**SUMMARY OF SUBMISSIONS: REVIEW OF TRANSITIONAL INSTRUMENTS**

This table is a summary of submissions lodged for the Annual Wage Review 2016–17 preliminary hearing into a review of transitional instruments.

| **No.** | **QUESTION** | **SUMMARY OF SUBMISSIONS** |
| --- | --- | --- |
| 1. | **Instruments of general application**  ***Given the operation of s.113 of the Fair Work Act, can the long service leave awards be terminated?*** | [Australian Government](https://www.fwc.gov.au/documents/sites/wagereview2017/consultations/ausgovsub.pdf) (p. 4) submitted that LSL awards could be terminated because s.113 preserves the effect of LSL terms in these awards.  [ACTU](https://www.fwc.gov.au/documents/sites/wagereview2017/consultations/actusub.pdf) (p.32) suggested that terminating the awards could have the unintended effect of extinguishing the entitlement s.113 to operate upon. Commission may not have jurisdiction to terminate these instruments as items 12(3) and 12A(4) of Schedule 3 may create a barrier to terminating these instruments outside of the modernisation processes.  [CFMEU C&G](https://www.fwc.gov.au/documents/sites/wagereview2017/consultations/cfmeusub.docx) (p.2) supported ACTU submission on this issue but did not object to identified relevant LSL Awards being terminated.  [CFMEU FFPD](https://www.fwc.gov.au/documents/sites/wagereview2017/consultations/cfmeusub.pdf) (p.3.) supported ACTU submission on this issue but did not object to identified relevant LSL Awards being terminated.  [TCFU](https://www.fwc.gov.au/documents/sites/wagereview2017/consultations/tcfuasub.pdf) ( para.2.2, p.2 ) did not object to termination of the *Footwear – Manufacturing and Component Industry (Long Service Leave) Award 1977*and noted that this award had very limited application, in addition to having terms less beneficial than applicable provisions in relevant state legislation.  [Ai Group](https://www.fwc.gov.au/documents/sites/wagereview2017/consultations/aigroupsub.pdf) (p.8 ) Section 113 operates to preserve LSL entitlements and it was not the intention of Parliament that pre-modern LSL awards be maintained.  [ABI and NSWBC](https://www.fwc.gov.au/documents/sites/wagereview2017/consultations/abisub.pdf) (paras 4.6–7, pp.6–7) LSL awards can be terminated as the effect of section 113 of the FW Act is to preserve employee entitlements to long service leave derived from awards or State reference transitional awards. See also [ABI and NSW submission in reply](https://www.fwc.gov.au/documents/sites/wagereview2017/consultations/abireplysub.pdf) (p.4 at paras 2.1–2.5).  [MTA organisations](https://www.fwc.gov.au/documents/sites/wagereview2017/consultations/mtasub.pdf) (pp. 2–3) submitted that s 113 has the effect of preserving these entitlements. MTA opposed terminating instruments identified as relevant to their industry because , in the absence of a national standard, LSL conditions in their relevant awards would be governed by state legislation which could incur unreasonable costs for employers. |
| 2. | **Outstanding issues**  ***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.*** | [ACTU](https://www.fwc.gov.au/documents/sites/wagereview2017/consultations/actusub.pdf) (p. 34) supported the termination of modernisable instruments after the completion of the modernisation process, but advised that they were consulting with their affiliates as to the proper characterisation of the instruments listed in Appendix 1.  [CFMEU C&G](https://www.fwc.gov.au/documents/sites/wagereview2017/consultations/cfmeusub.docx) (pp. 2-3) submitted an interest in the following instruments:   * *Building and Construction Industry (State) Award* * *Building Construction Industry Award - State 2003* * *Building Employees Mixed Industries (State) Award* * *Building Products, Manufacture and Minor Maintenance Award - State 2003* * *Building Trades (Construction) Award 1987* * *Building Trades (Government) Award 1968* * *Carpenters & Joiners (General) Award 1993* * *Civil Construction, Operations and Maintenance General Award - State 2003* * *Concrete Products Factories (A.C.T.) Award 1999* * *Engine Drivers and Firemen - General - Award 1998* * *General Construction and Maintenance, Civil and Mechanical Engineering, &c. (State) Award* * *Glass Workers (State) Award* * *Joiners (State) Award* * *Metal, Engineering and Associated Industries (Accident Pay, Victoria) Award 1998* * *Metal, Engineering and Associated Industries (State) Award* * *Metal, Engineering and Associated Industries Award 1998* * *Mobile Crane Hiring Award 2002* * *National Building and Construction Industry Award 2000* * *National Joinery and Building Trades Products Award 2002* * *National Training Wage Award 2000* * *Order – Apprentices’ and Trainees’ Wages and Conditions (Excluding Certain Queensland Government Entities) 2003* * *Order – Apprentices’ and Trainees’ Wages and Conditions (Queensland Government Departments and Certain Government Entities)* * *Order – Supply of Tools to Apprentices (Qld)* * *Plant, &c., Operators on Construction (State) Award* * *Quarries, &c (State) Award* * *Railways Metal Trades Grades Award 2002* * *Training Wage Award - State 2003*   The CFMEU C&G (p. 3) indicated that they would deal with these instruments in their response to Question 3.  [CFMEU FFPD](https://www.fwc.gov.au/documents/sites/wagereview2017/consultations/cfmeusub.pdf) (p. 4) submitted a list of current transitional instruments in which they had an interest, and supported the CFMEU C&G’s approach to dealing with these instruments:   * *Timber and Allied Industry (Long Service Leave) Award 1999* * *Glass Industry – Glass Production (Long Service Leave) – Award 1999* * *Furnishing Industry National Award 2003*   [CPSU](https://www.fwc.gov.au/documents/sites/wagereview2017/consultations/cpsusub.pdf) (p. 1) submitted that transitional *Government Administration Industry Sector – Minimum Wage Order – Victoria 1998* is now superseded by AT841792 and AT825011.  [TCFU](https://www.fwc.gov.au/documents/sites/wagereview2017/consultations/tcfuasub.pdf)A (pp. 1–2) submitted an interest in the following instruments:   * *Clothing Trades Award 1999* * *Textile Industry Award 2000* * *Textile Industry (State) Award (NSW)*   The TCFU supported the proposed process outlined by the ACTU in dealing with these instruments.  [Ai Group](https://www.fwc.gov.au/documents/sites/wagereview2017/consultations/aigroupsub.pdf) (p. 9) submitted that the *Metal, Engineering and Associated Industries Award 1998* and *the Graphic Arts - General - Award 2000* should not be terminated “if there is any doubt about the ongoing operation of the “applicable award-derived long service leave terms” which werederived from these awards.”  [ABI and NSWBC](https://www.fwc.gov.au/documents/sites/wagereview2017/consultations/abisub.pdf) (p.8 , paras. 4.10 - 4.11) submitted that there was no particular need to maintain the transitional instruments identified in Appendix 1.  [MTA organisations](https://www.fwc.gov.au/documents/sites/wagereview2017/consultations/mtasub.pdf) (p. 1) submitted an interest in the following instruments:   * *The Vehicle Industry Repair Services and Retail (Long Service Leave) Award* * *The Vehicle Industry (Long Service Leave) Award 1977* * *The Vehicle Industry Award 2000*   MTA organisations (p. 1) also submitted an additional award not included in Appendix 1, the *Clerks (Vehicle Industry – Repair, Services and Retail) Award 2003,*[[1]](#footnote-1) noting that this award provides for LSL in accordance with the *Vehicle Industry - Repair Services and Retail (Long Service Leave) Award*. |
| 3. | **Outstanding issues**  ***Do the parties agree that when the modernisation processes have been completed, the modernisable instruments in Appendix 1 should be terminated by the Commission?*** | [Australian Government](https://www.fwc.gov.au/documents/sites/wagereview2017/consultations/ausgovsub.pdf) (p. 4) submitted that some instruments in Appendix 1 may continue to be preserved as Division 2B Awards, but did not specify which instruments.  [ACTU](https://www.fwc.gov.au/documents/sites/wagereview2017/consultations/actusub.pdf) (p. 34) noted that some Appendix 1 instruments might be incorporated by reference in enterprise agreements (EAs), and the Commission should encourage parties to identify such incorporated instruments so their termination can be deferred until applications have been made or the EAs have been replaced.  [CFMEU C&G](https://www.fwc.gov.au/documents/sites/wagereview2017/consultations/cfmeusub.docx) (p. 4) submitted that if the Commission’s decision in *All Trades Queensland Pty Limited [[2]](#footnote-2)*(All Trades) stands on appeal, then the majority of NAPSAs and Award Based Transitional Instruments have already been terminated.  [CFMEU FFPD](https://www.fwc.gov.au/documents/sites/wagereview2017/consultations/cfmeusub.pdf) (p. 4) supported the CFMEU C&C’s response to this issue.  [CPSU](https://www.fwc.gov.au/documents/sites/wagereview2017/consultations/cpsusub.pdf) (p. 1) supported the termination of instruments in Appendix 1 after the completion of the modernisation process.  [TCFU](https://www.fwc.gov.au/documents/sites/wagereview2017/consultations/tcfuasub.pdf)A (p. 2, para. 2.3) supported the ACTU’s views on the termination of Appendix 1 instruments where such instruments might have been incorporated in EAs.  [Ai Group](https://www.fwc.gov.au/documents/sites/wagereview2017/consultations/aigroupsub.pdf) (p. 10) submitted that they did not support the retention of any “redundant instruments”, however if any “valid reasons” were identified for maintaining a particular transitional instrument, the instrument should not be terminated.  [ABI and NSWBC](https://www.fwc.gov.au/documents/sites/wagereview2017/consultations/abisub.pdf) (p. 8, paras. 4.12–4.13) supported the termination of instruments in Appendix 1 after the completion of the modernisation process. |
| 4. | **Apprentices and trainees for whom competency-based wage arrangements apply**  ***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?*** | [Australian Government](https://www.fwc.gov.au/documents/sites/wagereview2017/consultations/ausgovsub.pdf) (p. 5) submitted a list of preserved state awards that did not appear in the Background Paper:   * *Electrical Contracting Industry Award – State* * *Furniture and Allied Trades Award – State 2003* * *Plumbing Industry (QLD and WA) Award 1999* and * *Vehicle Industry – Repair, Services and Retail Award 2002.*   [ACTU](https://www.fwc.gov.au/documents/sites/wagereview2017/consultations/actusub.pdf) (p. 35) submitted that they were unaware of any instruments outside those listed in the Background Paper, but were currently consulting with their affiliates and would notify the Commission of any additional instruments.  [HIA](https://www.fwc.gov.au/documents/sites/wagereview2017/consultations/hiasub.pdf) (p. 2) submitted that they disagreed with the decision reached in All Trades that the Queensland transitional instruments had terminated, and advised that they would be seeking to intervene in the appeal. It submitted that the Commission should cease its examination of this matter before the appeal has been determined. |
| 5. | **Apprentices and trainees for whom competency-based wage arrangements apply**  ***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?*** | [Australian Government](https://www.fwc.gov.au/documents/sites/wagereview2017/consultations/ausgovsub.pdf) (p. 6) agreed with the proposition in question 5, subject to the decision of the Full Bench in the pending All Trades appeal.  [ACTU](https://www.fwc.gov.au/documents/sites/wagereview2017/consultations/actusub.pdf) (p. 36) agreed with the proposition in question 5, adding that the Commission should make published rates available.  [ABI and NSWBC](https://www.fwc.gov.au/documents/sites/wagereview2017/consultations/abisub.pdf) (pp. 8–9, para. 4.16) agreed with the proposition in question 5. |
| 6. | **Apprentices and trainees for whom competency-based wage arrangements apply**  ***Given the limitations under s.154, can instruments be made under the Fair Work Act to replace these instruments?*** | [Australian Government](https://www.fwc.gov.au/documents/sites/wagereview2017/consultations/ausgovsub.pdf) (p. 6) submitted the Commission is restricted by s154 (2) of the Act in replacing these instruments, and that “any amendment will only be possible if subsection 154(3) of the Fair Work Act is capable of being met.”    [ACTU](https://www.fwc.gov.au/documents/sites/wagereview2017/consultations/actusub.pdf) (p. 37) submitted that as the relevant instruments are applicable only in Queensland, their replication by a modern award would breach s. 154(1) of the Act.  [CFMEU C&G](https://www.fwc.gov.au/documents/sites/wagereview2017/consultations/cfmeusub.docx) (p. 5) submitted that if the Commission’s decision in All Trades stands on appeal, then the majority of NAPSAs and Award Based Transitional Instruments have already been terminated.  [CFMEU FFPD](https://www.fwc.gov.au/documents/sites/wagereview2017/consultations/cfmeusub.pdf) (p. 4) supported the CFMEU C&G’s response.  [Ai Group](https://www.fwc.gov.au/documents/sites/wagereview2017/consultations/aigroupsub.pdf) (p. 10) submitted that they would consider the submissions of other parties and address this question in reply, but did not.  [ABI and NSWBC](https://www.fwc.gov.au/documents/sites/wagereview2017/consultations/abisub.pdf) (p. 9, para. 4.18) submitted that as the relevant instruments are applicable only in Queensland; their effect if replicated by a modern award would breach s. 154(1) of the Act. |
| 7. | **The Social and Community Sector Pay Equity Order**  ***Given the 2012 ERO preserves the operation of transitional provisions and the Fair Work Act obliges the Commission to terminate transitional instruments, is there any reason why the Commission should not terminate the remaining transitional instruments related to the SACS modern award?*** | [Australian Government](https://www.fwc.gov.au/documents/sites/wagereview2017/consultations/ausgovsub.pdf) (p. 6)  Transitional arrangements in Schedule A of the SACS Award and the model transitional arrangements in other modern awards were intended to continue to preserve higher rates from transitional instruments after the instruments were terminated.  [ACTU](https://www.fwc.gov.au/documents/sites/wagereview2017/consultations/actusub.pdf) (p.38 ) These instruments should not be terminated because the ERO confers a benefit on employees, which is contingent upon the existence  of a transitional minimum wage instrument or award-based transitional instrument containing a higher rate of pay than that otherwise provided for in the Social, Community, Home Care and Disability Services Industry Award.  [ASU](https://www.fwc.gov.au/documents/sites/wagereview2017/consultations/asusub.pdf) (p. 1) These transitional instruments should not be terminated because  in making this Order the Full Bench was relying on the continued operation of state based awards through to 1 December 2020 at the risk of otherwise disadvantaging employees under state based awards that provide a higher rate than the Modern Award.  [ABI and NSWBC](https://www.fwc.gov.au/documents/sites/wagereview2017/consultations/abisub.pdf) ( paras.4.19– 4.22 at p.9 ) Terminating the instruments will have no effect on the ERO. The Commission has an obligation under Item 3 of Schedule 5 of the Transitional Act to terminate as soon as practicable any award-based transitional instruments and transitional APCSs that are completely replaced by a modern award. For this reason, the Commission is required to terminate the relevant awards that have been replaced by the Social, Community, Home Care and Disability Services Award 2010. |
| 8. | **Transitional Pay Equity Orders**  ***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?*** | [Australian Government](https://www.fwc.gov.au/documents/sites/wagereview2017/consultations/ausgovsub.pdf) (p.7 ) TPEO’s should are not technically transitional instruments and it is unlikely they could be terminated by the Commission.  [ACTU](https://www.fwc.gov.au/documents/sites/wagereview2017/consultations/actusub.pdf) (p.1 ) TPEOs should continue in operation for the next four years.  [ASU](https://www.fwc.gov.au/documents/sites/wagereview2017/consultations/asusub.pdf) (p.1 ) TPEOs should continue to operate.  [ABI and NSWBC](https://www.fwc.gov.au/documents/sites/wagereview2017/consultations/abisub.pdf) (p. 10, para. 4.25) TPEOs should continue to operate. |
| 9. | **The Annual Wage Review and Transitional Instruments**  ***Do the parties have any views about the on-going process of review for transitional instruments as part of the annual wage reviews?*** | [ACTU](https://www.fwc.gov.au/documents/sites/wagereview2017/consultations/actusub.pdf) (p. 41) submitted that the current ongoing process for reviewing transitional instruments was “sound” but would be complemented by publication of adjusted rates.  [CFMEU C&G](https://www.fwc.gov.au/documents/sites/wagereview2017/consultations/cfmeusub.docx) (p. 5) supported ACTU’s submission on this matter.  [CFMEU FFPD](https://www.fwc.gov.au/documents/sites/wagereview2017/consultations/cfmeusub.pdf) (p. 5) supported ACTU’s submission on this matter.  [TCFU](https://www.fwc.gov.au/documents/sites/wagereview2017/consultations/tcfuasub.pdf)A (p. 2, para. 2.5) supported ACTU’s submission on this matter.  [Ai Group](https://www.fwc.gov.au/documents/sites/wagereview2017/consultations/aigroupsub.pdf) (p. 11) have not identified any problems with the Commission’s “careful approach” regarding the review and termination of transitional instruments.  [ABI and NSWBC](https://www.fwc.gov.au/documents/sites/wagereview2017/consultations/abisub.pdf) (p. 10, para. 4.26) agreed with the Commission’s ongoing review process.  [MTA organisations](https://www.fwc.gov.au/documents/sites/wagereview2017/consultations/mtasub.pdf) (p. 3) submitted that annual wage reviews should be used to deal with outstanding issues flowing from the review of transitional instruments. |

**List of abbreviations (in alphabetical order)**

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| Ai Group | Australian Industry Group |
| ABI and NSWBC | Australian Business Industrial, New South Wales Business Chamber |
| ACCI | Australian Chamber of Commerce and Industry |
| ACOSS | Australian Council of Social Service |
| ACTU | Australian Council of Trade Unions |
| All Trades | *All Trades Queensland Pty Limited* [2016] FWC 2832 |
| APCS | Australian Pay and Classification Scales |
| ASU | Australian Services Union |
| AWR | Annual Wage Review |
| CFMEU C&G | Construction, Forestry, Mining and Energy Union - Construction and General Division |
| CFMEU FFPD | CFMEU Forestry, Mining and Energy Union – Forestry, Furnishing, Building Products and Manufacturing Division |
| CPSU | Community and Public Sector Union |
| Commission | Fair Work Commission |
| EA | Enterprise Agreement |
| ERO | Equal Remuneration Order |
| HIA | Housing Industry Association Ltd |
| LSL | Long Service Leave |
| MTA organisations | Motor Trade Association South Australia, Motor Trade Association NSW and Victorian Automobile Chamber of Commerce |
| NAPSA | Notional Agreements Preserving State Award |
| SACS | Social and Community Services |
| TCFUA | Textile Clothing & Footwear Union of Australia |
| TPEO | Transitional Pay Equity Order |
| Transitional Act | *Fair Work (Transitional Provisions and Consequential Amendments Act 2009* (Cth) |
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1. AP826201. [↑](#footnote-ref-1)
2. [2016] FWC 2832. [↑](#footnote-ref-2)