

EXPLANATORY STATEMENT

Select Legislative Instrument 2009 No. 166

Issued by the authority of the Minister for Employment Participation

Fair Work (Transitional Provisions and Consequential Amendments) Act 2009

Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009

The *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (the Act) recently received the Royal Assent. Most of the provisions of the Act would commence on 1 July 2009, except those relating to the National Employment Standards (NES) and modern awards, which will commence on 1 January 2010. The Act will regulate the transition from the federal workplace relations system under the *Workplace Relations Act 1996* (WR Act) to that under the *Fair Work Act 2009* (FW Act).

The purpose of the Regulations is to deal with a number of transitional matters relating to the commencement of the new workplace relations system established by the FW Act. These matters include:

- applications to set aside or vary redundancy pay obligations;
- obligations with respect to employee records;
- transitional provisions dealing with the continued existence of awards, workplace agreements and certain other WR Act instruments; and
- the extension of the compliance framework of the FW Act to contraventions of civil remedy provisions in the proposed Regulations.

Details of the Regulations are included in the Attachment.

The Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulations commence on 1 July 2009 to coincide with the commencement of the relevant provisions of the FW Act.

FAIR WORK (TRANSITIONAL PROVISIONS AND CONSEQUENTIAL AMENDMENTS) REGULATIONS 2009

Part 1 – Preliminary

Regulation 1.01 – Name of Regulations

1. This regulation sets out the name of the Regulations as the *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009* (the Regulations).

Regulation 1.02 – Commencement

2. This regulation provides that these Regulations commence on 1 July 2009.

Regulation 1.03 – Definitions

3. This regulation defines a number of terms used in the Regulations, including:
- “Act” is defined as the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (the Act).
 - “redundancy pay application” – this expression is defined to mean an application by an employer to have an obligation to pay redundancy pay set aside or varied because they have obtained acceptable alternative employment for the relevant employee, or because they cannot pay the amount. This definition is relevant to regulations 2.01 and 2.02.
4. The regulation also advises readers that terms used in these Regulations that are defined in the Act have the meaning they are given in the Act. Examples of such terms are listed in a note to the regulation, and include: “bridging period”, “FW (safety net provisions) commencement day” and “transitional instrument”.

Part 2 – Transitional provisions for Part 2 of Schedule 2 to the Act (Regulations about transitional matters)

Division 1 – Redundancy pay applications

Regulation 2.01 – Redundancy pay applications – continuing Schedule 6 instrument

5. Schedule 20 to the Act provides for the continuing operation (until 26 March 2011) of certain transitional instruments provided for in Schedule 6 of the *Workplace Relations Act 1996* (WR Act). These instruments apply to non-national system employers and their employees.

6. These continued instruments are referred to in the Act as ‘continuing Schedule 6 instruments’.

7. This regulation provides that, where a continuing schedule 6 instrument allows an employer to make a redundancy pay application to the Australian Industrial Relations Commission (AIRC), the application may instead be made to Fair Work Australia (FWA).

8. The function of receiving and determining such applications is conferred on FWA. This function is only conferred in respect of applications made on or before 26 March 2011, when continuing schedule 6 instruments cease to operate.

Regulation 2.02 – Redundancy pay applications – transitional instrument

9. This regulation provides that, where a transitional instrument (as defined in clause 2 of Schedule 3 of the Act) allows an employer to make a redundancy pay application to the AIRC or (in the case of transitional instruments derived from State awards or agreements) a State industrial tribunal, the application may instead be made to FWA.

10. The function of receiving and determining such applications is conferred on FWA. This function is only conferred in respect of applications made during the bridging period (ie between 1 July 2009 and 31 December 2009). From 1 January 2010, redundancy pay applications will need to be made under the National Employment Standards (NES).

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

11. This Division deals with a number of transitional issues regarding the obligations on employers, on and after WR Act repeal day, regarding employee records covering pre-repeal periods of employment.

- Item 11 of Schedule 2 to the Act provides that conduct that occurred before the WR Act repeal day remains subject to the WR Act. Accordingly, employers would continue to be subject to the employee record and payslip requirements in Part 16 of Chapter 2 of the WR Regulations up until WR Act repeal day.

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

12. This regulation ensures that records must kept by employers for the period required under the WR Regulations, despite the WR Act's repeal.

13. Following the WR Act's repeal, employers must continue to keep records relating their pre-repeal employment of employees for any unexpired portion of the period mentioned in subregulation 19.4(2) of Chapter 2 of the *Workplace Relations Regulations 2006* (WR Regulations).

14. Subregulation 2.03(3) provides that regulations 3.42, 3.43 and 3.44 of the *Fair Work Regulations 2009* (FW Regulations) apply to records that are required to be kept because of subregulation 2.03(2). This is intended to ensure that records

relating to pre-reform periods of employment continue to remain accurate and that employees to whom the records relate will be able to access and inspect those records.

15. Notes to regulation 2.03 explain the effect of subregulation 19.4(2) of Chapter 2 of the WR Regulations, item 11 of Schedule 2 to the Act and regulations 3.42, 3.43 and 3.44 of the FW Regulations. An additional note alerts the reader to the fact that subregulation (2) is a transitional civil remedy provision, which means that the infringement notice scheme set out in Part 4-1 of the FW Regulations applies to a contravention of regulation 2.03.

Regulation 2.04 – Obligations for transfer of records concerning transferring employee

16. This regulation sets out requirements relating to the transfer of records where a new employer becomes a successor, transmittee or assignee of the whole or a part of a business of the old employer before the WR Act repeal day and employs a transferring employee on or after the WR Act repeal day.

17. The transfer of records requirements set out below will apply on and after the WR Act repeal day. These requirements include:

- requiring an old employer to give a new employer all records in relation to any transferring employee, which the old employer was required to keep at the time of succession, transmission or assignment under Divisions 2, 3 and 4 of Part 19 of Chapter 2 of the WR Regulations (subregulation 2.04(2)), or in the case of the Commonwealth, providing copies of those records (subregulation 2.04(3));
- requiring a new employer to request records from an old employer, in relation to a transferring employee and requiring an old employer to comply with the request (subregulations 2.04(4) and (5)); and
- transferring the obligations to keep a transferring employee's records to the new employer (subregulation 2.04(6)).

18. Subregulation 2.04(7) clarifies that on and after the WR Act repeal day, a new employer has no obligation to make records in relation to a transferring employee's employment with the old employer.

19. The note under subregulation 2.04(7) provides that subregulations 2.04(3) and 2.04(4)-(6) are transitional civil remedy provisions to which Part 4-1 of the FW Regulations applies.

20. For the purposes of this regulation, 'transferring employee' has the same meaning as in the WR Act.

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

21. This regulation provides that regulation 19.15 of Part 19 of Chapter 2 of the WR Regulations and any other related regulations, continues to apply in relation to a

new employer who becomes a successor, transmittee or assignee of the whole or a part of a business of the old employer before the WR Act repeal day and employs a transferring employee (within the meaning of the WR Act) before the WR Act repeal day.

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

Regulation 3.01 – Meaning of *base rate of pay* – transitional instrument applies to pieceworker

22. Section 16 of the FW Act defines base rate of pay (which is relevant to calculation of many entitlements under the NES). The definition excludes incentive based payments and bonuses.

23. In the case of pieceworkers (who are paid by reference to output or task, and would not otherwise have a base rate of pay), provision for a base rate of pay is able to be made through a modern award or enterprise agreement. Provision is also made for award/agreement free pieceworkers. The specific arrangements provided for pieceworkers in the FW Act do not apply to employees to whom a transitional instrument applies.

24. Paragraph 32(2)(a) of Schedule 3 to the Act allows regulations to be made to provide a base rate of pay for such employees (either generally or for the purposes of the NES).

25. This regulation provides for the determination of a base rate of pay for a pieceworker to whom a transitional instrument applies.

26. The base rate of pay for such an employee is either:

- the rate provided in, or calculated in accordance with, the transitional instrument that applies to the employee; or
- an average rate - calculated by dividing the amount the employee earned over the 'relevant period' by the number of hours worked during that period. The relevant period is either 12 months or, if the employee has been employed for a shorter period, that shorter period.

Regulation 3.02 – Employee not award/agreement free if transitional instrument applies – meaning of *pieceworker*

27. This regulation prescribes a class of employees to whom a transitional instrument applies as pieceworkers. This is relevant to the operation of regulation 3.01 (which provides for the calculation of the base rate of pay for such employees for the purposes of the NES).

28. The regulation prescribes employees who:

- are paid a rate set by reference to a quantifiable output or task; and

- are not paid by reference to time worked.

Regulation 3.03 – Employee to whom transitional instrument applies – usual weekly hours of work

29. Many entitlements under the NES are calculated by reference to an employee's ordinary hours of work; for example, annual leave and personal/carer's leave accrue according to an employee's ordinary hours of work.
30. Clause 33 of Schedule 3 to the Act defines the expression ordinary hours of work for employees to whom a transitional instrument applies.
31. The ordinary hours for such an employee will generally be those provided for in their transitional instrument (see subclause 33(2)).
32. In the absence of such a provision, the ordinary hours of work for an employee to whom a transitional instrument applies will be the hours agreed as such between the employee and his or her employer. However, where there is no such agreement the Act provides, as a default:
- 38 hours for a full-time employee; or
 - the lesser of 38 hours and the employee's usual weekly hours of work for an employee who is not a full-time employee.
33. Where an employee who is not full time does not have usual hours, the regulations may prescribe a method for determining usual hours.
34. This regulation provides an averaging mechanism for determining the usual hours of such an employee, based on the number of hours worked by the employee in the last four completed weeks. If the employee has worked for the employer for less than four weeks, the average is calculated based on the number of hours worked during the number of completed weeks the employee has worked for the employer.

Part 4 – Transitional provisions for Schedule 8 to the Act (Workplace agreements and workplace determinations made under the WR Act)

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

35. Subitem 8(1) of Schedule 2 to the Act provides that regulations may modify provisions of the transitional Schedules.
36. Paragraph 4(1)(a) of Schedule 8 to the Act provides, among other things, that the Workplace Authority Director must not consider whether a union collective agreement passes the no-disadvantage test under section 346D of the WR Act unless the agreement was approved by employees whose employment will be subject to the agreement before the WR Act repeal day.

37. Union collective agreement has the meaning given by section 4 of the WR Act.

38. Subregulation 4.01(2) provides that 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 where:

- the agreement was made under paragraph 333(c) of the WR Act before the WR Act repeal day;
- before the WR Act repeal day, the agreement as made is signed by the employer or employers and organisation or organisations of employees; and
- the agreement is approved by employees under subsection 340(2) of the WR Act and lodged with the Workplace Authority Director within three months after the WR Act repeal day.

39. The general effect of this regulation is to allow a union collective agreement that has been made by an employer and an organisation of employees but not approved by the WR Act repeal day to be approved and lodged with the Workplace Authority Director after the WR Act repeal day, provided that the approval and lodgement occur no later than three months after the WR Act repeal day.

40. Where the content of a union collective agreement is changed after the WR Act repeal day, the change results in a new union collective agreement and it cannot be considered by the Workplace Authority Director.

41. Subregulation 4.01(3) sets out additional requirements that must accompany the signatures of the employer and the organisation of employees as required by paragraph 4.01(2)(b), when the agreement is made. This includes the date on which the person signed the agreement.

42. Subregulation 4.01(4) provides that where an agreement is lodged with the Workplace Authority Director and the requirements in paragraphs 4.01(2)(a)-(c) are not fulfilled, the Workplace Authority must notify the relevant employer and organisation of employees that the agreement cannot come into operation.

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

43. This regulation applies to an Australian Workplace Agreement (AWA) or pre-transition collective agreement to which Schedule 7A or 7B of the WR Act applied before the WR Act repeal day.

44. Subregulations 4.02(2) and (3) provide that Schedules 7A and 7B of the WR Act continue to apply to the extent necessary to authorise decisions to be made after the WR Act repeal day as to whether an AWA or a pre-transition collective agreement passes the fairness test and to provide for the consequences of those decisions.

45. The *Workplace Relations Amendment (A Stronger Safety Net) Act 2007* introduced the ‘fairness test’ by inserting Division 5A into Part 8 of the WR Act. The fairness test applies to agreements lodged between 7 May 2007 and 27 March 2008.

46. On 28 March 2008 the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (the Transition Act) came into force and (relevantly) replaced the fairness test with the no-disadvantage test and prohibited the making of new AWAs.

47. By virtue of the transitional provisions in Schedules 7A and 7B to the WR Act, the fairness test and various other provisions of Part 8 of the WR Act as in force before the commencement of the transition Act continue to apply to agreements lodged between 7 May 2007 and 27 March 2008, and agreements made before 28 March 2008 and lodged within 14 days of their making. These agreements are referred to as ‘AWAs’ and ‘pre-transition collective agreements’.

48. Schedule 8 to the Act provides for the application of the no-disadvantage test to agreements, but does not make provision for the Workplace Authority to apply the fairness test to agreements. A small number AWAs or pre-transition collective agreements above may need to be processed by the Workplace Authority in accordance with the provisions preserved by Schedules 7A and 7B to the WR Act and this regulation will allow that to occur.

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

49. This regulation makes clear that despite subitem 9(1) of Schedule 3 to the Act, an AWA or a pre-transition collective agreement to which Schedules 7A and 7B applied before the WR Act repeal day may be varied in accordance with the provisions of the WR Act that are continued in operation under regulation 4.02, where the variation was lodged between 7 May 2007 and 27 March 2008, or the variation was made before 28 March 2008 and lodged within 14 days of its making. Specifically, this means that an AWA or pre-transition collective agreement that has been assessed by the Workplace Authority Director as having failed the fairness test can be varied under section 346R as continued in operation by Schedule 7A or Schedule 7B so that it can pass.

50. It should be noted that after Part 8 of the WR Act was amended by the transition Act, pre-transition collective agreements can continue to be varied, subject to the agreement as varied passing the no-disadvantage test.

51. Where a variation is made to a collective agreement (including a pre-transition collective agreement) after the commencement of the transition Act and lodged but the Workplace Authority Director has not made a decision before the WR Act repeal day about whether the agreement as varied passes the no-disadvantage test, the provisions of Schedule 8 to the Act will apply.

52. Schedule 8 to the Act will also apply to a variation to a collective agreement made before the WR Act repeal day and lodged within 14 days of its making.

53. Similarly, Division 3 of Schedule 8 to the Act applies to pre-WR Act repeal day terminations of collective agreements (including pre-transition collective agreements). It preserves and modifies relevant provisions of Part 8 of the WR Act that allow for the termination of collective agreements either through lodgement of terminations with the Workplace Authority Director or by application to the AIRC.

Regulation 4.04 – References to Workplace Ombudsman taken to be references to Fair Work Ombudsman

54. This regulation provides that references to the Workplace Ombudsman in a provision continued by Schedules 7A and 7B of the WR Act as mentioned in regulations 4.02 and 4.03 are taken to be references to the Fair Work Ombudsman.

Part 5 – Miscellaneous and transitional civil remedy provisions

Regulation 5.01 – Regulation 1.1 of Chapter 2 of WR Regulations does not apply to Schedule 5 to the Act

55. This regulation provides that regulation 1.1 of Chapter 2 of the WR Regulations) does not apply to Schedule 5 to the Act.

56. Schedule 5 to the Act provides for the AIRC to continue and complete the award modernisation process provided for by Part 10A of the WR Act) and continues Part 10A of the WR Act for that purpose.

57. Subclause 5(1) of Schedule 2 to the Act preserves any provisions of the WR Act and the WR Regulations that are necessary for the operation of other WR Act provisions that are preserved by a Schedule to the Act. Subclause 5(2) provides that this is subject to the regulations.

58. Currently, regulation 1.1 of Chapter 2 of the WR Regulations excludes non-citizen crew members of permit ships, and a foreign corporation that employs such crew members, from the most provisions of the WR Act.

59. Regulation 5.01 ‘disapplies’ regulation 1.1 of Chapter 2 of the WR Regulations in relation to Part 10A of the WR Act so that it does not affect the AIRC’s capacity to make a modern award that is expressed to cover (from 1 January 2010) non-citizen crew members of permit ships and their employers.

60. Item 3 of Schedule 2 to the *Fair Work Amendment Regulations 2009* (the FW Amendment Regulations) would apply the FW Act from 1 January 2010 in the area of Australia’s exclusive economic zone (EEZ) and Australia’s continental shelf to *licensed ships, permit ships and majority Australian-crewed ships* (these terms are defined in item 1 of Schedule 2 to the FW Amendment Regulations). Item 2 of Schedule 2 to the FW Amendment Regulations would have the effect, from 1 January 2010, of extending provisions of the Act beyond the EEZ and the continental shelf to the employer of employees who are crew members performing work on a *majority Australian-crewed ship*, and those employees.

61. It is intended that the AIRC would be able to make a modern award that is expressed to cover employees and their employers on *licensed ships, permit ships* and *majority Australian-crewed ships* under the award modernisation process set out in Part 10A of the WR Act as continued under Schedule 5 to the Act.

- Regulation 5.10 provides that references to employee and employer in Part 10A of the WR Act as continued by Schedule 5 to the Act are taken to be references to *national system employee* and *national system employer* respectively.
- These terms are defined in sections 13 and 14 of the FW Act (and extended by sections 30C and 30D of the FW Act). Under section 14 of the FW Act, a national system employer includes a person who employs a maritime employee in connection with constitutional trade and commerce (such as trade between Australian and another country, or among the States).

62. Modern awards made under the award modernisation process will not commence until 1 January 2010, at which time the extraterritoriality provisions of the FW Act (including as extended by the FW Amendment Regulations) would also govern the extraterritorial operation of a modern award.

Regulation 5.02 – General Manager of FWA must prepare AFPC Secretariat’s annual report

63. This regulation provides that the General Manager of FWA must prepare the Australian Fair Pay Commission (AFPC) Secretariat's annual report for the financial year ending on 30 June 2009. Subregulation 5.02(2) provides that the report must include details of the operations of the AFPC and the AFPC Secretariat for the month of July 2009.

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

64. Regulation 5.03 permits Fair Work Inspectors to exercise their compliance powers (other than the powers under section 715 or 716 of the FW Act) for the purposes of investigating alleged contraventions of section 34 of the *Independent Contractors Act 2006* (IC Act).

65. A note to regulation 5.03 explains that section 34 of the IC Act prohibits certain coercive conduct in relation to opt-in agreements which may be entered into by parties to service contracts under the IC Act’s transitional provisions.

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

66. For the avoidance of doubt, this regulation makes it clear that despite the repeal of sections 123 and 131 of the WR Act, documents that have been sealed, or purport to have been sealed, with the seal of the AIRC or the Australian Industrial Registry (AIR) are receivable in evidence without further proof of the seal.

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

67. For the avoidance of doubt, this regulation makes it clear that despite the repeal of section 575 of the WR Act, a document purporting to be a copy of a reprint of an award as varied printed by the Government Printer continues to be, in all courts, evidence of the award as varied.

Regulation 5.06 – Application for orders in relation to contraventions of civil remedy provisions

68. Subregulation 5.06(1) extends the compliance framework in the FW Act to contraventions of the civil remedy provisions contained in these regulations. It is intended that Part 4-1 of the FW Act apply to a civil remedy provision in the regulations in the same way that it applies to a civil remedy provision in that Act.

- For example, section 550 of the FW Act would operate so that a person who is involved in a contravention of a civil remedy provision in the regulations will be taken to have contravened that provision.

69. Subregulation 5.06(2) sets out a table of civil penalties that have been prescribed in the regulations. In relation to each civil penalty, the table identifies who has standing to apply for an order in relation to a contravention of the provision, and the courts to which an application may be made.

70. In the table:

- Column 1 lists the civil remedy provisions contained in the regulations;
- Column 2 sets out who has standing to apply to a court for an order in relation to contravention of a civil remedy provision contained in the regulations. Column 2 is read subject to section 540 of the FW Act (which deals with limitations on who may apply for orders);
- Column 3 sets out the courts to which a person may make an application for orders in relation to a contravention of a civil remedy provision contained in the regulations. The orders that a particular court can make are dealt with in sections 545 and 546 of the FW Act; and
- Column 4 sets out the maximum pecuniary penalty that may be imposed by a court in relation to a contravention of the each civil remedy provision contained in the regulations. In the case of a contravention by a body corporate, the maximum pecuniary penalty that may be imposed is 5 times the amount referred to in the relevant item of Column 4.

Regulation 5.07 – Section 557 of the FW Act taken to apply to transitional civil remedy provision

71. Subsection 557 of the FW Act provides that 2 or more contraventions of civil remedy provisions referred to in subsection 557(2) of the FW Act may be taken to constitute a single contravention.

72. Regulation 5.07 provides that section 557 of the FW Act applies to a transitional civil remedy provision as if it were referred to in subsection 557(2) the FW Act.

Regulation 5.08 – When a reference to a civil remedy provision taken to include transitional civil remedy provision

73. Division 4 of Part 4-1 of the FW Regulations provides for an infringement notice scheme. It allows a person who is alleged to have contravened certain civil remedy provisions to pay penalty to the Commonwealth as an alternative to civil proceedings.

74. Regulation 5.08 extends the infringement notice scheme to apply to alleged contraventions of the transitional civil remedy provisions.

Regulation 5.09 – References to employee, employer and employment taken to be references to transitional employee, employer and employment

75. Schedule 20 to the Act provides that Schedule 6 to the WR Act continues to apply on and after the WR Act repeal day.

76. Regulation 5.08 provides that the record keeping and payslips rules contained in Division 3 of Part 3-6 of the FW Regulations apply in relation to:

- transitional employees;
- transitional employers; and
- employment

within the meaning of Schedule 6 to the WR Act.

Regulation 5.10 – References to employee and employer taken to be references to national system employee and national system employer

77. This regulation provides that references to *employee* and *employer* in Part 10A of the WR Act as continued by Schedule 5 to the Act are taken to be references to *national system employee* and *national system employer* respectively. This regulation is made for the purpose of subitem 8(2) of Schedule 2 to the Act, which enables the regulations to modify provisions of the WR Act that are continued in operation.

78. Schedule 5 to the Act provides for the AIRC to continue and complete the award modernisation process provided for by Part 10A of the WR Act, and continues Part 10A of the WR Act for that purpose. In Part 10A of the WR Act, the terms *employee* and *employer* have the meanings set out in subsections 5(1) and 6(1) of the WR Act.

79. When modern awards commence operation on 1 January 2010 they will cover *national system employees* and *national system employers*. These terms are generally defined in sections 13 and 14 of the FW Act and have an extended meaning under sections 30C and 30D of the FW Act.

80. The *Fair Work (State Referral and Consequential and Other Amendments) Act 2009* amended the FW Act to include Division 2A, which enables States to refer power to the Commonwealth for a national workplace relations system. Sections 30C and 30D of Division 2A extend the definitions of *national system employee* and *national system employer* to include any employee (including law enforcement officers who might not be employees at common law) and any employer in a referring State who would otherwise be outside the definitions in sections 13 and 14 of the FW Act.

81. Victoria will be a referring State when most of the Act commences on 1 July 2009 as a result of the *Fair Work (Commonwealth Powers) Act 2009* (Vic), which will replace Victoria's existing reference under the *Commonwealth Powers (Industrial Relations) Act 1996* (Vic).

82. This regulation ensures that the award modernisation process under Part 10A of the WR Act encompasses all employees and employers who will be covered by modern awards from 1 January 2010, including employees and employers covered by Victoria's referral of power to the Commonwealth.

83. As noted above, it is also intended that the AIRC would be able to make a modern award that is expressed to cover employees and their employers on licensed ships, permit ships and majority Australian-crewed ships. The definition of *national system employer* in section 14 of the FW Act (which would apply in Part 10A of the WR Act by reason of this regulation) includes a person who employs a maritime employee in connection with constitutional trade and commerce, such as trade between Australia and another country, or among the States. Under section 13 of the FW Act, a *national system employee* means an individual who is employed, or usually employed, by a national system employer.

Regulation 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

84. This regulation provides that item 11 of Schedule 2 to the Act does not apply to provisions of the WR Act that are not repealed by the Act. Item 11 of Schedule 2 continues the effect of the WR Act (including all procedural and jurisdictional provisions and associated instruments and orders) after repeal day in relation to pre-repeal conduct that is subject to court enforcement or processes in the AIRC or the AIR.

85. The effect of this regulation is to clarify that, from 1 July 2009, pre-repeal day conduct relating to Schedule 1 or Schedule 10 to the WR Act will be dealt with in accordance with the processes and institutions contained in the *Fair Work (Registered Organisations) Act 2009*. For example, from 1 July 2009, investigations under section 331 of Schedule 1 to the WR Act into the pre-repeal day conduct of an organisation will be conducted by the General Manager of FWA and not the Industrial Registrar.