



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

Select Legislative Instrument 2010 No. 77

I, QUENTIN BRYCE, Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following Regulations under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

Dated 6 May 2010

QUENTIN BRYCE
Governor-General

By Her Excellency's Command

JULIA GILLARD
Minister for Employment and Workplace Relations

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1 Name of Regulations

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

2 Commencement

These Regulations commence, or are taken to have commenced, as follows:

- (a) on 1 January 2010 — regulations 1 to 3 and Schedule 1;
- (b) on the day after they are registered — Schedule 2.

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

Schedules 1 and 2 amend the *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009*.

Schedule 1 Amendments taken to have commenced on 1 January 2010

(regulation 3)

[1] After Part 2, Division 3

insert

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

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- (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.

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- (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.’

[2] After regulation 3B.01*insert***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.’

[3] After regulation 3B.02*insert***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:

‘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.

- (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;

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- (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.
- (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.

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.'

Schedule 2 Amendment commencing on day after registration

(regulation 3)

[1] After regulation 3B.04

insert

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.

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- (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
 - (ii) starts to apply to the outworker when the order varying the award comes into operation; and

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- (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).'

Note

1. All legislative instruments and compilations are registered on the Federal Register of Legislative Instruments kept under the *Legislative Instruments Act 2003*. See <http://www.frli.gov.au>.