



# **Fair Work Legislation Amendment Regulations 2009 (No. 3)<sup>1</sup>**

## **Select Legislative Instrument 2009 No. 391**

---

I, QUENTIN BRYCE, Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following Regulations under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* and the *Fair Work Act 2009*.

Dated 14 December 2009

QUENTIN BRYCE  
Governor-General

By Her Excellency's Command

JULIA GILLARD  
Minister for Employment and Workplace Relations

---

**Contents**

	1	Name of Regulations	3
	2	Commencement	3
	3	Amendment of <i>Fair Work Regulations 2009</i>	3
	4	Amendment of <i>Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009</i>	3
<b>Schedule 1</b>		<b>Amendments of <i>Fair Work Regulations 2009</i></b>	<b>4</b>
<b>Schedule 2</b>		<b>Amendments of <i>Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009</i></b>	<b>5</b>

---

**1 Name of Regulations**

These Regulations are the *Fair Work Legislation Amendment Regulations 2009 (No. 3)*.

**2 Commencement**

These Regulations commence on 1 January 2010.

**3 Amendment of *Fair Work Regulations 2009***

Schedule 1 amends the *Fair Work Regulations 2009*, as amended by the *Fair Work Legislation Amendment Regulations 2009 (No. 2)*.

**4 Amendment of *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009***

Schedule 2 amends the *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009*, as amended by:

- (a) the *Fair Work (Transitional Provisions and Consequential Amendments) Amendment Regulations 2009 (No. 1)*; and
- (b) the *Fair Work Legislation Amendment Regulations 2009 (No. 1)*; and
- (c) the *Fair Work Legislation Amendment Regulations 2009 (No. 2)*.

## Schedule 1      **Amendments of *Fair Work Regulations 2009***

(regulation 3)

**[1]      Regulation 1.05**

*omit*

**[2]      Regulation 1.15A**

*omit*

For paragraph (d) of the definition of *State public sector employer*

*insert*

For paragraph (e) of the definition of *State public sector employer*

**[3]      Chapter 3, Part 3-3, Division 6**

*omit*

---

**Schedule 2      Amendments of *Fair Work*  
*(Transitional Provisions and*  
*Consequential Amendments)*  
*Regulations 2009***

(regulation 4)

**[1]      After regulation 2.05A**

*insert*

**2.05B      Permits, licences and authorisations issued under  
State industrial laws of Division 2B referring States**

- (1) For paragraph 7 (1) (c) of Schedule 2 to the Act, this regulation applies if:
- (a) a permit, licence or authority (however described) made:
    - (i) by a State industrial body; and
    - (ii) under a State industrial law of a Division 2B referring State (within the meaning of that Schedule);is in existence immediately before the Division 2B referral commencement (within the meaning of that Schedule); and
  - (b) the effect of the permit, licence or authority is to allow an employee to be paid a base rate of pay that is less than:
    - (i) the base rate of pay specified in a source State award or source State employment agreement, within the meaning of Schedule 2 to the Act, that applies to the employee; or
    - (ii) the relevant minimum wage of the State that would otherwise apply.
- (2) On and after the Division 2B referral commencement:
- (a) the base rate of pay specified in the permit, licence or authority continues to apply in relation to the employee; and

- 
- (b) the base rate of pay to which the employee would be entitled:
    - (i) under a Division 2B State instrument; or
    - (ii) under a modern award; or
    - (iii) under a national minimum wage order that applies to the employee's employment; or
    - (iv) under item 19 of Schedule 9 to the Act (if applicable);does not apply in relation to the employment; and
  - (c) Schedule 9 to the Act does not apply in relation to the base rate of pay specified in the permit, licence or authority.
- (3) Subregulation (2) ceases to have effect on the earlier of:
- (a) the date on which the permit, licence or authority is expressed to expire; and
  - (b) the end of the period of 12 months starting on the Division 2B referral commencement.

**[2] After regulation 3.03**

*insert in Part 3*

**3.04 Continued coverage of certain transitional instruments for Community Jobs Plan and Green Army**

For subclause 8 (1) of Schedule 2 to the Act, Schedule 3 to the Act is modified by inserting the following Part after Part 8.

---

## **Part 9            Continued coverage of certain transitional instruments**

### **44            Community Jobs Plan and Green Army**

- (1) Despite item 29 of Schedule 3, an award-based transitional instrument that:
  - (a) sets minimum terms and conditions for an employee participating in the program of the State of Queensland known as:
    - (i) the Community Jobs Plan; or
    - (ii) the Green Army; and
  - (b) covered the employee immediately before 1 January 2010; continues to cover the employee.
- (2) The award-based transitional instrument also covers an employee:
  - (a) who is employed, on or after 1 January 2010, by an employer of an employee who is covered by the award-based transitional instrument, as a participant in either of those programs; and
  - (b) who would have been covered by the award-based transitional instrument under subregulation (1) if the employee had been employed immediately before 1 January 2010.
- (3) For subregulations (1) and (2), the award-based transitional instrument also covers an employer in respect of the employee.
- (4) Despite section 47 of the FW Act, a modern award that would, but for this subregulation, apply to the employee does not apply for the period during which the award-based transitional instrument covers the employee.
- (5) Despite item 11 of Schedule 9, a transitional APCS that is derived from the Training Wage Award of the State of Queensland:
  - (a) covers an employee who is covered by the award-based transitional instrument; and
  - (b) covers an employer in respect of the employee.

- 
- (6) Despite anything in this Act or the FW Act, the National Employment Standards do not apply to:
- (a) an employee who is covered by the award-based transitional instrument; or
  - (b) an employer in respect of the employee.
- (7) This regulation ceases to apply at the end of 30 June 2012.

**[3] After Part 3**

*insert*

**Part 3A Transitional provisions for Schedule 3A  
to Act (treatment of State awards and  
State employment agreements of  
Division 2B referring States)**

**3A.01 Continued coverage under Division 2B State award**

For subitem 8 (1) of Schedule 2 to the Act, Schedule 3A to the Act is modified by inserting the following Part after Part 4.

**Part 4A Continued application of certain  
transitional instruments**

**36A Division 2B State awards**

- (1) Despite subitem 21(1) of Schedule 3A, a Division 2B State award that is affected, in the same way as a source State award is affected immediately before the Division 2B referral commencement, by an order, decision or determination of a State industrial body that:
- (a) sets minimum terms and conditions for an employee to whom a training arrangement applies; and
  - (b) either:
    - (i) provides for competency-based wage progression; or
    - (ii) provides solely for the provision of tools for use by apprentices;



---

does not terminate at the end of 12 months after the Division 2B referral commencement.

- (2) The Division 2B State award continues to operate only to the extent that it covers:
  - (a) an employee to whom a training arrangement applies; and
  - (b) an employer in respect of an employee to whom a training arrangement applies; and
  - (c) an employee, to whom a training arrangement applies, who is:
    - (i) an employee of an employer described in paragraph (b); and
    - (ii) employed after the Division 2B referral commencement.
- (3) Item 16 of Schedule 9 does not apply to the Division 2B State award.

### **36B Community Jobs Plan and Green Army**

- (1) Despite subitem 21(1) of Schedule 3A, a Division 2B State award that is affected, in the same way as a source State award is affected, by an order, decision or determination of a State industrial body that sets minimum terms and conditions for an employee participating in the program of the State of Queensland known as:
  - (a) the Community Jobs Plan; or
  - (b) the Green Army;does not terminate at the end of 12 months after the Division 2B referral commencement.
- (2) The Division 2B State award continues to apply only to the extent that it covers:
  - (a) an employee in relation to the employee's participation in the program; and
  - (b) an employer in relation to the employee's participation in the program.

- 
- (3) The Division 2B State award also covers an employee who:
- (a) who is employed after the Division 2B referral commencement; and
  - (b) to whom the Division 2B State award would have applied under subitem (1) or (2) if the employee had been employed immediately before the Division 2B referral commencement;
- but only to the extent that the employee is employed as a participant in either of those programs.
- (4) For Schedule 3A, the Division 2B State award also covers an employer after the Division 2B referral commencement, but only:
- (a) to the extent that the employer is a participant in either of those programs; and
  - (b) in respect of an employee who is employed as a participant in either of those programs.
- (5) Despite anything in this Act or the FW Act, the National Employment Standards do not apply to:
- (a) an employee who is covered by the Division 2B State award; and
  - (b) an employer in respect of the employee.
- (6) Item 16 of Schedule 9 does not apply to the Division 2B State award.
- (7) This item ceases to apply at the end of 30 June 2012.

---

**3A.02 Terms about disputes relating to matters arising  
under Division 2B State awards**

For subitem 7 (2) of Schedule 3A to the Act, the following model term is prescribed:

- (1) In the event of a dispute about a matter under this award, in the first instance the parties must attempt to resolve the matter at the workplace by discussions between the employee or employees concerned and the relevant supervisor. If such discussions do not resolve the dispute, the parties will endeavour to resolve the dispute in a timely manner by discussions between the employee or employees concerned and more senior levels of management as appropriate.
- (2) If a dispute about a matter arising under this award is unable to be resolved at the workplace, and all appropriate steps under clause (1) have been taken, a party to the dispute may refer the dispute to Fair Work Australia.
- (3) The parties may agree on the process to be utilised by Fair Work Australia including mediation, conciliation and consent arbitration.
- (4) Where the matter in dispute remains unresolved, Fair Work Australia may exercise any method of dispute resolution permitted by the Act that it considers appropriate to ensure the settlement of the dispute.
- (5) An employer or employee may appoint another person, organisation or association to accompany and/or represent them for the purposes of this clause.
- (6) While the dispute resolution procedure is being conducted, work must continue in accordance with this award and the *Fair Work Act 2009*. Subject to applicable occupational health and safety legislation, an employee must not unreasonably fail to comply with a direction by the employer to perform work, whether at the same or another workplace, that is safe and appropriate for the employee to perform.

---

**[4] After regulation 3B.01***insert***3B.02 References to award-based transitional instruments  
and continued coverage under award-based  
transitional instruments**

For subitem 8 (1) of Schedule 2 to the Act, Schedule 5 to the Act is modified by inserting the following item and Parts after item 14 of Part 4.

**15 References to award-based transitional instrument in  
term of modern award**

To avoid doubt, a reference to an award-based transitional instrument in a term of a modern award dealing with the transition from an award-based transitional instrument to the modern award includes a reference to a transitional award within the meaning of Schedule 6 to the *Workplace Relations Act 1996*.

**Part 5 Continued coverage under award-based  
transitional instruments****16 Continued coverage**

- (1) Despite item 29 of Schedule 3, an award-based transitional instrument that:
  - (a) sets minimum terms and conditions for an employee to whom a training arrangement applies; and
  - (b) either:
    - (i) provides for competency-based wage progression; or
    - (ii) provides solely for the provision of tools for use by apprentices; and
  - (c) covered an employee or employer immediately before 1 January 2010;continues to cover the employee or employer.

- 
- (2) Despite the rule in item 11 of Schedule 9, an employee who is covered by the award-based transitional instrument is also covered by a transitional APCS that would have covered the employee immediately before 1 January 2010.
  - (3) The award-based transitional instrument and transitional APCS also cover an employee to whom a training arrangement applies:
    - (a) who is employed, on or after 1 January 2010, by an employer who is covered by the award-based transitional instrument; and
    - (b) who would have been covered by the award-based transitional instrument and transitional APCS under subitems (1) and (2) if the employee had been employed immediately before 1 January 2010.
  - (4) For subitems (1) to (3), the award-based transitional instrument and transitional APCS only cover an employer in respect of an employee to whom a training arrangement applies.
  - (5) Despite section 47 of the FW Act, a modern award that would, but for this subitem, apply to the employee does not apply for the period during which the award-based transitional instrument covers the employee.

## **Part 6            Award-based transitional instruments**

### **17            Award-based transitional instruments include transitional awards**

- (1) For the purposes of the application of paragraph 8(3)(d) of this Schedule in relation to an employee, if, immediately before the commencement of a modern award:
  - (a) a Division 2B State reference transitional award within the meaning of Schedule 2 to the Act; or
  - (b) a transitional award within the meaning of Schedule 6 to the *Workplace Relations Act 1996*;applied in relation to the employer and employee, a reduction in the employee's take-home pay is taken to be attributable to the Part 10A award modernisation process.

- 
- (2) For the purposes of the application of paragraph 8(4)(d) of this Schedule in relation to an outworker, if, immediately before the commencement of a modern award:
- (a) a Division 2B State reference transitional award within the meaning of Schedule 2 to the Act; or
  - (b) a transitional award within the meaning of Schedule 6 to the *Workplace Relations Act 1996*;
- applied in relation to the outworker, a reduction in the outworker's take-home pay is taken to be attributable to the Part 10A award modernisation process.

**[5] After Part 3B**

*insert*

**Part 3D Transitional provisions for  
Schedule 7 to Act (enterprise  
agreements and workplace  
determinations made under  
the FW Act)**

**3D.01 Better off overall test in relation to transitional  
provisions inserted into modern awards by FWA after  
Division 2B State referral**

For paragraph 8 (1) of Schedule 2 to the Act, Schedule 7 to the Act is modified by inserting the following Part after Part 4A.

---

**Part 4D      Better off overall test in relation to  
transitional provisions inserted into  
modern awards by FWA after Division 2B  
State referral**

**20B      Better off overall test**

- (1) This item applies in relation to:
- (a) an enterprise agreement, or an enterprise agreement that is proposed to be varied, that is to be assessed under subsection 193(1) or (3) of the FW Act, for the purpose of determining whether it passes the better off overall test, during the period (the *transitional period*):
    - (i) starting on 1 January 2010; and
    - (ii) ending on 31 December 2014; and
  - (b) a modern award that contains a term which makes provision for the transition:
    - (i) from:
      - (A) a Division 2B State award that covered employees immediately before the modern award comes into operation; or
      - (B) a transitional award, within the meaning of Schedule 6 to the *Workplace Relations Act 1996*, that covered employees immediately before the modern award comes into operation; and
    - (ii) to the terms and conditions of employment of those employees covered by the modern award.
- (2) For the purpose of determining whether the enterprise agreement, or the enterprise agreement as proposed to be varied, passes the better off overall test, subsections 193(1) and (3) of the FW Act apply as if:
- (a) FWA were required, at the test time under the relevant subsection, to compare the enterprise agreement, or the enterprise agreement as proposed to be varied, with:
    - (i) the relevant modern award as it operates at the test time; and

- 
- (ii) the relevant modern award as it operates on 31 July in each year in the transitional period until the nominal expiry date of the enterprise agreement, that would be the first day of the first full pay period for an employee covered by the enterprise agreement; and
- (b) FWA were required to assume, at the test time, that the modern award will not be varied before the days mentioned in subparagraph (a)(ii).
- (3) Subsections 193(1) and (3) of the FW Act also apply as if they provided that:
- (a) if FWA carries out a comparison in accordance with subitem (2); and
- (b) for 1 or more of the comparisons, FWA is not satisfied that each of the employees mentioned in subsection 193(1) or (3) of the FW Act would be better off overall if the enterprise agreement, or the enterprise agreement as proposed to be varied, applied to the employee than if the modern award applied to the employee;
- the enterprise agreement, or the enterprise agreement as proposed to be varied, does not pass the better off overall test.

**[6] Regulation 5.10**

*omit*

**[7] Schedule 2.1, paragraph 20A (1) (a)**

*after*

an enterprise agreement

*insert*

, or an enterprise agreement that is proposed to be varied,



---

**[8] Schedule 2.1, subitem 20A (2)**

*after*

whether the enterprise agreement

*insert*

, or the enterprise agreement as proposed to be varied,

**[9] Schedule 2.1, paragraph 20A (2) (a)**

*after*

to compare the enterprise agreement

*insert*

, or the enterprise agreement as proposed to be varied,

**[10] Schedule 2.1, subitem 20A (3)**

*after each mention of*

the enterprise agreement

*insert*

, or the enterprise agreement as proposed to be varied,

---

**Note**

1. All legislative instruments and compilations are registered on the Federal Register of Legislative Instruments kept under the *Legislative Instruments Act 2003*. See <http://www.frli.gov.au>.