

EXPLANATORY STATEMENT

Select Legislative Instrument 2010 No. 224

(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. 3)

Section 4 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (the Act) provides that the Governor-General may make regulations prescribing matters either required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the 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 *Workplace Relations Act 1996* (WR Act) to develop modern awards for the workplace relations system established by the *Fair Work Act 2009* (FW Act). The Act also provides for the modernisation of enterprise instruments (Part 2 of Schedule 6) and State reference public sector transitional awards (SRPSTA) (Part 2 of Schedule 6A).

These award modernisation processes were not intended to result in a reduction in the take-home pay of employees or outworkers. Take-home pay orders are available under the Act to prevent reductions in take-home pay occurring or to remedy reductions which have occurred.

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 enabling FWA to make orders remedying reductions in take-home pay attributable to the award modernisation process or the transitional arrangements in modern awards. Although FWA has not yet made any modern enterprise awards or State reference public sector modern awards (SRPSMA), it is possible that FWA may include similar take-home pay provisions in those instruments.

The *Fair Work (Transitional Provisions and Consequential Amendments) Amendment Regulations 2010 (No. 1)* modified the Act to put beyond doubt that terms conferring power on FWA to make take-home pay orders can be included in modern awards. This was to ensure it was not open to argue that the modern award provisions were invalid because, as a statutory body, FWA only has the powers conferred on it by statute (not by the terms of an award).

The Regulations amend the *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009* (Principal Regulations) to modify provisions of the Act in order to ensure that similar arguments are not open with respect to take-home pay provisions that may be included in modern enterprise awards and SRPSMAs. The Regulations make clear that these types of instruments can include terms conferring power on FWA to make take-home pay orders.

The Regulations also extend the application of provisions in the Act dealing with FWA's power to make take-home pay orders under modern awards (Part 3A of Schedule 5) to outworkers. Outworkers are employees who perform work at premises that would not conventionally be regarded as being business premises or individuals engaged on contracts for services to work in the textile, clothing or footwear industry from similar non-conventional business premises. This is necessary to ensure that take-home pay orders made under a modern award (which can apply to both employees and outworkers) can be made with respect to all persons covered by those awards.

The Regulations also amend the Principal Regulations to modify Schedule 6A to the Act, which deals with the SRPSTA modernisation process, to permit applications to be made to vary the coverage of a SRPSTA. This is a minor technical amendment to enable employers and employees currently covered by a SRPSTA to become more easily covered by an appropriate modern award.

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

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

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

The Regulations have variable commencement dates. Most provisions commence on the day after the Regulations are registered on the Federal Register of Legislative Instruments. The provisions extending the scheme for take-home pay orders made under modern awards to outworkers are taken to have commenced on 1 January 2010. This is necessary because take-home pay provisions in modern awards commenced operating on that date. Subitem 10(2) of Schedule 2 to the Act provides that, despite subsection 12(2) of the *Legislative Instruments Act 2003*, regulations made under the Act may be expressed to take effect from a date before they are registered. However, a court must not convict a person of an offence or order a person to pay a pecuniary penalty as a result of the retrospective effect of any such regulations (subitem 10(3) of Schedule 2).

Details of the *Fair Work (Transitional Provisions and Consequential Amendments) Amendment Regulations 2010 (No. 3)*

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. 3)*.

Regulation 2 – Commencement

This regulation provides that regulations 1 to 3 and Schedule 1 are taken to have commenced on 1 January 2010. Regulations 4 and 5 and Schedules 2 and 3 commence 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 Schedule 1 to the Regulations amends the *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009* (the Principal Regulations), as amended by the *Fair Work (Transitional Provisions and Consequential Amendments) Amendment Regulations 2010 (No. 1)*.

Regulation 4 – Amendment of *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009*

This regulation provides that Schedule 2 to the Regulations amends the *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009*.

Regulation 5 – Amendment of *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009*

This regulation provides that Schedule 3 to the Regulations amends the *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009*, as amended by Schedule 2.

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

Item [1] to [15] – Regulation 3B.04, inserted Part 3A

Schedule 1 amends the Principal Regulations to extend the application of the provisions dealing with take-home pay orders made under modern awards to outworkers.

In addition to the take-home pay order provisions in the Act (see Part 3A of Schedule 5), the AIRC (as part of the award modernisation process) included transitional provisions in modern awards enabling FWA to make orders remedying reductions in take-home pay attributable to the award modernisation process or the transitional arrangements in modern awards.

Among other things, the *Fair Work (Transitional Provisions and Consequential Amendments) Amendment Regulations 2010 (No. 1)* (the Take-home Pay Regulations) modified the Act to put

beyond doubt that terms conferring power on Fair Work Australia (FWA) to make take-home pay orders can be included in modern awards. The Take-home Pay Regulations also specify how FWA should exercise its power under take-home pay provisions in modern awards to protect the take-home pay of employees.

The provisions of the Act dealing with the ability for take-home pay orders to be included in modern awards (Part 3A of Schedule 5), as amended by the Take-home Pay Regulations, are not expressed to apply to outworkers despite the fact that modern awards can apply to both employee and non-employee outworkers. This was not intended.

Items 1 to 15 extend to outworkers the application of the provisions of the Act dealing with the ability of modern awards to include take-home pay provisions. The items achieve this by including references to outworkers or classes of outworkers wherever references to employees or classes of employees appear in Part 3A of Schedule 5 to the Act. This ensures that modern awards can include take-home pay order provisions with respect to outworkers and that FWA can exercise power under those provisions to make take-home pay orders with respect to outworkers. It ensures that employees and outworkers, both of whom may be covered by modern awards, are treated consistently.

Items 1 to 15 are taken to have commenced on 1 January 2010. This is necessary because take-home pay provisions in modern awards commenced operating on 1 January 2010. It is also consistent with the commencement of the provisions in the Take-home Pay Regulations which put beyond doubt the ability of modern awards to include take-home pay provisions with respect to employees.

Schedule 2 – Amendment commencing on registration

Items [1] – After Part 3B

This item inserts new Part 3CA into the Principal Regulations.

New regulation 3CA.01 – State reference public sector transitional awards

Regulation 3CA.01 inserts new item 5A into Schedule 6A to the Act which deals with the State reference public sector transitional award (SRPSTA) modernisation process.

Item 5 of Schedule 6A to the Act permits an employer or an organisation covered by a SRPSTA to apply to FWA to terminate that SRPSTA, in which case the employer and its employees would become covered by an ordinary modern award (i.e. without having to apply to FWA for the making of a State reference public sector modern award). Applications of this kind may only be made up until 31 December 2013.

New item 5A of Schedule 6A provides that the coverage term of a SRPSTA may be varied by FWA on an application by an employer or organisation covered by the award so that it no longer covers the employer and its employees. This kind of application provides an alternative to the existing mechanism for terminating a SRPSTA and may be utilised in circumstances where a SRPSTA covers more than one employer or organisation and not all of them wish to terminate the SRPSTA at the same time. As with an application to terminate a SRPSTA, an application to vary the coverage of a SRPSTA under new item 5A is only able to be made until 31 December 2013.

Consistent with the approach taken in subitem 5(3) of Schedule 6A to the Act in respect of the termination of SRPSTAs, FWA will not be able to vary the coverage of a SRPSTA unless it is satisfied that the employees who would cease to be covered by the SRPSTA would become covered by a modern award (other than the miscellaneous modern award) that is in operation and is appropriate for them at the time of the variation. This ensures that a suitable award safety net is maintained for the employees who are the subject of the variation application.

If there is a modern award for the relevant industry but the coverage term does not describe the type of work performed by a particular employer covered by a SRPSTA and its employees, it is open to that employer, an employee or an organisation covered by the SRPSTA to also make an application to FWA under section 158 of the FW Act. Section 158 would enable FWA to vary or include coverage terms in that modern award so that the employer, employees and organisation become covered by the modern award when the coverage of the SRPSTA is varied to exclude them.

In deciding whether to vary the coverage term of a SRPSTA FWA is required, under subitem 5A(4), to take into account the following matters:

- the likely impact of the variation on those persons (including the employer and its employees) who would cease to be covered by the award if the variation were made;
- the views of those persons who would cease to be covered by the award if the variation were made; and
- any other matters prescribed by the regulations.

Subitem 5A(5) provides that if FWA varies the coverage of a SRPSTA under new item 5A, the variation would operate from the day specified by FWA in its decision.

Schedule 3 – Further amendments commencing on registration

Item [1] – After Part 3B

This item inserts new Part 3C into the Principal Regulations.

New regulation 3C.01 – Modern enterprise award or transitional arrangements resulting in reduction in take-home pay

New regulation 3C.01 modifies Schedule 6 to the Act to ensure that modern enterprise awards can contain provisions which confer power on FWA to make take-home pay orders.

A modern enterprise award is a type of modern award that regulates terms and conditions of employment in a single enterprise, or in one or more enterprises if the employers carry on similar business activities under the same franchise. To date, no modern enterprise awards have been made.

It is possible that, when made, FWA may include take-home pay provisions in modern enterprise awards. Such provisions would enable FWA to make orders remedying reductions in take-home pay attributable to the enterprise instrument modernisation process or any transitional arrangements in the modern enterprise award.

If this occurs, it may be possible to argue that take-home pay provisions in modern enterprise 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 same issue arose in relation to take-home pay provisions included in modern awards by the AIRC as part of the award modernisation process, however, this issue was addressed by the Take-home Pay Regulations, which put beyond doubt that such provisions are capable of being included in modern awards.

New regulation 3C.01 modifies Part 2 of Schedule 6 to the Act by inserting new Division 3A to clarify that modern enterprise awards can also include terms conferring power on FWA to make take-home pay orders. While no modern enterprise awards have yet been made, regulation 3C.01 avoids any inference that take-home pay provisions cannot be included in modern enterprise awards being drawn from the Take-home Pay Regulations having made special provision for take-home pay provisions in modern awards.

New item 16AA ensures that modern enterprise awards are 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 enterprise award or the operation of any transitional arrangements in the award. The new item allows modern enterprise 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.

In exercising its power to make a take-home pay order under a term of a modern enterprise award, FWA is required to do so in accordance with the remaining provisions of Division 3A (see new subitem 16AB(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 enterprise award.

Consistent with the other take-home pay provisions in the Act, new subitem 16AA(3) ensures that take-home pay orders under Division 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 16AB(2) provides examples of the types of take-home pay orders that FWA may make under a term of a modern enterprise 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;
- requiring the payment of an amount of take-home pay; or
- preventing a reduction in take-home pay from occurring.

New subitem 16AB(3) sets out who may make an application for a take-home pay order under a term of a modern enterprise 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 16AB(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.

New item 16AC 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).

New item 16AD provides that a take-home pay order made under a modern enterprise award continues to have effect in relation to an employee or class of employees (subject to the terms of the order) while the modern enterprise 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 made under a modern enterprise award are capable of being made in respect of a ‘class’ of employees. New item 16AE clarifies the meaning of ‘class’ in items 16AA to 16AD. Subitem 16AE(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 enterprise instrument);
- a particular employer.

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 employed as carpenters, bricklayers and labourers who are employed by company A.

New subitem 16AE(2) provides that in describing a class of employees, whether in an application or a take-home pay order made under a modern enterprise award, it is not necessary to individually name or specify the number of members of the class.

New item 16AF provides that a term of a modern enterprise 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 enterprise award.

New item 16AG ensures that take-home pay orders made under a modern enterprise 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.

Item [2] – After regulation 3CA.01

This item inserts regulation 3CA.02 in new Part 3CA of the Principal Regulations.

New regulation 3CA.02 – State reference public sector modern award or transitional arrangements resulting in reduction in take-home pay

Regulation 3CA.02 modifies Schedule 6A to the Act to ensure that State reference public sector modern awards (SRPSMAs) can contain provisions which confer power on FWA to make take-home pay orders.

A SRPSMA is a type of modern award which is expressed to cover only certain State reference public sector employers and their employees. To date, no SRPSMAs have been made.

It is possible that, when made, FWA may include take-home pay provisions in SRPSMAs. Such provisions would enable FWA to make orders remedying reductions in take-home pay attributable to the SRPSTA modernisation process or any transitional arrangements in a SRPSMA.

If this occurs, it may be possible to argue that take-home pay provisions in SRPSMAs 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 same issue arose in relation to take-home pay provisions included in modern awards by the AIRC as part of the award modernisation process, however, this issue was addressed by the Take-home Pay Regulations, which put beyond doubt that such provisions are capable of being included in modern awards.

Regulation 3CA.02 modifies Part 2 of Schedule 6A to the Act by inserting new Division 3A to clarify that SRPSMAs can also include terms conferring power on FWA to make take-home pay orders. While no SRPSMAs have yet been made, regulation 3CA.02 avoids any inference that take-home pay provisions cannot be included in SRPSMAs being drawn from the Take-home Pay Regulations having made special provision for take-home pay provisions in modern awards.

New item 18A ensures that SRPSMAs are 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 SRPSMA or the operation of any transitional arrangements in the award. The new item allows SRPSMA 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.

In exercising its power to make a take-home pay order under a term of a SRPSMA, FWA is required to do so in accordance with the remaining provisions of Division 3A (see new subitem 18B(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 SRPSMA.

Consistent with the other take-home pay provisions in the Act, new subitem 18A(3) ensures that take-home pay orders under Division 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 18B(2) provides examples of the types of take-home pay orders that FWA may make under a term of a SRPSMA. 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;
- requiring the payment of an amount of take-home pay; or
- preventing a reduction in take-home pay from occurring.

New subitem 18B(3) sets out who may make an application for a take-home pay order under a term of a SRPSMA. 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 18B(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.

New item 18C 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).

New item 18D provides that a take-home pay order made under a SRPSMA continues to have effect in relation to an employee or class of employees (subject to the terms of the order) while the SRPSMA 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 made under a SRPSMA are capable of being made in respect of a 'class' of employees. New item 18E clarifies the meaning of 'class' in items 18A to 18D. Subitem 18E(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 SRPSTA);
- a particular employer.

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 work in classification Public Servant 1, Public Servant 2 and Public Servant 3 who are employed by a particular State reference public sector employer.

New subitem 18E(2) provides that in describing a class of employees, whether in an application or a take-home pay order made under a SRPSMA, it is not necessary to individually name or specify the number of members of the class.

New item 18F provides that a term of a SRPSMA 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 SRPSMA.

New item 18G ensures that take-home pay orders made under a SRPSMA 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.