



Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009

Select Legislative Instrument 2009 No. 166 as amended

made under the

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

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Regulation 1.01

Part 1 Preliminary**1.01 Name of Regulations** [see Note 1]

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

- (1) In these Regulations:

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

amount of payments, for a retention or redeployment period, means an amount:

- (a) for the performance of work during the retention or redeployment period; or
- (b) as payment in lieu of the completion of the retention or redeployment period because the employee's employment is terminated due to redundancy by the employer during the retention or redeployment period; or
- (c) a combination of the amounts mentioned in paragraphs (a) and (b).

Note *retention or redeployment period* has the meaning given by modified item 5 of Schedule 4 to the Act, see item 1.1 of Schedule 1.

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.

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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.

NES amount means the amount an employee is entitled to be paid by the employee's employer as redundancy pay under section 119 of the FW Act.

Note Section 119 of the FW Act sets out a minimum entitlement to redundancy pay for employees covered by the FW Act.

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

public sector employee means an employee employed in public sector employment.

public sector employment has the meaning given by subsections 795 (4) and (5) of the FW Act, if subregulation 6.08 (5) of the FW Regulations did not exist.

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.

relevant enterprise agreement means an enterprise agreement that:

- (a) applies to a public sector employee; and
- (b) is made before 1 January 2010; and

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- (c) includes provisions about the reduction of the public sector employee's retention or redeployment period by an amount that would be equivalent to the employee's entitlements to redundancy pay under section 119 of the FW Act.

Note 1 For the definition of *enterprise agreement* see section 12 of the FW Act.

Note 2 Section 119 of the FW Act sets out a minimum entitlement to redundancy pay for employees covered by the FW Act.

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*.

- (2) In these Regulations, a provision of the Act modified in accordance with regulation 5.12 is referred to as **modified**.

Example

Item 5 of Schedule 4 to the Act is modified by item 1.1 of Schedule 1 and is referred to in these regulations as modified item 5.

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 **Matters about redundancy**

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.

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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.

2.02A Retention or redeployment period — entitlement to redundancy pay

- (1) For subitem 7 (1) of Schedule 2 to the Act, this regulation:
 - (a) does not apply to a public sector employee to whom a relevant enterprise agreement applies; and
 - (b) does apply to a public sector employee:
 - (i) to whom an enterprise agreement in relation to public sector employment made before 1 January 2010 or a transitional instrument in relation to public sector employment applies; and

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- (ii) who is entitled under the enterprise agreement or transitional instrument to enter into a retention or redeployment period; and
 - (iii) who enters into a retention or redeployment period under the enterprise agreement or transitional instrument; and
 - (iv) whose employment is terminated by the employee's employer due to redundancy during or at the end of the retention or redeployment period and on or after 1 January 2010.
- (2) If the employee is entitled to receive from the employee's employer an amount of payments for the retention or redeployment period that is equal to or greater than the NES amount, the employee is not entitled to the NES amount.
- (3) If the employee is entitled to receive from the employee's employer an amount of payments for the retention or redeployment period that is less than the NES amount, the employee is entitled to the NES amount reduced by the amount of payments the employee was entitled to receive from the employer for the retention or redeployment period.

Note 1 For the definition of *retention or redeployment period* see modified item 5 of Schedule 4 to the Act which is set out in item 1.1 of Schedule 1.

Note 2 For the definition of *transitional instrument* see item 2 of Schedule 2 of the Act.

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.

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Division 2	Obligations for employee records and records for transferring employees

Regulation 2.04

- (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.

Regulation 2.05

- (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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Division 2	Obligations for employee records and records for transferring employees

Regulation 2.05A

- (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.

2.05A Award-based transitional instruments including notional agreement preserving State award

For paragraph 8 (3) (a) of Schedule 2 to the Act, paragraph 36 (a) of Schedule 3 to the Act is modified to the extent necessary to provide that an award-based transitional instrument that is a notional agreement preserving State awards is not to be treated as a modern award for that paragraph if it only includes a term or terms mentioned in subclause 34 (2) of Schedule 8 to the WR Act.

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

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- (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.

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

Division 3 Application of better off overall test

Regulation 2.06

Division 3 Application of better off overall test

2.06 Modifications of the Act — better off overall test after end of bridging period if modern award contains transitional provisions

For subitem 8 (1) of Schedule 2 to the Act, Schedule 7 to the Act is modified in accordance with Schedule 2.1.

Division 4 Matters relating to reduction in take-home pay

2.07 Orders remedying reductions in take-home pay

- (1) This regulation is made for subitem 8 (1) of Schedule 2 to the Act.
- (2) Schedule 3A to the Act is modified by inserting the following subitem after subitem 32 (2).

‘(2A) Without limiting the kind of take-home pay order that may be made under subitems (1) and (2), one or more of the following orders may be made:

- (a) an order compensating a reduction in take-home pay that has already been suffered;
- (b) an order requiring the payment of an amount of take-home pay;
- (c) an order preventing a reduction in take-home pay from occurring.’

- (3) Schedule 5 to the Act is modified by inserting the following subitem after subitem 9 (2).

‘(2A) Without limiting the kind of take-home pay order that may be made under subitems (1) and (2), one or more of the following orders may be made:

- (a) an order compensating a reduction in take-home pay that has already been suffered;
- (b) an order requiring the payment of an amount of take-home pay;

(c) an order preventing a reduction in take-home pay from occurring.’

(4) Schedule 6 to the Act is modified by inserting the following subitem after subitem 12 (1).

‘(1A) Without limiting the kind of take-home pay order that may be made under subitem (1), one or more of the following orders may be made:

- (a) an order compensating a reduction in take-home pay that has already been suffered;
- (b) an order requiring the payment of an amount of take-home pay;
- (c) an order preventing a reduction in take-home pay from occurring.’

(5) Schedule 6A to the Act is modified by inserting the following subitem after subitem 14 (1).

‘(1A) Without limiting the kind of take-home pay order that may be made under subitem (1), one or more of the following orders may be made:

- (a) an order compensating a reduction in take-home pay that has already been suffered;
- (b) an order requiring the payment of an amount of take-home pay;
- (c) an order preventing a reduction in take-home pay from occurring.’

2.08 Avoiding likely reductions in take-home pay

- (1) This regulation is made for subitem 8 (1) of Schedule 2 to the Act.
- (2) Schedule 3A to the Act is modified by inserting the following item after item 31.

‘31A Employees or outworkers to whom a modern award will apply

If:

- (a) a modern award does not currently apply to an employee or outworker; and

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

Division 4 Matters relating to reduction in take-home pay

Regulation 2.08

- (b) the modern award will apply to the employee or outworker when a Division 2B State award terminates because of item 21;

then for this Division, the Division 2B State award is taken to have terminated and the employee or outworker is taken to be a person to whom a modern award applies.’

- (3) Schedule 3A to the Act is modified by inserting the following item after item 32.

‘32A Orders remedying likely reductions in take-home pay

FWA may make a take-home pay order under item 32 if an employee or outworker, or a class of employees or outworkers, to whom a modern award applies is likely to suffer a reduction in take-home pay attributable to the termination of a Division 2B State award.’

- (4) Schedule 5 to the Act is modified by inserting the following item after item 9.

‘9A Orders remedying likely reductions in take-home pay

FWA may make a take-home pay order under item 9 if an employee or outworker, or a class of employees or outworkers, to whom a modern award applies is likely to suffer a modernisation-related reduction in take-home pay attributable to the Part 10A award modernisation process.’

- (5) Schedule 6 to the Act is modified by inserting the following item after item 11.

‘11A Employees to whom a modern enterprise award will apply

If:

- (a) a modern enterprise award does not currently apply to an employee; and
(b) the modern enterprise award will apply to the employee when the award comes into operation;

then for this Division, the modern enterprise award is taken to have come into operation and to have started to apply to the employee.’

- (6) Schedule 6 to the Act is modified by inserting the following item after item 12.

‘12A Orders remedying likely reductions in take-home pay

FWA may make a take-home pay order under item 12 if an employee, or a class of employees, to whom a modern enterprise award applies is likely to suffer a modernisation-related reduction in take-home pay attributable to the enterprise instrument modernisation process.’

- (7) Schedule 6A to the Act is modified by inserting the following item after item 13.

‘13A Employees to whom a State reference public sector modern award will apply

If:

- (a) a State reference public sector modern award does not currently apply to an employee; and
- (b) the State reference public sector modern award will apply to the employee when the award comes into operation;

then for this Division, the State reference public sector modern award is taken to have come into operation and to have started to apply to the employee.’

- (8) Schedule 6A to the Act is modified by inserting the following item after item 14.

‘14A Orders remedying likely reductions in take-home pay

FWA may make a take-home pay order under item 14 if an employee, or a class of employees, to whom a State reference public sector modern award applies is likely to suffer a modernisation-related reduction in take-home pay attributable to the State reference public sector transitional award modernisation process.’

2.09 Describing classes of employees and outworkers

- (1) This regulation is made for subitem 8 (1) of Schedule 2 to the Act.

Regulation 2.09

- (2) Schedule 3A to the Act is modified by inserting the following item after item 34.

‘34A Describing classes of employees and outworkers

- (1) Without limiting the way in which a class of employees or outworkers mentioned in items 32 to 34 may be described for the purposes of those items, the class may be described by reference to one or more of the following:
- (a) a particular type of employment;
 - (b) a particular classification, job level or grade;
 - (c) a particular entitlement;
 - (d) a particular employer.
- (2) To avoid doubt, the description of a class is not required to include the names of the employees or outworkers, or the number of employees or outworkers, included in the class.’
- (3) Schedule 5 to the Act is modified by inserting the following item after item 11.

‘11A Describing classes of employees and outworkers

- (1) Without limiting the way in which a class of employees or outworkers mentioned in items 9 to 11 may be described for the purposes of those items, the class may be described by reference to one or more of the following:
- (a) a particular type of employment;
 - (b) a particular classification, job level or grade;
 - (c) a particular entitlement;
 - (d) a particular employer.
- (2) To avoid doubt, the description of a class is not required to include the names of the employees or outworkers, or the number of employees or outworkers, included in the class.’

- (4) Schedule 6 to the Act is modified by inserting the following item after item 14.

‘14A Describing classes of employees

- (1) Without limiting the way in which a class of employees mentioned in items 12 to 14 may be described for the purposes of those items, the class may be described by reference to one or more of the following:
- (a) a particular type of employment;
 - (b) a particular classification, job level or grade;
 - (c) a particular entitlement;
 - (d) a particular employer.

- (2) To avoid doubt, the description of a class is not required to include the names of the employees, or the number of employees, included in the class.’

- (5) Schedule 6A to the Act is modified by inserting the following item after item 16.

‘16A Describing classes of employees

- (1) Without limiting the way in which a class of employees mentioned in items 14 to 16 may be described for the purposes of those items, the class may be described by reference to one or more of the following:
- (a) a particular type of employment;
 - (b) a particular classification, job level or grade;
 - (c) a particular entitlement;
 - (d) a particular employer.

- (2) To avoid doubt, the description of a class is not required to include the names of the employees, or the number of employees, included in the class.’

Regulation 3.01

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:
- (a) if there is a transitional rate — that rate; or
- (b) 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.

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.

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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.

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:

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- (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.

Regulation 3A.01

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

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- (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;

Regulation 3A.02

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.

Regulation 3A.02

- (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.

Regulation 3B.01

Part 3B Transitional provisions for Schedule 5 to Act (modern awards (other than modern enterprise awards and State reference public sector modern awards))

3B.01 Modern awards

For subitem 8 (1) of Schedule 2 to the Act, Schedule 5 to the Act is modified by inserting the following Part after Part 3.

Part 4—Modern awards

14 Variation of modern award

- (1) FWA may make an order varying a modern award if FWA considers that the variation is necessary to give effect to the award modernisation request as it was in effect immediately before 1 January 2010.
- (2) However, FWA may make the order only:
 - (a) if:
 - (i) the Australian Industrial Relations Commission had received an application before 1 January 2010 to vary a modern award to give effect to the award modernisation request; and
 - (ii) the Commission did not make a decision on the application before 1 January 2010; or
 - (b) on its own initiative.
- (3) For subitem (2):
 - (a) FWA must have regard to the terms of the award modernisation request and the matters to which the Commission was required to have regard, immediately before 1 January 2010, in conducting the award modernisation process; and

Regulation 3B.02

- (b) FWA must have regard to submissions made to the Commission during the award modernisation process, if FWA considers that it is appropriate to do so.

Note: For the purpose of making the variation, FWA may inform itself in such manner as it considers appropriate. FWA will be able to seek, and have regard to, new submissions.

- (4) Subitems (1) to (3) cease to have effect at the end of 31 March 2010.

3B.01A Modification of FW Act — inclusion of variation of modern award in award modernisation process

For subitem 7 (1) of Schedule 2 to the Act, section 12 of the FW Act is modified by inserting in the definition of *award modernisation process*, after paragraph (a), the following paragraph and note:

- ‘(aa) the process of varying modern awards under item 14 of Schedule 5 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*; and

Note: Item 14 was inserted into the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* by regulation 3B.01 of the regulations made under that Act.’

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*.

Regulation 3B.02

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.

Regulation 3B.03

- (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.

3B.03 Modification of subitems 8 (3) and (4) of Schedule 5 to the Act

For subitem 8 (1) of Schedule 2 to the Act, Schedule 5 to the Act is modified by substituting the heading for Part 3 as follows:

Regulation 3B.04

‘Part 3—Avoiding reductions in take-home pay from Part 10A award modernisation process’.

3B.04 Modern award or transitional arrangements resulting in reduction in take-home pay

- (1) For subitem 8 (1) of Schedule 2 to the Act, item 2 of Schedule 2 to the Act is modified by:
 - (a) replacing ‘subitem 8(2)’ in the definition of *take-home pay* with ‘subitems 8(2) and 13A(2)’; and
 - (b) inserting in the definition of *take-home pay order*, after ‘subitems 9(1) and (2)’, the words ‘and 13B (1)’.
- (2) For subitem 8 (1) of Schedule 2 to the Act, Schedule 5 to the Act is modified by inserting the following Part after Part 3.

‘Part 3A—Avoiding reductions in take-home pay from modern award or transitional arrangements

13A Modern award terms giving FWA power to make take-home pay orders

- (1) A modern award may include terms that give FWA power to make an order (a *take-home pay order*) remedying a reduction in take-home pay suffered by an employee, or a class of employees, as a result of the making of a modern award or the operation of any transitional arrangements in relation to the award (whether or not the reduction in take-home pay is a modernisation-related reduction in take-home pay).
- (2) An employee’s *take-home pay* is the pay an employee actually receives:
 - (a) including wages and incentive-based payments, and additional amounts such as allowances and overtime; but
 - (b) disregarding the effect of any deductions that are made as permitted by section 324 of the FW Act.

Note: Deductions permitted by section 324 of the FW Act may (for example) include deductions under salary sacrificing arrangements.

Regulation 3B.04

- (3) This Part applies to an employee, or a class of employees, to whom a modern award applies if the employee or employees is likely to suffer a reduction in take-home pay attributable to the making of a modern award or the operation of any transitional arrangements in relation to the award.

13B Orders remedying reductions in take-home pay

- (1) If FWA makes a take-home pay order under the terms of a modern award it must do so in accordance with this Part.
- (2) Without limiting the kind of take-home pay order that may be made under the terms of a modern award, one or more of the following orders may be made:
- (a) an order compensating a reduction in take-home pay that has already been suffered;
 - (b) an order requiring the payment of an amount of take-home pay;
 - (c) an order preventing a reduction in take-home pay from occurring.
- (3) FWA may make a take-home pay order only on application by:
- (a) an employee who has suffered a reduction in take-home pay; or
 - (b) an organisation that is entitled to represent the industrial interests of such an employee; or
 - (c) a person acting on behalf of a class of such employees.
- (4) If FWA is satisfied that an application for a take-home pay order has already been made in relation to an employee or a class of employees, FWA may dismiss any later application that is made in relation to the same employee or employees.

13C Ensuring that take-home pay orders are confined to the circumstances for which they are needed

- (1) FWA must not make a take-home pay order in relation to an employee or class of employees if:
- (a) FWA considers that the reduction in take-home pay is minor or insignificant; or
 - (b) FWA is satisfied that the employee or employees have been adequately compensated in other ways for the reduction.

Regulation 3B.04

- (2) FWA must ensure that a take-home pay order is expressed so that:
- (a) it does not apply to an employee unless the employee has actually suffered a reduction in take-home pay; and
 - (b) if the take-home pay payable to the employee under the modern award increases after the order is made, there is a corresponding reduction in any amount payable to the employee under the order.

13D Take-home pay order continues to have effect so long as modern award continues to cover the employee or employees

A take-home pay order made in relation to an employee or class of employees to whom a particular modern award applies continues to have effect in relation to those employees (subject to the terms of the order) for so long as the modern award continues to cover the employee or employees, even if it stops applying to the employee or employees because an enterprise agreement starts to apply.

13E Describing classes of employees

- (1) Without limiting the way in which a class of employees mentioned in items 13A to 13D may be described for the purposes of those items, the class may be described by reference to one or more of the following:
- (a) a particular type of employment;
 - (b) a particular classification, job level or grade;
 - (c) a particular entitlement;
 - (d) a particular employer.
- (2) To avoid doubt, the description of a class is not required to include the names of the employees, or the number of employees, included in the class.

13F Inconsistency with modern awards and enterprise agreements

A term of a modern award or an enterprise agreement has no effect in relation to an employee to the extent that it is less beneficial to the employee than a term of a take-home pay order that applies to the employee.

Regulation 3B.05

13G Application of provisions of FW Act to take-home pay orders

The FW Act applies as if the following provisions of that Act included a reference to a take-home pay order:

- (a) subsection 675(2);
- (b) subsection 706(2).

Note: For compliance with take-home pay orders, see item 7 of Schedule 16.

3B.05 Modernisation-related reduction in take-home pay from variation of modern award

- (1) For subitem 8 (1) of Schedule 2 to the Act, item 2 of Schedule 2 to the Act is modified by:
 - (a) inserting in the definition of *modernisation-related reduction in take-home pay*, after paragraph (a), the following paragraph:
 - ‘(aa) in relation to the process of varying modern awards — see subitems 8A(4) and (5) of Schedule 5; and’; and
 - (b) replacing ‘subitems 8(2) and 13A(2)’ in the definition of *take-home pay* with ‘subitems 8(2), 8A(3) and 13A(2)’.
- (2) For subitem 8 (1) of Schedule 2 to the Act, Schedule 5 to the Act is modified by:
 - (a) omitting the words ‘if, and only’ in subitems 8 (3) and (4); and
 - (b) inserting the following item after item 8:

‘8A Variation of modern award not intended to result in reduction in take-home pay

- (1) The process of varying a modern award was not intended to result in a reduction in the take-home pay of employees or outworkers.
- (2) In this item, *varying a modern award* means varying a modern award:
 - (a) under item 14; or
 - (b) under section 157 of the FW Act before 1 July 2010.

Note: Item 14 was inserted into this Act by regulation 3B.01 and ceased to have effect on 31 March 2010.

Regulation 3B.05

- (3) An employee's or outworker's **take-home pay** is the pay an employee or outworker actually receives:
- (a) including wages and incentive-based payments, and additional amounts such as allowances and overtime; but
 - (b) disregarding the effect of any deductions that are made as permitted by section 324 of the FW Act.

Note: Deductions permitted by section 324 of the FW Act may (for example) include deductions under salary sacrificing arrangements.

- (4) An employee suffers a **modernisation-related reduction in take-home pay** if:
- (a) FWA made an order varying a modern award; and
 - (b) the modern award:
 - (i) starts to apply to the employee when the award comes into operation; or
 - (ii) starts to apply to the employee when the order varying the award comes into operation; and
 - (c) the employee is employed in the same position as (or a position that is comparable to) the position he or she was employed in immediately before the modern award came into operation; and
 - (d) the amount of the employee's take-home pay for working particular hours, or for a particular quantity of work, after the order varying the modern award comes into operation is less than what would have been the employee's take-home pay for those hours, or that quantity of work, immediately before the award came into operation; and
 - (e) the reduction in the employee's take-home pay is attributable to the order varying the modern award.
- (5) An outworker who is not an employee suffers a **modernisation-related reduction in take-home pay** if:
- (a) FWA made an order varying a modern award; and
 - (b) the modern award contains outworker terms and the outworker is a person to whom the outworker terms apply; and
 - (c) the modern award:
 - (i) starts to apply to the outworker when the award comes into operation; or

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- (ii) starts to apply to the outworker when the order varying the award comes into operation; and
- (d) the outworker is performing the same work as (or work that is similar to) the work he or she was performing immediately before the modern award came into operation; and
- (e) the amount of the outworker's take-home pay for working particular hours, or for a particular quantity of work, after the order varying the modern award comes into operation is less than what would have been the outworker's take-home pay for those hours, or that quantity of work, immediately before the award came into operation; and
- (f) the reduction in the outworker's take-home pay is attributable to the order varying the modern award.' ; and
- (c) replacing 'modernisation process.' in item 9A with 'modernisation process or an order varying a modern award within the meaning of subitem 8A (2).'

Regulation 3D.01

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

Regulation 3D.01

- (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.

Regulation 4.01

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 4.03

- (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

- (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.

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.

5.02A Annual reports for Australian Industrial Relations Commission, Australian Industrial Registry and Workplace Authority

- (1) For subitem 7 (1) of Schedule 2 to the Act, the General Manager of FWA must prepare:
 - (a) the annual report for the Australian Industrial Relations Commission for the financial year ending on 30 June 2010; and
 - (b) the annual report for the Australian Industrial Registry for the financial year ending on 30 June 2010.
- (2) For subitem 7 (1) of Schedule 2 to the Act, the Fair Work Ombudsman must prepare the annual report for the Workplace Authority for the financial year ending 30 June 2010.

Regulation 5.03

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.
- (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:

Regulation 5.06

(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.

Item	Column 1 Civil remedy provision	Column 2 Persons	Column 3 Courts	Column 4 Maximum penalty
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

Regulation 5.07

Item	Column 1 Civil remedy provision	Column 2 Persons	Column 3 Courts	Column 4 Maximum penalty
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.

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

Regulation 5.12

- (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.

5.11 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.

5.12 Modification of Act

For subitem 8 (1) of Schedule 2 to the Act, subitem 5 of Schedule 4 to the Act is modified as set out in Schedule 1.

Schedule 1 **Modification of Act — redundancy or redeployment**

(regulation 5.12)

1.1 **Schedule 4 to the Act, after subitem 5 (4)**

insert

(5) In this item:

an entitlement to redundancy pay includes an entitlement for an employee to enter into a retention or redeployment period.

retention or redeployment period means a period of employment (however described) performed by an employee for an employer as an alternative to:

- (a) the employment of the employee being terminated immediately due to redundancy; and
- (b) the employee receiving redundancy pay from the employee's employer.

**Schedule 2.1 Modification of Schedule 7 to
the Act — better off overall
test after end of bridging
period if modern award
contains transitional
provisions**

(regulation 2.06)

[1] Schedule 7, after Part 4

insert

**Part 4A Transitional provisions to apply the
better off overall test after end of
bridging period if modern award contains
transitional provisions**

**20A Application of the better off overall test to the making
of enterprise agreements if modern awards contain
transitional provisions**

- (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 award-based transitional instruments 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 subsection (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 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.

Notes to the *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009*

Note 1

The *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009* (in force under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*) as shown in this compilation comprise Select Legislative Instrument 2009 No. 166 amended as indicated in the Tables below.

Table of Instruments

Year and Number	Date of FRLI registration	Date of commencement	Application, saving or transitional provisions
2009 No. 166	30 June 2009 (see F2009L02566)	1 July 2009	
2009 No. 335	26 Nov 2009 (see F2009L04328)	1 Jan 2010	—
2009 No. 337	27 Nov 2009 (see F2009L04339)	Rr. 1–3 and Schedule 1: 28 Nov 2009 Schedule 3: 1 Jan 2010	—
2009 No. 364	16 Dec 2009 (see F2009L04520)	Rr. 1–3 and Schedule 1: 1 July 2009 Remainder: 1 Jan 2010	—
2009 No. 391	16 Dec 2009 (see F2009L04604)	1 Jan 2010	—
2010 No. 77	11 May 2010 (see F2010L01199)	Rr. 1–3 and Schedule 1: 1 Jan 2010 Schedule 2: 12 May 2010	—

Table of Amendments

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
Part 1	
R. 1.03	am. 2009 No. 337
Part 2	
Division 1	
Heading to Div. 1 of Part 2..	rs. 2009 No. 337
R. 2.02A	ad. 2009 No. 337
R. 2.06	ad. 2009 No. 337
Renumbered r. 2.05A	2009 No. 364
R. 2.05B	ad. 2009 No. 391
Division 3	
Div. 3 of Part 2	ad. 2009 No. 335
R. 2.06	ad. 2009 No. 335
Division 4	
Div. 4 of Part 2	ad. 2010 No. 77
R. 2.07	ad. 2010 No. 77
R. 2.08	ad. 2010 No. 77
R. 2.09	ad. 2010 No. 77
Part 3	
R. 3.04	ad. 2009 No. 391
Part 3A	
Part 3A	ad. 2009 No. 364
R. 3A.01	ad. 2009 No. 391
R. 3A.02	ad. 2009 No. 391
Part 3B	
Part 3B	ad. 2009 No. 364
R. 3B.01	ad. 2009 No. 364
R. 3B.01A	ad. 2010 No. 77
R. 3B.02	ad. 2009 No. 391
R. 3B.03	ad. 2010 No. 77
R. 3B.04	ad. 2010 No. 77
R.3B.05	ad. 2010 No. 77
Part 3D	
Part 3D	ad. 2009 No. 391
R. 3D.01	ad. 2009 No. 391
Part 5	
R. 5.02A	ad. 2009 No. 337

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
R. 5.10	rep. 2009 No. 391
R. 5.12	ad. 2009 No. 337
Schedule 1	
Schedule 1	ad. 2009 No. 337
Schedule 2.1	
Schedule 2.1	ad. 2009 No. 335
	am. 2009 No. 391
