



# Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009<sup>1</sup>

**Select Legislative Instrument 2009 No. 166**

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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*.

Dated 29 June 2009

QUENTIN BRYCE  
Governor-General

By Her Excellency's Command

MARK ARBIB  
Minister for Employment Participation

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**Contents**

<b>Part 1</b>	<b>Preliminary</b>	
1.01	Name of Regulations	5
1.02	Commencement	5
1.03	Definitions	5
<b>Part 2</b>	<b>Transitional provisions for Part 2 of Schedule 2 to Act (regulations about transitional matters)</b>	
<b>Division 1</b>	<b>Redundancy pay applications</b>	
2.01	Redundancy pay applications — continuing Schedule 6 instrument	7
2.02	Redundancy pay applications — transitional instrument	8
<b>Division 2</b>	<b>Obligations for employee records and records for transferring employees</b>	
2.03	Employer obligations for employee records made before WR Act repeal day	8
2.04	Obligations for transfer of records concerning transferring employee	9
2.05	WR Regulations continue to apply to records for transferring employee made before WR Act repeal day	10
<b>Part 3</b>	<b>Transitional provisions for Schedule 3 to Act (continued existence of awards, workplace agreements and certain other WR Act instruments)</b>	
3.01	Meaning of <i>base rate of pay</i> — transitional instrument applies to pieceworker	12
3.02	Employee not award/agreement free if transitional instrument applies — meaning of <i>pieceworker</i>	13
3.03	Employee to whom transitional instrument applies — usual weekly hours of work	14

	Page
<b>Part 4</b>	<b>Transitional provisions for Schedule 8 to Act (workplace agreements and workplace determinations made under WR Act)</b>
4.01	When Workplace Authority Director must consider whether union collective agreement passes no-disadvantage test 15
4.02	Continued application of Schedules 7A and 7B to WR Act to AWA and pre-transition collective agreement 16
4.03	Variation of AWA or pre-transition collective agreement after WR Act repeal day 16
4.04	References to Workplace Ombudsman taken to be references to Fair Work Ombudsman 17
<b>Part 5</b>	<b>Miscellaneous and transitional civil remedy provisions</b>
5.01	Regulation 1.1 of Chapter 2 of WR Regulations does not apply to Schedule 5 to the Act 18
5.02	General Manager of FWA must prepare AFPC Secretariat's annual report 18
5.03	Powers of Fair Work Inspector — contravention of section 34 of the <i>Independent Contractors Act 2006</i> 18
5.04	Continued application of provisions to documents sealed by Australian Industrial Registry 18
5.05	Continued application of provision to award printed on or after WR Act repeal day 19
5.06	Applications for orders in relation to contraventions of civil remedy provisions 19
5.07	Section 557 of FW Act taken to apply to transitional civil remedy provision 20
5.08	When a reference to a civil remedy provision taken to include transitional civil remedy provision 21
5.09	References to employee, employer and employment taken to be reference to transitional employee, transitional employer and employment 21
5.10	References to employee and employer taken to be references to national system employee and national system employer 21

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	Page
5.11 Item 11 of Schedule 2 to the Act does not apply to provisions of WR Act not repealed by Schedule 1 to the Act	22

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## Part 1 Preliminary

### 1.01 Name of Regulations

These Regulations are the *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009*.

### 1.02 Commencement

These Regulations commence on 1 July 2009.

### 1.03 Definitions

In these Regulations:

*Act* means the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

*AWA* has the meaning given by subclause 1 (1) of Schedule 7A to the WR Act.

*civil remedy provision* has the meaning given by section 12 of the FW Act.

*compliance powers* has the meaning given by section 12 of the FW Act.

*eligible State or Territory court* has the meaning given by section 12 of the FW Act.

*fairness test* means the test described in Division 5A of Part 8 of the WR Act as in force immediately before the commencement of the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008*.

*Fair Work Ombudsman* means the Fair Work Ombudsman mentioned in Part 5-2 of the FW Act.

*FW Regulations* means the *Fair Work Regulations 2009*.

*national system employee* has the meaning given by sections 13 and 30C of the FW Act.

*national system employer* has the meaning given by sections 14 and 30D of the FW Act.

**Regulation 1.03**

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***pre-transition collective agreement*** has the meaning given by clause 1 of Schedule 7B to the WR Act.

***redundancy pay application*** means an application by an employer to have an obligation to pay an amount of redundancy pay for an employee varied or set aside because:

- (a) the employer has obtained acceptable alternative employment for the employee; or
- (b) the employer cannot pay the amount.

***transitional civil remedy provision*** means a civil remedy provision mentioned in subregulation 5.06 (2).

***union collective agreement*** has the meaning given by section 4 of the WR Act.

***Workplace Authority Director*** has the meaning given by section 4 of the WR Act.

***Workplace Ombudsman*** has the meaning given by section 4 of the WR Act.

***WR Regulations*** means the *Workplace Relations Regulations 2006*.

*Note* Several words and expressions used in these Regulations have the meaning given by item 2 of Schedule 2 to the Act. For example:

- bridging period
- continuing Schedule 6 instrument
- FW Act
- FW (safety net provisions) commencement day
- transitional APCS
- transitional instrument
- WR Act
- WR Act repeal day.

## **Part 2**                      **Transitional provisions for Part 2 of Schedule 2 to Act (regulations about transitional matters)**

### **Division 1**                      **Redundancy pay applications**

#### **2.01**                      **Redundancy pay applications — continuing Schedule 6 instrument**

- (1) For subitem 7 (1) of Schedule 2 to the Act, this regulation applies if:
  - (a) an employer would be obliged under a continuing Schedule 6 instrument to pay redundancy pay for the redundancy of an employee; and
  - (b) a term of the instrument permits the employer to make a redundancy pay application to the Australian Industrial Relations Commission.
- (2) If the employer makes the redundancy pay application during the period starting on the WR Act repeal day and ending on 26 March 2011:
  - (a) the functions of receiving and determining the application are conferred on FWA; and
  - (b) a provision in the instrument has effect as if the references in it to the Commission were references to FWA.

*Note 1* For the definition of **Commission** see subsection 4 (1) of the *Workplace Relations Act 1996*.

*Note 2* For the definition of **FWA** see section 12 of the FW Act.

*Note 3* For the definition of **redundancy pay application** see regulation 1.03.

Part 2	Transitional provisions for Part 2 of Schedule 2 to Act (regulations about transitional matters)
Division 2	Obligations for employee records and records for transferring employees

## Regulation 2.02

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### 2.02 Redundancy pay applications — transitional instrument

- (1) For subitem 7 (1) of Schedule 2 to the Act, this regulation applies if:
  - (a) an employer would be obliged under a transitional instrument to pay redundancy pay for the redundancy of an employee; and
  - (b) a term of the instrument permits the employer to make a redundancy pay application to the Australian Industrial Relations Commission or to a State industrial tribunal.
- (2) If the employer makes a redundancy pay application during the bridging period:
  - (a) the functions of receiving and determining the redundancy pay application are conferred on FWA; and
  - (b) a provision in the instrument has effect as if the references in it to the Commission or a State industrial tribunal were references to FWA.

*Note 1* For the definition of *Commission* see subsection 4 (1) of the *Workplace Relations Act 1996*.

*Note 2* For the definition of *bridging period* see item 2 of Schedule 2 to the Act.

*Note 3* For the definition of *FWA* see section 12 of the FW Act.

*Note 4* For the definition of *redundancy pay application* see regulation 1.03.

## Division 2 Obligations for employee records and records for transferring employees

### 2.03 Employer obligations for employee records made before WR Act repeal day

- (1) This regulation is made for item 7 of Schedule 2 and subitem 19 (1) of Schedule 16 to the Act.



**Regulation 2.04**

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- (2) On and after the WR Act repeal day, subregulation 19.4 (2) of Chapter 2 of the WR Regulations continues to apply to require an employer to keep, or cause to be kept, an entry in a record for any part of the period identified in that regulation that has not expired before the WR Act repeal day.

- (3) Regulations 3.42, 3.43 and 3.44 of the FW Regulations apply to the record.

*Note 1* Subregulation 19.4 (2) of Chapter 2 of the WR Regulations requires an employer to keep an employee record for a certain period, which is generally 7 years from the date on which the record was made.

*Note 2* Item 11 of Schedule 2 to the Act has the effect of continuing the operation of regulation 19.4 of Chapter 2 of the WR Regulations to conduct (failure to make or cause to be made, or keep or cause to be kept, employee records) that occurred before WR Act repeal day.

*Note 3* Regulations 3.42, 3.43 and 3.44 of the FW Regulations set out requirements relating to the inspection and copying of a record, to giving employees information about a record, and the accuracy of a record.

*Note 4* Subregulation (2) is a transitional civil remedy provision.

**2.04 Obligations for transfer of records concerning transferring employee**

- (1) For subitem 7 (1) of Schedule 2 and subitem 19 (1) of Schedule 16 to the Act, this regulation applies if:
- (a) before the WR Act repeal day a person (the *new employer*) becomes a successor, transmittee or assignee of the whole, or a part, of a business of another person (the *old employer*); and
  - (b) on and after the WR Act repeal day the new employer employs any of the following persons (a *transferring employee*):
    - (i) a transferring employee within the meaning of sections 581 and 582 of the WR Act;
    - (ii) a transferring transitional employee within the meaning of clauses 72E and 72F of Schedule 6 to the WR Act;
    - (iii) a transferring employee within the meaning of clauses 5 and 6 of Schedule 9 to the WR Act.

Part 2	Transitional provisions for Part 2 of Schedule 2 to Act (regulations about transitional matters)
Division 2	Obligations for employee records and records for transferring employees

### Regulation 2.05

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- (2) Subject to subregulation (3), the old employer must transfer to the new employer all records concerning the transferring employee that, at the time of succession, transmission or assignment, the old employer is required to keep under Divisions 2, 3 and 4 of Part 19 of Chapter 2 of the WR Regulations.
- (3) If the old employer is a Commonwealth authority, the old employer has only to provide copies of those records to the new employer.
- (4) If the transferring employee becomes an employee of the new employer after the time of succession, transmission or assignment, the new employer must ask the old employer to provide the new employer with the transferring employee's records.
- (5) If the old employer receives a request under subregulation (4), the old employer must transfer those records to the new employer.
- (6) If the new employer receives transferred records, the new employer must keep the transferred records as if they had been made by the new employer at the time they were made by the old employer.
- (7) The new employer is not required to make records relating to the transferring employee's employment with the old employer.

*Note* Subregulations (2), (4), (5) and (6) are transitional civil remedy provisions.

### 2.05 WR Regulations continue to apply to records for transferring employee made before WR Act repeal day

- (1) For subitem 7 (1) of Schedule 2 and subitem 19 (1) of Schedule 16 to the Act, this regulation applies if:
  - (a) before the WR Act repeal day a person (the *new employer*) becomes a successor, transmittee or assignee of the whole, or a part, of a business of another person (the *old employer*); and

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**Regulation 2.05**

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- (b) before the WR Act repeal day the new employer employs any of the following persons (a *transferring employee*):
  - (i) a transferring employee within the meaning of sections 581 and 582 of the WR Act;
  - (ii) a transferring transitional employee within the meaning of clauses 72E and 72F of Schedule 6 to the WR Act;
  - (iii) a transferring employee within the meaning of clauses 5 and 6 of Schedule 9 to the WR Act;
- (2) On and after WR Act repeal day, regulation 19.15 of Chapter 2 of the WR Regulations, and any other regulations of the WR Regulations that relate to that regulation, continue to apply to records made for the transferring employee.

Regulation 3.01

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## Part 3 Transitional provisions for Schedule 3 to Act (continued existence of awards, workplace agreements and certain other WR Act instruments)

### 3.01 Meaning of *base rate of pay* — transitional instrument applies to pieceworker

- (1) For paragraph 32 (2) (a) of Schedule 3 to the Act, this regulation provides for the determination of the base rate of pay for the purposes of the National Employment Standards for an employee to whom a transitional instrument applies and who is a pieceworker.

*Note* For the definition of *pieceworker* see regulation 3.02.

- (2) The base rate of pay for the employee, expressed as an hourly rate of pay, is:
- if there is a transitional rate — that rate; or
  - if there is no transitional rate — the formula rate.
- (3) In this regulation:
- formula rate* means the rate of pay worked out using the formula:

$$\frac{TA}{TH}$$

where:

*TA* is the total amount earned by the employee during the relevant period.

*TH* is the total hours worked by the employee during the relevant period.

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**Regulation 3.02**

(4) In this regulation:

***relevant period*** means:

- (a) for an employee who was continuously employed by the employer for a period of 12 months or more immediately before the base rate of pay is to be worked out — the 12 months before the rate is to be worked out; or
- (b) for an employee who was continuously employed by the employer for a period less than 12 months immediately before the base rate of pay is to be worked out — that period.

***transitional rate*** means the rate mentioned in, or calculated in accordance with, the transitional instrument or transitional APCS that applies to the employee.

*Note* For the definition of ***transitional APCS*** see subitem 5 (3) of Schedule 9 to the Act.

**3.02 Employee not award/agreement free if transitional instrument applies — meaning of *piecemaker***

- (1) For paragraph 32 (2) (c) of Schedule 3 to the Act, this regulation prescribes as ***piecemarkers*** a class of employees to whom a transitional instrument applies.
- (2) The class is employees to whom a transitional instrument applies who:
  - (a) are paid a rate set by reference to a quantifiable output or task; and
  - (b) are not paid a rate set by reference to a period of time worked.

*Examples of rates set by reference to quantifiable output or task*

- 1 A rate of pay calculated by reference to the number of articles produced.
- 2 A rate of pay calculated by reference to the number of kilometres travelled.
- 3 A rate of pay calculated by referent to the number of articles delivered.
- 4 A rate of pay calculated by reference to the number of tasks performed.

**Regulation 3.03**

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**3.03 Employee to whom transitional instrument applies — usual weekly hours of work**

- (1) For subitem 33 (6) of Schedule 3 to the Act, this regulation applies to an employee:
  - (a) to whom a transitional instrument applies; and
  - (b) who is not a full-time employee; and
  - (c) who does not have usual weekly hours of work.
- (2) To work out the usual weekly hours of work for an employee who has been employed by the employer for at least 4 weeks:
  - (a) identify the total number of hours that the employee has worked during the previous 4 completed weeks; and
  - (b) divide the result by 4.
- (3) To work out the usual weekly hours of work for an employee who has been employed by the employer for less than 4 weeks:
  - (a) identify the total number of hours that the employee has worked during the period; and
  - (b) divide the result by the number of completed weeks for which the employee has been employed by the employer.

## **Part 4**

# **Transitional provisions for Schedule 8 to Act (workplace agreements and workplace determinations made under WR Act)**

### **4.01 When Workplace Authority Director must consider whether union collective agreement passes no-disadvantage test**

- (1) This regulation is made for subitem 8 (1) of Schedule 2 to the Act.
- (2) Despite paragraph 4 (1) (a) of Schedule 8 to the Act, the Workplace Authority Director must consider whether a union collective agreement passes the no-disadvantage test under section 346D of the WR Act if:
  - (a) the agreement is made under paragraph 333 (c) of the WR Act before the WR Act repeal day; and
  - (b) before the WR Act repeal day the agreement is signed by the employer or employers and organisation or organisations of employees with which the employer or employers made the agreement; and
  - (c) the agreement is approved by employees under subsection 340 (2) of the WR Act and lodged with the Workplace Authority Director in the period starting on the WR Act repeal day and ending 3 months after the WR Act repeal day.
- (3) For paragraph (2) (b), a signature to the agreement must be accompanied by:
  - (a) the full name and address of each person signing the agreement in accordance with paragraph (2) (b); and
  - (b) an explanation of the person's authority to sign the agreement; and
  - (c) the date on which the person signed the agreement.

**Regulation 4.02**

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- (4) If:
- (a) the agreement is lodged with the Workplace Authority Director; and
  - (b) the requirements mentioned in subregulation (2) are not met;
- the Workplace Authority Director must give written notification to the employer or employers and organisation or organisations for the agreement that the agreement cannot come into operation.

**4.02 Continued application of Schedules 7A and 7B to WR Act to AWA and pre-transition collective agreement**

- (1) For subitem (7) (1) of Schedule 2 to the Act, this regulation applies in relation to:
- (a) an AWA to which Schedule 7A to the WR Act applied before the WR Act repeal day; or
  - (b) a pre-transition collective agreement to which Schedule 7B to the WR Act applied before the WR Act repeal day.
- (2) On and after the WR Act repeal day, Schedule 7A to the WR Act continues to apply to the extent necessary to authorise a decision about whether the AWA passes the fairness test and to provide for consequences for that decision.
- (3) On and after the WR Act repeal day, Schedule 7B to the WR Act continues to apply to the extent necessary to authorise a decision about whether the pre-transition collective agreement passes the fairness test and to provide consequences for that decision.

**4.03 Variation of AWA or pre-transition collective agreement after WR Act repeal day**

- (1) For subitem 7 (1) of Schedule 2 to the Act, this regulation applies to:
- (a) an AWA to which Schedule 7A to the WR Act applied before the WR Act repeal day; or
  - (b) a pre-transition collective agreement to which Schedule 7B to the WR Act applied before the WR Act repeal day.



**Regulation 4.04**

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- (2) Despite subitem (9) (1) of Schedule 3 to the Act, on and after the WR Act repeal day:
  - (a) the AWA may be varied under section 346R of the WR Act as it is continued in operation by Schedule 7A to the WR Act; and
  - (b) the pre-transition collective agreement may be varied under section 346R of the WR Act as it is continued in operation under Schedule 7B to the WR Act.

**4.04 References to Workplace Ombudsman taken to be references to Fair Work Ombudsman**

- (1) For subitem 7 (1) of Schedule 2 to the Act, this regulation applies if regulation 4.02 or 4.03 applies to an AWA or a pre-transition collective agreement.
- (2) A reference to the Workplace Ombudsman in a provision continued by Schedule 7A or 7B to the WR Act mentioned in regulation 4.02 or 4.03 is taken to be a reference to the Fair Work Ombudsman.

**Regulation 5.01**

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**Part 5**                      **Miscellaneous and transitional  
civil remedy provisions****5.01**        **Regulation 1.1 of Chapter 2 of WR Regulations does  
not apply to Schedule 5 to the Act**

For paragraph 5 (2) (b) of Schedule 2 to the Act, regulation 1.1 of Chapter 2 of the WR Regulations does not apply to Part 10A of the WR Act as continued by Schedule 5 to the Act.

**5.02**        **General Manager of FWA must prepare AFPC  
Secretariat's annual report**

- (1) For subitem 7 (1) of Schedule 2 to the Act, the General Manager of FWA must prepare the AFPC Secretariat's annual report for the financial year ending on 30 June 2009.
- (2) The report must include details of the operations of the AFPC and the AFPC's secretariat for the period starting on 1 July 2009 and ending on 31 July 2009.

**5.03**        **Powers of Fair Work Inspector — contravention of  
section 34 of the *Independent Contractors Act 2006***

For subitem 7 (1) of Schedule 2 to the Act, a Fair Work Inspector may exercise compliance powers (other than a power under section 715 or 716 of the FW Act) for the purpose of investigating an alleged contravention of section 34 of the *Independent Contractors Act 2006*.

*Note* Section 34 of the *Independent Contractors Act 2006* prohibits certain coercive conduct in relation to reform opt-in agreements that may be entered into by parties to service contracts under the transitional provisions of that Act.

**5.04**        **Continued application of provisions to documents  
sealed by Australian Industrial Registry**

- (1) This regulation is made for subitem 7 (1) of Schedule 2 to the Act.

**Regulation 5.06**

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- (2) To avoid doubt, on and after the WR Act repeal day, subsections 123 (4) and 131 (4) of the WR Act continue to apply to documents sealed by the Australian Industrial Registry under the WR Act.

**5.05 Continued application of provision to award printed on or after WR Act repeal day**

- (1) This regulation is made for subitem 7 (1) of Schedule 2 to the Act.
- (2) To avoid doubt, on and after the WR Act repeal day, section 575 of the WR Act continues to apply to a document purporting to be a copy of a reprint of an award as varied and purporting to have been printed by the Government Printer on or after WR Act repeal day.

**5.06 Applications for orders in relation to contraventions of civil remedy provisions**

- (1) For item 7 of Schedule 2 to the Act and item 19 of Schedule 16 to the Act, Subdivision B of Division 2 of Part 4-1 of the FW Act applies as if the items in the table in subregulation (3) are:
- (a) civil remedy provisions for the purpose of section 539 of the FW Act; and
  - (b) included in the table to subsection 539 (2) of the FW Act.
- Note* See also paragraph 7 (2) (a) of Schedule 2 to the Act.
- (2) For each transitional civil remedy provision in an item of the table, the table sets out:
- (a) the persons who would be referred to in column 2 of the table in subsection 539 (2) of the Act if there were an item for the transitional civil remedy provision in that table; and
  - (b) the courts that would be referred to in column 3 of that table; and
  - (c) the maximum penalty that would be referred to in column 4 of that table.

**Regulation 5.07**

<b>Item</b>	<b>Column 1 Civil remedy provision</b>	<b>Column 2 Persons</b>	<b>Column 3 Courts</b>	<b>Column 4 Maximum penalty</b>
1	Subregulation 2.03 (2)	An employee An inspector	Federal Court Federal Magistrates Court An eligible State or Territory Court	20 penalty units
2	Subregulation 2.04 (2)	An employee An inspector	Federal Court Federal Magistrates Court An eligible State or Territory Court	20 penalty units
3	Subregulation 2.04 (4)	An employee An inspector	Federal Court Federal Magistrates Court An eligible State or Territory Court	20 penalty units
4	Subregulation 2.04 (5)	An employee An inspector	Federal Court Federal Magistrates Court An eligible State or Territory Court	20 penalty units
5	Subregulation 2.04 (6)	An employee An inspector	Federal Court Federal Magistrates Court An eligible State or Territory Court	20 penalty units

**5.07 Section 557 of FW Act taken to apply to transitional civil remedy provision**

For item 7 of Schedule 2 to the Act, section 557 of the FW Act is taken to apply to a transitional civil remedy provision as if the transitional civil remedy provision were included in subsection 557 (2) of the FW Act.

**Regulation 5.10**

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**5.08 When a reference to a civil remedy provision taken to include transitional civil remedy provision**

For item 7 of Schedule 2 to the Act, a reference to a civil remedy provision in Division 4 of Part 4-1 of the FW Regulations is taken to include a reference to a transitional civil remedy provision.

**5.09 References to employee, employer and employment taken to be reference to transitional employee, transitional employer and employment**

For item 7 of Schedule 2 to the Act:

- (a) a reference to an employee in Division 3 of Part 3-6 of the FW Regulations is taken to include a reference to a transitional employee within the meaning of Schedule 6 to the WR Act as it is continued in operation by Schedule 20 to the Act; and
- (b) a reference to an employer in Division 3 of Part 3-6 of the FW Regulations is taken to include a reference to a transitional employer within the meaning of Schedule 6 to the WR Act as it is continued in operation by Schedule 20 to the Act; and
- (c) a reference to employment in Division 3 of Part 3-6 of the FW Regulations is taken to include a reference to employment within the meaning of Schedule 6 to the WR Act as it is continued in operation by Schedule 20 to the Act.

**5.10 References to employee and employer taken to be references to national system employee and national system employer**

For subitem 8 (2) of Schedule 2 to the Act:

- (a) a reference to an employee in Part 10A of the WR Act as continued by Schedule 5 to the Act is taken to be a reference to a national system employee; and
- (b) a reference to an employer in Part 10A of the WR Act as continued by Schedule 5 to the Act is taken to be a reference to a national system employer.

**Regulation 5.11**

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**5.11 Item 11 of Schedule 2 to the Act does not apply to provisions of WR Act not repealed by Schedule 1 to the Act**

- (1) This regulation is made for subitem 8 (4) of Schedule 2 to the Act.
- (2) To avoid doubt, item 11 of Schedule 2 to the Act does not apply to provisions of the WR Act that are not repealed by Schedule 1 to the Act.

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**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>.