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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

FAIR WORK (TRANSITIONAL PROVISIONS AND CONSEQUENTIAL AMENDMENTS) BILL 2009

EXPLANATORY MEMORANDUM

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

FAIR WORK (TRANSITIONAL PROVISIONS AND CONSEQUENTIAL AMENDMENTS) BILL 2009

OUTLINE

The Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009 (this Bill) is the first of two Bills which make transitional and consequential provisions in relation to the new federal workplace relations system set out in the Fair Work Bill 2008 (the FW Bill).

This Bill:

- repeals the *Workplace Relations Act 1996* (WR Act) (other than Schedules 1 and 10) and renames it the *Fair Work (Registered Organisations) Act 2009* to reflect its remaining content;
- makes transitional provisions to move employers, employees and organisations from the old WR Act system to the new system; and
- makes consequential amendments to Commonwealth legislation that are essential to the operation of the FW Bill (e.g., the creation of the Fair Work Divisions of the Federal Court and the Federal Magistrates Court).

A second Bill will deal with consequential amendments to other Commonwealth legislation and amendments consequential on State referrals of power.

Transition to new system

Most of the FW Bill will commence on a single day by proclamation (anticipated to be 1 July 2009). However, the provisions relating to the National Employment Standards (NES) and modern awards will commence on a later day (anticipated to be 1 January 2010). Also, proposed amendments of the FW Bill would enable Fair Work Australia (FWA) and the Office of the Fair Work Ombudsman (FWO) to commence before the substantive provisions of the FW Bill. This would allow for early appointments to FWA and FWO and for other administrative arrangements associated with establishment of the new institutions.

This Bill makes provision for the operation of the FW Bill and the continued operation of some elements of the WR Act in the bridging period between 1 July 2009 and 1 January 2010, and for the time from 1 January 2010. An outline of the key features of this Bill follows.

Universal application of the safety net

The NES and minimum safety net wages (e.g., wages in modern awards) will apply to all employees from 1 January 2010, including those that are covered by a transitional instrument (in effect, an instrument made before 1 July 2009, or ITEAs made before 31 December 2009), and will prevail over a transitional instrument where the instrument is detrimental in comparison.

FWA will have scope to make orders to 'phase in' minimum wages in modern awards on application by an employer where it is satisfied that such measures are necessary to ensure the ongoing viability of a business.

Take-home pay orders

FWA will be able to make take-home pay orders where one or more employees' take-home pay (as defined) is reduced as a result of award modernisation.

Transitional instruments

Existing WR Act instruments (other than transitional awards and common rules for excluded employers) will become transitional instruments from 1 July 2009. Transitional instruments will continue to apply to employers, employees and organisations (where relevant) as if the WR Act had not been repealed. For all types of collective agreements and unmodernised awards, these instruments will also apply to new employees of an employer.

As a general rule, the content and interaction rules that applied under the WR Act will continue. In addition, this Bill provides for:

- processes for variation and termination of transitional instruments, including giving FWA power to vary instruments to resolve ambiguity or uncertainty (including in relation to the interaction of the instrument with the NES), and allowing an employer and an employee to agree to terminate an individual statutory agreement in some circumstances on condition that it is replaced by an enterprise agreement (to enable the employee to participate in collective bargaining) – with the termination not coming into effect until the new enterprise agreement that applies to the employee comes into operation;

- the cessation of unmodernised award-based instruments (including awards, Australian Pay and Classification Scales (APCSs) and notional agreements preserving State awards (NAPSAs) when replaced by a modern award;

- a process for parties to enterprise awards and enterprise NAPSAs to apply to FWA by the end of 2013 to have their instruments modernised; and

- sunsetting, at 27 March 2011, instruments that rely on the conciliation and arbitration power in section 51(xxxv) of the Constitution (such as pre-reform certified agreements made under Division 3 of Part VI of the WR Act before 27 March 2006.

Schedule 6 transitional awards and common rules

The rules in Schedule 6 of the WR Act that deal with transitional awards and Victorian common rules will be preserved. The existing sunsetting arrangements for these instruments will also be retained (27 March 2011).

Bargaining, agreement-making and industrial action

Bargaining for enterprise agreements can take place under the FW Bill from 1 July 2009. Before 1 January 2010, enterprise agreements will be assessed by FWA against the no-disadvantage test using an appropriate reference instrument (e.g., an unmodernised award).

ITEAs will be able to continue to be made until 31 December 2009, under saved provisions of the WR Act.

This Bill will not carry over bargaining or protected industrial action under the WR Act to bargaining under the FW Bill. In effect, bargaining participants either have to complete their bargaining under the WR Act prior to 1 July 2009 or commence bargaining for a new enterprise agreement or industrial action processes under the FW Bill. However, the FW Bill will include provisions that require FWA to take into account the history of the bargaining participants when exercising discretion under the bargaining and industrial action provisions of the FW Bill.

Dispute resolution

FWA will deal with disputes about matters arising under a transitional instrument as well as the Australian Fair Pay and Conditions Standard (AFPCS) and minimum entitlements in Part 12 of the WR Act (e.g., notice of termination and public holidays) until the NES commences on 1 January 2010. FWA will exercise the same powers that that the Australian Industrial Relations Commission (AIRC) could have exercised under the WR Act in relation to the dispute.

Transfer of business

The existing transmission of business rules in the WR Act are preserved in relation to transmissions of business that occur before commencement of the FW Bill.

The new rules in the FW Bill will apply to transfers of business that occur on or after commencement of the FW Bill. The transfer of business provisions are extended to cover employers and employees covered by transitional instruments. This means that transitional instruments can 'transfer' to cover a new employer in the same way as instruments made under the FW Bill and FWA's powers will apply in the same way to these instruments.

General protections, unfair dismissal, right of entry and stand down

The general protections, unfair dismissal, right of entry and stand down frameworks in the FW Bill will commence from 1 July 2009. This Bill ensures that the provisions of those frameworks that refer to modern awards and enterprise agreements also pick up transitional instruments. This Bill also ensures that the general protections provisions pick up the AFPCS and the continued minimum entitlements in Part 12 of the WR Act during the bridging period.

Existing right of entry permits and other right of entry instruments issued under the WR Act will in effect be deemed to be instruments issued under the FW Bill.

Institutions

The functions of the Workplace Ombudsman (WO) will be taken over by the FWO from 1 July 2009 and the office of the WO will cease to exist. From 1 July 2009, the FWO will also take on the general advisory function currently performed by the Workplace Authority (WA).

The other agencies which exist under the WR Act will cease to exist at the following times (subject to change of date by Ministerial declaration):

- The Australian Fair Pay Commission (AFPC) and its Secretariat will cease to exist on 31 July 2009 – this will allow the AFPC to complete its final wage review.

- The WA will cease to exist on 31 January 2010 - this will allow it to assess collective agreements made before 1 July 2009 using the current no-disadvantage test and ITEAs made until 31 December 2009 under saved provisions of the WR Act.

- The AIRC and the Australian Industrial Registry will cease to exist on 31 December 2009 – this will allow the AIRC to complete matters and processes commenced under the WR Act, including award modernisation and existing unfair dismissal applications.

This Bill also makes amendments to the *Federal Court of Australia Act 1976* and the *Federal Magistrates Act 1999* to establish Fair Work Divisions within those Courts. The new Divisions will operate from 1 July 2009 in relation to matters arising under this Bill, the WR Act as continued by this Bill, and the FW Bill.

Registered organisations

This Bill makes consequential amendments to Schedules 1 and 10 to the WR Act and renames the WR Act the *Fair Work (Registered Organisations) Act 2009*.

This Bill also amends Schedule 1 to the WR Act to give FWA power to make a new and additional form of representation order that does not require the existence of a dispute which threatens to disrupt or harm an employer's business or actually disrupts or harms the business, and is based on separate criteria to those that apply in the existing provisions.

This Bill will include new provisions that make it simpler and easier for State and federal unions to operate across multiple jurisdictions. This includes extending the transitional registration provisions and providing for the reciprocal recognition of State and federal unions where the State union has no federal counterpart and the relevant State's law has been prescribed in the regulations.

FINANCIAL IMPACT STATEMENT

The financial impact is yet to be determined in consultation with the Department of Finance and Deregulation and once agreed will be included in the relevant appropriation Bills.

NOTES ON CLAUSES

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

AFPC	Australian Fair Pay Commission
AFPCS	Australian Fair Pay and Conditions Standard
AIRC	Australian Industrial Relations Commission
APCS	Australian Pay and Classification Scale
AWA	Australian workplace agreement
FW Bill	Fair Work Bill 2008
FWA	Fair Work Australia
FWO	Fair Work Ombudsman
ITEA	individual transitional employment agreement
NES	National Employment Standards
NAPSA	notional agreement preserving State awards
this Bill	Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009
WR Act	*Workplace Relations Act 1996*

Clause 1 – Short title

1. This is a formal provision specifying the short title.

Clause 2 – Commencement

2. The table in this clause sets out when this Bill's provisions commence.

Clause 3 – Schedule(s)

3. This clause provides that an Act that is specified in a Schedule is amended or repealed as set out in that Schedule, and any other item in a Schedule operates according to its terms.

Clause 4 – Regulations

4. This clause allows the Governor-General to prescribe matters required or permitted by this Act to be prescribed or that are necessary or convenient to be prescribed for carrying out or giving effect to this Bill.

Schedule 1 – Repeals

Workplace Relations Act 1996

Item 1 – Sections 3 to 18

Item 2 – Parts 2 to 23

Item 3 – Schedules 2 to 9

5. These items repeal all of the WR Act except Schedules 1 and 10. Schedules 1 and 10 will remain part of the WR Act, and the WR Act will be renamed the *Fair Work (Registered Organisations) Act 2009* (see item 3 of Schedule 22 to this Bill).

Schedule 2 – Overarching Schedule about transitional matters

Part 1 – Interpretation of the transitional Schedules

Item 1 – What are the transitional Schedules?

Item 2 – The dictionary

Item 3 – Meaning of *WR Act* and *FW Act*

Item 4 – Expressions defined in the *WR Act* or the *FW Act*

6. These items are definitional provisions for the remainder of this Bill.

7. The dictionary in item 2 largely provides pointer definitions to definitions in the rest of this Bill. Widely-used phrases which are defined in the dictionary itself are:

- bridging period – which is the period starting on the WR Act repeal day and ending immediately before the FW (safety net provisions) commencement day;
- FW (safety net provisions) commencement day – which is the day on which Parts 2-2 (NES), 2-3 (Modern awards) and 2-6 (Minimum wages) of the FW Bill commence (expected to be 1 January 2010);
- WR Act repeal – which is the commencement of Schedule 1 to this Bill (Repeals); and
- WR Act repeal day – which means the day on which the WR Act repeal commences (expected to be 1 July 2009).

8. Subitem 3(1) defines WR Act to mean the WR Act as in force immediately before the WR Act repeal day. Generally the WR Act is continued by other provisions of this Bill as it was at the time of the repeal of (most of) the WR Act.

9. However, this is subject to a contrary intention. A contrary intention is shown by, for instance, item 11 of this Schedule which preserves the operation of the WR Act in relation to conduct that occurred before the WR Act repeal day. It applies the WR Act (for instance, the unlawful termination or freedom of association provisions) to conduct (for instance, a termination of employment) that occurred before the WR Act repeal day, but applies the WR Act as in force at the time of the termination of employment (which could be different from the WR Act as in force at the WR Act repeal day). Item 11 is intended to apply the general principle that conduct is regulated by the law at the time of the conduct, and shows a contrary intention to subitem 3(1).

10. Subitem 3(2) gives effect, despite the repeal of the WR Act, to other provisions of this Bill which provide for the WR Act to continue to apply after the WR Act repeal day.

11. Subitems 3(2) and 3(5) ensure that references to the WR Act and FW Act in this Bill encompass regulations made under those Acts.

12. Item 4 ensures that expressions defined in the WR Act or the FW Bill and used in this Bill are given the same meaning as in the WR Act or the FW Bill. If the expression is defined in different ways in the WR Act and the FW Bill, the context is to determine which meaning is to apply, subject to regulations and to the definitions in the dictionary.

Item 5 – Provisions that apply repealed provisions of the WR Act

13. This item ensures that provisions of the WR Act which are continued in operation by this Bill after the WR Act repeal day are continued in conjunction with any regulations or other instruments made under the WR Act that are necessary for the effectual operation of the continued WR Act provisions. This means that the AIRC Rules continue in operation for the purposes of AIRC proceedings which are continued in the AIRC under, for instance, item 11 of this Schedule.

14. Regulations can be made to vary the effect of this item.

Item 6 – Effect of Part 21 of the WR Act to be taken into account

15. This item continues the effect of the provisions of the WR Act that were extended to Victoria by Part 21 of the WR Act in reliance on the reference of power from Victoria to the Commonwealth. This means, that workplace agreements made in reliance on the reference of power are continued as transitional instruments under Schedule 3 to this Bill.

16. Regulations can be made to vary the effect of this item.

Part 2 – Regulations about transitional matters

Item 7 – General power for regulations to deal with transitional matters

Item 8 – Regulations relating to matters dealt with in the transitional Schedules

Item 9 – Limitation on power to make regulations

Item 10 – Other general provisions about regulations

17. These items provide regulation-making powers to make transitional provisions related to the transition from the WR Act workplace relations system to the FW Bill workplace relations system, and to modify the transitional provisions in this Bill.

18. Item 9 ensures that any regulations made under items 7 and 8 cannot change the right of entry regime set out in the FW Bill and this Bill or give inspectors additional compliance powers.

Part 3 – Conduct before WR Act repeal day etc.

Item 11 – Conduct before repeal—WR Act continues to apply

Item 12 – FWA to take over some processes

19. Item 11 provides a general rule that conduct that occurred before the WR Act repeal day remains subject to the WR Act provisions.

20. Item 11 continues the WR Act (including all substantive, procedural and jurisdictional provisions and associated instruments and orders) for pre-repeal conduct which was subject to court enforcement (e.g., breaches of the AFPCS or an industrial instrument and breaches of the freedom of association, unlawful termination and offence provisions).

21. Item 11 continues the WR Act (including all substantive, procedural and jurisdictional provisions and associated instruments and orders) for conduct that occurred pre-repeal and which is subject to processes in the AIRC or the Australian Industrial Registry. For example, it continues the unfair dismissal provisions in relation to a dismissal that occurred before the WR Act repeal day, and dispute resolution provisions where the dispute arose before the WR Act repeal day. It continues the jurisdiction, powers and rules of the AIRC to deal with the dismissal or dispute (see also item 5 of this Schedule) and any orders made by the AIRC before the WR Act repeal day.

22. However, where a process is instituted in the AIRC or the Australian Industrial Registry after the WR Act repeal day, item 12 provides that the WR Act provisions are to be administered by FWA or the General Manager of FWA, rather than by the AIRC or the Australian Industrial Registry. Thus an unfair dismissal application in relation to a dismissal that occurred before the WR Act repeal day is to continue before the AIRC, but an application in relation to a dismissal that occurred on or after the WR Act repeal day is to be made to FWA.

23. Importantly, however, these general rules are subject to the specific rules set out in other Schedules to this Bill. The specific rules often modify, and sometimes exclude altogether, the general rules. For instance, Schedule 13 to this Bill contains provisions which ensure that most industrial action processes in train at the WR Act repeal day do not continue under the WR Act. Also, Schedule 8 contains detailed rules, which displace the general rules, about the continued application of the WR Act to agreements made under the WR Act before the WR Act repeal day. (Indeed, the general rule in item 11 applies in the agreement-making context only in relation to the termination of a pre-reform AWA under Schedule 7A to the WR Act where the termination was approved or notified before the WR Act repeal day). In effect, the general rules in items 11 and 12 apply as default rules where the other Schedules to this Bill do not apply.

Item 13 – Regulations – conduct before repeal

24. This item provides a regulation-making power which authorises regulations to be made to adjust the general rule in item 11.

Schedule 3 – Continued existence of awards, workplace agreements and certain other WR Act instruments

25. This Schedule contains provisions dealing with:

- the continued operation of certain industrial instruments made under or given effect to by the WR Act as transitional instruments (Parts 2 and 3 of this Schedule);
- the continued operation of the AFPCS (Part 4 of this Schedule);
- interaction between transitional instruments and the NES, FW Bill instruments and other provisions of the FW Bill (Part 5 of this Schedule); and
- preservation of redundancy provisions (Part 6 of this Schedule).

Part 1 – Preliminary

Item 1 – Meanings of *employee* and *employer*

26. In this Schedule, the terms employer and employee have their ordinary meanings. A provision in this Schedule could relate to national system employers and their employees, or to other employers and their employees.

- For example, a transitional instrument that is a workplace agreement will cover or apply to (as the case may be) a national system employer and a national system employee or employees.
- However, some pre-reform certified agreements ('Division 3' agreements currently preserved by Schedule 7 to the WR Act) will only cover or apply to employers that are outside the definition of national system employer and their employees.

Part 2 – Continued existence of WR Act instruments as transitional instruments

27. This Part contains general rules for transitional instruments. In particular, it sets out:

- what are transitional instruments, including when an instrument becomes a transitional instrument;
- who the instrument covers or applies to; and
- content of the instrument and interaction rules with other instruments and provisions of this Bill (including saved provisions of the WR Act).

Item 2 – WR Act instruments that continue in existence as transitional instruments

28. Subitem 2(1) provides for the continued operation of WR Act instruments following the repeal of the WR Act.

29. Subitem 2(2) sets out which WR Act instruments are preserved as transitional instruments from the WR Act repeal day. The significance of an instrument being a transitional instrument is that it is subject to the rules set out in this Bill regarding operation, content, interaction, termination and other matters. A legislative note (Note 4) mentions that transitional awards are not transitional instruments for the purposes of this Schedule. Instead, transitional awards and common rules are separately preserved in Schedule 20.

30. Subitem 2(3) provides for the point in time when a WR Act instrument becomes a transitional instrument. WR Act instruments in operation immediately before the WR Act repeal day become transitional instruments on that day. In other situations, a WR Act instrument does not become a transitional instrument until after the WR Act repeal day. For example:

- a collective workplace agreement that is lodged before 1 July 2009 but not yet assessed, will become a transitional instrument after it is approved by the Workplace Authority Director; and

- a workplace determination made under the WR Act might not become a transitional instrument until after the WR Act repeal day because a later day is specified in the determination itself.

31. ITEAs made during the bridging period will become transitional instruments once they are made (see Division 7 of Part 2 of Schedule 8).

32. Subitem 2(5) further categorises transitional instruments according to whether they are award-based transitional instruments or agreement-based transitional instruments.

Item 3 – the employees, employers etc. who are covered by a transitional instrument and to whom it applies

33. The FW Bill adopts the concepts of covers and applies in relation to modern awards and enterprise agreements. These concepts are also used in relation to transitional instruments in item 3, and generally have the effect of preserving transitional instruments in relation to those employers, employees and other persons (i.e., registered organisations) who were bound by the instrument immediately before the WR Act repeal day as well as new employees engaged by those employers after that day (in the case of awards and collective agreement-based transitional instruments). A transitional instrument only applies to those employees, employers and others persons who are required to comply with, or can enforce, the terms of the transitional instrument (see subitem 3(2)). However, from the FW (safety net provisions) commencement day, an award-based transitional instrument will not apply to an employee (or to an employer, or an employee organisation, in relation to the employee) when the employee is a high income employee (see clause 329 of the FW Bill).

Item 4 – Transitional instruments continue to be subject to the same instrument content rules

34. Item 4 preserves most of the existing content rules for transitional instruments notwithstanding the repeal of the WR Act. For certain agreement-based transitional instruments this includes rules concerning prohibited content – (e.g., paragraph 356(1)(a) and section 358 of the WR Act which provides that prohibited content in a workplace agreement is void). For award-based transitional instruments, this item preserves the rules in relation to allowable and non-allowable award matters – (e.g., section 514 of the WR Act which provides that awards are

taken to include a term about the model dispute resolution process set out in Part 13 of the WR Act and that a term providing for any other dispute settling process or procedure is taken not to be an allowable award matter).

35. Most of the content rules for transitional instruments are in the WR Act.

36. A legislative note mentions that certain instrument content rules relating to the standing down of employees do not continue to apply in relation to transitional instruments (see item 3 of Schedule 15).

Item 5 – Transitional instruments continue to be subject to the same instrument interaction rules

37. Subitem 5(1) preserves the existing interaction rules for the different types of transitional instruments. These rules preserve, for example, the ability for one type of transitional instrument to operate again when another transitional instrument is terminated (see paragraphs 5(2)(a)(ii) and (b)(ii)). For example:

- section 349 of the WR Act which deals with the effect of an award while a workplace agreement in operation; and

- clause 38A of Schedule 8 to the WR Act which deals with the operation of NAPSAs.

38. Another example of an instrument interaction rule that is continued in effect by this item is clause 2 of Schedule 7 to the WR Act which preserves section 170LY of the WR Act as in force before the commencement of the Work Choices amendments and provides that a pre-reform certified agreement prevails over an award to the extent of any inconsistency.

39. This item does not apply to the interaction between a transitional instrument and an instrument made under the FW Bill. These rules are set out in Division 2 of Part 5 of this Schedule.

Item 6 – References in transitional instruments to the Australian Industrial Relations Commission etc.

40. Where a transitional instrument confers a function or power on the AIRC or the Industrial Registry, item 6 provides for FWA to assume these functions from the WR Act repeal day. However, this item cannot confer additional functions on FWA that are not provided for in this Bill or the FW Bill. For example, FWA can only deal with a dispute under a transitional instrument because Schedule 19 of this Bill (which deals with dispute resolution) confers this function on FWA.

Item 7 – No loss of accrued rights or liabilities when transitional instrument terminates or ceases to apply

41. This item preserves accrued rights, liabilities and investigations on foot when a transitional instrument terminates or ceases to apply to an employee (e.g., when it is replaced by an enterprise agreement made under the FW Bill).

Item 8 – Certain transitional instruments displace certain Commonwealth laws

42. This item provides for certain transitional instruments to displace certain Commonwealth laws. The transitional instruments listed in subitem 8(1) may, to the extent of any inconsistency, displace prescribed conditions of employment contained in Commonwealth laws that are prescribed in the regulations.

43. Subitem 8(2) sets out the definitions of Commonwealth law and prescribed conditions for the purposes of this item.

44. Subitem 8(3) is intended to preserve the regulations made under section 350 of the WR Act or that continue to apply under subclause 2(2) or 17(2) of Schedule 7 to the WR Act.

Part 3 – Variation and termination of transitional instruments

Item 9 – Transitional instruments can only be varied or terminated in limited circumstances

45. This item sets out the limited circumstances in which a transitional instrument can be varied or terminated. It includes cross references to other Schedules where the mechanism for variation or termination is not included in this Schedule. For example, a transitional instrument can be varied under Schedule 11 which deals with transfers of business.

Item 10 – All kinds of transitional instrument: variation to remove ambiguities etc.

46. Item 10 provides that transitional instruments can be varied to:

- resolve ambiguity or uncertainty in the instrument;
- resolve an uncertainty or difficulty relating to the interaction between the instrument and a modern award (e.g., a pre-reform certified agreement will interact with a modern award where a modern award replaces an unmodernised award); or
- remove or vary provisions that are inconsistent with the general protections framework in Part 3-1 of the FW Bill.

47. A legislative note makes reference to item 26 of this Schedule which makes provision for transitional instruments to be varied to resolve an uncertainty or difficulty relating to the interaction between the instrument and the NES.

48. This item also provides that variations will operate from a day specified in the determination, and that variations may have retrospective effect.

Item 11 – All kinds of transitional instrument: variation on referral by HREOC

49. This item requires FWA to review a transitional instrument referred to it by the Human Rights and Equal Opportunity Commission in accordance with section 46PW of the *Human Rights and Equal Opportunity Commission Act 1986* (which deals with discriminatory industrial instruments).

50. FWA must make a determination varying the transitional instrument if it is considered that the instrument requires a person to do an act that would be unlawful under Part II of the *Sex Discrimination Act 1984* (but for the fact it was done in direct compliance with the transitional instrument).

Item 12 – Awards: continued application of WR Act provisions about variation and revocation

51. The effect of this item is to provide that, in addition to rules about variation and termination that apply to all transitional instruments, an award can also be:

- varied to maintain minimum safety net entitlements;
- varied to bind additional employers, employees or organisations; or
- revoked where it is obsolete or no longer capable of operating.

52. However, an award cannot be varied or revoked under this item after the end of the bridging period, except:

- to maintain minimum safety net entitlements; or
- as a result of FWA finalising a matter on foot before the end of the bridging period.

Item 13 – Pre-reform certified agreements: continued application of WR Act provisions about variation

Item 14 – Preserved collective State agreements: continued application of WR Act provisions about variation

53. These items provide that during the bridging period, pre-reform certified agreements and preserved collective State agreements can continue to be varied or extended under the relevant preserved WR Act rules upon application to FWA. Applications cannot be made after the end of the bridging period.

Item 15 – Collective agreement-based transitional instruments: termination by agreement

Item 16 – Collective agreement-based transitional instruments: termination by FWA

54. These items provide for collective agreement-based transitional instruments to be terminated either by agreement or by FWA.

55. Item 15 provides that a collective agreement-based transitional instrument can be terminated under Subdivision C of Division 7 of Part 2-4 of the FW Bill as if the instrument were an enterprise agreement. The employer(s) and employees covered by the instrument may jointly agree to terminate it. Any termination needs to be approved by FWA before coming into operation (see clauses 223 and 224 of the FW Bill).

56. Item 16 provides that a collective agreement-based transitional instrument can be terminated under Subdivision D of Division 7 of Part 2-4 of the FW Bill as if the instrument were an enterprise agreement. An employer, employee or employee organisation covered by the

instrument may apply to FWA, after the instrument's nominal expiry date, for the termination of the instrument. FWA must terminate the instrument if it is satisfied that it is not contrary to the public interest to do so and that it is appropriate to terminate the agreement taking into account all the circumstances (see clause 226 of the FW Bill).

Item 17 – Individual agreement-based transitional instruments: termination by agreement

Item 18 – Individual agreement-based transitional instruments: termination conditional on enterprise agreement

Item 19 – Individual agreement-based transitional instruments: unilateral termination with FWA's approval

57. These items provide uniform rules for the termination of all individual agreement-based transitional instruments. Under the WR Act, different termination rules applied to ITEAs, preserved individual State agreements, AWAs and pre-reform AWAs. It is intended that these rules will make it simpler for employers and employees who wish to terminate an individual agreement-based transitional instrument.

58. Before a termination can operate under any of these items, FWA must be satisfied that certain formal requirements have been met. As with the approval of enterprise agreements (and variations of enterprise agreements), it is intended that FWA will usually act speedily and informally to approve terminations. FWA may, but need not, hold a hearing.

59. Item 17 provides for the termination of individual agreement-based transitional instruments by written agreement between the employer and employee covered by the instrument. Before it can operate, a termination agreement would need to be approved by FWA. FWA must approve a termination agreement if it is satisfied that the formal requirements for the termination agreement have been met and there are no other reasonable grounds for believing that the employee has not agreed to the termination.

60. Item 18 provides for the making of a conditional termination by agreement between an employer and an employee. Conditional terminations are intended to facilitate the orderly transition of employees covered by individual agreement-based transitional instruments to an enterprise agreement. A conditional termination has the effect of terminating an individual agreement-based transitional instrument if an enterprise agreement that covers the employer and employee comes into operation. An employee who is covered by a conditional termination can fully participate in bargaining for an enterprise agreement whether or not the transitional instrument to which the conditional termination relates has passed its nominal expiry date (see item 2 in Schedule 13 which deals with bargaining and industrial action).

61. Where the transitional instrument has not passed its nominal expiry date, a conditional termination must be signed by both the employer and employee. Where the transitional instrument has passed its nominal expiry date, either the employer or the employee can unilaterally make a conditional termination.

62. When an enterprise agreement is made that covers an employee who is also covered by a conditional termination, the conditional termination must accompany any application to FWA for approval of the enterprise agreement. Provided the formal requirements relating to the conditional termination have been met, the transitional instrument then terminates when the enterprise agreement comes into operation.

63. Item 19 provides for individual agreement-based transitional instruments to be terminated unilaterally by either the employer or employee covered by the instrument provided the instrument has passed its nominal expiry date. FWA must approve a termination before it can have effect.

64. The employer or employee wishing to terminate the agreement must:

- make a written declaration identifying the instrument and stating that the employer or employee wishes to terminate it;
- at least 14 days before applying to FWA for the approval of the termination, provide a notice to the other person setting out certain matters; and
- having provided the notice as required, apply to FWA for approval of the termination.

65. FWA must approve the termination if it is satisfied that the transitional instrument applies to the employer and employee and the formal requirements have been met. If the termination is approved, the transitional instrument terminates on the 90th day after the day on which FWA approves the termination.

Item 20 – Sunsetting rules for various transitional instruments

66. Subitem 20(1) provides for NAPSAs (other than a notional agreement that is an enterprise instrument) to terminate on the 4th anniversary of the FW (safety net provisions) commencement day or on a later date prescribed by the regulations.

67. The following kinds of transitional instruments that apply to non-national system employers will terminate on the earlier of 27 March 2011 or the circumstances provided for in the relevant subitems occurring:

- Division 3 pre-reform certified agreements;
- old IR agreements; and
- section 170MX awards.

68. However, these sunsetting rules do not apply if the relevant employer becomes a national system employer before 27 March 2011.

Item 21 – Effect of termination

69. Once a transitional instrument terminates, it ceases to cover (and can never again cover) any employees, employers or other persons (but see Part 6 of this Schedule in relation to the preservation of redundancy provisions in some circumstances that agreement-based transitional instruments terminate).

Part 4—Transitional instruments and the Australian Fair Pay and Conditions Standard

70. Schedule 4 provides for the ongoing operation of non-wage minimum entitlements under the AFPCS and some other provisions of the WR Act during the bridging period (at which point the NES commences operation).

71. Schedule 9 provides for the ongoing operation of minimum wage provisions of the AFPCS.

72. Part 4 of this Schedule deals with the continued operation of AFPCS interaction rules.

Item 22 – Same AFPCS interaction rules continue to apply

73. This item provides for the continued operation of existing AFPCS interaction rules during the bridging period.

74. However, at the end of the bridging period, interaction rules that provide for an instrument to prevail over the AFPCS cease to operate. This means that provisions of the WR Act that ensured that the AFPCS did not generally apply to agreements made before commencement of the Work Choices amendments (27 March 2006) cease to operate at the end of the bridging period.

75. In practice this only affects the interaction of wage rates in such an agreement and wage rates provided by APCSs. This is because, under Schedule 4 (see item 2), the non-wage entitlements in the AFPCS also ceased to operate at the end of the bridging period.

76. Where an APCS provides a higher rate of pay than that provided by such an agreement, the APCS rate will prevail. Item 14 of Schedule 9 allows an employer subject to wage increases as a result of this provision, to apply to FWA for an order phasing in wage increases.

77. Note: The rules that deal with the interaction between the AFPCS and enterprise agreements during the bridging period are provided for in item 27 of Schedule 7.

Part 5 – Transitional instruments and the FW Act

Division 1 – Interaction between transitional instruments and the National Employment Standards

Item 23 – The no detriment rule

78. This item provides that a term of a transitional instrument has no effect to the extent that it is detrimental to an employee, in any respect, when compared to an entitlement of the employee under the NES (subitem 23(1)).

79. This provision does not have practical operation during the bridging period, as the NES commences operation on the FW (safety net provisions) commencement day.

80. Subitem 23(1) is not intended to affect a term of a transitional instrument that is permitted by a provision of the NES as it has effect under item 24. This means that terms in transitional instruments about matters such as taking and cashing out of annual leave and substitution of public holidays may continue to operate, subject to the requirements of the NES.

81. Subitem 23(3) allows regulations to be made to assist in determining whether terms of a transitional instrument are detrimental to an employee, when compared to the NES.

82. The item ensures that, when the NES commences, an employee to whom a transitional instrument applies retains the benefit of comparable and more favourable terms and conditions in the transitional instrument.

83. The no detriment test applies on a 'line by line' basis. That is, the NES entitlement will continue to apply and prevail over the corresponding entitlement in the transitional instrument, if the term or entitlement in the transitional instrument is detrimental to an employee, in any respect, in comparison to the NES. This could mean, for example, that terms in a transitional instrument about the amount of annual leave that an employee is entitled to, and the amount the employee is entitled to be paid while on leave, might continue to operate, but subject to more favourable accrual rules in the NES.

84. Item 26 allows FWA to vary transitional instruments to resolve difficulties arising from the interaction of the NES with transitional instruments.

Illustrative example

Under the pre-reform certified agreement that applies to her employment, Fatima is entitled to six weeks' paid annual leave per year of service with the leave to be paid at Fatima's ordinary rate of pay (including overtime and allowances). Both the amount of leave and payment provisions in the agreement would continue to operate as they are more beneficial entitlements than the corresponding entitlements in the annual leave NES.

Item 24 – Provisions of the NES that allow instruments to contain particular kinds of terms

85. This item ensures that certain provisions of the NES have effect as if a reference to a modern award or enterprise agreement included a reference to a transitional instrument. The relevant provisions of the NES are identified in paragraphs (a) to (h) in this subitem.

86. The intention of this item is to ensure the continued application, subject to the no detriment test, of terms in a transitional instrument that provide for matters that are similar to these NES provisions. For example, this rule would enable the continued operation of a term in a transitional instrument for the cashing out of paid annual leave, but subject to the protections set out in subclause 93(2) of the FW Bill. Therefore, in order to cash out annual leave under the provision in the transitional instrument, the employee must retain a minimum balance of four weeks' leave, the agreement to cash out must be a separate written agreement and the cashed out leave must be paid at the full amount the employee would have received had the employee taken the leave forgone.

Item 25 – Shiftworker annual leave entitlement

87. This item ensures that where an employee is a shiftworker as defined in section 228 of the repealed WR Act, and employed under a transitional instrument, they are entitled to the shiftworker annual leave entitlement provided under clause 87 of the FW Bill (which provides five weeks of annual leave for shiftworkers, as defined). This maintains the existing level of entitlement for such employees.

88. Subitem 25(2) provides that this item has effect subject to subclause 87(4) of the FW Bill, which prevents an employee qualifying for the shiftworker annual leave entitlement if

they are in a class of employees prescribed by the regulations as not being qualified for that entitlement.

Item 26 – Resolving difficulties about application of this Division

89. This item enables a person covered by a transitional instrument to apply to FWA to resolve any difficulties about the application of the rules about the interaction between transitional instruments and the NES set out in this Division.

90. Under this item, FWA may vary the instrument to resolve uncertainty or difficulty relating to the interaction between the instrument and the NES, or to make the instrument operate effectively with the NES.

91. Any variation of the instrument operates from the day specified in the determination (which may be a day before the determination is made).

Item 27 – Division does not affect transitional instruments before NES commencement

92. This item makes it clear that this Division (including a determination made under item 26 does not affect the operation of a transitional instrument at any time before the FW (safety net provisions) commencement day.

Division 2 – Interaction between transitional instruments and FW Act modern awards, enterprise agreements and workplace determinations

Item 28 – Modern awards and agreement-based transitional instruments

93. Subitem 28(1) provides that a modern award does not apply where a workplace agreement, workplace determination, preserved state agreement, AWA or pre-reform AWA applies. This preserves the existing interaction rules between these types of instruments and unmodernised awards. This means that the rights and obligations of employers and employees will continue to come from these instruments.

94. However, a legislative note (Note 1) makes it clear that a modern award can still cover a relevant employee while these agreement-based transitional instruments continue to apply (see subitem 28(1)). A modern award can cover an employee and employer without it applying to the employee and employer. Where a modern award covers but does not apply to particular persons, the rights and obligations for those persons will not come from the modern award.

95. A further legislation note (Note 2) makes it clear that this subitem is subject to item 13 of Schedule 9 (which requires that the base rate of pay under an agreement-based transitional instrument must not be less than the relevant modern award rate).

96. Subitem 28(2) provides that a modern award can apply at the same time as a pre-reform certified agreement, an old IR agreements or a section 170MX award. However, these agreement-based transitional instruments prevail over the modern award, to the extent of any inconsistency. A legislative note makes it clear that this subitem is subject to item 13 of Schedule 9 (which requires that the base rate of pay under an agreement-based transitional instrument must not be less than the relevant modern award rate).

Item 29 – Modern awards and award-based transitional instruments

97. Subitem 29(1) provides that if a modern award (other than the miscellaneous modern award) that covers an employee, or an employer or other person in relation to the employee, comes into operation, then an award-based transitional instrument ceases to cover (and can never again cover) the employee, or the employer or other person in relation to the employee. This ensures that where a modern award commences operation in relation to particular persons, the award based instruments that the modern award is intended to replace cease to cover those persons. This item does not apply in relation to the miscellaneous modern award, as the miscellaneous modern award is not intended to replace award-based transitional instruments until the award modernisation and enterprise instrument modernisation processes have been completed. However, once the modernisation of awards and enterprise instruments is completed, any remaining award-based transitional instruments will be revoked by FWA.

98. Subitem 29(2) provides that while an award-based transitional instrument that covers an employee, or an employer or other person in relation to the employee, is in operation, the miscellaneous modern award does not cover the employee, or the employer or other person in relation to the employee. This ensures that award-based transitional instruments are not replaced by the miscellaneous modern award during the award modernisation and enterprise instrument modernisation processes.

99. The effect of subitems 29(3)-(5) is to provide that if a modern award containing outworker terms that covers an outworker entity comes into operation then outworker terms in an award-based transitional instrument cease to cover (and can never again cover) the outworker entity.

Item 30 – FW Act enterprise agreements and workplace determinations, and agreement-based transitional instruments

100. Subitem 30(1) provides that FW Bill enterprise agreements or workplace determinations do not apply while an individual agreement-based transitional instrument (e.g., a pre-reform AWA, ITEA, AWA) applies.

101. Subitem 30(2) provides that where an enterprise agreement or workplace determination made under the FW Bill starts to apply, then a collective agreement-based transitional instrument (e.g., a workplace agreement, pre-reform certified agreement or preserved collective State agreement) ceases to cover the relevant persons. A legislative note (Note 1) makes it clear that a collective agreement-based transitional instrument can be replaced at any time with an enterprise agreement, regardless of whether the transitional instrument has passed its nominal expiry date.

Item 31 – FW Act enterprise agreements and workplace determinations, and award-based transitional instruments

102. This item provides that where an enterprise agreement or workplace determination made under the FW Bill applies to an employee, or an employer or other person in relation to the employee, an award-based transitional instrument ceases to apply but can continue to cover the employee. However, the award-based transitional instrument can again start to apply to the employee, and the employer or other person in relation to the employee, if the enterprise agreement or workplace determination made under the FW Bill ceases to apply to the employee.

Division 3 – Other general provisions about how the FW Act applies in relation to transitional instruments

Item 32 – Employee not award/agreement free if transitional instrument applies

103. Item 32 provides that if a transitional instrument applies to an employee, the employee is not an award/agreement-free employee for the purposes of the FW Bill.

104. The NES includes a range of provisions for award/agreement-free employees dealing with matters that, for employees to whom a modern award or enterprise agreement applies, are able to be dealt with in the modern award or enterprise agreement. These provisions are not required for employees to whom a transitional instrument applies as the transitional instrument is able to deal with these matters. The manner in which a transitional instrument interacts with the NES is set out in Division 1 of this Part (see items 23-27 of this Schedule).

105. This item also includes a regulation making power to set, for employees to whom a transitional instrument applies, the base rate of pay and full rate of pay either generally or for the purposes of entitlements under the NES and may also prescribe whether such an employee is a pieceworker for the purposes of the FW Bill. This power is necessary to ensure that the provisions of the NES, and other provisions of the FW Bill such as clause 206, which rely on these concepts operate effectively in all cases – for example, where an employee is a commission only pieceworker, they will not have a base rate of pay (because, as defined, 'base rate of pay' does not include commissions or incentive-based payments).

Item 33 – Employee's ordinary hours of work

106. The concept of an employee's ordinary hours of work is central to the accrual and payment rules for a number of entitlements under the NES. Therefore, it is essential that rules are in place to ensure an employee's ordinary hours of work can be identified.

107. Item 33 provides that where a transitional instrument applies to an employee's employment, that employee's ordinary hours of work for the purposes of the FW Bill are determined by the transitional instrument.

108. Where there are no ordinary hours specified in the transitional instrument, the ordinary hours of work are the hours agreed between the employee and their employer.

109. Where there is no such agreement and the employee's ordinary hours are not specified in the transitional instrument, a full-time employee's ordinary hours are 38 hours a week and the ordinary hours for an employee who is not a full-time employee are either 38 hours a week or their usual weekly hours (whichever is lower).

110. If the transitional instrument does not specify an employee's ordinary hours of work and the agreed hours for an employee who is not a full-time employee are less than the employee's usual hours, the ordinary hours of work for that employee shall be the lesser of 38 hours or the employee's usual weekly hours of work.

111. For an employee who is not a full-time employee and who does not have usual weekly hours of work, the regulations can prescribe, or provide for the determination of, hours that are taken to be the employee's usual weekly hours of work.

Item 34 – Payment of wages

112. This item provides that Division 2 of Part 2-9 of the FW Bill (which deals with payment of wages) applies as though the term enterprise agreement included a reference to an agreement-based transitional instrument and the term modern award included a reference to an award-based transitional instrument. This enables, for example, an agreement-based transitional instrument or an award-based transitional instrument to specify a method of payment of wages (see paragraph 323(2)(d) of the FW Bill) or to authorise permitted deductions from wages (see paragraphs 324(b) and 324(c) of the FW Bill).

Item 35 – Guarantee of annual earnings

113. Subclause 47(2) of the FW Bill provides that a modern award does not apply to an employee who has guaranteed annual earnings that are more than the high income threshold (defined in Division 3 of Part 2-9 of the FW Bill).

114. Subitem 6(2) of Schedule 9 and subitem 3(3) of this Schedule make similar provision in relation to transitional APCSs and transitional award-based instruments to ensure that a transitional APCS and a transitional award-based instrument do not operate in relation to an employee (or to an employer, or an employee organisation, in relation to the employee) while the employee is a high income employee.

115. Item 35 provides that Division 3 of Part 2-9 of the FW Bill (guarantee of annual earnings) applies as if references in that Division to a modern award include a reference to an award-based transitional instrument and a transitional APCS and references to an enterprise agreement include a reference to an agreement-based transitional instrument.

116. These provisions will operate from proclamation of Division 3 of Part 2-9 of the FW Bill.

Item 36 – Application of unfair dismissal provisions

117. This item ensures that a person will be protected from unfair dismissal under clause 382 of the FW Bill if the person is covered by an award-based transitional instrument, or if an agreement-based transitional instrument applies to the person in relation to their employment.

118. This item also ensures that the requirement to consult about genuine redundancy under subclause 389(2) of the FW Bill also applies if there is an obligation to consult about the redundancy in an award-based transitional instrument or an agreement-based transitional instrument.

119. The terms award and agreement-based transitional instrument are defined in subitem 2(5) of this Schedule. Item 3 of this Schedule outlines when a transitional instrument covers or applies to employees and employers.

Item 37 – Regulations may deal with other matters

120. This item contains a regulation-making power to deal with matters that may arise in relation to the interaction between transitional instruments and the FW Bill.

Part 6 –Preservation of redundancy provisions in agreements etc.

Item 38 – Preservation of redundancy provisions when agreement-based transitional instrument terminates

Item 40 – Redundancy provisions that were already preserved as at the WR Act repeal day

121. These items provide for the preservation of redundancy provisions in certain agreement-based transitional instruments where the instrument is terminated at the initiative of the employer. These items are intended to operate in the same way as the existing preserved redundancy provisions contained in the WR Act.

122. Item 38 provides for the preservation of any redundancy provision contained in an agreement-based transitional instrument where that instrument is terminated in particular circumstances during the bridging period. This item applies in the following circumstances where the termination takes effect during the bridging period:

- where a preserved collective State agreement or a pre-reform certified agreement is terminated by FWA on application by the employer as provided for by subitem 16(1) of this Schedule (which states that Subdivision D of Division 7 of Part 2-4 of the FW Bill, including paragraph 225(a), applies to collective agreement-based transitional instruments).

- where an individual agreement-based transitional instrument is terminated under item 19 of this Schedule because FWA approves a termination of the instrument by the employer.

123. Items 38 and 40 together have the effect of continuing in operation certain redundancy provisions that were binding on persons immediately before the WR Act repeal day. The redundancy provisions continued in operation by these items are those from a WR Act instrument that was terminated before the WR Act repeal day which were preserved at that time under the WR Act (see subitem 40(1)).

124. Item 40 ensures that employees who have an existing redundancy entitlement as at the WR Act repeal day because of the application of the preserved redundancy provisions contained in the WR Act do not lose the benefit of that entitlement.

125. All of these redundancy provisions are subject to rules set out in item 38 of this Schedule that govern their continued operation.

126. Subitem 38(2) provides that any redundancy provision contained in the terminated instrument continues to apply in relation to any person covered by the instrument immediately before the termination took effect. Any redundancy provision that is preserved by item 38 or by the provisions of the WR Act set out in item 40 continue to apply for a maximum period of 24 months from the time the termination took effect. Paragraph 40(2)(c) provides that the maximum period of 24 months provided for in subitem 38(6) applies as if the reference to that period were a reference to the unexpired period of 24 months that started on the date that the WR Act instrument was terminated. The redundancy provision ceases to apply earlier if the employee's employment is terminated or an enterprise agreement, workplace determination or ITEA comes into operation in relation to the employee (see subitem 38(6)).

127. Any redundancy provision that is preserved by item 38 or by the provisions of the WR Act set out in item 40 is taken to be a transitional instrument of the same kind as the terminated instrument (subitems 38(2) and (3)). This is relevant to other provisions of this Bill dealing with, for example, transmission and transfer of business, and the NES.

128. One effect of subitems 38(2) and (3) is that, after the end of the bridging period (i.e., after 31 December 2009), a redundancy provision of a terminated instrument that is preserved by item 38 or by the provisions of the WR Act set out in item 40, continues to operate as a transitional instrument subject to the no-detriment rule in item 23. This means that an employee is entitled to the better of the relevant redundancy entitlement in the NES and the preserved redundancy provision.

129. Subitems 38(2) and (3) also have the effect of ensuring that an employee's service with the employer counts as service for the purpose of determining their entitlement to redundancy pay under the NES (see item 5 of Schedule 4). Subitem 5(4) of Schedule 4, which limits the application of the general rule about counting service for the purpose of the NES in relation to redundancy pay, does not apply to an employee who has a redundancy entitlement because of the application of item 38.

130. Paragraph 38(3)(a) provides that a redundancy provision that continues to apply to a person does not apply for the purposes of Part 2, 3, 4 and 5 of this Schedule, other than subitem 20(2) and item 23. This means that the redundancy provisions which are preserved by item 38 or by the provisions of the WR Act set out in item 40 are not subject to the same rules as transitional instruments concerning content, variation and termination.

131. The interaction rules that apply to a redundancy provision preserved by item 38, or by the provisions of the WR Act set out in item 40, are outlined in subitems 38(4) and (5). Subitem 38(4) provides that a preserved redundancy provision prevails over any other redundancy provision included in any other instrument that would otherwise have effect. An instrument is defined in subitem 38(7) to include an award-based transitional instrument, a collective agreement, a collective preserved State agreement, a pre-reform certified agreement or an old IR agreement.

132. Subitem 38(5) provides for the interaction between a redundancy provision that continues to apply to an employee under item 38 and an industry-specific redundancy scheme in a modern award. This subitem is necessary because an employee to whom the scheme in a modern award applies (see clause 141 of the FW Bill) is not covered by the redundancy pay provisions that form part of the NES in Part 2-2 of the FW Bill. Therefore, the no-detriment test in item 23 of this Schedule does not apply where an employee is entitled to redundancy pay under both item 38 and under a scheme in a modern award. In this circumstance, subitem 38(5) provides that the scheme in the modern award prevails over the redundancy provision to the extent that the redundancy provision is detrimental to the employee.

Item 39 – Notification of preservation of redundancy provisions

133. This item applies where FWA makes a decision to terminate an agreement (which is referred to as the termination decision) on or after the WR Act repeal day in the circumstances set out in subitem 38(1) and one or more redundancy provisions in the terminated instrument continue to apply to affected persons in accordance with item 38.

134. This item sets out the matters that must be included in FWA's decision to terminate the agreement-based transitional instrument (subitems 39(2) and (3)).

135. If the transitional instrument that is terminated is a preserved collective State agreement or pre-reform certified agreement, FWA must also give a copy the termination decision to the employer and employee organisations to whom any redundancy provisions contained in the terminated instrument continue to apply (paragraph 39(2)(b)). Once an employer has received a copy of the termination decision, they must take reasonable steps to ensure that all employees to whom the preserved collective State agreement or pre-reform certified agreement applied immediately before the termination takes effect, are given a copy of the decision within 21 days of receiving a copy of the decision (subitem 39(3)). Subitem 39(3) is a civil remedy provision (see item 4 of Schedule 16).

Schedule 4 – National Employment Standards

Part 1 – Preliminary

Item 1 – Meanings of *employee* and *employer*

136. In this Schedule, the terms employer and employee have their ordinary meanings. A provision in this Schedule could relate to national system employers and their employees, or to other employers and their employees.

137. This Schedule continues the application of provisions of the WR Act dealing with the AFPCS, and Divisions 1 and 2 of Part 12 of the WR Act, during the bridging period. These provisions are supported by the corporations and other constitutional powers that are engaged by clauses 13 and 14 of the FW Bill, and apply to national system employers and their employees.

138. This Schedule also continues the operation of other minimum entitlements set out in section 661 (and related provisions) and Division 6 of Part 12 of the WR Act during the bridging period. These provisions assist in giving effect to Australia's international treaty obligations in relation to notice of termination and related entitlements, and unpaid parental leave. These provisions are supported by the external affairs power and can therefore extend to employers and employees who are not within the definitions of national system employer and national system employee.

Part 2 – Continued application of WR Act minimum entitlements provisions (other than wages) during bridging period

139. This Part provides for the saving of WR Act minimum entitlement provisions during the bridging period, pending the commencement of the NES.

Item 2 – Continued application of the Australian Fair Pay and Conditions Standard leave and work hours provisions

140. This item provides for the ongoing operation of the AFPCS during the bridging period, other than the wages provisions (provision for which is made in Schedule 9).

Item 3 – Continued application of entitlements to meal breaks, public holidays and parental leave

141. This item continues the application, during the bridging period, of minimum entitlement provisions in Part 12 of the WR Act relating to:

- meal breaks;
- public holidays; and
- the extended application of the parental leave entitlement to non-national system employees.

142. Sections 615 to 618 of Division 2 of Part 12 of the WR Act have not been saved because these provisions deal with compliance matters. Compliance with these entitlements is instead provided for in Schedule 16.

Item 4 – Continued application of notice of termination provisions

143. This item provides for the continued application of section 661 of the WR Act (notice of termination), and related provisions, to terminations of employment that occur during the bridging period or where notice of a termination of employment is given during the bridging period.

Part 3 – Operation of the National Employment Standards

Item 5 – Non-accruing entitlements: counting service before the FW (safety net provisions) commencement day

144. Subitem 5(1) provides that, as a general rule, an employee's service with an employer before the commencement of the NES counts as service for the purpose of determining entitlements under the NES.

145. This rule does not apply to paid annual leave and paid personal/carer's leave – pre-commencement accrual of these entitlements is dealt with in item 6. Specific provision is also made in relation to redundancy entitlements (see subitem 5(4)).

146. A period of service will not be counted again for the purposes of calculating a NES entitlement where an employee has already had the benefit of an entitlement of that kind, calculated by reference to that period of service (subitem 5(2)). This is to prevent an employee 'double dipping'.

147. The intention of subitem 5(3) is to ensure that the rule in subitem 5(2) does not affect an employee's entitlement to accrue long service leave in circumstances where they have taken an entitlement to leave after an initial qualifying period of service.

Illustrative example

Rachel is a fashion designer employed in Victoria by That Suits You Pty Ltd. After 10 years of continuous service, in mid-2008 Rachel took her accrued entitlement to long service leave under the Victorian Long Service Leave Act 1992. The effect of subitem 5(3) is that Rachel's 10 years of continuous service will count in determining her initial entitlement to long service leave in the first place, but will not be counted in calculating her further entitlement to long service leave under the Victorian Act (so that she will not be entitled to accrue again the amount of long service leave that she took in mid-2008).

148. The general rule in item 5(1) does not apply to the calculation of redundancy pay under the NES if an employee's terms and conditions of employment (whether under the employee's contract of employment, a pre-reform award or another applicable transitional instrument) immediately before the commencement of the NES did not provide any entitlement to redundancy pay (subitem 5(4)). This is to prevent an employer suddenly incurring a contingent liability to pay redundancy pay when they have not previously been required to make provision in their accounts for this entitlement.

149. This item deals with the way in which pre-commencement service is counted for determining NES entitlements. However, no implication should be drawn that this item limits counting pre-commencement service for other provisions in the FW Bill, including for determining an employee's period of employment for unfair dismissal purposes under clause 384.

Item 6 – Accruing entitlements: leave accrued immediately before the FW (safety net provisions) commencement day

150. This item provides that where an employee has accrued paid annual leave or paid personal/carer's leave under the AFPCS, a transitional instrument or otherwise, immediately before commencement of the NES, the provisions of the NES relating to the taking of the leave (including payment for the leave) and cashing out of that leave will apply, as a minimum standard, to the leave.

151. This means that paid personal/carer's and paid annual leave that has accrued prior to commencement is treated as if it were accrued under the NES with the NES rules applying to that leave, as a minimum. More favourable arrangements would continue to apply.

152. So, for example, if an employee is entitled to a higher rate of pay than guaranteed by the NES, this would continue to apply.

153. Crediting leave in advance would also be more favourable than the NES 'progressive accrual' rule – however, if the amount credited in advance is less than the NES guaranteed minimum entitlement (e.g., 8 days' personal/carer's leave instead of the 10 days guaranteed by the NES), the shortfall would need to be made up over the course of the year (but not so as to provide a double entitlement). This is the effect of the NES rules applying as a minimum standard.

Item 7 – Leave that, immediately before the FW (safety net provisions) commencement day, is being, or is to be, taken under Part 7 of the WR Act

154. An employee who is 'in the middle' of accessing a type of leave under the AFPCS that is covered by the NES when the NES commences is entitled to continue on the equivalent type of leave under the NES for the remainder of the period (subitem 7(1)).

155. However, this subitem does not affect any more favourable arrangements that were in place for the taking of such leave (e.g., more favourable rate of pay).

156. The amount, time and arrangements for taking that leave may be adjusted as necessary in accordance with the provisions of the NES (subitem 7(2)).

157. Similarly, an employee who has applied for, but not started, their leave on commencement of the NES is taken to have applied for the leave under the equivalent provision in the NES (subitem 7(3)). This means, for example, that an employee who has complied with the notice and evidence requirements in the AFPCS to take maternity leave does not have to also comply with the notice and evidence requirements in clause 74 of the FW Bill for the taking of parental leave.

158. If an employee is deemed to have taken a step to apply for leave under the NES due to the operation of subitem 7(3), they are entitled to adjust this step consistently with the provisions

of the NES (subitem 7(4)). A legislative note after this subitem provides as an example an employee varying the content of a notice given to the employer in relation to the leave, or varying the amount of leave they intend to take.

159. An example of the operation of subitems 7(2) and (4) is that it would allow an employee who is absent on, or who has applied for (but not yet started), a period of parental leave to access the additional entitlement in the NES to request additional parental leave under clause 76 of the FW Bill.

160. Subitem 7(5) allows the regulations to deal with other matters relating to how the NES apply to leave that, immediately before commencement of the NES is being, or is to be, taken under the AFPCS.

Item 8 – Community service leave

161. This item applies the NES community service leave provisions to an employee who is absent from work on or after the commencement of the NES, even if the period of absence began before commencement (subitem 8(1)).

162. However, a reference to the first 10 days of absence under subclause 111(5) of the FW Bill will be taken as a reference to the first 10 days of absence on or after commencement of the NES (subitem 8(2)).

Illustrative example

Jarrod is employed full-time as a waiter at a café in Melbourne. He is summonsed to appear and is required to attend for jury service from 29 December 2009. The trial he is serving on ends on 20 January 2010.

From 1 January 2010 (the intended NES commencement date), Jarrod is taken to be on community service leave under the provisions in Division 8 of the NES. This means he is entitled to payment from his employer under clause 111 of the FW Bill. Under subclause 111(2), Jarrod's employer is required to pay him at his base rate of pay for ordinary hours of work in the period (up to a period of 10 days), less any amount of jury service pay he has received.

Jarrod is entitled to payment from his employer for the period from 4 to 15 January 2010 (10 working days). He is not entitled to any payment under the NES for the days of absence before this time, as they occurred prior to commencement of the NES (subitem 8(2)).

Item 9 – Notice of termination

163. This item provides that the NES notice of termination provisions (Subdivision A of Division 11) apply only to terminations of employment occurring on or after commencement of the NES (subitem 9(1)). The NES does not apply if notice of the termination was given before the NES commenced (subitem 9(2)) – section 661 of the WR Act continues to apply in such cases (see item 4).

164. This means that if an employee's employment is terminated, or the employee is given notice of termination of their employment prior to commencement of the NES (even if the actual

date of termination falls after commencement of the NES), the employer is not also required to provide notice under the NES.

Item 10 – Redundancy pay

165. This item provides that the entitlement to redundancy pay under the NES applies to terminations of employment due to an employee's position being made redundant that occur on or after the commencement of the NES, even if notice of termination was given before that date. This means that even where an employee is given notice of termination under the WR Act prior to commencement of the NES, an employer will still be liable to pay redundancy pay (to an eligible employee) if the date of termination falls after the NES commencement date.

Item 11 – References to transfers of employment

166. The purpose of this subitem is to clarify the intended operation of the transfer of employment provisions of the NES.

167. References to a transfer of employment in the NES, or subclauses 22(5) and (6) of the FW Bill (which relate to calculating service where there is a transfer of employment), as they apply for NES purposes do not cover a situation where an employee became employed by the second employer before commencement of the NES.

Item 12 – Recognised emergency management bodies

168. Section 659 of the WR Act provides that a recognised emergency management body does not include a body established, or continued in existence, for purposes that include the purpose of enabling employees to obtain the protection against unlawful termination of employment under subsection 659(2) of the WR Act (in particular, the protection set out in paragraph 659(2)(i)). This item maintains that exclusion.

169. The item is necessary because the expression recognised emergency management body is used in a different context in the FW Bill and the existing exclusion is therefore not dealt with directly in this Bill.

Item 13 – Fair Work Information Statement

170. This item is intended to make it clear that there is no obligation to provide the Fair Work Information Statement to employees who were employed by the employer before the NES commences. The obligation on an employer to give a new employee the Statement under clause 125 of the FW Bill only applies to employees who commence employment with the employer on or after commencement of the NES.

Item 14 – Regulations

171. This item allows regulations to be made that provide for how the NES apply to, or are affected by, things done or matters occurring before the commencement of the NES.

Schedule 5 – Modern awards (other than enterprise awards)

Part 1 – Preliminary

Item 1 – Meanings of *employee* and *employer*

172. In this Schedule, the terms employee and employer mean national system employee and national system employer respectively (as defined in clauses 13 and 14 of the FW Bill). The rights and obligations of employers and employees set out in this Schedule apply only to the employment relationships within the scope of the corporations and other constitutional powers that are engaged by clauses 13 and 14 of the FW Bill.

Part 2—The WR Act award modernisation process

173. This Part provides for the continuation of the award modernisation process, despite the repeal of Part 10A of the WR Act, and for revocation and coverage variation of award-based transitional instruments and relevant APCSs to reflect the outcomes of modernisation.

174. FWA is given powers to review awards ahead of the first 4 yearly review.

Item 2 – AIRC to continue and complete the award modernisation process

175. This item provides for the AIRC to continue and complete award modernisation, in accordance with the award modernisation request, despite the repeal of the WR Act. This is necessary as the WR Act is to be repealed before award modernisation is scheduled to be completed.

176. Despite the continued operation of Part 10A, the AIRC will not be able to vary modern awards once they have started operating. Variations to modern awards will be undertaken by FWA in accordance with the provisions of the FW Bill.

Item 3 – Variation and termination of certain transitional instruments etc. to take account of Part 10A award modernisation process

177. This item requires FWA to terminate any award-based transitional instruments and transitional APCSs (modernisable instruments) that it considers are completely replaced by a modern award made under the Part 10A award modernisation process.

178. Where it considers that a modern award only partially replaces a modernisable instrument, FWA is required to vary the coverage of the instrument so that it does not cover those who are covered by the modern award.

179. These provisions do not apply to enterprise instruments. Provisions relating to the termination and variation of modernisable instruments to take account of the enterprise instrument modernisation process are contained in item 9 of Schedule 6.

180. FWA can establish a decision-making process to terminate or vary modernisable instruments, and may also advise any persons or bodies about the proposed process in any way it considers appropriate. The President of FWA may delegate FWA's powers to advise persons or

bodies about the proposed decision-making process under the extended operation of clause 625 of the FW Bill.

Item 4 – How the FW Act applies to modern awards made in the Part 10A award modernisation process

181. This item provides that Part 10A modernised awards are taken to be modern awards for the purposes of Part 2-3 of the FW Bill from the latter of the day on which the award is made or the day on which the FW (safety net provisions) commence (subitem (1)).

182. Taking Part 10A modernised awards to be modern award made under Part 2-3 of the FW Bill ensures that:

- Part 10A modernised awards are taken to have complied with all of the FW Bill's requirements applying to the making of modern awards; and

- Part 10A modernised awards are enforceable and can be varied or revoked in the same way as modern awards made under Part 2-3 of the FW Bill.

183. Modern awards come into operation on the day that they are expressed to commence, in accordance with section 576Y of the WR Act (rather than under clause 49 of the FW Bill – which provides a default commencement of the next 1 July) (subitem (2)).

184. Subitem (3) allows regulations to be made to deal with other matters relating to the way in which the FW Bill applies to Part 10A modern awards.

Item 5 – Variations to deal with minor problems attributable to award modernisation starting before enactment of FW Act

185. This item allows FWA to make a determination that varies a modern award, but only if the variation is minor or technical in nature and addresses a problem related to the fact that the modern award was made under a process that began before the FW Bill was enacted. This enables an award to be varied to rectify incorrect references to provisions of the NES, or to reflect changes in concepts in the FW Bill as enacted.

186. Determinations made under this item can be made on application or on FWA's own initiative.

Item 6 – Review of all modern awards (other than modern enterprise awards) after first 2 years

187. This item requires FWA to conduct a review of modern awards after 2 years.

- This review will not consider modern enterprise awards, which will be reviewed as they are modernised by FWA (see Schedule 6 – Modern enterprise awards).

188. This review will be required to examine whether modern awards:

- are achieving the modern awards objective set out in this Bill; and

- are operating effectively, without anomalies or technical problems arising from the award modernisation process.

189. In considering whether modern awards are achieving the modern awards objective, FWA would consider a range of issues, including, for example, the need to encourage collective bargaining and the principle of equal remuneration for work of equal or comparable value.

190. The interim review will enable FWA to examine individual flexibility clauses in modern awards to ensure they are being used for the purpose intended and not to alter industry standards on hours and shift patterns.

191. FWA would have the power to vary a modern award in a way that it considers appropriate to remedy any issues identified, although the limits in Part 2-3 of the FW Bill as to the matters that may (or may not) be included in awards will apply.

192. The modern awards objective applies to any variations under this item and if the variation affects minimum wages, then the minimum wages objective also applies.

193. FWA may advise persons or bodies about the review in any manner it considers appropriate. The President can delegate this function.

Item 7 – Review of transitional arrangements included in modern awards

194. This item allows FWA to review transitional arrangements that have been included in modern awards as part of award modernisation, but only if the power to do so is included in a modern award.

195. If such a term is included in a modern award, subitem (1) authorises FWA to review the modern award in accordance with the review terms and to vary the modern award to give effect to the review.

196. Subitem (2) provides that review terms are taken to be permitted in modern awards by Subdivision B of Division 3 of Part 2-3 of the FW Bill.

Part 3 – Avoiding reductions in take-home pay

197. This Division makes clear that the award modernisation process is not intended to result in a reduction in the take-home pay of employees, and provides a mechanism for obtaining remedial orders (take-home pay orders) if there is such a reduction. The scope for take-home pay orders is tightly constrained. The intention is that orders can only be made where:

- there is an actual reduction in take-home pay - if award rates decrease, but an employee's pay does not decline (because pay is maintained by their employer), an order cannot apply;

- award modernisation is the operative or immediate reason for a reduction in take-home pay.

198. These provisions are not intended to allow FWA to review entitlements in modern awards generally. Rather, the intention is to allow FWA to deal with cases in which an

employee suffers a reduction in their take-home pay, for working the same hours or performing the same quantity of work, due to the award modernisation process.

Item 8 – Part 10A award modernisation process is not intended to result in reduction in take-home pay

199. This item provides that the award modernisation process is not intended to result in a reduction in the take-home pay of employees or outworkers.

200. An employee or outworker's take-home pay is defined as the pay that the employee or outworker actually receives (including not only wages and incentive-based payments, but other payments such as penalty rates and allowances). The effect of any deduction from wages (such as might occur under a salary sacrifice arrangement) is disregarded when assessing take-home pay.

201. An order can be sought (under item 9) in respect of a modernisation-related reduction in take-home pay. An employee suffers such a reduction if, and only if:

- the modern award starts to apply to the employee when it commences operation - that is, the orders are only available in respect of current award covered employees;
- the employee is employed in the same position (or a position that is comparable to) the position they were employed in immediately before the modern award came into operation. This makes clear that the provision is designed purely to ensure a fair transition from the old award to the new - it is not intended that this provision apply where employees change jobs, or where working arrangements change;
- the employee's take-home pay for working particular hours (including a particular shift pattern or spread of hours) or for a particular quantity of work is less than it would have been immediately before the modern award came into operation; and
- the reduction is attributable to the modernisation process - the intention is that orders can only be made where modernisation is the operative or immediate reason for a reduction in take-home pay.

202. Equivalent provision is made in relation to non-employee outworkers.

203. It is not intended that the take-home pay orders should prevent an employer from taking action (e.g., reorganising roster arrangements) that would otherwise be lawful.

Item 9 – Orders remedying reductions in take-home pay

204. This item allows an application for a take-home pay order to be made by: an employee or outworker who has suffered a reduction in take-home pay; an organisation entitled to represent the industrial interests of such an employee or outworker, or a person acting on behalf of a class of such employees or outworkers.

205. An application for an order will be able to be made in respect of an individual employee or outworker or a group of employees or outworkers.

206. It is not intended that there be a time limit on the making of an application, however, it is expected that the ability to draw a connection between a reduction in take-home pay and the award modernisation process will diminish over time.

207. It is intended, however, that repeat applications should be avoided. FWA can dismiss an application in whole or in part if it considers that the circumstances of an employee or outworker have already been considered as part of an earlier application (e.g., as part of an application relating to a group or class of employees or outworkers, or the employee or outworker has previously made an application).

208. In considering whether to make an order, FWA is to look at the circumstances of the individual or group of individuals to determine whether there has been a reduction in take-home pay and whether award modernisation is a direct and operative reason for any reduction.

209. If FWA is satisfied that there has been a reduction in take-home pay due to award modernisation, FWA has the power to make a take-home pay order - such orders may only relate to the payment of money.

210. As take-home pay orders operate separately from modern awards, any increases in annual wage reviews will not flow into these orders (i.e., they are not instruments that can be varied to reflect annual wage review outcomes).

Item 10 – Ensuring that take-home pay orders are confined to the circumstances for which they are needed

211. Subitem (1) provides that FWA must not make a take-home pay order in relation to an individual or a class where the reduction in take-home pay is minor or insignificant, or where the affected employees or outworkers have been adequately compensated for the reduction in other ways.

212. The provisions regarding take-home pay orders are intended to ensure that an employee or outworker is not disadvantaged in his or her take-home pay in the transition from the old system to the new modern award. Accordingly, subitem (2) provides that a take-home pay order is to be expressed so that:

- it does not apply to an employee or outworker unless they have actually suffered a reduction in their take home pay due to award modernisation. This means that if pay rates decrease in the award, but an employee or outworker's pay does not decline (e.g., because the pre-modernisation rate of pay is maintained), an order will not apply;

- future wage increases from annual wage reviews are absorbed into any amounts payable under a take-home pay order.

Item 11 – Take-home pay order continues to have effect so long as modern award continues to cover the employee or employees

213. This item provides that a take-home pay order continues to have effect in relation to an employee or class of employees (subject to the terms of the order) while the modern award covers the employee or employees, even if it stops applying because an enterprise agreement

starts to apply. This ensures that an employee does not lose the benefit of a take-home pay order when an enterprise agreement starts to apply.

Item 12 – Inconsistency with modern awards and enterprise agreements

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

Item 13 – Application of provisions of FW Act to take-home pay orders

215. This item ensures that take-home pay orders are treated in the same way as similar types of orders (such as equal remuneration orders) in subclauses 675(2) or 706(2) of the FW Bill.

Schedule 6 – Modern enterprise awards

Part 1 – Preliminary

Item 1 – Meanings of *employee* and *employer*

216. In this Schedule, the terms employee and employer mean national system employee and national system employer respectively (as defined in clauses 13 and 14 of the FW Bill). The rights and obligations of employers and employees set out in this Schedule apply only to the employment relationships within the scope of the corporations and other constitutional powers that are engaged by clauses 13 and 14 of the FW Bill.

Part 2 – The enterprise instrument modernisation process

217. This Part provides for the modernisation of enterprise instruments.

218. Enterprise awards and NAPSAs that were derived from a State enterprise award are excluded from the award modernisation process that is being undertaken by the AIRC. This Part provides for the integration of those awards into the new workplace relations system.

219. This Part also provides for the modernisation of certain preserved State agreements.

220. In exercising its functions and powers under this Schedule, FWA must consider specified criteria.

221. The modern awards objective and the minimum wages objective (see clauses 134 and 284 of the FW Bill) also apply to enterprise instrument modernisation (see item 6). This ensures that FWA considers the broader issues included in those objectives.

222. However, in considering these objectives, FWA must recognise the particular role and nature of enterprise awards (see item 6).

223. FWA is able to inform itself as it sees fit in conducting the modernisation process (see Schedule 2). This enables FWA to seek and consider submissions not only from those with a direct interest in the award, but also other interested parties (e.g., other employers in the relevant industry).

Division 1 – Enterprise instruments

Item 2 – Enterprise instruments

224. This item defines relevant terms.

225. The term enterprise instrument is defined as an enterprise award-based instrument or an enterprise preserved collective State agreement.

226. An enterprise award-based instrument is an award or NAPSA that regulates terms and conditions of employment in a single enterprise or part of a single enterprise or one or more enterprises, if the employers carry on similar business activities under the same franchise.

227. The terms single enterprise and part of a single enterprise are defined in item 3.

228. A franchise is defined in clause 12 of the FW Bill and has the meaning given by section 9 of the *Corporations Act 2001*.

229. The term franchisor is intended to have its ordinary meaning and includes the following:

- a person who grants a franchise;
- a person who otherwise participates in a franchise as a franchisor; and
- a subfranchisor in its relationship with a subfranchisee.

230. The term franchisee is also intended to have its ordinary meaning and includes the following:

- a person to whom a franchise is granted;
- a person who otherwise participates in a franchise as a franchisee; and
- a subfranchisee in its relationship with a subfranchisor.

231. An enterprise preserved collective State agreement is a transitional instrument that is a preserved collective State agreement where, on the day before the commencement of the Work Choices amendments (27 March 2006), a State or Territory law had the effect of converting a State or Territory enterprise award into an enterprise agreement.

Item 3 – Meaning of *single enterprise* and *part of a single enterprise*

232. This item defines single enterprise and part of a single enterprise for the purposes of Schedule 6.

Division 2 – The enterprise instrument modernisation process

Item 4 – The enterprise instrument modernisation process

233. This item enables FWA to receive an application to make a modern enterprise award.

234. An application to modernise an enterprise instrument can be made any time between the FW (safety net provisions) commencement day and the end of 31 December 2013 (paragraph 3(b)). No new enterprise awards will be able to be made by FWA outside this enterprise instrument modernisation process.

235. If an application to modernise an enterprise instrument has not been received by FWA by the end of 31 December 2013, the enterprise instrument will cease to operate. Employers and employees would at that point become covered by any relevant modern award.

236. The modernisation of enterprise instruments is intended to produce a new self-contained modern award that can operate effectively in the new workplace relations system. These new instruments are modern awards for the purposes of the FW Bill.

237. Prior to a decision being made about whether or not to make a modern enterprise award (or, if no application is made, until the end of 2013), existing enterprise instruments will continue and the parties covered by the instrument will retain their existing entitlements and obligations, that is, the entitlements and obligations that existed immediately before the FW (safety net provisions) commencement day.

238. Existing rates of pay under APCSs continue to apply (this is the effect of Schedule 9).

239. Terms drawn from another federal award also continue in force (these awards are preserved as transitional award-based instruments - see Schedule 3).

240. Schedule 5 ensures that, where a modern industry or occupation based award is made, FWA does not revoke transitional instruments that still apply to employers and employees covered by an enterprise award.

241. Paragraph (5) lists the factors that FWA must take into account when deciding whether or not to modernise an enterprise instrument.

242. These criteria are broad and require FWA to consider and balance all relevant matters in deciding whether to make a modern enterprise award.

243. For example, the criteria require FWA to consider the circumstances that led to the making of the enterprise instrument and the extent to which the instrument provides enterprise specific terms and conditions of employment.

244. However, FWA is required to assess these matters in light of the content of any relevant modern award that would otherwise apply (which would allow consideration of whether the relevant modern award provides terms and conditions that should be included in the modern enterprise award as an appropriate safety net), and the views of the persons covered by the enterprise instrument.

245. Paragraph (5)(f) also provides that FWA must have regard to the competitive position of both the enterprise covered by an enterprise instrument and of the enterprises covered by a modern award which, but for the enterprise instrument, would otherwise apply to that enterprise.

246. This means, for example, that FWA is to give consideration to whether an enterprise instrument should be modified if it would otherwise provide the enterprise covered by it with a significant cost advantage (or disadvantage) compared to other employers in the industry and so lessen the competitiveness of that enterprise or of other enterprises in the industry.

247. As noted above, FWA must also consider the broader factors listed in the modern enterprise awards objective, and modern awards and minimum wages objectives.

248. Other matters relating to the enterprise instrument modernisation process may be dealt with by regulation (subitem (6)).

Item 5 – Enterprise instruments: termination by FWA

249. This item allows a person covered by an enterprise instrument to apply to FWA to terminate an existing enterprise instrument.

250. An application can only be made during the period starting on the FW (safety net provisions) commencement day and ending at the end of 31 December 2013.

251. Where FWA receives an application to terminate an enterprise instrument, it will be open for FWA to:

- decide to terminate the enterprise instrument;
- decide not to terminate the enterprise instrument (meaning that it remains on foot in its present form); or
- decide to deal with the question of whether a modern enterprise award should be made to replace the enterprise instrument.

252. Where FWA decides to terminate an existing enterprise instrument, the termination takes effect from the date specified in the termination decision.

253. The factors and objectives guiding FWA in exercising its powers under the item reflect those outlined above.

Item 6 – The modern enterprise awards objective

254. This item extends the operation of the modern awards objective and the minimum wages objective to FWA's making of modern enterprise awards. This means that FWA takes into account the same social and economic factors in making modern enterprise awards as when making other modern awards. These factors include, for example, the impact on business, including business competitiveness and viability (see paragraphs 134(1)(f) and 284(1)(a) of the FW Bill).

255. As well as applying the modern awards objective and the minimum wages objective to the making of modern enterprise awards, FWA is also required to apply the modern enterprise awards objective.

256. The modern enterprise awards objective requires FWA to recognise that modern enterprise awards may provide tailored terms and conditions of employment that reflect arrangements that have developed in relation to specific enterprises.

257. The intention of this item is that the factors listed in paragraphs 134(1)(a)-(h) and 284(1)(a)-(e) of the FW Bill relating to the modern awards objective and minimum wages objective respectively should apply to the making of modern enterprise awards, as they do to the making of modern awards generally. However, the minimum terms and conditions for a modern enterprise award may not necessarily be the same as those that apply to an industry or occupation-based modern award.

258. An enterprise may have developed employment arrangements over a period of time that meet the particular needs of that enterprise and reflect the way in which the enterprise operates. The criteria that FWA will apply in deciding whether to make a modern enterprise award require FWA to consider any enterprise specific arrangements that apply in a particular enterprise. FWA will be able to maintain any enterprise specific arrangements in a modern enterprise award where it considers that this is appropriate to do so.

259. FWA will be able to inform itself in such manner as it considers appropriate, in accordance with clause 590 of the FW Bill, in exercising its functions in relation to modern enterprise awards. This will allow FWA to consult with and receive submissions from persons other than those covered by an enterprise instrument where appropriate. For example, when considering whether to modernise an enterprise instrument and, if so, the terms that it may include in a modern enterprise award, FWA may consider it appropriate to consult with and receive submissions from other businesses operating in the same industry.

Illustrative example

Wrenview Island Resort operates a remote island resort. The Wrenview Island Resort Enterprise Award includes a number of enterprise-specific arrangements that suit the needs of the business.

For example, under the Wrenview Island Resort Enterprise Award, a maximum of 10 ordinary hours may be worked per day within a spread of 16 hours per day from starting time, inclusive of meal breaks. The rates of pay for all employees covered by the enterprise award have been annualised to incorporate compensation for employees working 15 weekends and six public holidays per year.

Wrenview and its employees are keen for these working arrangements to remain in the new system and are able to make submissions to FWA that the enterprise award be modernised, taking into account these longstanding enterprise-specific arrangements.

260. In setting the terms and conditions, it is intended that FWA will take into account the employment arrangements that have been developed for the enterprise and which are reflected in the enterprise award. This is not intended, however, to impose an obligation on FWA to only include tailored terms in modern enterprise awards. Rather, the item is designed to ensure that FWA has regard to the fact that an enterprise instrument may contain tailored terms because they have been developed to meet the needs of a particular enterprise.

Item 7 – Terms of modern enterprise awards

261. This item provides that the terms which may be included in modern enterprise awards are the same as for modern awards generally.

262. Subitem (2) provides that if the making of a modern enterprise award results in an increase in an employee's entitlements, the modern enterprise award may provide for the increases to be phased in. The phase in power is intended to moderate the impact on employers of any increase in the level of employee entitlements that results from the modernisation process.

263. Subitem (3) allows FWA to include in a modern enterprise award an industry-specific redundancy scheme that has been included in the relevant modern award.

Item 8 – Coverage terms

264. Subitem (1) provides that a modern enterprise award must include coverage terms which set out the enterprise or enterprises to which the modern enterprise award relates as well as the employer or employers, employees and organisations that are covered.

265. Subitem (2) provides that a modern enterprise award must be expressed to relate to:

- a single enterprise (or part of a single enterprise); or
- one or more enterprises, if the employers all carry on similar business activities under the same franchise and are franchisees of the same franchisor, related bodies corporate of the same franchisor or a combination of the two.

266. It is intended that the coverage terms of a modern enterprise award be able (if appropriate) to be framed so that the award will extend to new franchisees of a franchisor.

267. Subitem (3) provides that modern enterprise awards must be expressed to cover specified employers and employees.

268. Subitem (4) provides that a modern enterprise award may be expressed to cover one or more specified organisations in relation to all or specified employees or employers covered by the award.

269. Subitem (5) provides that a modern enterprise award must not be expressed to cover outworker entities.

270. Subitems (6) and (7) contain provisions regarding the way in which coverage is to be expressed in modern enterprise awards.

271. Subitem (8) provides that modern enterprise awards must not be expressed to cover employees who have not traditionally been covered by awards. This the position for modern awards generally (see subclause 143(8) of the FW Bill).

Item 9 – Variation and termination of certain transitional instruments etc. to take account of enterprise instrument modernisation process

272. Subitem (1) provides that an enterprise preserved State collective agreement terminates when a modern enterprise award replacing it comes into operation.

273. Subitem (2) requires that, as soon as practicable after it makes a modern enterprise award to relace an enterprise instrument, FWA must terminate the enterprise instrument, and vary or terminate any other award-based transitional instruments and any transitional APCSs so that these other instruments no longer cover the employees who are now covered by the modern enterprise award.

274. If FWA decides not to make a modern enterprise award to replace an enterprise instrument, the enterprise instrument terminates when that decision comes into operation (subitem 9(3)). An enterprise instrument also terminates if no application has been made to FWA to modernise or terminate that instrument by the end of 31 December 2013 (subitem 9(4)).

275. Once all modern enterprise awards made in the enterprise instrument modernisation process have come into operation, FWA must terminate any remaining award-based transitional instruments and any remaining APCSs (subitem 9(5)).

Item 10 – Notification of the cut-off for the enterprise instrument modernisation process

276. As noted above, an enterprise instrument will terminate if no application has been made to FWA to modernise or terminate that instrument by the end of 31 December 2013.

277. To ensure that those covered by such instruments make an informed decision about whether to seek a modern enterprise award, item 10 requires FWA to advise those covered by unmodernised enterprise instruments 6 months before 31 December 2013 of the deadline for making an application, and the consequences for the enterprise instrument if they do not do so (i.e., termination).

278. FWA has discretion to advise parties to unmodernised awards by any means it considers appropriate.

279. The ability of the President of FWA to delegate functions and powers (provided by clause 625 of the FW Bill) extends to functions and powers under this item.

Division 3 – Avoiding reductions in take-home pay

280. This Division makes clear that the enterprise instrument modernisation process is not intended to result in a reduction in the take-home pay of employees, and provides a mechanism for obtaining remedial orders (take-home pay orders) if there is such a reduction. The scope for take-home pay orders is tightly constrained. The intention is that orders can only be made where:

- there is an actual reduction in take-home pay - if award rates decrease, but an employee's pay does not decline (because pay is maintained by their employer), an order cannot apply; and

- enterprise award modernisation is the operative or immediate reason for a reduction in take-home pay.

281. These provisions are not intended to allow FWA to review entitlements in modern enterprise awards generally. Nor is it intended that such orders should be available to constrain an employer from taking action (e.g., reorganising roster arrangements) that would otherwise be lawful.

282. Rather, the intention is to allow FWA to deal with cases in which an employee suffers a reduction in their take-home pay, for working the same hours or performing the same quantity of work, due to the enterprise instrument modernisation process.

Item 11 – Enterprise instrument modernisation process is not intended to result in reduction in take-home pay

283. This item provides that the enterprise instrument modernisation process is not intended to result in a reduction in the take-home pay of employees.

284. An employee's take-home pay is defined as the pay that the employee actually receives (including not only wages, but other payments such as penalty rates and allowances). The effect of any deduction from wages (such as might occur under a salary sacrifice arrangement) is disregarded when assessing an employee's take-home pay.

285. An order can be sought (under item 12) in respect of a modernisation-related reduction in take-home pay. An employee suffers such a reduction if, and only if:

- the modern enterprise award starts to apply to the employee when it commences operation - that is, the orders are only available in respect of current award covered employees;

- the employee is employed in the same position (or a position that is comparable to) the position they were employed in immediately before the modern enterprise award came in to operation. This makes clear that the provision is designed purely to ensure a fair transition from the old award to the new - it is not intended that this provision apply where employees change jobs, or where working arrangements change;

- the employee's take home pay for working particular hours (including a particular shift pattern or spread of hours) or for a particular quantity of work is less than it would have been immediately before the modern enterprise award came into operation; and

- the reduction is attributable to the modernisation process - the intention is that orders can only be made where modernisation is the operative or immediate reason for a reduction in take-home pay.

286. It is not intended that the take-home pay orders should prevent an employer from taking action (e.g., reorganising roster arrangements) that would otherwise be lawful.

Item 12 – Orders remedying reductions in take-home pay

287. Subitems (1) – (3) allow an application for a take-home pay order to be made by: an employee who has suffered a reduction in take-home pay; an organisation entitled to represent the industrial interests of such an employee; or a person acting on behalf of a class of such employees.

288. An application for an order will be able to be made in respect of an individual employee or a group of employees.

289. It is not intended that there be a time limit on the making of an application, however, it is expected that the ability to draw a connection between a reduction in take-home pay and the enterprise award modernisation process will diminish over time.

290. It is intended, however, that repeat applications should be avoided. FWA can dismiss an application in whole or in part if it considers that an employee's circumstances have already been considered as part of an earlier application (e.g., the employee's circumstances were considered as part of an application relating to a group or class of employees, or the employee has previously made an application).

291. In considering whether to make an order, FWA will look at the circumstances of the individual or group of individuals to determine whether there has been a reduction in take-home pay and that enterprise award modernisation is a direct and operative reason for that reduction.

292. If FWA is satisfied that there has been a reduction in take-home pay due to enterprise award modernisation, FWA will have the power to make a take-home pay order - such orders may only relate to the payment of money.

293. As take-home pay orders operate separately from modern enterprise awards, any increases in annual wage reviews will not flow into these orders (i.e., they are not instruments that can be varied to reflect annual wage review outcomes).

Item 13 – Ensuring that take-home pay orders are confined to the circumstances for which they are needed

294. Subitem (1) provides that FWA must not make a take-home pay order in relation to an employee or class of employees where the reduction in take-home pay is minor or insignificant, or where the employee or group of employees have been adequately compensated for the reduction in other ways.

295. The provisions regarding take-home pay orders are intended to ensure that an employee is not disadvantaged in his or her take-home pay in the transition from the old system to the new modern enterprise award. Accordingly, subitem (2) provides that a take-home pay order be expressed so that:

- it does not apply to an employee unless the employee has actually suffered a reduction in their take home pay due to the enterprise award modernisation process. This means that if pay rates in the award decrease, but an employee's pay does not decline (because pay is maintained by their employer), an order will not apply; and

- future wage increases from annual wage reviews are absorbed into any amounts payable under a take-home pay order.

Item 14 – Take-home pay order continues to have effect so long as modern enterprise award continues to cover the employee or employees

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

Item 15 – Inconsistency with modern enterprise awards and enterprise agreements

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

Item 16 – Application of provisions of FW Act to take-home pay orders

298. This item ensures that take-home pay orders will be treated in the same way as similar types of orders (such as equal remuneration orders) in subclauses 675(2) or 706(2) of the FW Bill.

Division 4 – Application of the FW Act

Item 17 – How the FW Act applies to modern awards made in the enterprise instrument modernisation process

299. The effect of this item is that modern enterprise awards are generally taken to be modern awards for the purposes of the FW Bill from the day on which the modern enterprise award is made. However, subitem (2) ensures that modern enterprise awards come into operation on the day on which it is expressed to commence (rather than on 1 July, as would be the effect of clause 49 of the FW Bill).

300. Subitem (3) provides that the regulations may deal with other matters relating to how the FW Bill applies in relation to modern enterprise awards.

Part 3 – Amendments

Fair Work Act 2009

301. This part makes a number of amendments to the FW Bill that are consequential upon the enterprise instrument modernisation process.

Item 18 – Clause 12 (definition of *award modernisation process*)

Item 19 – Clause 12 (definition of *coverage terms*)

302. These items amend existing definitions:

- the current definition of award modernisation process is replaced with a definition that accounts for both the continuation of Part 10A of the WR Act by Schedule 5 of this Bill, and the enterprise instrument modernisation process.
- the existing definition of coverage terms is amended to include a reference to modern enterprise award coverage terms.

Item 20 – Clause 12

Item 21 – Clause 12

Item 22 – Clause 12

Item 23 – Clause 12

303. These items insert pointers to definitions of modern enterprise award (and the related terms part of a single enterprise and single enterprise) (in new clause 168A) and modern enterprise awards objective (in new clause 168B).

Item 24 – Clause 132

304. This item amends the Guide at the commencement of Part 2-3 of the FW Bill to reflect the inclusion of additional provisions relating to modern enterprise awards (see Division 7 of Part 2 of Schedule 6)

Item 25 – Clause 143

305. This item inserts two new subclauses 143(8) and 143(9) in the FW Bill to ensure that modern awards are expressed not to cover employees who are covered by a modern enterprise award, enterprise award-based instrument or enterprise preserved collective State agreement.

306. This item also makes an amendment to the heading of clause 143 which is consequential on the other amendments in item 25.

Item 26 – New clause 143

307. This item inserts a new clause 143A which contains rules regarding the coverage terms of modern enterprise awards.

Item 27 – New Division 7 of Part 2-3

308. This item inserts a new Division 7 which contains additional provisions relating to modern enterprise awards.

309. New clause 168A defines a modern enterprise award as an award that regulates terms and conditions of employment in:

- a single enterprise or part of a single enterprise; or
- one or more enterprises, if the employers carry on similar business activities under the same franchise.

310. New clause 168B contains the modern enterprise awards objective, and explains when that objective is to apply.

311. The modern enterprise awards objective reflects the objective in item 6, described above.

312. New clause 168C provides that FWA may not make new modern enterprise awards under this Part. Modern enterprise awards can only be made through the enterprise instrument modernisation process in Division 2 of Schedule 6 of this Bill.

313. New clause 168C also ensures that coverage of a modern enterprise award cannot be varied so that the award ceases to be an enterprise award.

314. A modern enterprise award can be revoked if the award is obsolete, or if FWA is satisfied that a modern award (other than the miscellaneous modern award) that is appropriate will apply to the employees upon revocation.

315. In deciding whether to revoke a modern enterprise award, FWA must take account of specified factors. These factors reflect those that apply to the making or revoking of enterprise instruments during the modernisation process.

316. These criteria are broad and require FWA to consider and balance all relevant matters in deciding whether to revoke a modern enterprise award.

317. For example, the criteria require FWA to consider the circumstances that led to the making of the enterprise instrument and the extent to which the instrument provides enterprise specific terms and conditions of employment. FWA is also required to consider the content of any relevant modern award that would otherwise apply, the views of the persons covered by the modern enterprise award, and the competitive position of both the enterprise covered by the modern enterprise award and the enterprises covered a modern award which, but for the enterprise award, would otherwise apply to that enterprise.

318. New clause 168D provides that FWA is not permitted to extend the coverage of a modern enterprise award if the effect of the variation would be that the instrument ceases to be a modern enterprise award. The factors outlined above also guide FWA in determining whether to change the coverage of a modern enterprise award.

Item 28 – Subclause 292(1)

319. Subclause 292(1) of the FW Bill requires FWA to publish varied modern award wage rates by 1 July each year.

320. This item substitutes existing subclause 292(1) and replaces it with new subclause 292(1). Because of the potentially large number of modern enterprise awards, and the fact that those covered by such awards will be familiar with their contents, the new provision requires FWA to publish the wage rates in a modern enterprise award as soon as practicable after they are varied as part of an annual wage review. This different publication requirement does not affect when wage variations come into effect (which is dealt with in clause 287) or the enforceability of such rates.

Schedule 7 – Enterprise agreements and workplace determinations made under the FW Act

321. Schedule 7 sets out modifications and transitional provisions relating to enterprise agreements and workplace determinations made and varied in accordance with the FW Bill during and after the bridging period. The modifications are necessary because the NES and modern awards will not operate until 1 January 2010.

322. In particular, the Schedule provides for:

- the making and variation of enterprise agreements during the bridging period, which must pass the no-disadvantage test rather than the better off overall test - see Part 2;
- modifications of certain provisions of the FW Bill in relation to enterprise agreements, variations of enterprise agreements and workplace determinations made during the bridging period - see Parts 3 and 5;
- transitional provisions relating to the application of the better off overall test should the award modernisation process not be completed at the end of the bridging period - see Part 4; and
- transitional provisions in relation to the application of the AFPCS during the bridging period - see Part 6.

Part 1 – Preliminary

Item 1 – Meanings of *employer* and *employee*

323. In this Schedule, the terms employee and employer mean national system employee and national system employer respectively (as defined in clauses 13 and 14 of the FW Bill). The rights and obligations of employers and employees set out in this Schedule apply only to the employment relationships within the scope of the corporations and other constitutional powers that are engaged by clauses 13 and 14 of the FW Bill.

Part 2 – Transitional provisions relating to the application of the no-disadvantage test to enterprise agreements made and varied during bridging period

Division 1 – Enterprise agreements and variations made during bridging period must pass no-disadvantage test

Item 2 – Approval of agreement or variation by FWA – passing the no-disadvantage test

324. This item provides that the no-disadvantage test (as set out in Division 2 of this Schedule) applies to enterprise agreements and variations to enterprise agreements made during the bridging period instead of the better off overall test. The better off overall test operates from 1 January 2010 when modern awards and the NES commence operation.

Division 2 – The no-disadvantage test

Item 3 – Definitions

325. This item defines a number of terms used in this Division and explains how the Division applies to variations and prospective employees.

Item 4 – When does an agreement pass the no-disadvantage test?

326. This item provides that an enterprise agreement made during the bridging period must pass the no-disadvantage test. An enterprise agreement passes the no-disadvantage test if FWA is satisfied that an enterprise agreement would not result, on balance, in a reduction in the employees' overall terms and conditions of employment under any reference instrument relating to one or more employees. A reference instrument is defined in subitem 5(1). This is the same test that applied to the approval of workplace agreements under Division 5A of Part 8 of the WR Act.

327. Subitem 4(2) provides that in relation to long service leave, a reference instrument includes a relevant State or Territory law that applied to an employee immediately before an application was made to FWA for approval of the enterprise agreement. If the only reference instrument relating to the employees is a designated award, the award is to be disregarded to the extent that it provides for long service leave. The note under subitem 4(2) makes clear that an enterprise agreement made during the bridging period prevails over a State or Territory law to the extent of any inconsistency relating to long service leave (see item 17).

328. Subitem 4(3) provides that if there is no reference instrument in relation to any of the employees covered by the enterprise agreement, the enterprise agreement is taken to pass the no-disadvantage test

329. Subitem 4(4) provides that if a reference instrument only relates to some of the employees covered by the enterprise agreement and FWA is satisfied that the agreement passes the no-disadvantage test in relation to those employees, the agreement is taken to pass the test in relation to all employees. However, if the agreement does not pass the no-disadvantage test in relation to one or more employees covered by the agreement, it does not pass the test in relation to any employees. The effect of this is that an enterprise agreement either passes the no-disadvantage test in relation to all employees for which is a reference instrument or not at all.

330. Subitem 4(5) requires FWA to disregard any individual flexibility arrangement that has been agreed to by the affected employee and employer when it is determining whether an enterprise agreement as proposed to be varied passes the no-disadvantage test.

Item 5 – Reference instruments etc.

331. The no-disadvantage test requires FWA to assess an enterprise agreement against any reference instrument relating to one or more employees (item 4).

332. Subitem 5(1) defines reference instrument in relation to employees who are covered by an enterprise agreement as any relevant general instrument for one or more of the employees or if there is no relevant general instrument - a designated award.

333. A relevant general instrument is an award-based transitional instrument that:

- regulates, or would but for an enterprise agreement or another industrial instrument having come into operation regulate, any term or condition of employment of persons engaged in the same kind of work to be performed by an employee under the enterprise agreement; and

- applied, or would but for an enterprise agreement or another industrial instrument having come into operation have applied, to the employee's employer immediately before the day on which the application for FWA approval of the agreement was made.

Item 6 – Enterprise agreement to be tested as at test time

334. This item provides that, for the purpose of applying the no-disadvantage test, FWA must consider an enterprise agreement as it was at the time the bargaining representative made an application for FWA approval under clause 185 of the FW Bill.

Item 7 – Designated awards – before application for FWA approval

335. This item enables FWA to designate an award in relation to an employee or class of employees before an application for FWA approval is made under clause 185 of the FW Bill. An enterprise award cannot be a designated award.

Item 8 – Designated awards – after application for FWA approval

336. This item enables FWA to designate an award in relation to an employee or class of employees after an application for FWA approval is made under clause 185 of the FW Bill. An enterprise award cannot be a designated award.

Item 9 – Effect of State awards etc.

337. This item makes clear that FWA may determine that an award is a designated award where the terms and conditions of the kind of work performed or to be performed by an employee were (or would have been but for an industrial instrument or a State employment agreement having come into operation) regulated by a State award immediately before 27 March 2006.

Item 10 – Matters taken into account when testing agreement etc.

338. This item outlines the matters that FWA may to take into account when:

- deciding whether or not an agreement passes the no-disadvantage test; and

- determining an award is a designated award.

339. When performing these functions, FWA may inform itself in any way it considers appropriate. This includes (but is not limited to) contacting the employer, one or more employees, or if applicable, a bargaining representative in relation to the agreement.

Part 3 – Other requirements and modifications applying to making and varying enterprise agreements during the bridging period

Division 1 – Requirements relating to approval

Item 11 – Approval of agreement by FWA – interaction with the National Employment Standards

340. This item provides that paragraph 186(2)(c) of the FW Bill (the requirement that the agreement does not contravene the NES) does not apply in relation to an enterprise agreement, or a variation to an enterprise agreement made during the bridging period because the NES do not commence operation until 1 January 2010.

Item 12 – Approval of agreement by FWA – term about settling disputes

341. This item modifies the requirement that an enterprise agreement must have a term about settling disputes in relation to the NES to reflect that the NES do not come into operation until 1 January 2010.

Item 13 – Approval of agreement by FWA – requirements relating to particular kinds of employees

342. This item deals with the application of provisions in the FW Bill relating to particular employees (shift workers, pieceworkers, school-based apprentices and trainees and outworkers) to enterprise agreements and variations made during the bridging period.

343. Subitem 13(1) provides that subclause 187(4) of the FW Bill (which deals with requirements relating to the kinds of employees listed above) generally does not apply in relation to an enterprise agreement, or a variation to an enterprise agreement, made during the bridging period. This is because these provisions rely on modern awards being in operation. Until that time, the no-disadvantage test will provide protection for these employees. However, FWA must still be satisfied that the requirements in relation to outworkers are met (see clause 200 of the FW Bill).

344. Subitem 13(2) modifies the application of clause 200 of the FW Bill (which deals with requirements relating to outworkers) in relation to agreements or variations made during the bridging period. The modifications to clause 200 for the purposes of this item are:

- references to a modern award are taken to be references to an award; and
- references to outworker terms are taken to be references to outworker terms as defined in section 564 of the WR Act.

Division 2 – Base rates of pay

Item 14 – Base rate of pay under enterprise agreements

345. This item provides that clause 206 of the FW Bill (which deals with base rates of pay under enterprise agreements) does not apply during the bridging period. The AFPCS applies to employees covered by an enterprise agreement during the bridging period ensuring that minimum safety net wages are not undercut (see Part 6 of this Schedule).

Division 3 – No extensions of time

Item 15 – No extension of time to apply for approval of agreement made in final 14 days of bridging period

Item 16 – No extension of time to apply for approval of variation of agreement made in final 14 days of bridging period

346. These items provide that paragraphs 185(3)(b) and 210(3)(b) of the FW Bill (which deal with extending the period within which an application must be made to FWA for approval of an enterprise agreement or a variation of an enterprise agreement) do not apply in relation to an enterprise agreement or variation made during the period of 14 days before the end of the bridging period. If a bargaining representative does not make an application for FWA approval of an agreement or variation made during the bridging period within 14 days of the making of the agreement or variation, FWA is unable to approve the agreement or variation. In this circumstance, the employer and employees may make another agreement or variation in accordance with Part 2-4 of the FW Bill.

Division 4 – State and Territory laws dealing with long service leave

Item 17 – Enterprise agreement made during the bridging period prevails over State and Territory laws dealing with long service leave

347. This item provides that despite subclause 29(2) of the FW Bill (which deals with the interaction of enterprise agreements and State and Territory laws), an enterprise agreement made during the bridging period prevails over a State or Territory law dealing with long service leave to the extent of any inconsistency. The note to this item makes clear that a term of an enterprise agreement made during the bridging period operates subject to State or Territory laws referred to in paragraphs 29(2)(a) or 29(2)(b) of the FW Bill.

Part 4 – Transitional provisions to apply the better off overall test after end of bridging period if award modernisation not yet completed

348. It is intended that award modernisation will be substantially completed by the end of 2009 and that modern awards will operate from 1 January 2010. These provisions cater for the possibility that award modernisation may not have been completed and also have application to employers and employees covered by enterprise award-based transitional instruments.

Item 18 – Application of better off overall test to making of enterprise agreements that cover unmodernised award covered employees

349. This item applies in relation to an enterprise agreement made after the end of the bridging period if at least one of the employees covered by the agreement is covered by an unmodernised award (an unmodernised award covered employee - see definition in subitem 20(1)).

350. Subitems 18(2) and 18(3) provide that despite clause 193 of the FW Bill, enterprise agreements only pass the better off overall test if FWA is satisfied that:

- the requirements in subclause 193(1) (non-greenfields agreements) or subclause 193(3) (greenfields agreements) of the FW Bill have been satisfied in relation to the agreement; and

- as at test time, each unmodernised award covered employee, and each prospective unmodernised award coved employee, would be better off overall if the enterprise agreement applied to them than if the relevant award-based transitional instrument and transitional APCS applied to them.

Item 19 – Application of better off overall test to variation of enterprise agreements that cover unmodernised award covered employees

351. This item applies in relation to a variation of an enterprise agreement made after the end of the bridging period if at least one of the employees covered by the agreement is covered by an unmodernised award (an unmodernised award covered employee – see definition in subitem 20(1)).

352. Subitem 19(3) stipulates two conditions of which FWA must be satisfied in order for a variation to an enterprise agreement to pass the better off overall test:

- each award covered employee and each prospective award covered employee (within the meaning of subclauses 193(4) and (5) of the FW Bill) must be better off overall if the enterprise agreement applied to them than if the relevant modern award applied to them; and

- each unmodernised award covered employee and each prospective unmodernised award covered employee must be better off overall if the enterprise agreement applied to them than if the relevant award-based transitional instrument and transitional APCS applied to them.

Item 20 – Definitions

353. This item defines a number of terms used in this Part.

354. Key definitions are explained below:

- *prospective unmodernised award covered employee* means a person who, if he or she were employed at the test time, would be covered by an enterprise agreement and would be covered by the relevant award-based transitional instrument that is in

operation and covers the employer. The relevant award-based transitional instrument must cover the person in relation to the work that he or she would perform under the agreement.

- *test time:*

  (a) for the purposes of item 18 - means the time the application for approval of the agreement by FWA was made under clause 185 of the FW Bill; and

  (b) for the purposes of item 19 - means the time the application for approval of the variation of the enterprise agreement by FWA was made under clause 210 of the FW Bill.

- *unmodernised award covered employee* means an employee who, at the test time, is covered by an enterprise agreement and is covered by the relevant award-based transitional instrument that is in operation and covers the employer. The relevant award-based transitional instrument must cover the person in relation to the work that he or she is to perform under the agreement.

Part 5 – Transitional provisions relating to workplace determinations made under the FW Act

Item 21 – Application made during bridging period for special low-paid workplace determination – general requirement relating to minimum safety net

355. This item modifies the application of subclause 262(3) of the FW Bill in relation to an application for a special low-paid workplace determination made during the bridging period because the new safety net provisions will not commence operation until 1 January 2010. This item provides that the words 'awards together with the Australian Fair Pay and Conditions Standard' replace the words 'modern awards together with the National Employment Standards' in subclause 262(3) of the FW Bill.

Item 22 – Special low-paid workplace determination – employer must not previously have been covered by agreement-based transitional instrument

356. This item provides that subclause 263(3) of the FW Bill (which deals with additional requirements for making special low-paid workplace determinations) applies in relation to a special low-paid workplace determination made under the FW Bill as if the reference to an enterprise agreement included a reference to a collective agreement-based transitional instrument. That is, an employer must not be covered by, or previously have been covered by, an enterprise agreement or collective agreement-based transitional instrument in relation to the work to be performed by the employees who will be covered by the special low-paid workplace determination. This item will continue to apply to special low-paid workplace determinations made after the bridging period.

Item 23 – Core terms of workplace determinations – assessment of determination made during bridging period against the no disadvantage test

357. This item modifies the application of subclause 272(4) of the FW Bill (which deals with workplace determinations passing the better off overall test) in relation to workplace determinations made during the bridging period. It makes clear that the no-disadvantage test

applies to workplace determinations made during the bridging period instead of the better off overall test.

Item 24 – Core terms of workplace determinations – assessment of determination made after bridging period that covers unmodernised award covered employees against the better off overall test

358. This item provides that where a workplace determination made after the bridging period covers one or more unmodernised award covered employees (within the meaning of Part 4 of this Schedule), subclause 272(4) of the FW Bill is modified in the same way as item 23.

Item 25 – Core terms of workplace determinations – safety net requirements

359. This item provides that subclause 272(5) of the FW Bill (which deals with terms relating to safety net requirements) does not apply in relation to workplace determinations made during the bridging period. Despite this, no workplace determination can include a term which would contravene clause 200 of the FW Bill (which deals with requirements relating to outworkers) if the workplace determination were an enterprise agreement. The same modifications apply in relation to clause 200 of the FW Bill as those set out under item 13.

Item 26 – Mandatory terms of workplace determinations – term about settling disputes

360. This item makes two modifications to the application of clause 273 of the FW Bill in relation to workplace determinations made during the bridging period:

- paragraph 273(2)(b) reads as if the words 'apply after the end of the bridging period' were added after 'National Employment Standards'; and
- paragraph 273(3) applies as if the reference to paragraph 186(6)(a) of the FW Bill were a reference to that paragraph in its application to an enterprise agreement made during the bridging period (see item 12).

Part 6 – Interaction with Australian Fair Pay and Conditions Standard during bridging period

Item 27 – Interaction between Australian Fair Pay and Conditions Standard during bridging period

361. This item provides for the interaction between the AFPCS and enterprise agreements and workplace determinations (made under the FW Bill) during the bridging period.

362. Subitem 27(1) makes clear that the AFPCS, in its application during the bridging period, prevails over an enterprise agreement or a workplace determination that applies to an employee to the extent to which the AFPCS provides a more favourable outcome for the employee in a particular respect.

363. Subitem 27(2) provides that any dispute about the application of the AFPCS (including disputes about the operation of subitem 27(1)) is to be resolved using the model dispute resolution process set out in Part 13 of the WR Act. References in Divisions 2 and 3 of Part 13

of the WR Act to the AIRC or the Industrial Registrar are taken to be references to FWA for the purpose of resolving disputes about the application of the AFPCS.

364. Note that item 12 provides that terms dealing with settling disputes in relation to the NES only apply after the end of the bridging period.

365. Subitem 27(4) provides that the fact that the model dispute resolution process applies in relation to the dispute does not affect any right of a party to the dispute to take court action to resolve it.

366. Subitem 27(6) provides that during the bridging period references to workplace agreements in regulations made for the purposes of subsection 172(4) of the WR Act are to be read as references to enterprise agreements and workplace determinations.

367. Subitem 27(7) provides that any term of an enterprise agreement or workplace determination is invalid to the extent to which it purports to exclude the AFPCS.

Schedule 8 – Workplace agreements and workplace determinations under the WR Act

368. Schedule 8 sets out transitional and consequential provisions relating to workplace agreements and workplace determinations made under the WR Act. It includes:

- provisions allowing for the lodgment of workplace agreements (and variations of workplace agreements) made before the WR Act repeal day, their assessment against the no-disadvantage test and continued operation – see Divisions 1, 2, 4 and 5 of Part 2;
- provisions relating to the termination of workplace agreements where some, but not all, of the steps relating to termination occurred before the WR Act repeal day – see Divisions 3 and 6 of Part 2;
- provisions allowing for the making and lodgment of ITEAs during the bridging period - – see Division 7 of Part 2;
- provisions dealing with the way in which the no-disadvantage test operates in relation to workplace agreements that operate from lodgment if there is a transmission of business or transfer of business – see Division 8 of Part 2; and
- provisions relating to the continued application and termination of workplace determinations made under the WR Act – see Part 3.

Part 1 – Preliminary

Item 1 – Meanings of *employer* and *employee*

369. In this Schedule, the terms employee and employer mean national system employee and national system employer respectively (as defined in clauses 13 and 14 of the FW Bill). The rights and obligations of employers and employees set out in this Schedule apply only to the employment relationships within the scope of the corporations and other constitutional powers that are engaged by clauses 13 and 14 of the FW Bill.

Part 2 – Transitional provisions relating to workplace agreements

Division 1 – Transitional provisions relating to collective agreements made before the WR Act repeal day

Division 2 – Transitional provisions relating to variations of collective agreements made before the WR Act repeal day

Item 2 – Division applies to collective agreements made before WR Act repeal day

Item 6 – Division applies to variations of collective agreements made before WR Act repeal day

370. These items provide that Divisions 1 and 2 respectively apply to collective agreements and variations of collective agreements made before the WR Act repeal day. 'Made' is defined in item 2 of Schedule 2 to this Bill.

Item 3 – General rule – continued application of lodgment provisions, no-disadvantage test and prohibited content rules, etc.

Item 4 – Modification – unlodged collective agreements must be lodged within 14 days

Item 7 – General rule – continued application of lodgment provisions and no-disadvantage test to ordinary variations

Item 8 – Modification – unlodged variations must be lodged within 14 days

371. These items preserve and modify various provisions of Part 8 of the WR Act that allow for the lodgment of collective agreements and variations of collective agreements and their assessment against the no-disadvantage test. The rules governing the content of collective agreements are preserved by these items and item 5 of Schedule 3 to this Bill.

372. These items provide that where a collective agreement or variation of a collective agreement has been made but not lodged as at the WR Act repeal day, it may still be lodged with the Workplace Authority following that day. However, it must be lodged before the end of the period of 14 days after:

- it is approved, in the case of an employee collective agreement, union collective agreement or variation;
- it is made, in the case of a greenfields agreement.

373. Where an agreement or variation is lodged within this time, the Workplace Authority Director must consider whether the agreement or agreement as varied passes the no-disadvantage test. The no-disadvantage test is dealt with in (preserved) Division 5A of Part 8 of the WR Act (as modified by items 5 and 9).

374. If the agreement or variation is not lodged within this time, the Workplace Authority Director must not consider whether the agreement or the agreement as varied passes the no-disadvantage test. However, late lodgment will not give rise to a civil remedy. In this

circumstance, if the employer(s) and employees covered by the collective agreement or the agreement as varied wished still to implement the agreement or variation, they would need to make an enterprise agreement under the FW Bill.

Item 5 – Modification – limits on variation of a collective agreement that operates from approval for the purpose of passing the no-disadvantage test

Item 9 – Modification – limits on varying variations for the purpose of passing the no-disadvantage test

375. Under the (preserved) provisions of Division 5A of Part 8 of the WR Act (which deal with the no-disadvantage test), where a collective agreement that operates from approval (or a collective agreement as varied) fails the no-disadvantage test, an employer may lodge a variation of the agreement (or the agreement as varied) to try to pass the test. The types of collective agreements that operate from approval are union collective agreements or employee collective agreements (or multiple-business agreements that would be one of those types of agreements but for subsection 331(1) of the WR Act).

376. These items amend the provisions governing such variations by setting a time limit within which a variation must be lodged: namely 30 days beginning on the 7th day after the date of issue specified in the notice issued by the Workplace Authority Director under subsection 346M(2) of the WR Act.

377. The provisions of Division 5A of Part 8 of the WR Act governing the variation of collective agreements that operate from lodgment are not affected by this modification. They are preserved and continue to operate.

Division 3 – Transitional provisions relating to pre-WR Act repeal day terminations of collective agreements

378. This Division applies to pre-WR Act repeal day terminations of collective agreements. It preserves and modifies various provisions of Part 8 of the WR Act that allow for the termination of collective agreements either through lodgment of terminations with the Workplace Authority or by application to the AIRC.

Item 10 – Termination by approval general rule – continued application of lodgment provisions

Item 11 – Modification – unlodged terminations must be lodged within 14 days

379. These items provide that where a collective agreement has been terminated as at the WR Act repeal day but the termination has not been lodged, it may still be lodged with the Workplace Authority following the WR Act repeal day. However, it must be lodged before the end of the period of 14 days after the termination was approved.

380. If the termination is not lodged within this time it cannot come into operation. However, late lodgment does not give rise to a civil remedy. In this circumstance, if the employer(s) and employees covered by the collective agreement still wished to implement the termination, they would need to do so in accordance with the termination provisions that apply under Schedule 3.

Item 12 – Unilateral termination of collective agreement in manner provided for in agreement general rule – continued application of lodgment provisions

Item 13 – Termination by the Commission – Commission may continue to deal with applications made before the WR Act repeal day

381. These items preserve provisions of Part 8 of the WR Act that allow for the termination of collective agreements in the following circumstances:

- where a person lodges a declaration to unilaterally terminate a collective agreement in a manner provided for in the agreement before the WR Act repeal day;
- where a person specified in subsection 397A(2) of the WR Act has made an application to the AIRC before the WR Act repeal day to terminate a collective agreement (in this case, the AIRC may terminate the agreement if it is satisfied that it would not be contrary to the public interest to do so).

Division 4 – Transitional provisions relating to ITEAs made before the WR Act repeal day

Division 5 – Transitional provisions relating to variations of ITEAs made before the WR Act repeal day

Item 14 – Continued application of Part 8 to ITEAs made before the WR Act repeal day

Item 16 – General rule – continued application of lodgment provisions and no-disadvantage test to ordinary variations

382. These items preserve various provisions of Part 8 of the WR Act in relation to ITEAs and variations of ITEAs made before the WR Act repeal day. The preserved provisions relate to the lodgment of ITEAs and variations to ITEAs, the no-disadvantage test and prohibited content.

Item 15 – Modification – limits on variation of an ITEA that operates from approval for the purpose of passing the no-disadvantage test

Item 17 – Modification – limits on varying variations for the purpose of passing the no-disadvantage test

383. These items provide that where an ITEA made before the WR Act repeal day that operates from approval (i.e., an ITEA to which preserved subparagraph 326(2)(b)(ii) of the WR Act applies) or a variation of an ITEA does not pass the no-disadvantage test, the employer can lodge a variation of the ITEA to pass the no-disadvantage test, subject to the same modifications as set out in relation to item 5.

Division 6 – Transitional provisions relating to pre-WR Act repeal day terminations of ITEAs

Item 18 – Termination by approval – continued application of lodgment provisions

384. This item preserves various provisions of Part 8 of the WR Act in relation to a termination of an ITEA, if the termination is approved before the WR Act repeal day but not lodged by that time.

Item 19 – Unilateral termination of ITEAs in manner provided for in agreement – continued application of lodgment provisions

Item 20 – Continued application of lodgment provisions where termination by written notice is given before the WR Act repeal day and lodged within 120 days

385. These items preserve and modify various provisions of Part 8 of the WR Act that allow for the termination of ITEAs in the following circumstances:

- where a person lodges a declaration to unilaterally terminate an ITEA in a manner provided for in the ITEA before the WR Act repeal day (item 19);
- where a person gives notice that they are intending to lodge a declaration to unilaterally terminate in accordance with subsection 393(4) of the WR Act (item 20) – note that subitem 20(3) provides that the declaration must be lodged within 120 days of the WR Act repeal day.

Division 7 – Transitional provisions relating to making ITEAs during the bridging period

Item 21 – General rule – continued application of Part 8 to making of ITEAs

386. This item provides that ITEAs can be made during the bridging period. This item preserves various provisions of Part 8 of the WR Act in relation to ITEAs made during the bridging period.

387. ITEAs cannot be lodged after the end of the bridging period (subitem 21(3)). If an employer lodges an ITEA after the end of the bridging period, the ITEA cannot come into operation.

Item 22 – Modification – enterprise agreements and workplace determinations are taken to be instruments

388. This item modifies provisions of Part 8 of the WR Act that are preserved under item 21. This item provides that enterprise agreements and workplace determinations made under the FW Bill are taken to be instruments for the following purposes:

- applying the no-disadvantage test to ITEAs made during the bridging period;
- determining the instrument that will cover the employer and employee where an ITEA ceases to operate because it does not pass the no-disadvantage test.

Item 23 – Modification – limits on variation of an ITEA that operates from approval for the purpose of passing the no-disadvantage test

389. This item provides that where an ITEA made during the bridging period that operates from approval (i.e., an ITEA to which subparagraph 326(2)(b)(ii) of the WR Act applies) does not pass the no-disadvantage test an employer can lodge a variation to enable it to pass the no-disadvantage test, subject to the same modifications as set out in relation to item 5.

Item 24 – Modification – subsection 400(5)

390. Item 24 preserves the operation of subsection 400(5) of the WR Act, which prohibits a person applying duress to an employer or employee in connection with an ITEA.

Item 25 – Effect of section 342 of the FW Act during the bridging period

391. Item 25 provides that despite clause 342 of the FW Bill, an employer who refuses to employ a person because they refuse to make an ITEA does not contravene the prohibition on taking adverse action in subsection 340(1), unless the new employee would otherwise be a transferring employee of the new employer in a transmission of business under the WR Act or transfer of business under the FW Bill.

Division 8 – Applying the no-disadvantage test where there is a transmission or transfer of business

Item 26 – Applying the no-disadvantage test where there is a transmission or a transfer of business

Item 27 – Employment arrangements if there is a transfer of business and a workplace agreement ceases to operate because it does not pass the no-disadvantage test

392. These items preserve and modify provisions of Division 7A of Part 11 of the WR Act which deal with the application of the no-disadvantage test to workplace agreements that operate from lodgment where there is a transmission of business or transfer of business while the agreement is still to be assessed against the no-disadvantage test.

393. The items provide that Division 7A of Part 11 of the WR Act continues to apply. However, modifications are made to that Division so that it also applies to transfers of business and it reflects the new instruments that may be made under the FW Bill or created under this Bill.

394. Where there is a transmission or transfer of business and a workplace agreement which operates from lodgment (certain ITEAs and greenfields agreements) ceases to operate because the Workplace Authority Director decides that it does not pass the no-disadvantage test, the instrument that covers the new employer and the transferring employee or employees is the instrument that is capable of covering the new employer and that would have covered the old employer and the transferring employee or employees immediately before the termination of employment of the transferring employee or employees with the old employer. An instrument is defined in subitem 27(5). If there is no such instrument, the designated award (within the meaning of Division 5A of Part 8 of the WR Act) covers the new employer and the transferring employee or employees.

395. A redundancy provision that is preserved under item 9 of Schedule 11 to this Bill continues to apply to a transferring employee if a workplace agreement that operates from lodgment subsequently fails the no-disadvantage test and ceases to operate (subitem 27(3)).

Division 9 – Miscellaneous

Item 28 – References to variations under Division 8

Item 29 – Documents taken to be workplace agreements etc

396. These items make clear that:

- a reference in this Part to a variation under Division 8 of Part 8 of the WR Act does not include a reference to a variation made for the purposes of passing the no-disadvantage test; and
- certain provisions of the WR Act (which deal with documents that are taken to be workplace agreements, variations and terminations) continue in operation for the purposes of a provision of the WR Act that is preserved by this Part.

Part 3 – Transitional provisions relating to workplace determinations made under the WR Act

Item 30 – Continued application of WR Act prohibited content provisions

397. This item provides that a workplace determination made under the WR Act before the WR Act repeal day continues to be subject to the provisions of the WR Act dealing with prohibited content (except section 358 of the WR Act) after the WR Act repeal day.

Item 31 – Termination by approval general rule – continued application of lodgment provisions

Item 32 – Modification – unlodged terminations must be lodged within 14 days

398. These items preserve provisions of the WR Act in relation to the termination of a workplace determination that is approved before the WR Act repeal day but not lodged before that day. If, as at the WR Act repeal day, a termination of a workplace determination has been approved but not lodged, it may still be lodged with the Workplace Authority following the WR Act repeal day. However, it must be lodged before the end of the period of 14 days after it is approved.

399. If the termination is not lodged within this time it cannot come into operation. However, late lodgment does not give rise to a civil remedy. In this circumstance, if the employer(s) and employees covered by the workplace determination wished to implement the termination, they would need to do so in accordance with the termination provisions that apply under Schedule 3.

Item 33 – Termination by the Commission – Commission may continue to deal with applications made before the WR Act repeal day

400. This item preserves subsections 381(2) and 397(1) and (3) of the WR Act that allow for the termination of a workplace agreement where a person specified in subsection 397A(2) of the WR Act has made an application to the AIRC before the WR Act repeal day (in this case, the AIRC may terminate the workplace determination if it is satisfied that it would not be contrary to the public interest to do so).

Item 34 – Documents taken to be workplace determinations

401. This item makes clear that section 381A of the WR Act (which deal with documents that are taken to be terminations) continues in operation for the purposes of a provision of the WR Act that is preserved by this Part.

Schedule 9 – Minimum wages

Part 1 – Preliminary

Item 1 – Meanings of *employee* and *employer*

402. In this Schedule, the terms employee and employer mean national system employee and national system employer respectively (as defined in clauses 13 and 14 of the FW Bill). The rights and obligations of employers and employees set out in this Schedule apply only to the employment relationships within the scope of the corporations and other constitutional powers that are engaged by clauses 13 and 14 of the FW Bill.

Part 2 – Special provisions relating to FWA's first annual wage review

Item 2 – Period to which first annual wage review relates

403. This item provides that FWA's first annual wage review is to be conducted and completed within a period that starts on the FW (safety net provisions) commencement day and finishes at the end of the following 30 June.

404. This timeframe applies even if the period does not amount to a full financial year. For example, if the FW (safety net provisions) commencement day is 1 January 2010, FWA's first annual wage review would need to be conducted and completed in the six months between that date and 30 June 2010. Item 3 is designed to assist FWA meet this obligation.

Item 3 – Exercise of powers in advance of first annual wage review period

405. This item allows FWA to start gathering information for the purpose of conducting its first annual wage review before the FW (safety net provisions) commencement day.

406. As part of FWA's information-gathering process, FWA may exercise various powers including inviting persons or bodies to make written submissions and undertaking or commissioning research to assist with the review.

Item 4 – First national minimum wage order does not have to set full range of special national minimum wages

407. This item provides that, in conducting its first annual wage review, FWA does not have to establish special national minimum wages for all classes of employees referred to in paragraph 294(1)(b) of the FW Bill. However, it must do so if there was a special federal minimum wage for those employees under the WR Act immediately before the FW (safety net provisions) commencement day.

408. The classes of employees referred to in paragraph 294(1)(b) of the FW Bill are:

- junior employees;
- employees to whom training arrangements apply; and
- employees with a disability.

409. The AFPC set special federal minimum wages for employees with a disability in its 2006 wage-setting decision. However, it has not set special federal minimum wages for junior employees or employees to whom training arrangements apply. FWA is required to set special national minimum wages for these employees as part of its first annual wage review.

410. As the setting of special national minimum wages for junior employees and employees to whom training arrangements apply is likely to be a substantial task, FWA is not required to set minimum wage rates for these employees until FWA's second annual wage review.

411. If FWA does not set special minimum wages for junior employees and employees to whom training arrangements apply in its first annual wage review, the President of FWA is required to set in train a process for the setting of these special national minimum wages in FWA's second annual wage review. FWA can advise persons or bodies of the process in any way it considers appropriate.

Part 3 – Continued application of WR Act provisions about minimum wages

Division 1 – General provisions

Item 5 – Continuation of Australian Fair Pay and Conditions Standard wages provisions

412. Subitem (1) provides for the continued operation of the wages provisions in the AFPCS following the repeal of the WR Act.

413. Subitem (2) explains when various wage provisions cease to operate – for example:

- provisions relating to federal minimum wages and casual loadings cease to apply at the end of the bridging period (because, under item 12, a national minimum wage order to the same effect is then taken to have been made);
- provisions authorising the AFPC to do something cease to have effect when the AFPC ceases to exist;
- the frequency of payment guarantee is not preserved, because the FW Bill already provides for this (Division 2 of Part 2-9).

414. Subitem (3) provides for the continuation of APCSs, the standard federal minimum wage, special federal minimum wages and the default casual loading. These instruments will continue to exist after the WR Act repeal day as transitional minimum wage instruments.

415. The effect of these provisions is to preserve existing obligations to pay employees these minimum rates of pay for as long as those instruments continue to cover those employees. Provisions explaining when employees are covered by transitional minimum wage instruments are located at item 6.

- This differs from the rule that applies to the remainder of the AFPCS. The entitlements in the APFCS about hours of work, annual leave, personal/carer's leave and parental leave cease to operate at the end of the bridging period. This is because the NES then applies.

- Minimum wage rates in APCSs, however, continue to be relevant until replaced by a modern award (see item 11). (While award modernisation is expected to be substantially completed by the end of the bridging period, some awards may not have been modernised. APCSs will also continue to be relevant for employees covered by enterprise instruments).

416. Rules dealing with the interaction between transitional instruments and the AFPCS will continue to apply during the bridging period (see item 22 of Schedule 3). However, after the bridging period, interaction rules that result in an instrument applying instead of the APFCS (e.g., agreements made before the commencement of the Work Choices amendments (27 March 2006) that deal with the same matter) will cease to operate.

417. In practice, this means that if a transitional APCS that covers an employee provides a higher rate of pay than the instrument, the APCS rate applies (see subitems 22(2)-(4) of Schedule 3). Item 14 allows an employer subject to wage increases as a result of this provision to apply to FWA for an order to phase in wage increases.

418. The transitional standard federal minimum wage, transitional special federal minimum wage and the default casual loading will cease to cover any employees after the end of the bridging period (see item 12). At the end of the bridging period, FWA will be taken to have made a transitional national minimum wage order determining:

- the national minimum wage;
- for each transitional special federal minimum wage that was in existence immediately before the FW (safety net provisions) commencement day - a special national minimum wage; and
- a casual loading for award and agreement-free employees.

419. All rates in the transitional national minimum wage order will be the same as the rates in the corresponding transitional minimum wage instrument immediately before the FW (safety net provisions) commencement day.

Item 6 – The employees who are covered by transitional minimum wage instruments

420. Item 6 contains rules for determining when an employee is covered by a transitional minimum wage instrument.

421. Subitem (2) provides that a transitional APCS does not cover an employee, or an employer or employee organisation in relation to the employee, if the employee is a high income employee within the meaning of clause 329 of the FW Bill.

Item 7 – Transitional minimum wage instruments can only be varied or terminated in limited circumstances

422. This item describes the circumstances in which transitional minimum wage instruments can be varied or terminated.

423. Transitional minimum wage instruments can only be varied by the following bodies and in the following circumstances:

- the AFPC - as part of its final wage review under the WR Act; and
- FWA - as part of an annual wage review.

424. A transitional minimum wage instrument can also be varied or terminated as a result of the Part 10A award modernisation process (see item 3 of Schedule 5) or the enterprise instrument modernisation process (see item 9 of Schedule 6).

Item 8 – Effect of termination

425. This item provides that when a transitional minimum wage instrument terminates it ceases to cover any employees and can never cover any employees again.

Item 9 – No loss of accrued rights or liabilities when transitional minimum wage instrument terminates or ceases to cover an employee

426. This item preserves accrued rights and liabilities when transitional minimum wage instruments terminate or cease to cover employees.

Division 2 – Special provisions about transitional APCSs

Item 10 – Variation of transitional APCS in annual wage reviews under the FW Act

427. This item allows FWA to vary a transitional APCS as part of an annual wage review.

428. With the exception of clause 292 (which relates to publication of varied wage rates), all of Division 3 of Part 2-6 of the FW Bill applies to a review of a transitional APCS in the same way as it applies to a modern award.

Item 11 – Transitional APCS ceases to cover an employee if a modern award starts to cover the employee

429. This item provides that a transitional APCS ceases to cover an employee when a modern award covering that employee comes into operation.

430. FWA is required to revoke transitional APCSs when they no longer cover any employees (see item 3 of Schedule 5).

Division 3 – Special provisions about the FMW, special FMWs and the default casual loading

Item 12 – Cessation of coverage of transitional standard FMW etc.

431. This item provides that on the FW (safety net provisions) commencement day, the transitional standard federal minimum wage, any transitional special federal minimum wages, the transitional default casual loading and subsections 182(3) and (4) and section 185 of the continued AFPCS wages provisions cease to cover any employees.

432. At this time, FWA is taken to have made a transitional national minimum wage order determining:

- the national minimum wage;
- for each transitional special federal minimum wage that was in existence immediately before the FW (safety net provisions) commencement day - a special national minimum wage; and
- a casual loading for award and agreement-free employees.

433. All rates in the transitional national minimum wage order will be the same as the rates in the corresponding transitional minimum wage instrument immediately before the FW (safety net provisions) commencement day. The effect of this is to maintain existing minimum wage rates, but ensure that they continue to operate within the new framework.

434. All employers to whom the national minimum wage order applies will be required to pay their employees a base rate of pay and/or casual loading that at least equals the relevant rate in the national minimum wage order.

Part 4 – Universal application of minimum wages to employees

Item 13 – Base rate of pay under agreement-based transitional instrument must not be less than the modern award rate or the national minimum wage order rate etc.

435. This item (together with the continued AFPCS interaction rules in item 22 of Schedule 3, described earlier) ensure that, on or after FW (safety net provisions) commencement day all employees are entitled to at least the relevant safety net minimum wage - from either the relevant modern award, transitional APCS or, if the employee is award/agreement free, the national minimum wage order.

436. If an agreement-based transitional instrument provides a lesser base rate of pay, the relevant safety net minimum wage applies.

- This rule reflects clause 206 of the FW Bill. Item 15 provides an equivalent rule where a new enterprise agreement is made and applies to an employee covered by a transitional minimum wage instrument.

Item 14 – FWA may make determinations to phase in the effect of rate increases resulting from item 13 etc

437. This item provides that employers to whom a transitional instrument applies can make an application to FWA for an order that allows them to phase in increases to base rates of pay where the increases are the result of the operation of item 13 or subitem 22(2) of Schedule 3 and where the phasing-in of the increases is necessary to ensure the ongoing viability of the employer's enterprise.

Item 15 – Enterprise agreement base rate of pay not to be less than transitional minimum wage instrument rate

438. This item provides that where a transitional minimum wage instrument covers an employee and an enterprise agreement applies to the employee, the base rate of pay payable to

the employee under an enterprise agreement must not be less than the base rate of pay that is payable to the employee under the transitional minimum wage instrument.

439. If the agreement rate is less than the instrument rate, the enterprise agreement has effect in relation to the employee as if the agreement rate were equal to the instrument rate.

Schedule 10 – Equal remuneration

440. This Schedule provides transitional arrangements for equal remuneration orders made under the WR Act, and makes necessary transitional provision for the making and operation of equal remuneration orders under Part 2-7 the FW Bill.

Part 1 – Preliminary

Item 1 – Meanings of *employee* and *employer*

441. In this Schedule, the terms employee and employer mean national system employee and national system employer respectively (as defined in clauses 13 and 14 of the FW Bill). The rights and obligations of employers and employees set out in this Schedule apply only to the employment relationships within the scope of the corporations and other constitutional powers that are engaged by clauses 13 and 14 of the FW Bill.

Part 2 – Equal remuneration orders under the FW Act

Item 2 – FWA must take into account AFPC's final wage review

442. Under Part 2-7 of the FW Bill, when deciding whether to make an equal remuneration order, FWA must take account of orders and determinations made by the Minimum Wage Panel and the reasons for the orders and determinations.

443. The Minimum Wage Panel's first annual wage review decision will not come into effect until 1 July 2010.

444. This item provides that, in the period between commencement of Part 2-7 and the first annual wage review decision, FWA must instead take account of the AFPC's final wage review decision under the WR Act.

Item 3 – Inconsistency with certain instruments and orders

445. The FW Bill (like the WR Act) ensures primacy of equal remuneration orders over other instruments. This item and item 5 ensure that equivalent transitional rules govern the interaction of equal remuneration orders and instruments irrespective of whether the order and instrument were made under the FW Bill or the WR Act.

446. Item 3 provides that a term of an equal remuneration order made under the FW Bill prevails over a term of:

- a transitional instrument;
- an order of the AIRC made under the WR Act; or
- a transitional APCS,

to the extent that the instrument or order is less beneficial to an employee.

Part 3 – Equal remuneration orders under the WR Act

Item 4 – Continued effect of equal remuneration orders

447. This item allows FWA to vary or revoke an equal remuneration order that was made under the WR Act (in force from time to time), as if it were an order made under the FW Bill.

Item 5 – Inconsistency with certain instruments and orders

448. The WR Act (like the FW Bill) ensures primacy of equal remuneration orders over other instruments. This item and item 3 ensure that equivalent transitional rules govern the interaction of equal remuneration orders and instruments irrespective of whether the order and instrument were made under the FW Bill or the WR Act.

449. Item 5 provides that a term of an equal remuneration order made under the WR Act prevails over a term of a WR Act or FW Bill instrument or order that is listed in subitem 5(2) to the extent that it is less beneficial to the employee than a term of an equal remuneration order made under the WR Act that applied to that employee immediately before WR Act repeal day.

Schedule 11 – Transfer of business

450. Schedule 11 sets out transitional and consequential provisions relating to transmissions of business and transfers of business. The provisions of the Schedule generally:

- allow for the continued application of the WR Act where transmissions of business occur before the WR Act repeal day, with certain modifications;
- provide for the application of the transfer of business provisions in Part 2-8 of the FW Bill to transfers of business that occur on or after the WR Act repeal day; and
- allow, during the bridging period, for the transfer of entitlements under the AFPCS and preserved redundancy provisions.

Part 1 – Preliminary

Item 1 – Meanings of *employee* and *employer*

451. In this Schedule, the terms employer and employee have their ordinary meanings. Generally, references in this Schedule to employee and employer are references to national system employee and national system employer respectively (as defined in clauses 13 and 14 of the FW Bill). However, paragraph 3(2)(b) of this Schedule deals with transitional instruments that apply in relation to employers and their employees who are not within the definitions of national system employer and national system employee.

Part 2 – Transmissions of business occurring before WR Act repeal day

452. This Part deals with transmissions of business that occur where a new employer becomes the successor, transmittee or assignee of the whole, or a part, of a business of the old employer and the time of transmission (as defined under Part 11 of the WR Act) was before the WR Act repeal day. It provides general rules for the continued application of the transmission of business provisions of the WR Act as well as specific rules dealing with:

- the period for which certain instruments and other entitlements cover or apply to new employers; and
- applications to the AIRC in relation to the transmission of certain transitional instruments.

Item 2 – General rule – continued application of WR Act

453. This item outlines the circumstances in which Part 2 applies. It provides that despite the repeal of Part 11 of the WR Act, some provisions contained within that Part continue to apply in relation to transmissions of business that occurred before the WR Act repeal day, as if they had not been repealed. In this way, the item preserves and modifies various provisions of Part 11 of the WR Act.

454. Under Part 11 of the WR Act, the time at which a transmission of business occurs is called the time of transmission (see subsection 580(3)). However, a person can be a transferring

employee in relation to that transmission of business if they are employed by the new employer up to two months after the time of transmission. Part 11 of the WR Act may therefore have application where a person is employed by the new employer after the WR Act repeal day if the time of transmission occurred before the WR Act repeal day.

Illustrative example

On 25 June 2009, Whizz Bang Apparel Limited (WBA) acquires all of the business of Jocks 'n' Socks Pty Ltd (JnS). WBA is bound by a collective agreement that covers all of its employees. The sale is a transmission of business under Part 11 of the WR Act and 25 June 2009 is the time of transmission under subsection 580(3) of that Act. WBA does not engage any of JnS's employees at the time of transmission because it is still ascertaining whether it requires any of JnS's employees to work in the acquired business.

WR Act repeal day occurs on 1 July 2009. On 6 July 2009, WBA offers employment to Sam, who was marketing manager of JnS before the sale; he accepts the job. The effect of item 2 is that Part 11 of the WR Act (as modified) continues to apply because the time of transmission occurred prior to the WR Act repeal day. Sam would therefore become a transferring employee (see section 581 of the WR Act) and the collective agreement would bind WBA (see subsection 585(1) of the WR Act).

455. Subitem 2(3) is intended to operate in the same manner as provided in subitem 2(2) in relation to Schedule 9 to the WR Act.

Item 3 – Period for which transmitted transitional instrument etc. continues to cover or apply to new employer

456. This item sets out the period for which a new employer remains covered by certain transitional instruments in relation to a transferring employee because of a provision of Part 11 of, or Schedule 9 to, the WR Act.

457. The general rule about the period for which a new employer is covered by a transitional instrument (as defined in item 2 of Schedule 2) is set out at subitem 3(1). A new employer will remain covered by a transitional instrument until one of the following first occurs:

- the instrument is terminated;
- the transmission period ends (as defined in subsection 580(4) of, and subclause 4(4) of Schedule 9 to, the WR Act). This period does not apply in relation to certain pre-reform certified agreements (referred to in subitem 3(2));
- the instrument otherwise ceases to cover the new employer in relation to the transferring employee.

458. The circumstances in which an instrument might cease to cover the new employer in relation to the transferring employee include where the instrument is (in effect) replaced by a new FW Bill instrument (see Division 2 of Part 5 of Schedule 3).

459. The item also provides specific rules in relation to the coverage and application of a transitional APCS and preserved redundancy provisions. The effect of these rules is to provide

for the continued application of Division 6 of Part 11 of the WR Act in the case of a transitional APCS, where a transferring employee's employment with the new employer remains covered by the APCS.

460. In the case of preserved redundancy provisions, subitem 3(4) provides that if a redundancy provision applies to a new employer and a transferring employee because of the continued application of Division 6A of Part 11 of, or Part 5A of Schedule 9 to, the WR Act, the transferring employee's transmitted redundancy provisions prevail over any of the new employer's existing industrial instruments until one of the events as set out in paragraphs 3(4)(a) – (c) occurs.

Item 4 – Effect of industry-specific redundancy scheme in modern award in relation to preserved redundancy provisions

461. This item provides an exception to the rule in subitem 3(4) that a preserved redundancy provision continues to apply to a new employer. The exception provides that an industry specific redundancy scheme in a modern award prevails over another redundancy provision that applies to a new employer and a transferring employee because of Division 6A of Part 11 of, or Part 5A of Schedule 9 to, the WR Act if the other redundancy provision is detrimental to the transferring employee.

Item 5 – Modification – applications to Commission in relation to transmission of certain transitional instruments

462. This item provides that the rules in items 2 and 3 (governing the continued operation of Part 11 of, and Schedule 9 to, the WR Act) are subject to any order of the AIRC.

463. The item maintains, with some modifications, the powers of the AIRC for transmissions of business that occur before the WR Act repeal day. The effect of this item is to enable the AIRC to make orders in relation to the following instruments:

- transitional instruments that are collective agreements;
- transitional instruments that are awards;
- transitional instruments that are pre-reform certified agreements;
- transitional instruments that are State transitional instruments.

464. Subitems 5(5) and (6) modify the time within which an application may be made to the AIRC for an order within 90 days after the WR Act repeal day.

Item 6 – Modification – civil remedy provisions

465. This item modifies the legislative notes to certain provisions of Part 11 of, and Schedule 9 to, the WR Act that refer the reader to the civil penalty provisions contained in section 605 of, and clause 31 of Schedule 9 to, the WR Act respectively.

466. The legislative notes refer the reader to the civil penalty provisions contained in item 11 of Schedule 16.

Part 3 – Transfers of business occurring on or after WR Act repeal day

467. This Part deals with transfers of business that occur on or after the WR Act repeal day. It provides, among other things, for the application of Part 2-8 of the FW Bill to transitional instruments (as defined in Schedule 3), with some modifications. The Part also provides transitional provisions for the transfer of preserved redundancy provisions and entitlements under the AFPCS during the bridging period.

Division 1 – General

Item 7 – Application of FW Act in relation to transferring employees covered by transitional instrument

468. This item provides for the application of the transfer of business provisions in Part 2-8 of the FW Bill in relation to transferring employees covered by transitional instruments.

469. Part 2-8 of the FW Bill applies where there is a transfer of business within the meaning of subclause 311(1) of the FW Bill and the connection between the old employer and the new employer referred to in paragraph 311(1)(d) of that Bill occurs on or after the WR Act repeal day.

470. The item makes clear that Part 2-8 of the FW Bill applies regardless of whether:

- the transferring employee's employment was terminated by the old employer before, on or after the WR Act repeal day; or
- the transferring employee was employed by the new employer before, on or after the WR Act repeal day.

471. This contemplates that Part 2-8 of the FW Bill will apply, for example, where a transferring employee's employment is terminated and the employee becomes employed by the new employer before the WR Act repeal day but the connection between the old employer and the new employer under paragraph 311(1)(d) does not occur until after the WR Act repeal day.

Illustrative example

In May 2009, Geraldton Electric Pty Ltd (Geraldton) enters into an arrangement with Ingham Business Machines (Ingham) under which Ingham will buy Geraldton's business. The arrangement provides that Geraldton's employees will be offered employment by Ingham effective 27 June 2009. However, because the sale cannot complete until certain leasehold consents are obtained, completion will not occur until 15 July 2009. On completion, the ownership of Geraldton's business assets will transfer to Ingham.

Item 7 has the effect that the transfer of business provisions of Part 2-8 of the FW Bill will apply to this transaction because there is a transfer of business as described in subclause 311(1) of the FW Bill and the connection between Geraldton and Ingham occurs after the WR Act repeal day. Item 7 applies regardless of the fact that the termination of the transferring employees' employment and their subsequent employment with Ingham occurred before the WR Act repeal day.

Item 8 – Modification – application of FW Act in relation to transitional instruments

472. This item modifies the application of Part 2-8 of the FW Bill to make clear that the definition of transferable instrument in subclause 312(1) of the FW Bill is extended to cover transitional instruments, other than workplace agreements and workplace determinations that have not yet come into operation. This means that where a transfer of business occurs and the old employer was covered by a transitional instrument in relation to a transferring employee, the transitional instrument covers the new employer and the transferring employee.

473. The item further provides that, subject to certain exceptions in subitems 8(3) – (5), a reference in Part 2-8 to an enterprise agreement or a modern award is taken to include a reference to an agreement-based transitional instrument or an award-based transitional instrument respectively.

Division 2 – Transfer of preserved redundancy provisions during bridging period

474. This Division sets out the provisions relating to the transfer of preserved redundancy provisions during the bridging period.

Item 9 – Transfer of preserved redundancy provisions

475. This item sets out the general application of the Division. It also sets out the definitions of key terms that are used in the item.

476. The item provides that a redundancy provision applies to a new employer and the transferring employee after the time the employee becomes employed by the new employer, if the following circumstances are satisfied:

- there is a transfer of business from an old employer to a new employer within the meaning of subclause 311(1) of the FW Bill; and
- the connection between the old employer and the new employer occurs during the bridging period; and

- immediately before the termination of an employee's employment with the old employer, a redundancy provision applied to the old employer and the employee because of a preservation item (as defined in subitem 9(7)) or a previous application of this item; and

- the employee is a transferring employee in relation to the transfer of business.

477. The item makes clear that a redundancy provision applies regardless of whether the transferring employee's employment was terminated by the old employer before, on or after the WR Act repeal day or whether the transferring employee was employed by the new employer before, on or after the WR Act repeal day.

478. Subitem 9(4) provides a general rule that, to the extent of any inconsistency, a redundancy provision prevails over any other redundancy provision included in any other instrument that would otherwise have effect, even if the provisions in that other instrument are more beneficial to the transferring employee.

479. This general rule is subject to an exception contained in subitem 9(5) which provides that an industry specific redundancy scheme prevails over another redundancy provision if that provision is detrimental to the transferring employee.

480. Subitem 9(6) provides that the redundancy provision continues to apply to a new employer and a transferring employee until the first of the following occurs:

- the end of the period of 24 months from the time that the agreement that contained the redundancy provision ceased operating. (This means that the date that the redundancy provisions cease to apply to the new employer is the same date that the provisions would have ceased to apply to the old employer. The intention is that the new employer's obligations with respect to the redundancy provisions match the old employer's. The obligations do not start afresh on a transfer of business);

- the transferring employee ceases to be employed by the new employer; or

- an enterprise agreement, workplace determination or ITEA starts to apply to the transferring employee.

Item 10 – Notification of transfer of preserved redundancy provisions

Item 11 – Lodging copy of notice about preserved redundancy provisions with FWA

Item 12 – FWA must issue receipt for lodgement

481. These items create notification obligations for new employers in respect of transferred preserved redundancy provisions. The effect of the provisions is to require the new employer to inform the transferring employee about the continued operation of the preserved redundancy provision, and to lodge the relevant notice with FWA.

Division 3 – Transfer of entitlements under the AFPCS during bridging period

Item 13 – Transfer of entitlements under the AFPCS

482. This Division provides for the transfer of entitlements under the AFPCS during the bridging period. The intention is that despite the repeal of the provisions of Division 7 of Part 11 of the WR Act, that Division will continue to apply to transfers of business in the bridging period, subject to the modifications set out in subitem 13(3).

483. The item applies if there is a transfer of business from an old employer to a new employer within the meaning of subclause 311(1) of the FW Bill and the connection between the old employer and the new employer occurs during the bridging period.

484. The item makes clear that (subject to the provisions of Division 7 of Part 11 of the WR Act) entitlements under the AFPCS can transfer regardless of whether the transferring employee's employment was terminated by the old employer before, on or after the WR Act repeal day or whether the transferring employee was employed by the new employer before, on or after the WR Act repeal day.

Schedule 12 – General Protections

Item 1 – Meaning of *employee* and *employer*

485. In this Schedule, the terms employer and employee have their ordinary meanings. This is because the only references in the Schedule to 'employer' and 'employee' are to employers and employees to whom transitional instruments apply. Transitional instruments can apply to national system employers and employees, or to other employers and employees.

- For example, a transitional instrument that is a workplace agreement will apply to a national system employer and a national system employee or employees.

- However, some pre-reform certified agreements ('Division 3' agreements currently preserved by Part 2 of Schedule 7 to the WR Act) will only apply to employers that are outside the definition of national system employer and their employees.

Item 2 – Application in relation to Australian Fair Pay and Conditions Standard

Item 3 – Application in relation to award-based transitional instruments and agreement-based transitional instrument

486. These items ensure that the general protections provisions in Part 3-1 of the FW Bill provide comprehensive protection from 1 July 2009 by providing that:

- during the bridging period, a reference in that Part to the NES is taken to include a reference to the AFPCS (item 2); and

- a reference to a modern award or an enterprise agreement is taken to include a reference to an award-based transitional instrument or an agreement-based transitional instrument respectively (item 3).

487. The amendments in subitem 3(1) ensure that the prohibition on undue influence or pressure in paragraph 344(b) operates effectively during the bridging period in relation to terms specified in transitional instruments.

Schedule 13 – Bargaining and industrial action

488. This Schedule provides for the transitional and consequential arrangements in respect to the bargaining and industrial aspects of the new workplace relations system. With the repeal of the WR Act, those involved in bargaining for a collective agreement will generally need to start the bargaining and industrial action processes afresh under the FW Bill in relation to an enterprise agreement. The items in this Schedule cover the situations that differ from this general rule as well making provision for transitional instruments as they affect bargaining and industrial action.

Part 1 – Preliminary

Item 1 – Meanings of *employee* and *employer*

489. In this Schedule, the terms employee and employer mean national system employee and national system employer respectively (as defined in clauses 13 and 14 of the FW Bill). The rights and obligations of employers and employees set out in this Schedule relate principally to the employment relationships within the scope of the corporations and other constitutional powers that are engaged by clauses 13 and 14 of the FW Bill.

490. The exception is that the Schedule deals with the effect of orders made under subsection 496(3) of the WR Act in relation to non-federal system employers and employees. However, the relevant provisions do not use the terms employer and employee and there is no need to apply the ordinary meaning of those terms in those provisions.

Part 2 – Bargaining

491. Part 2 deals with how the bargaining laws in the FW Bill operate in relation to employees covered by individual agreement-based transitional instruments. It also limits when applications may be made for bargaining orders where certain collective agreement-based transitional instruments have not passed their nominal expiry date.

Item 2 – Employee covered by individual agreement-based transitional instrument is taken not to be an employee who will be, or who is, covered by enterprise agreement in certain circumstances

492. If an employee is covered by an individual agreement-based transitional instrument, then subitem 2(2) provides that the employee is only taken to be an employee that will be covered by a proposed enterprise agreement if the nominal expiry date of the individual agreement-based transitional instrument has passed or a conditional termination of the instrument has been made under subitem18(2) of Schedule 3. Subitem 18(2) of Schedule 3 sets out the process for making conditional terminations and the effect of these terminations.

493. The legislative note to subitem 2(2) explains the main effects of this subitem are that such an employee cannot:

- be represented in bargaining;
- vote on an enterprise agreement;

- be in a group of employees covered by a protected action ballot order in relation to the enterprise agreement; or

- have the enterprise agreement apply to them,

unless either the nominal expiry date of the individual agreement-based transitional instrument has passed or a conditional termination has been made in respect to the instrument.

494. Subitem 2(3) provides that despite subitem 2(2), an employer is still required to give an employee a notice of employee representational rights under clause 173 of the FW Bill if the employer would otherwise have been required to give such a notice. This ensures the employee is aware that bargaining is taking place for an enterprise agreement but, as is required to be explained in the notice, a person can only become the employee's bargaining representative after either the nominal expiry date of the individual agreement-based transitional instrument has passed or a conditional termination of the instrument is made.

495. An employer may issue the same notice of employee representational rights to its employees, regardless of the type of instrument that covers an employee (e.g., an individual agreement-based transitional instrument or an enterprise agreement) so long as the notice includes the information prescribed in clause 174 of the FW Bill as well as in subitem 2(3).

Item 3 – Application for bargaining order where certain collective agreement-based transitional instruments have not passed nominal expiry date

496. This item provides that the same time limitations apply to making applications for bargaining orders where certain collective agreement-based transitional instruments apply as apply to enterprise agreements generally, as specified in subclause 229(3) of the FW Bill. Therefore, if such a transitional instrument applies to an employee then an application for a bargaining order in respect to a proposed enterprise agreement may only be made if it is more than 90 days before the nominal expiry date of the transitional instrument, or after an employer has agreed to bargain or has initiated bargaining (e.g., by asking employees to approve a proposed enterprise agreement).

Part 3 – Industrial action

497. This Part deals with the transitional and consequential provisions for industrial action. In particular, this Part:

- provides that industrial action must not be taken before the nominal expiry date of an agreement-based transitional instrument;

- sets out rules relating to applications, orders and injunctions under sections 496 and 497 of the WR Act, after the WR Act repeal day;

- specifies that any applications or reviews relating to bargaining periods or orders suspending or terminating bargaining periods that have not been dealt with are of no effect after the WR Act repeal day. The only exception to this rule is if an order terminating a bargaining period was made under either section 430 or 498 of the WR Act, then FWA may make a workplace determination (under the provisions of the FW Bill) in relation to the collective agreement; and

- makes clear that notices of industrial action issued under the WR Act are of no effect after the WR Act repeal day.

Item 4 – Industrial action must not be taken before the nominal expiry date of transitional instrument

498. This item applies clause 417 and item 14 of the table in subclause 539(2) of the FW Bill after the WR Act repeal day in relation to agreement-based transitional instruments. This ensures that an employee who is covered by such an instrument cannot organise or engage in industrial action until after the nominal expiry date of the instrument has passed. Subitem 4(2) provides that this rule does not apply if an employer and employee covered by an individual agreement-based transitional instrument have made a conditional termination in relation to the instrument.

Item 5 – Applications on foot under sections 496 and 497 of the WR Act

499. Despite the repeal of sections 496 and 497 of the WR Act, this item requires the AIRC or Court to consider applications made under these sections but not finally dealt with as at the WR Act repeal day in accordance with the WR Act. However, subitem 5(2) makes it clear that if the AIRC or the Court does not make an order or grant an injunction to stop industrial action that is alleged to be unprotected, this will not affect whether or not the industrial action is protected under the FW Bill.

Item 6 – Continuation of section 496 and 497 orders and injunctions

500. This item ensures that despite the repeal of sections 496 and 497 of the WR Act, any orders made or injunctions granted under those provisions continue in operation after the WR Act repeal day and also that no persons may breach these orders or injunctions after that date.

Item 7 – Civil remedy provisions of FW Act apply to section 496 orders

501. This item applies the civil remedy provisions of the FW Bill to a breach of an order under section 496 of the WR Act that occurs after the WR Act repeal day.

Item 8 – Effect of orders terminating bargaining periods upon industrial action related workplace determinations

502. If an order is made terminating a bargaining period on a ground referred to in subsection 430(3) of the WR Act or the Minister makes a declaration under section 498 of the WR Act terminating a bargaining period, either may result in the making of a workplace determination under the WR Act. Item 8 ensures that if an order terminating a bargaining period under either of those provisions is in force immediately before the WR Act repeal day, then FWA may make an industrial action related workplace determination in relation to that proposed collective agreement in accordance with clauses 266, 267 and 268 of the FW Bill, as if that proposed collective agreement were an enterprise agreement.

Item 9 – Commission must not deal further with applications, appeals or reviews relating to bargaining periods

503. This item provides that if the AIRC has not finally dealt with an application for the suspension or termination of a bargaining period under Division 2 of Part 9 of the WR Act

before the WR Act repeal day, the AIRC must not after that day deal with the application or any appeal or review relating to the application.

Item 10 – Effect of suspension or termination orders on or after the WR Act repeal day

504. This item makes it clear that an order suspending or terminating a bargaining period under Division 2 of Part 9 of the WR Act is of no effect after the WR Act repeal day, other than as referred to in item 8.

Item 11 – Notices of industrial action of no effect on or after WR Act repeal day

505. This item provides that any notices of intention to take industrial action issued under section 441 of the WR Act before the WR Act repeal day cease to have effect on or after that day.

Part 4 – Protected action ballots

506. The key provision of this Part is that protected action ballot orders under the WR Act are of no effect after the WR Act repeal day. This means that, even if protected industrial action has taken place prior to the WR Act repeal day, bargaining representatives will need to apply afresh for protected action ballots after that day. This Part deals with technical transitional issues relating to protected action ballots, for example, record keeping requirements and liability for the costs of protected action ballots under the WR Act. This Part also restricts when applications for protected action ballots may be made if certain agreement-based transitional instruments cover the employees. Further technical transitional matters relating to protected action ballots are addressed in Schedule 16 (Compliance).

Item 12 – Commission must not deal further with application, appeal or review relating to ballot order

507. This item provides that the AIRC must not, on or after the WR Act repeal day, deal with any application, appeal or review relating to a ballot order.

Item 13 – Ballot orders and authorisations have no effect on or after WR Act repeal day

508. This item provides that any ballot order under subsection 451(1) of the WR Act, or a ballot or authorisation under such an order, is of no effect after the WR Act repeal day. This means that no protected action ballots can be conducted or continued after this date and that any nomination in a ballot order of a person as an authorised ballot agent or as an independent advisor will also be of no effect. This item is subject to item 15.

Item 14 – Continuation of sections 476, 477 and 479 of the WR Act for protected action ballots completed before WR Act repeal day

509. This item continues in operation section 476, subsections 477(1) to (6) and section 479 of the WR Act in relation to ballots completed before the WR Act repeal day. This ensures that:

- authorised ballot agents are still required to declare the results of these ballots (section 476) and comply with the reporting obligations (section 477) even if it is after the WR Act repeal day; and

- the Industrial Registrar must publish the results of the ballot (section 479).

Item 15 – Continuing liability for cost of protected action ballot

510. This item ensures that the WR Act provisions (sections 482 and 483) relating to the costs of conducting a protected action ballot continue to apply after the WR Act repeal day in relation to ballots ordered under the WR Act.

Item 16 – Record-keeping requirements relating to protected action ballot conducted under WR Act

511. If a protected action ballot is conducted before the WR Act repeal day, then the authorised ballot agent must keep the roll of voters and all ballot papers, envelopes and other documents relevant to the ballot for one year after the day the ballot is closed.

Item 17 – Restriction on when protected action ballot orders may be made – certain agreement-based transitional instruments cover employees who will be covered by proposed enterprise agreement

512. This item provides that if employees to be covered by a proposed enterprise agreement are covered by one of the agreement-based transitional instruments listed in subitem 17(1), then an application for a protected action ballot order must not be made under subclause 438(1) of the FW Bill earlier than 30 days before the latest nominal expiry date of those transitional instruments.

Part 5 – Effect of conduct engaged in while bargaining for WR Act collective agreement

Item 18 – FWA may take into account conduct engaged in by bargaining representatives while bargaining for WR Act collective agreement

513. This item allows FWA to take into account the conduct engaged in by bargaining representatives when bargaining for a collective agreement before the WR Act repeal day when making certain decisions under the FW Bill. For this item to apply, subitem 18(1) requires that the employees and employer who are to be covered by the proposed enterprise agreement would have been, respectively, subject to and bound by the prior proposed collective agreement had it come into operation.

514. Subitem 18(2) lists the circumstances when FWA may take into account the pre-WR Act repeal day conduct, namely in deciding:

- whether it is reasonable in the circumstances to make a bargaining order or scope order;
- which terms to include in a workplace determination that relates to a proposed enterprise agreement;
- under Part 3-3 of the FW Bill (Industrial Action), whether a bargaining representative is genuinely trying to reach an agreement; and

- under subclause 423(4) of the FW Bill, whether protected industrial action is causing, or threatening to cause, significant economic harm.

Part 6 – Payments relating to periods of industrial action

515. This Schedule provides transitional arrangements for payments relating to periods of industrial action (strike pay). In general, Division 9 of Part 3-3 of the FW Bill regulates strike pay (including related contravening conduct) in relation to periods of industrial action engaged in on and after the WR Act repeal day. This Schedule deals with strike pay (including related contravening conduct) in relation to a period of industrial action taken before that day.

516. This Schedule also makes provision in relation to certain transitional instruments.

Item 19 – Payments relating to pre-commencement periods of industrial action etc.

517. This item provides that Division 9 of Part 9 of the WR Act continues to apply (under this Schedule) in relation to industrial action engaged in before the WR Act repeal day.

518. This item also makes clear that Division 9 of Part 9 of the WR Act applies in relation to a period of industrial action that spans the commencement of Division 9 of Part 3-3 of the FW Bill (subitem 19(2)).

519. In other words, where industrial action is commenced before the WR Act repeal day, the employer is required to withhold pay for the period of industrial action as follows:

- where the duration of the industrial action is less than 4 hours – 4 hours;

- where the duration of the industrial action is more than 4 hours – the duration of the action on that day.

520. This also means that the WR Act provisions apply to contravening conduct in relation to such industrial action (e.g., the payment of strike pay) whether that contravening conduct occurs before or after the WR Act repeal day.

521. This item also ensures that there is no overlap with Part 3-1 of the FW Bill (General Protections) by making clear that Part 3-1 has no operation to the extent that Division 9 of Part 9 of the WR Act has operation under this Schedule. This is necessary because clauses 348 and 349 of the FW Bill would otherwise also apply to the contravening conduct. Clause 348 prohibits a person taking adverse action against another person for refusing to pay strike pay, and clause 349 prohibits misrepresentations about the payment of strike pay.

Item 20 – Application of Division 9 of Part 3-3 of the FW Act

522. This item ensures that the strike pay provisions apply to award and agreement-based transitional instruments in the same way as they apply to corresponding fair work instruments.

523. In particular, the provisions deem a reference to a modern award (in paragraph 470(4)(c), subclause 471(2) and paragraph 474(2)(c) of the FW Bill) to include a reference to an award-based transitional instrument. Similarly a reference in those provisions to an enterprise agreement is deemed to include a reference to an agreement-based transitional instrument.

524. This means that:

- an award or agreement-based transitional instrument has effect subject to the strike pay rules under the FW Bill; and

- in relation to protected overtime bans - the strike pay rules under the FW Bill do not apply if an employee's refusal to work overtime does not contravene the employee's obligations under an award or agreement-based transitional instrument. This clarifies that an employee may refuse to work overtime under a transitional instrument (e.g., in accordance with a term in that instrument that allows an employee to refuse to work overtime on the basis of family responsibilities) while protected bans are in place.

Schedule 14 – Transitional provisions relating to right of entry

Item 1 – Entry Permits

525. This item ensures that permits in force under Part 15 of the WR Act before its repeal are treated as entry permits in force under the FW Bill. This will avoid existing permit holders having to re-apply for new permits and enable FWA to be able to deal with these permits using all of the powers available under the FW Bill. The permits will maintain their original expiry dates and be subject to any limiting terms and conditions that were imposed under the WR Act.

526. This item also deals with any permits under the WR Act that come into force after the WR Act repeal day to ensure that any permits issued or conditions imposed on a permit will be taken to be permits or conditions imposed under the FW Bill.

Item 2 – Entry Notices and Exemption Certificates

527. This item deals with entry notices or exemption certificates that have been issued before the WR Act repeal day but where entry has not yet occurred.

528. It provides that an entry notice that complies with the requirements of the WR Act has effect as if the notice had been given under the FW Bill and that an exemption certificate properly issued by a Registrar has effect as if it had been issued by FWA.

Item 3 – Contravention of Acts etc.

529. Subclause 481(1) of the FW Bill allows entry onto premises to investigate a suspected contravention of the FW Bill or a term of a fair work instrument. This item provides that this also applies:

- the WR Act, as in force from time to time, or regulations made under that Act, as in force from time to time;
- an instrument made under the WR Act; and
- a transitional instrument (as defined in item 2 of Schedule 3).

Item 4 – Notice to produce documents

530. This item relates to inspection of member and non-member records. Where a notice given by a permit holder to produce, or allow access to, records at a later time for inspection under subsection 748(5) of the WR Act has been made, the notice has effect after the WR Act repeal day as though it was given under subclause 483(1) of the FW Bill.

531. However, a notice made by the AIRC under subsections 748(9) and (10) of the WR Act allowing access to non-member records has no effect after the WR Act repeal day. This is because the FW Bill does not restrict a permit holder inspecting non-member records and therefore such notices will be unnecessary after the WR Act repeal.

Item 5 – Conscientious objection certificates

532. This item provides that a conscientious objection certificate endorsed by the Registrar under subsection 762(2) of the WR Act and in force immediately before the repeal of that Act remains valid after the repeal of the WR Act and will have the same effect as one issued under subclause 485(3) of the FW Bill.

Item 6 – Suspending or revoking entry permits

533. This item relates to the provisions under the FW Bill where FWA is required to suspend or revoke an entry permit held by a permit holder. It requires FWA to apply clause 510 of the FW Bill as if references to a specified FW Bill provision include references to specified equivalent provisions in the WR Act. This will ensure that relevant conduct that occurred under the WR Act can continue to be considered under clause 510 of the FW Bill.

Item 7 – Continued operation of WR Act

534. This item addresses the bridging period after the repeal of the WR Act in which both WR Act institutions and FWA will deal with right of entry matters. Item 11 of Schedule 2 provides that the WR Act continues to apply in relation to conduct that occurred before the WR Act repeal day.

535. Subitem 7(1) provides that an instrument does not cease to have its effect under the WR Act when it is deemed by this Schedule to have effect under the FW Bill. The instrument will have concurrent effect under both the WR Act and the FW Bill in relation to conduct that occurred before the WR Act repeal day.

536. Subitem 7(2) provides that a suspension, revocation or imposition of an entry permit under the WR Act provisions after the repeal of that Act is deemed to have occurred under the FW Bill.

537. Subitems 7(3) and 7(4) displace the operation of item 11 of Schedule 2 as far as it could relate to disputes about the operation of the right of entry provisions in Part 15 of the WR Act. Such disputes may only be dealt with by FWA under clause 505 of the FW Bill. Subitem 7(4) gives FWA the power to deal with disputes about the operation of Part 15 of the WR Act in the same manner as it deals with disputes about the operation of Part 3-4 of the FW Bill.

Schedule 15 – Stand down

538. This Schedule deals with the interaction between stand down provisions under the FW Bill, and stand down provisions under a transitional instrument. It also ensures that provisions in transitional instruments that provide for third-party authorisations of stand downs have effect from and after the WR Act repeal day.

Item 1 – Meanings of *employee* and *employer*

539. In this Schedule, the terms employee and employer mean national system employee and national system employer respectively (as defined in clauses 13 and 14 of the FW Bill). The rights and obligations of employers and employees set out in this Schedule apply only to the employment relationships within the scope of the corporations and other constitutional powers that are engaged by clauses 13 and 14 of the FW Bill.

Item 2 – Application of FW Act – stand down under transitional instruments

540. This item provides that arrangements for stand downs under transitional instruments are treated in the same way as for enterprise agreements under subclause 524(2) of the FW Bill. This means that a stand down provision in a transitional instrument generally continues to apply from and after the WR Act repeal day.

541. However, the default stand down provision under subclause 524(1) of the FW Bill applies if a transitional instrument does not deal with a circumstance allowing stand down under the FW Bill, or does not deal with stand down at all.

Item 3 – Transitional instruments providing for authorisation by third party

542. This item ensures that provisions of a transitional instrument requiring an employer to apply to a third party for authorisation to stand down employees in certain circumstances have effect on and after the WR Act repeal day. Such provisions have effect despite item 4 of Schedule 3, as subsection 691A(5) of the WR Act does not continue to apply in relation to them.

Schedule 16 - Compliance

543. This Schedule sets out civil remedies for specified contraventions occurring after the WR Act repeal day.

Item 1 – meanings of *employee* and *employer*

544. In this Schedule, the terms employer and employee have their ordinary meanings. This is because this Schedule deals with matters that are incidental to other Schedules of this Bill. A provision in this Schedule could relate to national system employers and their employees, or to other employers and their employees, depending on the Schedule that creates the substantive right or obligation.

545. For example, this Schedule applies to a contravention of:

- an award-based transitional instrument by a national system employer;
- a continuing Schedule 6 instrument by a non-national system employer;
- the AFPCS and the Federal Minimum Wage by a national system employer during the bridging period; and
- the parental leave provisions of Part 7 of the WR Act, as extended by Division 6 of Part 12, by a non-national system employer during the bridging period.

Item 2 – Compliance with transitional instruments

Item 3 – Compliance with obligations relating to conditional terminations of individual agreement-based transitional instruments

Item 4 – Compliance with obligation to notify employees about preserved redundancy provisions

Item 5 – Compliance with transitional APCSs, the transitional FMW and transitional special FMWs

Item 6 – Compliance with minimum entitlements

Item 7 – Compliance with take-home pay orders

Item 8 – Compliance with continued provisions relating to workplace agreements

Item 9 – Compliance with continued provisions relating to workplace agreements

Item 10 – Compliance with WR Act equal remuneration orders

Item 11 – Transfer of business – compliance with notice requirements

Item 12 – Non-disclosure obligation – information acquired under FW Act that identifies an employee as an employee to whom an individual agreement-based transitional instrument applies

Item 13 – Non-disclosure obligation – protected ballot information acquired under the WR Act

Item 14 – Compliance with continued provisions relating to protected action ballots

Item 15 – Compliance with continuing Schedule 6 instruments

546. Items 2 to 8 and items 10 to 15 set out civil remedy provisions for specified contraventions of this Bill, and provisions of the WR Act that are preserved by this Bill (e.g., compliance with transitional instruments).

547. Item 9 preserves Subdivision C of Division 11 of Part 8 of the WR Act in relation to certain contraventions of the WR Act that are preserved by Schedule 8 to this Bill. Subdivision C of Division 11 of Part 8 of the WR Act provides that the Federal Court or Federal Magistrates Court may make certain orders in relation to contraventions of workplace agreement related civil remedy provisions.

548. The effect of this provision is that the Federal Court and Federal Magistrates Court will retain powers under the WR Act after its repeal in relation to the contraventions specified in this item in addition to the powers it has under Part 4-1 of the FW Bill (see, for example, clause 545). The provisions listed in item 9 are also civil remedy provisions for the purposes of this Schedule, and the FW Bill compliance framework (see item 8).

Item 16 – Application of FW Act to civil remedy provisions under this Act

549. Item 16 provides that proceedings in relation to civil remedy provisions in this Schedule are subject to rules regarding standing, jurisdiction and maximum penalties set out in a table contained in this Schedule, as if these rules were included as part of the table in subclause 539(2) of the FW Bill.

550. This means that, subject to modifications set out in this Schedule, Part 4-1 of the FW Bill applies to the civil remedy provisions contained in this Schedule in the same way that it applies to civil remedy provisions contained in the FW Bill.

551. For example:

- an employee who has applied for an order from a magistrates court or the Federal Magistrates Court about an amount that an employer was required to pay to them under a transitional instrument is able to elect to have their proceeding dealt with as small claims proceedings as set out in clause 548 of the FW Bill;

- contraventions of a civil remedy provision in this Schedule can be taken to be a part of a course of conduct for the purposes of clause 557 of the FW Bill;

- the costs rule in clause 570 of the FW Bill applies to proceedings in relation to contraventions of civil remedy provisions in this Schedule.

Item 17 – No injunctions in relation to certain contraventions

552. This item provides that notwithstanding subclause 545(2) of the FW Bill, the Federal Court and the Federal Magistrates Court cannot order an injunction in relation to a contravention, or a proposed contravention of a transitional instrument, a continuing Schedule 6 instrument or any of the following provisions of the WR Act as preserved by this Bill:

- any of subsections 182(1) to (4);
- section 185;
- section 661.

Item 18 – Application of safety net contractual entitlements

553. This item is an avoidance of doubt provision that provides that provisions in the FW Bill about safety net contractual entitlements have no effect until the FW (safety net provisions) commencement day. Safety net contractual entitlements are statutory entitlements that mirror common law rights.

554. The intention is that a person does not have the new statutory right until the FW (safety net provisions) commencement day. Consequently, breaches of this statutory entitlement can only be investigated and enforced on and after the FW (safety net provisions) commencement day in relation to breaches occurring on or after the FW (safety net provisions) commencement day. However, nothing in this Schedule is intended to derogate from, or otherwise affect, existing common law contractual entitlements.

Schedule 17 – Amendments relating to the Fair Work Divisions of the Federal Court and the Federal Magistrates Court

555. This Schedule contains amendments relating to the creation of the Fair Work Divisions of the Federal Court and the Federal Magistrates Court. The Fair Work Divisions of the Federal Court and Federal Magistrates Court will specialise in workplace relations matters and complement the work of FWA.

- Part 4-2 of the FW Bill confers on the Federal Court and the Federal Magistrates Court a general jurisdiction in matters arising under the FW Bill, and generally requires that jurisdiction to be exercised in the Fair Work Divisions of those courts.

- Jurisdiction is also conferred on the Federal Court and the Federal Magistrates Court in relation to matters arising under this Bill, the WR Act as continued by this Bill and the proposed *Fair Work (Registration of Organisations) Act 2009*. Jurisdiction arising under these Acts is also required to be exercised in the Fair Work Divisions of the Courts (see Part 5 of this Schedule and items 45 and 46 of Schedule 22).

Part 1 – Amendments to the Federal Court of Australia Act 1976

556. This Part amends the *Federal Court of Australia Act 1976* (the Federal Court Act) to establish two Divisions of the Federal Court, a Fair Work Division and a General Division.

Federal Court of Australia Act 1976

Item 1 – Section 4

557. This item inserts a new definition of Division in the Federal Court Act. The Federal Court will have two Divisions, a General Division and a Fair Work Division.

Item 2 – Section 4 (definition of Full Court)

558. This item makes a consequential amendment to the definition of Full Court for the purposes of the Federal Court Act. A Full Court must be constituted in a Division of the Court and comprise Judges who are entitled to exercise jurisdiction in that Division.

Item 3 – New section 6A

559. This item inserts a new section 6A to deal with the assignment of Judges (other than the Chief Justice) to the Divisions of the Court.

560. Judges may be assigned to either the Fair Work Division or the General Division. A Judge that is not assigned to a Division will be able to hear and determine matters in both Divisions (see item 7 - new subsection 15(1C)).

561. The Governor-General may assign a Judge to a Division of the Court as part of their initial commission to the Court, or at a later time with the consent of the Judge.

562. The assignment of a Judge may also be varied at a later date with the consent of the Judge.

563. All Judges who are appointed to the Court at the time these amendments commence are taken not to be assigned to a particular Division and will be able to hear and determine matters in both Divisions of the Court, unless they consent to being assigned to a particular Division after commencement (see subitem 19(2)).

564. The Chief Justice of the Court cannot be assigned to a Division of the Court as he or she is responsible for the overall management of the Court and, consistent with this, must be able to exercise jurisdiction in both the General and Fair Work Divisions of the Court.

Item 4 – Section 7

Item 5 – Section 7

565. Together these items amend section 7 of the Federal Court Act to provide that a Judge who is, for the time being, exercising powers as the Acting Chief Justice of the Court, is taken not to be assigned to either Division of the Court. This is consistent with the position that the actual Chief Justice of the Court may not be assigned to either Division.

Item 6 – New section 13

566. This item inserts a new section 13, and provides that the Federal Court comprises two Divisions, a General Division and a Fair Work Division. Proceedings in the Court must be instituted, heard and determined in one of these Divisions.

567. New subsections 13(3) and 13(4) set out the jurisdiction of the Divisions.

568. The Fair Work Division will hear and determine matters that are required by another Act to be heard and determined in the Fair Work Division.

- For example, the FW Bill confers jurisdiction on the Federal Court in relation to matters arising under the FW Bill, and generally requires this jurisdiction to be exercised in the Fair Work Division of that Court.

- Matters arising under this Bill, the WR Act as continued in operation by this Bill and the proposed *Fair Work (Registered Organisations) Act 2009* are also required to be heard in the Fair Work Divisions (see item 21 of this Schedule).

569. The Fair Work Division can also exercise jurisdiction that is incidental to jurisdiction required to be exercised in the Fair Work Division. Conversely, the General Division will hear and determine all matters where jurisdiction is not required by another Act to be exercised in the Fair Work Division, and any jurisdiction that is incidental to that jurisdiction

570. A single proceeding may give rise to various issues, some of which are required to be dealt with in the Fair Work Division, and some of which are required to be dealt with in the General Division. These issues must be dealt with together in one Division. New subsection 13(5) gives the Chief Justice the discretion to determine in which Division of the Court the proceeding will be instituted, heard and determined. In allocating matters to a Division, the

Chief Justice shall have regard to the predominant issue or issues that are apparent at the time the matters are instituted.

571. The Chief Justice's directions under subsection 13(5) may be specific as to the allocation of a particular proceeding, or general as to the allocation of proceedings of a particular kind.

572. The Chief Justice may issue a direction at any time during the proceeding and may transfer proceedings between the Divisions to ensure that they are dealt with in the most appropriate way.

Item 7 – Section 15

573. This item inserts new subsections (1A) to (1D) in section 15 of the Federal Court Act.

574. New subsection (1A) provides that where a Judge is assigned to a Division, he or she can only exercise the powers of the Court in that Division. A Judge may be assigned to a Division by the Governor-General as part of their initial commission to the Court, or at a later date with the consent of the Judge concerned (see item 3 - new section 6A).

575. The Chief Justice can arrange for a Judge that is assigned to a particular Division to deal with a matter in the other Division, if he or she considers it desirable to do so, consistent with the Chief Justice's overall responsibility for ensuring the orderly and expeditious discharge of the business of the Court.

576. This provision complements the existing powers of the Chief Justice in subsection 15(1), to make arrangements as is appropriate and practical as to the Judge or Judges who are to constitute the Court in particular matters or classes of matters, in consultation with those Judges.

577. New subsection (1C) makes it clear that a Judge who is not assigned to either Division of the Court may exercise jurisdiction in both the Fair Work Division and the General Division of the Court.

578. New subsection (1D) makes it clear that an exercise of the Court's power is not invalid, and cannot be challenged, on the ground that a proceeding was instituted, heard and determined in the wrong Division of the Court.

579. The note at the end of the items indicates that two further new subheadings will be inserted in section 15 to assist the reader.

Item 8 – New section 18BA

580. This item inserts a new section 18BA that enables the Chief Justice to enter into an arrangement with the chief executive (however described) of another agency or organisation for an employee or employees of the agency or organisation to receive documents or perform other non-judicial functions on behalf of the Court.

- For example, the Chief Justice will be able to enter into an arrangement with the General Manager of FWA for FWA to receive documents, or perform other non-judicial functions, on behalf of the Fair Work Division of the Court.

581. A similar arrangement can be entered into by the Chief Federal Magistrate under section 91 of the *Federal Magistrates Act 1999* (Federal Magistrates Act).

Item 9 – Subsection 43(1)

582. This item makes a consequential amendment to subsection 43(1) to make it clear that the general costs provisions contained in that section do not apply to proceedings in relation to a matter arising under the FW Bill.

583. In a proceeding where the Court is exercising jurisdiction under the FW Bill, the Federal Court may only order a party to pay costs in accordance with clause 570 of the FW Bill.

584. The ability of the courts to awards costs in workplace relations matters has been limited since 1904 and is consistent with discouraging legalism in proceedings before industrial courts.

Part 2 – Amendments to the Federal Magistrates Act 1999

585. This Part amends the Federal Magistrates Act to establish two Divisions within the Federal Magistrates Court, a Fair Work Division and a General Division.

Federal Magistrates Act 1999

Item 10 – Section 4

586. This item amends the simplified outline to the Federal Magistrates Act to note that jurisdiction of the Federal Magistrates Court is to be exercised in either the General Division or the Fair Work Division of the Court.

Item 11 – Section 5

587. The item inserts a definition of Division for the purposes of the Federal Magistrates Act. The Federal Magistrates Court will have two Divisions, a General Division and a Fair Work Division.

Item 12 – New section 10A

588. This item inserts new section 10A, and provides that the Federal Magistrates Court is to comprise two Divisions, a General Division and a Fair Work Division. Proceedings in the Court must be instituted, heard and determined in one of these Divisions.

589. New subsections (3) and (4) set out the jurisdiction of the Divisions.

590. The Fair Work Division will hear and determine matters that are required by another Act to be heard and determined in the Fair Work Division.

- For example, the FW Bill confers jurisdiction on the Federal Magistrates Court in relation to matters arising under the FW Bill, and generally requires this jurisdiction to be exercised in the Fair Work Division of that Court.

- Matters arising under this Bill, the WR Act as continued in operation by this Bill and the proposed *Fair Work (Registered Organisations) Act 2009* are also required to be heard in the Fair Work Divisions (see item 21 of this Schedule).

591. The Fair Work Division can also exercise jurisdiction that is incidental to jurisdiction required to be exercised in the Fair Work Division. Conversely, the General Division will hear and determine all matters where jurisdiction is not required by another Act to be exercised in the Fair Work Division, and any jurisdiction that is incidental to that jurisdiction.

592. A single proceeding may give rise to various issues, some of which are required to be dealt with in the Fair Work Division, and some of which are required to be dealt with in the General Division. These issues must be dealt with together in one Division. New subsection 10A(5) gives the Chief Federal Magistrate the discretion to determine in which Division of the Court the proceeding will be instituted, heard and determined. In initially directing matters to a Division, the Chief Federal Magistrate shall have regard to the predominant issue or issues that are apparent at the time the matters are instituted.

593. The Chief Federal Magistrate's directions under subsection 10A(5) may be specific as to the allocation of a particular proceeding, or general as to the allocation of proceedings of a particular kind.

594. The Chief Federal Magistrate may issue a direction at any time during the proceeding and may transfer proceedings between the Divisions to ensure that they are dealt with in the most appropriate way.

Item 13 – New section 12

595. This item inserts new subsections (3A) to (3D) in section 12 of the Federal Magistrates Act.

596. New subsection (3A) provides that where a Federal Magistrate is assigned to a Division, he or she can only exercise the powers of the Court in that Division. A Federal Magistrate may be assigned to a Division by the Governor-General as part of their initial appointment, or at a later date with the consent of the Federal Magistrate concerned.

597. The Chief Federal Magistrate can arrange for a Federal Magistrate that is assigned to a particular Division to deal with a matter in the other Division, if he or she considers it desirable to do so, consistent with the Chief Federal Magistrate's overall responsibility for ensuring the orderly and expeditious discharge of the business of the Court.

598. New subsection (3C) makes it clear that a Federal Magistrate who is not assigned to either Division of the Court may exercise jurisdiction in both the Fair Work Division and the General Division of the Court.

599. New subsection (3D) makes it clear that an exercise of the Court's power is not invalid, and cannot be challenged, on the ground that a proceeding was instituted, heard and determined in the wrong Division of the Court.

600. The note at the end indicates that three new subheadings will be inserted in section 12 to assist the reader.

Items 14 – Subsection 79(1)

Item 15 – Subsection 79(1) (at the end of the note)

601. Together these items make consequential amendments to subsection 79(1) to make it clear that the general costs provisions contained in that section do not apply to proceedings in relation to a matter arising under the FW Bill.

602. In a proceeding where the Court is exercising jurisdiction under the FW Bill, the Court may only order a party to pay costs in accordance with clause 570 of the FW Bill.

603. The ability of the courts to awards costs in workplace relations matters has been limited since 1904 and is consistent with discouraging legalism in proceedings before industrial courts.

Item 16 – New clause 1A of Schedule 1

604. This item inserts new clause 1A in Schedule 1 and deals with the assignment of Federal Magistrates (other than the Chief Federal Magistrate) to the Divisions of the Court.

605. Federal Magistrates may be assigned to either the Fair Work Division or the General Division. A Federal Magistrate who is not assigned to a Division will be able to hear and determine matters in both Divisions (see item 13 – new subsection 12(3C)).

606. The Governor-General may assign a Federal Magistrate to a Division of the Court as part of their initial commission to the Federal Magistrates Court, or at a later time with the consent of the Federal Magistrate.

607. The assignment of a Federal Magistrate may also be varied at a later date with the consent of the Federal Magistrate.

608. All Federal Magistrates who are appointed to the Court at the time these amendments commence are taken not to be assigned to a particular Division and will be able to hear and determine matters in both Divisions of the Court, unless they consent to being assigned to a particular Division after commencement (see item 20(2)).

609. The Chief Federal Magistrate cannot be assigned to a Division of the Court as he or she is responsible for the overall management of the Court and, consistent with this, must be able to exercise the jurisdiction of both the General and Fair Work Divisions of the Court.

Item 17 – Clause 10 of Schedule 1

610. This item provides that a Federal Magistrate who is, for the time being, exercising powers as the Acting Chief Federal Magistrate is taken not to be assigned to either Division of the Court. This is consistent with the position that the actual Chief Federal Magistrate may not be assigned to either Division.

Part 3 – Other amendments

Administrative Decisions (Judicial Review) Act 1977

Item 18 – Paragraph (a) of Schedule 1

611. This item contains amendments to Schedule 1 of the *Administrative Decisions (*Judicial *Review) Act 1977* (ADJR Act) that are consequential upon the repeal of the WR Act.

612. Schedule 1 of the ADJR Act excludes certain classes of decisions from administrative review under the ADJR Act. This currently includes decisions under the *Conciliation and Arbitration Act 1904*, the WR Act and the *Building and Construction Industry Improvement Act 2005*.

613. This item:

- removes the reference to decisions made under the *Conciliation and Arbitration Act 1904*, as this Act was repealed in 1988; and
- includes references to decisions made under the FW Bill, the Fair Work *(Registered Organisations) Act 2009* and this Bill.

614. Decisions of FWA and the FWO will, however, be subject to judicial review by means of prerogative writ.

Part 4 – Application and transitional provisions

615. This Part provides for the application of amendments in Parts 1 and 2 of this Schedule to proceedings on foot immediately prior to commencement, and proceedings commenced after that time.

616. Proceedings on foot as at commencement of the Fair Work Divisions involving the exercise of jurisdiction under the WR Act will be required to be heard and determined in the Fair Work Divisions of the Courts (item 21), unless the Chief Justice or Chief Federal Magistrate (as appropriate) directs that the matter be heard in the General Division (see item 6, new subsection 13(5) of the Federal Court Act, and item 12, new subsection 10A(5) of the Federal Magistrates Act).

617. This Part also makes it clear that existing Judges and Federal Magistrates are taken not to be assigned to the Divisions of the Federal Court and Federal Magistrates Court. In practice, this means that existing Judges and Federal Magistrates will be able to hear and determine matters in both Divisions of the respective Court, unless they consent to being assigned to a particular Division after commencement.

Item 19 – Application of Part 1

618. Subitem (1) provides that, from the commencement of Part 1, the amendments made by that Part to the Federal Court Act apply to all proceedings commenced after that Part commences, and to proceedings pending in the Federal Court immediately before the commencement of Part 1.

619. Subitem (2) makes it clear that Judges that are currently appointed to the Federal Court will continue to be able to exercise jurisdiction in both the General Division and the Fair Work Division of the Federal Court when the Divisions are established.

620. A Judge may agree to be assigned to a particular Division of the Federal Court in accordance with new section 6A (see item 3).

Item 20 – Application of Part 2

621. Subitem (1) provides that, from the commencement of Part 2 of this Schedule, the amendments made by that Part to the Federal Magistrates Act apply to all proceedings commenced after that Part commences, and to proceedings pending in the Federal Magistrates Court immediately before the commencement of Part 2.

622. Subitem (2) makes it clear that Federal Magistrates that are currently appointed to the Federal Magistrates Court will continue to be able to exercise jurisdiction in both the General Division and the Fair Work Division of the Federal Magistrates Court when the Divisions are established.

623. A Federal Magistrate may agree to be assigned to a particular Division of the Court in accordance with new clause 1A of Schedule 1 (see item 16).

Part 5 – Jurisdiction of courts

624. This Part confers on the Federal Court and the Federal Magistrates Court a general jurisdiction in matters arising under this Bill and the WR Act as continued in operation by this Bill, and requires this jurisdiction to be exercised in the Fair Work Divisions of the Courts.

625. This Part also deals with the general powers of the Federal Court and the Federal Magistrates Court, and the conferral on the Federal Court of a general appellate jurisdiction from decisions of eligible State and Territory courts exercising jurisdiction under this Bill, or the WR Act as continued in operation by this Bill.

Item 21 – Conferring jurisdiction on the Federal Court

626. This item confers original jurisdiction on the Federal Court in relation to any civil or criminal matter arising under this Bill or the WR Act as continued in operation by this Bill.

627. This Bill is not intended to limit the Federal Court's jurisdiction to hear a case stated or question of law reserved to it by a single judge under subsection 25(6) of the Federal Court Act.

Item 22 – Exercising jurisdiction in the Fair Work Division of the Federal Court

628. This item requires the jurisdiction conferred on the Federal Court by item 21 to be exercised by the Fair Work Division of the Federal Court in certain circumstances, including where:

- an application is made (or a prosecution is instituted) under this Bill or the WR Act as continued in operation by this Bill;

- a writ of mandamus or prohibition or an injunction is sought against a person holding office under this Bill or the WR Act as continued in operation by this Bill;
- a declaration or injunction is sought in relation to a matter arising under this Bill or the WR Act as continued in operation by this Bill;
- an appeal is instituted in the Federal Court from a judgment of the Federal Magistrates Court or a court of a State or Territory in a matter arising under this Bill or the WR Act as continued in operation by this Bill; or
- a matter arising under this Bill or the WR Act as continued in operation by this Bill is transferred to the Federal Court from the Federal Magistrates Court, or remitted to the Federal Court by the High Court, or involves a case stated or a question reserved for the consideration of the Federal Court (including by the President of FWA under clause 608 of the FW Bill).

Item 23 – No limitation on Federal Court's powers

629. For the avoidance of doubt, this item provides that nothing in this Bill limits the Federal Court's powers (including its powers to grant injunctions and make declarations) under sections 21, 22, or 23 of the Federal Court Act.

630. This item is intended to address authorities which have held that federal industrial laws exhaustively contain the remedies available to enforce those laws.

Item 24 – Appeals from eligible State or Territory courts

631. This item provides that the Federal Court has jurisdiction to hear an appeal from a decision of an eligible State or Territory court exercising jurisdiction under this Bill or the WR Act as continued in operation by this Bill. It is not necessary for a party to obtain leave of the Federal Court to hear the appeal. The Federal Court's appellate jurisdiction will be exclusive. No appeal will lie to other State and Territory courts, or to the High Court, from an eligible State or Territory court exercising jurisdiction under this Bill or the WR Act as continued in operation by this Bill.

632. Where the eligible State or Territory court is a court of summary jurisdiction (e.g., a magistrates court), a single judge will be able to exercise the Federal Court's appellate jurisdiction (see subsection 25(5) of the Federal Court Act).

633. The item does not limit the Federal Court's appellate jurisdiction under section 24 of the Federal Court Act (including its jurisdiction to hear appeals from the Federal Magistrates Court).

Item 25 – Conferring jurisdiction on the Federal Magistrates Court

634. This item confers jurisdiction on the Federal Magistrates Court in relation to all civil matters arising under this Bill or the WR Act as continued in operation by this Bill.

635. The Federal Magistrates Court will not have jurisdiction in criminal matters arising under this Bill or the WR Act as continued in operation by this Bill, appeals from decisions of

State or Territory courts under item 24 or references from FWA on questions of law. These will be dealt with exclusively by the Federal Court.

Item 26 – Exercising jurisdiction in the Fair Work Division of the Federal Magistrates Court

636. This item requires the jurisdiction conferred on the Federal Magistrates Court by item 25 to be exercised by the Fair Work Division of the Federal Magistrates Court in certain circumstances, including where:

- an application is made under this Bill or the WR Act as continued in operation by this Bill;
- a declaration or injunction is sought in relation to a matter arising under this Bill or the WR Act as continued in operation by this Bill; or
- a matter arising under this Bill or the WR Act as continued in operation by this Bill is transferred to the Federal Magistrates Court from the Federal Court, or remitted to the Federal Magistrates Court by the High Court.

Item 27 – No limitation on Federal Magistrates Court's powers

637. For the avoidance of doubt this item provides that nothing in this Bill limits the Federal Magistrates Court's powers (including its powers to grant injunctions and make declarations) under sections 14, 15 or 16 of the Federal Magistrates Act. As with item 23 above, this item is intended to address authorities which have held that federal industrial laws exhaustively contain the remedies available to enforce those laws.

Schedule 18– Institutions

Part 1 – Initial appointment of FWA Members

638. This Part appoints 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.

Item 1 – Appointments to Fair Work Australia

639. This item 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 FW 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 subsequent proclamation.

640. Subitem (3) enables the initial members of FWA to hold dual appointments as members of the AIRC notwithstanding the provisions of the WR Act (including sections 66, 69 and 83) or the FW Bill (including subclause 628(2) and clauses 632 and 633).

Item 2 – Terms and conditions

641. This item provides that the terms and conditions of the initial members of FWA continue to be governed by the WR Act rather than the FW 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.

642. In particular, the following terms and conditions of former AIRC members are preserved:

- FWA Members who were Presidential Members of the AIRC retain the same rank, status and precedence as a Judge, and the entitlement to be styled 'The Honourable';
- an FWA Member previously entitled to the designation as a Judge of the Federal Court is entitled to retain that designation;
- arrangements made between the President of the AIRC and a former AIRC member in relation to outside employment are preserved; and
- the *Judges' Pensions Act 1968* continues to apply to those FWA Members taken to have been appointed to FWA under item 1, to whom that Act applied as a member of the AIRC.

643. The WR Act terms and conditions continue to apply even after the provisions have been repealed.

Item 3 – Protection of members of the Commission and FWA

644. Section 97 of the WR Act confers on members of the AIRC the same protection and immunity as a Judge of the Federal Court. This item maintains that protection and immunity for the initial members of FWA following the repeal of section 97 of the WR Act, and extends the protection to their activities as FWA Members.

Item 4 – Seniority of FWA Members

645. As the initial members of FWA are taken to have been appointed at the same time, this item preserves the seniority those members enjoyed as members of the AIRC under section 65 of the WR Act.

Item 5 – Procedural rules

646. This item permits the President of FWA to make procedural rules prior to the appointment of any other FWA Members notwithstanding the consultation requirement in proposed subclause 609(1) of the FW Bill.

Item 6 – Directions by the President

647. This item enables the President of the AIRC to direct a person who holds concurrent appointments to both the AIRC and FWA as to the performance of his or her functions as a member of the AIRC. This provision mirrors clause 582 of the FW Bill which enables the President of FWA to direct FWA Members as to the performance of their powers and functions as members of FWA.

648. For the avoidance of doubt, subitem (4) clarifies that a direction given in writing 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*.

Part 2 – WR Act bodies and offices

649. This Part deals with the continuation and cessation of the AIRC; the Australian Industrial Registry; the AFPC and AFPC Secretariat; the Workplace Authority; and their respective statutory office holders.

Item 7 – Continuation and cessation

650. Despite the repeal of the WR Act, this item preserves the operation of the WR Act bodies and offices specified in columns 1 and 2 of the table until the default cessation time specified in column 3 of the table, or a different time determined by the Minister in writing.

651. These WR Act bodies and offices are preserved to enable the completion of matters that are underway at the time of commencement, such as award modernisation, concluding part-heard proceedings (including appeals) and the assessment of ITEAs. The note following subitem (1)

alerts the reader to the fact that FWA will take over some of the work of WR Act bodies and offices before their cessation times.

652. Any appointment made to a WR Act body or office before the repeal of the WR Act continues in force after the repeal in accordance with the terms of the appointment until the cessation time for that body.

653. For the avoidance of doubt, subitem (4) 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*.

Item 8 – Transfer of assets and liabilities

654. This item 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.

655. Assets and liabilities would be transferred on a specified default date, expected to be 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.

656. For the avoidance of doubt, subitem (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*.

657. Subitem (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.

658. The General Manager of FWA will be empowered 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 – see item 10.

Item 9 – Information acquired under WR Act

659. Clause 655 of the FW Bill authorises the President to disclose, for certain purposes, information acquired by FWA, or a member of the staff of FWA, in the course of performing functions or exercising powers as FWA. This item ensures that clause 655 also applies to any information acquired by FWA from a WR Act body.

Item 10 – Additional function and power of the General Manager

660. This item empowers the General Manager of FWA to enter into arrangements with, and provide assistance to, the Australian Industrial Registry, Workplace Authority and the AFPC Secretariat on and after the WR Act repeal day.

Item 11 – Transfer of functions to FWA at cessation time

661. This item provides that after the cessation time for a WR Act body or office, the powers, functions and duties are to be exercised and performed by FWA or any other body determined by the Minister in writing.

662. For the avoidance of doubt, subitem (4) clarifies that a Ministerial determination specifying a different body or person to exercise the powers, functions and duties of a WR Act body after cessation time 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*.

663. Notwithstanding anything to the contrary in a transitional instrument, FWA is not able to deal with a dispute in a manner that is inconsistent with the WR Act, the FW Bill or an instrument made or given effect to by or under either this Bill or the FW Bill that applies to the parties. Any law of the Commonwealth relating to a WR Act body or office is to be read as if a reference to the body or office were a reference to FWA.

664. Subitem (5) requires FWA or any other body or office that continues to deal with a matter that was being dealt with by a WR Act body or office holder to take into account everything previously done in relation to the matter.

Part 3 – Transitional role for Fair Work Ombudsman and Inspectors

665. Part 3 of this Schedule sets out the role of the FWO and Fair Work Inspectors (FW inspectors) in relation to conduct that occurred before the WR Act repeal day or in relation to instruments or provisions of the WR Act that are saved by this Bill.

Item 12 – No continued operation for Parts 5A and 6 of WR Act

666. This item provides that there is no continued role for the Workplace Ombudsman or workplace inspectors once the WR Act is repealed.

Item 13 – Conduct before WR Act repeal

Item 14 – Conduct after WR Act repeal

667. Contraventions of the WR Act that occur before the WR Act repeal day will be enforced under the provisions of the WR Act whether or not a proceeding was commenced before the WR Act repeal day (subject to contrary intention in this Bill). This means that the repeal of the WR Act will not prevent the enforcement of entitlements that arose under the WR Act before its repeal (see item 11 of Schedule 2).

668. To ensure continuation and completion of investigations and legal proceedings under the WR Act, item 13 of this Schedule provides that an application that could have been made or continued by a workplace inspector in relation to conduct that occurred before the WR Act

repeal may be made or continued, after repeal, by a FW inspector. This item is intended to give FW inspectors standing to bring or continue proceedings in relation to breaches of the WR Act under the WR Act notwithstanding its repeal.

669. Items 13 and 14 provide that, from the WR Act repeal day, Part 5-2 of the FW Bill applies to conduct that occurred before or after the WR Act repeal day. This means that:

- FW inspectors are able to exercise the compliance powers contained in Part 5-2 of the FW Bill; and

- the Office of the FWO is able to perform its functions under Part 5-2 of the FW Bill;

in relation to conduct that occurred before or after the WR Act repeal day.

670. FW inspectors are able to exercise compliance powers in the FW Bill in relation to conduct that occurred before the WR Act repeal day that is investigated after WR Act repeal day whether or not an investigation was commenced before the WR Act repeal day. Similarly, FW inspectors are able to exercise compliance powers in relation to transitional instruments, transitional minimum wage instruments and continuing Schedule 6 instruments.

671. Examples of the powers that may be exercised for these purposes are:

- entry to premises in accordance with the rules set out in clause 708 of the FW Bill;

- inspection and copying of documents that are kept on premises or that are accessible from a computer that is kept on premises in accordance with the rules set out in clause 709 of the FW Bill;

- taking an assistant onto premises to help investigate breaches of the WR Act and the FW Bill in accordance with clause 710 of the FW Bill; and

- the FWO accepting an enforceable undertaking in relation to contravention of a civil remedy or civil penalty provision under the WR Act or the FW Bill in accordance with clause 715 of the FW Bill.

672. However, FW inspectors are not able to issue a compliance notice in relation to contraventions of the WR Act or a WR Act instrument that occur before the WR Act repeal day.

673. Paragraph 14(e) extends the operation of subclause 706(2) of the FW Bill to specified instruments that are given effect to by this Bill, including transitional instruments and minimum wage entitlements. This means that FW inspectors are able to investigate breaches of a safety net contractual entitlement where they reasonably believe that a person has contravened a transitional instrument or minimum wage entitlement. However, FW inspectors are not able to investigate or enforce safety net contractual entitlements until the NES and modern awards commence. This is because the provisions that establish safety net contractual entitlements in the FW Bill will not operate until the FW (safety net provisions) commencement day (see item 18 of Schedule 16).

Item 15 – Directions of Workplace Ombudsman

674. This item preserves directions given to one or more inspectors by the Workplace Ombudsman.

Item 16 – Disclosure of information acquired by workplace inspectors

675. This item provides that the rules regarding the disclosure of information by the Office of the FWO contained in clause 718 of the FW Bill apply to information acquired before the WR Act repeal day, by a member of the Office of the Workplace Ombudsman in the course of exercising powers, or performing functions, as such a member. This means that information obtained by a member of the Office of the Workplace Ombudsman can only be disclosed by the FWO in accordance with the rules set out in the FW Bill.

Part 4 – Miscellaneous

Item 17 – FWA annual report – operations of FWA

Item 18 – Annual report – operations of the Office of the Fair Work Ombudsman

676. These items require that the annual report on the operations of FWA and the Office of the FWO for the year 1 July 2009 to 30 June 2010 must include any period during which FWA or the Office of the FWO is in existence prior to 1 July 2009. This avoids the need for FWA and the Office of the FWO to produce annual reports for what are likely to be short periods during which they would not be performing substantive functions.

Item 19 – Annual report – operations of the Office of the Workplace Ombudsman

677. This item provides that responsibility for the preparation of the annual report on the operations of Office of the Workplace Ombudsman for the year 1 July 2008 to 30 June 2009 will lie with the FWO.

Item 20 – Report about developments in making agreements

678. This item provides that, despite the repeal of the WR Act, section 844 of that Act continues to apply for a specified period as if that repeal had not happened. This means that the Minister must still cause a person to review and report on developments in bargaining for the making of agreements under the WR Act for the period beginning 1 January 2007 and ending on the day the office of the Workplace Authority Director, and the Workplace Authority, cease to exist.

Item 21 – Section 574A

Item 22 – Schedule 1 to the Act

679. These items repeal clause 574A and Schedule 1 to the FW Bill. The items of Schedule 1 are replicated in Schedule 18 to this Bill (see items 1, 2, 4, 5, 8 and 10).

Schedule 19 – Dealing with disputes

Item 1 – Continued application of WR Act

Item 2 – Disputes to be dealt with by FWA

680. Item 1 provides for the continued application of the WR Act after its repeal for the purposes of dealing with disputes in relation to:

- matters arising under a transitional instrument (including a WR Act instrument that becomes a transitional instrument);
- the AFPCS, other than in relation to wages, including as it continues to apply during the bridging period because of Schedule 4 (which is about transitional arrangements for the NES);
- Division 1, 2 or 6 of Part 12 of the WR Act, including as they continue to apply during the bridging period because of Schedule 4.

681. Item 2 provides that where an application has been made to the AIRC in relation to the dispute before the WR Act repeal day and the AIRC is dealing with, or has dealt with, the dispute the AIRC will continue to deal with that matter.

682. However, on and after the WR Act repeal day, an application in relation to a dispute that could have been made to the AIRC may be made only to FWA and anything that could, or would, have been done by, or in relation to, the AIRC or the Industrial Registrar because of the continued application of these provisions may only be done by, or in relation to, FWA.

683. These items mean that, when dealing with a dispute in relation to a matter arising under a transitional instrument or this Schedule, FWA may exercise any powers that the AIRC could have exercised in relation to that dispute prior to the WR Act repeal day.

684. For example, if FWA is dealing with a dispute that arises under a workplace agreement it is to apply the rules that applied under Part 13 of the WR Act. This means that:

- FWA has the powers and functions conferred upon it by the workplace agreement or as otherwise agreed between the parties but is not be able to make orders (see section 711 of the WR Act); and
- FWA must refuse to conduct a dispute resolution process if any of the steps that were required to be taken under the agreement before it could be referred to the AIRC had not been taken (see section 710 of the WR Act).

685. Similarly, where a person other than the AIRC (e.g., an alternative dispute resolution (ADR) provider) can currently deal with a dispute under the WR Act, that person may continue to deal with the dispute despite the repeal of the WR Act. The person is able to exercise any powers that they could have exercised under the WR Act before the WR Act repeal day.

686. Parties to a dispute will have to take the preliminary steps required by the WR Act before FWA or an ADR provider can deal with the dispute, as if the WR Act had continued in force. For example, where there is a dispute about an entitlement to annual leave under the AFPCS, FWA is to deal with the dispute in accordance with the model dispute resolution procedure that is set out in Part 13 of the WR Act. The model dispute resolution procedure provides that parties to a dispute are required to genuinely try to resolve the dispute at a workplace level before using an ADR process to resolve the matter (see sections 695 and 696 of the WR Act).

687. Parties to preserved individual State agreements, preserved collective State agreements and NAPSAs can continue to confer functions or powers on the AIRC to deal with disputes (due to the continued application of subclauses 7(2), 15(2) and 35(2) of Schedule 8 to the WR Act). Such agreements between the parties to confer functions or powers on the AIRC continue to operate. However, the applications in relation to disputes under these agreements after the WR Act repeal day have to be made to FWA and the AIRC has no power to deal with these matters after the WR Act repeal day.

Schedule 20 – WR Act transitional awards etc.

Item 1 – Schedule 6 to the WR Act

688. This item provides for the continued operation of Schedule 6 to the WR Act on and after the WR Act repeal day.

689. Schedule 6 continues to apply as continued Schedule 6. Transitional awards and common rules continue as continuing Schedule 6 instruments.

Item 2 – The role of FWA under continued Schedule 6

690. Item 2 provides that references in continued Schedule 6 to the AIRC are taken to be references to FWA.

691. Regulations may make additional modifications to continued Schedule 6 (see item 7 of Schedule 2).

Item 3 – Meaning of industrial action

692. This item amends the definition of industrial action in clause 3 of continued Schedule 6 to align it with the definition of that term under the FW Bill (clause 19).

Item 4 – Secret ballots

693. This item confers certain functions relating to secret ballots on presidential members of FWA (these functions are conferred on presidential members of the AIRC under the WR Act). It also extends the compliance regime that applies in relation to protected action ballots under the WR Act to secret ballots and related orders made under continued Schedule 6.

694. In particular, the provisions listed in subitem (3) apply in relation to a secret ballot ordered by FWA under continued Schedule 6, as if the order were a protected action ballot order, and the ballot were a protected action ballot (subitem (2)).

695. Note: Continued Schedule 6 compliance provisions are at item 15 of Schedule 16.

Schedule 21 – Clothing Trades Award 1999

Item 1 – Status of the Clothing Trades Award 1999

696. The Clothing Trades Award 1999 includes a range of terms to ensure that the employment conditions for outworkers are fair and reasonable in comparison with employees who perform the same kind of work at an employer's business or commercial premises. This amendment is intended to put beyond doubt that the outworker terms in this award are valid and enforceable.

697. Subitem (1) ensures that terms relating to outworkers in the Clothing Trades Award 1999, including any variation of those terms, are taken to have always been made in accordance with Part VI of the WR Act (which was in force before the commencement of the Work Choices amendments (27 March 2006)).

698. Subitem (2) provides that those terms, as varied from time to time, are taken always to have been terms about allowable matters under paragraph 513(1)(o) of the WR Act (in force after the commencement of the Work Choices amendments (27 March 2006)).

Schedule 22 – Registered organisations

699. This Schedule makes amendments to Schedules 1 and 10 of the WR Act which will create a stand alone Act, the *Fair Work (Registered Organisations) Act 2009* (FW(RO) Act), containing provisions dealing with registered organisations and State-registered associations. Schedule 1 to the WR Act will become the main body of the FW(RO) Act. Schedule 10 to the WR Act will become Schedule 1 to the FW(RO) Act and transitionally registered associations will become transitionally recognised associations. A new Schedule 2 to the FW(RO) Act will deal with recognised State-registered associations

700. Although registered or recognised and regulated under the FW(RO) Act, organisations and recognised State associations will also have rights and obligations arising under the FW Bill. Consequently, there is considerable overlap between the two pieces of legislation, which rely on many uniform concepts and approaches.

701. Part 1 of this Schedule makes the more complex amendments to the existing provisions in Schedule 1 to the WR Act, to bring it into conformity with the new federal workplace relations framework that will be created by the FW Bill.

702. Part 2 of this Schedule creates a new Schedule 2 to the FW(RO) Act, which will deal with the recognition of State-registered associations and their relationship with federal organisations.

703. Part 3 of this Schedule deals with representation orders. It will introduce a new Part to the FW(RO) Act that will enable FWA to make orders about the representation rights of organisations of employees who are members of a workplace group.

704. Part 4 of this Schedule replaces references to 'this Schedule' (a reference to Schedule 1 to the WR Act) in Schedules 1 and 10 to the WR Act.

705. Part 5 of this Schedule replaces references to 'the *Workplace Relations Act 1996*' in Schedules 1 and 10 to the WR Act.

706. Part 6 of this Schedule replaces references to 'the Commission' in Schedules 1 and 10 to the WR Act.

707. Part 7 of this Schedule replaces references to the 'Registrar' and the 'Industrial Registry' in Schedules 1 and 10 to the WR Act.

708. Part 8 of this Schedule replaces references to 'awards' and 'collective agreements in Schedules 1 and 10 to the WR Act.

709. Part 9 of this Schedule adds a new Part to the FW(RO) Act that ensures that all rights, responsibilities and instruments that existed under Schedule 1 to the WR Act are maintained during the transitional period.

Part 1 – Main amendments

710. Part 1 of this Schedule makes the more complex amendments to the existing provisions in Schedule 1 to the WR Act, to bring it into conformity with the new federal workplace relations framework that will be created by the FW Bill.

Item 1 – Title

711. This item renames the WR Act as the *Fair Work (Registered Organisations) Act 2009*.

Item 2 – Part 1 (heading)

712. This item repeals the heading of Chapter 1 of Schedule 1 of the WR Act and substitutes a new heading for Chapter 1 of the FW(RO) Act.

Item 3 – Section 1

Item 4 – Schedule 1 (heading)

Item 5 – Chapter 1 of Schedule 1 (heading)

Item 6 – Section 1 of Schedule 1

713. These items repeal headings and provisions that will be redundant after the amendments to Schedule 1 to the WR Act.

Item 7 – New section 5B of Schedule 1

714. This item inserts new section 5B, which gives effect to Schedule 1 to the FW(RO) Act. Schedule 1 to the FW(RO) Act will relate to transitionally recognised associations.

Item 8 – Section 6 of Schedule 1

Item 9 – Section 6 of Schedule 1 (definition of *award*)

Item 10 – Section 6 of Schedule 1 (definition of *collective agreement*)

Item 11 – Section 6 of Schedule 1 (definition of *Commission*)

Item 12 – Section 6 of Schedule 1

Item 13 – Section 6 of Schedule 1 (definition of *Deputy Industrial Registrar*)

Item 14 – Section 6 of Schedule 1

Item 15 – Section 6 of Schedule 1

Item 16 – Section 6 of Schedule 1

Item 17 – Section 6 of Schedule 1

Item 18 – Section 6 of Schedule 1

Item 19 – Section 6 of Schedule 1

Item 20 – Section 6 of Schedule 1 (definition of *industrial action*)

Item 21 – Section 6 of Schedule 1 (definition of *Industrial Registrar*)

Item 22 – Section 6 of Schedule 1 (definition of *Industrial Registry*)

Item 23 – Section 6 of Schedule 1

Item 24 – Section 6 of Schedule 1 (definition of *prescribed*)

Item 25 – Section 6 of Schedule 1 (definition of *Presidential member*)

Item 26 – Section 6 of Schedule 1

Item 27 – Section 6 of Schedule 1 (definition of *Registrar*)

Item 28 – Section 6 of Schedule 1 (definition of *registry*)

Item 29 – Section 6 of Schedule 1 (definition of *Registry official*)

Item 30 – Section 6 of Schedule 1 (definition of *State award*)

Item 31 – Section 6 of Schedule 1

Item 32 – Section 6 of Schedule 1 (definition of this *Schedule*)

Item 33 – Section 6 of Schedule 1 (definition of *workplace inspector*)

Item 34 – Section 6 of Schedule 1 (definition of *Workplace Relations Act*)

715. These items amend section 6 of Schedule 1 to the WR Act by inserting definitions of applies, covers, Deputy President, enterprise agreement, Fair Work Act, FWA, FWA Member, General Manager, modern award, protected industrial action, this Act, repealing the definitions of award, collective agreement, Commission, Deputy Industrial Registrar, Industrial Registrar, Industrial Registry, Presidential Member, Registrar, registry, Registry official, this Schedule, workplace inspector, Workplace Relations Act, and substituting new definitions of industrial action, prescribed and State award.

Item 35 – Section 6A of Schedule 1

716. This item repeals section 6A of Schedule 1 to the WR Act, which relates to references to provisions in Schedule 1 to the WR Act.

Item 36 – Section 7 of Schedule 1

717. This item repeals section 7 of Schedule 1 to the WR Act, which provides the meaning of industrial action. A new definition of industrial action is inserted by item 20.

Item 37 – Section 14 of Schedule 1

718. This item repeals section 14 of Schedule 1 to the WR Act, which gives the President of the AIRC the power to establish Organisations Panels. Despite the repeal of section 14, the President of FWA will be able to establish an Organisations Panel under the FW Bill.

Item 38 – Paragraphs 28(1)(b) and (c) of Schedule 1

719. This item amends paragraphs 28(1)(b) and (c) of Schedule 1 to insert '(other than protected industrial action)' after 'industrial action'. This amendment confines cancellation of registration of an organisation for the reasons in paragraphs 28(1)(b) and (c) to industrial action that is not protected or authorised. This recognises that organisations should not face cancellation of registration for engaging in behaviour that is lawful.

Item 39 - Subparagraph 73(2)(c)(ii) of Schedule 1

720. This item repeals subparagraph 73(2)(c)(ii) and inserts new subparagraphs 73(2)(c)(ii) and (iii). These subparagraphs relate to amalgamations of organisations taking effect. The new subparagraphs replace references to provisions and instruments that are no longer relevant under the new framework.

Item 40 – Paragraph 94(1)(c) of Schedule 1

721. This item repeals paragraph 94(1)(c) of Schedule 1 to the WR Act, which relates to applications to the AIRC for ballots, and inserts a new subsection. The new subsection provides that applications for withdrawal from an amalgamation must be made within 5 years of the amalgamation.

Item 41 – Subparagraph 337A(b)(ii) of Schedule 1

Item 42 – Subparagraph 337A(b)(v) of Schedule 1

722. These items repeal subparagraphs 337A(b)(ii) and (v) of Schedule 1 and insert new subparagraphs. The new subparagraphs provide protection for disclosures under section 337A that have been made to an FWA member or a member of the staff of FWA or to a member of the staff of the Office of the FWO (in addition to the existing bodies in section 337A). These provisions maintain the existing protections in section 337A within the new institutional framework.

Item 43 – Section 337E of Schedule 1

723. This item repeals section 337E of Schedule 1 to the WR Act. That section has been made redundant by paragraph 576(2)(d) of the FW Bill, which provides that FWA has any function conferred on it by a law of the Commonwealth.

Item 44 – Subsection 337K(5) of Schedule 1

724. This item repeals subsection 337K(5) of Schedule 1 to the WR Act and inserts a new subsection that will give the General Manager of FWA the power to issue the orders of a member of FWA in cases where the member has ceased to be a member after the order is made but before the order has been put into writing and signed. This item replicates similar powers of the General Manager in the FW Bill.

Item 45 – Section 338 of Schedule 1

725. This item repeals section 338 of Schedule 1 to the WR Act, which relates to the jurisdiction of the Federal Court, and inserts a new subsection that confers jurisdiction on the Federal Court for any matter arising under the FW(RO) Act.

Item 46 – New section 339A of Schedule 1

726. This item will insert new section 339A. Section 339A lists the circumstances in which the jurisdiction conferred on the Federal Court under Part 5 of the FW(RO) Act must be exercised in the Fair Work Division of the Federal Court. This item replicates similar provisions of the FW Bill.

Item 47 – Section 340 of Schedule 1

Item 48 – Section 340 of Schedule 1

727. These items insert new subsections 340(5) and 341(3), which make clear that sections 340 and 341 apply in addition to, and do not alter the effect of, new section 339A inserted by item 46.

Item 49 – New section 343A of Schedule 1

728. This item inserts a new provision in Chapter 11 of the FW(RO) Act, which allows the General Manager to delegate certain of his or her powers or functions under the FW(RO) Act. Amendments made by Part 7 of this Schedule will confer on the General Manager of FWA all powers that were previously exercised by the Industrial Registrar, Registry and Registry officials under the WR Act. Conferring all Registry functions on a single officer of FWA with specified powers to delegate some functions is consistent with the approach adopted under the FW Bill.

729. Despite the general power to delegate under subsection 343A(1), subsection 343A(2) sets out the functions and powers of the General Manager that cannot be delegated and subsection 343A(3) sets out the functions and powers of the General Manager that can only be delegated to a member of the staff of FWA who is an SES employee or equivalent.

Item 50 – New section 351A of Schedule 1

730. This item inserts new section 351A, which allows the Minister to intervene on behalf of the Commonwealth in proceedings before a court in relation to a matter arising under the FW(RO) Act if the Minister believes it is in the public interest to do so. If the Minister intervenes in a matter under section 351A, the court may make an order as to costs against the Commonwealth. This replicates provisions that appeared in Part 20 of the WR Act that are to be repealed by Item 3 of Schedule 1 (Repeals) to this Bill.

Item 51 – Subsection 359(2) of Schedule 1 (note)

731. This item repeals the note to subsection 359(2) of Schedule 1 to the WR Act and inserts a new note that makes clear that regulations made under the FW Bill may also be relevant to the operation of the FW(RO) Act.

Item 52 – Schedule 10

732. This item renumbers Schedule 10 to the WR Act as Schedule 1 to the FW(RO) Act and clarifies the provisions of this Bill that give effect to the Schedule.

Item 53 - Schedule 10 (note to heading)

733. This item replaces the reference to 'section 9' and substitutes a reference to section 5B of the FW(RO) Act. Section 5B will give effect to Schedule 1 to the FW(RO) Act (former Schedule 10 to the WR Act – see item 52).

Part 2 – State and federal organisations

734. Part 2 amends Schedule 1 to the WR Act to provide for an ongoing period of transitional recognition of State-registered associations and also to create a new Schedule (Schedule 2 to the FW(RO) Act) dealing with recognised State-registered associations (RSRAs).

735. These provisions are intended to allow certain State-registered industrial associations to be recognised and to participate in the federal workplace relations system as though they were an organisation registered under the FW(RO) Act. FWA may only grant ongoing recognition in the federal system to associations that have no federal counterpart (i.e., with no equivalent federal organisation) and that are registered in States whose industrial laws have been prescribed in regulations made under the FW(RO) Act.

736. Recognition in the federal system as a transitionally recognised association will continue to be available to all State unions. However, the legislation will cease to provide transitional recognition on the 5 year anniversary of the commencement of this Part or a later date as prescribed. After the 5 year period has expired, transitionally recognised associations will have to gain full registration (if they have no federal counterpart), become an RSRA (if they have no federal counterpart) or arrange with their federal counterpart for the federal counterpart to represent members in the federal system. Transitionally recognised associations will not be recognised in the federal system at the end of the 5 years unless a longer period is prescribed.

737. In contrast, RSRAs will be recognised on an ongoing basis in the federal system (subject to the deregistration provisions). This means that an RSRA can be registered under the relevant State industrial law, but have the full rights of an organisation to operate in the federal system. Despite this recognition, an RSRA will not be recognised by the federal system outside the State in which it is registered.

738. Part 2 also reduces the complexity for organisations and State associations that have multiple legal entities registered in both federal and State workplace relations systems. Under the new provisions, an organisation that is a federal counterpart to a State association can extend its rules to pick up the coverage of its State counterpart to ensure the continued representation of the members of the State association in the federal system. These amendments allow organisations and State associations to arrange their internal affairs in a way that removes the need for separate entities in each of the States and at the federal level.

739. The provisions of this Part are explained in detail below.

Item 54 – New section 5C of Schedule 1

740. This item inserts section 5C, which gives effect to Schedule 2 to the FW(RO) Act.

Item 55 – Section 6 of Schedule 1

Item 56 – Section 6 of Schedule 1

Item 57 – Section 6 of Schedule 1

Item 58 – Section 6 of Schedule 1 (definition of *transitionally registered association*)

741. These items amend section 6 of Schedule 1 by inserting new definitions of federal counterpart, recognised State-registered association and transitionally recognised association, and repealing the definition of transitionally registered association.

742. A federal counterpart, in relation to a State-registered association, is a federally registered organisation that has a branch in that State that has:

- substantially the same eligibility rules as the association; and
- substantially the same officers as the association.

743. A federal counterpart also includes an organisation that the association has purported to function as a branch. For the purposes of this definition, a reference to a branch will include a division or constituent part of that branch.

744. Federal counterpart is intended to be a non-prescriptive definition that will account for situations where, with reference to their eligibility rules or officials, a State association and a federal organisation are essentially the same entity. For the purposes of the definition, it is not necessary that a State association is identical to its federal counterpart. An organisation will be the federal counterpart of a State association where the State association is identical to a branch, division or constituent part of the organisation, but also where there are differences between the two.

Illustrative example

The Artists and Journalists Union (AJU) is a federally registered organisation. It has separate divisions that represent artist and journalists. Each of these divisions has a State branch structure.

In Queensland, there are separate unions for both artists and journalists registered in the State system. Each of these State unions has substantially the same coverage as the artists and journalists divisions of the AJU in the State. In addition, many of the officers of the State unions hold representative positions in the State divisions of the AJU.

The AJU would be the federal counterpart for both the State artists and journalists unions. This is because the State unions both have substantially the same eligibility rules and officers as a particular branch of the AJU. This is the case even though the AJU represents a broader class of workers in the federal system than either of the individual State unions represent in Queensland.

Item 59 – Section 19 of Schedule 1

745. This item amends section 19 of Schedule 1 by adding a new subsection. Section 19 sets out the criteria for registration as an organisation in the federal system. The new subsection will require FWA to reject an application for registration as an organisation by an association registered under the law of a State or Territory if that association has a federal counterpart. This provision is intended to reduce the duplication in the federal system of organisations that are essentially the same body. It will achieve this by preventing the registration of State associations that have substantially the same officers or eligibility rules as an existing federal organisation.

Item 60 – Subsection 138A(1) of Schedule 1

Item 61 – Subsection 138A(1) of Schedule 1

Item 64 – Schedule 10 (heading)

Item 66 – Subclause 2(1) of Schedule 10

Item 67 – Subclause 2(6) of Schedule 10

Item 69 – Clause 3 of Schedule 10

Item 71 – Subclause 4(1) of Schedule 10

Item 72 – Subclause 5(1) of Schedule 10

Item 73 – Subclause 5(1) of Schedule 10

Item 75 – Subclause 5(3) of Schedule 10

Item 76 – Subclause 5(5) of Schedule 10

Item 77 – Subclause 5(5) of Schedule 10

Item 78 – Subclause 5(6) of Schedule 10

Item 79 – Subclause 5(6) of Schedule 10

Item 80 – Clause 6 of Schedule 10

Item 81 – Clause 6 of Schedule 10

Item 83 – Clause 7 of Schedule 10

746. These items omit references in Schedule 10 to 'registered' and 'registration' in respect of transitionally registered associations and substitute references to 'recognised' and 'recognition'. These amendments will account for the use of transitionally recognised association and the repeal of transitionally registered association throughout the FW(RO) Act.

Item 62 – New Subdivision BA of Division 4 of Part 2 of Chapter 5 of Schedule 1

747. This item inserts Subdivision BA which deals with branches of organisations. This new Subdivision enables an organisation to maintain the structure and autonomy of a State branch, particularly in matters concerning the representation of the State system members of the branch and its financial arrangements. Under such an arrangement, the branch would be able to hold assets and make its own decisions on operational matters.

748. New section 154A allows organisations to make provision in their rules for the autonomy of a branch in matters affecting only the members of the branch and for matters concerning the participation of the branch in a State workplace relations system. New section 154B allows an organisation to make provision in its rules for the fund of a branch that will be managed and controlled through the rules of the branch. Subclause 154B(2) lists the items that may make up the branch fund.

Item 63 – Subsection 158(5) of Schedule 1

749. This item repeals subsection 158(5) of Schedule 1, which deals with alterations of the eligibility rules of an organisation, and inserts a new subsection. The new subsection retains the existing power in paragraph 158(5)(a) for FWA to authorise an amendment to eligibility rules after accepting an undertaking from the organisation that FWA considers appropriate to avoid demarcation disputes that may arise because of the alteration. However, subsection 158(5) will give FWA a further power to authorise an amendment to an organisation's eligibility rules in circumstances where:

- the alteration will not extend the eligibility rules of the organisation beyond those of its counterpart State association;
- the alteration will not apply outside the limits of the State or Territory in which the association is registered; and
- the State association has been actively representing the members who are covered by the rules relevant to the alteration.

750. This discretion is intended to allow an organisation to expand State eligibility rules to pick up the coverage of its counterpart State association.

751. Subsection 158(5A) lists the matters that FWA may consider in determining whether the State association has been actively representing the relevant members. These matters include but are not limited to the extent to which the association has:

- sought award variations on behalf of the members;
- exercised rights of entry in relation to the members;
- sought to bargain on behalf of the members; and
- sought to expand its membership among persons to whom the relevant eligibility rules (subject to the alteration) apply.

752. The requirement that a State association be actively representing its members that are covered by the rules relevant to the alteration is intended to prevent organisations expanding their coverage in the federal system where the State counterpart has never used that wider coverage to recruit members or otherwise actively represent employees in those sectors or occupations.

Illustrative example

The NSW Union of Astronauts (NSWUA) is a State-registered association. The NSWUA primarily represents people employed as astronauts within NSW. For historical reasons, the eligibility rules of the NSWUA also give the union coverage of deep sea divers. However, the NSWUA has not made any attempt to bargain or vary an award on behalf of deep sea divers for over 20 years.

The NSWUA and its federal counterpart, the Federal Astronauts Union (FAU), wish to centralise representation for federal system members with the federal union (i.e., the FAU). The eligibility rules of the NSWUA allow it to cover a broader class of workers, including but not limited to deep sea divers, in NSW. For this reason, the FAU has made an application to FWA under section 158 of the FW(RO) Act to amend its eligibility rules in order to pick up the coverage of the NSWUA members.

Under section 158 of the FW(RO) Act, the FAU can amend its rules to pick up the broader coverage of the NSWUA. However, the FAU will not be able to include coverage of deep sea divers in its amended rules because the NSWUA has not been actively representing that class of workers. The part of the NSWUA rules that allows membership by deep sea divers could not be replicated in the rules of the FAU.

Item 65 – Subclause 1(1) of Schedule 10 (definition of transitionally registered association)

753. This item repeals the definition of transitionally registered association in clause 1 of Schedule 10 to the WR Act.

Item 68 – Clause 3 of Schedule 10

Item 70 – Clause 3 of Schedule 10

754. Item 70 inserts a new subclause at the end of clause 3 of Schedule 10 to the WR Act. Clause 3 of Schedule 10 provides for the application of the FW(RO) Act to transitionally recognised associations. The new subclause makes clear that the provisions of the FW(RO) Act do not confer on a transitionally recognised association a separate legal identity that it would not otherwise have, or the right to represent its members' industrial interests outside of the State in which the transitionally recognised association is registered. This means that a transitionally recognised association has full representation rights in the federal system as if it were a registered organisation but that these rights can only be exercised within the State in which the transitionally recognised association is registered.

755. Item 68 amends the structure of clause 3 of Schedule 10 as a result of the amendments made by item 70.

Item 74 – Paragraphs 5(1)(b) and (c) of Schedule 10

756. This item amends paragraphs 5(1)(b) and (c) of Schedule 10 to the WR Act to insert '(other than protected industrial action)' after 'industrial action'. This amendment confines cancellation of registration of a transitionally recognised association for the reasons in paragraphs 5(1)(b) and (c) to industrial action that is not protected or authorised.

Item 82 – Subparagraph 6(c)(i) of Schedule 10

757. This item repeals subparagraph 6(c)(i) and inserts a new subparagraph. Clause 6 deals with when recognition of a transitionally recognised association expires. The new provision provides that the recognition of all transitionally recognised associations will end on the 5 year anniversary of the commencement of this Part. This is subject to a longer period being prescribed under the regulations under subparagraph 6(c)(ii), which will be retained. The extension of the current transitional provisions is intended to provide adequate time for State associations and federal organisations to adjust to the new registration and accountability framework and make necessary alterations to their affairs.

Item 84 – New Schedule 2

758. This item creates Schedule 2 to the FW(RO) Act. Schedule 2 deals with the recognition of State associations as RSRAs.

759. New clause 1 allows State-registered associations to make an application to the General Manager of FWA for recognition in the federal system as an RSRA. The General Manager can only grant recognition under Schedule 2 if:

- the State registered association has no federal counterpart; and
- the association is registered in a State whose industrial relations legislation has been prescribed in the regulations.

760. Subclause 1(2) allows regulations to be made prescribing the industrial laws of a State for the purposes of an application under subclause 1(1).

761. State-registered associations are taken to be recognised under Schedule 2 from the time the General Manager grants the application (subclause 1(7)). While the grant of recognition must be in writing (subclause 1(4)), it is not a legislative instrument. Subclause 1(5) has been included to assist readers and highlight that the instrument granting the application issued by the General Manager is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003* (LIA). Subclause 1(4) of Schedule 2 to the FW(RO) Act is not an exemption from the LIA.

762. New clause 2 of Schedule 2 makes clear that the provisions of the FW Bill and Part 3 of Chapter 4 of the FW(RO) Act apply in relation to an RSRA in the same way that they apply to a registered organisation and as if the RSRA were a person. However, subclause 2(1) makes clear that these provisions do not confer on a State-registered association a separate legal identity that it would not otherwise have, or the right to represent its members' industrial interests outside of the State in which the association is registered. This means that an RSRA has full representation rights in the federal system as if it were a registered organisation but that these rights can only be exercised within the State in which the RSRA is registered.

763. New section 3 of Schedule 2 will define the grounds on which an RSRA may have its federal recognition cancelled by the Federal Court, by FWA or by the General Manager of FWA. In terms of cancellation of recognition by the Federal Court, the grounds in subclause 3(1) are based on the existing grounds for cancellation of the registration of a federal organisation.

764. Similarly, the grounds on which FWA may cancel the federal recognition of a RSRA in subclause 3(5) mirror the existing provisions that allow the AIRC to cancel the registration of a transitionally registered association in Schedule 10 to the WR Act. FWA may cancel the recognition of a RSRA under subparagraph 3(5)(b)(iii) on the additional ground that the RSRA has been found by the industrial commission of the relevant State to have contravened a State industrial law, and that the contravention constitutes serious misconduct.

765. Under subclause 3(6), if a RSRA ceases to exist the General Manager of FWA may, by written instrument, cancel its recognition. Subclause 3(7) has been included to assist readers and highlight that the cancellation instrument issued by the General Manager is not a legislative instrument within the meaning of section 5 of the LIA. Subclause 3(6) of Schedule 2 to the FW(RO) Act is not an exemption from the LIA.

766. A RSRA will also have its federal recognition cancelled in circumstances where the State law under which the association is registered is no longer prescribed by the regulations (subclause 3(8)).

Part 3 – Representation orders

767. This Part creates a new type of representation order. These orders are intended to address any potential demarcation disputes that may arise as a result of the removal of the requirement that a union be bound to an award or agreement to exercise a right of entry or changes to the bargaining framework proposed under the FW Bill. These orders will be available when there is a dispute about whether an organisation is entitled to represent the industrial interests of a workplace group under the FW Bill or the FW(RO) Act.

768. The amendments are explained in detail below.

Item 85 – Section 6 of Schedule 1

Item 86 – Section 6 of Schedule 1

769. These items insert new definitions of peak council and workplace group into Section 6 of Schedule 1.

770. Peak council has the same meaning as in the FW Bill.

771. The definition of workplace group defines the class of employees in relation to whom a representation order may be made under proposed section 137A (see item 89).

Item 87 – Section 132 of Schedule 1

Item 88 – Subsection 133(1) of Schedule 1

772. These items amend current section 132 and subsection 133(1) of Schedule 1 to the WR Act. They are consequential amendments resulting from the insertion of the new Part discussed in item 89.

Item 89 – New Part 3 of Chapter 4 of Schedule 1

773. This item inserts a new Part into Chapter 4 of Schedule 1. Under the Part, an employer, an organisation or the Minister could apply to FWA for an order that an organisation of employees does or does not have the right to represent members of a workplace group. FWA is only be able to make an order where there is a disagreement regarding that organisation's entitlement to represent members of a workplace group (section 137A) in circumstances where more than one organisation is entitled to represent members of a workplace group.

774. Before making an order under new subsection 137A(1), FWA is required to consider the range of factors set out in new section 137B. These factors are designed to ensure that organisations with a longstanding and active history of representing a workplace group should be able to continue to represent those employees. Conversely, organisations that have not been active in representing people within the coverage of their eligibility rules should generally not be able to obtain a representation order that would prevent other unions from representing the workplace group.

775. In line with this aim, it is intended that in considering new paragraph 137B(1)(c), FWA could have regard to the extent to which the organisation is 'recognised' in the workplace as a representative body, taking into account such things as an active delegate structure or a presence on consultative committees at the workplace. This assessment will be made by FWA with reference to the totality of the circumstances and no particular factor should be assigned more weight than any other. FWA may also receive submissions from peak councils on the matters contained in section 137B (see sections 137A and 137C).

776. Where an order is sought under this Part relating to a genuine new enterprise (within the meaning of the FW Bill) that does not yet have any employees, new subsection 137B(2) requires FWA to have regard to the same matters as it would for an established site to the greatest extent practicable. This would require FWA to consider the factors set out in new subsection 137B(1) with reference to persons who are likely to make up the workplace group. This is necessary as without this provision many of the factors would not be capable of

consideration by FWA as they are framed with reference to an existing workplace group and so would not apply where a workplace group does not yet exist.

777. Under subsection 137A(2), a person or organisation who would have been eligible to make an application under subsection 137A(1) may apply to FWA for an interim representation order in relation to an application under subsection 137A(1) of the FW(RO) Act. FWA must not grant an interim representation order if the order would be unfair to a person or organisation other than the applicant.

778. FWA must not make an order under subsections 137A(1) and (2) that is inconsistent with an order already in force under section 133. However, FWA will have the ability to amend any order made under this Part that would be inconsistent with a section 133 order (subsections 137A(5)-(7)).

779. Sections 137D and 137E provide that FWA may place conditions or limitations on an order made under this Part and that the Federal Court would be empowered to make any order it thinks fit to ensure compliance with an order made by FWA under the Part.

780. A note under the heading to this Part would make clear that these representation orders can apply to transitionally recognised associations (see clause 3 of Schedule 1) and RSRAs (see clause 2 of Schedule 2).

Illustrative example

Brett is an official of the Bicycle Manufacturing Union (the BMU) which has a long history of representing a large number of its members employed at the Spokey Dokes manufacturing plant. The BMU has an active delegate structure at the site and always receives a warm response from its members for the work it does representing them. The BMU's eligibility rules give it coverage of manufacturing workers employed in the bicycle and bicycle accessory industries.

Aidan is an official of the Plastic Accessories Union (PAU). The PAU's eligibility rules give it coverage of manufacturing workers making plastic products. The employees of Spokey Dokes have not expressed any interest in the PAU and the union has not been party to the collective agreement covering the site or exercised a right of entry in relation to any of the 20 employees who are eligible to be members. However, the PAU has indicated that it now wishes to take a more active role at the workplace.

Parvinder, the owner of Spokey Dokes, is aware that there is a longstanding enmity between the BMU and the PAU. She does not wish any conflict between the two unions to disrupt Spokey Dokes' operations. She makes an application to FWA for a representation order for this workplace group.

The BMU would be able to demonstrate that is has actively represented the workplace group through its history of agreement making (paragraph 137B(1)(a)), the support of a large number of members employed at the site (paragraph 137B(1)(b)) and an active delegate structure (paragraph 137B(1)(c)). On this basis, it is likely to gain a representation order under section 137A(1)(a), particularly if FWA is satisfied that a consequence of not making the order would be disruption at the workplace.

Item 90 – Section 138 of Schedule 1

781. This item amends section 138 of FW(RO) Act to ensure that applications for both representation orders under section 133 and new section 137A of the Act can only be heard by the Full Bench of FWA.

Item 91 – Clause 3 of Schedule 10

782. This item is a consequential amendment to clause 3 of Schedule 10 resulting from the insertion of the new Part explained in item 89.

Part 4 – References to Schedules to the Workplace Relations Act 1996

783. This Part amends Schedules 1 and 10 to the WR Act by omitting all references to 'this Schedule' (a reference to Schedule 1 to the WR Act) and substituting references to 'this Act'. These amendments will account for the transition of Schedule 1 to the FW(RO) Act.

Part 5 – References to the Workplace Relations Act 1996 etc.

784. This Part amends Schedules 1 and 10 to the WR Act and the FW Bill by omitting all references to the 'Workplace Relations Act' and substituting 'the Fair Work Act'. This Part also changes references to 'this Act' in current Schedule 10 to 'the Fair Work Act'. These changes are a result of the creation of stand alone legislation to deal with registered organisations.

785. Where the existing provisions make reference to particular provisions of the WR Act, this Part substitutes the corresponding reference to provisions of the FW Bill. For example, Part 3 substitutes all references to sections 508 – 509 of the WR Act with references to Part 3-1 (General Protections) of the FW Bill. These changes ensure that the provisions of the FW(RO) Act remain consistent with the existing provisions in Schedule 1 and Schedule 10 to the WR Act.

Part 6 – References to the Commission etc.

786. The replacement of the AIRC with FWA necessitates changes to the body on which the powers and functions with respect to registered organisations are conferred. This Part amends the WR Act by conferring on FWA powers that are currently exercised by the AIRC.

787. This Part also provides that the powers previously only exercised by specific members of the AIRC, for example, a Presidential member, will now only be exercised by specified members of FWA. It does this by replacing all references to 'Presidential Member' with references to 'the President or a Deputy President'. These changes are necessary to conform to the new structure of FWA. Positions that previously existed within the AIRC, such as Presidential Member, will no longer exist in the new system.

Part 7 – References to Registrar etc.

788. The transition to FWA requires all the powers that were previously exercised by the Industrial Registrar, Registrars and Registry officials under the WR Act be conferred upon the General Manager of FWA. This Part therefore replaces all references in the WR Act to the 'Industrial Registrar', a 'Registrar' or a 'Registry official' with a reference to the 'General Manager'. As discussed above, item 49 inserts a new provision in Chapter 11 of the FW(RO) Act, which allows the General Manager to delegate his or her powers or functions under the FW(RO) Act. Further, all references to the 'Industrial Registry' and the 'Registry' are replaced with a reference to 'FWA'.

789. This Part also amends section 576 of the FW Bill to insert a note in that provision, which sets out the powers and functions of FWA, indicating that other functions and powers are conferred on FWA by the FW(RO) Act (item 405).

Part 8 – References to awards and collective agreements

790. This Part amends the WR Act by omitting references to an 'award' and substituting references to a 'modern award'. The Part also omits references to a 'collective agreement' and replaces them with references to an 'enterprise agreement'. These consequential amendments will bring the terminology of the FW(RO) Act into line with that used in the FW Bill.

791. This Part (see items 582 and 583) also amends the provisions of the FW Bill that set out when a modern award and enterprise agreement cover an employer, employee, organisation or an

outworker entity. These items provide that in addition to modern awards and enterprise agreements covering these entities where they are expressed to do so, they will also cover them if a provision of the FW(RO) Act (in addition to the FW Bill) makes provision for this. This amendment ensures that, for example, modern awards and enterprise agreements can be made to cover new organisations formed via amalgamation under Parts 2 and 3 of Chapter 3 of the FW(RO) Act.

Part 9 – Transitional provisions etc

792. These provisions ensure that in the transitional period all the rights, responsibilities and instruments that existed under the terms of Schedule 1 to the WR Act will continue to apply under the terms of the FW(RO) Act.

Item 621 – Things done before the commencement of this Schedule

793. This item provides a table setting out persons and bodies under the WR Act and the corresponding persons or bodies under the FW Bill and the FW(RO) Act. This item ensures that something that was done by, or in relation to, a person or body under the WR Act (if the thing remains in force), is taken to have been done by or in relation to the corresponding person or body under the FW Bill or the FW(RO) Act.

Item 622 – Instruments made under, or for the purposes of, a provision of Schedule 1 to the WR Act

794. This item applies to instruments made under, or for the purposes of, a provision of Schedule 1 to the WR Act that are still in force immediately before the commencement of this item. This item sets out that a reference in such instruments to a provision of Schedule 1 to the WR Act must be construed, after the commencement of this item, as a reference to the same provision of the FW(RO) Act.

Item 623 – Award-based transitional instruments and agreement-based transitional instruments

795. This item ensures that references in the FW(RO) Act to modern awards and enterprise agreements will be read as including references to award-based transitional instruments and agreement-based transitional instruments. These terms are defined in item 2 of Schedule 3 to this Bill. This item is necessary to ensure that references to instruments made under the WR Act are not lost as a result of the new terminology adopted by the FW Bill.

Item 624 – Register of organisations kept under paragraph 13(1)(a) of Schedule 1 to the WR Act

796. This item ensures that the register of organisations that was kept by the Industrial Registry under paragraph 13(1)(a) of Schedule 1 to the WR Act immediately before the commencement of the item is taken to be the register of organisations kept by FWA under the same provision of the FW(RO) Act. This item maintains the existing register.

Item 625 – Application of paragraph 73(2)(c) of Schedule 1 to the WR Act

797. This item inserts a new transitional provision that ensures that, for the purposes of considerations under paragraph 73(2)(c) (which relates to amalgamations of organisations taking effect), breaches of the WR Act that occurred before the commencement of this Schedule continue to be relevant to an assessment of whether a proposed amalgamation may take effect.

Item 626 – Application of section 337A of Schedule 1 to the WR Act

798. This item ensures for the purposes of paragraph 337A(b) of the FW(RO) Act that a disclosure of information under the whistleblower protections that was made before the commencement of the item or before the cessation time of the relevant body continues to be deemed a disclosure to which paragraph 337A(b) applies.

Item 627 – Transitionally registered organisations

799. This item provides that State-registered associations that were transitionally registered associations before the commencement of this item are taken to be transitionally recognised associations on commencement. It ensures that transitionally registered associations remain recognised under the FW(RO) Act.