

EXPLANATORY STATEMENT

Select Legislative Instrument 2012 No. 270

Issued by the authority of the Minister for Employment and Workplace Relations

Subject – *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*

Fair Work (Transitional Provisions and Consequential Amendments) Amendment Regulation 2012 (No. 2)

Section 4 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (the Act) enables the Governor-General to make regulations prescribing matters either required or permitted by the Act, or necessary or convenient to be prescribed for giving effect to the Act.

Subitem 8(1) of Schedule 2 to the Act provides that regulations may modify provisions of the transitional Schedules to the Act.

The Regulation amends the *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009* (the Principal Regulations) and the Act to provide annual wage increases for employees in the Queensland social and community services (SACS) sector whose minimum wages are set by two transitional pay equity orders (TPEOs) taken to have been made by Fair Work Australia (FWA).

The two TPEOs preserve the effect of a pay equity order made by the Queensland Industrial Relations Commission (QIRC) on 12 June 2009 (the source pay equity order), which amended the *Queensland Services and Crisis Assistance Award – State 2008* (the State Award) to include significant wage increases on work value and equal remuneration grounds, including a one per cent increase payable each July until 2015, known as the Equal Remuneration Component (ERC).

Applying annual wage increases to the two TPEOS will ensure that relevant employees maintain the benefit of the Queensland source pay equity order and are not left worse off as a result of Queensland's referral of industrial relations powers over the private sector to the Commonwealth.

The first TPEO applies to employees of employers covered by the Social, Community, Home Care and Disability Services Industry Award 2010 (SACS modern award) who entered the federal system on 1 January 2010 as a result of Queensland's referral of industrial relations powers (the first TPEO).

While employees to whom the first TPEO applies are currently entitled to higher rates than those covered by the SACS modern award alone, they have not received Queensland State Wage Case increases since 2009 and are not currently entitled to receive federal annual wage increases determined by FWA. The higher base rates payable under the first TPEO are therefore frozen (with the exception of the one per cent ERC increase payable each July until 2015) until the lower rates under the SACS modern award (as affected by the Equal Remuneration Order (ERO) made by FWA on 22 June 2012) converge with those higher rates.

The second TPEO was taken to have been made by FWA on 27 March 2011, in accordance with the *Fair Work (Transitional Provisions and Consequential Amendments) Amendment Regulation 2012 (No. 1)* (the second TPEO).

The second TPEO applies to employees of employers covered by the SACS modern award, who received funding from the Queensland Government in relation to the source pay equity order, and in respect of whom one of two federal ‘transitional awards’ previously applied.

The rates payable under the second TPEO are higher than under the first TPEO because they include State Wage Case increases awarded by the QIRC in 2010 and 2011. The second TPEO rates are, however, also frozen (with the exception of the one per cent ERC increase payable each July until 2015) as under the current arrangements, no further Queensland or federal annual wage increases will apply.

The Regulation applies the 2010, 2011 and 2012 State Wage Case increases to the base rates payable under the first TPEO, and the 2012 State Wage Case increase to the second TPEO. The Regulation provides that these increases are payable from 1 December 2012, from which time the rates payable under both the first TPEO and the second TPEO will be aligned.

The Regulation also provides that any increases to minimum wages in the SACS modern award determined by FWA in annual wage reviews for the financial years commencing on 1 July 2012 and ending on 1 July 2020 will apply to the first TPEO and the second TPEO.

The Regulation ensures, as far as possible, that the rates payable under the first TPEO and second TPEO will converge with the rates payable to employees covered by the SACS modern award alone (as affected by the ERO) by 1 December 2020, the date on which phased increases under the ERO will have been fully implemented.

The Regulation also allows FWA to vary minimum wages payable under a TPEO in annual wage reviews to the extent that those wages preserve increases determined by the QIRC for disability support workers, dental assistants and employees engaged in the provision of children’s services in Queensland.

Consultation on the Regulation has been undertaken with representatives of employers and employees in the relevant sectors, and State and Territory Governments.

Details of the Regulation are in [Attachment A](#).

A Statement of Compatibility with Human Rights has been completed for the Regulation, in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*, and is included at [Attachment B](#).

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Office of Best Practice Regulation advised that a Regulation Impact Statement was not required.

The Regulation commences on 1 December 2012.

<u>Authority:</u>	Section 4 of the <i>Fair Work (Transitional Provisions and Consequential Amendments) Act 2009</i>
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Details of *Fair Work (Transitional Provisions and Consequential Amendments) Amendment Regulation 2012 (No. 2)*

Section 1 – Name of regulation

This section sets out the name of the Regulation as the *Fair Work (Transitional Provisions and Consequential Amendments) Amendment Regulation 2012 (No. 2)*.

Section 2 – Commencement

This section provides that the Regulation commences on 1 December 2012.

Section 3 – Amendment of *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009*

This section provides that Schedule 1 to the Regulation amends the Principal Regulations.

Schedule 1 – Amendments

Item [1] – Regulation 3.03D

Item 1 makes an amendment in relation to the second TPEO which is minor and consequential upon the amendments in item 2 of this Schedule.

The second TPEO was taken to have been made by FWA on 27 March 2011, in accordance with item 43 of Schedule 3 to the Act and the *Fair Work (Transitional Provisions and Consequential Amendments) Amendment Regulation 2012 (No. 1)*.

Item 1 substitutes a new regulation 3.03D of the Principal Regulations which in turn substitutes a new subitem 43(5) of Schedule 3 to the Act.

New subitem 43(5) is in similar terms to existing subitem 43(5) but does not include the reference in existing paragraph 43(5)(b) to Schedule 1A to the Principal Regulations, which specifies the base rates of pay under the second TPEO. The reference to Schedule 1A to the Principal Regulations is repealed because the rates of pay set out in that Schedule will no longer be applicable from 1 December 2012. Item 4 of this Schedule substitutes a new Schedule 1A, setting out the new base rates payable under both the first TPEO and the second TPEO from 1 December 2012.

The repeal of the reference to existing Schedule 1A in subitem 43(5) does not impact on the rates payable under the second TPEO before 1 December 2012, or on any back pay obligations under the second TPEO (see regulation 3.03F of the Principal Regulations, as inserted by the *Fair Work (Transitional Provisions and Consequential Amendments) Amendment Regulation 2012 (No. 1)*).

Item [2] – After regulation 3.03G

This item inserts a new regulation 3.03H into the Principal Regulations which amends Schedule 3 to the Act to include new items 44 and 45.

New item 44 varies the second TPEO to incorporate the award wage increase determined in the 2012 Queensland State Wage Case from 1 December 2012. That increase was 2.9 per cent.

The second TPEO was taken to have been made by FWA on 27 March 2011, in accordance with item 43 of Schedule 3 to the Act and the *Fair Work (Transitional Provisions and Consequential Amendments) Amendment Regulation 2012 (No. 1)*.

The second TPEO applies to employees of employers covered by the SACS modern award who received funding from the Queensland Government in relation to the source pay equity order, and in respect of whom one of two federal ‘transitional awards’ applied (the *Social and Community Services (Queensland) Award 2001 [Transitional]*, and the *Crisis Assistance Supported Housing (Queensland) Award 1999 [Transitional]*). Had Queensland not referred industrial relations powers to the Commonwealth, these employees would have become regulated by the Queensland industrial relations system from 27 March 2011.

Subitem 44(1) provides that on 1 December 2012, FWA is taken to vary the second TPEO.

Subitem 44(2) provides that the second TPEO, as varied, requires the class of employers prescribed in regulation 3.03B of the Principal Regulations (i.e. employers to whom the second TPEO applies) to pay each affected employee a base rate of pay that is not less than the base rate of pay that the employee would be entitled to be paid if:

- the State Award, as in effect at 1 December 2012, applied to the employee; and
- the base rate of pay payable under the State Award after 1 December 2012 continued to be determined in accordance with the source pay equity order.

Note 1 to subitem 44(2) indicates that the source pay equity order is the order made by the QIRC on 12 June 2009 in the matter of *Queensland Services, Industrial Union of Employees AND Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers and Others (A/2008/5)*.

The source pay equity order amended the State Award to include significant wage increases on work value and equal remuneration grounds, including a 1 per cent ERC increase payable each year in July until 2015.

Note 2 indicates that the base rate of pay under the second TPEO, as varied, includes the amount required to be paid under the General Ruling made by the QIRC on 16 August 2012 (i.e. the award wage increase delivered in the 2012 Queensland State Wage Case).

The base rates payable under the varied second TPEO will not include any further Queensland State Wage Case increases determined by the QIRC after 1 December 2012. However, the base rates payable under the varied second TPEO will include further 1 per cent ERC increases payable each year in July from 2013 to 2015, as derived from the source pay equity order.

Subitem 44(3) provides that the varied second TPEO takes effect, in relation to an employee, on the first day of the first pay period that starts on or after 1 December 2012. While the award wage increase determined in the 2012 Queensland State Wage Case became payable to Queensland system employees from 1 September 2012, the varied second TPEO applies prospectively from 1 December 2012 and does not include any back pay obligation.

Subitem 44(4) provides that the base rates payable under the varied second TPEO are set out in new Schedule 1A to the Principal Regulations.

New item 45 provides for the application of federal annual award wage increases to the second TPEO.

Subitem 45(1) provides that if FWA varies minimum wages in the SACS modern award as part of an annual wage review for the financial years starting on 1 July 2012 and ending on 30 June 2020, the variation applies to the base rates payable under the varied second TPEO as if that TPEO were a modern award.

A note to subitem 45(1) refers to sections 286 and 286 of the *Fair Work Act 2009* (FW Act), which concern annual wage reviews.

New subitem 45(2) limits the application of the 2019-2020 annual wage review increase to the varied second TPEO. The subitem provides that any variation to minimum wages in the SACS modern award made by FWA as part of the annual wage review for the financial year starting on 1 July 2019, only applies to the varied second TPEO to the extent that the variation would not result in the relevant base rate of pay under that TPEO exceeding the 'final rate' set out in clause 6.2 of the ERO made by FWA on 22 June 2012 under section 302 of the FW Act.

The federal ERO delivers pay rises phased over eight years in nine equal instalments from 1 December 2012. The 'final rates' under the ERO will be fully phased in and payable on 1 December 2020.

The effect of new subitem 45(2) is likely to be that any increase determined as part of the 2019-2020 annual wage review will apply in full to the varied second TPEO in respect of some classifications, and only partially (or not at all) in respect of other classifications.

The intention of the provision is to ensure, as far as possible, that the rates payable under the varied second TPEO converge with the rates payable under the SACS modern award, as affected by the ERO, no later than 1 December 2020, the date on which the phased increases under the ERO will have been fully implemented.

The varied second TPEO, will cease to have any effect on an employee's minimum wages after the employee's base rate under that TPEO has converged with the relevant base rate in the SACS modern award, as affected by the ERO (see subitem 43(9) of the Act, as amended by regulation 3.03G of the Principal Regulations).

Item [3] – Before regulation 3A.01

Item 3 inserts new regulations 3A.01A and 3A.01B into the Principal Regulations.

Regulation 3A.01A modifies Schedule 3A to the Act by substituting new subitems 30A(6) and (7), to clarify how applicable TPEOs made under item 30A(1) interact with enterprise agreements and FWA orders.

New subitem 30A(6) of Schedule 3A to the Act provides that a term of a modern award, enterprise agreement or order of FWA is of no effect to the extent that it requires an employer to pay a base

rate of pay that is less than the relevant base rate of pay under an applicable TPEO taken to have been made under item 30A(1).

New subitem 30A(7) provides, for the avoidance of doubt, that a term of a modern award, enterprise agreement or order of FWA continues to have effect to the extent that it requires an employer to pay a base rate of pay that is equal to or more than the relevant base rate of pay under an applicable TPEO taken to have been made under subitem 30A(1).

New regulation 3A.01B amends Schedule 3A to the Act to include new items 30B, 30C and 30D.

New item 30B varies the first TPEO, taken to have been made by FWA on 1 January 2010, in accordance with item 30A of Schedule 3A to the Act, to incorporate award wage increases determined in the 2010, 2011 and 2012 Queensland State Wage Cases from 1 December 2012. Those increases were \$20.00 per week, 3.4% and 2.9% respectively.

The first TPEO applies to employees of employers covered by the SACS modern award who entered the federal system on 1 January 2010 as a result of Queensland's referral of industrial relations powers over the private sector to the Commonwealth (Division 2B State reference employees).

Subitem 30B(1) provides that new item 30B applies to the TPEO taken to have been made under item 30A to the extent that the order relates to the Division 2B State award derived from the State Award. The variation therefore only applies to the first TPEO.

Subitem 30B(2) provides that on 1 December 2012, FWA is taken to vary the first TPEO.

Subitem 30B(3) provides that the first TPEO, as varied, requires employers to whom that TPEO applies to pay each affected employee a base rate of pay that is not less than the base rate of pay that the employee would be entitled to be paid if:

- the State Award, as in effect at 1 December 2012; and
- the base rate of pay payable under the State Award after 1 December 2012 continued to be determined in accordance with the source pay equity order.

Note 1 to subitem 30B(3) indicates that the source pay equity order is the order made by the QIRC on 12 June 2009 in the matter of *Queensland Services, Industrial Union of Employees AND Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers and Others* (A/2008/5).

The source pay equity order amended the State Award to include significant wage increases on work value and equal remuneration grounds, including a 1 per cent ERC increase payable each year in July until 2015.

Note 2 indicates that the base rate of pay under the varied first TPEO includes the amount required to be paid under the General Ruling made by the QIRC on 16 August 2012 (i.e. the award wage increase delivered in the 2012 Queensland State Wage Case).

The effect of subitem 30B(3) is to include all award wage increases determined in Queensland State Wage Cases prior to 1 December 2012 (i.e. the 2010, 2011 and 2012 Queensland State Wage Case increases) in the base rate payable under the varied first TPEO.

The base rates payable under the varied first TPEO will not include any further Queensland State Wage Case increases determined by the QIRC after 1 December 2012. However, the base rates payable under the varied first TPEO will include further 1 per cent ERC increases payable each year in July from 2013 to 2015, as derived from the source pay equity order.

Subitem 30B(4) provides that the varied first TPEO takes effect, in relation to an employee, on the first day of the first pay period that starts on or after 1 December 2012. The increases derived from the 2010, 2011 and 2012 State Wage Case increases therefore apply prospectively from 1 December 2012, with no obligation placed on employers to pay back pay.

Subitem 30B(5) provides that the base rates payable under the varied first TPEO are set out in new Schedule 1A to the Principal Regulations.

New item 30C provides for the automatic application of federal annual award wage increases to the varied first TPEO.

Subitem 30C(1) provides that if FWA varies minimum wages in the SACS modern award as part of an annual wage review for the financial years starting on 1 July 2012 and ending on 30 June 2020, the variation applies to the base rates payable under the varied first TPEO as if that TPEO were a modern award.

Subitem 30C(2) limits the application of the 2019-2020 annual wage review increase to the varied first TPEO. The subitem provides that any variation to minimum wages in the SACS modern award made by FWA as part of the annual wage review for the financial year starting on 1 July 2019, only applies to the varied first TPEO to the extent that the variation would not result in rates under that TPEO exceeding the 'final rate' set out in clause 6.2 of the ERO made by FWA on 22 June 2012 under s 302 of the FW Act.

The federal ERO delivers pay rises phased over eight years in nine equal instalments from 1 December 2012. The 'final rates' under the ERO will be fully phased in and payable on 1 December 2020.

It is anticipated that the effect of new subitem 30C(2) will be that any increase determined as part of the 2019-2020 annual wage review will apply in full to the varied first TPEO in respect of some classifications, and only partially (or not at all) in respect of other classifications.

The intention of the provision is to ensure, as far as possible, that the rates payable under the varied first TPEO converge with the SACS modern award no later than 1 December 2020, the date on which the phased increases under the ERO will have been fully implemented.

The varied first TPEO will cease to have any effect on an employee's minimum wages after the employee's base rate under that TPEO has converged with the relevant base rate in the SACS modern award, as affected by the ERO (see new subitem 30A(7)).

New item 30D confers a discretion on FWA to vary the minimum wages payable under the TPEO taken to have been made under subitem 30A to the extent that the TPEO preserves wage increases determined by the QIRC for disability support workers, dental assistants and employees engaged in the provision of children's services.

Subitem 30D(1) provides that FWA may make a determination in an annual wage review varying the TPEO taken to have been made under subitem 30A(1).

Subitem 30D(2) provides that for this purpose, Division 3 of Part 2-6 of the FW Act (other than section 292) applies to the TPEO as if the TPEO were a modern award. For example, in conducting an annual wage review, FWA must review the relevant minimum wages under the TPEO and must ensure that all persons and bodies have a reasonable opportunity to make written submissions to FWA for consideration in the review (see sections 285 and 289 of the FW Act). However, FWA is not required to publish varied wage rates under the TPEO in accordance with section 292.

Allowing FWA to vary the TPEO in an annual wage review is consistent with the treatment of other transitional instruments, such as State reference transitional awards, transitional Australian Pay and Classification Scales and Division 2B State awards (see items 10 and 20 of Schedule 9, and subitems 12A(5) and (6) of Schedule 3 to the Act).

Subitem 30D(3) provides that FWA may not vary the TPEO taken to have been made under subitem 30A(1) to the extent that the TPEO relates to the Division 2B State award derived from the State Award (i.e. the first TPEO). Minimum wage increases determined in annual wage reviews will apply to the first TPEO, in accordance with new item 30C.

FWA's power to vary the TPEO under item 30D is intended to apply to employees of employers who entered the federal system on 1 January 2010 as a result of Queensland's referral of industrial relations powers to the Commonwealth and who were previously covered by Division 2B State awards derived from the Disability Support Workers Award – State (Queensland) 2003, the Dental Assistants (Private Practice) Award – State (Queensland), and the Children's Services Award – State (Queensland) 2006.

The base rates of pay under those Division 2B State awards were affected by the following QIRC pay equity decisions (see paragraph 30A(2)(b) of Schedule 3A to the Act):

- *The Australian Workers' Union of Employees, Queensland AND Queensland Community Services Employers Association Inc. (A/2009/5);*
- *Liquor Hospitality and Miscellaneous Union, Queensland Branch, Union of Employees AND The Australian Dental Association (Queensland Branch) Union of Employers (B/2003/2082); and*
- *Liquor Hospitality and Miscellaneous Union, Queensland Branch, Union of Employees AND Children's Services Employers Association Queensland Union of Employers and Others (B/2003/2133).*

Item [4] – Schedule 1A

Item 4 repeals existing Schedule 1A to the Principal Regulations and substitute a new Schedule 1A, which sets out the base rates payable on 1 December 2012 under both the varied first TPEO and the varied second TPEO.

Note 1 to new Schedule 1A provides that weekly wage rates were calculated by dividing annual salaries by 52.1667, and that hourly rates are calculated by dividing the weekly wage rate by 38. This is consistent with the methods of calculation provided for in the State Award, the Division 2B State award that derived from that award, and the source pay equity order.

Note 2 explains that the base rates of pay set out in the Schedule for Community Service Workers, Levels 6, 7 and 8, and Crisis Accommodation Workers, Category A, Level 4, do not include the 7.5% loading mentioned in clause 3.1.3 of Schedules 1 and 2 to the State Award.

Note 3 indicates that the base rates payable under the varied first TPEO and varied second TPEO on 1 December 2012 include the annual ERC increases of 1% for 2010-2012, as derived from the source pay equity order.

Note 4 indicates that the base rates payable under the varied first TPEO and varied second TPEO after 1 December 2012 can be determined by calculating and adding the following, in the following order:

- ERC increases of 1% for 2013-2015;
- any increases to the minimum wages in the SACS modern award determined by FWA as part of annual wage reviews under paragraph 285(2)(b) of the FW Act, and applicable to the varied TPEOs in accordance with new item 45 of Schedule 3 or new item 30C of Schedule 3A to the Act.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Fair Work (Transitional Provisions and Consequential Amendments) Amendment Regulation 2012 (No. 2)

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

This Legislative Instrument provides annual wage increases to employees in the Queensland Social and Community Services (SACS) sector to whom two transitional pay equity orders (TPEOs) apply.

The TPEOs preserve the effect of a decision of the QIRC made on 6 May 2009, which awarded significant pay increases on the basis that work in the Queensland SACS sector was undervalued. Providing employees to whom the two TPEOs apply with annual wage increases ensures that they maintain the benefit of that decision and are not left worse off as a result of Queensland's referral of its industrial relations powers over the private sector to the Commonwealth.

The *Social and Community Services Pay Equity Special Account Act 2012* ensures that employers to whom the two TPEOs apply, and who receive direct or indirect funding from the Commonwealth, are assisted to pay the rates preserved in those orders.

The Regulation also allows Fair Work Australia (FWA) to provide annual wage increases in relation to a TPEO to the extent that it applies to disability support workers, dental assistants and employees engaged in the provision of children's services in Queensland.

Human rights implications

The Regulation engages and promotes the human right, *Right to work and rights in work*, in particular the right to equal remuneration, as set out in Article 7 of the International Covenant on Economic, Social and Cultural Rights, and Article 11 of the Convention on the Elimination of all Forms of Discrimination Against Women. The right to equal remuneration includes women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work.

The Regulation promotes this human right by providing, or allowing FWA to provide, annual wage increases for employees working in sectors that have been the subject of decisions of the QIRC to award higher wages on pay equity grounds.

Conclusion

This Legislative Instrument is compatible with human rights.

The Hon William Richard Shorten MP

Minister for Employment and Workplace Relations