

EXPLANATORY STATEMENT

Select Legislative Instrument 2010 No. 77

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

Fair Work (Transitional Provisions and Consequential Amendments) Act 2009

Fair Work (Transitional Provisions and Consequential Amendments) Amendment Regulations 2010 (No. 1)

Subitem 7(1) of Schedule 2 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (the Act) allows regulations to be made of a transitional, application or saving nature in relation to the transition from the regime provided for by the former *Workplace Relations Act 1996* (WR Act) and the regime provided for by state industrial laws of Division 2B referring States to the regime provided for by the Act and the *Fair Work Act 2009* (FW Act).

Subitem 8(1) of Schedule 2 to the Act provides a regulation-making power to modify the transitional Schedules to the Act.

In 2008 and 2009 the Australian Industrial Relations Commission (AIRC) conducted the award modernisation process under Part 10A of the WR Act to develop modern awards for the workplace relations system established by the FW Act. This process considerably reduced the number of awards able to apply to employers, employees and their representatives, making it easier for those parties to understand their responsibilities and entitlements.

The award modernisation process conducted by the AIRC was not intended to result in a reduction in the take-home pay of employees or outworkers. However, as employees and outworkers move from being covered by thousands of state and federal awards and instruments to just 122 new modern awards, some terms and conditions will inevitably change. While many such changes will improve the terms and conditions of employees and outworkers, some may result in a reduction in wages, allowances and incentive based payments (i.e. the take-home pay of an employee or outworker).

Take-home pay orders provide a mechanism for obtaining remedial orders if there is such a reduction.

The Regulations amend the *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009* (Principal Regulations) to modify the provisions of the Act that allow for the making of take-home pay orders. The modifications expand the circumstances in which Fair Work Australia (FWA) may make orders to ensure that the award modernisation process does not result in the take-home pay of employees being reduced.

The Regulations allow take-home pay orders to be made where a reduction occurs because of certain variations to modern awards made by FWA. While take-home pay orders can be made with respect to reductions arising from the award modernisation process, FWA variations to modern awards to deal with residual issues are not recognised as part of that process, as defined by the legislation. Any reductions in take-home pay that result from this limited range of FWA variations to modern awards are not able to be remedied by take-home pay orders. The Regulations address this inconsistency.

In addition to the take-home pay order provisions in the Act, the AIRC (as part of the award modernisation process) included transitional provisions in modern awards (the modern award provisions) enabling FWA to make orders remedying reductions in take-home pay attributable to the award modernisation process or the transitional arrangements in modern awards. The Australian Government (the Government) is concerned to ensure that it is not open to argue that the modern award provisions are invalid because, as a statutory body, FWA only has the powers conferred on it by statute (not by the terms of an award). The Government considers that the protection provided by the modern award provisions is beneficial and furthers its intention that no employee be worse off as a result of the award modernisation process. The Regulations put beyond doubt any question about the ability of modern awards to contain provisions which confer a power on FWA to make take-home pay orders.

Finally, the Regulations make a number of minor and technical amendments to clarify the operation of the take-home pay order provisions of the Act and their interaction with certain provisions of the FW Act. The Regulations, for example, clarify the types of orders that FWA may make to remedy reductions in take-home pay and ensure FWA can include certain terms in modern awards when varying awards under item 14 of Schedule 5 to the Act.

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

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

Referring State and Territory Governments, as well as a number of peak industry bodies, were consulted during the development of the Regulations.

The Regulations are made under subitems 7(1) and 8(1) of the Act and have variable commencement dates. Some provisions are taken to have commenced on 1 January 2010. This is necessary because such provisions validate certain orders made by FWA and clarify the scope and operation of the take-home pay provisions in relation to applications made since 1 January 2010. Other provisions commence on the day after the Regulations are registered on the Federal Register of Legislative Instruments.

Details of the *Fair Work (Transitional Provisions and Consequential Amendments) Amendment Regulations 2010 (No. 1)*

Regulation 1 – Name of Regulations

This regulation sets out the name of the Regulations. The Regulations are called the *Fair Work (Transitional Provisions and Consequential Amendments) Amendment Regulations 2010 (No. 1)*.

Regulation 2 – Commencement

This regulation provides that regulations 1 to 3 and Schedule 1 are taken to have commenced on 1 January 2010. Schedule 2 commences on the day after the Regulations are registered on the Federal Register of Legislative Instruments.

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

This regulation provides that Schedules 1 and 2 of these Regulations amend the *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009* (the Principal Regulations).

Schedule 1 – Amendments taken to have commenced on 1 January 2010

Item [1] – After Part 2, Division 3

This item inserts a new Division, including new regulations 2.07, 2.08 and 2.09, that clarifies certain matters with respect to take-home pay orders made under the Act.

The take-home pay provisions in the Act allow FWA to make orders to avoid reductions in the take-home pay of employees which are attributable to the:

- movement of employees onto modern awards following the termination of a Division 2B State award (Division 2 of Part 4 of Schedule 3A);
- commencement of modern awards (Part 3 of Schedule 5);
- enterprise instrument modernisation process (Division 3 of Part 2 of Schedule 6); and
- State reference public sector transitional award modernisation process (Division 3 of Part 2 of Schedule 6A).

New regulation 2.07 – Orders remedying reductions in take-home pay

New regulation 2.07 modifies each of the take-home pay order schemes in the Act (i.e. Division 2 of Part 4 of Schedule 3A; Part 3 of Schedule 5; Division 3 of Part 2 of Schedule 6; Division 3 of Part 2 of Schedule 6A) by inserting new subitems to clarify the types of take-home pay orders FWA may make to remedy a reduction in take-home pay.

The take-home pay provisions in the Act allow FWA to make any order requiring, or relating to, the payment of an amount to an employee or outworker (where applicable) that FWA considers appropriate to remedy the situation (e.g. subitems 9(1) and (2) of Schedule 5 to the Act). It is not intended that take-home pay orders be limited to requiring an employer to pay back-pay.

The new subitems provide examples of the types of take-home pay orders that may be made by FWA when remedying reductions in take-home pay. The examples include:

- an order compensating an employee for a reduction in take-home pay that has already been suffered;
- an order requiring the payment of an amount to an employee (this would include an order that an employee be paid a rate specified in a pre-modernised industrial instrument to which the employee was previously entitled);
- an order requiring an employer to refrain from reducing an amount payable to an employee (this would include an order for a specified period or an order without a time limit).

These examples are not intended to limit FWA's power to make orders under the existing provisions of the Act.

New regulation 2.08 – Avoiding likely reductions in take-home pay

This regulation modifies each of the take-home pay order schemes in the Act (i.e. Division 2 of Part 4 of Schedule 3A; Part 3 of Schedule 5; Division 3 of Part 2 of Schedule 6; Division 3 of Part 2 of Schedule 6A) by inserting new items to make clear that take-home pay orders can be sought and made by FWA before an employee has suffered a reduction in take-home pay.

The Act enables FWA to make a take-home pay order if an employee (or an outworker, where applicable) suffers a reduction as a result of moving from an old instrument (e.g. a notional agreement preserving State awards, a Division 2B State award or an enterprise award) to a modern award, a modern enterprise award or a State reference public sector modern award. A take-home pay order may require an employer to pay an amount to an employee that FWA considers appropriate to remedy the situation.

The new items inserted by subregulations 2.08(3), (4), (6) and (8) make clear that take-home pay orders can be sought from and made by FWA pre-emptively in circumstances where an employee or outworker (or a class of employees or outworkers) to whom a modern award, a modern enterprise award or a State reference public sector modern award applies is 'likely' to suffer a reduction in take-home pay. An employee or outworker would be likely to suffer a reduction in take-home pay where, for example, an employer indicates that it intends to reduce wages in line with the transitional arrangements in a modern award for the phasing-in of the modern award rate of pay.

It is not intended that FWA be able to make a pre-emptive take-home pay order in relation to a theoretical reduction if there is no real prospect of the employee's pay being reduced.

Reflecting the existing terms of the Act, the new items require a modern award, a modern enterprise award or a State reference public sector modern award to apply to employees or outworkers (where applicable) for a take-home pay order (including a pre-emptive order) to be made. However, in relation to employees currently employed on Division 2B State awards, enterprise instruments or State reference public sector transitional awards, reductions in the take-home pay of employees may be likely at the time those instruments terminate (this can occur at varying dates after 1 January 2010) and a modern award, a modern enterprise award or a State reference public sector modern award begins to apply. Subregulations 2.08(2), (5) and (7) modify the Act to enable pre-emptive orders to be sought in these circumstances. The items

provide that if a modern award, a modern enterprise award or a State reference public sector modern award does not currently apply to an employee or outworker (where applicable), but will apply once the Division 2B State award, enterprise instrument or State reference public sector transitional award terminates, the employee (or outworker) is taken to be a person to whom the relevant modernised instrument applies.

Illustrative example

A number of employees engaged as cooks and kitchen hands prior to 1 January 2010 were entitled to a casual loading of 25 per cent under a pre-modernised award. The employees continued working in the same positions after 1 January 2010, from which time a modern award began applying to their employment. The modern award provided a casual loading of 20 per cent, with the change from 25 per cent to 20 per cent to be phased in in instalments from 1 July 2010. Before 1 July 2010, the employees were informed by their employer that their casual loading would be reduced in line with the transitional arrangements in the modern award.

This regulation clarifies that employees are not required to suffer a loss in take-home pay before they can obtain a take-home pay order. An order would be available because it is likely that the employees will suffer a reduction in their take-home pay (because of a reduction in their casual loading). The employer's announcement to the employees that their casual loading will be reduced would be sufficient for FWA to find that it is likely that a reduction in take-home pay is to occur.

New regulation 2.09 – Describing classes of employees and outworkers

Regulation 2.09 modifies each of the take-home pay order schemes in the Act (i.e. Division 2 of Part 4 of Schedule 3A; Part 3 of Schedule 5; Division 3 of Part 2 of Schedule 6; Division 3 of Part 2 of Schedule 6A) by inserting new items to clarify how a 'class' of employees or outworkers (where applicable) may be described in applications for take-home pay orders and in the orders themselves.

The take-home pay order schemes in the Act allow applications for take-home pay orders to be made on behalf of a 'class' of employees or outworkers (where applicable). FWA may also make orders remedying reductions in take-home pay suffered by such a 'class'.

The new items inserted by regulation 2.09 provide that a 'class' of employees (or outworkers) in this context may be described by reference to one or more of the following:

- a particular type of employment;
- a particular classification, job level or grade;
- a particular entitlement (e.g. an entitlement to an allowance under a pre-modernised instrument);
- a particular employer.

The new items provide examples of how a class may be described and do not limit the ordinary meaning of the term 'class'. Although described in the singular, the descriptors include references to the plural by operation of paragraph 23(b) of the *Acts Interpretation Act 1901*. It is therefore possible for a take-home pay order to describe a 'class' by reference to, for example, employees performing carpentry work who are employed by company A, company B and company C.

The new items also clarify that in describing a ‘class’ of employees (or outworkers), whether in an application for a take-home pay order or in the order itself, it is not necessary to individually name or specify the number of members of the class. This protects the identity of employees who can be adequately described because of their membership of a broader group of employees.

Illustrative example

A number of employees engaged as cooks and kitchen hands prior to 1 January 2010 were entitled to a casual loading of 25 per cent under a pre-modernised award. The employees continued working in the same positions after 1 January 2010, from which time a modern award commenced to apply to their employment. The modern award provided for a casual loading of 20 per cent, with the change from 25 per cent to 20 per cent to be phased in in instalments from 1 July 2010. Before 1 July 2010 the employees were informed by their employer that their casual loading would be reduced in line with the transitional arrangements in the modern award.

One of the cooks spoke to an official at her union about her employer’s plan to reduce her casual loading. She said she was unwilling to have any legal proceedings seeking a take-home pay order brought on her behalf because she was concerned about the possibility of being singled out by her employer as a trouble-maker. In this situation, an application could be brought on behalf of a class that included the concerned cook. The class could be described as all cooks employed by a particular employer on a casual basis. In making the application it would not be necessary to name, or specify the number of, members of the class. FWA could also make a take-home pay order with respect to the class without needing to identify each individual by name. This would protect the identity of employees who raise concern about their pay.

The general protection provisions in the FW Act also prohibit an employer taking adverse action against an employee because they have a workplace right or propose to exercise a workplace right (this includes an ability to initiate or participate in an application for a take-home pay order).

It is not intended that an employee, who is included as part of a ‘class’ in a take-home pay order, be prevented by subitems 32(4) of Schedule 3A, 9(4) of Schedule 5, 12(3) of Schedule 6 or 14(3) of Schedule 6A from seeking a further individual take-home pay order if the employee’s individual circumstances are different to those of the class.

Item [2] – After regulation 3B.01

This item inserts new regulation 3B.01A into Part 3B of the Principal Regulations.

New regulation 3B.01A – Modification of FW Act – inclusion of variation of modern award in the award modernisation process

This regulation modifies the definition of ‘award modernisation process’ in section 12 of the FW Act to include variations to modern awards made by FWA under item 14 of Schedule 5 to the Act. That item provides a three month period (commencing on 1 January 2010) in which FWA could finalise unresolved applications to vary modern awards made to the AIRC before 1 January 2010. Item 14 was inserted into the Act by regulation 3B.01 of the Principal Regulations.

The FW Act provides that state-based difference terms and terms that establish industry-specific redundancy schemes, can be included in modern awards as part of the award modernisation process (see paragraphs 141(1)(a) and 154(2)(a) of the FW Act). Because ‘award modernisation process’ is defined in section 12 of the FW Act to include ‘the process of making awards under Part 10A of the WR Act’, such terms could not have been validly inserted in modern awards by FWA when exercising its power under item 14 of Schedule 5 to the Act.

This regulation modifies the definition of ‘award modernisation process’ in section 12 of the FW Act to ensure that when making variations to modern awards under item 14 of Schedule 5 to the Act, FWA was permitted to include state-based difference terms and industry-specific redundancy schemes in the circumstances set out in paragraphs 154(2)(a) and 141(1)(a) of the FW Act.

This regulation is taken to have commenced on 1 January 2010, the date on which FWA’s power to make orders varying modern awards under item 14 of Schedule 5 commenced.

Item [3] – After regulation 3B.02

This item inserts new regulations 3B.03 and 3B.04 into the Principal Regulations.

New regulation 3B.03 – Modification of subitems 8 (3) and (4) of Schedule 5

This regulation is consequential to the making of regulation 3B.04.

Regulation 3B.03 replaces the heading for Part 3 of Schedule 5 to the Act to distinguish Part 3 from Part 3A (as inserted by regulation 3B.04) which refers to the take-home pay provisions in modern awards.

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

Regulation 3B.04 modifies Schedule 5 of the Act to ensure that modern awards can contain provisions which confer power on FWA to make take-home pay orders.

The AIRC, as part of the award modernisation process, included transitional provisions in modern awards allowing FWA to make take-home pay orders. The award take-home pay provisions allow FWA to make orders to remedy reductions in an employee’s take-home pay caused by the making of the modern award or the operation of transitional arrangements in the award.

The Government is concerned to ensure that it is not open to argue that the take-home pay provisions in modern awards are invalid because, as a statutory body, FWA only has the powers conferred on it by statute (not by the terms of an award). The protection afforded by such provisions in modern awards assists in ensuring that the award modernisation process does not result in the take-home pay of employees being reduced. Consequently, the Government considers it desirable that there be no doubt about the validity of such provisions in modern awards. This regulation removes any such doubt.

Regulation 3B.04 modifies Schedule 5 to the Act by inserting new Part 3A which validates provisions in modern awards that confer power on FWA to make take-home pay orders (this is achieved by new item 13A). New item 13A ensures that modern awards have always been able to confer power on FWA to make take-home pay orders remedying reductions in take-home pay suffered by an employee or class of employees because of the making of a modern award or the operation of transitional arrangements in the award. The new item allows award terms to confer power on FWA to remedy reductions in take-home pay even if those reductions are not a 'modernisation-related reduction in take-home pay' within the meaning of the Act.

New item 13A is intended to allow modern awards to include terms protecting the take-home pay of a broader class of employees than the take-home pay provisions in Part 3 of Schedule 5 to the Act. Modern awards include provisions allowing new employees (i.e. those employed after the commencement of the modern award) to obtain a take-home pay order with respect to reductions in take-home pay that occur as a result of the transitional arrangements in the award (a reference to the phasing in of differences between the pay rates in pre-modernised awards and modern awards). This is different to the take-home pay provisions in Part 3 of Schedule 5 which require the employee to be employed in the same position as the position he or she was employed in immediately before the modern award came into operation (see item 8(3)(b) of Schedule 5 to the Act). The validation of these provisions in modern awards furthers the commitment made by the Government that the award modernisation process not reduce the take-home pay of employees.

In exercising its power to make a take-home pay order under a term of a modern award, FWA is required to do so in accordance with the remaining provisions of the proposed Part (see new subitem 13B(1)). This promotes consistency between the circumstances in which take-home pay orders can be made under the Act and under the terms of a modern award.

New subitem 13A(2) defines an employee's take-home pay for the purpose of Part 3A. The definition is the same as that used in the other take-home pay provisions in the Act (see Division 2 of Part 4 of Schedule 3A; Part 3 of Schedule 5; Division 3 of Part 2 of Schedule 6; Division 3 of Part 2 of Schedule 6A).

Consistent with the other take-home pay provisions in the Act, new subitem 13A(3) ensures that take-home pay orders under Part 3A are capable of being sought and made by FWA pre-emptively in circumstances where it is likely that an employee or employees will suffer a reduction in take-home pay. It is not intended that take-home pay orders be available in relation to a theoretical reduction if there is no real prospect of the employee's pay being reduced.

New subitem 13B(2) provides examples of the types of take-home pay orders that FWA may make under the terms of a modern award. These may include one or more of the following, but are not limited to:

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

New subitem 13B(3) sets out who may make an application for a take-home pay order under a term of a modern award. This reflects the arrangements for take-home pay orders under the other provisions in the Act.

Repeat applications for take-home pay orders should be avoided. New subitem 13B(4) provides that FWA may dismiss an application in whole or in part if it considers that the individual circumstances of an employee have already been considered as part of an earlier application. However, it is not intended that FWA would dismiss an application for a take-home pay order made by an employee who had previously been included in a 'class' order, but whose individual circumstances are different to that of the class.

Item 13C sets out circumstances in which FWA must not make a take-home pay order. It also requires FWA to ensure that orders are expressed in certain ways. This item imposes the same requirements on FWA as the other take-home pay provisions in the Act (see items 33 of Schedule 3A, 10 of Schedule 5, 13 of Schedule 6 and 15 of Schedule 6A to the Act).

Item 13D provides that a take-home pay order made under a modern award continues to have effect in relation to an employee or class of employees (subject to the terms of the order) while the modern award covers the employee or employees, even if it stops applying because an enterprise agreement starts to apply. This ensures that an employee does not lose the benefit of a take-home pay order when an enterprise agreement starts to apply.

Applications for take-home pay orders and orders made under a modern award may be made in respect of a 'class' of employees. New item 13E clarifies the meaning of 'class' in items 13A to 13D. Subitem 13E(1) provides that, without limiting the ordinary meaning of 'class', a 'class' of employees may be described by reference to one or more of the following:

- a particular type of employment;
- a particular classification, job level or grade;
- a particular entitlement (e.g. an entitlement to an allowance under a pre-modernised instrument);
- a particular employer.

This subitem provides examples of how a class may be described and is not intended to limit the ordinary meaning of 'class'. Although described in the singular, the descriptors include references to the plural by operation of paragraph 23(b) of the *Acts Interpretation Act 1901*. It would therefore be possible for a take-home pay order to describe a 'class' by reference to, for example, employees performing carpentry work who are employed by company A, company B and company C.

New subitem 13E(2) provides that in describing a class of employees, whether in an application or a take-home pay order made under a modern award, it is not necessary to individually name or specify the number of members of the class.

New item 13F provides that a term of a modern award or enterprise agreement has no effect to the extent that it is less beneficial than a term in a take-home pay order made under a modern award.

New item 13G ensures that take-home pay orders made under a modern award are treated in the same way as similar types of orders (such as equal remuneration orders or take-home pay orders made under Part 3 of Schedule 5 to the Act) for the purposes of subsections 675(2) and 706(2) of the FW Act.

Schedule 2 – Amendment commencing on the day after registration

Item [1] – After regulation 3B.04

This item inserts new regulation 3B.05 into the Principal Regulations.

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

New regulation 3B.05 modifies the Act to ensure that take-home pay orders may be made by FWA with respect to reductions in the take-home pay of employees or outworkers that result from certain variations to modern awards. The regulation provides that some variations to modern awards that result in reductions to the take-home pay of employees are a ‘modernisation-related reduction in take-home pay’. Where a ‘modernisation-related reduction in take-home pay’ occurs, FWA may make a take-home pay order to remedy the situation under item 9 of Schedule 5 to the Act. The regulation also makes consequential amendments to Schedule 2 of the Act.

Paragraph 3B.05(2)(b) modifies Schedule 5 to the Act by inserting new item 8A. The new item describes new circumstances in which a ‘modernisation-related reduction in take-home pay’ is taken to have occurred. The item applies to variations of modern awards made by FWA under:

- item 14 of Schedule 5 to the Act; or
- section 157 of the FW Act, provided the variation was made before 1 July 2010.

Item 14 of Schedule 5 to the Act provides for a three month period (commencing on 1 January 2010) in which FWA could finalise unresolved applications to vary modern awards made to the AIRC before 1 January 2010. Item 14 was inserted into the Act by regulation 3B.01 of the Principal Regulations. It is unclear whether take-home pay orders are available to remedy reductions caused by variations to modern awards made by FWA, rather than the AIRC, when finalising the award modernisation process under item 14 of Schedule 5. This is because variations made by FWA under item 14 are not technically part of the award modernisation process provided for by Part 10A of the WR Act (as is required by the existing take-home pay provisions – see paragraph 8(3)(d) of Schedule 5 to the Act). The regulation ensures that take-home pay orders are available to remedy such reductions.

Section 157 of the FW Act allows FWA to vary modern awards if satisfied that the variation is necessary to achieve the modern awards objective in section 134 of that Act. In the period immediately following the commencement of modern awards (on 1 January 2010) some applications under section 157 have sought the inclusion of old state and federal award terms that applied to employees now employed under a modern award. Given this use of section 157 to address outstanding award modernisation matters, the Government considers it appropriate to extend take-home pay protections to employees who suffer reductions in pay as a result of this variation process.

Take-home pay orders can only be made (under item 9 of Schedule 5) in respect of a ‘modernisation-related reduction in take-home pay’. New item 8A provides that, in addition to the existing meanings of ‘modernisation-related reduction in take-home pay’, an employee also suffers such a reduction if:

- FWA makes an order varying a modern award;
- the modern award:

- starts to apply to the employee when the award comes into operation; or
- starts to apply to the employee when the order varying the award comes into operation; and
- the employee is employed in the same position (or a position that is comparable to) the position they were employed in immediately before the modern award came into operation. This makes clear that the provision is designed purely to ensure a fair transition from the old award to the new (it is not intended that this provision apply where employees change jobs, or where working arrangements change);
- 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 it would have been immediately before the modern award came into operation; and
- the reduction is attributable to the variation of the modern award under item 14 of Schedule 5 to the Act or section 157 of the FW Act made before 1 July 2010.

Equivalent provision is made by new item 8A for non-employee outworkers.

It is not intended that an employee be entitled to a take-home pay order if the employee suffers a reduction between the amount the employee would have received under a modern award in its form on 1 January 2010 and what the employee receives after that modern award is varied by FWA. The relevant comparison is between the amount of take-home pay an employee received for performing particular work before the modern award came into operation on 1 January 2010 (i.e. the take-home pay an employee received under a former WR Act instrument, such as an Australian Pay and Classification Scale) and what the employee receives (or is likely to receive) for the same work under the modern award, taking into account any variations to the modern award made by FWA.

New regulation 3B.05 modifies the definition of 'modernisation-related reduction in take-home pay' in item 2 of Schedule 2 to the Act to include a reference to reductions attributable to modern award variations made by FWA under item 14 of Schedule 5 to the Act or under section 157 of the FW Act. These modifications are consequential to the insertion of new item 8A.

The regulation also modifies subitems 8(3) and (4) of Schedule 5 to the Act by omitting the words 'if, and only'. Those subitems provide that an employee or outworker suffers a modernisation-related reduction in take-home pay 'if, and only if' certain circumstances have arisen. This modification allows additional circumstances to be included so that modernisation-related reductions in take-home pay are taken to include reductions attributable to modern award variations made by FWA under item 14 of Schedule 5 to the Act and section 157 of the FW Act. These modifications are consequential to the insertion of new item 8A.

New regulation 3B.05 also modifies item 9A of Schedule 5 to the Act (item 9A was inserted by new subregulation 2.08(4) in item [1] of Schedule 1 to these Regulations) to make clear that take-home pay orders can be sought and made pre-emptively. This ability exists where 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 an order varying a modern award under item 14 of Schedule 5 to the Act or section 157 of the FW Act (if the variation was made before 1 July 2010).

It is not intended that FWA would be able to make a pre-emptive take-home pay order in relation to a theoretical reduction if there is no real prospect of the employee's pay being reduced.