

2008 - 2009

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

FAIR WORK BILL 2008

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments to be Moved on Behalf of the Government

(Circulated by authority of the Minister for Employment and Workplace Relations,
the Honourable Julia Gillard MP)

LIST OF GOVERNMENT AMENDMENT SHEET NUMBERS

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PA442	Application of this Act
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PJ447	Fair Work Information Statement, Functions of the Fair Work Ombudsman
PD364	Fair Work Ombudsman, Fair Work Australia

NOTES ON AMENDMENTS

1. In these notes on amendments, the following abbreviations are used:

AIRC Australian Industrial Relations Commission

FWA Fair Work Australia

FWO Fair Work Ombudsman

NES National Employment Standards

COMMENCEMENT

Item 1 – Clause 2

2. Item 1 replaces the table in clause 2, setting out when particular clauses of the Bill may commence by proclamation. It provides, for example, for clauses 573 to 718 of the Bill to commence on a single proclamation day. This is intended to allow the new institutions (FWA and the FWO) and Schedule 1 (transitional provisions about early commencement) to be established before the rest of the Bill. However, the substantive functions of the institutions, and inspectors' powers, cannot commence before the Fair Work (Transitional Provisions and Consequential Amendments) Bill receives the Royal Assent.

APPLICATION OF THIS ACT

State or Territory anti-discrimination laws

Item 1 – Subclause 27(1)

Item 2 – Subclause 27(1)

3. Currently, paragraph 27(1)(a) of the Bill preserves the operation of State or Territory laws dealing with discrimination and equal employment opportunity in relation to national system employers and national system employees, but not to the extent that they are, or are contained in, a State or Territory industrial law (as defined in subclause 26(2)).

4. Consistent with the idea of a national workplace relations system, this limitation prevents States from regulating industrial matters in discrimination laws. However, it raises issues about the extent to which discrimination laws may be characterised as State or Territory industrial laws, given that this definition includes laws that have the main purpose (or one or more main purposes) of providing rights and remedies for termination of employment or conduct that adversely affects an employee in employment.

5. In order to avoid any uncertainty in this area, these items amend clause 27 of the Bill to ensure that each of the named State and Territory anti-discrimination and equal opportunity laws are not excluded by clause 26 of the Bill.

Non-excluded matters

Item 3 – Paragraph 27(2)(1)

6. Paragraph 27(2)(1) of the Bill currently preserves the operation of State or Territory laws dealing with regulation of employer and employee organisations and their members. Organisation is a defined term in clause 12.

7. This item replaces the reference to organisation with association, which has a broader meaning than organisation and gives State and Territory laws in this area greater scope to operate.

Interaction of modern awards etc with State and Territory laws

Item 4 – Subclause 29(2)

8. This item ensures that modern awards and enterprise agreements apply subject to all non-excluded State or Territory laws, including:

- the named State and Territory discrimination laws set out in item 1; and
- laws dealing with rights and remedies that are incidental to all the non-excluded State or Territory laws.

Technical correction

Item 5 – Paragraph 34(3)(a)

9. Paragraph 34(3) enables the regulations to extend the application of the Bill beyond the exclusive economic zone and continental shelf in relation to certain persons.

10. This item makes a minor technical correction to paragraph 34(3)(a), adding the word ‘and’ to make clear that regulations extending the application of the Bill in this way may be made in relation to any Australian employer and any Australian-based employee.

Prescribed extensions beyond the EEZ and continental shelf

Item 6 – Subclause 34(3A)

11. Paragraphs 33(1)(d) and 34(1)(b) currently extend the Bill to ships operated or chartered by Australian employers that use Australia as a base in the exclusive economic zone, the waters of the continental shelf and beyond. For this purpose, subclauses 33(2) and 34(2) provide that references in relevant provisions of the Bill to an employer and an employee are deemed to mean an Australian employer (as defined in clause 35) and an employee of an Australian employer.

- The definition of Australian employer provides the necessary jurisdictional connection to Australia to underpin the Bill’s extraterritorial application, consistent with international law.

12. Subclause 34(3) enables regulations to extend the Bill (or parts of the Bill) beyond the continental shelf to Australian employers and Australian-based employees. This item inserts a new provision which ensures that, similar to subclauses 33(2) and 34(2), references to employer and employee in the Bill, as extended by such regulations, are deemed to mean (respectively):

- Australian employer, and employer of an Australian-based employee; and
- Australian-based employee, and employee of an Australian employer.

Regulations excluding application of Act

Item 7 – Clause 35A

13. Clause 32 and subclauses 33(4) and 34(4) of the Bill currently enable the regulations to modify the application of the Bill in relation to the territorial sea, Christmas Island and the Cocos-Keeling Islands, the exclusive economic zone, the continental shelf and beyond.

14. This item inserts a new provision to clarify that the regulations can also exclude the application of the Bill in these areas.

- For example, regulations may be made to exclude from the Bill’s operation foreign-flagged ships engaged in innocent passage across the territorial sea between an overseas port and an Australian port.

NATIONAL EMPLOYMENT STANDARDS, DEALING WITH DISPUTES

Base rate of pay for pieceworkers

Item 2 - Clause 16

Item 3 – Clause 16

15. These items relate to the definition of ‘base rate of pay’ in clause 16 of the Bill.
16. Item 3 adds a power to allow regulations to be made to prescribe, or provide for the determination of, a base rate of pay for pieceworkers for the purposes of the protections provided in clause 206 of the Bill.
 - Clause 206 provides that an employee’s base rate of pay under an enterprise agreement must not be less than the modern award rate or the national minimum wage order rate.
17. Special provision is required for pieceworkers because the general meaning of base rate of pay in subclause 16(1) excludes bonuses and incentive-based payments.
18. This amendment will enable the protection in clause 206 to work as intended for this category of employees.
19. Item 2 is consequential upon item 3.

Interaction between NES and modern awards and enterprise agreements

Item 4 – Subclause 55(4)

20. This item amends subclause 55(4) of the Bill to make clear that a modern award or enterprise agreement may include terms that are ancillary or incidental to, or which supplement, the NES, but only to the extent that such a term is not detrimental to an employee in any respect.
21. The intention of this amendment is to ensure that if a term of an enterprise agreement or modern award that is ancillary or incidental to, or supplements, the NES contains an element that is detrimental when compared to the NES, then only the detrimental element of the term is of no effect. The remainder of the term will operate.

Item 5 – Subclause 55(5)

22. This item omits existing subclause 55(5) and inserts new subclauses 55(5)-(7).
23. These provisions explain the interaction of enterprise agreements and modern awards with the NES.
24. The amendments make clear that an enterprise agreement can include terms that are the same (or substantially the same) as an NES entitlement. These could be terms which simply replicate the NES or terms that make ancillary or supplementary provision in relation to the NES and subsume the NES entitlement. This means that an employer can make a comprehensive enterprise agreement with the employer’s employees.

25. Such terms operate in parallel with the NES entitlement, and do not confer a double entitlement. The same applies to terms of modern awards that are ancillary or supplementary to a NES entitlement. This means that a NES entitlement can be sourced both in the NES and in an enterprise agreement or modern award and can be enforced as an entitlement under either. Also, the mechanisms contained in the agreement are available to resolve any dispute about the entitlement.

26. This means, for example, that an enterprise agreement could include provisions about requests for flexible work arrangements (as provided for by Division 4 of the NES), and disputes about whether or not an employer had reasonable business grounds for refusing an application could be dealt with by FWA (or an alternative dispute resolution provider) under the dispute procedure in the agreement, even though dispute resolution about this issue is generally not available (see clauses 739 and 740 of the Bill).

27. Items 17 and 19 insert new notes to clauses 739 and 740 to make this clear (see further below).

28. The amendments made by this item also make clear that where:

- an enterprise agreement contains terms that are the same or substantially the same as a NES entitlement, or terms that are ancillary or incidental to, or which supplement, a NES entitlement; or
- a modern award contains terms that are ancillary or incidental to, or which supplement, a NES entitlement,

the provisions in the NES that relate to that entitlement (e.g., in relation to rate of accrual of leave, or what notice must be given to access an entitlement) apply to the entitlement in the award or agreement (as a minimum standard) to the extent that the award or agreement entitlement is the same as the NES guaranteed entitlement.

29. As the note to subclause 55(6) makes clear, this means, for example, that if an enterprise agreement provides 6 weeks' annual leave, the accrual rules and rules about taking of leave will operate as a minimum standard in relation to the NES entitlement (4 weeks' leave), but not in relation to the additional leave. This provision is designed to ensure the integrity of the NES, while allowing flexibility in relation to 'above-NES' entitlements. In the case of an agreement with 6 weeks' annual leave, it would be possible for the parties to agree that the additional two weeks would be provided in a 'lump sum' at the end of a year, rather than accruing progressively under the NES.

Item 6 – Clause 61

30. The amendment to clause 61 of the Bill made by this item is a consequence of the amendments made by item 5 described above. This amendment confirms that the NES is a set of minimum standards that cannot be displaced, even where an enterprise agreement includes terms that have the same effect as the NES (as will be permitted by new subclause 55(5)).

Dealing with disputes

Item 12 – Clause 186

Item 13 – Clause 186

Item 17 – Clause 739

Item 19 – Clause 740

31. Under subclauses 65(5) and 76(4) of the Bill, an employer may refuse a request for flexible working arrangements or an extension to a period of unpaid parental leave on reasonable business grounds. The Bill does not permit FWA (or another person) to deal with a dispute to the extent that it is about whether an employer had reasonable business grounds under the NES (subclauses 739(2) and 740(2)).

32. These items insert legislative notes after subclauses 186(6), 739(2) and 740(2), consequential upon the amendments made by item 5, to make clear that FWA, or another person, may deal with a dispute relating to a term of an enterprise agreement that has the same or similar effect as subclauses 65(5) or 76(4) (that is, a term of an enterprise agreement that provides that a request for flexible working arrangements or to extend unpaid parental leave may be refused on reasonable business grounds).

Item 14 – Clause 738

33. Item 14 will allow FWA to deal with a dispute about the NES or a safety net contractual entitlement where the parties have agreed, not only through an enterprise agreement or contract of employment (as is currently provided), but also via any other written agreement.

Item 15 – Clause 739

34. Item 15 provides that a determination under the *Public Service Act 1999* may also authorise FWA or an alternative dispute resolution (ADR) provider to deal with a matter arising under the determination or in relation to the NES.

35. Determinations under the *Public Service Act 1999* are made by the Agency Head and a determination therefore cannot authorise FWA or an ADR provider to arbitrate a dispute. However, parties to a determination could make a written agreement to authorise an arbitrated outcome. Similarly, parties that are covered by a modern award could make a written agreement to confer arbitral powers on FWA or an ADR provider.

Item 16 – Clause 739

Item 18 – Clause 740

36. Items 16 and 18 will allow parties (which may include award/agreement free employees or award employees) to consent to FWA or an ADR provider dealing with disputes about whether an employer had reasonable business grounds under subclauses 65(5) (refusing requests for flexible working arrangements) or 76(4) (refusing extension of unpaid parental leave) of the Bill. Such consent could be provided in advance under an enterprise agreement, a contract of employment or otherwise by written agreement.

LONG SERVICE LEAVE

Item 1 – Clause 12

Item 7 – Clause 113

37. Item 7 amends the NES entitlement to long service leave. The amendment set out in this item replaces clause 113 in the Bill. Subclauses 113(1)-(3) are to the same effect as existing clause 113.

38. An employee is entitled to long service leave under clause 113 in accordance with applicable award-derived long service leave terms (subclause 113(1)).

39. This clause preserves the effect of long service leave terms in pre-modernised awards (i.e., awards as they stood immediately before commencement of the NES).

40. The legislative note after this subclause explains that the Bill does not exclude State and Territory laws dealing with long service leave, except in relation to employees entitled to long service leave under the NES.

41. To determine whether there are applicable award-derived long service leave terms, it is necessary to consider the award that would have applied to the employee's current employment if the employee had been in that employment immediately before commencement (paragraph 113(3)(a)). (This test applies to existing employees and employees that start employment after commencement of the NES.)

42. When making the assessment under paragraph 113(3)(a), the effect of the types of agreements, and other instruments, referred to in subclause 113(2) on the award-derived entitlement is ignored.

43. The fact that an employee's award-derived entitlement does not apply because of the operation of subclause 113(2) does not mean that the employee does not have an award-derived NES entitlement (and such an employee could not, for example, become covered by an agreement-derived NES entitlement under subclause 113(4)).

44. The legislative note after subclause 113(2) explains that where an agreement or instrument referred to in this subclause ceases to apply, the employee will be entitled to long service leave in accordance with any applicable award-derived long service leave terms.

45. Subclauses 113(4) to (6) are new provisions, and have been included to establish a process under which agreement-derived long service leave terms may be preserved as an employee's long service leave NES entitlement in certain limited circumstances.

46. The effect of clauses 27 and 29 of the Bill, in relation to long service leave, is that new enterprise agreements must comply with legislation in any State or Territory in which the agreement applies. This is a new requirement. Currently, long service leave can be dealt with in agreements in a way that is inconsistent with such legislation and the terms in the agreement

prevail over the State/Territory legislation. The standards that have applied in State/Territory legislation have varied over the years.

47. Some employers that operate in more than one State or Territory have developed collective agreement-based long service leave arrangements, which have been able to operate nationally.

48. The new provisions inserted by this item are intended to allow existing collective agreement-based long service leave arrangements to form an employee's NES entitlement if:

- the terms are included in a collective agreement that applies beyond a single State or Territory;
- there are no award-derived long service leave terms for the employee (meaning that State or Territory long service leave legislation would otherwise apply); and
- FWA has made an order that it is satisfied that the long service leave arrangements in the agreement are, considered overall, no less beneficial to employees than the long service leave entitlements that would otherwise apply under State or Territory law – this is intended to be a global (rather than line by line) test.

49. This mechanism is only available where such a scheme exists in a collective agreement before commencement of the NES. This approach reflects the transitional nature of the NES long service leave arrangements, which will apply pending development of a national long service leave scheme.

50. Item 1 makes a consequential amendment to insert a definition of applicable agreement-derived long service leave terms that directs readers to subclause 113(5).

Item 7 – New clause 113A

51. Item 7 also inserts a new clause 113A. Clause 113A provides for the situation where an employee is covered by a collective or individual agreement, or other specified instrument (such as a workplace determination), on commencement of the NES that expressly excludes the employee's long service leave entitlements.

52. Long service leave entitlements are based on an employee's length of service – they do not allow for 'discounting' of any periods during which an agreement or other instrument excludes the entitlement. In effect, this means that where an agreement or other specified instrument that excluded long service leave ceases to operate, the terms of the scheme then begin to apply (e.g., under State or Territory legislation) and operate to provide a full entitlement to the employee, despite the purported period of exclusion.

53. Clause 113A provides a one-off opportunity for an enterprise agreement made after commencement of the NES (referred to in clause 113A as the 'replacement agreement') to recognise in an ongoing way the effect of the exclusion of long service leave in an agreement, or other specified instrument, that applied on commencement (referred to as the 'first instrument').

It does this by allowing a replacement agreement to provide that some or all of the period of service during which the first agreement applied does not count as service for the purposes of determining long service leave entitlements.

54. In relation to this provision:

- the ability for a replacement agreement to discount periods of service does not apply where long service leave entitlements may have been excluded by implication – the exclusion must be in express terms;
- the period of service that may be discounted in an enterprise agreement may not exceed the period during which the first instrument applied (i.e., the effect of previous agreements cannot be included);
- the replacement agreement must commence immediately after the first instrument for the exclusion to have effect.

55. Where an enterprise agreement includes such a provision, the period of service is taken not to count, and never to count, for the purpose of determining long service leave entitlements under either the NES or under State or Territory law, despite clauses 27 and 29 (which provide for the continued effect of State and Territory long service leave legislation). However, a period of service that is taken never to count for calculation of long service leave entitlements can be reinstated by subsequent agreement. This agreement need not be by way of an enterprise agreement but could occur, for example, through a contract of employment.

The following summarises the operation of the long service leave (LSL) NES and the rules for how LSL is dealt with in enterprise agreements after commencement of the NES.

The LSL NES preserves pre-commencement award-derived LSL entitlements.

The LSL NES also establishes a process under which employees' agreement-derived LSL entitlements may be preserved as their NES entitlements. (The intention is to enable parties to preserve genuine and fair agreement-based national LSL schemes.)

If an employee does not have an award or agreement-derived entitlement, then applicable State and Territory LSL legislation applies. (This is the effect of the coverage provisions in the Bill – see clauses 27 and 29.)

LSL terms in agreements that are in operation at the time the NES commences are not disturbed by the commencement of the NES and will continue to apply until the agreement is terminated or replaced.

Where an enterprise agreement is made after commencement of the NES:

- the agreement cannot exclude the LSL NES, but may supplement the NES subject to the requirement that such terms not cause any detriment to an employee (see clause 55 of the Bill);
- for employees without an award or agreement-derived entitlement, enterprise agreements will operate subject to State/Territory LSL laws (see clauses 27 and 29 of the Bill).

An enterprise agreement may include terms that 'discount' the period of service that is counted for the purposes of determining long service leave entitlements in limited circumstances, namely:

- where the enterprise agreement replaces an agreement (or other specified instrument) that applied when the NES came into operation;
- where the agreement being replaced expressly excluded long service leave.

Notice of termination

Item 8 – Paragraph 117(2)(b)

56. This item replaces paragraph 117(2)(b) in the Bill to put beyond doubt that when an employer elects to pay an employee in lieu of providing notice of termination, this payment must include payments made on behalf of the employee, such as superannuation contributions.

Item 11 – Paragraph 123(3)(a)

57. This item deletes paragraph 123(3)(a) from the Bill. Paragraph 123(3)(a) had provided that an employee was not entitled to notice of termination under the NES where they had not completed a specified period of continuous service with their employer at the time of termination, or notice of termination (whichever was earlier).

58. The effect of this amendment is that all employees (unless otherwise excluded) are entitled to minimum notice of termination, irrespective of how long they have been employed.

Redundancy pay

Item 9 – Clause 121

Item 10 – Clause 121

59. This item amends clause 121 to insert additional subclauses.

60. Subclause 121(2) allows a modern award to specify situations in which clause 119 (redundancy pay) does not apply to the termination of an employee's employment.

61. Under subclause 121(3), where a modern award includes such a term, an enterprise agreement may incorporate that award term in the agreement by reference (paragraph 121(3)(a)) and the agreement may provide that the incorporated term covers some or all of the employees who are covered by the award term.

62. Item 9 amends clause 121 of the Bill as a consequence of the amendment set out in item 10.

Extended entitlements

Item 20 – Clause 758

Item 21 – Paragraph 771(c)

Item 22 – Clause 784

63. Clauses 758, 771 and 784 of the Bill set out the objects of Division 3 in Part 6-3 and Divisions 2 and 3 in Part 6-4. These objects refer to Australia's international treaty obligations.

64. The amendments made by these items make technical amendments to clauses 758, 771 and 784 to include additional references to the international standards that underpin the provisions in these Divisions.

MODERN AWARDS

Item 1 – Clause 12

Item 2 – New clause 140A

Item 3 – New clause 145A

Item 4 – Clause 154

65. This is a group of amendments to the modern awards content provisions.

Industry-specific redundancy schemes

66. Item 1 amends the definition of industry specific redundancy scheme in clause 12 of the Bill. This amendment makes clear that the full range of industry specific redundancy schemes can be included in modern awards.

Long distance transport employees

67. Item 2 enables modern awards to include terms relating to the conditions under which an employer may employ employees to undertake long distance transport work. This provision reflects concerns that certain industry specific health and safety provisions currently in State awards would not be able to be included in a modern award. For example, this clause is intended to enable a modern award dealing with long distance transport work to include terms that:

- require transport operators to develop and comply with safe driving plans;
- allow for the inspection of safe driving plans;
- require transport operators to ensure that employees undertaking long distance transport work receive safety awareness training; and
- require transport operators to develop and implement a written drug and alcohol policy.

Consultation and representation

68. The amendment in item 3 requires modern awards to include a term providing for consultation with, and representation of, employees in situations where an employer has decided to introduce major changes that are likely to have a significant effect on the employees.

State-based differences

69. Item 4 is designed to make clear that the requirement that terms of modern awards be expressed to operate in each State and Territory, does not necessarily mean that the terms will always have effect in each State or Territory because of circumstances specific to that State or Territory.

- For example, a modern award could contain a provision that allowed for the payment of a remote location allowance or tropical allowance even if such a provision would not have effect in a particular State or Territory.

MINIMUM WAGES

Operation of national minimum wage orders

Item 5 – Clause 287

70. Clause 287 provides that national minimum wages orders to come into operation on 1 July each year. There is no capacity for the effect of an order to be delayed.

71. Item 5 provides FWA with a limited capacity to set different wages or casual loadings in the national minimum wage order and to delay the commencement of wage variations. FWA is only able to do this where there are exceptional circumstances, and only to the extent that is necessary because of the particular situation to which the exceptional circumstances relate.

72. The effect of this provision is that, although generally the national minimum wage and casual loading included in the minimum wage order must be set at the same level for all employees and variations in wage rates commence on 1 July, FWA may provide a different rate, or for variations to take effect later in the financial year, where exceptional circumstances justify this. The scope for any such different treatment is limited, and must not extend beyond the scope of the exceptional circumstances.

73. Similar provision is made in relation to classes or subclasses of employees to whom special national minimum wages apply. However, this provision does not limit the capacity of FWA to set different rates for different classes of employees covered by a special national minimum wage. So, for example, FWA will be able to:

- set different rates for different classes of junior employees (e.g., based on age or experience);
- provide that different pay rates apply to employees undertaking different classes of training arrangement; and
- provide a method for calculating wage rates for disabled workers that takes account of productive capacity,
- without being required to find that exceptional circumstances exist.

Publication of submissions

Item 6 – Clause 289

74. Item 6 amends clause 289 (which requires FWA to publish submissions made to an annual wage review). These amendments provide FWA with discretion as to how it publishes submissions received as part of an annual wage review where submissions contain confidential

or commercially sensitive information. This will enable FWA to publish submissions in a way that does not disclose confidential or commercially sensitive information.

EQUAL REMUNERATION

Item 7 – Clause 306

75. The amendment in this item clarifies the intended relationship between equal remuneration orders and modern awards, enterprise agreements and FWA orders.

76. An equal remuneration order will prevail over a term of a modern award, an enterprise agreement or an FWA order, to the extent that the term of the modern award, enterprise agreement or FWA order is less beneficial to the employee than the equal remuneration order.

PAYMENT OF WAGES

Item 8 – Clause 324

Item 9 – Clause 324

77. These items amend clause 324 of the Bill to provide additional protections for employees when authorising deductions from their wages.

78. The amendments made by these items require an employee authorisation to specify the amount of the deduction, and require any variation to the amount of the deduction to be authorised by the employee in writing.

79. The amendments also make clear that an authorisation may be withdrawn in writing by the employee at any time.

Item 10 – Clause 326

Item 11 – Clause 326

80. These amendments extend the protection provided by clause 326 of the Bill. Clause 326 provides that certain terms of a modern award, enterprise agreement or contract of employment that allow an employer to deduct an amount from an employee's wages, or require an employee to make a payment to an employer or another person, are of no effect.

81. The amendments ensure that a term of a modern award, enterprise agreement or contract of employment will be of no effect if either of the following applies:

- the deduction or payment is for the benefit of the employer, or a party related to the employer, and is unreasonable in the circumstances; or
- an employee is under 18 and the employee's parent or guardian has not agreed, in writing, to the deduction.

82. Even if the employee's parent or guardian consents to the deduction, it may still be of no effect if it is an unreasonable deduction for the benefit of the employer, or a party related to the employer.

HIGH INCOME THRESHOLD

Item 12 – Clause 333

Item 13 – Clause 333

83. Clause 333 of the Bill provides that the high income threshold is the amount prescribed by, or worked out in the manner prescribed by, the regulations. It is intended that the high income threshold will be \$100,000 per annum for full time employees, indexed from 27 August 2007 (the date this policy was announced) and then annually from 1 July each year.

84. The amendments made by these items ensure that the amount of the high income threshold cannot be reduced from one year to another.

85. A regulation will have no effect to the extent that it would reduce the amount of the high income threshold (proposed subclause 333(2)).

86. If the calculation of the high income threshold in the manner prescribed in the regulations would result in a reduction in the amount of the threshold, the high income threshold is taken to be the same as the amount of the threshold in the previous year.

GUARANTEE OF ANNUAL EARNINGS

Item 14 – New clause 333A

87. This item inserts a new provision which ensures that a prospective employee may be offered and may accept a guarantee of annual earnings before commencing employment.

88. An employer or prospective employer must comply with all of the requirements in relation to a guarantee of annual earnings as if the prospective employee were an employee. However, an employer's obligations under a guarantee will not take effect until the prospective employee commences employment with the employer.

OUTWORKERS

Designated outworker terms

Item 1 – Clause 12

Item 5 – New clause 57A

Item 7 – Clause 186

Item 9 – Clause 253

Item 10 – Clause 272

89. This group of amendments enhances protection for outworkers in the textile, clothing and footwear (TCF) industry. These amendments acknowledge the unusual nature of longstanding provisions in the TCF industry award in relation to outworkers.

90. The award creates a regulatory framework that applies to employers and other entities that arrange for work to be carried out by employee and non-employee outworkers. The obligations include record keeping in relation to these arrangements and ensuring claims for payment can be recovered from outworker entities that do not themselves directly employ or engage outworkers. In addition, the award extends minimum terms and conditions to non-employee outworkers.

91. These provisions are maintained in the modern award (see Schedule D to the *Textile, Clothing, Footwear and Associated Industries Award 2010*).

92. This group of amendments has the effect that designated outworker terms (most outworker terms relating to TCF outworkers) cannot be modified in bargaining. The effectiveness of these terms depends on them applying uniformly to all employers and other entities covered by the award. If particular employers could modify or remove them in bargaining, the protections for workers in the industry would be undermined.

93. Clause 57 of the Bill provides that an enterprise agreement displaces a modern award in relation to an employer and employee. It displaces the modern award for an outworker employee but the employee must have the protection of non-detrimental outworker terms in the enterprise agreement (see clause 200).

94. Item 5 adds clause 57A to the Bill to make an exception to clause 57 in relation to designated outworker terms in a modern award. It provides that designated outworker terms continue to apply to an employer even where an enterprise agreement applies to the employer (and to the employees to whom the enterprise agreement applies and the organisations covered by the modern award). Coupled with this, items 7 and 9 amend clauses 186 and 253 of the Bill to provide, in effect, that an enterprise agreement cannot include designated outworker terms.

95. Designated outworker terms are terms that relate to outworkers in the TCF industry that regulate minimum work conditions of contract outworkers, that regulate liabilities of employers and outworker entities in relation to outwork or that impose conditions in relation to giving out work of a kind often performed by outworkers (see the definition to be added to clause 12 by

item 1). Designated outworker terms cover the sort of terms that are proposed to be included in the modern award for the TCF industry relating to outworkers, with the exception of terms that regulate conditions of employee outworkers directly in the traditional way in which awards provide conditions to employees.

96. The effect of clause 57A and amended clauses 186 and 253 is that designated outworker terms in a modern award cannot be bargained away and continue to apply to an employer despite entry into an enterprise agreement. An employer therefore remains subject to any obligations under the designated outworker terms in relation to employee outworkers with whom the employer has made an enterprise agreement. The employer also remains subject to award obligations in relation to others of the employer's employees who are outworkers and any award obligations imposed on the employer in its capacity as an outworker entity in relation to contract outworkers or outworkers employed by another employer.

97. Item 10 amends clause 272 of the Bill to make complementary provision in relation to workplace determinations. A workplace determination cannot include designated outworker terms and there can therefore be no question of displacement of those terms by a workplace determination.

Definition of outworker and outworker entity

Item 2 – Clause 12

98. This item makes a technical amendment to the definition of outworker entity to clarify the link required with work in a Territory.

Item 3 – Clause 27

99. Paragraph 27(2)(d) preserves the operation of State and Territory laws dealing with matters relating to outworkers. This item gives the term outworker its ordinary meaning (which is broader than the definition of outworker in clause 12 of the Bill) to give State and Territory laws in this area broader scope to operate.

Description of outworker terms

Item 6 – Clause 140

100. This item amends the definition of outworker terms in clause 140 of the Bill. The amendment provides greater clarity about the terms that may be included in a modern award.

101. An award may include terms relating to the conditions under which an outworker entity may arrange for work to be performed for the entity (either directly or indirectly) where the work is of a kind that is often performed by outworkers.

102. In order for such a term to apply to an outworker entity, it is not necessary for the entity to know or intend that work will actually be undertaken by an outworker; nor is it necessary that work for the particular entity is likely to be performed by outworkers. Rather, all that is required is that the work is of a kind that is normally undertaken by outworkers.

Enterprise agreement outworker terms

Item 8 – Clause 200

103. Clause 200 of the Bill requires outworker terms to be included in an enterprise agreement that covers an outworker employee where a modern award that covers the employee includes outworker terms. The terms of the enterprise agreement cannot be detrimental to the employee compared with the outworker terms in the modern award.

104. This amendment clarifies that the agreement cannot be detrimental to the employee in any respect, and not just better off overall, when compared with the award. The amendments in relation to designated outworker terms (see items 1, 5, 7, 9 and 10 above) mean that, in any case, certain outworker terms may not be included in enterprise agreements.

Enforcement

Item 4 – Clause 46

Item 13 – Clause 548

Item 14 – Clause 548

Item 17 – Clause 682

Item 11 – Clause 545

Item 12 – Clause 547

Item 15 – Clause 679

Item 16 – Clause 682

105. This group of amendments ensure that modern award terms that deal with outworkers can be enforced in the same ways as terms dealing with employees by providing that:

- modern award terms that deal with outworkers can be enforced through small claims proceedings;
- outworkers can be represented in proceedings by the FWO; and
- outworker entities can be ordered by eligible State or Territory courts to pay amounts (including interest) to, or on behalf of, outworkers if such amounts were payable under a modern award and were not paid in breach of a civil remedy provision.

106. Clause 46 of the Bill deals with when an award applies to an employee. Modern award terms do not directly ‘apply’ to contract outworkers (as the terms impose obligations on outworker entities in relation to such outworkers). However, outworkers have standing to enforce such terms under Part 4-1. An amendment to the note under clause 46 makes this clear.

GREENFIELDS AGREEMENTS

107. This group of items provides for amendments to the Bill in relation to greenfields agreements. These items:

- remove the requirement that employers notify relevant employee organisations of their intention to make a greenfields agreement;
- remove the provisions that would enable bargaining representatives be appointed in relation to greenfields agreements;
- make clear that an employer does not have to make a greenfields agreement with all relevant employee organisations;
- clarify the operation of the better off overall test in respect of greenfields agreements, ensuring consistency with the application of the test to non-greenfields agreements;
- insert additional approval requirements for greenfields agreements to ensure these agreements are made by organisations that represent the majority of the relevant employees and are in the public interest.

108. The remaining amendments proposed by this Schedule are consequential to these measures.

Item 1 – Clause 12, definition of appointment

Item 2 – Clause 12, definition of bargaining representative

109. These items are minor technical amendments consequential to item 6 which omits clause 177.

Item 3 – Clause 172

Item 4 – Clause 172

110. These items amend subparagraphs 172(2)(b)(ii) and 172(3)(b)(ii) to clarify that an employer or employers can make a greenfields agreement where they have employed employees in relation to a genuine new enterprise, provided those employees will not be covered by the greenfields agreement.

111. For example, an employer may employ a manager to assist in the start-up of the enterprise who would not be covered by an agreement. This amendment makes clear that a greenfields agreement can be made in situations such as these.

Item 5 – Clause 175

112. This item omits clause 175 with the effect that there will no longer be a requirement for an employer to notify relevant employee organisations of the employer's intention to make a greenfields agreement.

Item 6 – Clause 177

Item 7 – Paragraph 178(2)(b)

Item 8 – Paragraph 178(2)(c)

113. Item 6 omits clause 177 with the effect that bargaining representatives are no longer to be appointed in relation to greenfields agreements. Items 7 and 8 are technical amendments consequential to the removal of clause 177 by item 6.

Item 9 – Subclause 182(3)

114. This item amends subclause 182(3) to clarify that an employer is not required to make a greenfields agreement with all the relevant employee organisations.

Item 10 – Subclause 182(4)

115. This item is an amendment consequential to the omission of clause 175 by item 5.

Item 11 – Clause 185

116. This item inserts a new subclause 185(1A) into the Bill to make clear that an application for FWA's approval of a greenfields agreement must be made by either an employer or a relevant employee organisation covered by the agreement. This amendment is consequential on the fact that there will no longer be bargaining representatives for greenfields agreements.

Item 12 – Clause 187

117. This item inserts a new subclause 187(5) that contains additional requirements in relation to greenfields agreements about which FWA must be satisfied before it approves the agreement. The requirements are that:

- the relevant employee organisations that will be covered by the agreement are (taken as a group) entitled to represent the industrial interests of a majority of the employees in relation to work to be performed under the agreement; and
- it is in the public interest to approve the agreement.

118. In assessing the public interest, it would be expected that FWA would take into account the objects of the Act, and the need to ensure that the interests of employees who are to be employed under the agreement are appropriately represented.

Item 13 – Clause 193

119. This item amends subclause (3) of clause 193 to clarify that a greenfields agreement will pass the better off overall test if FWA is satisfied that each prospective employee would be better off overall under the agreement. This amendment ensures that the same test applies in respect of greenfields agreements as applies to agreements that are not greenfields agreements.

Item 14 – Subclause 207(4)

120. This item amends subclause 207(4) to ensure that a greenfields agreement can only be varied where one or more persons have been employed and are covered by the agreement.

Item 15 – Subclause 219(3)

121. This item amends subclause 219(3) to ensure that a greenfields agreement can only be terminated by agreement where one or more persons have been employed and are covered by the agreement.

AGREEMENTS

Better off overall test

Item 1 – Clause 193

122. This item inserts subclause 193(7) into the Bill to clarify how the better off overall test operates. Subclause 193(7) ensures that in satisfying itself that each employee is better off overall FWA may consider the circumstances of classes of employees. Subclause 193(7) establishes an evidentiary presumption that, in the absence of any evidence to the contrary, the better off overall test does not require FWA to enquire into each employee's individual circumstances.

123. Subclause 193(7) is intended to recognise that, although the enterprise agreement must pass the better off overall test in relation to each employee and prospective employee, FWA may group employees into classes in order to apply the test. It ensures that the test provides a guarantee that the agreement does not undercut the safety net but is also able to be applied by FWA efficiently and without causing undue delay in the agreement approval process.

124. The phrase 'class of employees' is intended to refer to a group of employees covered by the enterprise agreement who share common characteristics that enable them to be treated as a group when FWA applies the better off overall test. An example is where the employees are in the same classification, grade or job level, with the same working patterns.

Illustrative Example

Wreck Resolve Limited (WRL) is a chain of automotive repairers. WRL makes an enterprise agreement that covers employees working in its workshops and head office. WRL seeks approval of the agreement from FWA. Amongst the employees covered by the agreement are mechanics of different levels of qualification whose classifications under the agreement align with three classifications in the relevant modern award. The agreement covers employees within each of these classifications in the same way. Accordingly, all of the employees falling within each classification may be considered as a 'class of employees' by FWA when it assesses whether the agreement passes the better off overall test. In the absence of any evidence to the contrary, FWA is not therefore required to enquire into the individual circumstances of each employee within the class.

Variation of enterprise agreements

Item 2 – Subclause 207(5)

125. This item omits subclause 207(5). The effect of this amendment is that an agreement that does not pass the better off overall test but is approved by FWA under clause 189 of the Bill will be able to be varied. The agreement as varied will be required to pass the better off overall test.

Item 3 – Clause 211

Item 4 – Clause 211

126. Item 2 omits paragraph 211(1)(c) and inserts a new clause to ensure that when considering whether to approve a variation to an agreement FWA must not do so if there are serious public interest grounds for not approving the variation. Item 3 is consequential to the removal of paragraph 211(1)(c).

Item 5 – Clause 211

Item 6 – Clause 211

Item 7 – Clause 211

127. Item 7 inserts subclause 211(3)(ha) to clarify that when considering whether to approve an application for variation of an agreement FWA must consider whether the enterprise agreement as proposed to be varied, rather than the variation itself, passes the better off overall test and does not contravene the NES.

128. These items also include technical amendments to clarify the modification requirements in clause 211 in light of this change.

Item 8 – New clause 217A

129. This item inserts clause 217A into the Bill to provide a mechanism for FWA to deal with disputes about a proposed variation to an enterprise agreement. The good faith bargaining requirements do not apply to bargaining in respect of a variation of an enterprise agreement. This clause provides a mechanism whereby an employer or employee organisation covered by the agreement or an affected employee for the variation can seek assistance from FWA if the employer and affected employees are unable to resolve a dispute about the proposed variation. FWA may deal with such a dispute by mediation or conciliation or by making a recommendation or expressing an opinion (see clause 595). However, FWA must not arbitrate the dispute.

Description of employees

Item 9 – New clause 256A

130. This item inserts clause 256A into the Bill to clarify how employees, employers and employee organisations are to be described in instruments referred to in Part 2-4 (Enterprise Agreements). The amendment clarifies that when a provision of Part 2-4 requires or permits an instrument to specify the employees covered by an enterprise agreement or other instrument, the employees may either be specified by class or by name. This is a technical amendment to ensure that the provisions do not require employees to be individually named.

131. The item also makes clear that where a provision requires an employer or employee organisation to be specified, the employer or employee organisation must be specified by name.

BARGAINING

132. This group of items sets out amendments to the Bill in relation to the bargaining process. The key amendments:

- specifically provide for the revocation of the appointment of bargaining representatives;
- remove the civil penalty provision in clause 179 of the Bill and instead insert into the good faith bargaining requirements in clause 228 a requirement that bargaining representatives recognise and bargain with other bargaining representatives for an agreement;
- amend the operation of the ‘fairly chosen’ criterion in majority support determinations and scope orders to require FWA to be satisfied in all cases that the group of employees is fairly chosen.

133. The remaining items in this group are consequential to these changes or deal with technical amendments relating to other aspects of the bargaining process.

Bargaining representatives

Item 2 – Clause 176

Item 3 – Clause 176

134. These items amend subclauses 176(1) and (2) respectively to reflect that an employee organisation cannot be a bargaining representative for an employee if the employee has notified the employer under new clause 178A that the organisation is not his or her bargaining representative.

Item 4 – New clause 178A

135. This item inserts new clause 178A into the Bill to specifically provide that an employee or employer can revoke the appointment of their bargaining representative for an enterprise agreement by written instrument.

136. Subclause 178A(2) provides that if an employee organisation is a bargaining representative for an employee because of the operation of paragraph 176(1)(b) or subsection 176(2), the employee may revoke by written instrument that organisation’s status as the employee’s bargaining representative.

137. Subclause 178A(3) requires an employee to provide a copy of the revocation instrument to the employer. If an employer revokes the appointment of its bargaining representative, the revocation instrument must be given to the bargaining representative and on request to a bargaining representative of an employee.

138. Subclause 178A(4) enables the regulations to prescribe matters relating to the content or form of the instrument of revocation or the manner in which the copy of the instrument may be given.

Good faith bargaining

Item 5 – Clause 179

139. This item omits clause 179. The obligation for an employer not to refuse to recognise or bargain with another bargaining representative for a proposed enterprise agreement will instead be included as a good faith bargaining requirement in subclause 228(1). The key consequence of this is that the obligation will apply to bargaining representatives generally (see item 7).

Item 7 – Clause 228

140. This item inserts an additional good faith bargaining requirement in subclause 228(1), being the requirement that a bargaining representative must recognise and bargain with other bargaining representatives for a proposed enterprise agreement.

Item 13 – Clause 539, table item 5

141. This item removes the reference to clause 179 from the table of civil remedy provisions that is set out in clause 539. This amendment is consequential to item 5 which omits clause 179.

Fairly chosen

Item 6 – Subclause 186(3)

142. This item omits subclause 186(3) of the Bill and substitutes two further subclauses that require FWA to be satisfied that before approving an enterprise agreement, first, the group of employees covered by the agreement was fairly chosen and second, that if the agreement does not cover all of the employer's employees, FWA must, in deciding whether the group of employees was fairly chosen, take into account whether the group of employees is geographically, operationally or organisationally distinct.

Item 9 – Clause 237

Item 10 – Clause 237

Item 11 – Clause 238

Item 12 – Clause 238

143. Item 9 omits paragraph 237(2)(c) and substitutes a new paragraph requiring FWA to be satisfied before making a majority support determination that the group of employees to be covered by the proposed enterprise agreement was fairly chosen. Item 10 inserts new subclause 237(3A), which provides that if the proposed agreement will not cover all of the employer's employees, FWA must take into account whether the group of employees is geographically, operationally or organisationally distinct in deciding whether the group of employees was fairly chosen.

144. Items 11 and 12 make similar changes in relation to the matters of which FWA is required to be satisfied before it makes a scope order under clause 238. Item 11 also makes clear that the agreement being referred to is the one that is the subject of the scope order, not the one that triggered the application.

Other technical amendments

Item 1 – Clause 174

145. This item inserts a new subclause in clause 174 to enable the regulations to prescribe other matters relating to the content or form of the notice of employee representational rights or the manner in which employers may give the notice to employees.

Item 8 – Clause 229

146. This item is a technical amendment that omits subclause 229(5) and substitutes a new subclause that makes clear that FWA may consider an application for a bargaining order even if the application does not comply with paragraph 229(4)(b) or (c) if FWA is satisfied it is appropriate in the circumstances to do so.

TRANSFER OF BUSINESS

Item 1 – Clause 318

Item 2 – Clause 319

147. These items amend paragraphs 318(3)(d) and 319(3)(d) of the Bill by inserting additional matters that FWA must take into account when deciding whether to make an order under subclauses 318(1) and 319(1). These items are intended to ensure that, in deciding what instruments should cover the new employer and its employees, FWA has regard to the new employer's situation as well as the existing factors in subclauses 318(3) and 319(3) (such as whether employees would be disadvantaged). This includes the efficient operation of the new employer's enterprise and the degree of fit between any transferable instrument and arrangements that already exist in the new employer's enterprise.

Illustrative example

Albury-Wodonga Banking Corporation (ABC) employs a number of employees to maintain its IT systems. The employees are covered by the ABC Award (a named employer award). That is, the award covers banking work generally as well as ABC's IT staff.

ABC decides to outsource the maintenance of its IT systems to Sydney Tech Systems (STS), a general IT services company. STS agrees to offer employment to certain employees of ABC who performed the maintenance work in-house. STS is covered by an enterprise agreement that relates specifically to IT services.

Clause 313 has the effect that ABC's award will cover STS and the transferring employees. However, STS makes an application to FWA under clause 318 for an order that ABC's award not cover it or the transferring employees and that STS's enterprise agreement cover the transferring employees instead. In deciding whether to make the order, FWA is required to consider, among other things, the degree of 'business synergy' between ABC's award and STS's existing instruments. FWA is also required to consider whether the employees would be disadvantaged. Although the terms and conditions in STS's enterprise agreement are different from those in the ABC Award, overall, the employees would not be disadvantaged. Therefore, FWA decides to make the order sought by STS for reasons including that ABC's award, which is focused on applying to banking work, is less suitable to the work performed by the transferring employees than STS's enterprise agreement.

Item 3 – Clause 320

148. This item amends subclause 320(2) to insert an additional ground on which FWA may vary a transferable instrument. This item permits FWA to vary a transferable instrument to enable it to operate in a way that is better aligned to the working arrangements of the new employer's enterprise.

Illustrative example

Wood Weather Systems Pty Ltd (Wood) acquires the business of Fahrenheit Co and offers employment to employees of Fahrenheit Co. These employees were covered by the Fahrenheit Co Enterprise Agreement (Agreement). The Agreement provides that employees' ordinary hours are 37½ hours each week. Wood's existing employees all work ordinary hours of 38 hours each week. Wood applies to FWA to vary the term of the Agreement dealing with ordinary hours so that the transferring employees can work ordinary hours of 38 hours a week, to enable them to be better integrated into Wood's business. Wood also proposes that the pay rates under the Agreement be adjusted to reflect the slightly longer working week. FWA agrees to the proposed variations because it better aligns the terms of the Agreement to the working arrangements in place at Wood.

Item 4 – Clause 320

149. This item amends clause 320 to include additional matters that FWA must take into account when deciding whether to make a variation under subclause 320(1). This is intended to ensure that FWA has regard to the new employer's financial position, the efficient operation of the new employer's enterprise and the degree of fit between any transferable instrument and arrangements that already exist in the new employer's enterprise.

INDUSTRIAL ACTION

150. Part 3-3 of the Bill deals with industrial action, including processes for protected action ballots, and restrictions on payments to employees relating to periods of industrial action (strike pay). The key items in this group of amendments:

- make clear that industrial action is not protected if it occurs whilst a serious breach declaration is in operation;
- amend clause 426 of the Bill to modify the threshold that FWA is to apply when considering whether to suspend protected industrial action because the action is threatening to cause significant harm to a third party; and
- amend the strike pay provisions to clarify the operation of the rules about deduction of pay in the context of overtime bans and partial work bans.

The remaining amendments are technical in nature.

Meaning of employee claim/employer response action

Item 1 – Clause 12

Item 2 – Clause 12

151. These items amend the meaning of employee claim action and employee response action by including a cross-reference to paragraphs 471(4A)(c) and (d) respectively. They are consequential to the amendment proposed by item 19.

Item 3 – Clause 19

152. This item inserts a legislative note at the end of clause 19 to make clear to the reader that in this clause (which defines the meaning of industrial action) employer and employee are to have their national system meanings.

Protected industrial action

Item 4 – Subclause 409(1)

Item 5 – Subclause 409(1)

153. These items are technical amendments to subclause 409(1) to clarify that the industrial action organised or engaged in for the purpose of supporting or advancing claims must only be about, or reasonably believed to only be about, permitted matters.

Item 7 – Subclause 413(7)

Item 8 – Subclause 413(7)

154. Items 7 and 8 are technical amendments to subclause 413(7) to clarify that if the order or declaration suspends or terminates any protected industrial action in relation to the agreement then no other action can be engaged in during that time.

Item 6 – Subclause 413(7)

Item 9 – Subclause 413(7)

155. Item 9 inserts a new paragraph 413(7)(c) into the Bill to ensure that industrial action will not be protected if a serious breach declaration made by FWA under clause 235 is in operation in relation to the proposed enterprise agreement. Item 6 is a technical amendment consequential to item 9.

Item 10 – Subclause 417(2)

Item 11 – Subclause 417(2)

156. These items are technical amendments to subclause 417(2) to provide that the subclause identifies persons ‘covered’ by the agreement or determination.

Item 12 – Clause 426

Item 13 – Clause 426

Item 14 – Clause 426

157. These items amend clause 426 to modify the threshold that is necessary for threatened harm before FWA must make an order suspending the protected industrial action. More particularly, these items amend subclause 426(4) so that the matters FWA may take into account when considering if the action is threatening to cause significant harm include the extent to which the action threatens to:

- damage the ongoing viability of an enterprise carried on by a person;
- disrupt ‘for an extended period’ the supply of goods or services to an enterprise;
- ‘significantly’ reduce the person’s capacity to fulfil a contractual obligation; or
- cause other ‘serious’ economic loss to a person.

Item 15 – Clause 426

158. This item inserts new subclause 426(4A), which requires that where industrial action is threatening to cause significant harm to a third party, that harm must be imminent.

Protection action ballot orders

Item 16 – Subclause 438(1)

159. This item is a technical amendment to subclause 438(1) to provide that it operates if one or more enterprise agreements ‘cover’ the employees.

Non-payment for overtime bans

Item 17 – Subclause 470(4)

160. This item is a technical amendment that restructures subclause 470(4) of the FW Bill (that deals with protected overtime bans) to make its operation clearer. That subclause provides

that a deduction may only be made under the provisions in relation to ‘a period of overtime to which the ban applies’ (i.e., a period of overtime an employee is required or requested to work, but refuses to work because of the imposition of protected overtime bans). This means that no deduction may be made from ordinary time earnings.

161. Additionally the prohibition on the payment of strike pay does not apply if the employee refuses to work overtime under an applicable modern award, enterprise agreement or contract of employment. For example, a term of an agreement might allow an employee to decline a request to work overtime on the ground of family responsibilities. If an employee declines to work overtime and complies with that term, the prohibition on the payment of strike pay does not apply because the employee has not engaged in industrial action.

Item 18 – Clause 471

162. This item substitutes a new paragraph 471(4)(c) which deals with non-payment for protected partial work bans.

163. The provision currently provides that an employer may withhold payments from an employee (who engages in protected partial work bans) in relation to an industrial action period, providing that the employer has given the employee a valid notice of non-payment (subclause 471(4)).

164. The amendment makes it clear that, in these circumstances, payments may only be withheld for the industrial action period if the employer gives the employee a written notice stating that, because of the ban:

- the employee will not be entitled to any payments; and
- the employer refuses to accept the performance of any work by the employee until the employee is prepared to perform all of his or her normal duties.

165. It is intended that an employer’s refusal to accept the employee’s work in these circumstances would not constitute industrial action.

Item 19 – Clause 471

166. This item inserts a new subclause 471(4A) which is consequential to the amendments made by item 18.

167. The amendment specifies an employee’s legal status during a period of non-payment under subclause 471(4). For that period, the failure or refusal of an employee to attend for work, or perform any work (i.e., not just the banned duties) if he or she does attend for work, would be either:

- employee claim action—even if it does not satisfy ballot and notice requirements under subclauses 409(2) and 413(3) respectively; or

- employee response action—even if it does not satisfy ballot requirements under subclause 413(4),

depending on the nature of the original protected partial work bans. In effect, the employee's refusal or failure would be taken to be a continuation of the original protected industrial action.

Item 20 – Clause 474

168. This item is a technical amendment that clarifies the application of the strike pay rules for overtime bans that are not protected industrial action (by inserting new subclause 474(2A)).

169. In particular, the new subclause clarifies that the total duration of the industrial action (i.e., for which payment must be withheld) is, or includes, any period of overtime that an employee has been required or requested to work, but has refused to work, pursuant to an unprotected overtime ban. If payment must be withheld for the minimum period of four hours on a day (i.e., under paragraph 474(1)(b)), then that period would include any period of overtime an employee has been required or requested to work, but has refused to work, pursuant to an overtime ban that is not protected. For example, if an employee refuses to work two hours' overtime on a day (when requested by their employer) pursuant to an overtime ban that is not protected, then the employer must withhold payments for that two-hour overtime period, plus a further two hours (taking the deduction to the minimum four hours' pay).

Protected industrial action

Item 21 – Clause 539, item 14

170. This item is a technical amendment to clause 539, item 14, paragraph (c), second column to provide that it is the employee organisation 'covered' by the enterprise agreement or workplace determination concerned that has standing in respect to clause 417. Item 21 is consequential on items 7 and 8.

RIGHT OF ENTRY: TCF OUTWORKERS

171. These amendments are intended to ensure that permit holders who are entitled to represent workers in the textile, clothing and footwear (TCF) industry can enter premises for investigation or discussion purposes.

172. In particular, these changes acknowledge the need to ensure the effective operation of longstanding provisions in awards applying in the TCF industry (which are maintained in the modern award – see Schedule D to the *Textile, Clothing, Footwear and Associated Industries Award 2010*).

Item 17 – New Subdivision AA of Division 2 of Part 3-4

173. The Bill currently allows permit holders to enter workplaces to investigate a suspected breach of the FW Bill or a fair work instrument if the breach relates to a member who works on the premises. In the TCF industry permit holders may not be able to meet these requirements due to the low rate of union membership amongst TCF workers and not knowing whether a TCF outworker performs work on the premises.

174. The nature of the TCF outworker industry means that investigating a breach will invariably require entry to premises other than where TCF workers perform work (e.g., where relevant documents may be kept).

175. Item 17 inserts a new Subdivision AA in Division 2 of Part 3-4 of the Bill to address these issues.

176. New clause 483A sets out particular rights of entry to premises for contraventions that relate to TCF outworkers. There are two types of entry set out in this clause.

177. The first is set out in paragraph 483A(1)(a) and is to investigate a suspected contravention of the Bill or a term of a fair work instrument where the contravention relates to or affects a TCF outworker who performs work on the premises.

178. The second is set out in paragraph 483A(1)(b) and is to investigate a suspected contravention of a designated outworker term that is in an instrument that relates to TCF outworkers.

179. The types of entry are dealt with separately as entry to investigate a suspected contravention of a designated outworker term does not require the permit holder to have a reasonable suspicion that a contravention has occurred or is occurring or have the burden of proving a suspicion is reasonable. These requirements do apply to entry under paragraph 483A(1)(a) and are set out in subclauses 483A(2) and (3).

180. Designated outworker term will be defined in clause 12 – see item 1 in PY414 (Outworkers).

181. In both types of entry under this clause the permit holder's organisation must be entitled to represent the industrial interests of TCF outworkers. However, entry under paragraph 483A(1)(b) would not require the presence or identification of a particular outworker. This recognises the fact that designated outworker terms in the TCF award create a regulatory framework that applies to employers and other entities that arrange for work to be carried out by employee and non-employee outworkers. Some of these obligations are imposed irrespective of whether a particular employer or entity directly engages or employs outworkers.

182. Subclause 483A(5) defines designated outworker terms entry as meaning entry provided for in paragraph 483A(1)(b) to investigate a suspected contravention of a designated outworker term. This term is used in various other clauses to refer to entry under paragraph 483A(1)(b).

183. Clause 483B sets out the rights a permit holder can exercise once on premises. These rights are the same as those that can be exercised by permit holders entering premises to investigate suspected contraventions under clause 482 (as proposed to be amended).

184. An occupier of premises or an affected employer who is required by a permit holder to allow the inspection and copying of records or documents must comply with that requirement (see subclause 483B(4)). This subclause is a civil remedy provision under Part 4-1 (Civil remedies).

185. Subclause 483B(3) sets out who is an affected employer in relation to the types of entry onto premises authorised by clause 483A. Generally, a person is an affected employer in relation to TCF outworker entry if:

- she or he employs a TCF outworker whose industrial interests the permit holder's organisation is entitled to represent;
- the TCF outworker performs work on the premises; and
- the suspected contravention relates to or affects the TCF outworker.

186. However, for a designated outworker terms entry, a person is an affected employer if she or he is covered by a TCF award. This reflects the distinctive nature of investigating such terms, particularly the fact that a person who has obligations under the award and holds relevant documents may not be in any direct employment or contractual relationship with any relevant TCF outworkers.

187. Clause 483C allows a permit holder to require an occupier or affected employer to provide documents or records at a later time - i.e., after the permit holder has visited the premises. This provision generally replicates the rights and requirements regarding later access to records or documents set out in existing clause 483. However, the rights and requirements set out in clause 483C also apply to occupiers of premises to address the fact that, for TCF outworker entry, there may not always be an affected employer who holds the relevant documents.

188. Clause 483D authorises entry to premises where TCF outworkers do not work but at which documents that are directly relevant to a suspected contravention affecting TCF outworkers are kept. This right of entry to ‘other’ premises is required because TCF outworkers may work at premises other than an employer’s place of business, where documents relevant to the suspected contravention may be kept.

189. In order to be able to enter other premises under clause 483D, a permit holder must meet the requirements for entry onto premises under paragraph 483A(1)(a). The permit holder must also reasonably suspect that records or documents that are directly relevant to the suspected contravention relating to a TCF outworker are kept on the other premises, or are accessible from a computer that is kept on those premises.

190. While on the other premises, the permit holder can require the occupier of the premises to give him or her access to the records or documents (subclause 483D(2)), unless the documents or records are protected by another law of the Commonwealth or a law of a State or Territory (subclause 483D(3)).

191. Subclause 483D(4) is a civil remedy provision which provides that the occupier must comply with a requirement to provide documents or records.

192. Clause 483E allows a permit holder to require the occupier of those other premises to provide documents or records that are directly relevant to a suspected contravention at a later time after the permit holder has visited the other premises. This provision generally replicates the rights and requirements regarding later access to records or documents set out in clause 483C.

193. It is important to note that clauses 483D and 483E operate subject to clause 493 which prevents a permit holder from entering premises used mainly for residential purposes.

194. The mandatory requirements applying to permit holders when exercising or attempting to exercise rights in Subdivision C of Division 2 apply to entry under new Subdivision AA.

Item 1 – clause 12

Item 4 – clause 12

Item 5 – clause 12

Item 6 – clause 12

Item 7 – clause 478

Item 8 – clause 478

Item 9 – clause 480

195. These amendments are consequential to the general TCF outworker right of entry amendments.

196. Items 5 and 6 insert two new definitions in clause 12. The definition of TCF award refers to an instrument prescribed by the FW regulations. It is intended that the *Textile, Clothing, Footwear and Associated Industries Award 2010* will be prescribed.

197. The definition of TCF outworker refers to persons who perform work that is within the scope of a TCF award. This ensures that the TCF-specific entry right exists only with respect to employers within the TCF industry.

Item 38 – Clause 518

198. This amendment provides specific entry notice requirements for entry to investigate suspected contraventions relating to TCF outworkers. The different requirements are based on the circumstances of the specific types of TCF outworker entry.

199. In particular, as designated outworker terms entry under clause 483A does not require the presence of a particular outworker at the premises, the entry notice only needs to contain a declaration by the permit holder that his or her organisation is entitled to represent the industrial interests of TCF outworkers in general (see paragraph 518(2)(cb)).

Item 19 – Clause 484

Item 20 – Clause 486

Item 21 – Clause 487

Item 22 – Clause 487

Item 23 – Clause 489

Item 24 – Clause 489

Item 25 – Clause 489

Item 26 – Clause 489

Item 27 – Clause 490

Item 28 – Clause 490

Item 30 – Clause 502

Item 35 – Clause 518

Item 36 – Clause 518

Item 37 – Clause 518

Item 39 – Clause 518

Item 40 – Clause 518

Item 41 – Clause 518

Item 42 – Clause 519

Item 43 – Clause 519

Item 44 – Clause 539

200. These amendments are consequential to the general TCF industry amendments to Part 3-4 of the FW Bill. They ensure that the entry rights conferred on officials of organisations, and the associated requirements and prohibitions, also apply to permit holders entering premises in relation to workers in the TCF industry.

RIGHT OF ENTRY: PROTECTION OF EMPLOYEE INFORMATION

Item 10 – Clause 482

Item 11 – Clause 482

Item 14 – Clause 483

201. Paragraph 482(1)(c) and subclause 483(1) of the Bill allow permit holders to require occupiers or employers to produce records or documents relevant to a suspected breach while the permit holder is on the premises or at a later time. These amendments make it clear that only documents that are directly relevant to the suspected contravention can be inspected or copied. This ensures that permit holders only collect information that is closely aligned to, and directly achieves, the intended purpose of the collection.

202. The requirement that documents and records be directly relevant to the suspected contravention is replicated in the proposed new clauses 483B, 483C, 483D and 483E. These clauses deal with entry to investigate suspected contraventions relating to TCF outworkers (see item 17).

Item 12 – Clause 482

Item 16 – Clause 483

203. These amendments to the legislative notes after subclauses 482(1) and 483(5) clarify what protections apply to information or documents collected under the right of entry provisions.

204. Note 1 directs the reader to clause 504. Clause 504 prohibits any person from disclosing information obtained by a permit holder for a purpose not related to rectifying the suspected contravention or in other limited circumstances. Note 2 highlights that the use or disclosure of personal information collected by a permit holder under these amended clauses is also covered by the *Privacy Act 1988*.

Item 13 – Clause 482

Item 15 – Clause 483

205. These amendments insert new subclauses 482(1A) and 483(1A) to provide that occupiers and employers are not required to provide permit holders with access to documents or records that are protected by another law of the Commonwealth or by a law of a State or Territory.

206. These amendments are intended to ensure that obligations under Commonwealth, State or Territory laws prohibiting the disclosure of sensitive information are not overridden by the right of entry provision. An example of such a law is section 58 of the *Child Support (Registration and Collection) Act 1988* (the Child Support Act), which provides that an employer must not divulge information about the deduction of child support from an employee's wages. These new

subclauses mean that an employer will not have to disclose information in a record or document to a permit holder if that disclosure would otherwise amount to a breach of section 58 of the Child Support Act.

207. Proposed new clauses 483B, 483C, 483D and 483E, dealing with entry to investigate contraventions relating to TCF outworkers, also adopt this approach.

Item 31 – Clause 504

208. This item replaces current clause 504 of the Bill, which deals with the use or disclosure of documents in contravention of National Privacy Principle 2 (NPP2) in Schedule 3 to the *Privacy Act 1988*. New clause 504 is broader than the existing provision. It protects against the unauthorised use or disclosure of not just employee records but other information, including business plans or other sensitive information of employers.

209. The new provision prohibits permit holders from using or disclosing any information or document collected in the course of investigating a suspected contravention (including personal information within the meaning of the *Privacy Act 1988*) unless the use or disclosure is for a purpose related to the investigation or rectifying the suspected contravention. The new provision also sets out a number of circumstances where the use or disclosure of such information for a purpose other than rectifying the contravention is not prohibited (paragraphs 504(a)-(e)). These exceptions are based on the exceptions that are provided for in NPP2 in relation to the disclosure of personal information under the *Privacy Act 1988*.

210. These exceptions include where the disclosure is:

- necessary to lessen or prevent a serious threat to public health and safety;
- required or authorised by or under law; and
- with the consent of the individual whose information is being disclosed.

211. Clause 504 continues to be a civil remedy provision under Part 4-1 (Civil remedies).

Item 32 – Clause 510

Item 33 – Clause 510

Item 45 – Clause 539

212. These amendments are consequential to the amendments to clause 504.

Item 34 – Clause 510

213. This amendment is consequential to the amendments to clause 504 and to the general TCF industry amendments to Part 3-4 of the Bill (Right of entry).

OTHER RIGHT OF ENTRY AMENDMENTS

Item 18 – Clause 484

214. This item clarifies that when a permit holder enters premises under clause 484, the entry must be for the purpose of holding discussions with employees or TCF outworkers who:

- perform work on the premises;
- are entitled to be represented by the permit holder's organisation; and
- wish to participate in those discussions.

215. While entry must be for the purpose of holding discussions with this class of workers, it does not mean that if other workers choose to attend or participate in discussion that the entry is invalid or contrary to the Act.

216. The amendment also makes clear that the proviso that employees must wish to participate in discussions operates after entry – i.e., it ensures that an employee cannot be required or otherwise compelled to participate in the discussions. However, it does not mean that a permit holder must demonstrate before entry that there is a particular employee on the premises who wishes to talk to the permit holder.

Item 29 – Clause 495

217. Clause 495 currently requires a permit holder exercising a right of entry under State or Territory OHS legislation to notify both the occupier of the premises and any affected employer when seeking access to employee records. An affected employer is defined as a person whose employees work on the premises. This has the unintentional consequence that on sites with multiple employers, every employer has to be notified even if the permit holder only wishes to view records held by one employer.

218. Consistent with the intent of the provision, the amendment changes the definition of affected employer to persons who employ employees to whom the relevant records relate. This amendment ensures that only employers of employees whose records a permit holder wishes to inspect need to be notified.

Item 2 – Clause 12

Item 3 – Clause 12

219. These amendments are consequential to the amendment in item 29.

GENERAL PROTECTIONS

Item 1 – Clause 12

Item 3 – Clause 12

Item 6 – Clause 351

Item 7 – Clause 351

Item 8 – Clause 351

Item 9 – Clause 351

220. Paragraph 351(2)(a) of the Bill (together with paragraph 342(3)(a)), currently provide that action is not discriminatory if it is authorised by or under a Commonwealth, State or Territory anti-discrimination law. This exception is intended to ensure that where action is not unlawful under a relevant anti-discrimination law (e.g., because of the application of a relevant statutory exemption) then it is not adverse action under subclause 351(1). The word ‘authorised’ may not capture all action that is not unlawful under anti-discrimination legislation, especially if the legislation does not specifically authorise the conduct but has the effect that the conduct is not unlawful. These amendments ensure the exception operates as intended.

221. Item 8 also clarifies that the exception in paragraph 351(2)(a) only relates to laws applying in the place where the action occurred. This means that the exception cannot operate to authorise action in one State (e.g., Queensland) because the action is authorised under the provision of an anti-discrimination law in another State (e.g., Victoria).

Item 5 – Clause 347

222. Under paragraph 347(b)(vi) of the Bill, a person engages in industrial activity if he or she pays a fee (however described) to an industrial association.

223. However, paragraph 347(b)(vi) does not expressly deal with payments made to other persons ‘in lieu of an industrial association’ (e.g., where an industrial association is collecting or demanding fees through another entity). Item 7 ensures such payments are captured.

WORKPLACE DETERMINATIONS

Description of employees

Item 4 – Clause 281A

224. This item inserts clause 281A into the Bill to clarify how employees, employers and employer organisations are to be described in instruments referred to in Part 2-5 (Workplace Determinations). The amendment clarifies that when a provision of Part 2-5 requires or permits an instrument to specify the employees covered by a workplace determination or other instrument, the employees may either be specified by class or by name. This is a technical amendment to ensure that the provisions do not require each employee to be individually named.

225. The item also makes clear that where a provision requires an employer or employee organisation to be specified, the employer or employee organisation must be specified by name.

REINSTATEMENT BY ASSOCIATED ENTITIES

Item 2 – Clause 12

Item 10 – Clause 391

Item 11 – Clause 391

226. Item 10 inserts a new subclause (1A) into clause 391 to enable FWA to make a reinstatement order applying to an associated entity of the person's previous employer if there has been a corporate restructure in the period since the employee was unfairly dismissed.

227. Item 11 ensures that FWA can make an order under paragraph 391(2)(b) to maintain the person's continuous service with the associated entity if relevant.

228. Item 2 amends clause 12 to include a definition of reinstatement, defined to include appointment by an associated entity where subclause 391(1A) applies.

STAND DOWN

Item 12 – Clause 524

Item 13 – Clause 524

229. This item adds another legislative note following clause 524 of the Bill. The note explains that an enterprise agreement or contract of employment may make additional provision in relation to stand downs, including requirements relating to consultation or notice periods. This reinforces the notion that the stand down provisions under the Bill are default provisions, and may be replaced in certain circumstances by stand down provisions under an enterprise agreement or contract of employment (i.e., to the extent the provisions deal with each of the circumstances provided for under subclause 524(1) of the Bill).

230. This item is a technical amendment as a consequence of the amendment made by item 13.

MULTIPLE ACTIONS

Item 14 – Clause 734

Item 15 – Clause 734

Item 16 – Clause 734

231. Clause 734 of the Bill is an 'anti-double dipping' provision which prevents a person from making a general protections court application in relation to conduct that does not involve dismissal, if the person has made an application or complaint in relation to that conduct under another law.

232. Items 14 and 15 limit the scope of this provision so that it only applies to applications or complaints made under an anti-discrimination law and not applications for remedies under different sorts of legislative frameworks (e.g., workers compensation).

233. Item 16 inserts an equivalent prohibition on a person making an application or complaint under an anti-discrimination law in relation to conduct where a general protections court application has already been made.

FAIR WORK INFORMATION STATEMENT

Item 1 – Clause 124

234. This item provides that the FWO (rather than FWA) must prepare and publish the Fair Work Information Statement. In addition to the matters identified in the Bill, the Statement must include information about:

- termination of employment;
- individual flexibility arrangements; and
- right of entry (including the protection of personal information by privacy laws).

235. Subclause (3) states that the Fair Work Information Statement is not a legislative instrument. This provision is included to assist readers, as the Statement is not a legislative instrument as defined by section 5 of the *Legislative Instruments Act 2003*.

236. Subclause (4) allows regulations to be made dealing with other matters relating to the content or form of the Statement, or the manner in which employers may give the Statement to employees.

FUNCTIONS OF THE FAIR WORK OMBUDSMAN

Item 2 – Clause 576

Item 3 – Clause 682

Item 4 – Clause 682

Item 5 – Clause 682

Item 6 – Clause 682

Item 7 – Clause 682

237. The amendments to clause 682 (Functions of the Fair Work Ombudsman) in items 4 and 5 would amend the functions of the FWO to include:

- promoting harmonious, productive and cooperative workplace relations (item 4); and
- producing best practice guides to workplace relations or workplace practices (item 5).

238. Best practice guides could cover the following topics:

- workplace privacy;
- work and family;
- young workers' toolkit;
- use of individual flexibility agreements;

- improving workplace productivity in bargaining;
- effective dispute resolution;
- managing underperformance;
- consultation and cooperation in the workplace; and
- pay equity.

239. The amendments to clause 682 in items 3, 6 and 7 are consequential amendments. The amendment made by item 7 requires the FWO to consult with FWA in producing guidance material that relates to the functions of FWA. The amendment to clause 576 (Functions of FWA) in item 2 reflects the intention that the FWO is the primary source of information, assistance and advice within the institutional framework to be established by the Bill. It ensures FWA's education functions are focused on providing assistance and advice that directly relate to its functions and activities.

FAIR WORK OMBUDSMAN, FAIR WORK AUSTRALIA

Definitions

Item 1 – Clause 12

240. Clause 12 of the Bill contains a definition of magistrates court. State and Territory legislation sets out the requirements for the appointment of magistrates in each jurisdiction. This item amends paragraph (b) of the definition of magistrates court so that it simply means a court constituted by an industrial magistrate.

Early commencement

Item 2 – New clause 574A

241. This item adds a new clause 574A giving effect to Schedule 1 (see item 27).

Compliance notice

Item 3 – Clause 539

242. This item amends a note about the interaction between compliance notices and applications for orders (see item 26).

Underpayments

Item 4 – Clause 544

Item 5 – Clause 544

Item 6 – Clause 545

243. Clause 545 sets out the orders that can be made by particular courts, including orders that require an employer to remedy an underpayment. Item 6 amends clause 545 to provide that a court must not make an underpayment order that relates to a period that is more than six years before the proceedings commenced. Item 5 adds a note to clause 544 to alert the reader that there is a time limit on orders relating to underpayments.

Functions of FWA

Item 8 – Clause 576

Item 9 – Clause 576

244. These items amend clause 576 to confer the following additional functions on FWA:

- providing administrative support to the Federal Court and the Federal Magistrates Court in accordance with an agreement entered into by the General Manager with the relevant Court – Item 8. The amendment in item 18 empowers the General Manager to enter into such arrangements;
- providing mediation services on referral from the Fair Work Divisions of the Federal Court and Federal Magistrates Court – item 9. The Courts can refer matters for mediation, either

to a Registrar of the Federal Court or, in some cases, to a private mediator. This amendment enables (but does not require) the Courts to refer matters to FWA for mediation.

Representation by lawyers

Item 10 – Clause 596

245. This item amends clause 596 to enable lawyers employed by an association of employers that is not registered under the Fair Work (Registered Organisations) Act to represent their members before FWA without the need to seek permission from FWA. This amendment maintains the current position in the *Workplace Relations Act 1996* (section 100) and *Workplace Relations Regulations 2006* (regulation 3.4).

Delegation by President

Item 11 – Clause 625

Item 12 – Clause 625

246. These items amends clause 625 to enable the President to delegate the following additional functions or powers of FWA to the General Manager, SES staff or acting SES staff, or a member of the staff who is in a prescribed class:

- publishing the results of a protected action ballot under proposed clause 457(2); and
- any function or power as prescribed by the regulations. This would include any functions or powers conferred on FWA by other Commonwealth legislation as well as functions or powers under the Fair Work Bill.

Report by General Manager

Item 14 – Clause 653

Item 15 – Clause 653

Item 16 – Clause 653

Item 17 – Clause 653

Item 23 – Clause 658

247. Items 14-17 amend clause 653 to also require the General Manager of FWA to conduct research into, and report on:

- the extent to which individual flexibility arrangements under modern awards and enterprise agreements are being utilised; and
- the provisions of the NES relating to requests for flexible working arrangements and extensions of unpaid parental leave. This would include the circumstances in which employees make such requests, the outcome of such requests and the circumstances in which such requests are refused.

248. Item 23 makes a consequential amendment to clause 658 which ensures that, in undertaking this additional research and report, the General Manager is not subject to the direction of the President.

Functions of General Manager

Item 7 – Clause 573

Item 13 – Heading to Division 7 of Part 5-1

Item 18 – New clause 653A

Item 20 – Clause 657

Item 21 – Clause 657

Item 22 – Clause 657

Item 24 – Clause 671

249. These items confer additional powers and functions on the General Manager of FWA.

250. Item 18 inserts a new clause 653A, which empowers the General Manager to enter into arrangements with the Federal Court or Federal Magistrates Court under which FWA staff would provide administrative support to the Fair Work Division of the relevant Court. This could include accepting lodgement of documents and performing other non-judicial activities on behalf of the Court. The amendments in items 7 and 13 are consequential upon the amendment made by item 18.

251. Item 20 adds subclause 657(1A) to ensure the General Manager can perform functions conferred on him or her by:

- a fair work instrument, for example a modern award may require the General Manager to establish and chair a Board of Reference;
- a law of the Commonwealth, for example the Fair Work (Registered Organisations) Act or the Fair Work (Transitional Provisions and Consequential Amendments) Act.

252. A legislative note alerts the reader to the General Manager's review function under clause 653 and power to enter into arrangements with the courts for the provision of administrative support under clause 653A. Items 21, 22 and 24 contain technical amendments consequential to the changes made by item 20. In particular item 24 makes it clear that the General Manager may also delegate his or her functions under proposed new clause 653A and subclause 657(1A) to members of the staff of FWA.

Disclosure of information by FWA

Item 19 – Clause 655

253. Clause 655 currently permits FWA to disclose information including where necessary or appropriate to do so in the course of performing functions or exercising powers under the Fair Work Bill. It is envisaged that functions may also be conferred on FWA by other

Commonwealth legislation, for example the Fair Work (Registered Organisations) Act or the Fair Work (Transitional Provisions and Consequential Amendments) Act, including the *Workplace Relations Act 1996* as preserved by the latter Act. The amendment in item 19 makes it clear that the President may disclose information in the course of FWA exercising or performing any of its powers or functions, not just those under the Fair Work Bill.

Self-incrimination

Item 25 – Clause 713

254. Item 25 provides that any record or document that is inspected or copied by an inspector on premises or any information, document or thing obtained as a direct or indirect consequence of an inspector exercising that power is not admissible against an individual in criminal proceedings, whether or not the person has provided the documents to the inspector.

Compliance notice

Item 26 – Clause 716

255. Item 26 prevents an inspector from instituting proceedings to enforce a contravention if the inspector has already given the person a notice in relation to the contravention and:

- the notice has not been withdrawn, and the person has complied with the notice; and/or
- the person has applied to the Federal Court, Federal Magistrates Court or an eligible State or Territory Court under clause 717 of the Bill to have the notice reviewed.

256. This item also provides that a person who complies with a notice is not taken to have admitted to the contravention or to have been found to have contravened the alleged contravention specified in the notice.

Schedule 1 - Transitional provisions

Item 27 – New Schedule 1 to Bill

257. Item 27 adds a new Schedule 1 to the Bill containing transitional provisions that enable FWA and the Office of the FWO to commence before the operative provisions of the Bill. The Schedule allows for early appointments to FWA and FWO for administrative purposes (not to perform substantive functions).

Clause 1 – Definitions

258. Clause 1 provides that expressions used in Schedule 1 would generally be defined by reference to the *Workplace Relations Act 1996*, unless the expression is also defined in the Bill and it is clear from the context that the latter definition should apply.

Clause 2 – Appointments to FWA

259. Clause 2 deals with the appointment of all primary AIRC members as initial members of FWA. Until the AIRC is abolished, these members will hold dual appointments to the AIRC and FWA. This clause provides that:

- the President of the AIRC is taken to be appointed as the President of FWA at the time that Part 5-1 of the Bill commences; and
- all other Presidential Members and Commissioners of the AIRC (other than acting members of the AIRC and members of a prescribed State industrial authority who hold secondary appointments as members of the AIRC) are taken to be appointed as Deputy Presidents and Commissioners of FWA, respectively, by a subsequent proclamation.

260. Subclause 2(3) enables the initial members of FWA to hold dual appointments as members of the AIRC notwithstanding the provisions of the *Workplace Relations Act 1996* (including sections 66, 69 and 83) or the Bill (including subclause 628(2) and clauses 632 and 633).

Clause 3 – Terms and Conditions

261. Clause 3 of the Schedule provides that the terms and conditions of the initial members of FWA will continue to be governed by the *Workplace Relations Act 1996* rather than the Bill. This ensures that:

- a single set of terms and conditions (e.g., remuneration and leave) apply to dual appointees; and
- the terms and conditions of former AIRC members are preserved. Presidential Members of the AIRC who become FWA Members retain the same rank, status and precedence as a Judge, are entitled to be styled ‘The Honourable’ and continue to be eligible for a judicial pension. An FWA Member previously entitled to the designation as a Judge of the Federal Court is entitled to retain that designation.

Clause 4 – Seniority of FWA Members

262. As the initial members of FWA will all be taken to have been appointed at the same time, clause 4 preserves the seniority those members enjoyed as members of the AIRC under section 65 of the *Workplace Relations Act 1996*.

Clause 5 – Procedural Rules

263. Clause 5 permits the President of FWA to make procedural rules prior to the appointment of any other FWA Members notwithstanding the consultation requirement in subclause 609(1) of the Bill.

Clause 6 – Transfer of assets and liabilities

264. Clause 6 requires:

- the Director of the AFPC Secretariat and the Industrial Registrar to transfer their assets and liabilities to FWA; and
- the Workplace Authority Director and the Workplace Ombudsman to transfer their assets and liabilities to the Office of the FWO.

265. Assets and liabilities would be transferred on a specified default date, expected to be the day on which the *Workplace Relations Act 1996* is repealed (the WR Act repeal day). However, the Minister may, before that date, determine that some or all assets and liabilities are to be transferred to a different body, or on a different day, or according to regulations made for the purposes of this item.

266. For the avoidance of doubt, subclause 6(3) clarifies that a Ministerial determination specifying a different cessation time for a WR Act body or office is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*. This provision is declaratory of the law and does not amount to an exemption from the *Legislative Instruments Act 2003*.

267. Subclause 6(4) clarifies that records or any other information in the custody or control of a WR Act body will transfer to FWA or the Office of the FWO in accordance with the asset transfer rules.

Clause 7 – Additional function and power of the General Manager

268. Clause 7 empowers the General Manager of FWA to enter into arrangements with the Industrial Registrar, the Workplace Authority Director and the Director of the AFPC Secretariat to provide assistance to those office holders in the period between the WR Act repeal day and the cessation time for the body or office.