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| **IN THE FAIR WORK COMMISSION** |  |

**Matter Number:** C2017/1

*Fair Work Act 2009*

s.285—Annual wage reviews to be conducted

**Annual Wage Review 2016–17—Transitional instruments**

**(C2017/1)**

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| **CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION (CONSTRUCTION & GENERAL DIVISION) RESPONSE TO QUESTIONS IN THE BACKGROUND PAPER ON TRANSITIONAL INSTRUMENTS** |

10th October 2016

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**Introduction**

On 19th September 2016 the Fair Work Commission (FWC) released a background paper on transitional instruments as part of the Annual Wage Review 2016-17. The background paper contained a number of questions that interested parties were asked to consider in relation to which, if any, of the remaining instruments should continue to operate. This submission is the CFMEU (Construction and General Division) (CFMEU C&G) response to those questions.

**Instruments of General Application**

1. **Given the operation of s.113 of the Fair Work Act, can the long service leave awards be terminated?**

The CFMEU C&G supports the submission of the ACTU that the FWC should be cautious of unintended consequences in terminating such instruments. We note however that there is only one transitional instrument dealing with LSL that we have an interest in – the *Engine Drivers and Firemen’s (General) (Long Service Leave) Award 1964* [[1]](#footnote-1)- and that as the conditions in that award are equal to, if not less than, the prevailing State/Territory legislation dealing with LSL we would not generally be opposed to its termination.

**Outstanding Issues**

1. **The parties are directed to review the list of existing transitional instruments at Appendix 1 and indicate whether there are instruments on the list in which they have an interest and that they consider need to remain current.**

The following table lists the current transitional instruments that we have an interest in:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Title**  | **Transitional award or NAPSA** **code** | **Common rule** | **State reference transitional award code** | **Notes (see legend below)** |
| Building and Construction Industry (State) Award | AN120089 |  |  | AE |
| Building Construction Industry Award - State 2003 | AN140043 |  |  | AE |
| Building Employees Mixed Industries (State) Award | AN120091 |  |  | AE |
| Building Products, Manufacture and Minor Maintenance Award - State 2003 | AN140045 |  |  | AE |
| Building Trades (Construction) Award 1987 | AN160034 |  |  | AE  |
| Building Trades (Government) Award 1968 | AN160036 |  |  | AE |
| Carpenters & Joiners (General) Award 1993 | AN150029 |  |  | AE |
| Civil Construction, Operations and Maintenance General Award - State 2003 | AN140061 |  |  | AE |
| Concrete Products Factories (A.C.T.) Award 1999 | AP772210 | CRA |  | AE |
| Engine Drivers and Firemen - General - Award 1998  | AP780049 | CRV |  | AE |
| Engine Drivers and Firemen’s (General) (Long Service Leave) Award 1964  | AP780052 |  |  | LSL |
| General Construction and Maintenance, Civil and Mechanical Engineering, &c. (State) Award  | AN120228  |  |  | AE |
| Glass Workers (State) Award  | AN120232 |  |  | AE |
| Joiners (State) Award  | AN120280  |  |  | AE |
| Metal, Engineering and Associated Industries (Accident Pay, Victoria) Award 1998, The  | AP789881 | CRV | AT789881  | AE |
| Metal, Engineering and Associated Industries (State) Award  | AN120334 |  |  | AE |
| Metal, Engineering and Associated Industries Award 1998  | AP789529  | CRV  | AT789529  | AE |
| Mobile Crane Hiring Award 2002  | AP816842  | CRV  | AT816842  | AE |
| National Building and Construction Industry Award 2000  | AP790741 | CRV | AT790741 | AE |
| National Joinery and Building Trades Products Award 2002  | AP817265 | CRV | AT817265 | AE |
| National Training Wage Award 2000  | AP790899  | CAN  | AT790899  | AE |
| Order – Apprentices’ and Trainees’ Wages and Conditions (Excluding Certain Queensland Government Entities) 2003  | AN140326 |  |  | See Note 4 |
| Order – Apprentices’ and Trainees’ Wages and Conditions (Queensland Government Departments and Certain Government Entities)  | AN140327 |  |  | See Note 4 |
| Order – Supply of Tools to Apprentices (Qld)  |  |  |  | See Note 4 |
| Plant, &c., Operators on Construction (State) Award  | AN120419  |  |  | AE |
| Quarries, &c (State) Award  | AN120447  |  |  | AE |
| Railways Metal Trades Grades Award 2002  | AP817167  |  | AT817167  | AE |
| Training Wage Award - State 2003  | AN140303  |  |  | AE |

Our comments on their continuation are dealt with in our response to question 3 below.

1. **Do the parties agree that when the modernisation processes have been completed, the modernisable instruments in Appendix 1 should be terminated by the Commission?**

The legislation regarding transitional instruments is very complex and we doubt that many would argue with the proposition that interpreting the interaction between the Fair Work Act 2009 (FW Act), the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (FW (TPCA) Act) and the relevant regulations is akin to navigating through a virtual minefield. Having said that, our understanding is that unless there are specific provisions that exclude the operation of items 20 and 21 of Schedule 3 of the FW (TPCA) Act, or provide a later date for termination, any Notional Agreement Preserving a State Award (NAPSA) or Award Based Transitional Instrument (ABTI) terminated on 1st January 2014. This was recently confirmed in the decision of Commissioner Spencer in *All Trades Queensland Pty Limited* ([2016] FWC 2832), where the Commissioner found,

***[212]*** *However, the operation of NAPSAs/ABTIs ceased on 1 January 2014; they were “sunsetted” by Item 20 of Schedule 3 of the Transitional Act. Item 20 provides that NAPSAs terminate on the 4th anniversary of the FW (safety net provisions) commencement day, unless the Regulations prescribe a later day. The 4th anniversary was 1 January 2014. The Regulations do not prescribe a later day. The Regulation could have prescribed a later date or indicated that an ABTI was not to “sunset” despite the sunsetting provision. Whilst there is an express exclusion with respect to the operation of Item 29 of Schedule 3 in Item 16 of Regulation 3B.02, there is no such exclusion for Item 20, which means that Item 16 is subject to Item 20.*

***[213]*** *In accordance with the specific legislative provisions and interaction between Item 16 of the Transitional Regulations and Items 20 and 29 of the Transitional Act, and given the nature of the provisions and regulations as “transitional provisions”, Item 16 of Regulation 3B.02 does not operate indefinitely and therefore the NAPSAs have terminated, from 1 January 2014.”*

Whilst we understand that the above decision is under appeal, if the decision stands then we submit that the majority of NAPSA’s and ABTI’s have already been terminated.

**Apprentices and trainees for whom competency-based wage arrangements apply**

1. **Are there any other transitional instruments not listed above that are preserved by the Transitional regulations for the purposes of providing for competency-based arrangements and provision of tools?**

No.

1. **Do parties agree that, regardless of the termination and modernisation of other transitional instruments, there will be an on-going requirement for the Commission to review Division 2B State awards, award-based transitional instruments and related APCSs as part of the annual wage review?**

In light of our response to question 3 we make no further comment.

1. **Given the limitations under s.154, can instruments be made under the Fair Work Act to replace these instruments?**

See our response to question 3 above.

**The Social and Community Sector Pay Equity Order**

1. **Given the 2012 ERO preserves the operation of transitional provisions and the Fair Work Act obliges Commission to terminate transitional instruments,51 is there any reason why the Commission should not terminate the remaining transitional instruments related to the SACS modern award?**

No comment.

**Transitional Pay Equity Orders**

1. **Given these instruments continue to operate until 1 December 2020, should they remain as transitional instruments or can these entitlements be preserved for the affected employees in another Fair Work Act instrument?**

No comment.

**The Annual Wage Review and Transitional Instruments**

1. **Do the parties have any views about the on-going process of review for transitional instruments as part of the annual wage reviews?**

We support the submissions of the ACTU.

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1. <https://www.fwc.gov.au/documents/consolidated_awards/ap/ap780052/asframe.html> [↑](#footnote-ref-1)