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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**FAIR WORK AMENDMENT BILL 2012**

EXPLANATORY MEMORANDUM

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

## FAIR WORK AMENDMENT BILL 2012

### OUTLINE

In 2009 the Government committed to undertake a review of the *Fair Work Act 2009* (FW Act) within 2 years of its full implementation. On 22 December 2011 the Minister announced an independent panel of 3 experts to conduct a post-implementation review of the legislation in accordance with this commitment. The terms of reference for the review were wide-ranging, encompassing an assessment as to whether the legislation was meeting its objectives and any areas for improvement. The review also had to meet the best practice regulation requirements for a review as outlined in the Best Practice Regulation Handbook.

The Fair Work Act Review Panel (the Panel) completed its deliberations and delivered its report – *Towards more productive and equitable workplaces: An evaluation of the fair work legislation* (the Report) – in June 2012. The Report found that the FW Act was broadly meeting its objectives and did not require wholesale change. The Panel made 53 mainly technical recommendations to improve the operation of the legislation without compromising productivity and fairness in the workplace. The Office of Best Practice Regulation (OBPR) in the Department of Finance and Deregulation confirmed the Report met the best practice regulation requirements.

Consistent with the Government's approach to consultation on workplace relations legislation, the Government has consulted widely in developing its response to the Report. The Fair Work Amendment Bill 2012 (the Bill) represents a first tranche response to the Report. As the Minister has announced, the Bill includes mainly technical and clarifying amendments recommended by the Panel and where there is broad consensus among stakeholders. The Bill also includes additional amendments in relation to Fair Work Australia (FWA) and the process for selecting superannuation funds as default funds in modern awards.

The Bill will make:

- technical amendments in relation to striking out applications to vary modern awards in certain circumstances and in relation to the parties able to apply to amend modern awards
- technical amendments in relation to the notification requirements for scope order applications and the form of the notice of employee representational rights
- amendments to clarify that opt-out terms cannot be included in enterprise agreements, that enterprise agreements cannot be made with only one employee and that a union official from one union cannot act as a bargaining representative where that union does not have coverage
- amendments to align the time limits for lodging unfair dismissal claims and general protections claims involving dismissal at 21 days and to provide new measures in relation to dismissing unfair dismissal applications and costs orders in certain circumstances

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- amendments to clarify which union members are able to vote on and participate in protected industrial action and the conduct of protected action ballots, including allowing for electronic voting and requiring ballots to be conducted expeditiously
  - structural amendments to FWA including:
    - changing the name to the Fair Work Commission (FWC), and necessary consequential and transitional amendments
    - providing for the appointment of the General Manager to be made on the nomination of the FWC President
    - allowing stay orders to be made by Presidential Members
    - allowing for the appointment of acting Commissioners
    - creating 2 statutory positions of Vice President
    - including a process to deal with complaints against FWC members and streamlining provisions dealing with conflicts of interest of members, and
    - other minor amendments to improve the conduct of matters before the FWC.

The Bill will also amend the FW Act to give effect to the Government's response to the Productivity Commission's *Report into Default Superannuation Funds in Modern Awards* (Report No. 60). The Bill will:

- introduce new requirements in relation to modern award terms about default superannuation, and a process under which the FWC will review default fund terms every 4 years, at the same time as the 4 yearly review of modern awards (the first such review must be conducted as soon as practicable after 1 January 2014), and
- provide for the establishment of the Expert Panel, which will subsume the functions of the Minimum Wage Panel (MWP) and will include members with relevant expertise to allow them to be appointed to the Expert Panel assessing default superannuation funds or to the Expert Panel responsible for the annual minimum wage review.

The Bill was developed following extensive consultation with superannuation industry stakeholders, members of the National Workplace Relations Consultative Council and their technical advisers through the Committee on Industrial Legislation, and State and Territory government officials.

Regulation Impact Statements on proposed reforms to unfair dismissal and general protections provisions and changes to the selection of default superannuation funds in modern awards were prepared by the Department of Education, Employment and Workplace Relations and assessed as adequate by the OBPR. These Regulation Impact Statements can be found at <http://ris.finance.gov.au>.

## **STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### **Fair Work Amendment Bill 2012**

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

### **Overview of the Bill**

The object of the *Fair Work Act 2009* (FW Act) is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians. This Bill makes amendments to improve the operation of the FW Act in accordance with a number of Panel recommendations. The Bill also makes amendments in response to recommendations of the Productivity Commission in its final report on *Default Superannuation Funds in Modern Awards* (released on 12 October 2012), additional amendments to the structure and operation of the FWC and a number of technical amendments.

### **Human rights implications**

This Bill engages the following rights:

- the right to just and favourable conditions of work under Article 7 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)
- the right to freedom of association (including the right to form and join trade unions, and the right of trade unions to function) under Article 8(1) of the ICESCR and Article 22 of the *International Covenant on Civil and Political Rights* (ICCPR), and the right to strike under Article 8(1) of the ICESCR
- the right to work, and the right not to be unjustly deprived of work, under Article 6(1) of the ICESCR
- rights to equality and non discrimination in employment under Articles 2(1) and 26 of the ICCPR, Article 2 of the ICESCR, Article 5(e)(i) and (ii) of the *Convention on the Elimination of All Forms of Racial Discrimination* (CERD), Article 11 of the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) and Article 27 of the *Convention on the Rights of Persons with Disabilities* (CRPD)
- the right to privacy and reputation under Articles 17 and 14 of the ICCPR, and
- the right to a fair hearing under Article 14 of the ICCPR.

In addition, the Bill engages rights protected by the International Labour Organisation (ILO) *Right to Organise and Collective Bargaining Convention, 1949 (No. 98)*, which protects the right of employees to collectively bargain for terms and conditions of employment.

### Right to work and rights in work

Article 7 of the ICESCR sets out the right to just and favourable conditions of work, including:

- remuneration that provides all workers, as a minimum, with fair wages and equal remuneration for work of equal value without distinction of any kind
- safe and healthy working conditions
- equal opportunity to be promoted in employment to an appropriate higher level, subject to no considerations other than those of seniority and competence, and
- rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

### *Default superannuation and Expert Panel*

Schedule 1 to the Bill will introduce new requirements in relation to terms of modern awards dealing with default superannuation arrangements, and a process under which the FWC will review default fund terms of modern awards every 4 years, at the same time as the 4 yearly review of modern awards. The first such review will occur as soon as practicable after 1 January 2014.

Schedule 1 establishes a process for the FWC to assess applications from superannuation funds that wish to have generic MySuper products included as default funds in modern awards. An Expert Panel of the FWC (established by Schedule 2) will make determinations in relation to such applications and publish a list of generic MySuper products that it considers are in the best interests of default fund employees covered by modern awards, having regard to a number of criteria relating to the performance and governance of superannuation funds.

A Full Bench of the FWC must then review default superannuation fund terms in modern awards and ensure that the default fund term in each modern award specifies between 2 and 10 (or a greater number, if appropriate) of the funds that were included on the Default Superannuation List by the Expert Panel and which the Full Bench considers best meet the interests of employees to whom the particular award applies.

These amendments promote the right to just and favourable conditions of work by improving the transparency, objectivity and contestability of default superannuation fund selection and increasing competition within the sector.

Schedule 2 to the Bill provides for the establishment of the Expert Panel, which will subsume the functions of the Minimum Wage Panel (MWP). As a consequence, the MWP will be abolished.

The Expert Panel will include Members with expertise in finance, investment management and superannuation when assessing default superannuation funds, and members with expertise in workplace relations, economics, social policy or finance, business or commerce when considering minimum wages. The FWC's ability to set just and fair minimum wages will not be affected.

#### *Minimum terms and conditions of employment*

Under the FW Act the National Employment Standards and modern awards provide a safety net of minimum terms and conditions of employment. Schedule 3 to the Bill makes technical amendments concerning the standing of organisations to apply for variations of modern awards, and would insert a note highlighting the FWC's power to dismiss applications to make, vary or revoke modern awards. These amendments do not alter rights contained in modern awards. Part 2 of Schedule 10 to the Bill replaces the reference to 'unpaid personal leave' with a reference to 'unpaid parental leave' in paragraph 84A(b)(ii) to correct a typographical error.

#### Freedom of association

Article 22 of the ICCPR protects the right to freedom of association, including the right to form and join trade unions. Article 8(1) of the ICESCR protects:

- the right to form and join trade unions
- the right of trade unions to function freely subject to necessary limitations in the interests of national security, public order or the protection of the rights and freedoms of others, and
- the right to strike, provided it is exercised in conformity with the laws of the particular country.

#### *Industrial action*

The FW Act permits employees and employers to engage in protected industrial action in support of claims for an enterprise agreement provided that certain requirements are satisfied. One of these requirements is that protected industrial action must be authorised by a protected action ballot of employees.

Schedule 7 to the Bill clarifies the eligibility of certain employees who are union members and who are acting as a bargaining representative to be included in a protected action ballot, requires protected action ballots to be conducted expeditiously and confirms that protected action ballots can be conducted by electronic voting methods. These amendments will enhance freedom of association by promoting the efficient and effective conduct of protected action ballots.

#### Collective bargaining

The ILO *Right to Organise and Collective Bargaining Convention, 1949 (No. 98)* protects the right of employees to collectively bargain for terms and conditions of employment. It requires States Parties (among other things) to take measures appropriate to national conditions to

encourage and promote machinery for voluntary negotiation between employers or employers' organizations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

#### *Representation in enterprise bargaining*

Part 2-4 of the FW Act provides a legislative framework for the making of enterprise agreements through a process of collective bargaining in good faith. Employees are entitled to be represented in bargaining for a proposed enterprise agreement by a bargaining representative of their choice, including an employee organisation (i.e. a union) of which they are a member. The FW Act also requires an employer to give notice to each employee of their right to be represented in bargaining for an enterprise agreement by a bargaining representative.

Part 2 of Schedule 4 to the Bill will make clear that an official of an employee organisation cannot be a bargaining representative for an employee unless that organisation is entitled to represent the interests of the employee in relation to work that will be performed under the proposed enterprise agreement. Part 5 of Schedule 4 will clarify that notices of employee representational rights must comply with form and content requirements set out in the regulations.

Parts 1 and 3 of Schedule 4 to the Bill strengthen collective bargaining by ensuring that enterprise agreements cannot be made with a single employee and by prohibiting terms which enable employees to opt out of an enterprise agreement. Part 4 of Schedule 4 provides that an applicant for a scope order must take 'all reasonable steps' to inform other bargaining representatives for the proposed agreement. Scope orders determine the employees to be covered by a proposed enterprise agreement where the parties are in disagreement about the scope of that agreement.

These amendments will enhance collective bargaining by providing greater certainty and clarity about employee rights to be represented in that process, and by ensuring the integrity of collectively bargained terms and conditions of employment.

#### Right not to be unjustly deprived of work

Article 6(1) of the ICESCR protects the right to work, and the United Nations Committee on Economic Social and Cultural Rights has stated that this encompasses the right not to be unjustly deprived of work.

#### *Unfair dismissal*

Part 3-2 of the FW Act provides remedies for employees who are unfairly dismissed. Schedule 6 amends certain aspects of procedures for dealing with unfair dismissal applications.

Part 1 of Schedule 6 extends the time limit for lodging unfair dismissal applications with the FWC from 14 days to 21 days (the 21 day period aligns with the new time limit for General Protections applications set by Part 1 of Schedule 5).

Section 587 of the FW Act currently enables the FWC to dismiss applications under the FW Act (including unfair dismissal applications) in circumstances where the application is not made in accordance with the Act, is frivolous or vexatious or has no reasonable prospects of success. Part 2 of Schedule 6 additionally enables the FWC to dismiss an unfair dismissal application in circumstances where the applicant has unreasonably failed to attend an FWC conference or hearing, to comply with an FWC order, or to discontinue an application after a settlement agreement has been concluded. This power is only intended to be exercised in very limited circumstances where there is clear evidence for the FWC to be satisfied of the unreasonable conduct of the applicant.

Parts 3 and 4 of Schedule 6 to the Bill enhance the FWC's ability to order costs against a party and/or their representative in unfair dismissal matters. The new 'party costs' provision applies where a party to an unfair dismissal matter (either an employee or employer) has caused the other party to incur costs by an unreasonable act or omission. Under section 401 of the FW Act, lawyers and paid agents may currently be exposed to costs orders if FWA has granted permission for a person to be represented in an unfair dismissal matter. The Bill will provide for the FWC to order costs against a lawyer or paid agent whether or not the FWC has given permission for a person to be represented.

The amendments strike a balance between the need to protect workers from unfair dismissal, and to provide a deterrent against unreasonable conduct during proceedings. The amendments will enable costs orders to be more easily made in the case of unreasonable conduct but will not prevent genuine claims from being pursued. They will discourage frivolous and speculative claims and assist in the efficient resolution of claims by encouraging all parties to approach proceedings in a reasonable manner. These measures are reasonable and proportionate to address the time and expense that an unreasonable conduct by a participant and/or their representative may cause another party to incur.

### *General Protections*

The general protections in Part 3-1 of the FW Act prohibit adverse action against a person because:

- that person has a workplace right (such as an entitlement under a modern award or enterprise agreement)
- that person is a member or officer of an industrial association or engages in industrial activity (such as participating in a lawful activity organised by, or representing the views of, an industrial association), or
- of that person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

Adverse action includes dismissal of an employee or termination of an independent contractor's contract, and includes other action such as prejudicially altering the position of an employee or



independent contractor. Coercion and misrepresentations in relation to workplace rights and industrial activities are also prohibited.

Part 1 of Schedule 5 to the Bill shortens the time limit for applying to the FWC to mediate or conciliate a dispute about a dismissal in contravention of Part 3-1 from 60 days to 21 days. The FWC will retain its existing ability to accept late applications in exceptional circumstances, taking into account factors such as the reason for delay, fairness and the merits of the case.

This amendment will align the timeframe for lodging dismissal-related general protections claims with the new 21 day time limit for lodging unfair dismissal applications. This will provide greater clarity to applicants and respondents and will require applicants to determine at the outset which claim they intend to pursue. Where an employee challenges a dismissal, it is in the interest of both the employee and the employer for the matter to be resolved quickly so that, in the event of a successful challenge, the employee can return to their original position with minimal impact on relationships and management of the business. Together with the amendment made by Part 1 of Schedule 6, this amendment balances the need to provide sufficient time for employees to consider the most appropriate application, and the need to provide certainty for employers in relation to the types of claims they may be exposed to. The FWC's discretion to accept late applications protects employees in relation to how the time limit is applied.

Part 2 of Schedule 5 clarifies that workplace rights apply to 'persons' which include employees, employers and contractors.

#### *FWC Members – disclosure of conflicts of interest*

Section 640 of the FW Act currently requires FWC members to disclose potential conflicts to the President. Part 2 of Schedule 8 amends section 640 to provide that a potential conflict must also be disclosed to persons making (or likely to make) a submission in a matter.

Paragraph 643(c) of the FW Act currently requires the Governor-General to terminate the appointment of an FWC member (other than the President) if the FWC member fails, without reasonable excuse, to comply with the requirement to disclose potential conflicts of interest. Part 2 of Schedule 8 removes this ground for termination. Any concerns about an FWC Member's failure to make a disclosure in accordance with the expanded disclosure requirements in Part 2 of Schedule 8 would be able to be dealt with under the complaints handling framework set out in Part 7 of Schedule 8 (see below).

#### *Complaints against FWC Members*

FWC members have security of tenure under the FW Act. Under section 641 of the FW Act, the Governor-General may terminate an FWC Member's appointment only on the request of both Houses of Parliament, on the grounds of proved misbehaviour or physical or mental incapacity. The Governor-General may also suspend an FWC Member's appointment on the grounds of misbehaviour or physical or mental incapacity under section 642. This requires the Minister to table a statement setting out the grounds for suspension, and provides for the Governor-General

to terminate the FWC Member's appointment if requested by both Houses of Parliament, otherwise the suspension lapses.

Part 7 of Schedule 8 to the Bill establishes a process for the handling of complaints against FWC Members, and for the development of a code of conduct for FWC Members. These provisions enable the FWC President to take measures necessary to maintain public confidence in the FWC, such as temporarily restricting a Member's duties. Part 7 of Schedule 8 also provides for the FWC President to refer a complaint to the Minister (following investigation and report) if a complaint has been substantiated and the President considers that Parliament should consider asking the Governor-General to terminate the Member's appointment under section 641. Part 7 of Schedule 8 provides certain immunities for those who participate in a complaints handling process, specifically complaint handlers, witnesses, and lawyers.

These amendments will strengthen the right of FWC Members not to be unjustly deprived of work by enabling the formulation of standards of conduct for FWC Members and by ensuring that complaints can be dealt with in a structured way.

#### Rights to equality and non-discrimination in employment

Rights to equality and non-discrimination in employment are provided under Articles 2(1) and 26 of the ICCPR, Article 2 of the ICESCR, Article 5(e)(i) and (ii) of the CERD, Article 11 of the CEDAW and Article 27 of the CRPD.

Section 351 of the FW Act protects an employee or prospective employee from adverse action because of the person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, political opinion, national extraction or social origin.

Part 1 to Schedule 3 will shorten the time limit for making a General Protections application to the FWC relating to dismissal for the reasons addressed above.

#### Right to privacy and reputation

Article 17 of the ICCPR prohibits arbitrary or unlawful interference with an individual's privacy, family, home or correspondence, and protects a person's honour and reputation from unlawful attacks.

As noted above, the amendments to be made by Part 7 of Schedule 8 to the Bill provide a structured process for the consideration and handling of complaints about FWC Members. This may give rise to sensitive reports or other documents about an FWC Member or another person. These documents require a degree of confidentiality to avoid improper interference in the complaints handling process and the possibility of damage to the reputation of a Member and the operation of the FWC.

Participation by an FWC Member in a complaint handling process is voluntary. In circumstances where a person provides personal information in a complaint handling process, the

amendments together with the provisions of the *Privacy Act 1988* and the *Freedom of Information Act 1982* as they apply to the FWC will provide a fair and appropriate complaint handling process while safeguarding the privacy of individuals.

### Right to a fair hearing

Article 14 of the ICCPR protects the right to a fair hearing, including the right to a fair and public hearing before a competent, independent and impartial court or tribunal established by law.

### *FWC changes*

The FW Act established FWA as an independent tribunal with a range of functions and powers to deal with workplace relations matters. Section 562 of the FW Act confers jurisdiction on the Federal Court in relation to any matter arising under the Act.

Schedule 9 to the Bill renames FWA as the FWC and makes necessary consequential amendments to the FW Act and other Acts. Schedule 8 to the Bill amends provisions of the FW Act relating to the operation and organisation of the FWC. These amendments deal with the conduct of matters before the FWC, the disclosure of interests by FWC Members, the handling of complaints against FWC Members and the appointment of 2 Vice Presidents and the appointment of Commissioners on an acting basis.

These amendments reinforce the right to a fair hearing before a competent, independent and impartial tribunal by enhancing the accountability, impartiality efficiency and effectiveness of the FWC.

### *Costs*

Section 570 of the FW Act provides for courts exercising jurisdiction under the FW Act to award costs against a party to proceedings (including appeals) only in circumstances where the court is satisfied that the party instituted proceedings vexatiously or without reasonable cause, the party's unreasonable act or omission caused the other party to incur costs, or the party unreasonably refused to participate in a matter before FWA that arose from the same facts as the court proceedings. Part 1 of Schedule 10 to the Bill will amend section 570 of the FW Act so that it operates in relation to matters arising under the FW Act, rather than in relation to courts exercising jurisdiction under the FW Act. This amendment confirms that the FW Act is generally a 'no costs' jurisdiction (including in appeal proceedings).

**FINANCIAL IMPACT STATEMENT**

Nil.

## **NOTES ON CLAUSES**

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

FWC	Fair Work Commission
FW Act	<i>Fair Work Act 2009</i>
FW (T&C) Act	<i>Fair Work (Transitional Provisions and Consequential Amendments) Act 2009</i>
FW (RO) Act	<i>Fair Work (Registered Organisations) Bill 2009</i>

### **Clause 1 – Short Title**

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

### **Clause 2 – Commencement**

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

### **Clause 3 – Schedules**

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

## **SCHEDULE 1 – DEFAULT SUPERANNUATION**

### ***Fair Work Act 2009***

#### **Overview**

4. Most modern awards specify a particular fund or funds ('default funds') to which employers are required to make compulsory superannuation contributions for the benefit of employees to whom the modern award applies and who have not chosen a fund. A failure to make contributions for such employees to a default fund listed in the award constitutes a contravention of the award, exposing the employer to civil penalties under the FW Act.
5. Schedule 1 amends the FW Act to introduce a process under which the FWC will review default fund terms in modern awards every 4 years, at the same time as the 4 yearly review of modern awards. The first such review must be conducted as soon as practicable after 1 January 2014.
6. The amendments in Schedule 1 give effect to the Government's response to the Productivity Commission's *Report into Default Superannuation Funds in Modern Awards* (Report No. 60), which was submitted to the Government on 5 October 2012. Four yearly reviews of default fund terms in modern awards are intended to ensure a transparent and contestable process that results in only those superannuation funds which are in the best interests of employees being included as default funds in modern awards. The amendments will operate in addition to the requirement that default funds are authorised by the Australian Prudential Regulation Authority (APRA) to offer a MySuper product.
7. Four yearly reviews are to be conducted by the FWC in 2 stages. In the first stage, the Expert Panel of the FWC (constituted by both full-time members and experts in finance, investment management and/or superannuation) must make and publish a 'Default Superannuation List'. Superannuation funds that offer a generic MySuper product may apply to the Expert Panel to have the product included on the list. In order for an application to be successful, the Expert Panel must be satisfied, having regard to information provided in the application, taking into account relevant criteria and submissions from any interested parties, that including the product on the list is in the best interest of default fund employees to whom modern awards apply or a particular class of those employees.
8. In the second stage, a Full Bench of the FWC must review the default fund term in each modern award and ensure that each modern award specifies at least 2, but no more than 10, superannuation funds from those included on the 'Default Superannuation List' and which the Full Bench is satisfied are in the best interests of default fund employees to whom the modern award applies. The Full Bench may include more than 10 funds if satisfied that it is warranted, having regard to the range of occupations of employees covered by the modern award. The FWC must also conduct the second stage in an open and transparent way and have regard to the views of employees and employers covered by the modern award, and organisations entitled to represent their industrial interests.

9. The new requirements and 4 yearly review process in relation to default superannuation funds in modern awards do not affect the ability of an employee to choose a fund, or employers and employees to agree to include a particular default fund in an enterprise agreement, whether or not that fund is included in the modern award they are covered by.

***Fair Work Act 2009***

**Item 1 – Section 12**

**Item 2 – Section 12**

**Item 3 – Section 12**

**Item 4 – Section 12**

**Item 5 – Section 12**

**Item 6 – Section 12**

**Item 7 – Section 12**

**Item 8 – Section 12**

10. Items 1-8 insert new definitions in section 12 of the FW Act.

11. ‘Corporate MySuper product’ is defined by reference to new subsection 23A(3).

12. ‘Default fund term’ is defined by reference to new subsection 149C(2).

13. ‘Default Superannuation List’ is defined by reference to new subsection 156B(1).

14. ‘First stage criteria’ is defined by reference to new section 156F.

15. ‘Generic MySuper product’ is defined by reference to new subsection 23A(1).

16. ‘Second stage test’ is defined by reference to new subsection 156H(2).

17. ‘Superannuation fund’ is defined as a superannuation fund or a superannuation scheme.

18. ‘Tailored MySuper product’ is defined by reference to new subsection 23A(2).

**Item 9 – At the end of Division 4 of Part 1-2**

19. Item 9 inserts a new section 23A which provides definitions for terms relating to superannuation.

20. New subsection 23A(1) defines ‘generic MySuper product’ as a MySuper product that is not a tailored MySuper product or a corporate MySuper product.

21. New subsection 23A(2) defines ‘tailored MySuper product’ as a MySuper product in relation to which section 29TB of the *Superannuation Industry (Supervision) Act 1993* is satisfied.

22. New subsection 23A(3) defines ‘corporate MySuper product’ by reference to a number of terms within the *Superannuation Industry (Supervision) Act 1993*. A corporate MySuper product is an employer-specific product which is not offered by a public offer superannuation fund. The definition of a corporate MySuper product does not include a generic MySuper product that may have been white-labelled or discounted for a particular employer.

23. New subsection 23A(4) provides that a reference in the FW Act to a superannuation fund doing a thing in relation to a matter is a reference to the RSE licensee (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) of the fund doing that thing. For example, RSE licensees of superannuation funds may make written applications to the FWC to have a generic MySuper product included on the Default Superannuation List.

**Item 10 – Section 132 (paragraph relating to Division 4)**

**Item 11 – Section 132 (after the paragraph relating to Division 4)**

24. Items 10 and 11 amend the Guide to Part 2-3 of the FW Act to make it clear that default fund terms in modern awards are not to be reviewed by the FWC as part of 4 yearly reviews of modern awards under Division 4 but are to be reviewed every 4 years under new Division 4A.

**Item 12 – Section 149A**

25. Item 12 repeals section 149A of the FW Act (which is expected to be inserted into the FW Act by the Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Bill 2012).

26. However, despite the repeal of section 149A, item 1 of Schedule 11 of this Bill amends the FW Act to provide that the section will continue in force in relation to a modern award that is made before 1 January 2014 and is not varied on or after that day as part of a 4 yearly review of default fund terms.

**Item 13 – At the end of Subdivision C of Division 3 of Part 2-3**

27. Item 13 inserts new sections 149B, 149C and 149D into Subdivision C of Division 3 of Part 2-3 of the FW Act, which deals with terms that must be included in modern awards.

28. New section 149B provides that a modern award must include a term requiring employers to make such superannuation contributions to a superannuation fund for the benefit of an employee as will avoid the employer being liable to pay the superannuation guarantee charge under the *Superannuation Guarantee Charge Act 1992* with respect to that employee. This provision will ensure that if an employer is required to make superannuation contributions for an employee to whom a modern award applies in order to avoid paying the superannuation charge,



the employee will also have an entitlement to be paid those contributions under the terms of the modern award. The FWC will be required to include the term in all modern awards from the time awards are varied as part of the first 4 yearly review of default fund terms. The term will apply in respect of both default fund employees and employees who have a chosen fund.

29. New sections 149C and 149D provide that modern awards must include ‘default fund terms’ which require any superannuation contributions for employees who have no chosen fund to be made to certain funds. Such contributions must be made to a superannuation fund specified in the award, unless the contributions are made to a ‘defined benefit scheme’ in respect of a ‘defined benefit member’, an exempt public sector superannuation scheme, a State public sector superannuation scheme (if a State law requires the contributions to be made to such a scheme for the benefit of the employee), or a transitionally authorised superannuation fund.

30. New section 149C provides that modern awards must include a ‘default term’, and defines such a term as one which requires, permits or prohibits contributions to a superannuation fund for the benefit of a ‘default fund employee’ who has no chosen fund (within the meaning of the *Superannuation Guarantee (Administration) Act 1992*).

31. New subsection 149D(1) provides that a default fund term must require an employer to make contributions, for the benefit of a default fund employee, to a superannuation fund that is specified in the default fund term in relation to the fund’s generic MySuper product if:

- the employer will be liable for the superannuation guarantee charge under the *Superannuation Guarantee Charge Act 1992* if it does not make contributions to a superannuation fund for the benefit of the employee; and
- the employer is not making the contributions to a superannuation fund referred to in subsections 149D(2), (3), (4) or (5).

32. The requirement in new subsection 149D(1) is consistent with the model superannuation term formulated by the Australian Industrial Relations Commission in the award modernisation process and which is contained in most current modern awards.

33. It is intended that funds in relation to their generic MySuper products are specified, or named, in default fund terms. By contrast, the funds or schemes referred to in new subsections 149D(2), (3), (4) and (5) should be referred to in modern awards more generally as a category of fund to which contributions are permitted to be made for default fund employees in certain circumstances .

34. New subsection 149D(2) provides that a default fund term of a modern award must permit an employer covered by the award to make contributions, for the benefit of a default fund employee, to a superannuation fund in relation to which a default fund employee is a defined benefit member.

35. New subsection 149D(3) provides that a default fund term of a modern award must permit an employer covered by the award to make contributions, for the benefit of a default fund employee, to a superannuation fund that is an exempt public sector superannuation scheme.

36. New subsection 149D(4) provides that a default fund term of a modern award must permit an employer covered by the award to make contributions, for the benefit of a default fund employee, to a superannuation fund that:

- is a public sector superannuation scheme (within the meaning of the *Superannuation Industry (Supervision) Act 1993*), and
- a law of a State requires the employer to make contributions to, for the benefit of the employee.

37. New subsection 149D(5) provides that a default fund term of a modern award must permit an employer covered by the award to make contributions, for the benefit of a default fund employee, to a superannuation fund in relation to which a transitional authorisation is in operation under new section 156K.

#### **Item 14 – Section 155A**

38. Item 14 repeals section 155A of the FW Act (which is expected to be inserted into the FW Act by the Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Bill 2012).

39. However, despite the repeal of section 155A, item 1 of Schedule 11 of this Bill amends the FW Act to provide that the section will continue in force in relation to a modern award that is made before 1 January 2014 and is not varied on or after that day as part of a 4 yearly review of default fund terms.

#### **Item 15 – At the end of subsection 156(2)**

40. Item 15 amends subsection 156(2) of the FW Act to insert a new paragraph 156(2)(c), which provides that the FWC must not review, or make a determination to include or vary, a default fund term of a modern award as part of a 4 yearly review of modern awards. This is to make clear that 4 yearly reviews of modern awards and 4 yearly reviews of default fund terms are distinct reviews even though they are to be conducted by the FWC within the same timeframes.

#### **Item 16 – Subsection 156(2) (note)**

#### **Item 17 – At the end of subsection 156(2)**

41. Item 16 omits the word ‘Note’ at the end of subsection 156(2) and substitutes it with ‘Note 1’. Item 17 inserts a new Note 2 at the end of subsection 156(2), which directs the reader to new Division 4A for reviews of default fund terms of modern awards.

**Item 18 – After Division 4 of Part 2-3**

42. Item 18 inserts new Division 4A after Division 4 of Part 2-3 of the FW Act.

***Division 4A – 4 yearly reviews of default fund terms of modern awards***

43. New Division 4A provides for a review of default fund terms of modern awards every 4 years. The review is to be conducted by the FWC in 2 stages. Four yearly reviews of default fund terms are intended to ensure that only superannuation funds which meet certain criteria and are in the best interests of relevant employees are included as default funds in modern awards.

***Subdivision A – 4 yearly reviews of default fund terms***

44. New Subdivision A deals with the timing of 4 yearly reviews of default fund terms in modern awards and provides that such reviews are to be conducted in 2 stages.

45. New subsection 156A(1) provides that the FWC must conduct a 4 yearly review of default fund terms, starting as soon as practicable after each 4th anniversary of the commencement of Part 2-3 of the FW Act. The timing of 4 yearly reviews of default fund terms aligns with 4 yearly reviews of modern awards conducted under Division 4 of Part 2-3. The first 4 yearly review of default fund terms is to commence as soon as practicable after 1 January 2014.

46. A note to new subsection 156A(1) indicates that the President of the FWC may give directions as to the manner in which the FWC is to perform its functions, exercise its powers or deal with matters in relation to the conduct of 4 yearly reviews of default funds (see section 582).

47. New subsection 156A(2) provides that 4 yearly reviews of default terms are to be conducted in 2 stages. New subsection 156A(3) provides that in the first stage of the 4 yearly review, the FWC must make a Default Superannuation List. A note to new subsection 156A(3) indicates that for the first stage, the FWC must be constituted by an Expert Panel.

48. New subsection 156A(4) provides that in the second stage of the 4 yearly review, the FWC must:

- review the default fund term of each modern award
- vary the default fund term of each modern award to ensure that it specifies at least 2, but generally no more than 10, default funds which are included on the Default Superannuation List and which the FWC is satisfied are in the best interests of relevant employees, and
- ensure that default fund terms in modern awards provide for contributions to be made to certain funds in accordance with new section 149D.

49. When conducting the second stage of the 4 yearly review, the FWC must be constituted by a Full Bench of the FWC (see new subsections 616(2A) and (3A) of the FW Act as inserted by Schedule 2 of this Bill).

***Subdivision B – The first stage of the 4 yearly review***

50. New subdivision B provides further details on how the FWC must conduct the first stage of a 4 yearly review of default fund terms, including relevant criteria and a number of provisions directed at ensuring that such reviews are open and transparent.

51. New subsection 156B provides that the FWC must make and publish a Default Superannuation List. The Default Superannuation List must specify each generic MySuper product that the FWC has determined is to be included on the list under new section 156E and must not specify any other product. Tailored MySuper products and Corporate MySuper products, as defined in new section 23A, may not be included on the list and will therefore not be permitted to be included as default funds in modern awards.

52. New section 156C provides for superannuation funds that offer a generic MySuper product to apply to the FWC to have the product included on the Default Superannuation List. New subsection 156C(1) provides that before making the Default Superannuation List, the FWC must publish a notice inviting superannuation funds that offer a generic MySuper product to make an application to have the product included on the list. New subsection 156C(2) provides that the notice must specify the period in which an application may be made.

53. New subsection 156C(3) provides that after the notice is published, a superannuation fund that offers a generic MySuper product may make a written application to have the product included on the list.

54. New subsection 156C(4) provides that the application must:

- be made in the period specified in the notice
- be accompanied by any fees that are prescribed by the regulations, and
- provide information relating to the first stage criteria (see new section 156F).

55. New subsection 156C(5) provides that the FWC must publish any applications made by superannuation funds to have a generic MySuper product included on the list.

56. However, new subsection 156C(6) provides that if a fund satisfies the FWC that their application includes information which is confidential or commercially sensitive, then:

- the FWC may decide not to publish the information, and
- if it does so, the FWC must instead publish a summary of the information which contains sufficient detail to allow a reasonable understanding of the substance of the information, without disclosing anything that is confidential or commercially sensitive.

57. New subsection 156C(7) provides that a reference in the FW Act (other than in new section 156C) in relation to an application made under new subsection (3) includes a reference to a summary referred to in new paragraph 156C(6)(b).

58. New subsection 156D(1) provides that the FWC must ensure that all persons and bodies have a reasonable opportunity to make written submissions in relation to funds' applications to have their generic MySuper products included on the Default Superannuation List.
59. New subsection 156D(2) provides that if a person or body makes a written submission in relation to such an application and the person or body has an interest in relation to either the superannuation fund that made the application or another superannuation fund referred to in that written submission, then the person or body must disclose that interest in the submission.
60. New subsection 156D(3) provides that the FWC must publish submissions.
61. New section 156E provides for how the FWC must determine applications made under subsection 156C(3) to include a MySuper product on the Default Superannuation List.
62. The FWC must not determine that a generic MySuper product is to be included on the Default Superannuation List unless it is satisfied that including the product would be in the best interest of default fund employees to whom modern awards apply or a particular class of those employees, taking into account:
- the information provided in the application
  - the first stage criteria provided for in new section 156F, and
  - any submissions made in relation to the application.
63. While it is anticipated that the FWC will generally assess a generic MySuper product in relation to all default fund employees to whom modern awards apply, the reference to 'a class' of employees is intended to ensure that products which are in the best interests of a particular group of employees can be included on the Default Superannuation List. For example, a product may have high net returns but have a risk profile and insurance scheme appropriate for employees in a particular industry or occupation to whom one modern award applies but not other modern awards.
64. New section 156F sets out the first stage criteria that the FWC must take into account when determining applications to list a generic MySuper product. The criteria reflect those recommended by the Productivity Commission and include areas such as investment return, fees and costs, governance practices, insurance offered and administrative efficiency.
65. The first stage criteria are non-exhaustive. New paragraph 156F(i) provides that in determining whether to include a generic MySuper product on the Default Superannuation List, the FWC may take into account any other matters it considers relevant. For example, the FWC may consider any fee or other impact on members when exiting the employment to which the original fund division relates or the administrative and compliance impact on employers.

***Subdivision C – Second stage of the 4 yearly review***

66. New Subdivision C provides for the second stage of the 4 yearly review of default fund terms.

67. In the second stage, a Full Bench of the FWC must review the default fund term of each modern award and must ensure that modern awards:

- only specify at least 2, but no more than 10, default funds in relation to generic MySuper products which the FWC is satisfied are in the best interests of default fund employees to whom the modern award applies
- include terms permitting contributions to be made for default fund employees to certain other types of schemes, and
- include a term allowing contributions to be made for default fund employees to a transitionally authorised superannuation fund.

68. New Subdivision C also includes a number of provisions directed at ensuring the second stage of the 4 yearly review of default fund terms is open and transparent.

69. New subsection 156G(1) provides that as soon as practicable after the Default Superannuation List is made, the FWC must review the default fund term of each modern award.

70. Of the 122 modern awards, there are currently 13 which do not list a default superannuation fund. However, from 1 January 2014 every modern award will include a default fund term, as defined in new subsection 149C(2), and therefore be reviewable. This is because the FWC will have been required to include a term permitting contributions to be made to a scheme in relation to default fund employees who are defined benefit members (in accordance with section 149A and item 10 of Schedule 1 of the FW Act, which are expected to be inserted by the Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Bill 2012).

71. New subsection 156G(2) provides that the FWC must ensure that the following persons have a reasonable opportunity to make written submissions to the Full Bench, including submissions requesting that a particular superannuation fund be specified in a modern award in relation to a generic MySuper product:

- an employee or employer that is covered by the modern award (new paragraph 156G(2)(a))
- an organisation that is entitled to represent the industrial interests of one or more employees or employers that are covered by the award (new paragraph 156G(2)(b)), and
- if the award includes an outworker term – an organisation that is entitled to represent the industrial interests of one or more outworkers to whom the outworker term relates (new paragraph 156G(2)(c)).

72. New subsection 156G(2) does not affect the FWC’s power under s 590 of the FW Act to inform itself in relation to any matter before it in such manner as it considers appropriate.

73. New subsection 156G(3) provides that when any person or body makes a written submission to the Full Bench in relation to a default fund term of a modern award, they must disclose any interest they have in relation to any superannuation fund referred to in the submission.

74. New subsection 156G(4) provides that the FWC must publish any submission that is made.

75. New subsection 156H(1) provides that after reviewing a default fund term in a modern award, the FWC must make a determination varying the term to:

- remove every superannuation fund specified in the term in relation to a generic MySuper product, and
- specify at least 2, but no more than 10, superannuation funds in relation to generic MySuper products that satisfy the second stage test.

76. The requirement to remove all specified funds in the default fund term of a modern award does not have the effect of precluding the FWC from specifying a fund in the modern award that was included in the award prior to the review, provided the fund is specified in relation to its generic MySuper product and satisfies the second stage test. Where a fund is removed there is scope for the FWC to make a transitional authorisation under section 156K.

77. New subsection 156H(2) provides for the second stage test. A generic MySuper product satisfies the second stage test if the product is on the Default Superannuation List and the FWC is satisfied that specifying the fund in relation to the product as a default fund in the modern award would be in the best interests of the default fund employees to whom the modern award applies. In determining whether a MySuper product satisfies the second stage test, the FWC must take into account:

- any submissions that were made in relation to the default fund term of the award, and
- any other matter the FWC considers relevant.

78. New subsection 156H(3) provides that a default term may specify more than 10 superannuation funds in relation to MySuper products that satisfy the second stage test if the FWC is satisfied that it is warranted, having regard to the range of occupations of employees covered by the modern award.

79. New section 156J provides that if, at the time of the 4 yearly review, a default fund term of a modern award does not comply with new section 149D, the FWC must make a determination varying the term so that it does. The effect of this provision is to require the FWC to ensure that modern awards:

- require any contributions to be made for default fund employees to funds specified in the award in relation to their generic MySuper product, unless the employer is making contributions for the employee to certain other types of funds in specified circumstances (see new subsection 149D(1))
- include terms allowing contributions to be made for default fund employees to other types of funds or schemes in certain circumstances (see new subsections 149D(2)-(4)), and
- include a term allowing contributions to be made for default fund employees to a transitionally authorised superannuation fund (see new subsection 149D(5) and new section 156K).

80. New section 156K provides that the FWC may authorise certain funds (those which are not referred to in new subsections 149D(1), (2), (3) or (4)) for a transitional period, if at the time of the 4 yearly review, the FWC is satisfied that it is appropriate to make the authorisation. A transitional authorisation comes into operation on the day it is made and ceases on the day specified in the authorisation. The effect of a transitional authorisation is to allow employers to continue to make contributions for the benefit of default fund employees to a fund for a transitional period (see also subsection 149D(5)). This mechanism is intended to allow the FWC to provide a reasonable transitional period for employees and employers in circumstances where an employer will be required to stop making contributions to a fund as a result of a variation made to the default fund term as part of a 4 yearly review. The transitional period will allow employees and employers to make alternative arrangements to either continue using their fund (by making an enterprise agreement that nominates the fund as a default fund, or by exercising choice of fund) or move to a default fund to which contributions are permitted by the modern award.

81. As part of the first 4 yearly review of default funds in modern awards, a ‘grandfather clause’ included in most modern awards during the award modernisation process will be removed. The grandfather clause provides that employers can make contributions on behalf of default fund employees if the employer was making contributions to the fund before 12 September 2008. It is intended that the transitional authorisation mechanism could be used by the FWC to provide for a reasonable transition for employers currently making contributions in reliance on the grandfather clause.

82. New section 156L provides that if the FWC is required to publish a document under new Division 4A, the FWC must publish the document on its website or by any other means that the FWC considers appropriate.

#### **Item 19 – Paragraph 157(1)(a)**

83. Item 19 amends paragraph 157(1)(a) of the FW Act to make it clear that the FWC cannot vary a default fund term under section 157 of the FW Act.



## Item 20 – After section 159

84. Item 20 inserts new section 159A, which allows the FWC to vary the default fund term of a modern award insofar as the term relates to a superannuation fund specified in relation to a generic MySuper product ('the specified product'), in the following circumstances:

- to reflect a change in the name of a fund or the specified product
- if a fund has ceased to exist – to omit the name of the fund or the specified product
- if the specified product ceased to exist and no other MySuper product is specified in relation to the fund – to omit the name of the fund and the specified product
- if the specified product has ceased to exist and another MySuper product is specified in relation to the fund – to omit the name of the specified product
- if APRA gives the FWC a notice under subsection 29U(4) of the *Superannuation Industry (Supervision) Act 1993* that the fund no longer offers the specified product and no other MySuper product is specified in relation to the fund – to omit the name of the fund and the specified product, or
- if APRA gives the FWC notice under subsection 29U(4) of the *Superannuation Industry (Supervision) Act 1993* that the fund no longer offers the specified product and another MySuper product is specified in relation to the fund – to omit the name of the specified product.

85. New section 159A does not have the effect of allowing a fund to be specified in a default fund term other than in relation to a generic MySuper product (see new subsection 149D(1)).

86. New subsection 159A(2) provides that the FWC may make a determination under new section 159A on its own initiative or on application by an employee, employer, organisation or outworker entity covered by the modern award.

87. The FWC may also vary a default fund term outside 4 yearly reviews of default fund terms to remove an ambiguity or uncertainty, or to correct an error, in accordance with section 160. This is consistent with the overall approach to the variation of modern awards, which is tightly circumscribed outside of 4 yearly reviews.

## Application Provisions

88. Item 1 of Schedule 11 of this Bill inserts a new Schedule 3 into the FW Act. New subitem 2(1) of Schedule 3 provides that the requirement to include a term providing for an award entitlement to superannuation in section 149B, and the rules in relation to default fund terms in subsection 149C(1) and section 149D apply in relation to a modern award:

- that is made on or after 1 January 2014, or

- that is made before 1 January 2014 and that is varied on or after that day as part of a 4 yearly review of default fund terms under new Division 4A of Part 2-3.

89. New subitem 2(2) provides that despite the repeal of sections 149A and 155A made by Schedule 1 of the Bill, those sections continue in force in relation to a modern award that:

- is made before 1 January 2014; and
- is not varied on or after that day under new Division 4A of Part 2-3 of the FW Act.

90. Section 149A (which is to be inserted into the FW Act by the Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Bill 2012) provides that modern awards must include a new term permitting an employer to make contributions to a superannuation fund or scheme for employees that do not have a chosen fund if the employee is a ‘defined benefit member’ of the fund or scheme. The FWC will be required to amend existing modern awards to ensure that they include the new mandatory term by 1 January 2014, in accordance with clause 10 of Schedule 1 to the FW Act (which is also to be inserted into the FW Act by the Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Bill 2012).

91. The requirement to include such a term in relation to defined benefit members in any new modern awards made on or after 1 January 2014 and in existing modern awards after they are varied as part of a 4 yearly review of default fund terms derives from new subsection 149D(2) of the FW Act, as inserted by item 13 of this Schedule.

92. Section 155A (which is to be inserted into the FW Act by the Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Bill 2012) provides that from 1 January 2014, modern awards must not include a term that requires or permits contributions to be made to a superannuation fund for the benefit of a default fund employee unless the fund offers a MySuper product or is an exempt public sector superannuation scheme. The FWC will be required to ensure that on 1 January 2014, the text of each modern award does not include any term to the extent that it contravenes this requirement, in accordance with clause 11 of Schedule 1 to the FW Act (which is also to be inserted into the FW Act by the Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Bill 2012).

93. New subitem 2(3) of new Schedule 3 provides that the amendments to the FW Act made by items 15, 18, 19 and 20 of Schedule 1 apply in relation to a modern award that is in operation on or after 1 January 2014, whether or not the award was made before that day.

## **SCHEDULE 2 – EXPERT PANEL**

94. Schedule 2 amends the FW Act to provide for the constitution of an Expert Panel within the FWC to exercise certain functions in relation to the assessment of default superannuation funds for inclusion in modern awards and annual wage reviews. An Expert Panel will subsume the functions currently performed by the Minimum Wage Panel.

95. Six Expert Panel Members will be appointed to the FWC on a part-time basis for a specified period not exceeding 5 years. The Expert Panel Members will be appointed by the Governor-General on the recommendation of the responsible Minister following a merit based selection process. Minimum Wage Panel Members will be invited to apply for appointment as an Expert Panel Member.

### ***Fair Work Act 2009***

96. Items 1 and 2 amend section 12 of the FW Act to include a definition of Expert Panel and Expert Panel Member. Item 3 amends the definition of the FWC Member in section 12 of the FW Act to replace the reference to a Minimum Wage Panel Member with a reference to an Expert Panel Member. Items 4 and 5 repeal the definition of Minimum Wage Panel and Minimum Wage Panel Member.

97. Item 6 omits the references in section 282 to the Minimum Wage Panel and replaces them with a reference to the Expert Panel. Item 7 omits the reference in the first note at the end of subsection 285(1) to the Minimum Wage Panel and replaces it with a reference to an Expert Panel.

98. Items 8–11 replace the references in section 290 of the FW Act to the Minimum Wage Panel and Minimum Wage Panel Members with a reference to an Expert Panel and Expert Panel Members. Item 12 replaces the reference to the Minimum Wage Panel in the first note after subsection 296(1) with a reference to the Expert Panel.

99. Item 13 amends the heading to subsection 302(4) to remove the reference to the Minimum Wage Panel and to make other changes consequential on the change of the name of FWA. Items 14 and 15 make consequential amendments to subsection 302(4) to remove references in that subsection to the Minimum Wage Panel. The FWC will still be required to take into account orders made in annual wages reviews undertaken by the FWC. The FWC must be constituted by an Expert Panel when making a minimum wage order.

100. Items 16 and 17 replace the reference to the Minimum Wage Panel and Minimum Wage Panel Members in section 573 with references to an Expert Panel and Expert Panel Members.

101. Item 18 amends paragraph 575(2)(d) and provides that the FWC consists of 6 Expert Panel Members (in addition to the President, the 2 Vice Presidents, Deputy Presidents and Commissioners).

102. Items 19-21 amend section 582 to enable the President of the FWC to issue a direction to an Expert Panel, including a direction about the conduct of 4 yearly reviews of default fund terms of modern awards under Division 4A of Part 2-3.
103. Items 22-28 replace the references to the Minimum Wage Panel and Minimum Wage Panel Members in the sections amended by these items with a reference to an Expert Panel or an Expert Panel Member.
104. Item 29 amends subsection 616(2) to include a reference to Division 4 of Part 2-3, under which 4 yearly reviews of modern awards are conducted. The 4 yearly review of modern awards conducted under Division 4 of Part 2-3 must be conducted by a Full Bench.
105. Item 30 includes a new subsection after subsection 612(2) to also require a 4 yearly review of default superannuation terms of modern awards to be conducted by a Full Bench under new Division 4A of Part 2-3.
106. Item 31 amends subsection 616(3) to include a reference to Division 4 of Part 2-3, under which 4 yearly reviews of modern awards are conducted by the FWC and determinations by the FWC are made.
107. Item 32 inserts a note at the end of subsection 613(3) to alert the reader that a determination that varies or revokes a modern award may be made by a single FWC Member under Division 5 of Part 2-3.
108. Item 33 inserts new subsection 616(3A) and requires that a determination that varies a default superannuation term of a modern award in a 4 yearly review conducted under Division 4A of Part 2-3 must be made by a Full Bench of the FWC.
109. Items 34-39 amend section 617 to set out the functions and powers of the FWC that must be performed by an Expert Panel. An Expert Panel will conduct the annual wage review and the making of the national minimum wage order. An Expert Panel will also conduct the first stage of the 4 yearly review of default superannuation terms of modern awards, and make determinations as to whether a product should be included on the Default Superannuation List.
110. Items 40 and 41 replace the references to the Minimum Wage Panel and Minimum Wage Panel Member in the heading and note amended by these items with a reference to an Expert Panel and Expert Panel Member.
111. Items 42-47 amend section 620 to provide for the constitution of an Expert Panel to replace the Minimum Wage Panel. An Expert Panel consists of 7 Members, including the President (or delegate) and 3 Expert Panel Members. The remaining 3 members can be drawn from FWC Members or other Expert Panel Members with relevant expertise as the President considers appropriate.
112. When constituting an Expert Panel under new subsection 620(1A) for the purpose of determining the Default Superannuation List the President may appoint a Vice President or a

Deputy President as the President's delegate to Chair the Expert Panel. When conducting an annual wage review an Expert Panel must include 3 Expert Panel Members who have knowledge of, or experience in the fields relevant to wage setting, namely workplace relations, economics, social policy, business industry or commerce. An Expert Panel determining the Default Superannuation List for a 4 yearly review must include 3 Expert Panel Members who have knowledge of, or experience in the fields of finance, investment management, or superannuation. An Expert Panel Member may have expertise in more than one field, and may be appointed to more than one Expert Panel if they have appropriate expertise.

113. Items 44-45 amend subsections 620(2) and (3) and gives the President discretion to determine which Members form part of an Expert Panel. The President, or the Member appointed by the President to chair an Expert Panel under subsection 620(1A) is responsible for managing the Expert Panel in performing its functions and exercising its powers.

114. Item 46 amends subsection 620(4) to replace the reference to Minimum Wage Panel in that subsection to an Expert Panel. This subsection provides for decisions of an Expert Panel to be made by a majority of Members. Item 47 repeals and replaces subsection 620(5) and provides that if there is no majority (for example, because a Member of the Expert Panel is not available) the decision of the President, or the Member appointed by the President to chair the Panel, prevails.

115. Item 48 amends paragraph 621(1)(a) to replace the reference to the Minimum Wage Panel with a reference to an Expert Panel.

116. Items 49-53 amend section 622 to deal with the reconstitution of an Expert Panel where a Member of the Panel becomes unavailable.

117. Item 54 amends section 624 to preserve the validity of any decision, including any instrument, made by an improperly constituted Expert Panel. This will ensure that technical challenges to the validity of the FWC instruments are avoided.

118. Items 55 and 56 amend section 626 to replace the references to Minimum Wage Panel Members in that section to Expert Panel Members. Expert Panel Members would be appointed to perform specialist functions on a part time basis.

119. Item 57 replaces subsection 627(4) and provides for the appointment of Expert Panel Members. Expert Panel Members will perform functions in relation to the first stage assessment of superannuation funds for inclusion in the Default Superannuation List, in addition to those functions previously performed by Members of the specialist Minimum Wage Panel. The qualification for appointment as an Expert Panel Member reflects this expanded role. Subitem 627(4) provides that a person may be appointed as an Expert Panel Member if the person has knowledge of, or experience in workplace relations, economics, social policy, business, industry or commerce, finance, investment management or superannuation. An Expert Panel Member can only sit on an Expert Panel if they have the relevant expertise (see item 45).

120. Item 58 amends subsection 628(3) to provide that an Expert Panel Member holds office on a part time basis. Item 59 amends subsection 629(4) to provide that part time Expert Panel Members hold office for the period specified in the instrument of appointment and this period must not exceed 5 years. A person can be reappointed as an Expert Panel Member (see subsection 33(4A) of the *Acts Interpretation Act 1901*).

121. Item 60 amends subsection 633(3) to provide that an Expert Panel Member must not engage in any paid work that, in the President’s opinion conflicts, or may conflict with the proper performance of his or her duties. Paid work is defined in section 12 as work for financial gain or reward (whether as an employee, a self-employed person or otherwise). Item 61 amends subsection 644(2) and requires the Governor-General to terminate the appointment of an Expert Panel Member for engaging in paid work that, in the opinion of the President, conflicts or may conflict with the proper performance of his or her duties.

***Fair Work (Registered Organisations) Act 2009***

122. Item 62 amends the definition of FWC Member in the FW (RO) Act to replace the reference to a Minimum Wage Panel Member with a reference to an Expert Panel Member.

***Road Safety Remuneration Act 2012***

123. Item 63 amends paragraph 20(1)(e) of the *Road Safety Remuneration Act 2012* to replace the reference to the Minimum Wage Panel with a reference to an Expert Panel.

## **SCHEDULE 3 – MODERN AWARDS**

124. Part 2-3 of the FW Act deals with modern awards, which provide a safety net of minimum terms and conditions of employment across industries and occupations. Schedule 3 makes technical amendments to Part 2-3 in relation to applications to the FWC to vary modern awards.

### **Part 1 – Variation etc. of modern awards**

#### ***Fair Work Act 2009***

125. Item 1 inserts new paragraphs 160(2)(c) and (d). Section 160 deals with modern award variations to remove an ambiguity, uncertainty or to correct an error. Item 1 will ensure that such applications can be made by organisations entitled to represent the industrial interests of employers or employees covered by the modern award or, if the modern award includes an outworker term, an organisation entitled to represent the industrial interests of outworkers to whom the outworker term relates.

126. This amendment ensures that the standing requirements for variation applications in section 160 are consistent with those in section 158, so that the parties entitled to bring an application to make, vary or revoke a modern award under section 158 can also apply to vary a modern award to remove an ambiguity or uncertainty under section 160. This amendment responds to Panel recommendation 15.

127. Item 1 of Schedule 11 inserts a new Schedule 3 into the FW Act. Item 3 of Part 4 to Schedule 3 ensures that applications and determinations to vary a modern award under section 160 before the commencement of this amendment are valid.

### **Part 2 – Applications to vary etc. modern awards**

#### ***Fair Work Act 2009***

128. Item 2 inserts a legislative note at the end of subsection 158(1) referring the reader to section 587, under which the FWC may dismiss an application to vary, revoke or make a modern award in certain circumstances.

129. Section 587 allows the FWC to dismiss an application on its own initiative or on application. Without limiting when the FWC may dismiss an application, subsection 587(1) provides that the FWC may dismiss an application that is not made in accordance with the FW Act (which includes the regulations), that is frivolous or vexatious or has no reasonable prospects of success.

130. This amendment responds to Panel recommendation 14.

## **SCHEDULE 4 – ENTERPRISE AGREEMENTS**

131. Part 2-4 of the FW Act provides a framework for the making of enterprise agreements through a process of collective bargaining in good faith. Schedule 4 to this Bill amends Part 2-4 in relation to the coverage of enterprise agreements, requirements for employee bargaining representatives, notices of employee representation rights, and notification requirements for scope order applications.

### **Part 1 - Enterprise agreements covering a single employee**

#### ***Fair Work Act 2009***

132. Section 172 provides for the making of enterprise agreements between employers and employees.

133. Item 1 inserts new subsection 172(6), which provides that an enterprise agreement cannot be made with a single employee. The amendment makes it clear that an enterprise agreement can only be made with 2 or more employees. This amendment responds to Panel recommendation 26.

134. Item 1 of Schedule 11 inserts a new Schedule 3 into the FW Act. Item 4 of Schedule 3 provides for this amendment to apply in relation to enterprise agreements made after the commencement of this Part.

### **Part 2 – Bargaining representatives**

#### ***Fair Work Act 2009***

135. Section 176 of the FW Act provides for the appointment of bargaining representatives for enterprise agreements. Subsection 176(3) provides that an employee organisation cannot be a bargaining representative for an employee unless that organisation is entitled to represent the interests of the employee in relation to work that will be performed under the proposed enterprise agreement.

136. Item 2 replaces this provision with a new subsection 176(3), which provides that neither an employee organisation nor an official of an employee organisation can be a bargaining representative for an employee unless the employee organisation is entitled to represent the interests of the employee in relation to work that will be performed under the proposed enterprise agreement. ‘Official’ is defined in section 12 of the FW Act to mean a person who holds office in, or is an employee of, an industrial association.

137. The amendment makes clear that an official of an employee organisation cannot be a bargaining representative for an employee where the official’s employee organisation is not itself entitled to represent the employee. This is so even if the official is purporting to act in a private capacity rather than as an official of the employee organisation. This amendment responds to Panel recommendation 21.



138. Item 1 of Schedule 11 inserts a new Schedule 3 into the FW Act. Item 5 of Schedule 3 provides for this amendment to apply in relation to appointments of bargaining representatives that are made after the commencement of this Part.

### **Part 3 – Unlawful terms**

#### ***Fair Work Act 2009***

139. Subsection 186(4) of the FW Act provides that the FWC cannot approve an enterprise agreement that contains an unlawful term. Section 194 of the FW Act specifies the terms of an enterprise agreement that are unlawful terms. Paragraph 253(1)(b) of the FW Act provides that a term of an enterprise agreement has no effect to the extent that it is an unlawful term.

140. Item 4 amends section 194 to insert new paragraph 194(ba), which provides that a term of an enterprise agreement that would enable an employee or an employer to ‘opt out’ of coverage of the agreement is an unlawful term. This amendment responds to Panel recommendation 23.

141. Item 1 of Schedule 11 inserts a new Schedule 3 into the FW Act. Sub-item 6(1) of Schedule 3 provides for this amendment to apply in relation to all enterprise agreements, whether they are made before or after the commencement of this amendment. However, while any such terms in existing enterprise agreements will become unlawful terms that are of no effect, sub-item 6(2) provides for the amendment not to apply only in relation to a person who has elected to opt out of an enterprise agreement under an opt out provision prior to the commencement of Part 3 of Schedule 4.

### **Part 4 – Scope orders**

#### ***Fair Work Act 2009***

142. Section 238 of the FW Act enables a bargaining representative to apply to the FWC for a scope order, which can determine the employees to be covered by a proposed enterprise agreement where the bargaining representatives do not agree about the scope of that agreement. Subsection 238(3) currently requires the scope order applicant to give written notice of its concerns to all other relevant bargaining representatives and must give those representatives a reasonable time to respond to those concerns before applying to the FWC for a scope order.

143. Item 6 repeals paragraph 238(3)(a) of the FW Act and substitutes a new paragraph. The amendment provides for a bargaining representative to take all reasonable steps to notify the other relevant bargaining representatives of their concerns in writing. The amendment is intended to facilitate the making of scope orders in cases where a bargaining representative is not able to notify all relevant bargaining representatives of its bargaining concerns despite reasonable efforts to do so. This amendment responds to Panel recommendation 16. Item 5 amends the heading to section 238, consequential on the amendment made by item 6.

144. Item 1 of Schedule 11 inserts a new Schedule 3 into the FW Act. Item 7 of Schedule 3 provides for this Part to apply in relation to scope order applications that are made after the commencement of this Part.

### **Part 5 - Notice of employee representational rights**

#### ***Fair Work Act 2009***

145. Under the FW Act employees are entitled to be represented in bargaining for a proposed enterprise agreement by a bargaining representative of their choice, including an employee organisation. The FW Act requires an employer to give notice to each employee to be covered by a proposed enterprise agreement of their right to be represented in bargaining for an enterprise agreement by a bargaining representative. Section 174 of the FW Act provides for the content and form of notice of employee representational rights.

146. Item 8 would insert new subsections 174(1A) and 174(1B) to provide that a notice of employee representational rights must only contain the content prescribed by the regulations (which must comply with the requirements of section 174), must not contain any other content and must be in the form prescribed by the regulations. Item 7 would amend the heading to section 174 to clarify that the section deals with both content and form requirements.

147. This amendment responds to Panel recommendation 19. The amendment is intended to eliminate confusion about whether employers may modify the content or form of the notice of employee representational rights. The amendment would make clear that the notice must contain only the content prescribed by the regulations and no other content except that which the regulations require an employer to insert or omit.

148. In other words, if the notice prescribed in the regulations requires an employer to insert or omit certain information then the employer is able to do this, without affecting the validity of the notice. The notice currently prescribed in the regulations requires an employer to insert into the notice:

- the name of the employer
- the name of the proposed enterprise agreement
- the proposed coverage of the agreement
- the prescribed content if the agreement is not an agreement for which a low paid bargaining authorisation applies
- the prescribed content if a low paid bargaining authorisation applies to the agreement
- the prescribed content if the employee is covered by an individual agreement-based transitional instrument, and
- the contact number for the FWA Infoline.

149. Item 1 of Schedule 11 inserts a new Schedule 3 into the FW Act. Item 8 of Schedule 3 provides for these amendments made by Part 5 of Schedule 4 to apply in relation to notices of employee representational rights issued after commencement of this Part. Item 8 also ensures

that regulations made under subsection 174(6) as in force immediately before commencement of Part 5 continue in force as if they were made for the purposes of subsection 174(1A).

## **SCHEDULE 5 – GENERAL PROTECTIONS**

150. The general protections in Part 3-1 of the FW Act prohibit adverse action against a person because that person has a workplace right, is a member or officer of an industrial association or engages in industrial activity, or because of the person's race, colour, sex, sexual preference or other prescribed attributes. Schedule 5 amends the timeframe for making dismissal-related general protections applications to the FWC and clarifies the objects of Part 3-1.

### **Part 1 – Time limits for making applications**

#### **Fair Work Act 2009**

151. Item 1 amends paragraph 366(1)(a) to shorten the current 60 day time limit for applying to the FWC to mediate or conciliate a dispute about a dismissal allegedly in contravention of Part 3-1. Where a person alleges that they have been dismissed in contravention of Part 3-1, the application to the FWC to deal with the dispute must be made within 21 days of the dismissal taking effect. The FWC will retain its existing discretion to accept late applications if it is satisfied that there are exceptional circumstances.

152. This amendment responds to Panel recommendation 49, and will align the timeframe for lodging dismissal-related general protections claims with the new 21 day time limit for lodging unfair dismissal applications.

153. Item 1 of Schedule 11 inserts a new Schedule 3 into the FW Act. Item 9 of Schedule 3 provides for this amendment to apply in relation to dismissals that take effect after the commencement of this Part.

### **Part 2 – The persons protected by the general protections**

#### **Fair Work Act 2009**

154. Items 2 and 3 amend section 336, which sets out the objects of Part 3-1. These objects include:

- protection of workplace rights and freedom of association
- providing protection from workplace discrimination, and
- providing effective remedies for persons who have been adversely affected as a result of a contravention of Part 3-1.

155. Item 3 inserts new subsection 336(2) to make clear that the protections in Part 3-1 are provided to a person (whether an employee, employer or otherwise) depending on the particular protection and the circumstances.

156. Item 2 amends section 336 to insert a new subsection (1), consequential on the amendment in item 3.

## **SCHEDULE 6 – UNFAIR DISMISSAL**

157. Part 3-2 of the FW Act provides remedies for employees who are unfairly dismissed. Schedule 6 makes amendments in relation to certain procedural matters concerning unfair dismissal applications.

### **Part 1 – Time limits for making applications**

#### **Fair Work Act 2009**

158. Item 1 amends paragraph 394(2)(a) to extend the timeframe for lodging unfair dismissal applications to the FWC from within 14 days of the dismissal taking effect to 21 days.

159. This amendment responds to Panel recommendation 40, and will align the timeframe for lodging unfair dismissal applications with the new 21 day time limit for lodging dismissal-related general protections claims.

160. Item 1 of Schedule 11 inserts a new Schedule 3 into the FW Act. Item 10 of Schedule 3 provides for this amendment to apply in relation to dismissals that take effect after the commencement of this Part.

### **Part 2 – Power to dismiss applications**

#### **Fair Work Act 2009**

161. Item 2 inserts a new section 399A to enable the FWC to dismiss an unfair dismissal application where the FWC is satisfied that the applicant has unreasonably:

- failed to attend an FWC conference or hearing relating to the application
- failed to comply with an FWC direction or order relating to the application, or
- failed to discontinue the application after a settlement agreement has been concluded.

162. The power to dismiss an unfair dismissal application in these circumstances is not intended to prevent an applicant from robustly pursuing a legitimate unfair dismissal claim. Rather, the amendment is intended to address the small proportion of applicants who may pursue claims in an improper or unreasonable manner. This amendment responds to Panel recommendation 42.

163. In particular, the power to dismiss an application is only intended to be available where there is an unreasonable act or omission by the applicant. Examples of when the FWC may exercise its discretion to dismiss an application under these provisions may include where:

- an applicant fails to attend an FWC proceeding relating to the matter without providing prior advice and/or without any reasonable excuse for their failure to attend, or
- an applicant continues to pursue an unfair dismissal application despite a settlement agreement having been concluded by the parties.

164. Note 2 to new subsection 399A(1) draws the reader's attention to the FWC's capacity to make an order for costs under new section 400A (explained below) if satisfied that the applicant's failure caused the other party to the matter to incur costs.

165. New subsection 399A(2) provides that the power to dismiss applications is only exercisable on application by an employer.

166. Subsection 399A(3) and Note 1 to subsection 399A(1) make clear that new section 399A is not intended to limit the FWC's general power to dismiss applications on grounds such as where the application is frivolous or vexatious or has no reasonable prospects of success under section 587. Similarly, item 3 inserts a note to subsection 587(1) to highlight the FWC's power to dismiss an unfair dismissal application under new section 399A.

167. Item 1 of Schedule 11 inserts a new Schedule 3 into the FW Act. Item 11 of Schedule 3 provides for these amendments to apply in relation to dismissals that take effect after the commencement of this Part.

### **Part 3 – Costs orders against parties**

#### **Fair Work Act 2009**

168. Item 4 inserts a new section 400A to enable the FWC to order costs against a party to an unfair dismissal matter (the first party) if it is satisfied that the first party caused the other party to the matter to incur costs by an unreasonable act or omission in connection with the conduct or continuation of the matter.

169. As with the new power to dismiss applications under section 399A, the power to award costs under section 400A is not intended to prevent a party from robustly pursuing or defending an unfair dismissal claim. Rather, the power is intended to address the small proportion of litigants who pursue or defend unfair dismissal claims in an unreasonable manner. The power is only intended to apply where there is clear evidence of unreasonable conduct by the first party.

170. The FWC's power to award costs under this provision is discretionary and is only exercisable where the first party (whether the applicant or respondent) causes the other party to incur costs because of an unreasonable act or omission. This is intended to capture a broad range of conduct, including a failure to discontinue an unfair dismissal application made under section 394 and a failure to agree to terms of settlement that could have led to the application being discontinued.

171. However, the power to award costs is only available if the FWC is satisfied that the act or omission by the first party was unreasonable. What is an unreasonable act or omission will depend on the particular circumstances but it is intended that the power only be exercised where there is clear evidence of unreasonable conduct by the first party.

172. This amendment responds to Panel recommendation 45.

173. Subsection 400A(2) provides that the power to award costs against one party in these circumstances is only exercisable if the other party to the matter makes an application in accordance with section 402. Subsection 400A(3) makes clear that the new power to award costs under subsection 400A(1) operates in addition to subsection 611(2), which enables the FWC to make costs orders against a person in certain circumstances, such as where an application is made vexatiously or without reasonable cause.

174. Section 402 provides that an application for costs must be made within 14 days after a matter is determined by the FWC or discontinued.

175. Item 5 amends section 402 consequential on the insertion of new section 400A in item 4. Item 6 amends paragraph 403(1)(b) to insert a reference to section 400A so that a schedule of costs can be prescribed for the purposes of a costs order made under that section.

176. Item 7 amends subsection 403(2), which sets out how the FWC can award costs if a schedule of costs is prescribed, to insert a reference to section 400A.

177. Item 8 amends the note to subsection 611(2) to highlight the FWC's ability to make an order for costs under new section 400A.

178. Item 1 of Schedule 11 inserts a new Schedule 3 into the FW Act. Item 12 of Schedule 3 provides for these amendments to apply in relation to dismissals that take effect after the commencement of this Part.

#### **Part 4 – Costs orders against lawyers and paid agents**

##### **Fair Work Act 2009**

179. Section 401 currently enables FWA to award costs against a lawyer or paid agent in certain circumstances, but only where FWA has granted permission under section 596 for them to represent a party in unfair dismissal proceedings. Item 9 replaces subsection 401(1) with new subsections 401(1) and 401(1A), under which this power will no longer depend on the FWC having granted permission under section 596.

180. New subsections 401(1) and 401(1A) will provide a stronger deterrent for lawyers and paid agents from encouraging parties to bring or continue speculative unfair dismissal claims, particularly claims they know have no reasonable prospect of success. The provision will also deter lawyers or paid agents from unreasonably encouraging a party to defend a claim or make a jurisdictional argument where there is no prospect of the argument succeeding. It will act as a stronger deterrent than the current provision as it will make lawyers and paid agents subject to the possibility of adverse costs orders even if they are not granted, or do not seek, permission to represent the party in the matter before the FWC.

181. Item 9 repeals subsection 401(1) and replaces it with new subsections 401(1) and (1A). New subsection 401(1) provides that the section applies if:

- an application for an unfair dismissal remedy has been made under section 394
- a lawyer or paid agent (the representative) has been engaged by a party to represent them in the matter, and
- the party is required to seek the FWC’s permission under section 596 to be represented by the representative.

182. New subsection 401(1A) sets out the grounds on which an order for costs is available against a representative. Costs are available where the FWC is satisfied that the representative caused costs to be incurred because:

- the representative encouraged the person to start, continue or respond to the matter and it should have been reasonably apparent that the person had no reasonable prospect of success in the matter (subsection 401(1A)(a)), or
- of an unreasonable act or omission of the representative in connection with the conduct or continuation of the matter (subsection 401(1A)(b)).

183. The addition of the words “or respond to” in new subsection 401(1A)(a) makes clear that costs are also available against employer representatives who encourage an employer to defend a claim where there is no reasonable prospect of the defence succeeding.

184. An example of where the FWC may award costs against a representative under new item 401(1A) is where the representative knows that his or her client’s unfair dismissal claim is dishonest or without foundation but still actively encourages them to proceed with the claim to try and extract a remedy such as a financial settlement from the employer.

185. This amendment responds to Panel recommendation 46.

186. Item 1 of Schedule 11 inserts a new Schedule 3 into the FW Act. Item 13 of Schedule 3 provides for this amendment to apply in relation to dismissals that take effect after the commencement of this Part.



## **SCHEDULE 7 – INDUSTRIAL ACTION**

187. Part 3-3 of the FW Act permits employees and employers to engage in protected industrial action (including strikes or other limitations on work) in support of claims for an enterprise agreement provided that a number of procedural and other requirements are satisfied. One of these requirements is that the particular protected industrial action to be undertaken must be authorised by a protected action ballot of employees who are members of an employee organisations and who will take the action.

188. Schedule 7 to the Bill amends Part 3-3 to clarify that protected action ballots can be conducted by electronic voting methods, clarify the eligibility requirements for certain employees who are union members and who are acting as a bargaining representative to be included in a protected action ballot and to require protected action ballots to be conducted expeditiously.

### **Part 1 – Electronic voting in protected action ballots**

#### **Fair Work Act 2009**

189. Section 455 deals with the requirements for protected action ballot papers. Item 8 amends section 455 to insert a new definition of ‘ballot paper’ that encompasses both electronic and non-electronic voting methods. The new definition provides that a ballot paper means:

- a paper ballot paper where the voting method is not electronic, and
- an electronic ballot paper where the voting method is electronic.

190. Item 1 inserts a signpost to this definition in the dictionary (section 12), and item 7 makes a numbering change consequential on the amendment in item 8.

191. Section 450 is about the FWC’s written directions to a protected ballot agent other than the Australian Electoral Commission (AEC). Section 451 concerns the timetable and voting methods for a protected action ballot conducted by the AEC or other protected action ballot agents as directed by the FWC. Items 2, 3, 4, 5 and 6 amend sections 450 and 451 to clarify that voting method(s) for a protected action ballot can include attendance voting, electronic voting and postal voting but not a show of hands.

192. Items 9 to 12 amend section 462 (which concerns interference with protected action ballots) to prohibit fraudulent electronic voting. Item 9 substitutes new paragraphs 462(1)(h) and 462(1)(ha) for existing paragraph 462(1)(h) to prohibit a person from fraudulently:

- putting a paper (or other) ballot paper into a repository that receives or holds paper ballot papers or into the post, and
- delivering or sending an electronic ballot paper or other document to a repository that receives or holds electronic ballot papers.

193. Item 10 amends paragraph 462(1)(i) to include the word ‘send’ in addition to ‘deliver’ to cater for electronic voting. Items 11 and 12 amend paragraph 462(1)(o) and paragraph 462(1)(p) respectively to ensure that they operate in relation to both paper and electronic ballot papers.

194. These amendments respond to Panel recommendation 32(a).

195. Item 1 of Schedule 11 inserts a new Schedule 3 into the FW Act. Item 14 of Schedule 3 provides for these amendments to apply in relation to applications for protection action ballot orders that are made after the commencement of this Part.

## **Part 2 – Employees to be balloted in protected action ballots**

### **Fair Work Act 2009**

196. Items 13 and 14 repeal and substitute paragraphs 437(5)(b) and 453(b) of the FW Act respectively. The amendments make clear that where an employee organisation has applied for a protected action ballot order, an employee who is a bargaining representative for himself or herself and who is also a member of that employee organisation will be:

- taken to be included in the group of employees specified in the protected action ballot application to be balloted, and
- eligible to be included on the roll of voters for the protected action ballot for the purposes of section 453 of the Act.

197. These amendments respond to Panel recommendation 32(c) and are intended to enable employees who represent themselves in bargaining to vote on and take protected industrial action if they are members of an employee organisation that applied for the protected action ballot.

198. Item 14 also clarifies that an employee will be eligible to be included on the roll of voters for a protected action ballot after the protected action ballot order was made, but before the close of the roll of voters if they are otherwise eligible to vote in the protected action ballot (for example, because they are a new employee). These amendments respond to Panel recommendations 32(b) and (c).

199. Item 1 of Schedule 11 inserts a new Schedule 3 into the FW Act. Item 15 of Schedule 3 provides for the amendments made by items 13 and 14 to apply in relation to applications for protected action ballot orders that are made after the commencement of this Part.

## **Part 3 – Conducting protected action ballots**

### **Fair Work Act 2009**

200. Item 15 inserts a new subsection (3A) in section 443 of the FW Act to require the FWC, when specifying a date on which voting in a protected action ballot closes, to ensure that this date will enable the ballot to be conducted as expeditiously as practicable. Item 16 amends

subsection 449(2) of the FW Act to require a ballot agent to conduct a protected action ballot as expeditiously as practicable. This amendment responds to Panel recommendation 32(d).

201. Item 1 of Schedule 11 inserts a new Schedule 3 into the FW Act. Item 16 of Schedule 3 provides for the amendments in items 15 and 16 to apply in relation to protected action ballot orders that are made after the commencement of this Part.

## **SCHEDULE 8 – THE FAIR WORK COMMISSION**

202. Part 5-1 of the FW Act provides for the establishment and functions of FWA. Schedule 9 changes the name of FWA to the FWC. Schedule 8 amends Part 5-1 to make changes to the structure and processes of the FWC. It provides for the appointment of 2 full time Vice Presidents to the FWC, and clarifies the mechanism by which matters may be referred to a Full Bench when it is in the public interest to do so. Amendments also more clearly set out the obligations of FWC Members in relation to potential conflicts of interest, establish a framework for the handling of complaints about FWC Members, provide for the appointment of Acting Commissioners and for the appointment of the FWC General Manager by the Governor-General on the nomination of the FWC President.

### **Part 1 – Stay orders**

#### ***Fair Work Act 2009***

203. Item 1 amends subsection 606(2) of the FW Act to enable the President, a Vice President or a Deputy President of the FWC to stay a decision pending review or appeal by the FWC. This amendment responds to Panel recommendation 52.

204. A person aggrieved by a decision made by the FWC, or the Minister, may appeal or seek a review of a decision by applying to the FWC under sections 604 or 605 of the FW Act.

205. Subsection 606(1) of the FW Act provides that if the FWC hears an appeal from, or conducts a review of a decision, the FWC may order that the operation of the whole or part of the decision be stayed until a decision in relation to the appeal or review is made or the FWC makes a further order.

206. Subsection 606(2) provides that only the Full Bench hearing the appeal, or the senior member of that Full Bench, can grant a stay order.

207. The amendment made by this item will enable any Presidential Member of the FWC to stay the order in circumstances where the relevant senior member is unavailable, enhancing the efficiency with which the FWC can undertake this function.

208. Item 1 of Schedule 11 inserts a new Schedule 3 into the FW Act. Item 17 of Schedule 3 provides for these amendments to apply in relation to stay orders that are made after the commencement of this Part.

### **Part 2 – Conflicts of interest**

#### ***Fair Work Act 2009***

209. Section 640 of the FW Act applies where an FWC Member is dealing, or will deal with a matter and the FWC Member has or acquires an interest that conflicts or could conflict with the proper performance of his or her functions.

210. The amendment made by item 2 requires the FWC Member to disclose the conflict to persons making submissions in the matter, as well as the President.

211. If the President becomes aware of a potential conflict and considers that the Member should not deal with the matter, the President must give a direction to the FWC Member to this effect (subsection 640(4)).

212. Failure to comply with section 640 will no longer be a ground for termination of the appointment of the FWC Member under section 643, however a failure to disclose the conflict may lead to a complaint against the FWC Member to be dealt with in accordance with the new complaints handling process. In addition, the President may take other measures that he or she believes are reasonably necessary to maintain public confidence in the FWC.

213. Further provisions in relation to the handling of complaints by the President against the FWC Members are provided for in Part 8 of this Schedule.

214. Item 1 of Schedule 11 inserts a new Schedule 3 into the FW Act. Item 18 of Schedule 3 provides for these amendments to apply in relation to matters that an FWC Member begins to deal with before or after the commencement of this Part.

### **Part 3 – Referral of matters to Full Bench etc.**

#### ***Fair Work Act 2009***

215. Section 615 of the FW Act provides that a function or power of the FWC may be performed or exercised by a Full Bench if the President so directs.

216. Item 7 inserts new sections 615A, 615B and 615C into the FW Act to clarify the mechanisms available for referring matters to a Full Bench or the President by including provisions similar to those included in sections 112 and 113 of the *Workplace Relations Act 1996* (WR Act) prior to the commencement of the FW Act.

217. New section 615A of the FW Act requires the President to direct a Full Bench to perform a function or exercise a power in relation to a matter if:

- the parties (being persons who have, or will make a submission in the matter, or the Minister) apply to the FWC to have a Full Bench perform or exercise a function or power in relation to the matter; and
- the President is satisfied that it is in the public interest to do so.

218. The note provides that the President gives directions under section 582. A person to whom a direction is given must comply with the direction (section 582(5)).

219. New section 615B of the FW Act provides for the transfer of a function or power to a Full Bench from an FWC Member. This section applies if the President had given a direction (the earlier direction) to an FWC Member to exercise or perform a function and later directs a Full

Bench to perform or exercise that function or power under sections 615 or 615A of the FW Act. Where this occurs, new section 615B clarifies that the President is taken to have revoked the earlier direction.

220. Where a Full Bench performs or exercises the function or power, the Full Bench is required to take into account everything that occurred before the FWC, and everything that the FWC did, in relation to the matter before the Full Bench began to perform or exercise the function or power.

221. New section 615C of the FW Act provides for the transfer of a function or power to the President from an FWC Member or a Full Bench. This section applies if the President had given a direction (the earlier direction) that a function be performed by a Full Bench or an FWC member and later decides to perform or exercise that function or power. Where this occurs, the President is taken to have revoked the earlier direction.

222. If the President performs or exercises the function or power, she or he is required to take into account everything that occurred before the FWC, and everything that the FWC did, in relation to the matter before the Member began to perform or exercise the function or power.

223. The power of the President to decide to perform a function or power of an FWC member or a Full Bench originates from section 108 of the *Industrial Relations Act 1988* and section 113 of the WR Act. The purpose of these provisions was to empower the President to endeavour to settle an industrial dispute, where the President thought it justified, notwithstanding that the proceeding may have commenced before another Member of the Australian Industrial Relations Commission. In this context, new section 615C has been included in the FW Act to enable the President to be more proactive in dealing with matters before the FWC in circumstances in which the President considers it is appropriate. For example, the President may decide to take over a matter from an FWC member, if the President considers that it may expedite a resolution of the matter. There may also be other circumstances in which the President may decide to perform or exercise a function or power of an FWC member or a Full Bench – for example, where the President is of the view that 2 or more matters should be dealt with jointly.

#### **Part 4 – Appointing Acting Commissioners**

##### ***Fair Work Act 2009***

224. Items 8 to 11 amend section 648 of the FW Act to enable the Governor-General to appoint an Acting Commissioner for a specified period where the Minister is satisfied that the appointment is necessary to enable the FWC to perform its functions effectively. For example, Acting Commissioners may be appointed for a fixed term to fill a short-term vacancy arising from the absence of another Commissioner, or during a period in which the FWC is experiencing an abnormally high level of work. The FW Act already provides for the appointment of acting Deputy Presidents.

225. Item 1 of Schedule 11 inserts a new Schedule 3 into the FW Act. Item 19 of Schedule 3 provides for this amendment to apply in relation to appointments that are made after the commencement of this Part.

226. These amendments respond to Panel recommendation 53.

## **Part 5 – Appointing the General Manager**

### **Fair Work Act 2009**

227. Items 12 to 14 amend sections 660, 668 and 669 of the FW Act to provide for the appointment of the General Manager of the FWC to be made by the Governor-General on the nomination of the President of the FWC. These amendments bring the procedure for the appointment of the General Manager into line with the procedure for the appointment of the Registrar of the Federal Court.

228. Item 1 of Schedule 11 inserts a new Schedule 3 into the FW Act. Item 20 of Schedule 3 provides for these amendments to apply in relation to appointments or acting appointments that are made after the commencement of this Part.

229. These amendments respond to Panel recommendation 51.

## **Part 6 – Vice Presidents**

### **Fair Work Act 2009**

230. The amendments made by this part provide for the appointment of 2 Vice Presidents to the FWC. As with other FWC Members, the Vice Presidents will be appointed by the Governor-General on the recommendation of the responsible Minister following a merit based selection process.

231. Item 15 repeals the definition of ‘FWA Member’. Item 16 inserts a new definition of ‘FWC Member’, which has the same meaning as FWA Member but includes a reference to a Vice President. Item 17 inserts a definition of Vice President in section 12 of the FW Act.

232. Items 18 amends the note at the end of subsection 508(1) to reflect changes made to subsection 612(2) and 615(1) of the FW Act to ensure a Vice President can exercise the same functions and powers as a Deputy President.

233. Item 19 amends the guide to Part 5-1 of the FW Act (in section 573) to include a reference to the new statutory Vice President positions.

234. Item 20 includes a new paragraph in section 575 to reflect that the 2 Vice Presidents will be members of the FWC.

235. Item 21 amends subsection 584(1) of the FW Act to enable the President of the FWC to delegate his functions and powers to a Vice President.

236. Item 22 makes a consequential amendment to subsection 612(2) of the FW Act to include a reference to the Vice Presidents.

237. Item 23 amends the heading of section 613 of the FW Act.

238. Item 24 amends subsection 613(2) of the FW Act to include a reference to the Vice President.

239. Item 25 amends subsection 613(2)(b) of the FW Act to enable a Vice President to grant permission for an appeal to be heard by the President, or a Vice President or Deputy President directed by the President.

240. Item 26 amends subsection 618(1) of the FW Act, which provides for the constitution of a Full Bench of the FWC. A Full Bench must consist of at least 3 Members, and must include at least one presidential member of the FWC (that is the President, a Vice President or a Deputy President).

241. Item 27 makes a consequential amendment to subsection 619(1) of the FW Act to include Vice Presidents in the order of seniority of FWC Members on the Full Bench.

242. This item amends subsection 619(1) of the FW Act to provide for the following order of seniority: the President, the Vice Presidents (according to the days on which their appointments took effect) and the Deputy Presidents (according to the days on which their appointments took effect).

243. The Vice Presidents appointed under section 647 have seniority over a Member taken to be appointed to the FWC by item 1 of Schedule 18 of the FW (T&C) Act.

244. This item also provides that if 2 appointments as Vice Presidents took effect on the same day, the seniority of these Vice Presidents depend on the precedence assigned to them in their instruments of appointment.

245. Items 28 and 29 make consequential amendments to include references to the President and Vice President.

246. Item 30 amends subsection 626(3) of the FW Act to provide that if an FWC Member and another FWC Member are appointed as Vice Presidents on the same day, the instrument of appointment must assign precedence to the FWC Members. This item also amends the note in subsection 626(3) to include a reference to the Vice President.

247. Item 31 to 41 make consequential amendments to include references to the Vice President.

248. Items 42-43 amend subsection 647(1) of the FW Act to provide that the Governor-General may appoint a Vice President to act as the President during a vacancy in the office or during any period or periods when the President is absent or otherwise unable to perform the duties of the office.



249. Item 44 inserts a new subsection to provide for the appointment of an acting Vice President (new subsection 647(1A)).

250. New subsection 647(1A) of the FW Act provides that the Governor-General may appoint a Deputy President to act as a Vice President during a vacancy in the office or during any period or periods when a Vice President is absent or otherwise unable to perform the duties of the office. (Section 33A of the Acts Interpretation Act 1901 provides that acting appointments are made on the same basis as appointments, but may only be made for a maximum term of 12 months.)

251. Item 45 amends subsection 647(3) of the FW Act to enable it to apply to the President and a Vice President.

### ***Fair Work (Registered Organisations) Act 2009***

252. Item 46 amends the FW(RO) Act to include a new definition of Vice President in section 6 of that Act. Items 47-52 amend the FW(RO) Act to enable a Vice President to exercise the same functions and powers as a Deputy President under that Act.

### ***Road Safety Remuneration Act 2012***

253. Items 53-56 amend the *Road Safety Remuneration Act 2012* to enable a Vice President (or a Deputy President) to be appointed as the President (or Acting President) of the Road Safety Remuneration Tribunal.

254. Item 1 of Schedule 11 inserts a new Schedule 3 into the FW Act. Item 21 of Schedule 3 provides for this amendment to apply in relation to appointments that take effect after the commencement of this Part.

## **Part 7– Handling complaints**

### **Fair Work Act 2009**

255. The amendments made by this Part provide for the President of the FWC to deal with complaints about FWC Members. The Part also provides for the Minister to handle complaints about an FWC member including the President for the purpose of considering whether a matter should be considered by each House of Parliament or the Governor-General (in accordance with section 641 of the FW Act). The provisions are broadly modelled on provisions contained in the Courts Legislation Amendment (Judicial Complaints) Bill 2012 (Judicial Complaints Bill) that is currently before the Parliament. Like the amendments made by that Bill in relation to judicial officers, these amendments are intended to support the independence of FWC Members and confidence in the FWC.

256. The amendments outline the measures the President may take in relation to an FWC Member, where the President believes that such measures are reasonably necessary to maintain public confidence in the FWC. For example, the President may temporarily restrict the duties of the FWC Member. The President may determine a Code of Conduct for FWC Members. These

measures would be consistent with the President's broad responsibility for ensuring the FWC performs its functions and exercises its powers in a manner that is efficient and adequately serves the needs of employers and employees throughout Australia (section 581 of the FW Act).

257. The amendments are intended to provide a framework that is flexible and enables the President to deal with a complaint regarding an FWC member as the President considers appropriate. The President would have discretion to appoint an independent person or body to investigate a complaint. Options available would include those described in the Explanatory Memorandum to the Judicial Complaints Bill, such as establishing a Conduct Committee to investigate a complaint. The amendments provide that if the President finds that a serious complaint has been substantiated and is of the view that the Parliament should consider the termination of the Members appointment (in accordance with section 641), the complaint must be referred to the Minister.

258. It is anticipated that the vast majority of complaints would be dealt with by the President within the FWC. Parliamentary consideration of the termination of an FWC Member's appointment under section 641 of the FW Act would only be triggered in the rarest and most serious of circumstances.

259. The Bill does not limit the ability of a complaint which may warrant removal of an FWC Member from office under section 641 being considered by the Parliament at any time, and clarifies that the Minister may also consider a complaint about an FWC Member (including the President) for the purpose of considering whether to refer the matter to the Parliament. The Minister may arrange for an independent inquiry into a complaint made about the President or another FWC Member if the Minister has a belief that circumstances giving rise to a complaint may, if substantiated justify consideration of the termination of the appointment of the FWC Member in accordance with section 641 of the FW Act.

260. Item 57 inserts into section 12 of the FW Act a new definition of 'complaint about an FWC Member'. A 'complaint about an FWC Member' for the purposes of the FW Act will mean a complaint mentioned in new subsection 581A(1) or 641A (see items 62 and 65 of this Schedule).

261. Item 58 inserts into section 12 of the FW Act a new definition of 'complaint handler'. The amendment will mean that a 'complaint handler' for the purposes of the FW Act is the President, a person who is authorised by the President under subsection 581A(3) or a person who is a member of a body that is authorised by the President under subsection 581A(3) (see item 62 of this Schedule).

262. Item 59 inserts into section 12 of the FW Act a definition of 'handle' a complaint. The definition gives a person who may be handling a complaint a high degree of flexibility in taking action appropriate to an individual complaint. For example, it would enable the President to refer a complaint to a Conduct Committee and enable the Conduct Committee to investigate the complaint and provide a report to the President for further consideration.

263. The President or complaint handler may ‘handle’ a complaint by dismissing the complaint summarily, or after further investigation, where the person considers this appropriate in the circumstances.

264. Item 60 inserts into section 12 of the FW Act a definition of ‘relevant belief’. This term is used in proposed subsection 581A(2)) (see item 62 of this Schedule). The definition applies where a person has a relevant belief in relation to a complaint about an FWC Member. A person has such a belief if the person believes that circumstances giving rise to a complaint may, if substantiated:

- justify consideration of terminating the appointment of the FWC Member in accordance with section 641 of the FW Act, or
- adversely affect performance of duties by the FWC Member, or have capacity to adversely affect the reputation of the FWC.

265. Having a relevant belief enables the President or complaint handler to take certain actions, such as handling a complaint (see new paragraphs 581A(2)(a)(ii) and (b)(ii) inserted by item 62 of this Schedule).

266. A note to the new definition refers the reader to the sections 641 and 642 of the FW Act, which deal with termination and suspension of FWC Members.

267. Item 61 inserts a note to section 580 to draw the reader’s attention to new section 584B which deals with protections of persons involved in handling complaints about FWC Members.

268. Item 62 inserts a new section relating to the power of the President to deal with a complaint about another FWC Member’s performance of his or her duties. New subsection 581A(1) complements the President’s broad powers and functions under section 581, by providing a specific power to deal with a complaint about the performance by another FWC Member of his or her duties. Subsection 581A(1) requires the President to deal with such a complaint in accordance with the process set out in new subsection 581A(1) 2.

269. A complaint about the performance by another FWC Member of his or her duties will not include complaints about matters in cases that are capable of being raised in an appeal. Such complaints are properly matters for tribunal determination. It may be necessary for the President or other complaint handler to consider whether the complaint relates to a matter capable of being raised on appeal.

270. The performance of duties would extend to personal conduct that would have the potential to impact on an FWC Member’s official duties or the public confidence in the FWC.

271. New paragraph 581A(1)(b) gives the President power to take any measures that he or she believes are reasonably necessary to maintain public confidence in the FWC. This includes the ability to temporarily restrict another FWC Member to non-sitting duties. This power operates whether or not there has been a complaint.

272. This paragraph enables the President to take timely action that he or she believes is reasonably necessary to maintain public confidence in the FWC. The President would need to establish a clear basis for his or her belief that the measures are reasonably necessary. The type of measure that might be taken would be consistent with the President's responsibility for ensuring that the FWC performs its functions and exercises its powers in a manner that is efficient and adequately serves the needs of employers and employees throughout Australia (section 581).

273. Where a complaint is made about another FWC Member, new subsection 581A(2) enables the President to deal with the complaint as outlined in the provision. The President may do either or both of the options under new paragraphs 581A(2) (a) and (b).

274. Under new paragraph 581A(2)(a), the President may decide whether or not to handle the complaint. Under new paragraph 581(2)(b), the President may arrange for any other complaint handlers to decide whether or not to handle the complaint.

275. The powers of any other complaint handler under new paragraph 581A(2)(b) are similar to those of the President under new paragraph 581A(2)(a). This subsection enables the President to arrange with a complaint handler to deal with a complaint without needing to conduct preliminary investigations about a complaint.

276. The actions the President or a complaint handler may take to 'handle' a complaint include investigating a complaint, referring the complaint to another person, or disposing of a complaint (see definition inserted by item 59 of this Schedule). The ability of the President or a complaint handler to dismiss a complaint summarily under proposed subparagraph 581A(2)(a)(i) and (b)(i) does not affect the ability of a person handling a complaint to dispose of a complaint by dismissing it where the person considers this to be appropriate in the circumstances, including where the complaint has not been substantiated on further investigation of the complaint.

277. The President may authorise another person or body to assist the President to handle a complaint under new subsection 581(3). Authorisations may be made either generally or in relation to a specified complaint. An authorisation must be in writing.

278. New subsection 581A(4) requires the President to refer a complaint about an FWC Member to the Minister if the President is satisfied that that circumstances that gave rise to the complaint have been substantiated and that the complaint is serious enough to justify Parliamentary consideration of the termination of the FWC Member's appointment in accordance with section 641 of the FW Act.

279. If a complaint is referred to the Minister by the President, the Minister must consider whether to refer the matter to the Parliament for consideration. The Minister could handle the complaint for the purpose of considering this question (see new section 641A inserted by item 65 to this Schedule).

280. New subsection 581B(1) enables the President to determine a Code of Conduct for FWC Members following consultation with the Members. Subsection 581B(2) clarifies that the

determination of a Code of Conduct does not limit the President's ability to give directions under section 582.

281. Subsection 581B(3) provides that any Code of Conduct determined by the President must be published on the FWC's website or by another means considered appropriate by the President. Subsection 581B(4) provides that a Code of Conduct determined under subsection 581B(1) is not a legislative instrument for the purpose of the Legislative Instruments Act 2003, and is intended to be declaratory of the law.

282. Item 63 amends subsection 584(1) of the FW Act and prevents the President from delegating his functions and powers under new paragraph 581A(1)(b). The power to take any measures considered necessary and appropriate to maintain public confidence in the FWC under this new paragraph (such as restricting the duties of an FWC member) must be performed personally by the President.

283. Item 64 inserts a new section 584B at the end of Division 2 of Part 5-1 of the FW Act to outline broad protections afforded to participants in the process of dealing with complaints about FWC Members.

284. This new section is designed to promote effectiveness of the complaints process by enabling appropriate people to participate in the process to the extent possible without fear of prosecution or liability.

285. New subsection 584B(1) affords broad protection and immunity to a person exercising powers or performing functions under or for the purposes of paragraph 581A(1)(a), subsections 581A(2) to (5) or section 641A, or assisting in the exercise of those powers or performing those functions. The level of protection and immunity under subsection 584(1) is the same as a Justice of the High Court.

286. New subsection 584B(2) affords broad protection and immunity for a witness requested to attend, or appearing, before a complaint handler or other person in relation to a complaint. A witness has the same protection, and is subject to the same liabilities, as a witness in a case before the High Court. As processes may vary in formality depending on the circumstances, a witness will include a person who provides information to a complaint handler in the course of the handling of a complaint.

287. New subsection 584B(3) affords broad protection and immunity for a lawyer assisting the complaint handler, or representing a person appearing before a complaint handler or other person in relation to a complaint. The level of protection and immunity is the same as a barrister appearing for a party in proceedings in the High Court.

288. The protections and immunities in this clause are in addition to, and do not limit, other protections and immunities which may apply in the circumstances.

289. Item 65 inserts new section 641A to make it clear that the Minister may also handle a complaint about the performance of an FWC Member. This power may be exercised by the

Minister only for the purpose of considering whether the matter should be referred to the Parliament, or for the purpose of considering whether to advise the Governor-General to suspend the FWC Member.

290. Item 1 of Schedule 11 inserts a new Schedule 3 into the FW Act. Item 22 of Schedule 3 provides for these amendments to apply after the commencement of this Part in relation to a complaint about an FWC Member, whether the complaint is made, or the circumstances that gave rise to the complaint occur, before or after that commencement.

### **Part 8 – Engaging in outside work**

#### **Fair Work Act 2009**

291. Item 66 amends section 12 of the FW Act to insert a new definition of ‘paid work’. Paid work is defined to mean work for financial gain or reward (whether as an employee, a self-employed person or otherwise).

292. Items 67-76 amend sections 633, 644, 663, 666, 690 and 693 to clarify that FWC Members and the General Manager are prohibited from engaging in any form of paid work outside their duties without the President’s approval.

#### **Road Safety Remuneration Act 2012**

293. Items 77-81 amend the *Road Safety Remuneration Act 2012* to insert a new definition of ‘paid work’ and clarify that an industry member of the Road Safety Remuneration Tribunal must not engage in any paid work that, in the President’s opinion, conflicts or may conflict with the proper performance of the member’s duties.

294. Item 1 of Schedule 11 inserts a new Schedule 3 into the FW Act. Item 23 of Schedule 3 provides for this amendment to apply in relation to paid work that is engaged in after the commencement of this Part.

## **SCHEDULE 9 – CHANGE OF NAME FROM FWA TO THE FWC**

295. This Schedule amends the FW Act to change the name of ‘Fair Work Australia’ to the ‘Fair Work Commission’, and makes consequential amendments to the FW Act and other Commonwealth legislation to reflect this change and transitional arrangements. Schedule 11 also contains transitional provisions which arise as a result of the change of name. These amendments respond to Panel recommendation 50.

### **Part 1 – Amendments to Fair Work legislation**

#### ***Fair Work Act 2009***

296. This part amends the FW Act to change the name of ‘Fair Work Australia’ to the ‘Fair Work Commission’ and makes consequential amendments to that Act to reflect this change.

297. This part also makes consequential amendments to the FW(RO) Act, the FW (T&C) Act, the *Fair Work (Building Industry) Act 2012*, and the *Fair Work (Registered Organisations) Amendment Act 2012* to reflect the change of the name of ‘Fair Work Australia’ to the ‘Fair Work Commission’.

### **Part 2 – Other amendments**

298. This part makes consequential amendments to other Commonwealth legislation to reflect the change of the name of ‘Fair Work Australia’ to the ‘Fair Work Commission’. This part amends the:

*Australian Crime Commission Act 2002*

*Australian Human Rights Commission Act 1986*

*Coal Mining Industry (Long Service Leave) Administration Act 1992*

*Defence Act 1903*

*Judges’ Pensions Act 1968*

*Jury Exemption Act 1965*

*Legislative Instruments Act 2003*

*National Health Act 1953*

*Northern Territory (Self-Government) Act 1978*

*Occupational Health and Safety (Maritime Industry) Act 1993*

*Offshore Petroleum and Greenhouse Gas Storage Act 2006*

*Paid Parental Leave Act 2010*

*Remuneration Tribunal Act 1973*

*Road Safety Remuneration Act 2012*

*Seat of Government (Administration) Act 1910*

*Social Security Act 1991*

*Superannuation Guarantee (Administration) Act 1992*

*Work Health and Safety Act 2011*

### **Part 3 – Contingent amendments**

299. This part makes consequential amendments to the FW Act and the FW (RO) Act that are contingent on the passage and commencement of amendments made to those Acts by the Fair Work Amendment (Transfer of Business) Bill 2012.

300. This part also amends the FW (RO) Act contingent on the proclamation and commencement of amendments made by the *Fair Work (Registered Organisations) Amendment Act 2012*.

### **Part 4 – Transitional provisions**

301. This part makes transitional arrangements associated with the change of the name of 'Fair Work Australia' to the 'Fair Work Commission'.

302. Item 1386 provides that an identity card that was issued to a member of the staff of FWA under section 203 of the FW (RO) Act and was in force immediately prior to the change to the name, continues to be in force.

303. Item 1387 is a transitional provision for the meaning of 'public office' under the *Remuneration Tribunal Act 1973*. As amended by this Bill, paragraph 3(4)(j) of that Act excludes from the definition of public office 'the office of the President of the Fair Work Commission' or a FWC Member taken to be appointed to the FWC by item 1 of Schedule 18 to the FW (T&C) Act. Item 1388 is a transitional provision for travelling allowances under the *Remuneration Tribunal Act 1973*. As amended by this Bill, subsection 7(4B) of that Act allows the Remuneration Tribunal to inquire into and determine the travelling allowances to be paid to the President of the Fair Work Commission or a FWC Member taken to be appointed to the FWC by item 1 of Schedule 18 to the FW (T&C) Act for travel within Australia.

304. Item 1389 provides that the person holding office as a dual FWA member under the *Road Safety Remuneration Act 2012* immediately before commencement of the name change continues to hold office as a dual FWC member (subitem (1)). Subitems (2) and (3) preserve the effect of things done by or in relation to a dual FWA Member.



## **SCHEDULE 10 – OTHER AMENDMENTS**

### **Part 1 – Costs orders in court proceedings**

#### ***Fair Work Act 2009***

305. Section 570 of the FW Act provides for courts exercising jurisdiction under the FW Act to award costs against a party to proceedings (including appeals) only in circumstances where the court is satisfied that the party instituted proceedings vexatiously or without reasonable cause, the party's unreasonable act or omission caused the other party to incur costs, or the party unreasonably refused to participate in a matter before FWA that arose from the same facts as the court proceedings.

306. Item 1 amends section 570(1) of the FW Act so that it operates in relation to matters arising under the FW Act, rather than in relation to courts exercising jurisdiction under the FW Act. This amendment confirms that the FW Act is generally a 'no costs' jurisdiction (including in appeal proceedings).

307. In *Construction, Forestry, Mining and Energy Union v CSBP No 2* [2012] FCAFC 64 the Federal Court held that section 570 of the FW Act (which limits adverse costs orders to situations where proceedings were instituted vexatiously or without reasonable cause etc.) does not apply where there is an appeal from a first instance decision of the Federal Court to a Full Bench. The Court said that subsection 43(1) of the *Federal Court of Australia Act 1976* (FCA Act), under which the Court has discretion as to costs, governed costs in this matter. The Court held that section 570 of the FW Act did not apply as it was limited to proceedings in courts exercising jurisdiction under the FW Act. This did not include appeals from a decision of a single Federal Court judge to a Full Bench under section 24 of the FCA Act, which was the source of the Court's jurisdiction in this case.

308. Item 1 of Schedule 11 inserts a new Schedule 3 into the FW Act. Item 34 of Schedule 3 provides for this amendment to apply in relation to proceedings commenced after the commencement of this Part.

### **Part 2 – Technical correction**

#### ***Fair Work Act 2009***

309. Item 1 makes a technical amendment to section 84A of the FW Act. Section 84A requires an employer, before engaging an employee to perform the work of another employee who is going to take, or is taking, unpaid parental leave to notify the replacement employee that the engagement is temporary and that the employee and employer have particular rights under the FW Act.

310. This item omits an incorrect reference to 'unpaid personal leave' in subparagraph 84A(b)(ii) and substitutes the correct reference to 'unpaid parental leave'.

## **SCHEDULE 11 – APPLICATION, TRANSITIONAL AND SAVING PROVISIONS**

### ***Fair Work Act 2009***

311. Schedule 11 inserts a new Schedule 3 at the end of the FW Act to make application, transitional and savings provisions.

#### **Item 1 At the end of the Act**

312. This item includes a new schedule in the FW Act (Schedule 3).

#### **Part 1**

313. Part 1 creates definitions of terms used in the Schedule.

#### **Parts 2-8 and 10**

314. These parts set out provisions dealing with when certain amendments take effect. The effect of these provisions is described together with the explanatory detail for the substantive amendments in the relevant schedules.

#### **Part 9 – Changing the name of Fair Work Australia**

315. This part contains transitional provisions arising as a result of the change of the name of ‘Fair Work Australia’ to the ‘Fair Work Commission’.

316. Item 24 is a transitional provision for the office of President of FWA. For the avoidance of doubt, subsection (1) provides that the person holding office as the President of FWA immediately before the commencement of the change of name will continue to hold office as the President of the FWC. Subitem (2) provides that anything that was done by, or in relation to, the President of FWA is taken to have been done by, or in relation to, the President of the FWC. Instruments (such as the FWA Rules) made by the President of FWA will be taken to have been instruments made by the President of the FWC.

317. Subitem (3) preserves the effect of action taken by, or things done by the President of FWA prior to the commencement of the name change. Subitem (4) provides that the Minister may make determinations specifying exceptions or certain modifications to subsection (2). Subitem (5) provides that such a determination is not a legislative instrument for the purpose of the *Legislative Instruments Act 2003*, and is declaratory of the law.

318. Item 25 is a transitional provision for the office of Deputy President of FWA. For the avoidance of doubt, subsection (1) provides that a person holding office as a Deputy President of FWA immediately before the name change continues to hold office as a Deputy President of the FWC. Subitem (2) preserves the appointment of a member of a State industrial tribunal who holds a dual appointment to FWA as a Deputy President.

319. Subitems (3) and (4) preserve the effect of action taken or things done by or in relation to a Deputy President. Subitem (5) provides that the Minister may make determinations specifying exceptions or certain modifications to subitem (3). Subitem (6) provides that such a determination is not a legislative instrument for the purpose of the *Legislative Instruments Act 2003* and is declaratory of the law.

320. Item 26 is a transitional provision for the office of Commissioner of FWA. For the avoidance of doubt, subitem (1) provides that a person holding office as a Commissioner of FWA immediately before this item commences, continues to hold office as a Commissioner of the FWC. Subitem (2) preserves the appointment of a member of a State industrial tribunal who holds a dual appointment to FWA as a Commissioner.

321. Subitems (3) and (4) preserve the effect of action taken by, or things done in relation to a Commissioner. Subitem (5) provides that the Minister may make determinations specifying exceptions or certain modifications to subitem (3). Subitem (6) provides that such a determination is not a legislative instrument for the purpose of the *Legislative Instruments Act 2003* and is declaratory of the law .

322. Item 27 is a transitional provision for the office of Minimum Wage Panel Member of FWA. For the avoidance of doubt, subitem (1) provides that the appointment of a person holding office as a Minimum Wage Panel Member of FWA immediately before the commencement of the name change continues to hold office as a Minimum Wage Panel Member of the FWC. The Member will continue to hold office for the balance of the term of their appointment, or until the amendments made by Schedule 2 commence (whichever is earlier).

323. Subitems (2) and (3) preserve the effect of action taken by, or things done in relation to a Minimum Wage Panel Member. Subitem (4) provides that the Minister may make determinations specifying exceptions or certain modifications to subitem (2). Subitem (5) provides that such a determination is not a legislative instrument and is declaratory of the law.

324. Item 28 provides that if before the commencement of the name change, a thing was done by or in relation to FWA, then for the purposes of the operation of any law after the commencement time, the thing is taken to have been done by, or in relation to the FWC.

325. Subitem (2) preserves the effect of things done by or in relation to FWA. Subitem (3) provides that the Minister may make determinations specifying exceptions or certain modifications to subitem (1). Subitem (4) provides that such a determination is not a legislative instrument and is declaratory of the law.

326. Item 29 is a transitional provision for the office of General Manager of FWA, and for the staff of FWA. Subitem (1) provides that the appointment of a person holding office as the General Manager of FWA immediately before the commencement of the name change will continue to hold office as the General Manager of the FWC for the balance of person's term of appointment.

327. Subitems (2) and (3) preserve the effect of things done by, or in relation to the General Manager. Subitem (4) provides that the Minister may make determinations specifying exceptions or certain modifications to subitem (2). Subitem (5) provides that such a determination is not a legislative instrument and is declaratory of the law.

328. Subitem (6) provides that for the avoidance of doubt, a person who is a member of the staff of FWA immediately prior to the name change, continues as a member of the staff of the FWC.

329. Item 30 makes it clear that the transitional rules in this Part are not intended to limit the operation of section 7 and subsection 25B(1) of the *Acts Interpretation Act 1901*.

### **Part 11 – Regulations**

330. Item 32 permits regulations to be made in relation to the amendments made by the Act of an application, transitional or saving nature. For example, regulations may be made to provide for transitional matters arising from the creation of 2 new Vice President positions in the FWC.

331. Regulations may also be made to deal with the transition of functions currently performed by the Minimum Wage Panel to the Expert Panel, and the abolition of the Minimum Wage Panel and appointment of Expert Panel Members.

332. The regulations may modify the operation of the items in this Part or Part 4 of Schedule 9 of the Bill or the provisions of the FW (T&C) Act. This is necessary to address any unforeseen issues that may arise in the transition from the change of name from 'Fair Work Australia' to the 'Fair Work Commission'.

333. This item also allows for regulations to be made with retrospective effect should it become apparent that there has been an omission or an unintended effect arising from the change of name. This regulation making power is necessary to deal with any issues that have been overlooked in the Bill.

334. The power to make regulations under this clause is limited to matters arising out of the change of name and such regulations would be disallowable instruments subject to parliamentary oversight.