



FAIR WORK  
AUSTRALIA

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### **Minimum wage transitional instruments under the *Fair Work Act 2009* and the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009***

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This document has been published for illustrative purposes only. It is not a legal document, nor does it purport to contain legal interpretations of the relevant instruments.

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The contents of this paper are the responsibility of the authors and the research has been conducted without the involvement of members of the Minimum Wage Panel of Fair Work Australia.

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On 3 June 2010, the Minimum Wage Panel issued its Annual Wage Review 2009–10 Decision. At paragraph 396 the decision noted that:

“[396] Arrangements will be made for the Minimum Wages and Research Branch of Fair Work Australia to provide information about the full range of transitional instruments. A draft will be released for comment before finalisation of the material.”



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## 1 Instruments in the Transitional Fair Work system

A number of transitional instruments operate in the national system as a result of provisions preserving instruments in the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (TPCA Act) and the *Fair Work (State Referral and Consequential and Other Amendments) Act 2009*. These instruments have been derived either from those under the *Workplace Relations Act 1996* (WR Act) or from state instruments in states that have recently referred their powers.

The minimum wage instruments<sup>1</sup> that operate in the Fair Work system<sup>2</sup> include:

- Modern award instruments
  - modern awards
  - modern enterprise awards
  - state reference public sector modern awards
- Division 2B State instruments
  - Division 2B State Awards
  - Division 2B enterprise awards
- Schedule 9 instruments
  - Transitional Australian Pay and Classification Scales (APCSs)
  - state minimum wage instruments
- Award-based transitional instruments<sup>3</sup>
  - awards (pre-*Fair Work Act 2009*)
  - notional agreements preserving a State award (NAPSAs)
  - enterprise NAPSAs
  - Division 2A state reference transitional awards
  - Division 2A state reference transitional enterprise awards
  - Division 2A state reference public sector transitional awards
  - Division 2B state reference transitional awards
  - Division 2B state reference transitional enterprise awards
  - Division 2B state reference public sector transitional awards
- Continuing schedule 6 instruments
  - transitional awards
  - common rules

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1 Note: Relevant transitional instruments that establish minimum conditions of employment, such as award-based transitional instruments that do not include minimum rates of pay, have also been included.

2 Note: This paper does not discuss transitional wage instruments, such as transitional agreement-based instruments, that are outside the scope of an annual wage review.

3 Pre-*Fair Work Act 2009* awards and NAPSAs did not contain wages, casual loadings and piece rates because they were extracted to create APCSs. Other rates in the award or NAPSA remained, and could be varied by the Australian Industrial Relations Commission.

Table 1 summarises the categories of minimum wage instruments.

A flowchart outlining the transition of these instruments from the pre-*Workplace Relations (Work Choices) Amendment Act 2005* (Work Choices Act) system to the *Fair Work Act 2009* (FW Act), as well as the relevant transitional legislation, is attached.

## 2 Table 1: Categories of minimum wage instruments

Type of instrument	Employees and employers covered by the instrument	When does the instrument terminate?
<b>Modern award instruments</b>		
Modern award	<p>National system employees and employers included within the coverage terms except for those covered by:</p> <ul style="list-style-type: none"> <li>• a modern enterprise award<sup>4</sup></li> <li>• a state reference public sector modern award<sup>5</sup></li> <li>• a state reference public sector transitional award<sup>6</sup></li> <li>• a state reference transitional enterprise award<sup>7</sup></li> <li>• a Division 2B State award<sup>8</sup>, or</li> <li>• a Division 2B enterprise award<sup>9</sup></li> <li>• and except for those for whom:</li> <li>• an exception applies by regulation. (See 'Exceptions by regulation' note below).</li> </ul>	<p>Fair Work Australia may revoke a modern award in the four-yearly modern award review<sup>10</sup>, or at any time to further the modern awards objective.<sup>11</sup></p> <p>The Minimum Wage Panel may revoke modern award minimum wages as part of an annual wage review.<sup>12</sup></p>

4 FW Act s.143(8)

5 FW Act s.143(10)

6 *ibid.*

7 FW Act s.143(8) states that coverage terms of a modern award cannot be expressed to cover employees covered by an 'enterprise instrument' (see TPCA Act item 2, Schedule 6).

8 TPCA Act item 4, Schedule 3A

9 *ibid.* A Division 2B enterprise award is a type of Division 2B State award (see TPCA Act item 2(4), Schedule 6).

10 FW Act s.156

11 FW Act s.157

12 FW Act s.285(2)

13 TPCA Act item 8, Schedule 6

14 FW Act s.168C(2); Section 158 FW Act limits the application for revocation of a modern award to employees and employers covered by the modern award and organisations entitled to represent the industrial interests of those employees and employers.

15 FW Act s.285(2)

16 FW Act s.168E(2); TPCA Act item 3(2), Schedule 6A

17 FW Act s.168K(1) limits who can apply to revoke a State reference public sector modern award to employers covered by the award and organisations entitled to represent the industrial interests of employers and employees covered by the award.



Type of instrument	Employees and employers covered by the instrument	When does the instrument terminate?
<b>Modern award instruments cont...</b>		
Modern enterprise award (as at 29 June 2010, no modern enterprise awards have been made)	National system employees and employers specified in the coverage terms.  The enterprise must be named and the employer specified by name or by class of employer within the enterprise. Employees must be specified employees of the employer or a specified class of employees of the employer. <sup>13</sup>	Fair Work Australia may revoke a modern enterprise award on application. <sup>14</sup>  The Minimum Wage Panel may revoke modern enterprise award minimum wages in an annual wage review. <sup>15</sup>
State reference public sector modern award (as at 29 June 2010, no state reference public sector modern awards have been made)	State reference public sector employees and employers specified in the coverage terms. <sup>16</sup>	Fair Work Australia may revoke the state reference public sector modern award on application. <sup>17</sup>  The MWP may revoke modern award minimum wages as part of the annual wage review. <sup>18</sup>
<b>Division 2B instruments<sup>19</sup> (Item 2, Schedule 3A TPCA Act)</b>		
Division 2B State Award	Qld, NSW, SA and Tasmania state reference employees and employers who: <ul style="list-style-type: none"> <li>• were not in the federal system prior to 1 January 2010, and</li> <li>• are covered by a 'State award'.<sup>20</sup></li> </ul> <p>This can include employees and employers if employed between 1 January 2010 and 31 December 2010 but only if the employer had employed employees to do the kind of work regulated by the State award before 1 January 2010.<sup>21</sup></p> <p>On 1 January 2011<sup>22</sup> employees and employers covered by a Division 2B State award (not including Division 2B State enterprise awards) will be covered by a modern award unless specifically exempted by regulation. (See 'Exceptions by regulation' note on page 15).</p>	1 January 2011 despite any term in the award that terminates the instrument at an earlier time. <sup>23</sup>

18 FW Act s.285(2)

19 Division 2B instruments include 'State awards' and 'state agreements'. Instruments listed in this section are limited to 'State award' instruments because these can be varied as part of an annual wage review.

20 See item 2(2), Schedule 3A of the TPCA Act for definition of 'State award'.

21 TPCA Act, Item 4, Schedule 3A; Division 2B State awards are taken to be effected by any order, decision or determination of a state industrial body or state court prior to 1 January 2010 (see TPCA Act item 3(3), Schedule 3A). Orders affecting the award include state pay equity orders. Where State pay equity orders were made prior to 15 September 2009 any higher rate of pay applying to an employee under that order will continue to apply as a 'transitional pay equity order' when the employee becomes covered by a modern award (see TPCA Act item 30A, Schedule 3A).

22 TPCA Act item 21, Schedule 3A

23 TPCA Act item 21, Schedule 3A

Type of instrument	Employees and employers covered by the instrument	When does the instrument terminate?
<b>Division 2B instruments</b> (Item 2, Schedule 3A TPCA Act) cont...		
Division 2B enterprise award	<p>Qld, NSW, SA and Tasmanian state reference employees and employers who:</p> <ul style="list-style-type: none"> <li>• were not in the federal system prior to 1 January 2010, and</li> <li>• are covered by a State award expressed to cover an enterprise.<sup>24</sup></li> </ul> <p>These employees and employers become covered by a modern enterprise award if Fair Work Australia makes a modern enterprise award to replace the instrument<sup>25</sup>. If Fair Work Australia decides not to make a modern enterprise award to replace the instrument, it terminates, and these employees and employers become covered by either:</p> <ul style="list-style-type: none"> <li>• a modern award<sup>26</sup> or</li> <li>• a national minimum wage order.</li> </ul>	<p>31 December 2013 or when Fair Work Australia terminates the instrument after making a modern enterprise award. If Fair Work Australia decides not to make a modern enterprise award, the instrument terminates on the operational date of the decision.<sup>27</sup></p>

24 TPCA Act item 2(4), Schedule 6, defines 'enterprise' to include a single enterprise and multiple enterprises that are franchisees and/or related bodies corporate of the same franchisor.

25 TPCA Act item 29, Schedule 3; 'Modern award' is taken to include a modern enterprise award (see TPCA Act item 17, Schedule 6).

26 FW Act s.143(8)

27 TPCA Act items 5, 9, Schedule 6

Type of instrument	Employees and employers covered by the instrument	When does the instrument terminate?
<b>Schedule 9 instruments</b> (Items 5(3) and 19(4), Schedule 9 TPCA Act)		
Transitional APCS	<p>Employees and employers covered by an APCS immediately prior to 1 July 2009.<sup>28</sup></p> <p>Employees and employers covered by a transitional APCS are generally also covered by an 'award-based transitional instrument'.</p> <p>The relevant award-based transitional instruments are:</p> <ul style="list-style-type: none"> <li>• awards (pre-reform awards)</li> <li>• enterprise awards (pre-reform enterprise awards)</li> <li>• NAPSAs</li> <li>• enterprise NAPSAs (see 'transitional instruments' below)</li> <li>• Victorian reference awards.<sup>29</sup></li> </ul> <p>APCSs also include other industrial tribunal decisions and instruments converted to an APCS from 27 March 2006, including minimum wage orders for Victoria.<sup>30</sup></p> <p>The APCSs became 'transitional APCSs' on 1 July 2009. Transitional APCSs continue to cover these employees and employers until they become covered by a modern award (which also replaces the relevant award-based transitional instrument).<sup>31</sup></p>	When Fair Work Australia makes an order to terminate the instrument as soon as practicable after making a modern award or modern enterprise award to replace it. <sup>32</sup>

28 APCSs were notionally created on 26 March 2006 from a range of minimum wage instruments which existed in or transferred to the federal system. APCSs were derived from pre-reform awards, NAPSAs, state minimum wage orders, etc. (See WR Act, subdivision I of Division 2, Part 7). They continue to hold the pay and classifications scales from those instruments by operation of the TPCA Act (see item 5, Schedule 9).

29 A 'Victorian reference award' was a federal award made under the scope of the Victorian state referral of industrial powers prior to 26 March 2006. After 26 March 2006 if the employer and their employees covered by this type of an award was a constitutional corporation then they became covered by a pre-reform award and an APCS derived from the award.

30 The AIRC could make minimum-wage orders for employees within work classifications established in the Victorian industrial system before the initial referral of Victorian industrial relations powers to the Commonwealth in 1996 (see WR Act ss.501 – 501A, repealed by the Work Choices Act). Those orders became APCSs from 26 March 2006. Employers that were not constitutional corporations, and their employees, became covered by an APCS with specific rules in Division 2, Part 21 of the WR Act. Incorporated employers, and their employees, became covered by an APCS derived directly from the pre-reform order and subject to the same rules as other APCSs in WR Act Division 2, Part 7 (also see *Workplace Relations Regulations 2006*, ch 2, reg 7.2(1)).

31 TPCA Act items 5–6, 11, Schedule 9

32 TPCA Act item 3, Schedule 5; TPCA Act Item 9, Schedule 6

Type of instrument	Employees and employers covered by the instrument	When does the instrument terminate?
<b>Schedule 9 instruments</b> (Items 5(3) and 19(4), Schedule 9 TPCA Act) cont...		
State minimum wages instrument	<p>Employees and employers from Division 2B states (Qld, NSW, SA and Tasmania) who:</p> <ul style="list-style-type: none"> <li>• are award/agreement-free, and</li> <li>• are not covered by a Division 2B instrument.</li> </ul> <p>If an order, decision or ruling of a state industrial body before 1 January 2010 had the effect of providing a higher minimum rate than the national minimum wage order or transitional national minimum wage order, then the higher 'state minimum amount' will apply.<sup>33</sup> (See paragraph 3 of 'Exceptions by regulation' note).</p> <p>The Minimum Wage Panel cannot vary the instrument.<sup>34</sup></p>	The instrument ceases to operate when the national minimum wage order exceeds the 'state minimum amount'. <sup>35</sup>
<b>Transitional Instruments</b> Award based: WR Act instruments <sup>36</sup> (Item 2, Schedule 3 TPCA Act)		
An award (pre-FW Act award) <sup>37</sup>	<p>Employees and employers who were covered by a pre-reform award immediately prior to 1 July 2009.<sup>38</sup></p> <p>These instruments are the awards created by the Work Choices Act, which notionally removed the identified wage components.<sup>39</sup></p> <p>From 1 January 2010, coverage of awards will only include those of the above employees and employers who are not covered by a modern award (other than the Miscellaneous Award 2010).<sup>40</sup> (See 'Exceptions by regulation' note below.)</p> <p>The Minimum Wage Panel cannot vary the instrument.<sup>41</sup></p>	The award is to be terminated by Fair Work Australia as soon as practicable after a modern award intended to replace the instrument has come into operation. <sup>42</sup>

33 TPCA Act item 19, Schedule 9

34 TPCA Act item 19(5), Schedule 9 provides that altering the effect of a state minimum wage instrument is to be done by regulation.

35 TPCA Act item 19(1), Schedule 9

36 Transitional instruments include 'award-based transitional instruments' and 'agreement-based transitional instruments' (see TPCA Act item 2(5), Schedule 3). Instruments listed in this section are limited to 'award-based transitional instruments' because these can be varied as part of an annual wage review.

37 Awards (pre-reform awards) were stripped of all matters provided for in the Australian Fair Pay and Conditions Standard (see WR Act s.516). Minimum wage rates, casual loadings and piece rates were moved into an APCS derived from the award (see WR Act ss.204, 208).

38 TPCA Act item 3, Schedule 3; 'award' is not defined in the FW Act or TPCA Act. WR Act s.4(1) defines 'award' to be a pre-reform award.

39 Note: 'awards' are not 'modern awards'.

40 TPCA Act item 29, Schedule 3; TPCA Act item 11, Schedule 9

41 Fair Work Australia may vary terms of an award (pre-reform award) but as they do not contain any form of minimum wages, casual loadings or piece rates, the power is not extended to the Minimum Wage Panel (see TPCA Act item 12, Schedule 3). However, the Minimum Wage Panel can vary the transitional APCS derived from the award—see 'Schedule 9 instruments'.

42 TPCA Act item 3(2), Schedule 5; a statement issued by the President of Fair Work Australia on 23 April 2010 set out a process for termination of award-based transitional instruments: [2010] FWA 3104 at 3.

Type of instrument	Employees and employers covered by the instrument	When does the instrument terminate?
<b>Transitional Instruments</b> Award based: WR Act instruments (Item 2, Schedule 3 TPCA Act) cont...		
An enterprise award (pre-FW Act award) <sup>43</sup>	<p>Employees and employers who were covered by a pre-reform award that was expressed to cover an enterprise.<sup>44</sup></p> <p>These employees and employers do not become covered by a modern award on 1 January 2010.<sup>45</sup></p> <p>A modern enterprise award will cover these employees and employers if Fair Work Australia makes a modern enterprise award to replace the transitional instrument.<sup>46</sup> If Fair Work Australia decides not to make a modern enterprise award to replace the transitional instrument then these employees and employers become covered by either:</p> <ul style="list-style-type: none"> <li>• a modern award<sup>47</sup>, or</li> <li>• a national minimum wage order.</li> </ul> <p>The Minimum Wage Panel cannot vary the instrument.<sup>48</sup></p>	31 December 2013, or when Fair Work Australia terminates the enterprise award after making a modern enterprise award, or the operational date of any Fair Work Australia decision not to make a modern enterprise award. <sup>49</sup>

43 Awards (pre-reform awards) were stripped of all matters provided for in the Australian Fair Pay and Conditions Standard (see WR Act s.516). Minimum wage rates, casual loadings and piece rates were set by an APCS derived from the award (see ss.204, 208 WR Act).

44 TPCA Act item 2(2A), Schedule 6

45 FW Act s.143(8)

46 TPCA Act item 29, Schedule 3; 'Modern award' is taken to include a modern enterprise award (see TPCA Act item 17, Schedule 6).

47 FW Act s.143(8)

48 Fair Work Australia may vary terms of an enterprise award (pre-reform enterprise award) but as they do not contain any form of minimum wages, casual loadings or piece rates the power is not extended to the MWP (see item 12, Schedule 3 TPCA Act). The MWP can vary the transitional APCS derived from the award — see 'Schedule 9 instruments'.

49 TPCA Act item 9, Schedule 6

Type of instrument	Employees and employers covered by the instrument	When does the instrument terminate?
<b>Transitional Instruments</b> Award based: WR Act instruments (Item 2, Schedule 3 TPCA Act) cont...		
NAPSA <sup>50</sup>	<p>Employees and employers who entered the federal system on 27 March 2006 and who were previously covered by a State award.</p> <p>These employees and employers became covered by a NAPSA.<sup>51</sup> (Like pre-reform awards, these are notional instruments which removed the identified wage components created by the Work Choices Act. However, NAPSA's were derived from preceding state—rather than federal—awards. Wage components are included in an APCS).</p> <p>From 1 January 2010 coverage will only include those of the above employees and employers who have not been included within the coverage terms of a modern award (other than the Miscellaneous Award 2010).<sup>52</sup> (See 'Exceptions by regulation' note below).</p> <p>The Minimum Wage Panel cannot vary the instrument.<sup>53</sup></p>	1 January 2014 <sup>54</sup> , or when Fair Work Australia terminates the NAPSA as soon as practicable after making a modern award to replace the NAPSA. <sup>55</sup>
Enterprise NAPSA <sup>56</sup>	<p>Employees and employers that entered the federal system on 27 March 2006 and that were previously covered by a State award expressed to cover an enterprise.</p> <p>These employees and employers became covered by a NAPSA.<sup>57</sup> Those employees and employers do not become covered by a modern award on 1 January 2010.<sup>58</sup></p> <p>A modern enterprise award will cover these employees and employers if Fair Work Australia makes a modern enterprise award to replace the transitional instrument.<sup>59</sup> If Fair Work Australia decides not to make a modern enterprise award to replace the transitional instrument, then those employees and employers become covered by either:</p> <ul style="list-style-type: none"> <li>• a modern award<sup>60</sup>, or</li> <li>• a national minimum wage order.</li> <li>• The Minimum Wage Panel cannot vary the instrument.<sup>61</sup></li> </ul>	<p>31 December 2013, or when Fair Work Australia terminates the NAPSA after making a modern enterprise award.<sup>62</sup></p> <p>If Fair Work Australia decides not to make a modern enterprise award they terminate on the operational date of that decision.<sup>63</sup></p>

50 NAPSA's preserved State awards as they existed at 26 March 2006 except for matters provided for in the Australian Fair Pay and Conditions Standard (see WR Act clauses 38, 44, Schedule 8). Minimum wage rates, casual loadings and piece rates were set by an APCS derived from the State award (see WR Act ss.204, 208).

51 TPCA Act item 3, Schedule 3

52 TPCA Act item 29, Schedule 3; TPCA Act item 11, Schedule 9

53 Fair Work Australia may only vary a NAPSA, on application of a party, to remove ambiguity or uncertainty (see TPCA Act item 10, Schedule 3). The MWP can vary the transitional APCS derived from the NAPSA—see 'Schedule 9 instruments'

54 TPCA Act item 20(1), Schedule 3

55 TPCA Act item 3(2), Schedule 5; a statement issued by the President on 23 April 2010 set out a process for termination of award-based transitional instruments: [2010] FWA 3104 at 3.

56 NAPSA's preserved State awards as they existed at 26 March 2006, except for matters provided for in the Australian Fair Pay and Conditions Standard (see WR Act clauses 38, 44, Schedule 8). Minimum wage rates, casual loadings and piece rates were set by an APCS derived from the State award (see WR Act ss.204, 208).

57 TPCA Act item 3, Schedule 3

Type of instrument	Employees and employers covered by the instrument	When does the instrument terminate?
<b>Transitional Instruments</b> Award based: WR Act instruments (Item 2, Schedule 3 TPCA Act) cont...		
State reference common rule	<p>Employees and employers:</p> <ul style="list-style-type: none"> <li>• who were covered by a federal common rule prior to 1 July 2009 (this should only apply to Victorian state reference employers and Victorian state reference employees), or</li> <li>• who came within the coverage terms of a state reference common rule by 31 December 2009.<sup>64</sup></li> </ul> <p>From 1 January 2010 this will only be those of the above employees and employers that are not included within the coverage terms of a modern award (other than the Miscellaneous Award 2010).<sup>65</sup></p> <p>Victorian public sector employees and employers that were previously covered by a common rule underpinned by a transitional award (e.g. social and community services) will be covered by a state reference common rule until it is modernised into a state reference public sector modern award.<sup>66</sup></p>	To be terminated by Fair Work Australia as soon as practicable after modern awards intended to replace the instruments have come into operation, or when a state reference public sector modern award completely replaces the common rule. <sup>67</sup>

58 FW Act s. 143(8)

59 TPCA Act item 29(1), Schedule 3; 'Modern award' is taken to include a modern enterprise award (see TPCA Act item 17, Schedule 6).

60 FW Act s.143(8)

61 Fair Work Australia may only vary a NAPSA, on application of a party, to remove ambiguity or uncertainty (see TPCA Act item 10, Schedule 3).  
Note: The MWP can vary the transitional APCS derived from the NAPSA—see 'Schedule 9 instruments'

62 TPCA Act item 5(2) and 9(4), Schedule 6

63 TPCA Act item 9, Schedule 6

64 TPCA Act item 2A(2), Schedule 3

65 TPCA Act item 29, Schedule 3

66 TPCA Act item 2(1), Schedule 6A; FW Act s.143(10) provides that a modern award other than a State reference public sector modern award cannot be expressed to cover the same employees and employers as a State reference public sector transitional award (including State reference common rules).

67 TPCA Act item 3(2), Schedule 5; a statement issued by the President on 23 April 2010 set out a process for termination as part of the award modernisation process: [2010] FWA 3104 at 3. TPCA Act item 10, Schedule 6A provides for termination as part of the State reference public sector award modernisation process. A State reference public sector transitional award is taken to include a State reference common rule that covers public sector employees and employers (see TPCA Act item 2, Schedule 6A).

Type of instrument	Employees and employers covered by the instrument	When does the instrument terminate?
<b>Transitional instruments</b> Award based: State reference transitional awards <sup>68</sup> (Item 2, Schedule 3 TPCA Act)		
Division 2A State reference transitional award	<p>Victorian state reference employees employed by Victorian state reference employers that were:</p> <ul style="list-style-type: none"> <li>not constitutional corporations, but</li> <li>were still covered by a federal award (including a 'transitional Victorian reference award') at 26 March 2006, and</li> <li>from 27 March 2006, became covered by a transitional award, or became bound by that award before 31 December 2009.<sup>69</sup></li> </ul> <p>For example, transitional awards continued to cover employment in the pastoral and social and community sectors.<sup>70</sup></p> <p>The instrument may be the underlying award for a state reference common rule (see above). From 1 January 2010, this will only include those of the above employees and employers that are not included within the coverage terms of a modern award (other than the Miscellaneous Award 2010).<sup>71</sup> (See 'Exceptions by regulation' note below).</p>	When terminated by Fair Work Australia as soon as practicable after a modern award intended to replace the instrument has come into operation. <sup>72</sup>

68 Transitional instruments include 'award-based transitional instruments' and 'agreement-based transitional instruments' (see TPCA Act item 2(5), Schedule 3). Instruments listed in this section are limited to 'award-based transitional instruments' because these can be varied as part of an annual wage review.

69 TPCA Act items 2A(1)-(1A), Schedule 3; WR Act clause 2, Schedule 6 defines the meaning of 'transitional award' and is extended in Part 7 of that schedule to include a 'transitional Victorian reference award'. A 'Victorian reference award' was a federal award made under the scope of the Victorian state referral of industrial powers prior to 26 March 2006 and did not require an industrial dispute across state borders. After 26 March 2006, the 'transitional Victorian reference award' continued to cover only employees who were employed by employers that were not constitutional corporations (see WR Act clause 73, Schedule 6). The AIRC had power to vary these instruments, as with transitional awards.

70 Explanatory Memorandum, Fair Work Amendment (State Referrals and Other Measures) Bill 2009 at vi.

71 TPCA Act item 29, Schedule 3

72 TPCA Act item 3(2), Schedule 5; a statement issued by the President on 23 April 2010 set out a process for termination: [2010] FWA 3104 at 3.



Type of instrument	Employees and employers covered by the instrument	When does the instrument terminate?
<b>Transitional instruments</b> Award based: State reference transitional awards (Item 2, Schedule 3 TPCA Act) cont...		
<p>Division 2A State reference transitional enterprise award</p>	<p>Victorian state reference employees employed by Victorian state reference employers that were:</p> <ul style="list-style-type: none"> <li>not constitutional corporations, but</li> <li>were still covered by a federal award expressed to cover an enterprise at 26 March 2006, and</li> <li>from 27 March 2006 became covered by a transitional award.<sup>73</sup></li> </ul> <p>Such enterprises are most likely to be agricultural enterprises. These employees and employers do not become covered by a modern award on 1 January 2010.<sup>74</sup> A modern enterprise award will cover these employees and employers if Fair Work Australia makes a modern enterprise award to replace the transitional instrument.<sup>75</sup> If Fair Work Australia decides not to make a modern enterprise award to replace the transitional instrument, then these employees and employers become covered by either:</p> <ul style="list-style-type: none"> <li>a modern award<sup>76</sup></li> <li>a national minimum wage order.</li> </ul>	<p>31 December 2013 or when Fair Work Australia terminates the instrument after making a modern enterprise award.<sup>77</sup></p> <p>If Fair Work Australia decides not to make a modern enterprise award it terminates on the operational date of the decision.<sup>78</sup></p>

73 TPCA Act item 2(2A), Schedule 6

74 FW Act s.143(8)

75 TPCA Act item 29 (1), Schedule 3; 'Modern award' is taken to include a modern enterprise award (see TPCA Act item 17, Schedule 6).

76 FW Act s.143(8)

77 TPCA Act item 5(2) and 9(4), Schedule 6

78 TPCA Act item 9, Schedule 6

Type of instrument	Employees and employers covered by the instrument	When does the instrument terminate?
<b>Transitional instruments</b> Award based: State reference transitional awards (Item 2, Schedule 3 TPCA Act) cont...		
Division 2A State reference public sector transitional award (including common rules)	<p>Victorian state reference public sector employees, and Victorian state reference public sector employers that were:</p> <ul style="list-style-type: none"> <li>• previously referred to the Commonwealth in 1996<sup>79</sup>, and</li> <li>• not constitutional corporations, and</li> <li>• still covered by a federal award or federal common rule (with an underlying federal award).<sup>80</sup></li> </ul> <p>These employees and employers do not become covered by a modern award on 1 January 2010.<sup>81</sup> If Fair Work Australia makes a state reference public sector modern award to replace the transitional instrument, these employees and employers become covered by a state reference public sector modern award.<sup>82</sup></p> <p>If Fair Work Australia terminates the instrument and has not made a state reference public sector modern award, these employees and employers must be covered by another modern award.<sup>83</sup></p>	<p>Operational date of any decision by Fair Work Australia to terminate the instrument<sup>84</sup>, or when a state reference public sector modern award completely replaces the instrument.<sup>85</sup></p> <p>Fair Work Australia is obligated to modernise or terminate these instruments if they are still in operation after 31 December 2013.<sup>86</sup></p>
Division 2B State reference transitional award <sup>87</sup>	<p>Qld, NSW, SA and Tasmanian state reference employees employed by state reference employers of those states that:</p> <ul style="list-style-type: none"> <li>• were not constitutional corporations, but</li> <li>• were still covered by a federal award at 26 March 2006, and</li> <li>• from 27 March 2006 became covered by a transitional award, or became bound by that award before 31 December 2009.<sup>88</sup></li> </ul> <p>For example, transitional awards continued to cover employment in the pastoral and social and community sectors.<sup>89</sup> This will only include those of the above employees and employers that are not included within the coverage terms of a modern award (other than the Miscellaneous Award 2010).<sup>90</sup> (See 'Exceptions by regulation' note on page 15 of this guide).</p>	<p>When terminated by Fair Work Australia as soon as practicable after a modern award intended to replace the instruments has come into operation.<sup>91</sup></p>

79 Commonwealth Powers (Industrial Relations) Act 1996 (Vic)

80 TPCA Act item 2, Schedule 6A; 'Public sector employee' and 'public sector employer' for a Division 2A State reference is defined in FW Act s.30A.

81 FW Act s.143(10)

82 TPCA Act item 29, Schedule 3; 'Modern award' is taken to include a State reference public sector modern award (see TPCA Act item 20, Schedule 6A). A state reference public sector transitional award expressed to cover an enterprise is excluded from the definition of 'enterprise instrument' and can only be modernised as part of the public sector award modernisation in Schedule 6A to the TPCA Act (see item 2(2), Schedule 6).

83 TPCA Act item 5, Schedule 6A

84 TPCA Act item 5, Schedule 6A

85 TPCA Act item 10(1), Schedule 6A

86 TPCA Act item 6, Schedule 6A

87 A Division 2B state reference transitional award is taken to be affected by a 'transitional pay equity order'. The transitional pay equity order applies any higher rate of pay that would have been payable as a result of a state pay equity order by a state industrial body. This continues to apply when a modern award covers the employee and employer (see TPCA Act item 43, Schedule 3).

88 TPCA Act items 2A(1)-(1A), 3, Schedule 3

89 Explanatory Memorandum, Fair Work Amendment (State Referrals and Other Measures) Bill 2009 at vi.

90 TPCA Act item 29(1), Schedule 3

91 TPCA Act item 3(2), Schedule 5; a statement issued by the President on 23 April 2010 set out a process for termination in [2010] FWA 3104 at 3.

92 TPCA Act item 2(2A), Schedule 6

93 FW Act s.143(8)

94 TPCA Act item 29(1), Schedule 3; 'Modern award' is taken to include a modern enterprise award (see TPCA Act item 17, Schedule 6).

Type of instrument	Employees and employers covered by the instrument	When does the instrument terminate?
<b>Transitional instruments</b> Award based: State reference transitional awards (Item 2, Schedule 3 TPCA Act) cont...		
Division 2B State reference transitional enterprise award	<p>Qld, NSW, SA and Tasmanian state reference employees who are employed by state reference employers of those states that:</p> <ul style="list-style-type: none"> <li>were not constitutional corporations, but</li> <li>were still covered by a federal award expressed to cover an enterprise at 26 March 2006, and</li> <li>from 27 March 2006, became covered by a transitional award.<sup>92</sup></li> </ul> <p>Such enterprises are most likely to be farm-based enterprises. These employees and employers do not become covered by a modern award on 1 January 2010.<sup>93</sup> A modern enterprise award will cover these employees and employers if Fair Work Australia makes a modern enterprise award to replace the transitional instrument.<sup>94</sup> If Fair Work Australia decides not to make a modern enterprise award to replace the instrument, then those employees and employers become covered by either:</p> <ul style="list-style-type: none"> <li>a modern award<sup>95</sup>, or</li> <li>a national minimum wage order.</li> </ul>	<p>31 December 2013, or when Fair Work Australia terminates the instrument after making a modern enterprise award.<sup>96</sup></p> <p>If Fair Work Australia decides not to make a modern enterprise award, the instrument terminates on the operational date of the decision.<sup>97</sup></p>
Division 2B State reference public sector transitional award <sup>98</sup>	<p>Qld, NSW, SA and Tasmanian state reference public sector employees, and state reference public sector employers that:</p> <ul style="list-style-type: none"> <li>were not constitutional corporations, but</li> <li>were still covered by a federal award or federal common rule (with an underlying federal award).<sup>99</sup></li> </ul> <p>These employees and employers do not become covered by a modern award on 1 January 2010.<sup>100</sup> These employees and employers become covered by a state reference public sector modern award if Fair Work Australia makes a state reference public sector modern award to replace the instrument.<sup>101</sup> If Fair Work Australia terminates the instrument without making a state reference public sector modern award, these employees and employers must be covered by another modern award.<sup>102</sup></p>	<p>Operational date of any decision by Fair Work Australia to terminate the instrument<sup>103</sup>, or when a state reference public sector modern award completely replaces the instrument.<sup>104</sup></p> <p>Fair Work Australia is obligated to modernise or terminate these instruments if they are still in operation after 31 December 2013.<sup>105</sup></p>

95 FW Act s.143(8)

96 TPCA Act item 5(2) and 9(4), Schedule 6

97 TPCA Act item 9, Schedule 6

98 No Division 2B state has referred public sector employees and employers (Division 2B public sector employee and employer are defined in s.30K FW Act). It is unlikely that any employees or employers would be covered by a Division 2B State reference public sector transitional award. State government-owned or controlled entities and their employees may be national system employees and national system employers through the corporations power. Those employees and employers would be covered by 'an award' (see above) and/or an APCS. State government-owned or controlled entities that were not constitutional corporations and their employees who were bound by federal awards prior to 26 March 2006, and not referred into the Fair Work system, would be covered by a transitional award (see 'continuing Schedule 6' instruments).

99 TPCA Act item 2, Schedule 6A

100 FW Act s.143(10)

101 TPCA Act item 29(1), Schedule 3. 'Modern award' is taken to include a State reference public sector modern award (see TPCA Act item 20, Schedule 6A). A state reference public sector transitional award expressed to cover an enterprise is excluded from the definition of 'enterprise instrument' and can only be modernised as part of the public sector award modernisation in Schedule 6A to the TPCA Act (see item 2(2), Schedule 6).

102 TPCA Act item 5(3), Schedule 6A

103 TPCA Act item 5, Schedule 6A

104 TPCA Act item 10(1), Schedule 6A

105 TPCA Act item 6, Schedule 6A

Type of instrument	Employees and employers covered by the instrument	When does the instrument terminate?
<b>Continuing Schedule 6 instruments<sup>106</sup></b> (Item 1(3), Schedule 20 TPCA Act)		
Transitional awards	<p>Employees and employers (mostly in Western Australia) that:</p> <ul style="list-style-type: none"> <li>• were bound by a federal award prior to 27 March 2006, and</li> <li>• were not included in the federal system under the corporations power, and</li> <li>• have not been included in the national system by a state referral.</li> </ul> <p>Those employees and employers continue to be covered by transitional awards, based on the constitutional conciliation and arbitration power<sup>107</sup>, until they cease operating on 27 March 2011<sup>108</sup>. After that date, those employees and employers revert to the state industrial system.</p> <p>The Minimum Wage Panel cannot vary the instrument.<sup>109</sup></p>	27 March 2011 or at an earlier date by order of Fair Work Australia. <sup>110</sup>
Common rules	<p>Federal common rules under Schedule 6 of the WR Act after 27 March 2006 covered employees of employers in Victoria that were not constitutional corporations. All employees and employers covered by a federal common rule at 1 July 2009 became covered a state reference common rule (see 'award-based transitional instruments') because Victoria has referred all employers and employees (with some limited exceptions) to the national system.</p> <p>The Minimum Wage Panel cannot vary the instrument.<sup>111</sup></p>	27 March 2011 or by an order of Fair Work Australia revoking the underlying transitional award. <sup>112</sup>

106 Schedule 6 WR Act instruments, continued in operation by TPCA Act item 1, Schedule 20, includes award-based and agreement-based instruments. Instruments listed in this section are limited to award-based instruments.

107 A 'transitional award' is continued in operation based on the conciliation and arbitration power underpinning parts of the WR Act. The FW Act and TPCA Act do not rely on the conciliation and arbitration power to any extent. State reference transitional awards are intended to put employers and employees subject to the conciliation and arbitration power within the scope of the state referrals underpinning the two acts. Those employees and employers are transitioned on to modern awards through various modernisation processes in the TPCA Act.

108 TPCA Act item 1, Schedule 20 continues the operation of WR Act cl.6, Schedule 6. Other than Western Australia, it is possible that employees and employers that were part of the federal system prior to 27 March 2006, and have not subsequently been referred by a state may also be covered by a transitional award or common rule. This should only be a very small number of employees and employers.

109 TPCA Act items 1 – 2, Schedule 20 gives Fair Work Australia the power of the AIRC to vary and revoke transitional awards by continuing the application of Schedule 6 of the WR Act. Clause 29 of this continuing schedule allows Fair Work Australia to vary a transitional award to settle or prevent an industrial dispute. TPCA Act item 2, Schedule 20 amends the objects of continuing schedule 6 to require any variation to wages and other monetary entitlements to be consistent with a decision of the annual wage review. There is no provision allowing the MWP to make the variation.

110 WR Act cl.6, Schedule 6 (continued in operation by schedule 20 of the TPCA Act) provides that all transitional awards cease to have effect from 27 March 2011. Fair Work Australia may revoke transitional awards prior to 27 March 2011 under WR Act, cl.31, Schedule 6.

111 As for 'transitional awards', Fair Work Australia may vary common rules as if it were the AIRC, but there is no provision allowing this power to be exercised by the Minimum Wage Panel.

112 WR Act clause 82, Schedule 6

### 3 NOTE: Exceptions by regulation

*The Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009* (the Transitional regulations) create some exceptions to modern award coverage. If the award-based transitional instrument sets a competency-based training arrangement, or relates exclusively to the provision of tools for an apprentice, then it will continue to cover those employees and employers (and any related transitional APCs) after 1 January 2010, including for employment commenced after that date.<sup>113</sup> Division 2B State Awards that cover similar competency-based arrangements and tool provision will continue to cover employers and employees after 1 January 2011. Employees, and their respective employer, employed into those arrangements after 1 January 2011 will also be covered by the Division 2B State Award.<sup>114</sup>

If an award-based transitional instrument covered an employee and employer as part of the Community Jobs Plan or Green Army in Queensland immediately prior to 1 January 2010 then the transitional instrument (and any related APCs) continues to cover those employees and employers and anyone employed in similar arrangements until 30 June 2012.<sup>115</sup> Division 2B State Awards that cover similar employment arrangements in Queensland will continue to cover employers and employees after 1 January 2011 until 30 June 2012. Employees, and their respective employer, employed into those arrangements after 1 January 2011 will also be covered by the Division 2B State Award.<sup>116</sup>

The Transitional Regulations also provide exceptions to minimum rates of pay that apply for Division 2B (Qld, NSW, SA and Tasmania) employees and employers. Where a State industrial body made a 'permit, licence or authority' (e.g. slow-worker permits) that allows an employee to be paid below a State award minimum rate or the relevant minimum wage of that state then the lower wage rate will apply over any Division 2B instrument, modern award, national minimum wage order or State minimum wage instruments. The permit, license or authority will cease to have effect on its expiry date or 1 January 2011, whichever is earlier.

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113 Transitional regulations, reg 3B.02.

114 Transitional regulations, reg 3A.01; most competency-based training progression this relates to is found in Queensland State awards affected by the *Order—Apprentices' and Trainees' Wages and Conditions (Queensland Government Departments and Certain Government Entities) 2000* (Qld), *Order—Apprentices' and Trainees' Wages and Conditions (Excluding Certain Queensland Government Entities) 2003* (Qld) and *Order—Supply of Tools to Apprentices 1998* (Qld).

115 Transitional regulations, reg 3.04.

116 Transitional regulations, reg 3A.01.

## 4 Transition of federal and state minimum wage instruments to national Fair Work system





