

2008 – 2009

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**FAIR WORK (STATE REFERRAL AND CONSEQUENTIAL AND OTHER
AMENDMENTS) BILL 2009**

EXPLANATORY MEMORANDUM

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

FAIR WORK (STATE REFERRAL AND CONSEQUENTIAL AND OTHER AMENDMENTS) BILL 2009

OUTLINE

The Fair Work (State Referral and Consequential and Other Amendments) Bill 2009 (the Bill) amends the *Fair Work Act 2009* (the FW Act) to enable States to refer matters to the Commonwealth for the purposes of paragraph 51(xxxvii) of the Constitution with a view to establishing a national workplace relations system. The Bill makes transitional arrangements for Victorian employees and employers, who are currently covered by the *Workplace Relations Act 1996* (the WR Act) as a result of a reference of power and who are expected to be covered by a new reference of power.

The Bill also makes transitional and consequential amendments to other Commonwealth legislation required as a result of the FW Act and the Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009 (the T&C Bill).

State referrals

Schedule 1 to the Bill inserts new Division 2A into Part 1-3 of the FW Act, which:

- enables a State to refer matters that would extend the application of the FW Act (so far as not otherwise within Commonwealth power) to the State by extending the meaning of terms defined in the FW Act (including national system employer, national system employee and outworker entity) and the provisions of Part 3-1 (General protections);
- enables a State to refer matters that would support Commonwealth amendments to the FW Act (so far as not otherwise within Commonwealth power) in relation to the subject matter of the FW Act as originally enacted, and arrangements for the transition to the national system; and
- envisages that State references of these matters may be subject to certain exclusions relating to public sector employment (including in relation to law enforcement officers).

It is expected that only Victoria will be a referring State when most of the FW Act commences (expected to be 1 July 2009, with other provisions expected to commence on 1 January 2010). However, Division 2A establishes a framework that could be adapted to subsequent references from other States.

Schedule 2 to the Bill amends provisions of the T&C Bill and the FW Act to transition Victorian employers and employees from the system in place under the WR Act (as extended by the **Commonwealth Powers (Industrial Relations) Act 1996** (Vic)) to the new system created by the FW Act.

Schedule 2 also amends the T&C Bill and the FW Act to insert provisions establishing a framework for making State reference public sector modern awards.

It is anticipated that a new reference from Victoria would support transitional arrangements for Victoria-specific awards and common rules underpinned by the existing Victorian reference and a process for making public sector modern awards.

Schedule 3 to the Bill makes amendments to section 12 of the FW Act that are consequential on amendments to be made by Schedule 1 and a minor technical amendment to section 27.

Consequential amendments of other legislation

Schedules 4 to 19 to the Bill make transitional and consequential amendments to 67 Commonwealth Acts which refer to parts of the WR Act that will be repealed by the T&C Bill. The Schedules replace those references with references to corresponding concepts in the FW Act. The Schedules also make more significant amendments to certain other Commonwealth legislation to provide clarity and consistency with respect to the operation of that legislation in the new federal workplace relations system established by the FW Act. The more significant of these amendments are:

- amendments to the *Human Rights and Equal Opportunity Commission Act 1986* to enable the Human Rights and Equal Opportunity Commission to refer to Fair Work Australia industrial instruments alleged to breach the *Age Discrimination Act 2004* and the *Disability Discrimination Act 1992*;
- amendments to the *Migration Act 1958* to align the powers of migration inspectors with the powers of Fair Work Inspectors under the FW Act;
- amendments to the *Privacy Act 1988* to apply that legislation to small business operators within the meaning of that Act who are also associations of employees; and
- amendments to the *Seat of Government (Administration) Act 1910* and the *Northern Territory (Self-Government) Act 1988* in relation to the interaction rules between Commonwealth workplace relations laws and Territory public sector employment laws.

Regulations

Schedule 20 to the Bill allows further transitional or consequential arrangements relating to amendments made by the Bill, the FW Act and the T&C Bill to be addressed in regulations made under this proposed Act.

FINANCIAL IMPACT STATEMENT

The measures proposed in this Bill are budget neutral.

NOTES ON CLAUSES

1. The following abbreviations are used in the Notes on Clauses:

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
CP (IR) Act	Commonwealth Powers (Industrial Relations) Act 1996 (Vic)
FW Act	Fair Work Act 2009
FW(RO) Act	Fair Work (Registered Organisations) Act 2009
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 (State Referral and Consequential and Other Amendments) Bill 2009
T&C Bill	Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009
WR Act	Workplace Relations Act 1996

Clause 1 – Short Title

2. This is a formal provision specifying the short title of the Bill.

Clause 2 – Commencement

3. The table in this clause sets out when the provisions of the Bill will commence.

Clause 3 – Schedule(s)

4. This clause gives effect to the Schedules to the Bill by providing that each Act specified in the Schedules is amended or repealed as set out in the items of the Schedules. Any other item in the Schedules to the Bill has effect according to its terms.

Clause 4 – Definitions

5. This clause defines the meaning of certain terms used by the Bill.

Schedule 1 – Referring States

6. Schedule 1 to this Bill amends the FW Act to insert Division 2A of Part 1-3. Division 2A enables States to refer matters to the Commonwealth with a view to establishing a uniform national workplace relations system for employees and employers in the private sector, with scope for referring States to choose the extent to which the FW Act covers their public sector workforces.

7. States would refer matters under paragraph 51(xxxvii) of the Constitution, which enables the Commonwealth Parliament to make laws with respect to matters referred by State Parliaments.

8. A reference of matters is needed if the FW Act is to apply to all employers and employees in a State. This is because the Commonwealth has legislative power to regulate most, but not all, employment relationships in Australia.

9. Most provisions of the FW Act as originally enacted apply to the employers and employees within the scope of the corporations and other legislative powers engaged by the definitions of national system employee and national system employer in sections 13 and 14 of the FW Act. Division 2A extends the meaning of national system employee and national system employer to include all employees (including law enforcement officers who might not be employees at common law) and employers in a referring State so that provisions of the FW Act that rely on these definitions apply to all employees and employers in the referring State, whether covered by sections 13 and 14 or not. It also extends the general protections in Part 3-1 of the FW Act to all action in a referring State.

10. A State will only be a referring State if it refers to the Commonwealth matters which, in effect, give the Commonwealth power to include the text of Division 2A in the FW Act as originally enacted, to amend the FW Act in relation to the subject matter of the FW Act as originally enacted and to make provision for the transition from the existing industrial regime in the State to the industrial regime under the FW Act.

11. A State would be a referring State even if it did not refer power in relation to any or all of its public sector employees and employers or an aspect of a public sector employment relationship. For this purpose, a public sector employee would include a law enforcement officer. Division 2A would also extend the ordinary meaning of employee in the FW Act to include law enforcement officers so that they would be covered by the unlawful termination provisions in Part 6-4 of the FW Act, if a State referral law so provided.

12. It is expected that the only State that will be a referring State at the time that most of the FW Act commences (expected to be 1 July 2009) would be Victoria. If that is the case, the FW Act is likely to have been amended by the time other States refer power and Division 2A will

need to be amended to accommodate those references. However, Division 2A establishes a framework that can be adapted to subsequent references from other States.

Fair Work Act 2009

Item 1 – Section 12 (at the end of note 2 at the end of the definition of *employee*)

Item 2 – Section 12 (at the end of note 2 at the end of the definition of *employer*)

Item 3 – Section 12 (at the end of the definition of *national system employee*)

Item 4 – Section 12 (at the end of the definition of *national system employer*)

Item 5 – Section 12 (note at the end of the definition of *outworker entity*)

Item 6 – At the end of section 13

Item 7 – Section 14 (note)

Item 8 – At the end of subsection 15(1)

Item 9 – At the end of subsection 15(2)

Item 12 – At the end of section 337

13. These items cross-reference new definitions and application provisions in new Division 2A by replacing or inserting notes to sections 12, 13, 14, 15 and 337 of the FW Act.

14. Section 12 of the FW Act (the Dictionary) is a list of defined terms in the FW Act. Terms are either defined in the Dictionary or in another provision of the FW Act (in which case the Dictionary signposts the definition in that provision). Notes to some of the terms provide cross-references to provisions of the FW Act that define those terms.

15. Items 1-9 replace or insert notes to:

- signposts to the meaning of employee and employer in section 12 (items 1 and 2);
- signposts to the meaning of national system employee and national system employer in section 12 (items 3 and 4);
- the definition of outworker entity in section 12 (item 5);
- the definitions of national system employee and national system employer in sections 13 and 14 (items 6 and 7);
- the ordinary meaning of employee and employer in subsection 15(1) (items 8 and 9); and

- section 337, which presently limits the application of Part 3-1 (General protections) (item 12).

Item 10 – Section 24

16. Item 10 replaces the Guide to Part 1-3 of the FW Act in section 24 (which is about the FW Act's application) to reflect the addition of new Division 2A, which is about the extended application of the FW Act in a referring State.

Item 11 – After Division 2 of Part 1-3

Division 2A – Application of the FW Act in a referring State

17. This item inserts Division 2A into the FW Act, which gives effect to a reference of matters from a referring State to the Commonwealth. As noted above, it is anticipated that the only State that will be a referring State at the time that most of the FW Act commences would be Victoria.

New section 30A – Meaning of terms used in this Division

18. New section 30A defines a number of terms used in new Division 2A. The meaning of these terms is explained below.

New section 30B – Meaning of *referring State*

19. New subsection 30B(1) defines referring State. A State is a referring State if its Parliament refers the matters set out in new subsections 30B(3), 30B(4) and 30B(5) to the Commonwealth Parliament, to the extent that these matters are not otherwise within Commonwealth legislative power and are within the State's legislative power.

20. New subsection 30B(2) is explained further below. This provision makes clear that a State is still a referring State even if the State's referral law provides for the reference to terminate in certain circumstances, or if it excludes certain matters relating to State public sector employment.

Initial reference

21. New subsection 30B(3) gives effect to a reference of matters relating to the text of new Division 2A (see the definition of referred provisions in new subsection 30A).

22. New subsection 30B(3) envisages that a referring State would refer the provisions of new Division 2A to the Commonwealth, to the extent that they deal with matters within the State's legislative power. The matters referred by this text cover the regulation of unincorporated and public sector employers and their employees, outworker entities, and certain types of adverse action.

23. New sections 30C and 30D (explained further below), among other provisions, are part of the referred text and extend the existing definitions of national system employee and national system employer in the FW Act to include any employee and any employer in a referring State.

- The FW Act generally applies to national system employees and national system employers, and these extended definitions apply the FW Act in a referring State, so far as it would not otherwise be supported by Commonwealth power.

24. It is anticipated that a reference from Victoria would enable the Commonwealth to amend the FW Act as originally enacted (that is, on 20 March 2009, when the FW Act received Royal Assent) to include Division 2A to the extent within Victoria's legislative power. This would fix Victoria's initial reference to matters related to the FW Act as it exists at a particular time.

- New subsection 30B(3) means that only Victoria is likely to meet the proposed definition of referring State. However, the framework established by Division 2A would be able to be amended in future to accommodate references from other States.

Amendment reference

25. New subsection 30B(4) requires a referring State to refer matters relating to amendments of the FW Act. Such a reference would enable the Commonwealth to amend the FW Act (so far as this would not otherwise be within Commonwealth power) in relation to the referred subject matters (defined in new section 30A) by making express amendments of the FW Act.

26. New section 30A defines amendment to mean the insertion, omission, repeal, substitution, addition or relocation of words or matter. Express amendment is defined to mean the direct amendment of the FW Act, but not the enactment of a provision having substantive effect other than as part of the text of the FW Act.

27. The amendment reference provisions of Division 2A would enable the FW Act (as supported by the Commonwealth's and a referring State's legislative powers) to be amended to apply to all employers and employees in the State.

28. The referred subject matters (defined in new section 30A) correspond with matters regulated by the FW Act to cover:

- terms and conditions of employment, including:
 - employment standards, minimum wages and terms and conditions of employment in instruments;
 - bargaining in relation to terms and conditions of employment;
 - the effect of a transfer of business on terms and conditions of employment;
- terms and conditions under which an outworker entity may arrange for work to be performed for the entity;

- rights and responsibilities of employees and employers and other persons, in relation to:
 - freedom of association and related protections (such as workplace rights), and protection from discrimination in employment;
 - termination of employment (including unfair dismissal and notification and consultation obligations concerning employment termination);
 - industrial action (including the circumstance in which industrial action is protected and the circumstances in which payment may be made to an employee during a period of industrial action);
 - protection from payment of bargaining services fees;
 - sham independent contractor arrangements;
 - standing down employees without pay;
 - rights of entry and rights of access to records;
- compliance with, and enforcement of, the FW Act;
- the administration and application of the FW Act; and
- matters incidental or ancillary to the operation of the FW Act or its instruments.

29. The amendment reference framework balances matters of regulatory interest to a referring State with the Commonwealth's concurrent or related regulatory interest in many of these areas.

30. It is anticipated that some matters would be excluded from Victoria's amendment reference. These are reflected in the definition of excluded subject matters in new section 30A - that is:

- matters dealt with by Victoria's **Equal Opportunity Act 1995**, which is preserved in its application to national system employees and employers by subsection 27(1A) of the FW Act as originally enacted;
- matters dealt with by Victorian laws preserved under paragraph 27(1)(c) and subsection 27(2) of the FW Act as originally enacted such as occupational health and safety (OHS), public holidays, outworkers and workplace surveillance (but not matters prescribed by regulations under paragraph 27(2)(p) as originally enacted); and
- rights and remedies that are incidental to any of these matters.

31. However, the definition of excluded subject matters does not prevent the Commonwealth from amending the FW Act in relation to any of these matters, to the extent that the FW Act as originally enacted deals with them (directly or indirectly), or requires or permits instruments made or given effect under the FW Act to deal with them.

32. This framework reflects the fact that section 27 of the FW Act does not reserve certain matters only to the States, but preserves the operation of laws on these matters by providing that they are not excluded from the workplace relations field covered by section 26 of the FW Act. Most of the preserved State laws under section 27 deal with matters that are also subject to concurrent or related regulation in the FW Act. For example:

- Subsection 27(1A) of the FW Act preserves the named State anti-discrimination and equal opportunity Acts, and paragraphs 27(1)(c) and 27(2)(c) preserve State laws relating to OHS. However, Part 3-1 of the FW Act (General protections) provides protection from discrimination in relation to employment, and protects workplace rights (including those set out in a State OHS law).
- Paragraphs 27(1)(c) and 27(2)(l) of the FW Act preserve State laws dealing with the regulation of employee and employer organisations and their members. However, various provisions of the FW Act regulate the rights and obligations of organisations, including in relation to bargaining, industrial action, standing to apply for court orders and representation of persons before FWA.
- The matters dealt with by preserved State laws may (depending on relevant instrument content rules) also be dealt with by federal instruments such as enterprise agreements and modern awards, subject to State laws in these areas (see subsection 29(2) of the FW Act).

Transitional reference

33. New subsection 30B(5) requires a referring State to refer matters relating to the transition to the national system.

34. It is anticipated that Victoria's new reference would enable the Commonwealth to transition Victorian employers and employees from the system in place under the WR Act (as extended by the CP (IR) Act) to the new system created by the FW Act as extended in its operation by the Victorian Bill.

- Part 21 of the WR Act extends and modifies provisions of that Act in relation to employers and employees within the scope of the CP (IR) Act. Schedule 6 to the WR Act gives effect to a number of Victorian instruments as transitional awards, transitional Victorian reference awards and common rules.
- The T&C Bill and Schedule 2 to this Bill (explained further below) make arrangements for the transition of Victorian employers and employees, and instruments that cover them, into the new system.

Reference exclusions

35. New paragraph 30B(2)(b) makes clear that a State could be a referring State even if the State's referral law excludes matters relating to State public sector employment.

36. It is anticipated that Victoria would refer the matters required by proposed subsections 30B(3), 30B(4) and 30B(5) of Division 2A to meet the definition of referring State, but that each

of the referred matters would be subject to certain exclusions relating to Victorian public sector employment (including certain matters relating to law enforcement officers).

37. The terms State public sector employee and State public sector employer are defined in new section 30A, and generally operate to recognise qualifications on matters expected to be referred by Victoria.

- A State public sector employee is an employee of a State public sector employer, or a State employee specified in the regulations. The definition includes a law enforcement officer.
- A State public sector employer is an employer that is a State, a body (whether incorporated or not) established for a public purpose by or under a law of the State, or by the Governor or a Minister of the State; a body corporate in which the State has a controlling interest; or another State employer specified in the regulations. The definition includes an office-holder deemed to be the employer of a law enforcement officer by a State's referral law.

38. The FW Act generally applies to these employees and employers because of new sections 30C and 30D, which extend the FW Act to any employer and any employee in a referring State.

39. However, the FW Act's application is subject to certain public sector exclusions in Victoria's anticipated reference, such as those relating to:

- the number, identity and appointment (other than terms and conditions of appointment) of public sector employees;
- the number and identity of public sector employees dismissed on the basis of redundancy, and
- the provision of essential services or a state of emergency.

40. It is also anticipated that Victoria's reference would be subject to certain exclusions relating to law enforcement officers, including matters such as probation, promotion, transfer and discipline, and termination of employment (except, in relation to the latter, to the extent that Part 6-4 of the FW Act provides remedies for unlawful termination).

41. As a result of these exclusions the application of the FW Act would need to be read down in certain circumstances (see new section 30H). For example:

- while State public sector employees and State public sector employers could make an enterprise agreement under Part 2-4 of the FW Act, the agreement could not deal with certain matters pertaining to redundancy; and
- Part 3-1 (General protections) would not apply in relation to the probation, transfer, discipline or termination of employment of law enforcement officers.

Termination of reference

42. New paragraph 30B(2)(a) makes clear that a State could still be a referring State if the State's referral law provides for the reference to terminate in certain circumstances, for example, by proclamation of the Governor in Council of the State.

43. New subsection 30A(6) provides for a State to cease to be a referring State if any or all of the initial, amendment or transitional references terminate. This would be the case notwithstanding anything to the contrary in a State referral law.

New section 30C – Extended meaning of *national system employee*

New section 30D – Extended meaning of *national system employer*

44. Generally the FW Act applies to national system employees and national system employers. The existing definitions of national system employee and national system employer in sections 13 and 14 of the FW Act provide constitutional support for most parts of the FW Act by engaging Commonwealth powers to legislate with respect to trading and financial corporations and foreign corporations (constitutional corporations), the Territories, interstate and overseas trade and commerce, and the Commonwealth's power to regulate its own employment relationships.

45. Most parts of the FW Act regulate the employment relationship between national system employees and national system employers. Parts 6-3 and 6-4 are supported by the external affairs power and extend entitlements and obligations in relation to unpaid parental leave, notice of termination or payment in lieu of notice and unlawful termination of employment to employees and employers who are not within the national system definitions. (See the Explanatory Memorandum to the Fair Work Bill 2008.)

46. New subsections 30C(1) and 30D(1) extend the existing definitions of national system employee and national system employer to include any employee and any employer in a referring State who would otherwise be outside those definitions. In turn, these extended definitions have the effect of applying the FW Act to any employee and any employer in a referring State, including public sector employees and employers who are within scope of a State's reference.

- The extended definitions expressly include law enforcement officers (who may not be employees at common law) deemed to be employees, and an office-holder deemed to be the employer of law enforcement officers, by a State's referral law.
- As noted above, it is anticipated that the FW Act's application would be subject to certain exclusions relating to Victorian public sector employment, including certain matters relating to law enforcement officers.

47. Consistent with sections 13 and 14 of the FW Act, new subsection 30C(1) encompasses an individual who is employed, or usually employed, by an employer, and new subsection 30D(1) encompasses a person who employs, or usually employs, an individual. The Federal Court of Australia considered the meaning of ‘usually employed’ in *Australian Meat Industry Employees Union v Belandra Pty Ltd* (2003) 126 IR 165.

- The Court held that while an employer ceased operating for a period and did not have any employees during that time, it was still an employer for the purposes of then paragraph 298K(1)(c) of the WR Act. Other cases considered in that decision indicate that a casual or daily hire employee may still be an employee for the purposes of the WR Act, even though their employment relationship terminates at the end of each shift or daily period of employment.

48. The extended definition of national system employee makes clear that a person on a vocational placement (as defined in section 12 of the FW Act) is not within the definition.

49. New subsections 30C(2) and 30D(2) have the effect that sections 13 and 14 are not limited by the extended national system definitions. New subsections 30C(1) and 30D(1) would not affect employees or employers in Victoria who are already within the national system definitions.

New section 30E – Extended ordinary meanings of *employee* and *employer*

50. This provision would give effect to an anticipated reference from Victoria which would:

- deem a Victorian law enforcement officer to be an employee, and the Victorian Chief Commissioner of Police to be the employer of such an officer, for the purpose of Victoria’s reference; and
- enable the unlawful termination provisions of Divisions 1 and 2 of Part 6-4 of the FW Act to apply in relation to law enforcement officers.

51. At common law, law enforcement officers may not be employees. The terms employee and employer have their ordinary meaning in Part 6-4, which relies on the external affairs power to assist in giving effect to Australia’s international treaty obligations, and can therefore extend to any employer and any employee.

52. New subsections 30E(1) and 30E(2) ensure that Divisions 1 and 2 of Part 6-4 of the FW Act can apply in relation to law enforcement officers (if a State’s referral law provides for this), by extending the ordinary meaning of employee and employer to include (respectively) a law enforcement officer deemed to be an employee, and an office-holder deemed to be the employer of a law enforcement officer, by a State referral law.

- Division 2 of Part 6-4 generally applies in relation to any employee in Australia, subject to clause 723, which prevents a person who can make a general protections court application from making an unlawful termination application. Because of anticipated exclusions in the

Victorian Bill, Victorian law enforcement officers would not be able to make a general protections court application.

53. New subsection 30E(3) provides that the ordinary meaning of employee and employer (including as affected by section 15 of the FW Act), is not limited by new subsections 30E(1) and 30E(2).

New section 30F – Extended meaning of *outworker entity*

54. This provision extends the meaning of outworker entity in a referring State. Section 12 of the FW Act includes a definition of outworker entity. Paragraph (e) of the definition in section 12 applies in relation to a Territory and identifies particular circumstances in which a person, other than in their capacity as a national system employer, will be an outworker entity.

55. New section 30F extends this definition by setting out, in relation to a referring State, particular circumstances in which a person will be an outworker entity.

56. Under new section 30F the definition of outworker entity will extend to a person, other than in their capacity as a national system employer, where:

- the person arranges for work to be performed for the person (either directly or indirectly);
- the work is of a kind that is often performed by outworkers; and
- the arrangement is connected with the referring State.

57. An arrangement is connected with a referring State if one or more of the following applies:

- at the time the arrangement is made, one or more parties to the arrangement is in a referring State;
- the work is to be performed in a referring State;
- the person arranging the work carries on an activity (whether of a commercial, governmental or other nature) in a referring State, and the work is reasonably likely to be performed in that State or in connection with that activity.

58. The description of the required connection to a referring State in new section 30F picks up a broader range of outworker entities than the description of the equivalent connection in current paragraph (e) of the definition of outworker entity in section 12 of the FW Act. A consequential amendment is therefore also proposed in relation to paragraph (e) of that definition to align the two provisions (see items 1, 2 and 3 of Schedule 3).

New section 30G – General protections

59. Part 3-1 of the FW Act sets out a range of workplace protections, and ensures fairness and representation at the workplace, by recognising the right to freedom of association and preventing discrimination and other unfair treatment.

60. Part 3-1 largely applies to action by or affecting national system employers and employees and organisations (see sections 338 and 339). Action by employees and employers who are within the extended definitions of national system employee and national system employer under new subsections 30C(1) and 30D(1) are covered.

61. New subsection 30G(1) extends the application of Part 3-1 to action in a referring State in the same way that paragraph 338(1)(d) of the FW Act applies the Part to action taken in a Territory or in a Commonwealth place. Extension of the Part to all action in a referring State means that the Part may apply in circumstances such as the following.

- If an unincorporated principal terminated a contractor's contract because the contractor was a member of a State industrial association or had given evidence in a proceeding before a State industrial body, such action is prohibited by Part 3-1 if the termination of the contract took place in a referring State.
- If a State industrial association, or any other person, coerced an unincorporated contractor not to engage an unincorporated subcontractor because the subcontractor had refused to join the association, the coercion action is prohibited by Part 3-1 if it took place in a referring State.

62. This provision applies despite section 337 of the FW Act (which limits the application of Part 3-1), and does not limit the operation of sections 338 and 339.

New section 30H – Division only has effect if supported by reference

63. New section 30H makes clear that provisions of the FW Act that are supported by a State's reference only have effect to the extent that the State refers the matters mentioned in new subsection 30B(1) – that is, the matters set out in new subsections 30B(3), 30B(4) and 30B(5). This has the effect that the FW Act is read down in accordance with any exclusion from a referring State's initial, amendment and transitional references relating to State public sector employment.

New section 30J – Application of the *Acts Interpretation Act 1901*

64. New section 30J provides for the *Acts Interpretation Act 1901* (the AI Act), as in force on the day on which Division 2A commences, to apply to the FW Act, and that amendments of the AI Act made after that day do not apply to the FW Act.

65. This is a standard provision in Commonwealth legislation based on a text reference, to ensure that the scope of a reference is certain.

Schedule 2 – Consequential and transitional provisions relating to referral of matters

66. This Schedule makes transitional and consequential provision in relation to arrangements in Victoria that are currently underpinned by the Victorian reference of power in force under the CP (IR) Act. Part 1 amends the T&C Bill to ensure that it operates effectively in relation to transitional awards and common rules that have effect in relation to Victorian employers and employees under the Victorian reference.

67. Part 2 inserts new provisions in the T&C Bill and the FW Act dealing with public sector modern awards and public sector transitional awards for employers and employees that are within the scope of the Victorian reference.

68. Division 1 of Part 2 deals with the amendments to the T&C Bill. Division 2 of Part 2 amends the FW Act to include provisions dealing with public sector modern awards for employees and employers in the Victorian public sector that are within the scope of the Victorian reference, and that are not within the definition of national system employee or national system employer in sections 13 and 14 of the FW Act.

Part 1 – Treatment of transitional awards and common rules as transitional instruments etc.

Fair Work (Transitional Provisions and Consequential Amendments) Act 2009

Item 1 – Item 2 of Schedule 2

Item 2 – Item 2 of Schedule 2

Item 3 – Item 2 of Schedule 2

Item 4 – Item 2 of Schedule 2

Item 5 – Item 2 of Schedule 2

Item 6 – Item 2 of Schedule 2

Item 7 – Item 2 of Schedule 2

69. These items amend item 2 of Schedule 2 to the T&C Bill to insert signposts to a number of new definitions and application provisions that are used in Schedule 3 as amended by this Bill.

70. Item 2 of Schedule 2 to the T&C Bill (the Dictionary) is a list of every defined term in that Bill. Terms are either defined in the Dictionary itself or in another provision of the Bill (in which case the Dictionary signposts the definition in that provision).

71. Item 1 inserts a definition of common rule that relies on the definition contained in provisions of Schedule 6 to the WR Act that are continued by proposed item 8A of Schedule 3 (see item 11).

72. Items 2-5 and item 7 cross-reference new definitions that will be inserted in Schedule 3 (see item 10) to define:

- State reference common rule;
- State reference employee;
- State reference employer;
- State reference transitional award; and
- Victorian employment agreement.

73. Item 6 defines State reference transitional award or common rule to mean a State reference transitional award or a State reference common rule, using a single phrase for ease of reference throughout this Bill.

Item 8 – After paragraph 2(2)(a) of Schedule 3

74. This item amends the definition of WR Act instrument in paragraph 2(2)(a) of Schedule 3 to the T&C Bill, to include a State reference transitional award or common rule in that definition.

Item 9 – Subitem 2(2) of Schedule 3 (note 4)

75. This item inserts note 4 to item 2 of Schedule 3 to the T&C Bill, by replacing it with a new note identifying the location of transitional provisions relating to transitional awards other than State reference transitional awards and State reference common rules in Schedule 20 to the T&C Bill.

Item 10 – At the end of subitem 2(3) of Schedule 3

76. This item inserts a new note at the end of subitem 2(3) of Schedule 3 to the T&C Bill to clarify that Victorian employment agreements are not transitional instruments for the purposes of the T&C Bill and to refer to the provisions in this Bill that deal directly with those agreements.

Item 11 – After subitem 2(3) of Schedule 3

77. This item inserts a new subitem 3A in item 2 of Schedule 3 to the T&C Bill. The amendment ensures that State reference common rules that come into effect under this Bill are treated as transitional instruments for the purposes of the T&C Bill.

Item 12 – Paragraph 2(5)(a) of Schedule 3

78. This item amends paragraph 2(5)(a) of Schedule 3 to the T&C Bill to include State reference transitional awards or common rules in the definition of award-based transitional instrument.

Item 13 – After item 2 of Schedule 3

79. This item amends Schedule 3 by inserting a new subitem 2A of Schedule 3 containing definitions of State reference common rule, State reference employee, State reference employer and State reference transitional award.

- A State reference common rule is defined to mean a common rule (see item 1) that covers specified State reference employers and their employees. A common rule is expressed to cover employers in an industry in respect of their employees. Common rules only have effect in relation to Victoria, because the provisions that give effect to them are underpinned by the CP(IR) Act, in which the Victorian Parliament referred to the Commonwealth Parliament the matter of declaring any term of an award or order to be a common rule in the State for an industry.
- A State reference employee is defined to mean an employee who is a national system employee only because of Victoria's reference of power (see also discussion of proposed sections 30B and 30C of the FW Act, as amended by Schedule 1 to this Bill).
- State reference employer is defined to mean an employer that is a national system employer only because of Victoria's reference of power (see also discussion of proposed sections 30B and 30C of the FW Act, as amended by Schedule 1 to this Bill).
- State reference transitional award is defined to mean a transitional award that covers one or more specified State reference employers and their employees. Transitional award is defined in continued Schedule 6 (see item 1 of Schedule 20 to the T&C Bill) and includes a transitional Victorian reference award.

80. Proposed subitem 2A(5) 'splits' transitional awards that cover both State reference employers and their employees and other employers and employees (that is, employers and employees that are not from a referring State).

81. Subitem 2A(5) ensures that a State reference transitional award only covers State reference employers, State reference employees and organisations in relation to State reference employers and State reference employees.

Item 14 – At the end of Part 2 of Schedule 3

82. This item amends Part 2 of Schedule 3 to the T&C Bill to add a new item 8A dealing with the continuing application of clauses 82 to 87 of Schedule 6 to the WR Act in relation to State reference common rules. The effect of item 8A is to ensure that State reference common rules

continue to operate under the new system, and to cover the same classes of employers and employees covered by common rules under Schedule 6 to the WR Act.

Item 15 – After item 12 of Schedule 3

83. This item inserts a new item 12A after item 12 of Schedule 3 to the T&C Bill. New item 12A gives effect to provisions of Part 10 of the WR Act that deal with variation and revocation of transitional awards so that these provisions apply from the WR Act repeal day in relation to State reference transitional awards. This means that terms of a State reference transitional award, including terms relating to wages, can be varied by FWA under Part 10 of the WR Act after the WR Act repeal day.

84. After the end of the bridging period, State reference transitional awards may be terminated to take into account the award modernisation process. State reference transitional awards will only be able to be varied if the variation is essential to the maintenance of minimum safety net entitlements (see section 553 of the WR Act), or so that FWA can continue to deal with a matter that was being dealt with before the end of the bridging period.

85. However, terms of a State reference transitional award dealing with wages will only be able to be varied after the bridging period in annual wage reviews under Division 3 of Part 2-6 of the FW Act.

86. Variation and revocation of State reference common rules is dealt with separately under proposed item 8A of Schedule 3 (see item 14).

Item 16 – At the end of Schedule 3

87. This item amends Schedule 3 to add new provisions dealing with Victorian employment agreements. These agreements, which are currently kept in operation by Division 12 of Part 21 of the WR Act, are individual agreements which either came into effect under the former **Employee Relations Act 1992** (Vic) (ER Act) and were not replaced by an agreement under the WR Act, or were deemed into existence on the cessation of an ER Act collective employment agreement.

88. From the WR Act repeal day, any Victorian employment agreement that is still in force will no longer be a statutory instrument. Instead, it will be treated as an enforceable contract between the parties.

Item 17 – Subitem 2(2A) of Schedule 6

89. This item amends subitem 2(2A) of Schedule 6 to the T&C Bill, which defines enterprise award-based instrument. 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.

90. This amendment ensures that a State reference transitional award may also be an enterprise award-based instrument.

Item 18 – Subitem 3(1) of Schedule 7

91. This item amends Schedule 7 to the T&C Bill with the effect that a State reference transitional award or common rule is capable of being a designated award for the purposes of the no-disadvantage test which will apply during the bridging period under Division 2 of Schedule 7.

Item 19 – Paragraph 13(2)(a) of Schedule 7

92. Paragraph 13(2)(a) of Schedule 7 to the T&C Bill modifies the application of section 200 of the FW Act (which deals with requirements relating to outworkers) in relation to agreements or variations made during the bridging period, so that references to a modern award in section 200 of the FW Act are taken to be references to awards.

93. This item amends paragraph 13(2)(a) of Schedule 7 so that a reference to a modern award in that paragraph is also taken to be a reference to a State reference transitional award or common rule.

Item 20 – At the end of item 18 of Schedule 7

Item 21 – At the end of item 19 of Schedule 7

94. Items 18 and 19 of Schedule 7 to the T&C Bill set out arrangements for the application of the better off overall test for enterprise agreements if award modernisation is not completed at the end of the bridging period.

95. Items 20 and 21 respectively amend items 18 and 19 of Schedule 7 to the T&C Bill to ensure that only the relevant ‘unmodernised’ State reference transitional award or common rule is used for the purpose of assessing whether an enterprise agreement passes the better off overall test. A transitional APCS is not relevant in this context, as State reference transitional awards and State reference common rules contain terms dealing with wages.

Item 22 – Item 21 of Schedule 7

96. This item extends the operation of item 21 of Schedule 7 to the T&C Bill so that it also applies in relation to a State reference transitional award or common rule. The effect of this amendment is that where an application for a special low-paid workplace determination is made during the bridging period, FWA would need to be satisfied that the employees to be covered by

the determination are substantially equivalent to the minimum safety net of terms and conditions provided by these instruments and the AFPCS.

Item 23 – Paragraph 25(3)(a) of Schedule 7

97. This item amends paragraph 25(3)(a) of Schedule 7 to the T&C Bill so that if an employee is covered by a State reference transitional award or common rule that contains outworker terms, and a workplace determination is made that will cover the employee, the workplace determination must also include outworker terms that are not detrimental to the employee in any respect, when compared to the State reference transitional award or common rule (see section 200 of the FW Act) (see also item 15).

Item 24 – Subitem 27(5) of Schedule 8 (before the definition of *instrument*)

98. This item amends the definition of instrument in item 27 of Schedule 8 to the T&C Bill so that it also includes a State reference transitional award (but not a common rule). Schedule 8 to the T&C Bill sets out transitional arrangements for the assessment of collective agreements and ITEAs that are lodged with the Workplace Authority before the WR Act repeal day, and ITEAs lodged during the bridging period. Item 27 of Schedule 8 deals with the circumstance where there is a transfer of business and a workplace agreement ceases to operate because it does not pass the no-disadvantage test.

Item 25 – At the end of item 5 of Schedule 9

99. This item amends item 5 of Schedule 9 to the T&C Bill so that specified provisions of Part 21 of the WR Act do not apply in relation to State reference employers and State reference employees.

100. Reflecting the limitations of the current Victorian reference, subparagraph 861(1)(d)(iii) of the WR Act displaces the guarantee of the standard FMW (as defined in section 195 of the WR Act) in relation to some Victorian employers and employees, while section 865 of the WR Act restricts the power of the AIRC to adjust wages in relation to employees in Victoria who are not within a work classification (as defined in that section).

101. This amendment ensures that the transitional standard FMW (as continued under subitem 5(3) of Schedule 9 to the T&C Bill) applies in relation to State reference employers and State reference employees from the WR Act repeal day, and that the power of the AIRC to adjust wages in relation to Victoria is no longer restricted to employees within a work classification. At the end of the bridging period, item 12(2) of Schedule 9 deems FWA to have made a transitional national minimum wage order under Part 2-6 of the FW Act at the same wage rate as the transitional standard FMW immediately before that day.

Item 26 – At the end of paragraph 5(2)(d) of Schedule 10

102. This item amends item 5 of Schedule 10 to the T&C Bill so that the provisions continuing the application of equal remuneration orders made under the WR Act also apply in relation to a State reference transitional award or common rule.

Item 27 – After subitem 2(2) of Schedule 11

Item 28 – Subitem 5(2) of Schedule 11

103. These items amend items 2 and 5 of Schedule 11 to the T&C Bill so that Division 5 of Part 11 of the WR Act (which deals with transmission of awards) also has continued application in relation to State reference transitional awards (but not State reference common rules).

Item 29 – Subitem 8(1) of Schedule 11

Item 30 – At the end of paragraph 8(2)(b) of Schedule 11

104. These items amend item 8 of Schedule 11 to the T&C Bill so that the extended application of the FW Act by Schedule 11 in relation to a transfer of business applies in relation to a State reference transitional award but not a State reference common rule. Common rules are instruments of general application to an industry and do not need specific rules to transfer their effect from one employer to another.

Item 31 – Paragraph 13(2)(a) of Schedule 18

105. This item makes a consequential amendment to item 13 of Schedule 18 to the T&C Bill to correct the reference to a transitional award so that it does not include a reference to a State reference transitional award or common rule. These instruments are now within the definition of WR Act instrument in Schedule 3 to the T&C Bill.

Item 32 – Item 1 of Schedule 20

106. This item amends Schedule 20 to the WR Act by replacing item 1 to reflect the amendments made to Schedules 2 to 18 to the T&C Bill by the items above dealing with State reference transitional awards and State reference common rules.

107. The effect of this amendment is that continued Schedule 6 does not apply in relation to State reference transitional awards and State reference common rules from the WR Act repeal day. However, the instrument content rules and instrument interaction rules contained in continued Schedule 6, as they apply to State reference transitional awards and State reference common rules continue to apply from the WR Act repeal day.

Part 2 – State reference public sector modern awards

Division 1 – State reference public sector transitional award modernisation

Fair Work (Transitional Provisions and Consequential Amendments) Act 2009

Item 33 – Subsection 2(1)(after table item 4)

108. This item makes a consequential amendment to the table in subclause 2(1) of the T&C Bill so that it also includes a reference to proposed Schedule 6A (see item 51).

Item 34 – Item 2 of Schedule 2 (at the end of the definition of *modernisation-related reduction in take-home pay*)

109. This item amends the definition of modernisation-related reduction in take-home pay in item 2 of Schedule 2 so that it also includes a reference to the State reference public sector transitional award modernisation process, as defined in proposed subitem 13(3) of Schedule 6A.

Item 35 – Item 2 of Schedule 2

Item 36 – Item 2 of Schedule 2

Item 37 – Item 2 of Schedule 2

Item 38 – Item 2 of Schedule 2

Item 39 – Item 2 of Schedule 2

Item 40 – Item 2 of Schedule 2

110. These items insert signpost definitions in item 2 of Schedule 2 to the T&C Bill that define:

- State reference public sector employee (proposed item 2(2) of Schedule 6A to the T&C Bill);
- State reference public sector employer (proposed item 2(3) of Schedule 6A to the T&C Bill);
- State reference public sector modern award (proposed item 3(2) of Schedule 6A to the T&C Bill);
- State reference public sector modern awards objective (proposed item 7 of Schedule 6A to the T&C Bill);
- State reference public sector transitional award (proposed item 2(1) of Schedule 6A to the T&C Bill);
- State reference public sector transitional award modernisation process (proposed item 3(1) of Schedule 6A to the T&C Bill).

Item 41 – Item 2 of Schedule 2 (definition of *take-home pay*)

Item 42 – Item 2 of Schedule 2 (definition of *take-home pay order*)

111. These items amend the definitions of take-home pay and take-home pay order contained in item 2 of Schedule 2 to the T&C Bill, so that the definitions also cross-reference relevant provisions contained in proposed Schedule 6A to the T&C Bill.

Item 43 – Subitem 29(1) of Schedule 3 (note)

112. This item amends the note to subitem 29(1) of Schedule 3 to the T&C Bill, by replacing it with a note to the effect that a modern award cannot be expressed to cover an employee who is covered by an enterprise instrument or a State reference public sector transitional award.

Item 44 – Schedule 5 (heading)

Item 45 – Subitem 3(3) of Schedule 5

Item 46 – Subitem 3(3) of Schedule 5 (note)

Item 47 – At the end of subitem 3(3) of Schedule 5

113. These items amend the heading of Schedule 5 and subitem 3(3) of Schedule 5 to the T&C Bill so that the limitations on the power of FWA to terminate or vary a modernisable instrument under that item also apply in relation to State reference public sector transitional awards.

114. Proposed note 2 to subitem 3(3) cross-references the provisions of proposed Schedule 6A to the T&C Bill dealing with termination and variation of State reference public sector transitional awards in connection with the State reference public sector transitional award modernisation process.

Item 48 – Item 6 of Schedule 5 (heading)

Item 49 – Subitem 6(1) of Schedule 5

115. These items amend item 6 of Schedule 5 to the T&C Bill, so that the first 2 year review of modern awards does not apply in relation to State reference public sector modern awards.

Item 50 – Subitem 2(2) of Schedule 6

116. This item amends item 2 of Schedule 6 so that the definition of enterprise award-based instrument does not include a State reference public sector transitional award.

Item 51 – After Schedule 6

117. This item inserts a new Schedule 6A to the T&C Bill dealing with State reference public sector modern awards.

118. Proposed Schedule 6A gives effect to the State reference public sector transitional award modernisation process under the T&C Bill.

Schedule 6A – State reference public sector modern awards

Part 1 – Preliminary

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

119. This item provides that in Schedule 6A, the terms employer and employee have their ordinary meanings.

Part 2 – The State reference public sector transitional award modernisation process

Division 1 – State reference public sector transitional awards

Item 2 – State reference public sector transitional awards

120. This item inserts new definitions into the T&C Bill relating to the State reference public sector transitional award modernisation process (item 51). The item defines:

- State reference public sector employee to mean a State reference employee (item 10) who is also a State reference public sector employee (as defined in proposed section 30A of the FW Act dealing with referring States) (subitem 2(2));
- State reference public sector employer to mean a State reference employer (item 10) that is also a State reference public sector employer (as defined in proposed section 30A of the FW Act dealing with referring States) (subitem 2(3));
- State reference public sector modern award to mean a modern award that is only expressed to cover one or more specified State reference public sector employers and State reference public sector employees of those employers. A State reference public sector modern award must be made by a Full Bench (subitem 3(2));
- State reference public sector transitional award to mean a State reference transitional award or common rule that is only expressed to cover State reference public sector employers and their State reference public sector employees. A State reference public sector transitional award also covers organisations in relation to the State reference public sector employers and State reference public sector employees covered by the award (subitems 2(1) and 2(4)).

Division 2 – The State reference public sector transitional award modernisation process

Item 3 – The State reference public sector transitional award modernisation process

Item 4 – Making State reference public sector modern awards on application

121. Subitem 3(1) of Schedule 6A establishes the State reference public sector transitional award modernisation process. This is the process of making modern awards to cover State reference public sector employers, State reference public sector employees and organisations in relation to those employers and employees.

122. State reference public sector modern awards may be made on application to FWA. Application may be made by a person who is covered by a State reference public sector transitional award, and must be made between the WR Act repeal day and 31 December 2013.

123. FWA is required to make a State reference public sector modern award that covers the persons identified in the application if satisfied that those persons are covered by a State reference public sector transitional award and that State reference public sector employers and organisations who will be covered by the State reference public sector modern award have agreed to it being made.

124. A State reference public sector modern award may be made before 1 January 2010, and commences operation on the day it is expressed to commence (item 20 refers), which cannot be retrospective. If FWA makes a State reference public sector modern award before 1 January 2010, the FW Act applies as if the various modern award content rules contained in the FW Act had commenced, so that these rules can be taken into account in the making of the modern award (item 19 refers).

Item 5 – Termination of State reference public sector transitional awards on application

125. This item provides that a State reference public sector transitional award may be terminated on application to FWA by a State reference public sector employer or organisation covered by the award. The application must be made between the WR Act repeal day and 31 December 2013. This ensures that State reference public sector employers and State reference public sector employees are able to become covered by a modern award without having to apply for the making of a State reference public sector modern award.

126. FWA may grant the application and terminate the State reference public sector transitional award as long as it is satisfied that employees who will lose the coverage of the award if it is terminated will be covered by an appropriate modern award. In deciding whether to grant the application, FWA must take into account specified criteria (including the State reference public sector modern awards objective). FWA may specify the date from which the termination of the award has effect, but may not terminate a State reference public sector transitional award before 1 January 2010 (modern awards will commence operation from this time).

Item 6 – Further obligation of FWA to make or vary State reference public sector modern awards at end of application period

127. This item provides that after 31 December 2013, FWA is required to deal with any remaining State reference public sector transitional awards that have not been modernised, either by varying the coverage of an appropriate State reference public sector modern award, or by making a new State reference public sector modern award, to replace the remaining State reference public sector transitional awards.

Item 7 – The State reference public sector modern awards objective

128. If FWA is required to make a State reference public sector modern award, the modern awards objective and the minimum wages objective apply to the making of the modern award, together with the State reference public sector modern awards objective (item 7 of Schedule 6A).

129. The State reference public sector modern awards objective requires FWA to recognise:

- the need to facilitate arrangements for State reference public sector employers and State reference public sector employees that are appropriately adapted to the effective administration of a State; and
- that State reference public sector modern awards may provide terms and conditions tailored to reflect employment arrangements that have been developed in relation to State reference public sector employers and State reference public sector employees.

Item 8 – Terms of State reference public sector modern awards

Item 9 – Coverage terms

130. A State reference public sector modern award must contain coverage terms (item 9), setting out the employers, employees and organisations who are covered by the award. Coverage terms may be expressed in terms of a class or classes of employers and employees, and any organisations must be specified by name. These awards can only apply to employers that are State reference public sector employers and to employees who are State reference public sector employees. These awards may cover specified organisations in relation to the employers and employees covered by the award. A State reference public sector modern award cannot cover outworker entities (outworker entity is defined in section 12 of the FW Act).

131. Item 8 provides (with some exceptions) that the terms which may be included in a State reference public sector modern award are the same as for modern awards generally.

132. Once made, State reference public sector modern awards are treated as modern awards under the FW Act (item 20 refers) and are generally treated in the same way as other modern awards in relation to their content.

133. FWA may specify the date from which the modern award has effect, which must not be before 1 January 2010, to coincide with the commencement of other modern awards under the FW Act.

Item 10 – Variation and termination of State reference public sector transitional awards to take account of the modernisation process

134. This item makes clear that once a State reference public sector modern award is made, it replaces the State reference public sector transitional award that covered the parties to the modern award because of the effect of item 29 of Schedule 3 to the T&C Bill.

135. A State reference public sector transitional award that is completely replaced by a State reference public sector modern award terminates when the modern award commences operation. If the transitional award is only partially replaced by the modern award, FWA is required to vary the coverage terms of the transitional award once the modern award commences operation so that it is only expressed to cover persons that are not covered by the modern award.

Item 11 – Notification of the cut-off for the State reference public sector transitional award modernisation process

136. This item provides that by no later than 1 July 2012, FWA must notify all parties still covered by a State reference public sector transitional award that application for the making of a State reference public sector modern award, or the termination of a State reference public sector transitional award, must be made by 31 December 2013 and that, if no application is made before that time, FWA will commence the State reference public sector transitional award modernisation process in relation to the award.

Item 12 – Regulations setting out other matters

137. This item provides that the regulations may deal with other matters relating to the State reference public sector transitional award modernisation process.

Division 3 – Avoiding reductions in take-home pay

Item 13 – State reference public sector transitional award modernisation process is not intended to result in reduction in take-home pay

Item 14 – Orders remedying reductions in take-home pay

Item 15 – Ensuring that take-home pay orders are confined to the circumstances for which they are needed

138. This Division makes clear that the State reference public sector transitional award modernisation process (as with other award modernisation processes) is not intended to result in a reduction in the take-home pay of employees (item 13), and provides a mechanism for obtaining remedial orders (take-home pay orders) if there is such a reduction (item 14). The

scope for take-home pay orders is highly constrained. The intention (item 15 refers) 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
- State reference public sector transitional award modernisation is the operative or immediate reason for a reduction in take-home pay.

139. These provisions are not intended to allow FWA to review entitlements in State reference public sector modern awards generally. Nor is it intended that such orders should be able to constrain an employer from taking action (for example, reorganising roster arrangements) that would otherwise be lawful.

140. 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 State reference public sector transitional award modernisation process.

Item 16 – Take-home pay order continues to have effect so long as State reference public sector modern award continues to cover the employee or employees

141. 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 State reference public sector 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 17 – Inconsistency with State reference public sector modern awards and enterprise agreements

142. This item provides that a term of a State reference public sector 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 18 – Application of provisions of FW Act to take-home pay orders

143. 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 subsections 675(2) and 706(2) of the FW Act.

Division 4 – Application of the FW Act

Item 19 – How the FW Act applies to the modernisation process before the FW (safety net provisions) commencement day

144. This item provides that if FWA makes a State reference public sector modern award before 1 January 2010, the FW Act applies as if the various modern award content rules contained in the FW Act had commenced, so that these rules can be taken into account in the making of the State reference public sector modern award.

Item 20 – How the FW Act applies to modern awards made in the State reference public sector transitional award modernisation process

145. The effect of this item is that a State reference public sector modern award is generally taken to be a modern award for the purposes of the FW Act from the date on which the modern award is made.

146. However, subitem (2) ensures that a State reference public sector modern award comes into operation on the day it is expressed to commence (rather than on 1 July 2009, as would be the effect of section 49 of the FW Act).

147. Subitem (3) provides that the regulations may deal with other matters relating to how the FW Act applies in relation to State reference public sector modern awards.

Division 2 – Other amendments related to State reference public sector modern awards

Fair Work Act 2009

Item 52 – Section 12 (at the end of the definition of *award modernisation process*)

148. This item amends the definition of award modernisation process in section 12 of the FW Act to include the State reference public sector transitional award modernisation process.

Item 53 – Section 12 (at the end of the definition of *coverage terms*)

149. This item amends the definition of coverage terms in section 12 of the FW Act to include a cross-reference to the provisions dealing with coverage terms for State reference public sector modern awards in new clause 143B.

Item 54 – Section 12

Item 55 – Section 12

Item 56 – Section 12

Item 57 – Section 12

150. These items insert signpost definitions in section 12 of the FW Act dealing with definitions used in relation to the State reference public sector modern awards. The signpost definitions are:

- State reference public sector employee (new subclause 168E(3)).
- State reference public sector employer (new subclause 168E(4)).
- State reference public sector modern award (new subclause 168E(2)).
- State reference public sector modern awards objective (new clause 168F).

Item 58 – At the end of subsection 49(3)

151. This item inserts a note at the end of subsection 49(3) of the FW Act, to cross-reference new clause 168J of the FW Act, dealing with the commencement of State reference public sector modern awards.

Item 59 – Section 132 (after the paragraph relating to Division 7)

152. This item amends the table in section 132 of the FW Act so that it also refers to proposed Division 8 of Part 2-3, dealing with State reference public sector modern awards.

Item 60 – At the end of section 143

153. This item amends section 143 of the FW Act, so that a modern award (other than a State reference public sector modern award) cannot cover employees who are covered by a State reference public sector modern award or a State reference public sector transitional award.

Item 61 – After section 143A

154. This item inserts a new clause 143B in the FW Act dealing with the coverage terms of State reference public sector modern awards made under the FW Act. The coverage terms of modern awards made under proposed Division 8 of Part 2-3 of the FW Act (see discussion below) are the same as coverage terms of State reference public sector modern awards made under the T&C Bill (see discussion of item 51, dealing with the State reference public sector transitional award modernisation process).

Item 62 – At the end of Part 2-3

155. This item inserts a new Division 8 of Part 2-3 of the FW Act dealing with State reference public sector modern awards.

156. New clause 168E inserts new definitions in the FW Act relating to State reference public sector modern awards.

157. A State reference public sector modern award is a modern award that covers only State reference public sector employers and State reference public sector employees of those employers.

158. A State reference public sector employee is an employee who is within the extended definition of national system employee under proposed section 30C of Division 2A of Part 1-3 of the FW Act, but only because of a relevant reference of power from a State. A State reference public sector employee must also be a State public sector employee (this term is defined in proposed section 30A of Division 2A of Part 1-3 of the FW Act).

159. A State reference public sector employer is an employer who is within the extended definition of national system employer under proposed section 30D of Division 2A of Part 1-3 of the FW Act, but only because of a relevant reference of power from a State. A State reference public sector employer must also be a State public sector employer (this term is defined in proposed section 30A of Division 2A of Part 1-3 of the FW Act).

160. New clause 168F states the State reference public sector modern awards objective. This objective applies to State reference public sector modern awards made under the FW Act in the same way as it applies to State reference public sector modern awards made under the T&C Bill. It applies to the performance of FWA's functions in relation to State reference public sector modern awards under the FW Act.

161. It requires FWA to recognise:

- the need to facilitate arrangements for State reference public sector employers and State reference public sector employees that are appropriately adapted to the effective administration of a State; and
- that State reference public sector modern awards may provide terms and conditions tailored to reflect employment arrangements that have been developed in relation to State reference public sector employers and State reference public sector employees.

162. New clause 168G deals with the making of State reference public sector modern awards. Under the FW Act, these awards may be made on application by a State reference public sector employer or an organisation that is entitled to represent the industrial interests of a State reference public sector employee or a State reference public sector employer.

163. The persons to be covered by the proposed award must be specified in the application. FWA is required to make a State reference public sector modern award on application by a person with standing, if it is satisfied that:

- the employers and organisations that will be covered by the modern award agree to its being made (this does not require agreement on the terms of the award itself); and either:
- no person who will be covered by the award is already covered by a State reference public sector modern award; or
- it is appropriate to vary the coverage of an existing State reference public sector modern award so that those persons will no longer be covered by that award. These persons can then become covered by a new State reference public sector modern award made under the FW Act.

164. A State reference public sector modern award may only be made under Division 8 of Part 2-3 of the FW Act or under proposed Schedule 6A to the T&C Bill.

165. New clause 168H has the effect that the prohibition on including State-based differences in modern awards in section 154 of the FW Act does not apply to State reference public sector modern awards.

166. New clause 168J deals with the commencement of State reference public sector modern awards. These awards come into operation on the day they are expressed to commence, but this date cannot be retrospective.

167. New clause 168K deals with the revocation of State reference public sector modern awards. FWA may only revoke a State reference public sector modern award on application under section 158 by a State reference public sector employer or an organisation entitled to represent the industrial interests of a State reference public sector employee or State reference public sector employer.

168. Before granting an application under new clause 168K, FWA must be satisfied that either:

- the modern award is obsolete or no longer capable of operating; or
- there is an appropriate modern award that will cover employees who are covered by the State reference public sector modern award if it is revoked.

169. In deciding whether to revoke a State reference public sector modern award, FWA must take into account specified criteria (including the State reference public sector modern awards objective).

170. New clause 168L establishes rules about varying coverage of State reference public sector modern awards. Application to vary the coverage of a State reference public sector modern

award may be made under section 158 by a State reference public sector employer or an organisation entitled to represent the industrial interests of a State reference public sector employee or State reference public sector employer.

171. State reference public sector modern awards cannot be varied so that they cover persons that are not State reference public sector employers or State reference public sector employees (or organisations in relation to those employers or employees).

172. In considering whether to vary the coverage of a State reference public sector modern award in relation to persons that may be covered by one of these awards, FWA must take into account specified criteria.

Item 63 – Subsection 292(1)

173. This item amends subsection 292(1) of the FW Act so that FWA is required to publish wage rates varied as a result of an annual wage review that is undertaken in relation to a State reference public sector modern award in the same way as it is required to do this for modern awards and modern enterprise awards.

Schedule 3 – Other amendments of the Fair Work Act 2009

Item 1 – Section 12

Item 2 – Section 12 (paragraph (e) of the definition of *outworker entity*)

Item 3 – Section 12 (subparagraph (e)(iii) of the definition of *outworker entity*)

174. These items make amendments to the definition of outworker entity in section 12 of the FW Act that are consequential on the extended definition of outworker entity in new section 30F, in relation to a referring State.

175. Section 12 of the FW Act includes a definition of outworker entity. Paragraph (e) of the definition in section 12 applies in relation to a Territory and identifies particular circumstances in which a person, other than in their capacity as a national system employer, will be an outworker entity.

176. New section 30F extends the meaning of outworker entity in a referring State by providing, in relation to a referring State, particular circumstances in which a person is an outworker entity. Under this section the definition of outworker entity will be extended to a person, other than in their capacity as a national system employer, where:

- the person arranges for work to be performed for the person (either directly or indirectly);
- the work is of a kind that is often performed by outworkers; and
- the arrangement is connected with the referring State.

177. An arrangement is connected with a referring State if one or more of the following applies:

- at the time the arrangement is made, one or more parties to the arrangement is in a referring State;
- the work is to be performed in a referring State;
- the person arranging the work carries on an activity (whether of a commercial, governmental or other nature) in a referring State, and the work is reasonably likely to be performed in that State or in connection with that activity.

178. The description of the required connection to a referring State in new section 30E picks up a broader range of outworker entities than the description of the equivalent connection in paragraph (e) of the definition of outworker entity in section 12 of the FW Act. A consequential amendment is therefore needed in relation to paragraph (e) to align the two definitions.

179. Items 1, 2 and 3 of Schedule 3 amend paragraph (e) to ensure that the definition of outworker entity in section 12 of the FW Act aligns with the extended meaning of outworker entity given in new section 30F.

180. Paragraph (e) of the definition in section 12 currently applies in relation to a Territory and identifies particular circumstances in which a person, other than in their capacity as a national system employer, is an outworker entity.

181. Under new paragraph (e), a person will be an outworker entity, other than in their capacity as a national system employer, where:

- the person arranges for work to be performed for the person (either directly or indirectly);
- the work is of a kind that is often performed by outworkers; and
- the arrangement is connected with a Territory.

182. The phrase ‘connected with a Territory’ is defined. An arrangement is connected with a Territory if one or more of the following applies:

- at the time the arrangement is made, one or more parties to the arrangement is in a Territory;
- the work is to be performed in a Territory;
- the person arranging the work carries on an activity (whether of a commercial, governmental or other nature) in a Territory, and the work is reasonably likely to be performed in that Territory or in connection with that activity.

Item 4 – Subparagraph 27(1)(d)(i)

183. Item 4 makes a minor technical amendment to subparagraph 27(1)(d)(i) of the FW Act to correct a typographical error.

184. Under subclause 27(1) of the FW Act, the named State or Territory Acts dealing with discrimination and equal opportunity are preserved in their application to national system employees and employers. Paragraph 27(1)(d) saves State or Territory laws dealing with rights and remedies that are incidental to any of these laws. This item amends subparagraph 27(1)(d)(i) of the FW Act so that it refers to the laws mentioned in subsection 27(1A) (the named State or Territory Acts dealing with discrimination and equal opportunity).

Schedule 4 – Agriculture, Fisheries and Forestry

Australian Meat and Live-stock Industry (Repeals and Consequential Provisions) Act 1997

Item 1 – Item 23 of Schedule 5 (definition of award)

185. This item repeals the definition of award in the *Australian Meat and Live-stock Industry (Repeals and Consequential Provisions) Act 1997*. This allows the term to have its ordinary meaning, which includes awards and NAPSAs continued as transitional award-based instruments under Schedule 3 to the T&C Bill, transitional awards continued under Schedule 20 to the T&C Bill and FW Act modern awards.

Dairy Industry Service Reform Act 2003

Item 2 – Subsection 22(2) (definition of award)

Item 3 – Subsection 38(2) (definition of award)

186. These items repeal the definitions of award in the *Dairy Industry Service Reform Act 2003*. This allows the term to have its ordinary meaning, which includes awards and NAPSAs continued as transitional award-based instruments under Schedule 3 to the T&C Bill, transitional awards continued under Schedule 20 to the T&C Bill and FW Act modern awards.

Horticulture Marketing and Research and Development Services (Repeals and Consequential Provisions) Act 2000

Item 4 – Subsection 4(1) (definition of award)

187. This item repeals the definition of award in the *Horticulture Marketing and Research and Development Services (Repeals and Consequential Provisions) Act 2000*. This allows the term to have its ordinary meaning, which includes awards and NAPSAs continued as transitional award-based instruments under Schedule 3 to the T&C Bill, transitional awards continued under Schedule 20 to the T&C Bill and FW Act modern awards.

Pig Industry Act 2001

Item 5 – Section 7 (definition of award)

188. This item repeals the definition of award in the *Pig Industry Act 2001*. This allows the term to have its ordinary meaning, which includes awards and NAPSAs continued as transitional award-based instruments under Schedule 3 to the T&C Bill, transitional awards continued under Schedule 20 to the T&C Bill and FW Act modern awards.

Schedule 5 – Attorney-General

Part 1 – General consequential amendments

Age Discrimination Act 2004

Item 1 – Section 5 (paragraph (c) of the definition of *Commonwealth law*)

189. This item aligns the *Age Discrimination Act 2004* with other discrimination related Acts. The other Acts specifically include determinations in their definitions of Commonwealth law.

Item 2 – Subsection 23(3) (definition of *registered organisation*)

Item 3 – Subsection 36(2) (definition of *registered organisation*)

190. These items ensure that organisations registered, and associations recognised, under the FW(RO) Act are included in the definition of registered organisation for the purposes of the *Age Discrimination Act 2004*.

Australian Capital Territory (Self-Government) Act 1988

Item 4 – Section 28 (note)

191. This item removes the reference to section 17 of the WR Act and replaces it with a reference to sections 29 and 40 of the FW Act. These sections deal with inconsistencies between fair work instruments and Territory laws.

Australian Crime Commission Act 2002

Item 5 – Subsection 19A(8) (definition of *prescribed agency*)

192. This item is consequential on the replacement of the AIRC with FWA.

Item 6 – Schedule 1

Item 7 – Schedule 1

193. These items update Schedule 1 (provisions to which information gathering powers are subject) to remove references to provisions of the WR Act and include a provision of the FW(RO) Act (section 356 - Trade secrets etc. tendered as evidence).

Australian Federal Police Act 1979

Item 8 – Subsection 4(1) (definition of *collective agreement*)

Item 12 – Subparagraph 40J(1)(ab)(i)

194. These items ensure that the references in paragraph 40J(1)(ab)(i) to certain industrial agreements made under the WR Act cover industrial agreements made under the WR Act and the FW Act.

Item 9 – Subsection 27(4) (definition of *industrial instrument*)

195. This item ensures that the definition of industrial instrument, for the purposes of section 27 of the *Australian Federal Police Act 1979*, includes modern awards, enterprise agreements, workplace determinations and national minimum wage orders that will be made under the FW Act or continued under the T&C Bill (see item 2 of Schedule 3 to that Act).

Item 10 – Subsection 27(4) (note)

196. The item amends the note to subsection 27(4) to pick up the minimum employment standards under the NES as well as the AFPCS.

Item 11 – Section 28 (note)

197. This item is a consequential amendment changing the reference from the WR Act to the FW Act.

Item 13 – Subsection 69B(1)

Item 14 – Paragraph 69B(1)(b)

Item 15 – Subsection 69B(2)

Item 16 – Subsection 69B(3)

198. These items are consequential amendments changing references to the WR Act and provisions of the WR Act to references to the FW Act and provisions of the FW Act.

Bankruptcy Act 1966

Item 17 – Subsection 5(1)

Item 18 – Paragraph 109(1)(e)

Item 19 – Subparagraph 139Y(1)(b)(i)

199. These items add a definition of industrial instrument to the *Bankruptcy Act 1966* which encompasses all laws and instruments regulating conditions of employment, and use that definition instead of existing formulations which refer to the WR Act.

Crimes Act 1914

Item 20 – Section 85ZL (subparagraphs (c)(ii) and (iii) of the definition of *Commonwealth authority*)

200. This item ensures that organisations registered, and associations recognised, under the FW(RO) Act and branches of such organisations and associations are, like their equivalents under the WR Act, excluded from the definition of Commonwealth authority.

Criminal Code Act 1995

Item 21 – Dictionary in the Criminal Code (subparagraphs (a)(vi) and (vii) of the definition of *Commonwealth authority*)

Item 22 – Dictionary in the Criminal Code (after paragraph (aa) of the definition of *Commonwealth authority*)

201. These items ensure that organisations registered, and associations recognised, under the FW(RO) Act are, like their equivalents under the WR Act, excluded from the definition of Commonwealth authority.

Item 23 – Dictionary in the Criminal Code (paragraph (n) of the definition of *Commonwealth public official*)

Item 24 – Dictionary in the Criminal Code (subparagraphs (n)(vi) and (vii) of the definition of *Commonwealth public official*)

Item 25 – Dictionary in the Criminal Code (paragraph (r) of the definition of *Commonwealth public official*)

Item 26 – Dictionary in the Criminal Code (subparagraph (r)(vi) of the definition of *Commonwealth public official*)

Item 27 – Dictionary in the Criminal Code

202. These items ensure that officials of organisations registered, and associations recognised, under the FW(RO) Act are, like their equivalents under the WR Act, excluded from the definition of Commonwealth public official.

Disability Discrimination Act 1992

Item 28 – Subsection 4(1) (paragraph (c) of the definition of *Commonwealth law*)

Item 29 – Subsection 4(1) (paragraph (d) of the definition of *Commonwealth law*)

203. These items remove the reference to a decision of the AFPC from the definition of Commonwealth law.

Item 30 – Subsection 4(1) (definition of *registered organisation*)

204. This item amends the definition of registered organisation to refer to organisations registered, and associations recognised, under the FW(RO) Act, rather than the WR Act.

Item 31 – Paragraph 21A(4)(b)

205. This item is a consequential amendment replacing a reference to the WR Act with a reference to the FW Act.

Human Rights and Equal Opportunity Commission Act 1986

Item 32 – Subsection 3(1) (paragraph (a) of the definition of *trade union*)

206. This item ensures that organisations registered, and associations recognised, under the FW(RO) Act are included in the definition of trade union.

Judges' Pensions Act 1968

Items 33, 34, and 35 – Subsection 4(1) (paragraph (a) of the definition of *appropriate current judicial salary*)

Item 36 – Subsection 4(1) (at the end of the definition of *appropriate current judicial salary*)

207. These items make clear that, despite the repeal of section 79 of the WR Act, the appropriate current judicial salary for a person who was a Presidential Member of the AIRC, and who is entitled to a benefit under the *Judges' Pensions Act 1968*, continues to be the salary that would have been payable to them if section 79 of the WR Act had not been repealed.

Item 37 – Paragraph 20(2)(a)

208. This item enables the Secretary to delegate, to the General Manager of FWA, his or her functions and powers as trustee of the *Judges' Pensions Act 1968* scheme in relation to:

- former AIRC Members who had retired at 1 July 2009;
- former AIRC Members who were taken to have been appointed to FWA on 1 July 2009 and subsequently retire; and
- the President of FWA.

Judiciary Act 1903**Item 38 – Subsection 39B(2)**

209. This item amends subsection 39B(2) of the *Judiciary Act 1903* to remove references to a person holding office under the WR Act or the *Coal Industry Act 1946*. The reference to the WR Act is not replaced with a reference to the FW Act and the effect of this is that the Federal Court has jurisdiction under subsection 39B(1) in matters in which mandamus, prohibition or an injunction is sought against one of those persons.

Jurisdiction of Courts (Cross-vesting) Act 1987**Item 39 – After paragraph 4(4)(aa)**

210. This item ensures that matters arising under the FW Act, the FW(RO) Act and the T&C Bill are exempt from section 4 of the *Jurisdiction of Courts (Cross-Vesting) Act 1987*.

Jury Exemption Act 1965**Item 40 – The Schedule****Item 41 – The Schedule**

211. These items are consequential on the replacement of the AIRC and the AFPC with FWA.

Legislative Instruments Act 2003**Item 42 – Subsection 7(1) (table items 18, 18A and 19)**

212. Awards and agreements, and decisions and orders of the AFPC and the AIRC, made under the WR Act are excluded from the definition of legislative instrument. This item ensures that:

- awards and agreements made under the WR Act and AFPC and AIRC decisions and orders continue to be excluded from the definition;
- AFPC and AIRC decisions made under the T&C Bill are excluded from the definition; and
- awards, agreements, national minimum wage orders and workplace determinations made under the FW Act, and FWA decisions and orders, are excluded from the definition.

213. This continues a policy that such instruments, which principally deal with the terms and conditions of employees and are made by a tribunal, should not be considered to be legislative instruments and subject to the requirements of the *Legislative Instruments Act 2003*.

Northern Territory (Self-Government) Act 1978

Item 43 – Subsections 53(3) and (4)

Item 44 – Subsection 53(4)

Item 45 – Subsection 53(4)

214. These items reflect the replacement of the AIRC with FWA, and the replacement of the WR Act with the FW Act.

Item 46 – Subsection 53(6)

215. This item inserts a note after subsection 53(6) of the *Northern Territory (Self-Government) Act 1978* that alerts the reader to the operation of section 40 of the FW Act and regulations made under that section. In particular, regulations made under section 40 of the FW Act may affect the interaction between determinations made under laws referred to in paragraph 53(6)(b) and fair work instruments.

Item 47 – Subsection 53(7)

216. This item repeals subsection 53(7) of the *Northern Territory (Self-Government) Act 1978* which is not consistent with section 40 of the FW Act. Section 40, which has no counterpart in the WR Act, provides that public sector employment laws (which include NT and ACT laws, and instruments made under those laws, dealing with public sector employment) prevail over fair work instruments unless regulations prescribe to the contrary. Subsection 53(7) of the *Northern Territory (Self-Government) Act 1978* gives priority to Commonwealth industrial instruments. It is anticipated that regulations will be made under section 40 of the FW Act to preserve the current interaction between Commonwealth workplace relations laws and NT public sector laws.

Seat of Government (Administration) Act 1910

Item 48 – Subsections 5(3) and (4)

Item 50 – Subsection 5(4)

217. These items are consequential on the replacement of the AIRC with the FWA.

Item 49 – Subsection 5(4)

218. This item is a consequential amendment changing references to the WR Act to references to the FW Act.

Item 51 – Subsection 5(5)

219. This item repeals subsection 5(5) of the *Seat of Government (Administration) Act 1910* which is not consistent with section 40 of the FW Act. Section 40, which has no counterpart in the WR Act, provides that public sector employment laws (which include ACT and NT laws, and

instruments made under those laws, dealing with public sector employment) prevail over fair work instruments unless regulations prescribe to the contrary. Subsection 5(5) of the *Seat of Government (Administration) Act 1910* gives priority to Commonwealth industrial instruments. It is anticipated that regulations will be made under section 40 of the FW Act to preserve the current interaction between Commonwealth workplace relations laws and ACT public sector laws.

Sex Discrimination Act 1984

Item 52 – Subsection 4(1) (definition of *committee of management*)

Item 57 – Subsection 4(1) (paragraph (b) of the definition of *voluntary body*)

Item 58 – Section 19

220. The *Sex Discrimination Act 1984* uses the spellings organization and organisation inconsistently. This amendment changes all references to organization rather than organisation.

Item 53 – Subsection 4(1) (paragraph (c) of the definition of *Commonwealth law*)

Item 54 – Subsection 4(1) (paragraph (d) of the definition of *Commonwealth law*)

221. These items remove a reference to a decision of the AFPC in the definition of Commonwealth law. There is no amendment to add an express reference to national minimum wage orders made under the FW Act. The references to order or award in the current definition are intended pick up national minimum wage orders.

Item 55 – Subsection 4(1)

Item 56 – Subsection 4(1) (definition of *registered organization*)

222. These items amend the definition of registered organisation to refer to organisations registered, and associations recognised, under the FW(RO) Act, rather than the WR Act.

Item 59 – Section 109

223. Section 109 of the *Sex Discrimination Act 1984* provides that the Act is a prescribed Act for the purposes of section 116 of the WR Act. There is no equivalent of section 116 in the FW Act. This item repeals section 109.

Part 2 – Amendments relating to discrimination in compliance with industrial instruments and laws

Division 1 – General

224. The *Human Rights and Equal Opportunity Commission Act 1986* permits the Human Rights and Equal Opportunity Commission (HREOC) to refer to the AIRC allegedly discriminatory industrial instruments. Section 46PW only applies to industrial instruments that have allegedly authorised an act that would be unlawful under the *Sex Discrimination Act 1984*. The *Age Discrimination Act 2004* and the *Disability Discrimination Act 1992* are not included, and this Division makes amendments to allow HREOC to refer to FWA instruments which have allegedly authorised acts that would be unlawful under any of these Acts. Equivalent provision is not made for the *Racial Discrimination Act 1975* because, unlike the other discrimination Acts, section 10 of the Racial Discrimination Act provides for equality before the law.

Age Discrimination Act 2004

Item 60 – Paragraph 39(8)(a)

Item 61 – Paragraph 39(8)(b)

Item 62 – Subsection 39(8) (note)

Item 63 – Schedule 1 (after table item 25)

Item 64 – Schedule 1 (table item 48)

225. These items make consequential amendments to the *Age Discrimination Act 2004* to ensure that the term industrial instruments captures instruments made under the FW Act, including workplace determinations.

Disability Discrimination Act 1992

Item 65 – Paragraph 47(1)(c)

Item 66 – Subsection 47(1) (note)

226. These items make consequential amendments to the *Disability Discrimination Act 1992* to ensure that the term industrial instruments captures instruments made under the FW Act, including workplace determinations.

Fair Work Act 2009

Item 67 – Section 12

Item 68 – Subsection 161(2)

Item 69 – Subsection 161(3)

Item 70 – Subsection 218(2)

Item 71 – Subsection 218(3)

Item 72 – Paragraph 279(2)(f)

227. These items ensure that FWA can deal with matters that have been referred by HREOC relating to breaches of the *Age Discrimination Act 2004* and the *Disability Discrimination Act 1992*.

Human Rights and Equal Opportunity Commission Act 1986

Item 73 – Subsections 46PW(3) and (5)

Item 74 – Subsection 46PW(7) (definition of discriminatory act under an industrial instrument)

Item 75 – Subsection 46PW(7) (definition of *industrial instrument*)

228. These items expand section 46PW of the HREOC Act so that industrial instruments that might breach the *Age Discrimination Act 2004* and the *Disability Discrimination Act 1992* can be referred by HREOC to FWA.

Sex Discrimination Act 1984

Item 76 – Paragraph 40(1)(e)

Item 77 – Paragraph 40(1)(f)

Item 78 – Paragraph 40(1)(g)

Item 79 – Subsection 40(1) (note)

229. These items make consequential amendments to the *Sex Discrimination Act 1984* to ensure that the term industrial instruments captures instruments made under the FW Act, including workplace determinations.

Division 2—Amendments relating to HREOC name change
Fair Work Act 2009

Item 80 – Paragraph 161(2)(a)

Item 81 – Paragraph 218(2)(a)

Item 82 – Paragraph 279(2)(f)

230. These are consequential amendments changing the name HREOC to the Australian Human Rights Commission. As this change will come into effect when item 38 of Schedule 3 to the Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 commences, these amendments are contingent on the commencement of that item (see table item 20 of clause 2 of this Bill).

Part 3 – Application provisions

Item 83 – Application of item 5

231. This item provides that, despite the proposed amendment to subsection 19A(8) of the *Australian Crime Commission Act 2002*, that Act will continue to apply to the AIRC as continued in existence under the T&C Bill.

Item 84 – Application of item 29

232. This item provides that, despite the proposed amendment to subsection 4(1) of the *Disability Discrimination Act 1992*, that Act will continue to apply to a decision of the AFPC, whether made before or after the WR Act repeal day.

Item 85 – Application of item 38

233. For the avoidance of doubt, this item provides that the amendment proposed by item 38 applies in relation to a decision made by a person holding office under the FW Act, in their capacity as an officer under the FW Act, from the commencement of section 3 of the FW Act. The amendment applies notwithstanding that an officer may hold a dual appointment to a WR Act institution.

234. The Federal Court will not have jurisdiction to hear an application for prerogative relief in relation to a decision made by a person holding office under the WR Act in their capacity as an officer under that Act.

Item 86 – Application of items 40 and 41

235. This item provides that, despite the proposed amendment at items 40 and 41 to the *Jury Exemption Act 1965*, that Act will continue to apply to members of the AIRC and the AFPC as those members continue to hold office under the T&C Bill.

Item 87 – Application of item 54

236. This item provides that, despite the proposed amendment at item 54 to the *Sex Discrimination Act 1984*, that Act will continue to apply to decisions of the AFPC made before or after the WR Act repeal day.

Item 88 – Application of item 77

237. This item provides that, despite the proposed amendment at item 77 to the *Sex Discrimination Act 1984*, that Act will continue to apply to a decision of the AFPC made before the commencement of the amendment.

Schedule 6 – Broadband, Communications and the Digital Economy

Telstra Corporation Act 1991

Item 1 – Subsection 9A(2) (definition of *industrial instrument*)

Item 2 – Subsection 9A(2) (paragraph (b) of the definition of *law*)

Item 3 – Subsection 9A(2) (definition of *post-sale long service leave rights*)

238. These items amend definitions used for transitional provisions relating to long service leave of Telstra employees. The provisions have been amended so that they capture instruments and agreements made under the WR Act and the FW Act without needing to refer to each particular type of instrument and agreement.

Schedule 7 – Defence

Naval Defence Act 1910

Item 1 – Subsection 40(1) (definition of Australian Fair Pay and Conditions Standard)

Item 2 – Subsection 40(1)

Item 3 – Subsection 40(1) (definition of *industrial award*)

Item 4 – Subsection 42A(7)

Item 5 – Subsection 42D(3)

239. These items update references to minimum standards in the AFPCS and WR Act awards to references to minimum standards in the NES and, where applicable, any relevant national minimum wage order or industrial award.

Schedule 8 – Education, Employment and Workplace Relations

Part 1 – Consequential amendments

Air Passenger Ticket Levy (Collection) Act 2001

Item 1 – Section 5 (definition of *Workplace Relations Minister*)

240. This item a consequential amendment changing the reference to the WR Act to a reference to the FW Act.

Building and Construction Industry Improvement Act 2005

241. The BCII Act adopts many concepts used by the WR Act. That Act, with the exception of the provisions relating to registered organisations, will be repealed by the T&C Bill and replaced by the FW Act. This Part makes consequential amendments to the BCII Act to reflect this change.

Item 2 – Subsection 4(1) (definition of *Australian Fair Pay and Conditions Standard*)

Item 3 – Subsection 4(1) (definition of *AWA*)

Item 4 – Subsection 4(1) (definition of *award*)

Item 5 – Subsection 4(1)

Item 6 – Subsection 4(1) (definition of *building agreement*)

Item 7 – Subsection 4(1) (definition of *building collective agreement*)

Item 8 – Subsection 4(1)

Item 9 – Subsection 4(1) (at the end of the definition of *Commonwealth industrial instrument*)

Item 10 – Subsection 4(1) (paragraph (a) of the definition of *designated building law*)

Item 11 – Subsection 4(1) (definition of *employee organisation*)

Item 12 – Subsection 4(1)

Item 13 – Subsection 4(1)

Item 14 – Subsection 4(1)

Item 15 – Subsection 4(1)

Item 16 – Subsection 4(1)

Item 17 – Subsection 4(1) (definition of *industrial association*)

- Item 18 – Subsection 4(1) (definition of *industrial body*)**
- Item 19 – Subsection 4(1) (definition of *industrial dispute*)**
- Item 20 – Subsection 4(1) (paragraph (a) of the definition of *industrial law*)**
- Item 21 – Subsection 4(1) (definition of *Industrial Registrar*)**
- Item 22 – Subsection 4(1)**
- Item 23 – Subsection 4(1) (definition of *negotiating party*)**
- Item 24 – Subsection 4(1) (definition of *occupier*)**
- Item 25 – Subsection 4(1) (definition of *organisation*)**
- Item 26 – Subsection 4(1) (definition of *premises*)**
- Item 27 – Subsection 4(1) (definition of *pre-reform AWA*)**
- Item 28 – Subsection 4(1) (definition of *pre-reform certified agreement*)**
- Item 29 – Subsection 4(1)**
- Item 30 – Subsection 4(1) (definition of *workplace agreement*)**
- Item 31 – Subparagraph 10(a)(i)**
- Item 32 – Subparagraph 10(b)(i)**
- Item 33 – Paragraph 10(c)**
- Item 34 – Paragraph 10(d)**
- Item 35 – Paragraph 10(e)**
- Item 36 – Paragraph 10(f)**
- Item 37 – Subsection 36(1) (paragraph (c) of the definition of *constitutionally-connected action*)**
- Item 38 – Subsection 36(1) (paragraph (e) of the definition of *constitutionally-connected action*)**
- Item 39 – Subsection 36(1) (definition of *excluded action*)**
- Item 40 – Subsection 36(4) (paragraph (e) of the definition of *industrial dispute*)**
- Item 41 – Part 3 of Chapter 5 (heading)**
- Item 42 – Subsection 40(1)**

- Item 43 – Subsection 40(2) (paragraph (a) of the definition of *protected person*)**
- Item 44 – Subsection 40(2) (paragraph (b) of the definition of *protected person*)**
- Item 45 – Subsection 40(2) (paragraph (d) of the definition of *protected person*)**
- Item 47 – Subsection 42(1)**
- Item 48 – Paragraph 42(1)(b)**
- Item 49 – Subsection 42(2)**
- Item 50 – Paragraph 44(1)(c)**
- Item 51 – Subsection 44(2)**
- Item 52 – Subsection 44(3)**
- Item 53 – Subsection 44(4)**
- Item 54 – Subsection 44(5)**
- Item 55 – At the end of paragraph 45(1)(a)**
- Item 56 – At the end of paragraph 45(1)(b)**
- Item 57 – Subsection 45(1) (example for subparagraphs (1)(a)(ii) and (1)(b)(ii))**
- Item 58 – Subsection 45(2)**
- Item 59 – Paragraph 45(4)(a)**
- Item 60 – Subsection 46(2)**
- Item 61 – Subsection 50(4)**
- Item 62 – Subsection 64(1)**
- Item 63 – Paragraph 64(1)(d)**
- Item 64 – Subsection 64(2)**
- Item 65 – Subsection 65(8) (paragraph (j) of the definition of *designated official*)**
- Item 66 – Paragraph 67(c)**
- Item 67 – Paragraph 71(1)(b)**
- Item 68 – Section 72**
- Item 69 – Subsection 73(1)**

Item 70 – Paragraph 73(1)(a)

Item 71 – Subsection 73(2)

Item 72 – Subsection 73(2)

Item 73 – Subsection 73(3)

Item 74 – Subsections 73(4) and (5)

Item 75 – Subsection 73A(3)

Item 76 – Section 74

Item 77 – Paragraph 74(a)

Item 78 – Paragraph 75(3)(a)

Item 79 – Subsection 75(4)

Item 81 – Paragraph 76(b)

Item 82 – Paragraph 77(1)(b)

Item 83 – Subsection 77(2) (paragraph (j) of the definition of *protected person*)

Item 84 – Subparagraph 78(2)(d)(i)

242. These items replace terms used in the WR Act with corresponding terms used in the FW Act. For example, references to a workplace inspector are replaced with references to a Fair Work Inspector, and references to the Industrial Registrar are replaced with references to the General Manager of FWA. These items also amend, insert or repeal definitions as necessary to bring the BCII Act into line with the FW Act.

Item 46 – Section 41

243. This item repeals section 41 of the BCII Act because action before the nominal expiry date of an enterprise agreement is dealt with in the definition of protected industrial action in section 408 of the FW Act.

Item 80 – After section 75

244. This item includes new provisions (sections 75A and 75B) requiring that, where jurisdiction is conferred on the Federal Court or Federal Magistrates Court in relation to the BCII Act, the jurisdiction must be exercised in the Fair Work Division of the appropriate court. This is consistent with the approach adopted in sections 563 and 567 of the FW Act.

Coal Mining Industry (Long Service Leave Funding) Act 1992

Item 85 – Subsection 4(1) (definition of Australian Fair Pay and Conditions Standard)

Item 86 – Subsection 4(1) (paragraph (a) of the definition of *eligible employee*)

Item 88 – Subsection 4(1)

245. These items are consequential on the replacement of the AFPCS with the NES.

Item 87 – Subsection 4(1) (definition of *industrial authority*)

246. This item are consequential on the replacement of the AIRC, the Workplace Authority Director and the Employment Advocate with FWA.

Item 89 – Subsection 4(1) (paragraph (a) of the definition of *relevant industrial instrument*)

Item 90 – Subsection 4(1) (paragraphs (d) to (f) of the definition of *relevant industrial instrument*)

247. These items amend the definition of relevant industrial instrument in subsection 4(1) to include awards or agreements that are made or approved by, or registered with, an industrial authority.

Defence Act 1903

Item 91 – Section 58F

Item 92 – Section 58F

Item 93 – Section 58F (definition of *presidential member of the Commission*)

Item 94 – Subsection 58G(4)

Item 97 – Paragraph 58L(2)(c)

Item 95 – Subsection 58K(7)

Item 96 – Subsection 58KB(4)

248. These items make amendments to the provisions of the *Defence Act 1903* relating to the Defence Force Remuneration Tribunal. The amendments are consequential on the replacement of the AIRC with FWA.

249. The President of the Defence Force Remuneration Tribunal is currently required to be a Presidential Member of the AIRC. These items amend the membership requirement to require the President to be a Deputy President of FWA.

250. Items 95 and 96 replace the references to the decisions and principles of the AIRC with references to decisions and principles of FWA. The provisions retain a reference to any decisions and principles of the AIRC in situations where FWA has not yet made a decision or established any principles.

Long Service Leave (Commonwealth Employees) Act 1976

Item 98 – Paragraph 12(11)(a)

251. This item amends the definition of organisation because organisations will now be registered and recognised under the FW(RO) Act .

Item 99 – At the end of subsection 15(1)

252. This item ensures that the operation of the *Long Service Leave (Commonwealth Employees) Act 1976* does not affect the making or operation of an award, order, agreement or determination under the FW Act in relation to maritime employees.

Item 100 – Subsection 15(4) (definition of *maritime employee*)

253. This is a consequential amendment changing a reference to the WR Act to a reference to the FW Act.

Maternity Leave (Commonwealth Employees) Act 1973

Item 101 – Section 8

254. This item replaces a reference to sections 280 and 281 of the WR Act with a reference to section 84 of the FW Act (which deals with the return to work guarantee for employees ending unpaid parental leave).

Occupational Health and Safety Act 1991

Item 102 – Subsection 5(1) (paragraph (a) of the definition of *registered organisation*)

255. This item ensures that associations registered or recognised under the FW(RO) Act are covered by the definition of registered organisation in the *Occupational Health and Safety Act 1991*.

Occupational Health and Safety (Maritime Industry) Act 1993

Item 103 – Section 4 (paragraph (a) of the definition of *registered union*)

256. This item ensures that employee associations registered or recognised under the FW(RO) Act are covered by the definition of registered union in the *Occupational Health and Safety (Maritime Industry) Act 1993*.

Remuneration Tribunal Act 1973

Item 104 – Paragraph 3(4)(j)

257. This item replaces the reference to an AIRC member in the definition of public office with a reference to the President of FWA. FWA members, other than the President, will have their remuneration determined by the Remuneration Tribunal, as holders of public offices.

Item 105 – Paragraphs 5(1)(a) and (b)

258. This item replaces the reference to the wage-setting decisions of AFPC with a reference to the national minimum wage orders of FWA and the last wage-setting decision of the AFPC. The reference to the AFPC's last wage decision is retained as FWA will not make an order to replace wage-setting decisions of the AFPC until after the commencement of the FW Act.

Item 106 – Subsection 7(4B)

Item 107 – Subsection 7(4C)

Item 108 – Paragraph 7(9)(af)

259. These items make amendments to the way that the Remuneration Tribunal determines the travelling allowances to be paid to members of the AIRC and the AFPC. These amendments are consequential to the AIRC and the AFPC being replaced by FWA under the FW Act. These provisions relating to the AIRC will be preserved during the transitional period in which the AIRC operates in conjunction with FWA. The Remuneration Tribunal will be empowered to inquire into and determine the travel allowances of the President of FWA. Provision has not been made for the Tribunal to set travel allowances for members of FWA (other than the President) as there is already a general power under subsection 7(4) to determine any matter that is significantly related to remuneration of holders of public office. This power has been taken to extend to allowances such as travel allowances. In the event that the Remuneration Tribunal does not determine travel allowances for FWA members, these allowances can be prescribed under subsection 637(2) of the FW Act.

Safety, Rehabilitation and Compensation Act 1988

Item 109 – Paragraph 52(6)(b)

260. This item ensures that the definition of award picks up workplace determinations made under the FW Act.

Item 110 – Subsection 116(1)

261. This item ensures that determinations and agreements are included as instruments that can provide for leave of absence with pay while an employee is on post-determination compensation leave.

Seafarers Rehabilitation and Compensation Act 1992

Item 111 – Section 3 (definition of Australian Fair Pay and Conditions Standard)

Item 115 – Section 3

262. These items repeal the definition of the AFPCS and replace it with a definition of the NES.

Item 112 – Section 3 (definition of *collective agreement*)

Item 113 – Section 3

Item 114 – Section 3

Item 116 – Section 3 (definition of *pre-reform certified agreement*)

Item 118 – Subsection 13(3)

Item 124 – Subsection 78(7) (definition of *industry panel*)

263. These items replace references to collective agreement and pre-reform certified agreement with references to industrial agreement, which will include industrial awards, determinations and agreements.

Item 117 – Subsection 13(2)

Item 119 – Subsection 13(5)

Item 120 – Paragraph 13(6)(b)

Item 121 – Paragraph 31(14)(a)

Item 125 – Section 137

264. These items remove references to award, determination, collective agreement, pre-reform certified agreement or the AFPCS and replace them with references to industrial instrument or the NES.

Item 122 – Subsection 61(6) (definition of *award*)

Item 123 – Subsection 61(6) (definition of *award*)

265. These items add agreements to the definition of award.

Social Security Act 1991

Item 126 – Section 16C

Item 127 – Subsection 23(1) (definition of *applicable statutory conditions*)

Item 129 – Subsection 23(1) (definition of *relevant minimum wage*)

266. These items repeal the definitions of applicable statutory conditions and relevant minimum wage (which contain references to the AFPCS and WR Act instruments) and replace them with general definitions that do not refer to particular legislation. Applicable statutory conditions is defined to mean all minimum terms and conditions of employment (including wages) applicable under law. Relevant minimum wage is defined to mean the minimum wage payable under law. These definitions will pick up terms and conditions applicable under both the WR Act and the FW Act and instruments made under both Acts.

Item 128 – Subsection 23(1) (definition of *Australian Fair Pay and Conditions Standard*)

267. This amendment is consequential to the amendments proposed in items 126 and 127.

Item 130 – Paragraph 120(d)

Item 131 – Paragraph 501D(4)(d)

Item 132 – Paragraph 544B(8)(d)

Item 136 – Paragraph 631C(d)

Item 139 – Paragraph 745L(d)

268. These items are consequential amendments changing references to the WR Act to references to the FW Act.

Item 133 – Paragraphs 553A(4)(a) to (c)

Item 134 – Subsection 596(4)

Item 135 – Subsection 596(4) (note)

Item 137 – Subsection 660XBE(4)

Item 138 – Subsection 660XBE(4) (note)

Item 140 – Subsection 771HB(4)

Item 141 – Subsection 771HB(4) (note)

269. These amendments update provisions which list courts and tribunals which can make orders in relation to industrial action. The provisions now list State industrial authorities as

defined in the FW Act (rather than the WR Act), FWA (as well as the AIRC) and the Federal Magistrates Court (which can make industrial action orders – see, for example, s 417 of the FW Act).

Item 142 – Paragraph 954A(1)(f)

Item 143 – Paragraph 1061PB(2)(a)

Item 144 – Subsection 1061PB(6) (definition of *AFPCS*)

Item 146 – Subsection 1061PB(6)

Item 147 – Subparagraph 1067A(10)(c) (i)

270. These items remove references to the AFPCS and replace them with references to the relevant minimum wage order, a modern award, a transitional APCS or the NES.

Item 145 – Subsection 1061PB(6) (definition of *industrial instrument*)

271. This item ensures that workplace determinations are included in the definition of industrial instrument.

Item 148 – Subparagraph 1067A(10)(c)(ii)

272. These items are consequential on the AFPC being replaced by FWA.

Item 149 – Paragraph 1188BB(d)

273. This item is a consequential amendment changing a reference to the WR Act to a reference to the FW Act.

Tradesmen's Rights Regulation Act 1946

Item 150 – Section 6 (definition of Australian Pay and Classification Scale)

Item 153 – Subsections 33E(6) and 41(6) and (7)

274. These items remove references to the wage rate prescribed by an APCS, award, determination etc and substitute a reference to the wage rate prescribed by a standard, pay or classification scale, award, determination etc. The reference to a standard and to pay scales has been retained to make comprehensive provision for the sources of wage rates, including because FWA will make the first national minimum wage order to replace wage-setting decisions of the AFPC after the commencement of the FW Act.

Item 151 – Section 6 (definition of award)

275. This item repeals the definition of award. This allows the term to have its ordinary meaning, which includes awards and NAPSAs continued as transitional award-based instruments under Schedule 3 to the T&C Bill, transitional awards continued under Schedule 20 to the T&C Bill and FW Act modern awards.

Item 152 – Section 6 (definition of industrial agreement)

276. This item repeals the definition of industrial agreement. This allows the term to have its ordinary meaning.

United States Naval Communication Station (Civilian Employees) Act 1968

Item 154 – Paragraph 4(b)

277. This item ensures that organisations registered, and associations recognised, under the FW(RO) Act are included in the definition of registered organisation for the purpose of the *United States Naval Communication Station (Civilian Employees) Act 1968*.

Part 2 – Transitional provisions

Division 1 – Provisions relating to the Building and Construction Industry Improvement Act 2005

278. This Division contains transitional rules to provide for the transition between the BCII Act as in force before the WR Act repeal day and the BCII Act from that day.

Item 155 – General transitional provision relating to functions and powers of the ABC Commissioner and ABC inspectors

279. This item allows the ABC Commissioner and ABC inspectors to exercise powers and functions in relation to the WR Act as in force before the WR Act repeal day and as continued in force by the T&C Bill where the BCII Act, as amended, confers powers or functions on the ABC Commissioner or ABC inspectors in relation to the FW Act.

Item 156 – Transitional provision relating to paragraph 44(1)(c)

280. Paragraph 44(1)(c) is amended by item 50 to refer to a building enterprise agreement because a building agreement under Part 8 of the WR Act does not exist under the FW Act. This item continues the effect of paragraph 44(1)(c) in relation to building agreements under Part 8 of the WR Act that were entered into before the WR Act repeal day.

Item 157 – Transitional provision relating to paragraph 64(1)(d)

281. Paragraph 64(1)(d) is repealed by item 64 because an agreement made after the WR Act repeal day cannot be lodged in accordance with the WR Act provisions. Instead, item 64 amends paragraph 64(1)(d) so that it refers to an agreement not being approved by FWA. This item continues 64(1)(d) in relation to an agreement made before the WR Act repeal day.

Item 158 – Transitional provisions relating to Industrial Registrar

282. This item preserves the BCII Act provisions relating to the Industrial Registrar for certain purposes. Subitems (1) and (3) retain the Industrial Registrar's status as a designated person under section 65 and a protected person under subsection 77(2). Subitem (2) preserves section 74, providing that the Industrial Registrar must keep the ABC Commissioner informed in relation to an application lodged before the WR Act repeal day.

Division 2—Provision relating to the Defence Act 1903

Item 159 – Appointments to continue

283. This item preserves the existing appointment of the President of the Defence Force Remuneration Tribunal for the remainder of her term while she continues to be a presidential member of the AIRC.

Division 3 – Provisions relating to the Remuneration Tribunal Act 1973

Item 160 – Transitional

284. This item ensures that, despite the amendment to the definition of public office in paragraph 3(4)(j) of the *Remuneration Tribunal Act 1973*, that paragraph continues to apply to members of the AIRC while the AIRC is in existence. This item also ensures that a reference to the President of FWA in the definition of public office is taken to include a reference to the other members of FWA as appointed under item 1 of Schedule 18 to the T&C Bill.

Item 161 – Transitional

285. This item ensures that, despite the amendments to subsections 7(4B) and 7(4C) of the *Remuneration Tribunal Act 1973*, those subsections continue to apply to the AIRC and the AFPC while they are in existence. This item also ensures that a reference to the President of FWA is taken to include a reference to the other members of FWA as appointed under item 1 of Schedule 18 to the T&C Bill.

Schedule 9 – Families, Housing, Community Services and Indigenous Affairs

Equal Opportunity for Women in the Workplace Act 1999

Item 1 – Subsection 3(1) (paragraph (a) of the definition of *trade union*)

286. This item ensures that organisations registered, or associations recognised, under the FW(RO) Act are included in the definition of trade union.

Social Security Act 1991

Item 2 – Paragraphs 729AA(4)(a) to (c)

Item 3 – Paragraphs 759(4)(a) to (c)

287. These items update references to tribunals which can make orders, directions or injunctions in relation to industrial action to include a prescribed State industrial authority within the meaning of the FW Act and FWA.

Schedule 10 – Finance and Deregulation

Airports (Transitional) Act 1996

Item 1 – Paragraphs 59(4)(b), (c), (d) and (da)

Item 2 – At the end of subsection 59(4)

288. These items ensure that instruments continued under the T&C Bill are included as instruments that could specify the terms and conditions of transferred employees.

Commonwealth Authorities and Companies Act 1997

Item 3 – Paragraph 7(2)(c)

289. This item excludes organisations registered under the FW(RO) Act from the definition of Commonwealth authority.

Commonwealth Electoral Act 1918

Item 4 – Section 5 (definition of *electoral matters*)

290. This item updates the definition of electoral matters to replace the reference to WR Act ballots with a reference to FW Act and FW(RO) Act ballots.

Item 5 – Subsection 287(1) (definition of *registered industrial organisation*)

291. This item ensures that organisations registered under the FW(RO) Act, rather than under the WR Act, are included in the definition of registered organisation.

Superannuation Act 1976

Item 6 – Subsection 3(1) (definition of *industrial award*)

292. This item amends the definition of industrial award to remove specific references to WR Act instruments and agreements, and to ensure that it covers FW Act instruments and agreements such as modern awards, workplace determinations and enterprise agreements.

Item 7 – Subsection 51(2BB) (paragraph (a) of the definition of *approved organisation*)

293. This item amends the definition of approved organisation to refer to associations recognised under the FW(RO) Act.

Item 8 – Subsection 54C(1)

294. This item amends subsection 54C(1) to replace the reference to an award or determination with a reference to an industrial award (which includes modern awards, enterprise agreements and workplace determinations – see item 6).

Superannuation Act 1990

Item 9 – Subsection 13(1)

Item 10 – At the end of section 13

295. These items amend subsection 13(1) to replace the reference to an award or determination with a reference to an industrial award, and define industrial award to mean an industrial award, determination or agreement (which includes modern awards, enterprise agreements and workplace determinations made under the FW Act).

Schedule 11 – Health and Ageing

Commonwealth Serum Laboratories Act 1961

Item 1 – Subsection 27(1)

Item 2 – Subsection 27(5)

Item 3 – Paragraph 29(2)(b)

Item 4 – Subsection 29(3) (definition of *industrial instrument*)

296. These amendments remove specific references to WR Act awards and agreements and ensure that FW Act modern awards and enterprise agreements are included in the definition of industrial instrument.

National Health Act 1953

Item 5 – Subsection 98A(4)

Item 6 – Paragraphs 98B(5)(a) and (b)

Item 7 – Subsection 99A(2)

Item 8 – Subsection 99B(1)

Item 9 – Subsections 99D(1) and (10)

297. These items relate to the Pharmaceutical Remuneration Tribunal and are consequential on the replacement of the AIRC by FWA.

298. References to a Senior Deputy President or a Deputy President of the AIRC are replaced by references to a Deputy President of FWA. (FWA does not have Senior Deputy Presidents.)

299. Item 6 replaces the reference to the wage-setting decisions and statements of the AFPC with a reference to the national minimum wage orders and statements of FWA and, if no national minimum wage order has been made, the last wage-setting decision of the AFPC. FWA will make the first national minimum wage order to replace wage-setting decisions of the AFPC after the commencement of the FW Act and reference to the last wage-setting decision of the AFPC therefore needs to be retained for an interim period.

Schedule 12 – Immigration and Citizenship

Fair Work Act 2009

Item 1 – Section 709 (note)

Item 2 – Paragraphs 713(d) and (e)

Item 3 – After section 713

300. A new section 713A clarifies the circumstances in which criminal limited use immunity applies to information obtained by an inspector under paragraph 709(e) of the FW Act.

301. Section 713A provides that if the individual had custody of, or access to, the record or document when it was inspected or copied under paragraph 709(e), the record or document inspected or copied or any information, document or thing obtained as a direct or indirect result of the inspection or copying is not admissible in criminal proceedings against that individual.

302. These limitations are intended to reflect the limitations that apply where a document is produced to an inspector by an individual (see section 713 of the FW Act). The intention is that there be a consistent approach to criminal limited use immunity in relation to records or documents obtained by Fair Work Inspectors.

303. Consequential amendments are made to paragraphs 709(e), 713(c), (d) and (e) to reflect and refer to the new provision.

Migration Act 1958

Item 4 – Sections 140X, 140Y, 140Z and 140ZA

304. This item amends the *Migration Act 1958* immediately after the commencement of the *Migration Amendment (Worker Protection) Act 2008* (Worker Protection Act) by:

- repealing sections 140X to 140Z (inserted into the Migration Act by the Worker Protection Act), and replacing them with provisions that are modelled on the powers of Fair Work Inspectors under sections 706 to 714 of the FW Act; and
- repealing section 140ZA (inserted into the Migration Act by the Worker Protection Act) and replacing it with a provision that is modelled on section 718 of the FW Act, which deals with the disclosure of information by the Office of the FWO.

305. It is intended that the powers of inspectors appointed under the Migration Act be similar in substance and form to those of Fair Work Inspectors. This consistency between the inspection regimes is appropriate because the same persons may be appointed as inspectors for the purposes of the FW Act and for the Migration Act, and these inspectors may exercise their powers under both Acts simultaneously.

306. There are, however, certain aspects of the amendments to the Migration Act which do not replicate the FW Act provisions.

307. For example, section 708 of the FW Act only provides for entry to business premises, and residential premises in limited circumstances. In comparison, proposed section 140XB of the Migration Act provides for entry to 'business premises or another place'. It is necessary for inspectors, for the purposes of sponsorship, to be able to enter places other than business premises due to the nature of some of the sponsorship obligations. More specifically, for professional development sponsors there is a proposed obligation to secure an offer of a reasonable standard of accommodation (expected to be prescribed in regulations). To investigate compliance with this obligation, inspectors may need to inspect the accommodation to confirm that it is of a reasonable standard.

308. Paragraph 712(2)(c) of the FW Act allows a person a minimum of 14 days to respond to a notice to produce records or documents. Proposed paragraph 140XF(2)(c) of the Migration Act differs from the FW Act provision by providing for a minimum of 7 days to respond rather than 14 days.

309. There may be compelling reasons in special cases for requesting information in as few as 7 days, taking into account the special vulnerability to exploitation of non-citizens in Australia on temporary visas. In normal circumstances however inspectors will be expected to provide sponsors with at least 14 days in which to respond to a written notice.

Schedule 13 – Infrastructure, Transport, Regional Development and Local Government

Navigation Act 1912

Item 1 – Section 292

310. This item amends section 292 of the *Navigation Act 1912* so that it provides that a transitional APCS, a transitional award, a modern award or a national minimum wage order (if any or if applicable) which covers seamen employed in any part of the coasting trade is evidence of the rates of wages in Australia for those seamen.

Schedule 14 – Innovation, Industry, Science and Research

Part 1 – Consequential amendments

Independent Contractors Act 2006

Item 1 – Section 4

Item 3 – Section 4 (definition of *workplace inspector*)

Item 9 – Paragraph 34(5)(a)

311. These items ensure that the reference to a workplace inspector in the *Independent Contractors Act 2006* is converted to a reference to a Fair Work Inspector within the meaning of the FW Act.

Item 2 – Section 4 (definition of *organisation*)

312. This item amends the definition of organisation to refer to organisations registered, and associations recognised, under the FW(RO) Act, rather than the WR Act.

Item 4 – Section 6 (definition of *State or Territory industrial law*)

313. This item ensures that State or Territory industrial law has the same meaning as in the FW Act, rather than the WR Act.

Item 5 – Subparagraph 8(1)(h)(i)

314. This item is a consequential amendment changing a reference from the WR Act to the FW Act and the T&C Bill.

Item 6 – Subparagraph 9(1)(e)(i)

Item 7 – Subparagraph 9(1)(e)(iii)

Item 8 – At the end of section 9

315. These items are consequential amendments changing a reference from the WR Act to the FW Act or the WR Act, as in force immediately before the WR Act repeal day, or as that Act continues to apply on and after the WR Act repeal day because of a provision of the T&C Bill. The term WR Act repeal day is defined by reference to Schedule 2 to the T&C Bill.

Item 10 – Subsection 34(7)

316. This item is a consequential amendment changing the reference from Division 3 of Part 14 of the WR Act to the equivalent provisions of the FW Act (Division 4 of Part 4-1).

Part 2 – Transitional provision

Item 11 – Transitional

317. This item relates to the amendment of subsection 34(7) of the *Independent Contractors Act 2006* made by item 10 and ensures that Division 3 of Part 14 of the WR Act continues to have effect if the breach to which it relates happened before this amendment commences.

Schedule 15 – Parliamentary Service

Part 1 – Consequential amendments

Parliamentary Service Act 1999

Item 1 – Section 7 (definition of APCS)

Item 2 – Section 7 (definition of Australian Fair Pay and Conditions Standard)

Item 3 – Section 7 (definition of AWA)

Item 4 – Section 7 (definition of award)

Item 5 – Section 7 (definition of *collective agreement*)

Item 6 – Section 7

Item 7 – Section 7

Item 8 – Section 7

Item 9 – Section 7

Item 10 – Section 7 (definition of *pre-reform AWA*)

Item 11 – Section 7 (definition of *pre-reform certified agreement*)

Item 12 – Section 7 (definition of *workplace agreement*)

Item 13 – Section 7

Item 14 – Section 7

318. These items ensure that the provisions of the *Parliamentary Service Act 1999* which refer to the AFPCS and WR Act instruments are updated to encompass the NES and FW Act instruments.

Item 15 – Subsection 8(1)

319. This item is a consequential amendment changing a reference to the WR Act to a reference to the FW Act, and updating the heading to section 8.

Item 16 – Subsection 8(2)

320. This item is a consequential amendment changing a reference to the WR Act to a reference to the FW Act and the T&C Bill.

Item 17 – Subsection 23(2)

321. This item updates subsection 23(2) so that the Classification Rules may apply, adopt or incorporate provisions of instruments under the FW Act, rather than APCSs under the WR Act.

Item 18 – Subsection 23(5)

322. This item updates subsection 23(5) to take account of the instruments that can be made under the FW Act.

Item 19 – Subsections 24(1) and (2)

323. This item updates subsections 24(1) and (2), including by inserting new subsection (1A), to take account of the instruments that can be made under the FW Act.

Item 20 – Subsection 24(4)

324. This item clarifies that a determination made under subsection 24(3) can override a subsection 24(1) determination, the AFPCS and the NES.

Item 21 – Subsection 29(1) (note)

325. This item is a consequential amendment changing a reference to the WR Act to a reference to the FW Act.

Part 2 – Saving provision

Item 22 – Saving provision – determinations under subsection 24(1)

326. This item is a saving provision, ensuring the continued operation of any determinations made under subsection 24(1) of the *Parliamentary Service Act 1999* before the commencement of the amendments made to subsection 24(1) by this Bill.

Schedule 16 – Prime Minister and Cabinet

Part 1 – Consequential amendments

Privacy Act 1988

Item 1 – Subsection 6(1) (subparagraph (c) (ii) of the definition of agency)

327. This item includes an organisation that is registered under the FW(RO) Act, or a branch of such an organisation, within the meaning of agency.

Item 2 – After subsection 6E(1A)

Item 3 – Subsection 6E(3)

328. These items include subsections (1B) and (1C) in section 6E of the Privacy Act. New subsection (1C) requires small business operators who are protected action ballot agents to comply with the Privacy Act in connection with their conduct of a protected action ballot under the FW Act. Protected action ballot agents have access to and collect personal information during the course of their conduct of a protected action ballot. This amendment ensures that the handling of that personal information by small business operators who are protected action ballot agents (and who may otherwise have been exempt from the Privacy Act) is regulated by the Privacy Act. The definition of protected action ballot agent for the Privacy Act means a person, other than the Australian Electoral Commission, that conducts a protected action ballot under Part 3-3 of the FW Act.

329. Item 3 defines protected action ballots for the purpose of this proposed section.

330. Proposed subsection 6E(1C) of the Privacy Act has the effect of classifying a small business operator that is an employee association registered or recognised under the FW(RO) Act as an organisation for the purposes of the Privacy Act. The amendment ensures that all registered or recognised employee associations are subject to the Privacy Act when they collect and handle personal information in the course of their union activities.

331. The legislative note under proposed subsections 6E(1B) and (1C) refers to the power for regulations to modify the application of the Privacy Act in different ways for different small business operators. The power is provided for in the *Acts Interpretation Act 1901*. It is not intended at this stage to prescribe any modifications of the Privacy Act in relation to protected action ballot agents or employee associations.

Public Service Act 1999

Item 4 – Section 7 (definition of APCS)

Item 5 – Section 7 (definition of Australian Fair Pay and Conditions Standard)

Item 6 – Section 7 (definition of AWA)

Item 7 – Section 7 (definition of award)

Item 8 – Section 7 (definition of *collective agreement*)

Item 9 – Section 7

Item 10 – Section 7

Item 11 – Section 7

Item 12 – Section 7

Item 13 – Section 7 (definition of *pre-reform AWA*)

Item 14 – Section 7 (definition of *pre-reform certified agreement*)

Item 15 – Section 7 (definition of *workplace agreement*)

Item 16 – Section 7

Item 17 – Section 7

332. These items ensure that the provisions of the *Public Service Act 1999* which refer to the AFPCS and WR Act instruments are updated to encompass the NES and FW Act instruments.

Item 18 – Subsections 8(1)

333. This item is a consequential amendment changing a reference to the WR Act to a reference to the FW Act, and updating the heading to section 8.

Item 19 – Subsection 8(2)

334. This item is a consequential amendment changing a reference to the WR Act to a reference to the FW Act and the T&C Bill.

Item 20 – Subsection 23(2)

335. This item updates subsection 23(2) so that the Classification Rules may apply, adopt or incorporate provisions of instruments under the FW Act, rather than APCSs under the WR Act.

Item 21 – Subsection 23(5)

336. This item updates subsection 23(5) to take account of the instruments that can be made under the FW Act.

Item 22 – Subsections 24(1) and (2)

337. This item updates subsections 24(1) and (2), including by inserting new subsection (1A), to take account of the instruments that can be made under the FW Act.

Item 23 – At the end of subsection 24(4)

338. This item clarifies that a determination made under subsection 24(3) can override a subsection 24(1) determination, the AFPCS and the NES.

Item 24 – Subsection 29(1) (note)

339. This item is a consequential amendment changing a reference to the WR Act to a reference to the FW Act.

Item 25 – Paragraphs 72(3)(a) and (b)

340. This item updates subsection 72(3) to take account of the instruments that can be made under the FW Act.

Item 26 – Paragraph 72(4)(a)

341. This item updates subsection 72(4) to take account of the instruments that can be made under the FW Act.

Item 27 – Subsection 72(6)

342. This item ensures that workplace determination in section 72 has the same meaning as in the FW Act.

Part 2 – Saving provision

Item 28 – Saving provision – determinations under subsection 24(1)

343. This item is a saving provision, ensuring the continued operation of any determinations made under subsection 24(1) of the *Public Service Act 1999* before the commencement of the amendments made to subsection 24(1) by this Bill.

Schedule 17 – Resources, Energy and Tourism

Moomba-Sydney Pipeline System Sale Act 1994

Item 1 – Subsection 3(1) (definition of *award*)

344. This item repeals the definition of award in the *Moomba-Sydney Pipeline System Sale Act 1994*. This allows the term to have its ordinary meaning, which includes awards and NAPSAs continued as transitional award-based instruments under Schedule 3 to the T&C Bill, transitional awards continued under Schedule 20 to the T&C Bill and FW Act modern awards.

Offshore Petroleum and Greenhouse Gas Storage Act 2006

Item 2 – Clause 3 of Schedule 3 (definition of *registered organisation*)

345. This item ensures that organisations registered, and associations recognised, under the FW(RO) Act are included in the definition of registered organisation.

Item 3 – Clause 3 of Schedule 3 (paragraph (a) of the definition of *workforce representative*)

Item 4 – Clause 3 of Schedule 3 (paragraph (a) of the definition of *workforce representative*)

Item 5 – Clause 3 of Schedule 3 (paragraph (b) of the definition of *workforce representative*)

Item 6 – Clause 3 of Schedule 3 (paragraph (b) of the definition of *workforce representative*)

346. These items ensure that organisations registered, and associations recognised, under the FW(RO) Act are included in the definition of workforce representative.

Snowy Hydro Corporatisation Act 1997

Item 7 – Paragraph 23(5)(b)

347. This item ensures that the awards covered by this provision (pre-reform awards within the meaning of the WR Act) continue to be covered by the provision (by updating the reference to the WR Act to a reference to the T&C Bill). The other paragraphs of subsection 23(5) do not need to be updated because they identify instruments and agreements by reference to the WR Act as in force at a particular time.

Schedule 18 – Treasury

Part 1 – Consequential amendments

Commonwealth Volunteers Protection Act 2003

Item 1 – Subsection 4(1) (paragraph (b) of the definition of *Commonwealth authority*)

348. This item provides that organisations registered, and associations recognised, under the FW(RO) Act are excluded from the definition of Commonwealth authority.

Corporations Act 2001

Item 2 – Subparagraphs 764A(1)(d)(i), (e)(i) and (f)(i)

Item 3 – Paragraph 765A(1)(u)

349. These items ensure that employee organisations registered, and employee associations recognised, under the FW(RO) Act are exempt from certain provisions of the *Corporations Act 2001* relating to financial products.

Financial Sector (Business Transfer and Group Restructure) Act 1999

Item 4 – Subsection 43(7)

350. This item replaces a reference to the WR Act with a reference to the FW Act, the FW(RO) Act and the T&C Bill.

Fringe Benefits Tax Assessment Act 1986

Item 5 – Paragraph 65J(1)(f)

351. This item ensures that associations registered and recognised under the FW(RO) Act, rather than the WR Act, are referred to in this provision.

Income Tax Assessment Act 1997

Item 6 – Section 50-15 (table item 3.1)

352. This item ensures that associations registered and recognised under the FW(RO) Act, rather than the WR Act, are referred to in this provision.

Item 7 – Paragraph 290-80(1)(b)

353. This item updates the reference to a NAPSA to refer to a NAPSA within the meaning of the T&C Bill.

Item 8 – Subsection 290-80(2) (note)

Item 9 – At the end of section 290-80

354. These items remove references to WR Act agreements and replace those references with a reference to enterprise agreements within the meaning of the FW Act, and clarify that a determination does not include a workplace determination made under the FW Act or the WR Act.

Income Tax (Transitional Provisions) Act 1997

Item 10 – Paragraph 82-10(1)(a)

355. This item ensures that a payment received under a collective agreement or AWA continues to be covered by section 82-10 by updating the references to the WR Act to references to the T&C Bill.

Insurance Act 1973

Item 11 – Subsection 3(1) (paragraph (e) of the definition of *insurance business*)

356. This item is a consequential amendment changing the reference to an organisation within the meaning of the WR Act to an organisation registered or recognised under the FW(RO) Act.

Life Insurance Act 1995

Item 12 – Paragraph 11(3)(b)

357. This item is a consequential amendment changing the reference to an organisation within the meaning of the WR Act to an organisation registered or recognised under the FW(RO) Act.

Superannuation Guarantee (Administration) Act 1992

Item 13 – Paragraph 5B(1)(a)

Item 14 – Paragraph 5B(1)(aa)

358. These items are consequential on the replacement of the AIRC by FWA.

Item 15 – Paragraph 5B(1)(b)

Item 16 – Subsection 5B(2)

359. These items update references to the WR Act to references to the FW Act, the FW(RO) Act and the T&C Bill.

Item 17 – Section 12A**Item 18 – At the end of subsection 32C(6)**

360. These items ensure that references to various industrial instruments are given their meaning under either the FW Act or the T&C Bill. AWA, collective agreement, ITEA, NAPSA, old IR agreement, pre-reform AWA, pre-reform certified agreement and preserved State agreement all have their meaning as defined in item 4 of Schedule 2 of the T&C Bill. Enterprise agreement has the same meaning as in the FW Act and workplace determination means a workplace determination made under the FW Act or the WR Act.

Item 19 – Subsection 32C(6) (note)**Item 20 – Subsection 32C(6A) (note)****Item 21 – Subsection 32C(6B) (note)**

361. These items update references to the WR Act to references to the T&C Bill or the FW Act.

Item 2 – Subsection 32C(7)

362. This item ensures that superannuation contributions under old Victorian agreements continue to satisfy the choice of fund requirements.

Superannuation Industry (Supervision) Act 1993**Item 23 – Subsection 10(1) (paragraph (c) of the definition of *registered organisation*)**

363. This item ensures that organisations registered, and associations recognised, under the FW(RO) Act are covered by the definition of registered organisation.

Trade Practices Act 1974**Item 24 – Subsection 45DD(4)****Item 25 – Subsection 45DD(4)****Item 29 – Subclause 45DD(4) of the Schedule****Item 30 – Subclause 45DD(4) of the Schedule**

364. These items remove the references to an industrial instrument within the meaning of the WR Act and replace them with a reference to a workplace instrument within the meaning of the FW Act. There is no definition of industrial instrument in the FW Act but there is a definition of workplace instrument in the FW Act which covers similar instruments.

Item 26 – Subsection 45DD(8) (note)

Item 31 – Subclause 45DD(6) of the schedule (note)

365. These items are consequential amendments changing the reference to section 170MT of the WR Act to a reference to the equivalent provision of the FW Act (section 415). Sections 170MT and 415 are the sections that deal with immunity in relation to industrial action.

Item 27 – Subsection 87AA(2) (definition of *industrial authority*)

Item 28 – Subsection 93AB(11) (definition of *trade union*)

366. There were definitions of State industrial authority and trade union in the WR Act on which the *Trade Practices Act 1974* relied. There are no definitions of these terms in the FW Act. These amendments provide definitions of both industrial authority and trade union for the purposes of the Trade Practices Act.

Part 2 – Application provision

Item 32 – Superannuation Guarantee (Administration) Act 1992

367. This item ensures that, despite the amendments made to the *Superannuation Guarantee (Administration) Act 1992* at items 13,14, 15 and 16 of this Schedule, section 5B of that Act continues to operate in relation to the AIRC, the AFPC and the WR Act as they are preserved by the T&C Bill.

Schedule 19 – Veterans' Affairs

Military Rehabilitation and Compensation Act 2004

Item 1 – Subsection 89(3) (note 1)

Item 2 – Subsection 132(2) (note 1)

Item 3 – Paragraph 178(a)

Item 4 – Section 179

Item 5 – Subparagraph 185(2)(b)(ii)

Item 7 – Paragraph 193(2)(b)

368. These items replace references to the WR Act federal minimum wage or an APCS with references to the relevant minimum wage set by a national minimum wage order under the FW Act.

Item 6 – Subparagraph 185(2)(b)(ii)

Item 8 – Paragraph 193(2)(b)

369. These items are consequential amendments changing references to the WR Act to references to the FW Act.

Schedule 20 – Regulations

Item 1 – Regulations may deal with transitional etc. matters

Item 2 – Regulations may make consequential amendments of Acts

370. These items include a power for regulations to be made to enable any consequential issues that emerge in the future to be dealt with without requiring a further Bill.

Item 3 – Regulations may take effect from date before registration

371. This item allows for regulations to be made with retrospective effect. This is necessary to prevent unforeseen difficulties that may arise in the transition from the legal framework of the WR Act to the new Fair Work system.

372. However, as it would not be appropriate for a regulation to impose retrospective liability under a civil penalty provision, any regulations made under this power may not retrospectively subject a person to civil liability. The reason for this regulation making power is to deal with any issues that have been overlooked in the Bill and not to penalise a person for any potential breaches of a regulation that may apply retrospectively. Subitem (2) provides that if a regulation takes effect before it is registered, a person cannot be convicted of an offence or ordered to pay a penalty in relation to conduct contravening the regulation that occurred prior to registration.