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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE HOUSE OF REPRESENTATIVES

**FAIR WORK AMENDMENT BILL 2013**

EXPLANATORY MEMORANDUM

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

## FAIR WORK AMENDMENT BILL 2013

### OUTLINE

The Fair Work Act Review was carried out by a panel of three independent experts in response to the Government's commitment to commence a post-implementation review of the *Fair Work Act 2009* (FW Act) within 2 years of its full implementation.

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. In finding that the FW Act was broadly meeting its objectives and did not require wholesale change, the Panel made a range of 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.

The *Fair Work Amendment Act 2012* (FW Amendment Act 2012) was passed by the Parliament in December 2012 and implemented approximately one third of the recommendations of the Panel for which there was broad consensus between the Government and workplace relations stakeholders. These included amendments to unfair dismissal provisions, functions of the Fair Work Commission (FWC) and a range of technical and clarifying amendments. The FW Amendment Act 2012 also made amendments in relation to default superannuation schemes in response to the Productivity Commission's *Report into Default Superannuation Funds in Modern Awards* (Report No. 60).

The Fair Work Amendment Bill 2013 (the Bill) will implement several more of the Panel's recommendations and a number of reforms which reflect the Government's policy priorities. The Bill has been developed following extensive consultation by Government with employer and union stakeholders following the conclusion of the Fair Work Act Review.

The Bill will make amendments to:

- introduce new family friendly arrangements, including expanding the right for pregnant women to transfer to a safe job, providing further flexibility in relation to concurrent unpaid parental leave, ensuring that any special maternity leave taken will not reduce an employee's entitlement to unpaid parental leave and expanding access to the right to request flexible working arrangements to more groups of employees;
- require employers to consult with employees about the impact of changes to regular rosters or hours of work, particularly in relation to family and caring responsibilities;
- amend the modern awards objective to require that the Fair Work Commission (FWC), when ensuring that modern awards together with the National Employment Standards provide a fair and relevant minimum safety net of terms and conditions, take into account the need to provide additional remuneration for employees working overtime; unsocial, irregular or unpredictable hours; working on weekends or public holidays; or working shifts;
- give the FWC capacity to deal with disputes about the frequency of visits to premises for discussion purposes;
- provide for interviews and discussions to be held in rooms or areas agreed to by the occupier and permit holder, or in the absence of agreement, in any room or area in which one or more

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of the persons who may be interviewed or participate in the discussions ordinarily take meal or other breaks and is provided by the occupier for that purpose;

- facilitate, where agreement cannot be reached, accommodation and transport arrangements for permit holders in remote areas and to provide for limits on the amounts that an occupier can charge a permit holder under such arrangements to cost recovery;
- give the FWC capacity to deal with disputes in relation to accommodation and transport arrangements and ensure appropriate conduct by permit holders while being accommodated or transported under an accommodation or transport arrangement;
- expressly confer on the FWC the function of promoting cooperative and productive workplace relations and preventing disputes; and
- make a number of minor technical amendments.

The Bill will also amend the FW Act to give effect to the Government's response to the House of Representatives Standing Committee on Education and Employment's report *Workplace Bullying* "We just want it to stop". The Bill will:

- allow a worker who has been bullied at work in a constitutionally-covered business to apply to the FWC for an order to stop the bullying;
- adopt a definition of 'bullied at work' which is consistent with the definition of 'workplace bullying' recommended by the Committee in its report, and the proposed Safe Work Australia model Code of Practice: *Preventing and Responding to Workplace Bullying*;
- require the FWC to start dealing with an application for an order to stop bullying within 14 days of the application being made; and
- enable the FWC to make any order it considers appropriate (other than an order for payment of a pecuniary amount) to stop the bullying.

The development of the Bill included extensive consultation with the National Workplace Relations Consultative Council and their technical advisers through the Committee on Industrial Legislation, and State and Territory government officials.

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

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

### **Fair Work Amendment Bill 2013**

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 Fair Work Amendment Bill 2013**

The object of the *Fair Work Act 2009* (the 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 as explained below:

#### *Family-friendly measures*

The family-friendly amendments contained in Schedule 1 provide greater flexibility in working arrangements for modern families. This includes greater flexibility in parental leave, increased rostering protections and broader rights to request flexible working arrangements.

#### *Protections for pregnant workers*

The amendments contained in Schedule 1 are also aimed at ensuring the safety and wellbeing of pregnant workers. This includes clarifying the operation of the special maternity leave provisions and providing pregnant employees with less than 12 months service with the right to transfer to a safe job.

#### *Modern awards objective*

Schedule 2 amends the modern awards objective set out in section 134 of the FW Act to require that the FWC, when making or varying a modern award, takes into account the need to provide additional remuneration for employees working overtime, unsocial, irregular or unpredictable hours, working on weekends or public holidays, or working shifts.

#### *Anti-bullying measure*

The anti-bullying amendments are part of the Government's response to the House of Representatives Standing Committee on Education and Employment report *Workplace bullying "We just want it to stop"*. Schedule 3 amends the FW Act to include a new Part 6-4B to enable a worker who is bullied at work to apply to the Fair Work Commission (FWC) for an order to stop the bullying.

#### *Right of entry*

Schedule 4 amends Part 3-4 of the FW Act in relation to the location of discussions and interviews, as well as transport and accommodation arrangements for the facilitation of entry to premises in remote areas by permit holders. The Schedule also amends the FWC's dispute settlement powers in relation to transport and accommodation arrangements and frequency of entry to hold discussions.

## Human Rights Implications

The Bill engages the following rights:

- the right to maternity leave under Article 10(2) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and Article 11(2) of the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW);
- the rights of parents and children under Articles 3, 5 and 18 of the *Convention of the Rights of the Child* (CRC) and Article 5(b) of the CEDAW;
- the right to freedom of association, including the right to form and join trade unions and the right of trade unions to function freely in Article 22 of the *International Covenant on Civil and Political Rights* (ICCPR), Article 8 of the ICESCR and in the International Labour Organisation (ILO) Convention 87;
- the right to just and favourable conditions of work under Article 7 of the ICESCR, including the right to fair wages, the right to safe and healthy working conditions, and the right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction under Article 11(1) of the CEDAW;
- the right to the enjoyment of the highest attainable standard of physical and mental health under Article 12 of the ICESCR;
- the right 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 CEDAW and Article 27 of the *Convention on the Rights of Persons with Disabilities* (CRPD);
- the right to a fair hearing under Article 14 of the ICCPR; and
- the right to privacy and reputation under Articles 17 and 14 of the ICCPR.

### Right to maternity leave

Article 10(2) of the ICESCR states that special protection should be accorded to mothers during a reasonable period before and after childbirth, with working mothers accorded paid leave or leave with adequate social security benefits during such a period.

Article 11(2) of the CEDAW requires that State Parties take appropriate measures to introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances.

Article 18 of the CRC sets out that State Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child.

### *Family-friendly measures*

Under the FW Act an eligible employee is entitled to up to 12 months of unpaid parental leave. In general, to be eligible for unpaid parental leave an employee must have completed at least 12 months of continuous service before the expected date of birth of the child. An employee who is not fit for work while pregnant, for reasons including that she has a pregnancy-related illness, is also entitled to unpaid special maternity leave, however this counts as part of her entitlement to 12 months of unpaid parental leave.

Part 1 of Schedule 1 to the Bill amends the FW Act to ensure that any special maternity leave taken by an employee will not reduce an employee's entitlement to unpaid parental leave. These amendments further advance the rights of mothers by providing for a reasonable period of maternity leave before and after childbirth by ensuring mothers who take unpaid special maternity leave are not required to return to work earlier than would otherwise be necessary.

The FW Act also provides for the taking of unpaid parental leave in circumstances where both members of an employee couple intend to take parental leave. Currently, members of an employee couple must each take unpaid parental leave consecutively and in a single unbroken period, subject to limited exceptions. One such exception is that both employees are entitled to take leave at the same time for a period of three weeks from the date of the child's birth, with the three week period able to be taken slightly earlier or later, by agreement with the employer.

Part 2 of Schedule 1 to the Bill extends the period during which parents can take concurrent unpaid parental leave from three weeks to eight weeks, allows the parents to choose when they want to take that leave in the first twelve months after the birth or placement of the child and allows leave to be taken in separate periods of at least two weeks unless otherwise agreed by the employer. This amendment supports the right to maternity leave and promotes the understanding that both parents have an important role to play in raising a child and supports working parents to fulfil those roles, in line with Australia's obligations under the CRC.

#### Rights of parents and children

Article 3 of the CRC provides that, in all actions undertaken by legislative bodies, the best interests of the child shall be a primary consideration, while Article 5 of the CRC states that State Parties shall respect the responsibilities, rights and duties of parents. Finally, Article 18 of the CRC sets out that State Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child.

Article 5(b) of the CEDAW provides that States Parties should take all appropriate measures to ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interests of the children is the primary consideration in all cases.

#### *Family-friendly measures*

The FW Act currently provides that an employee who is a parent, or has responsibility for the care of a child, may request that their employer agree to a change in their working arrangements to assist the employee to care for the child if the child is under school age or the child is under the age of 18 and has a disability. Part 3 of Schedule 1 to the Bill amends this provision to include further situations in which an employee can request a change in their working arrangements, including for employees who are parents or who have responsibility for the care of a child of school age, as well as specifying that an employee who is returning to work after taking leave in relation to the birth or adoption of his or her child may request to work part-time. This amendment further enhances the ability of parents to utilise flexible work arrangements in order to better care for their children and is in line with Australia's obligations under the CRC.

Subdivision C of Division 3 of Part 2-3 of the FW Act sets out terms that must be included in modern awards, while Division 5 of Part 2-4 of the FW Act sets out terms that must be included

in enterprise agreements. Part 4 of Schedule 1 to the Bill inserts new content requirements in both modern awards and enterprise agreements in relation to employers consulting with employees about changes to regular rosters or ordinary hours of work before making any decision to change rosters or working hours. These additional requirements will also require employers to genuinely consult with affected employees about the impact of the changes on their family and caring responsibilities should employees raise them.

The amendments made by Part 4 of Schedule 1 ensure that a person's family and caring responsibilities are taken into account by their employer when changes are made to their working arrangements. This accords with the obligations contained in the CRC and the CEDAW to render appropriate assistance to the parents and legal guardians in the performance of their child-rearing responsibilities.

### Right to 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.

### *Right of entry*

The amendments made by Schedule 4 of the Bill engage the right to freedom of association and the rights of people to form organisations to represent their interests. Of particular relevance in the right of entry context is guidance provided by the Committee on Freedom of Association established by the Governing Body of the International Labour Organisation in its 336th Report at paragraph 108 that:

*... Governments should guarantee access of trade union representatives to workplaces with due respect for the rights of property and management, so that trade unions can communicate with workers....*

Part 3-4 of the FW Act provides a framework for right of entry for officials of organisations and empowers the FWC to deal with the misuse of rights and disputes.

The object of Part 3-4 is to balance:

- the right of organisations to represent their members in the workplace, hold discussions with potential members and investigate suspected contraventions;
- the right of employees and TCF award workers to receive, at work, information and representation from officials of organisations; and
- the right of occupiers of premises and employers to go about their business without undue inconvenience.

The amendments made by Schedule 4 of the Bill will encourage parties to reach agreement as to how entry by permit holders to workplaces is to be facilitated. The amendments assist organisations in circumstances where agreement has not been possible by:

- providing for interviews and discussions to be held in rooms or areas agreed by the occupier and permit holder, or in the absence of agreement, in any room or area in which one or more of the persons who may be interviewed or participate in the discussions ordinarily take meal or other breaks and is provided by the occupier for that purpose;
- facilitating assistance with transport and accommodation for permit holders at remote sites; and
- limiting the amounts that an occupier can charge a permit holder for provision of accommodation or transport at remote sites to cost recovery.

Schedule 4 of the Bill enables the FWC to deal with disputes about the frequency of entry to premises for discussion purposes. This could lead to the FWC placing limitations on the frequency of entry. However, that could only occur if the FWC is satisfied that the frequency of entry would require an unreasonable diversion of the occupier's critical resources.

Schedule 4 to the Bill also provides the FWC with the ability to deal with disputes about aspects of accommodation and transport arrangements, such as whether to provide accommodation or transport would cause the occupier undue inconvenience. This will ensure that occupiers of premises are not required to go to unreasonable lengths to facilitate right of entry.

In all cases, in dealing with right of entry disputes, FWC must take into account fairness between the parties concerned.

This amendment also ensures appropriate conduct by permit holders while being accommodated or transported under a transport or accommodation arrangement, consistent with the right of entry framework established by the FW Act.

The amendments in Schedule 4 of the Bill advance freedom of association and provide for right of entry disputes to be resolved with due respect for both the rights of employees to be represented at work and the rights of the occupiers of premises to maintain their property and manage their businesses. These changes to the right of entry framework do not limit the right to freedom of association.

#### Right to just and favourable working conditions

Article 7 of the ICESCR requires that State Parties recognise the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular, remuneration that provides all workers with fair wages, a decent living and rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

#### *Modern awards objective*

Under the FW Act, the FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant safety net of terms and conditions. In making or varying modern awards, the FWC must take into account the modern awards objective (see subsection 134(1) of the FW Act).

Item 1 of Schedule 2 to the Bill amends the modern awards objective to include a new requirement for the FWC to consider, in addition to the existing factors set out in subsection 134(1) of the FW Act, the need to provide additional remuneration for:



- employees working overtime;
- employees working unsocial, irregular or unpredictable hours;
- employees working on weekends or public holidays; or
- employees working shifts.

This amendment promotes the right to fair wages and in particular recognises the need to fairly compensate employees who work long, irregular, unsocial hours, or hours that could reasonably be expected to impact their work/life balance and enjoyment of life outside of work.

#### Right to safe and healthy working conditions

Article 11(1) of the CEDAW sets out that States Parties shall take all appropriate measures to eliminate discrimination against working women to ensure equal rights, in particular the right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction. Article 11(2)(d) of the CEDAW sets out that in order to ensure women their effective right to work States Parties shall take appropriate measures to provide special protection to women during pregnancy in types of work proved to be harmful to them.

Article 7 of the ICESCR requires that State Parties to the Covenant recognise the right of everyone to the enjoyment of just and favourable working conditions, 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; and
- rest, leisure and reasonable limitations on working hours and periodic holidays with pay, as well as remuneration for public holidays.

#### *Family-friendly measures*

The FW Act provides a pregnant employee who has completed twelve months' service and who is otherwise eligible for unpaid parental leave with an entitlement to be transferred to an appropriate safe job for a risk period, if she provides evidence that she is fit for work, but that it is inadvisable for her to continue in her present position because of illness or risks arising out of her pregnancy, or hazards associated with the position.

Part 5 of Schedule 1 to the Bill extends the right to transfer to a safe job to all pregnant employees regardless of their length of service. This enhances the protection of health and safety in working conditions and further safeguards the function of reproduction by ensuring that all pregnant employees are entitled to be transferred to an appropriate, safe job during their pregnancy.

#### *Anti-bullying measure*

The House of Representatives Standing Committee on Education and Employment report *Workplace Bullying "We just want it to stop"* notes that to most Australians, 'work provides a sense of dignity and is central to our individual and collective sense of identity'.<sup>1</sup> Recognising the central place of work in our lives, the report goes on to note that workplace bullying 'can

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<sup>1</sup> House of Representatives Standing Committee on Education and Employment report, *Workplace bullying "We just want it to stop"*, p. 1

have a profound effect on all aspects of a person's health as well as their work and family life, undermining self-esteem, productivity and morale'.<sup>2</sup>

Schedule 3 to the Bill promotes the right to safe and healthy working conditions by providing a mechanism to help an individual worker resolve a bullying matter quickly and inexpensively. One of the key issues highlighted by the Committee was the difficulty people face in trying to find a quick way to make the bullying stop so that they do not suffer further harm or injury. Schedule 3 to the Bill enables a worker who reasonably believes that they have been bullied at work to make an application to the FWC for an order to prevent future bullying. Early intervention in bullying matters can help to ensure that the bullying behaviour is stopped before it has a chance to negatively impact on the person's health and wellbeing.

### Right to the enjoyment of the highest attainable standard of physical and mental health

Article 12 of the ICESCR requires that State Parties to the Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. This includes taking steps towards the prevention and control of occupational and other diseases.

#### *Anti-bullying measure*

As noted in the House of Representatives Standing Committee on Education and Employment's report *Workplace Bullying "We just want it to stop"*, workplace bullying often results in significant negative consequences for an individual's health and wellbeing.<sup>3</sup> The negative effects of workplace bullying can manifest both mentally and physically, including depression, anxiety, sleep disturbances, nausea and musculoskeletal complaints and muscle tension.<sup>4</sup>

Schedule 3 to the Bill promotes the right to the enjoyment of the highest attainable standard of physical and mental health by allowing for early intervention to stop and prevent workplace bullying by providing a quick and cost-effective remedy to individuals. The need for quick action in these situations is reflected in the process established by Schedule 3, which requires the FWC to start to deal with the matter within 14 days of the application being made.

Schedule 3 to the Bill enables FWC to make an order to stop bullying that is tailored to the specific circumstances of the applicant. To reinforce the preventative nature of these amendments orders may not include requiring the payment of a pecuniary amount. As such, these amendments will assist in preventing incidence of workplace bullying at an early enough stage to minimise the risk of physical and mental harm to individuals.

### Right to non-discrimination

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.

#### *Family-friendly measures*

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<sup>2</sup> Ibid, p. 2

<sup>3</sup> Ibid, p. 12

<sup>4</sup> Ibid.

The FW Act currently provides that an employee who is a parent of a child may request that their employer agree to a change in their working arrangements to assist the employee to care for the child.

Part 3 of Schedule 1 to the Bill extends the right to request a change in working arrangements to a broader category of persons, including to employees with caring responsibilities, parents with children that are school age or younger, employees with a disability, those who are mature age, as well as to employees who are experiencing violence from a family member or are providing care and support to a member of their immediate family or a member of their household as a result of family violence.

In some circumstances it is legitimate to take measures that assist or recognise the interests of particular groups in the community who may be disadvantaged. The UN Committee on the Elimination of All Forms of Discrimination against Women, for example, has stated that gender-based violence, including domestic violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men.<sup>5</sup>

Extending the right to request a change in working conditions to this additional range of employees recognises the interests of these particular groups and further enhances the assistance provided to them.

Part 4 of Schedule 1 to the Bill amends Subdivision C of Division 3 of Part 2-3 and Division 5 of Part 2-4 of the FW Act to insert new content requirements in modern awards and enterprise agreements in relation to employers consulting with employees about changes to regular rosters or ordinary hours of work before making any decision to change those rosters or hours. These additional requirements will require employers to genuinely consult with affected employees about the impact of the changes on their family and caring responsibilities.

These amendments reinforce existing protections against discrimination contained in the FW Act. In particular, the requirement to be consulted prior to changes being made to regular rosters or ordinary hours of work will help to ensure that the specific needs of persons with family and caring responsibilities are given proper consideration by employers before changes are made to their rosters or ordinary hours of work.

#### *Anti-bullying measure*

Workplace bullying can be motivated by a wide range of factors, including the grounds encompassed by the Conventions listed above. While there are existing anti-discrimination mechanisms in Australia that provide a right of recourse to individuals who have been subject to discriminatory behaviour, Schedule 3 to the Bill will reinforce these protections by providing a quick, cost effective mechanism for individuals to apply for an order to stop the bullying.

#### Right to a fair hearing

Article 14 of the ICCPR provides the right to a fair hearing, including matters such as the right to a presumption of innocence and the right to not be compelled to testify against himself or herself or to confess to guilt.

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<sup>5</sup> Committee on the Elimination of Discrimination Against Women, General Recommendation No. 19 (11<sup>th</sup> Session, 1992)

### *Anti-bullying measure*

The FW Act established the FWC as an independent tribunal with a range of functions and powers to deal with workplace relations matters.

The amendments contained in Schedule 3 to the Bill do not directly engage the rights contained in Article 14 of the ICCPR as they do not create an ‘offence’ of bullying in the workplace. Instead, the amendments identify actions and behaviours that may constitute workplace bullying and enable FWC to make orders to stop bullying. An individual cannot be subject to criminal or civil sanctions as a result of an application under these provisions. The exception to this is if the individual identified by the applicant as engaging in the unreasonable behaviour does not comply with the term of the stop bullying order, at which time the applicant may seek a civil remedy against them.

Schedule 3 requires FWC to start dealing with an application within 14 days of the application being made.

Section 590 of the FW Act provides the FWC with flexibility to inform itself as it considers appropriate in relation to an application for an order to stop the bullying. This may include contacting the employer or other parties to the application, conducting a conference or holding a formal hearing. In the course of dealing with a matter, the FWC may make a recommendation to the parties or express an opinion.

While the individual alleged to have engaged in the bullying behaviour may be involved in these proceedings, they will not have an adverse determination made against them and any order to stop bullying made by the FWC will focus solely on preventing future harm. As such, this amendment does not limit human rights.

### Right to privacy and reputation

Article 17 of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with their privacy. Privacy guarantees a right to secrecy from the public of personal information. For interference with privacy not to be arbitrary it must be in accordance with the provisions, aims and objectives of the ICCPR and should be reasonable in the particular circumstances. Reasonableness in this context incorporates notions of proportionality to the end sought and necessity in the circumstances.

### *Anti-bullying measure*

The amendments to be made by Schedule 3 to the Bill enables the FWC, upon receiving an application in relation to workplace bullying, to inform itself in such a manner as it considers appropriate. This can include requiring a person to provide documents to the FWC. In this context, this may involve the FWC requesting the applicant’s employer to provide documents relating to their internal anti-bullying processes and information about any management action that has been taken that relates to the matter in question.

The ability of the FWC to collect this information is considered proportionate, appropriate and necessary to facilitate the effective administration of these amendments. Given the health risks posed by workplace bullying, it is essential that the FWC be able to easily and quickly access information that relates to applications for a stop bullying order. Any information collected

through these processes will be handled in accordance with the FWC's privacy obligations under legislation such as the *Privacy Act 1982* and consistent with section 655 of the FW Act which allows for the disclosure of information by FWC.

Conclusion

The Bill is compatible with human rights because it advances the protection of human rights. To the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

**Minister for Employment and Workplace Relations, the Honourable William Shorten MP**

**FINANCIAL IMPACT STATEMENT**

Financial impacts will be announced as part of the 2013-14 Budget.

## **NOTES ON CLAUSES**

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

FW Act	<i>Fair Work Act 2009</i>
FW Amendment Act 2012	<i>Fair Work Amendment Act 2012</i>
FWA	Fair Work Australia
FWC	Fair Work Commission
FW (T&C) Act	<i>Fair Work (Transitional Provisions and Consequential Amendments) Act 2009</i>
RO Act	<i>Fair Work (Registered Organisations) Act 2009</i>
the Bill	Fair Work Amendment Bill 2013
WHS Act	<i>Work Health and Safety Act 2011</i>
WHS laws	Work health and safety laws

### **Clause 1 – Short title**

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

### **Clause 2 – Commencement**

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

### **Clause 3 – Schedule(s)**

3. Clause 3 of the Bill 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.

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## **SCHEDULE 1 – FAMILY-FRIENDLY MEASURES**

### **Part 1 – Special maternity leave**

#### **Overview**

4. Part 1 of Schedule 1 amends the unpaid special maternity leave provisions of the FW Act. The effect of these amendments will be that any period of unpaid special maternity leave taken by an eligible employee will not reduce that employee's entitlement to unpaid parental leave under section 70 of the FW Act.

5. These amendments implement Panel recommendation 4.

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

**Item 1 – Section 70 (note 1)**

**Item 2 – Section 70 (note 2)**

**Item 3 – Paragraph 75(2)(c)**

**Item 4 – Paragraph 75(2)(d)**

**Item 5 – Paragraph 76(6)(a)**

**Item 6 – Paragraph 76(6)(b)**

**Item 7 – Subsection 80(1) (note)**

**Item 8 – At the end of subsection 80(1)**

**Item 9 – Subsection 80(7)**

**Item 10 – Section 97 (note)**

**Item 11 – At the end of section 97**

6. Section 80 of the FW Act provides for an entitlement to unpaid special maternity leave for an eligible employee who is not fit for work while she is pregnant, including because she has a pregnancy-related illness. Subsection 80(7) of the FW Act currently provides that any period of special maternity leave taken by the employee reduces the employee's entitlement to 12 months of unpaid parental leave under section 70 by an equivalent amount. Sections 75 and 76 of the FW Act deal with the extension of unpaid parental leave in certain circumstances.

7. Item 9 repeals subsection 80(7) of the FW Act. The effect of this amendment is that the taking of a period of unpaid special maternity leave will not reduce an employee's entitlement to unpaid parental leave. Items 3, 4, 5 and 6 make corresponding amendments to remove references to unpaid special maternity leave in subsections 75(2) and 76(6) of the FW Act.

8. Items 1 and 2 make changes to notes in section 70 of the FW Act, consequential on the amendment made by item 9.

9. Items 8 and 11 insert notes that make clear that where an employee has an entitlement to paid personal/carer's leave, the employee may take that leave before taking unpaid special maternity leave. Items 7 and 10 make amendments consequential upon the insertion of the notes.

#### **Application of amendments**

10. Item 1 of Schedule 7 inserts new Schedule 4 to the FW Act. Item 2 of new Schedule 4 provides that these amendments apply in relation to periods of unpaid special maternity leave that start after the commencement of Part 1 of Schedule 1 to the Bill.



## **Part 2 – Parental leave**

### **Overview**

11. Part 2 of Schedule 1 to the Bill amends the concurrent leave provisions of the FW Act. These amendments will provide parents with greater flexibility when caring for their child by increasing the maximum period of concurrent leave available under the unpaid parental leave provisions from 3 to 8 weeks. The amendments will also provide greater flexibility for when parents may choose to take concurrent leave, by enabling the 8 weeks' leave to be taken in separate periods (of at least 2 weeks, or a shorter period if agreed by the employer) at any time within the first 12 months of the birth or adoption of a child.

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

#### **Item 12 – Section 12**

12. Item 12 inserts a signpost definition of 'concurrent leave' in the dictionary (section 12).

#### **Item 13 – Paragraphs 72(5)(a), (b) and (c)**

#### **Item 14 – Subsection 74(2)**

#### **Item 15 – After subsection 74(4)**

13. Section 72 of the FW Act deals with the taking of unpaid parental leave in circumstances where both members of an employee couple (that is, where one employee is the spouse or de facto partner of another employee) intend to take parental leave. In general, members of an employee couple must each take unpaid parental leave consecutively and in a single unbroken period, subject to limited exceptions.

14. Subsection 72(5) of the FW Act provides a limited exception to the rule that both members of an employee couple must take unpaid parental leave consecutively. Currently, both employees are entitled to take leave at the same time for a period of three weeks from the date of the child's birth or adoption. By agreement with the employer, the three weeks concurrent leave may be taken earlier than the birth and up to six weeks from the date of the child's birth or adoption.

15. Under section 72(6) of the FW Act, the taking of concurrent leave is also an exception to the rule that the employee must take his or her leave in a single unbroken period.

16. Item 13 repeals paragraphs 72(5)(a), (b) and (c) and replaces them with new paragraphs 72(5)(a), (b) and (c). New paragraph 72(5)(a) provides that the concurrent unpaid parental leave may be up to 8 weeks in total. New paragraph 72(5)(b) provides that the concurrent leave may be taken in separate periods of at least 2 weeks each, or a shorter period if the employer agrees. New paragraph 72(5)(c) provides that, unless otherwise agreed by the employer, the concurrent leave must not start before the date of birth or, in the case of adoption, the day of placement of the child with the employee for adoption.

17. Under current section 74 of the FW Act, an employee must give his or her employer at least 10 weeks' written notice of the taking of unpaid parental leave under sections 71 and 72. If the provision of 10 weeks' notice is not practicable, the employee can provide the notice as soon as is practicable.

18. Subsection 74(4) of the FW Act requires an employee to confirm the intended start and end dates of the leave (or advise of any changes) at least 4 weeks before the intended start date, unless it is not practicable to do so.

19. Item 14 repeals subsection 74(2) and substitutes new subsection 74(2). New subsection 74(2) provides that an employee must give 10 weeks' written notice of the taking of

unpaid parental leave, except where a member of an employee couple intends to take second and subsequent periods of concurrent leave in accordance with new paragraph 72(5)(b), in which case the employee must give at least 4 weeks' written notice. The 10 weeks' notice period will continue to apply in relation to the taking of the first period of concurrent unpaid parental leave.

20. Item 15 inserts new subsection 74(4A). New subsection 74(4A) provides that the requirements to confirm or advise of changes of intended start and end dates under subsection 74(4) do not apply in relation to second and subsequent periods of concurrent unpaid parental leave.

### **Application of amendments**

21. Item 1 of Schedule 7 inserts new Schedule 4 to the FW Act. Item 3 of new Schedule 4 provides for these amendments to apply in relation to periods of unpaid parental leave that are taken by members of an employee couple if the first taking of leave by either member of the employee couple occurs after the commencement of Part 2 of Schedule 1.

### **Part 3 – Right to request flexible working arrangements**

#### **Overview**

22. Part 3 of Schedule 1 amends provisions of the FW Act about the requests for flexible working arrangements, in part response to Panel recommendation 5, by extending the right to request a change in working arrangements to a wider range of caring and other circumstances.

23. The Part also provides a non-exhaustive list of what might constitute 'reasonable business grounds' for the purposes of refusing a request under the Part.

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

#### **Item 16 – Section 12 (definition of *school age*)**

24. Item 16 amends the definition of 'school age' set out in section 12 of the FW Act to mean the age at which a child is required to attend school in the relevant State or Territory. This amendment is consequential on the amendment in item 17 inserting new paragraph 65(1A)(a).

#### **Item 17 – Subsection 65(1)**

25. Currently, subsection 65(1) of the FW Act provides that an employee may request a change in his or her working arrangements to assist the employee with his or her caring responsibilities. Subsection 65(1) applies in circumstances where the employee is a parent, or has responsibility for the care of a child, if the child is under school age or the child is under the age of 18 and has a disability.

26. Item 17 replaces subsection 65(1) of the FW Act with new subsections 65(1), 65(1A) and 65(1B).

27. New subsection 65(1) provides that if an employee would like to change his or her working arrangements because of any of the circumstances specified in new subsection 65(1A), then the employee is entitled to request a change in his or her working arrangements. The terms of new subsection 65(1) make clear that the reason the employee would like to change their working arrangement is because of the particular circumstances of the employee. That is, there must be a nexus between the request and the employee's particular circumstances.

28. These provisions are not intended to limit the timing or nature of discussions about flexible working arrangements generally. For example, where an employee can foresee that he or she may need to assume caring responsibilities in the short to medium term, it is anticipated that the employee could commence discussions ahead of assuming those responsibilities to 'flag' that a request in accordance with these provisions may be coming, and to give the parties an

opportunity to explore suitable alternative arrangements that accommodate the needs of both parties. Consistent with the current operation of the right to request provisions and the intent of these provisions to promote discussion between employers and employees about flexible working arrangements, there is no evidence requirement attaching to the request. It would be expected that documentation relating to the particular circumstances of an employee would be addressed in discussions between employers and employees.

29. New subsection 65(1A) sets out the range of circumstances related to a request under subsection 65(1), namely, that the employee:

- is the parent, or has responsibility for the care, of a child who is of school age or younger;
- is a carer (within the meaning of the *Carer Recognition Act 2010*);
- has a disability;
- is 55 or older;
- is experiencing violence from a member of the employee’s family; or
- provides care or support to a member of his or her immediate family or a member of his or her household who requires care or support because the member is experiencing violence from the member’s family.

30. New subsection 65(1B) explicitly provides that an employee who is a parent, or has responsibility for the care of a child, and who is returning to work after taking leave in connection with the birth or adoption of the child, is entitled to request to work on a part-time basis, to assist the employee to care for the child.

31. For example, as a parent of a child who is of school age or younger, an employee returning from parental leave would also be able to request changes to their working arrangements other than part-time hours, such as to change their patterns of work to take longer work or meal breaks, or adjust their start and finish times, under subsection 65(1).

32. The term ‘carer’ in new paragraph 65(1A)(b) is given the meaning set out in the *Carer Recognition Act 2010* and encompasses all people who provide personal care, support and assistance to individuals who need support due to disability, a medical condition, including a terminal or chronic illness, mental illness or fragility due to age.

33. A person is not a carer within the meaning of the *Carer Recognition Act 2010* in respect of care, support or assistance he or she provides under a contract of service or a contract for the provision of services, in the course of doing voluntary work for a charitable, welfare or community organisation, or as part of the requirements of a course of education or training. A person will not be precluded from being a carer, however, if they are paid for their caring services in one context, but in another context provides care to an individual within the meaning of the *Carer Recognition Act 2010*.

34. To avoid doubt, a person is not a carer within the meaning of the *Carer Recognition Act 2010* simply because he or she is the spouse, de facto partner, parent or other relative or guardian of an individual who requires care or lives with an individual who requires care. For example, a parent of a child with a disability is not a carer unless the child being cared for needs support from that parent due to that disability.

35. ‘Disability’ in new paragraph 65(1A)(c) is not defined and has its ordinary meaning.

36. References to ‘family’ and family violence in new paragraphs 65(1A)(e) and (f) are not defined. ‘Family’ includes persons, whether related by blood, marriage, adoption, step or fostering and those who usually reside in the same household. The Australian Law Reform

Commission (ALRC) has conducted a number of extensive inquiries into family violence, including a review of Australian and international definitions of family violence. Based on this review the ALRC has concluded that ‘family violence’ includes violent or threatening behaviour or any other form of behaviour that coerces or controls a family member or causes that family member to be fearful. Family violence may include, but is not limited to physical violence, sexual assault and other sexually abusive behaviour, economic abuse and emotional or psychological abuse.

**Item 18 – After subsection 65(5)**

37. Currently, under subsection 65(5) of the FW Act, an employer may refuse a request for a change in working arrangements only on reasonable business grounds.

38. Item 18 inserts new subsection 65(5A), which sets out a non-exhaustive list of what may constitute reasonable business grounds, including:

- the excessive cost of accommodating the request;
- that there is no capacity to reorganise work arrangements of other employees to accommodate the request;
- the impracticality of any arrangements that would need to be put in place to accommodate the request, including the need to recruit replacement staff;
- that there would be a significant loss of efficiency or productivity;
- that there would be a significant negative impact on customer service.

39. The list of reasonable business grounds is not exhaustive and such grounds will be determined having regard to the particular circumstances of each workplace and the nature of the request made.

**Application of amendments**

40. Item 1 of Schedule 7 inserts new Schedule 4 to the FW Act. Item 4 of new Schedule 4 provides for these amendments to apply in relation to requests under new subsection 65(1) of the FW Act that are made on or after the commencement of Part 3 of Schedule 1.

**Part 4 – Consultation about changes to rosters or working hours**

**Overview**

41. Part 4 of Schedule 1 inserts new content requirements for modern awards and enterprise agreements in relation to employers consulting with employees about changes to regular rosters or ordinary hours of work. The intention of the amendments is to promote discussion between employers and employees who are covered by a modern award or who are party to an enterprise agreement about the likely impact of a change to an employee’s regular roster or ordinary hours of work, particularly in relation to the employee’s family and caring arrangements, by requiring employers to genuinely consult employees about such changes and consider the impact of the change in making such changes raised by employees.

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**Item 19 – After section 145**

42. Subdivision C of Division 3 of Part 2-3 of the FW Act sets out terms that must be included in modern awards.

43. Item 19 inserts new section 145A, which relates to changes to regular rosters or ordinary hours of work. New paragraph 145A(1)(a) provides that modern awards must include a

term that requires employers to genuinely consult with employees about changes to their regular roster or ordinary hours of work.

44. ‘Regular roster’ in new paragraph 145A(1)(a) is not defined. It is intended that the requirement to consult under new section 145A will not be triggered by a proposed change where an employee has irregular, sporadic or unpredictable working hours. Rather, regardless of whether an employee is permanent or casual, where that employee has an understanding of, and reliance on the fact that, their working arrangements are regular and systematic, any change that would have an impact upon those arrangements will trigger the consultation requirement in accordance with the terms of the modern award. The employer will be required to inform employees about the proposed change to their regular roster or ordinary hours of work and invite employees to give their views on the impact of the proposed change (particularly any impact upon the employees’ family and caring responsibilities), and consider those views.

45. The amendments will ensure that employers cannot unilaterally make changes that adversely impact upon their employees without consulting on the change and considering the impact of those changes on those employees’ family and caring responsibilities.

46. New paragraph 145A(1)(b) provides that the term must allow for the representation of those employees for the purposes of the consultation. A person representing an employee for the purposes of new paragraph 145A(1)(b) could be an elected employee or a representative from an employee organisation.

47. New subsection 145A(2) sets out the consultation process to be included in the term of the modern award. The term must require an employer to consult with employees about a change to a regular roster or ordinary hours of work by:

- providing information to the employees about the change;
- inviting employees to give their views about the impact of the change (including any impact in relation to their family and caring responsibilities); and
- considering any views put forward by those employees about the impact of the change.

#### **Illustrative example**

Gabrielle has worked 4 days a week with Wednesdays off for several years. Her employer knows that she has school aged children and that she cares for her elderly mother on her day off. Her employer has decided to change the arrangements under which Gabrielle works such that she will no longer be able to take Wednesdays off. Before changing her regular rostered hours of work, in accordance with the consultation term included in the applicable modern award, Gabrielle’s employer will be required to provide information to her about the proposed change, give her an opportunity to raise with her employer the impact of the proposed change on her (including in the context of her family and caring responsibilities) and require the employer to consider Gabrielle’s views on that impact before making any changes.

48. The dispute resolution mechanisms of the relevant workplace instrument will apply to the operation of the consultation term.

49. Compliance with consultation terms, including the new requirements in relation to regular rosters and ordinary working hours, will continue to be enforceable by application to a Court.

## Application of amendments

50. Item 1 of Schedule 7 inserts new Schedule 4 to the FW Act. Item 5 of new Schedule 4 provides that these amendments apply to a modern award that is in operation on or after 1 January 2014, whether or not the award was made before that day.

51. Item 5 of new Schedule 4 also provides that Part 4 of Schedule 1 to this Bill applies in relation to a modern award if the award:

- is made before 1 January 2014; and
- is in operation on that day; and
- immediately before that day, does not include a consultation term (the ‘relevant term’) of the kind mentioned in new section 145A (as inserted by item 19 of Schedule 1).

52. If these criteria are satisfied, the FWC must, by 31 December 2013, make a determination varying the modern award to include the relevant term. Such a determination comes into operation on (and takes effect from) 1 January 2014. Where a modern award contains an existing consultation term, it will be open to the FWC to make a determination varying the existing term in accordance with these amendments.

53. Section 168 of the FW Act, which requires the FWC to publish an award as varied by a FWC determination as soon as practicable, applies to a determination made under these provisions.

### Item 20 – Paragraph 205(1)(a)

### Item 21 – After subsection 205(1)

54. Division 5 of Part 2-4 of the FW Act sets out terms that must be included in an enterprise agreement. Currently, an enterprise agreement must include a term requiring an employer to consult about major workplace changes that are likely to have a significant effect on the employees (subsection 205(1) of the FW Act).

55. Item 20 repeals paragraph 205(1)(a) of the FW Act, and substitutes new paragraph 205(1)(a).

56. New paragraph 205(1)(a) requires the employer or employers to which an enterprise agreement applies to consult the employees to whom the agreement applies about:

- a major workplace change that is likely to have a significant effect on the employees; or
- a change to their regular roster or ordinary hours of work.

57. New subparagraph 205(1)(a)(ii) provides for the additional requirement that an enterprise agreement must include a term about consultation on change to a regular roster or ordinary hours of work. The effect of this amendment is to ensure that, where a change to regular rosters or ordinary hours of work (which may impact upon an employee, particularly in relation to his or her family and caring responsibilities) does not constitute ‘major workplace change’ in accordance with subsection 205(1), an employer will nevertheless be required to engage in consultation with the employee about the change and impacts raised by the employee.

58. Item 21 inserts new subsection 205(1A) which sets out the consultation process to be included in a term in an enterprise agreement. The term must require an employer to consult with employees about change to a regular roster or ordinary hours of work by:

- providing information to the employees about the change;

- inviting employees to give their views about the impact of the change (including any impact in relation to their family and caring responsibilities); and
- considering any views put forward by those employees about the impact of the change.

59. As discussed at paragraph 44, the consultation term will only be triggered where the change relates to ‘regular’ rosters or ordinary working hours.

60. Paragraph 205(1)(b) of the FW Act allows for the representation of employees for the purposes of consultation referred to in paragraph 205(1)(a) of the FW Act. A person representing an employee for the purposes of new subparagraph 205(1)(a)(ii) of the FW Act could be an elected employee or a representative from an employee organisation eligible to represent the employee.

61. Employers and employees will still be able to negotiate a consultation term for inclusion in an enterprise agreement that meets the requirements of their particular workplace. The agreement must include a term in accordance with these amendments. If an enterprise agreement negotiated by employers and employees does not include a consultation term for the purposes of their particular workplace, in accordance with subsection 205(2) of the FW Act, the model consultation term, which will be amended in accordance with these amendments, will be taken to be a term of the agreement.

62. The dispute resolution mechanisms of the relevant workplace instrument will also apply to the operation of the consultation term

63. Compliance with consultation terms, including the new requirements in relation to regular rosters and ordinary working hours, will continue to be enforceable by application to the Courts.

### **Application of amendments**

64. Schedule 7 inserts new Schedule 4 to the FW Act. Item 5 of new Schedule 4 provides that the amendments made by items 20 and 21 of Schedule 1 to the Bill apply in relation to an enterprise agreement that is made on or after the commencement of that Schedule.

### **Part 5 – Transfer to a safe job**

#### **Overview**

65. Part 5 of Schedule 1 extends the existing entitlement to transfer to a safe job to a pregnant employee regardless of whether she has, or will have, an entitlement to unpaid parental leave.

66. Currently, an employee is eligible for unpaid parental leave if they have, or will have completed at least 12 months of continuous service with their employer immediately before the proposed leave is to start. The employee is only entitled to transfer to a safe job if they are entitled to unpaid parental leave. The effect of these amendments is that, subject to the usual evidence requirements being met, the entitlement to be transferred to an appropriate safe job applies to any pregnant employee, regardless of the period of service that the employee will have worked.

67. Under these amendments, if there is no appropriate safe job available:

- The current arrangements for an employee who is entitled to unpaid parental leave and who has complied with the notice and evidence requirements continue and the employee will be entitled to paid no safe job leave, and

- A new provision which provides that an employee who is not entitled to unpaid parental leave and who complies with any evidence requirements is entitled to unpaid no safe job leave.

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

#### **Item 22 – Section 12 (definition of *appropriate safe job*)**

#### **Item 23 – Section 12 (definition of *paid no safe job leave*)**

#### **Item 24 – Section 12**

68. Items 22 and 23 make numbering changes to the signpost definitions of ‘appropriate safe job’ and ‘paid no safe job leave’ in the dictionary (section 12), consequential on the amendments in item 29. Item 24 inserts a signpost definition of ‘risk period’ and ‘unpaid no safe job leave’ in the dictionary (section 12).

#### **Item 25 – Subsections 67(1) and (2)**

#### **Item 26 – Subsection 71(3) (note 2)**

#### **Item 27 – Subparagraph 73(2)(c)(ii)**

#### **Item 28 – Subsection 73(2) (note)**

#### **Item 29 – Section 81**

#### **Item 30 – After section 82**

69. Item 29 repeals section 81 of the FW Act and substitutes new sections 81 and 81A.

70. New subsection 81(1) provides a pregnant employee with an entitlement to be transferred to a safe job. The employee must provide evidence of the kind that would satisfy a reasonable person that she is fit for work, but that it is inadvisable for her to continue in her present position during the risk period because of illnesses or risks arising out of her pregnancy, or hazards connected with the position. New subsection 81(6) provides that an employer may require the evidence to be in the form of a medical certificate.

71. New subsection 81(2) provides that where these requirements are met, for the duration of the risk period the employee must be transferred to an appropriate safe job with no other change to the employee’s terms and conditions of employment. A note to new subsection 81(2) indicates that if there is no appropriate safe job available, the employee may be entitled to paid no safe job leave under section 81A or unpaid no safe job leave under new section 82A of the FW Act.

72. New subsection 81(3) retains the current definition of ‘appropriate safe job’ to be a safe job that has the same ordinary hours of work as the employee’s present position, or an agreed different number of hours. New subsection 81(4) retains the current requirement that an employer pay the transferred employee at her full rate of pay for the position she was in before the transfer for the hours that she works in the risk period. New subsection 81(5) retains the existing provision in section 81(7) and provides that should the employee’s pregnancy end before the end of the risk period, the risk period ends when the pregnancy ends.

73. New section 81A deals with the entitlement to paid no safe job leave. Under new subsection 81A(1), if section 81 of the FW Act applies to a pregnant employee, there is no safe job available, the employee is entitled to unpaid parental leave and has complied with the relevant notice and evidence requirements for taking unpaid parental leave then the employee is



entitled to ‘paid no safe job leave’ for the duration of the risk period. This provision reflects the existing entitlement prior to the commencement of this section.

74. New subsection 81A(2) requires an employer to pay the employee who takes no safe job leave at the employee’s base rate of pay (as defined in section 16 of the FW Act) for the employee’s ordinary hours of work in the risk period. This provision reflects the existing entitlement prior to the commencement of this section.

75. Item 30 inserts new section 82A, which deals with the entitlement to unpaid no safe job leave. Under new subsection 82A(1), if section 81 of the FW Act applies to a pregnant employee, but the employee is not entitled to unpaid parental leave and there is no safe job available, the employee is entitled to ‘unpaid no safe job leave’ for the duration of the risk period. If required by the employer, the employee is required to give the employer evidence that would satisfy a reasonable person of the pregnancy. New subsection 82A(2) provides that an employer may require the evidence referred to in paragraph 82(1)(c) of the FW Act to be in the form of a medical certificate. The evidence requirements reflect existing arrangements and the requirements for ‘paid no safe job leave’.

76. Item 25 inserts references to ‘unpaid no safe job leave’ in sections 67(1) and (2) consequential to item 30, to clarify that the eligibility rules in section 67 do not apply to unpaid no safe job leave.

#### **Illustrative examples**

Stephanie is a pregnant employee who has been working full-time with her employer Brett for three years and is entitled to unpaid parental leave. She has applied for unpaid parental leave and has given at least 10 weeks’ written notice and a medical certificate in accordance with the notice and evidence requirements in section 74.

Ten weeks before the expected date of birth, Stephanie provides Brett with a medical certificate stating that she is fit to continue working, but that it is inadvisable for her to continue working in her present position because of hazards connected with the position.

If Brett is not able to transfer Stephanie to a safe job because there is no appropriate safe job available, then Stephanie can take paid no safe job leave for the risk period, which may extend until the birth of the child.

Leanne is a pregnant employee who has been working full-time with her employer Luke for eight months and is not entitled to unpaid parental leave. Leanne provides Luke with a medical certificate stating that she is fit to continue working, but that it is inadvisable for her to continue working for the next couple of weeks in her present position because of risks arising out of her pregnancy.

If Luke is not able to transfer Leanne to a safe job because there is no appropriate safe job available, then Leanne can take unpaid no safe job leave for the risk period. At the end of the risk period, Leanne is entitled to return to her position.

77. Item 26 repeals and substitutes the second legislative note after subsection 71(3), consequential on the amendments in item 29. The new note alerts the reader to new sections 81, 81A and 82A of the FW Act.

78. Item 27 repeals subparagraph 73(2)(c)(ii) of the FW Act and substitutes new subparagraph 73(2)(c)(ii).

79. Paragraph 73(2)(c) sets out the circumstances in which an employer may require a pregnant employee to start unpaid parental leave. This may be as soon as practicable within

6 weeks before the expected date of birth where the employee is certified as fit for work, but a medical certificate indicates that it is inadvisable for the employee to continue in her present position, and the employee is not otherwise entitled to transfer to a safe job or to paid no safe job leave.

80. New subparagraph 73(2)(c)(ii) is consequential upon the changes to the transfer to a safe job provisions. The effect of this subparagraph is to clarify that the circumstances in which an employee is not otherwise entitled to transfer to a safe job as provided for in current subparagraph 73(2)(c)(ii) are that the employee has not complied with the notice and evidence requirements in section 74 of the FW Act for taking unpaid parental leave.

81. Item 28 repeals and substitutes the legislative note after subsection 73(2) of the FW Act, consequential on the amendments in items 29 and 30. The new note reminds the reader that if the medical certificate contains a statement as referred to in subparagraph 73(2)(c)(i) and the employee has complied with the notice and evidence requirements in section 74 of the FW Act, the employee is entitled to be transferred to a safe job under section 81 or to paid no safe job leave under section 81A of the FW Act.

### **Application of amendments**

82. Schedule 7 inserts new Schedule 4 to the FW Act. Item 6 of new Schedule 4 to the FW Act provides for the amendments made by Part 5 of Schedule 1 to the Bill to apply in relation to evidence that is given under section 81 of the FW Act after the commencement of this Part.

## **SCHEDULE 2 – MODERN AWARDS OBJECTIVE**

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

#### **Item 1 – After paragraph 134(1)(d)**

83. Section 134 of the FW Act sets out the modern awards objective, which requires the FWC to ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account the factors set out in paragraphs 134(1)(a) – (h).

84. Item 1 inserts new paragraph 134(1)(da) of the FW Act, which amends the modern awards objective so that FWC must take into account the need to provide additional remuneration for:

- employees working overtime;
- employees working unsocial, irregular or unpredictable hours;
- employees working on weekends or public holidays; or
- employees working shifts.

#### **Application of amendment**

85. Schedule 7 of the Bill inserts new Schedule 4 to the FW Act. Item 7 of new Schedule 4 provides that the amendment made by Schedule 2 to the Bill applies in relation to a modern award that is made or varied after the commencement of that Schedule.

## **SCHEDULE 3 – ANTI-BULLYING MEASURE**

### **Overview**

86. The amendments in Schedule 3 to the Bill are part of the Government’s response to the House of Representatives Standing Committee on Education and Employment Inquiry report *Workplace Bullying “We just want it to stop”* (Committee recommendations 1 and 23). Schedule 3 amends the FW Act to include a new Part 6-4B to enable a worker who is bullied at work to apply to the FWC for an order to stop the bullying.

87. The Government announced the House of Representatives Committee Inquiry into workplace bullying in May 2012 in response to increasing community concerns about the impact of bullying across workplaces and industries. The Committee completed its inquiry and tabled its report, *Workplace Bullying “We just want it to stop”*, in November 2012. The Committee made 23 recommendations to eliminate and prevent bullying in the workplace and support workers and employers to respond more effectively to allegations of bullying.

88. One of the key issues highlighted by the Committee was the difficulty many workers face in trying to find a quick way to stop bullying so they do not suffer further harm or injury. The Committee recommended that the Government provide an individual right of recourse for persons who are bullied at work to help resolve the matter quickly and inexpensively.

89. The amendments implement the Government’s response to the Committee’s recommendation, by enabling a worker who reasonably believes that they have been bullied at work to apply to the FWC for an order.

90. The FWC is required to start dealing with a matter within 14 days after the application is made. If the FWC is satisfied that the worker has been bullied, and there is a risk that the worker will continue to be bullied, it may make an order to prevent the worker being bullied at work. The power of the FWC to make an order does not extend to ordering reinstatement of a person or the payment of compensation or a pecuniary amount.

91. The FWC may refer a matter to a work health and safety (WHS) regulator where it considers this necessary and appropriate.

92. In making its recommendation the Committee sought to emphasise that WHS regulators should not perceive individual remedies as a replacement for penalties enforceable under WHS and criminal legislation. The amendments in Schedule 3 are not intended to preclude investigation and prosecutions under WHS and criminal law.

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

#### **Item 1 – After subsection 9(5A)**

93. This item amends the Guide to the FW Act in Division 3 of Part 1-1 of the Act. A consequential amendment is made to section 9 to include a reference to new Part 6-4B.

#### **Item 2 – Section 12**

94. This item adds a number of terms to the dictionary set out at section 12 of the FW Act. The definitions link to definitions that are contained in Part 6-4B.

#### **Item 3 – Subsection 539(2) (at the end of the table)**

95. This item amends the table of civil remedy provisions in section 539 of the FW Act to include a reference to the new civil remedy provision in Part 6-4B (see new section 789FG). The table identifies, in relation to each civil remedy provision in the FW Act, who has standing to

apply for an order, the courts to which an application for an order may be made, and the maximum penalty that may be imposed by a court.

96. An application for an order in relation to contravention of the civil remedy provision in new section 789FG may be made by a person affected by the contravention, an inspector or an industrial association. An application may be made to the Federal Court, the Federal Magistrates Court or an ‘eligible State or Territory court’. The maximum penalty that can be imposed by the court on an individual is 60 penalty units.

**Item 4 – At the end of subsection 576(1)**

97. Section 576 of the FW Act sets out the functions of the FWC. Subsection (1) lists the broad areas in which the FWC has functions by reference to other parts of the FW Act. This item inserts a reference to the new functions of the FWC in relation to workers bullied at work (contained in Part 6-4B).

**Item 5 – At the end of subsection 675(2)**

98. Section 675 of the FW Act provides that it is an offence for a person to engage in conduct which contravenes an order of the FWC, except for the orders set out in subsection (2). This item includes a reference to an order made by the FWC to stop bullying (made under Part 6-4B) in subsection 675(2), with the effect that breach of an order will not be an offence. A person must not contravene an order made under Part 6-4B (see new section 789FG). This is a civil remedy provision.

**Item 6 – After Part 6-4A**

99. This item inserts Part 6-4B into the FW Act. New Part 6-4B of the FW Act establishes a process to allow a worker who is being bullied at work to apply to the FWC for an order to stop that bullying.

*Part 6-4B—Workers bullied at work*

*Division 1 – Introduction*

*New section 789FA – Guide to this Part*

100. This section includes a guide to new Part 6-4B.

*New section 789FB – Meanings of employee and employer*

101. This section clarifies that in this Part, the terms ‘employee’ and ‘employer’ have their ordinary meanings.

*Division 2 – Stopping workers being bullied at work*

*New section 789FC – Application for an FWC order to stop bullying*

102. New subsection 789FC(1) provides that a worker who reasonably believes they have been bullied at work may apply to the FWC for an order to stop the bullying under new section 789FF. The term ‘bullied at work’ is defined in section 789FD.

103. New subsection 789FC(2) provides that the term ‘worker’ has the same meaning as in the *Work Health and Safety Act 2011* (WHS Act). The WHS Act adopts a broad definition of ‘worker’ defining the term in section 7. The term extends to persons who carry out work in any capacity for a ‘person conducting a business or undertaking’ (PCBU), including as an employee, a contractor, a subcontractor, an outworker, an apprentice, a trainee, a student gaining work experience or a volunteer. The term also extends to include other persons who are deemed to be workers by section 7 of the WHS Act for the purpose of that Act, including Members of the

Australian Defence Force, Members of the Australian Federal Police and Commonwealth statutory office holders.

104. Section 5(7) of the WHS Act excludes volunteer associations from the definition of a PCBU in that Act. The effect of this is that members of volunteer associations are not captured by the definition of ‘worker’ in the WHS Act and will not fall within the scope of these provisions. Regulations made under section 5 of the WHS Act also exclude from the definition of PCBU, strata bodies corporate and incorporated volunteer associations (Regulation 7 of the Work Health and Safety Regulations 2011).

105. New subsection 789FC(3) requires an application to the FWC to be accompanied by the prescribed fee (if any).

106. New subsection 789FC(4) provides that the application fee, the method for indexing the fee and the circumstances in which all or part of the fee may be waived or refunded may be prescribed by regulation.

*New section 789FD – When is a worker bullied at work?*

107. New subsection 789FD(1) provides that a worker is bullied at work if, while the worker is engaged by a constitutionally-covered business, another individual, or group of individuals, repeatedly behaves unreasonably towards the worker, and that behaviour creates a risk to health and safety.

108. This definition reflects the definition of workplace bullying that was recommended in the *Workplace Bullying “We just want it to stop”* report. The Committee considered the existing definitions used by State, Territory and federal jurisdictions and expert evidence and concluded that there were three criteria that were most helpful in defining bullying behaviour – the behaviour has to be repeated, unreasonable and cause a risk to health and safety.

109. The Committee went on to note that ‘repeated behaviour’ refers to the persistent nature of the behaviour and can refer to a range of behaviours over time and that ‘unreasonable behaviour’ is behaviour that a reasonable person, having regard to the circumstances may see as unreasonable (in other words it is an objective test). This would include (but is not limited to) behaviour that is victimising, humiliating, intimidating or threatening.

110. New subsection 789FD(1) covers bullying behaviours carried out by an individual or a group of two or more individuals.

111. The Committee also found that balanced against this definition is the need for managers to be able to manage their staff. New subsection 789FD(2) is included to clarify that reasonable management action when carried out in a reasonable manner will not result in a person being ‘bullied at work’.

112. Persons conducting a business or undertaking have rights and obligations to take appropriate management action and make appropriate management decisions. They need to be able to make necessary decisions to respond to poor performance or if necessary take disciplinary action and also effectively direct and control the way work is carried out. For example, it is reasonable for employers to allocate work and for managers and supervisors to give fair and constructive feedback on a worker’s performance. These actions are not considered to be bullying if they are carried out in a reasonable manner that takes into account the circumstances of the case and do not leave the individual feeling (for example) victimised or humiliated.

113. The provisions in this Part only apply where the worker being ‘bullied at work’ is at work in a constitutionally covered business. New subsection 789FD(3) defines the term

‘constitutionally-covered business’ to mean a business or undertaking (within the meaning of section 5 of the WHS Act):

- where the person is a ‘constitutional corporation’, the Commonwealth, or a ‘Commonwealth authority’, or a body corporate incorporated in a Territory; or
- the person is conducting a business or undertaking principally in a Territory or Commonwealth place.

114. The terms ‘constitutional corporation’ and ‘Commonwealth authority’ are defined in section 12 of the FW Act.

*New section 789FE – FWC to deal with applications promptly*

115. New subsection 789FE(1) provides that the FWC must start to deal with an application under new section 789FC within 14 days after the application is made. This may include the FWC taking steps to inform itself of the matters under section 590 of the FW Act, conducting a conference under section 592 of the FW Act or deciding to hold a hearing under section 593 of the FW Act.

116. Section 590 of the FW Act provides the FWC with flexibility to inform itself as it considers appropriate in relation to an application for an order to stop the bullying. This may include contacting the employer or other parties to the application, conducting a conference or holding a formal hearing. In the course of dealing with a matter, the FWC may make a recommendation to the parties or express an opinion.

117. The FWC may also refer a matter to a WHS regulator or another regulatory body. Section 655 of the FW Act enables the President to authorise the disclosure of information acquired by the FWC in accordance with that section.

*New section 789FF – FWC may make orders to stop bullying*

118. New subsection 789FF(1) empowers the FWC to make any order it considers appropriate to prevent a worker from being bullied at work by an individual or group of individuals. Before an order can be made, a worker must have made an application to the FWC under new section 789FC and the FWC must be satisfied that the worker has been bullied at work by an individual or group of individuals. There must also be a risk that the worker will continue to be bullied at work by the individual or group. Orders will not necessarily be limited or apply only to the employer of the worker who is bullied, but could also apply to others, such as co-workers and visitors to the workplace. Orders could be based on behaviour such as threats made outside the workplace, if the threats relate to work.

119. The power of the FWC to grant an order is limited to preventing the worker from being bullied at work, and the focus is on resolving the matter and enabling normal working relationships to resume. The FWC cannot order reinstatement or the payment of compensation or a pecuniary amount.

120. Examples of the orders that the FWC may make include an order requiring:

- the individual or group of individuals to stop the specified behaviour;
- regular monitoring of behaviours by an employer;
- compliance with an employer’s workplace bullying policy;
- the provision of information and additional support and training to workers;
- review of the employer’s workplace bullying policy.

121. New subsection 789FF(2) provides that, when considering the terms of the order, the FWC can take into account any factors that it considers relevant, but must have regard to the following (to the extent that the FWC is aware):

- any final or interim outcomes of an investigation into the matter that is being undertaken by another person or body;
- any procedures available to the worker to resolve grievances or disputes;
- any final or interim outcomes arising from any procedures available to the worker for resolving grievances or disputes.

122. These factors may be used by the FWC to frame the order in a way that has regard to compliance action being taken by the employer or a health and safety regulator or another body, and to ensure consistency with those actions.

*New section 789FG – Contravening an order to stop bullying*

123. New section 789FG provides that a person to whom an order to stop bullying applies must not contravene a term of that order. The note to this provision explains that this clause is a civil remedy provision.

124. The table in section 539 of the FW Act identifies who has standing to apply for an order, the courts to which an application for an order may be made, and the maximum penalty that may be imposed by a court for all civil remedy provisions in the FW Act (see new table item 38, as inserted by item 3 of this Schedule).

*New section 789FH – Actions under work health and safety laws permitted*

125. New section 789FH provides that section 115 of the WHS Act and corresponding WHS laws do not apply in relation to an application for an order to stop bullying made under new section 789FC.

126. Section 115 of the WHS Act prohibits the bringing of civil proceedings in relation to discriminatory or coercive conduct under the WHS Act if a person has already commenced a proceeding or made an application or complaint in relation to the same matter under a law of the Commonwealth or a State. As the Explanatory Memorandum for the WHS Act notes (paragraph 389), this provision is intended to ‘ensure that a person may not initiate multiple actions in relation to the same matter under two or more laws of that jurisdiction’.

127. This item ensures that access to these remedies is not blocked in circumstances where a person has made an application to the FWC for an order to stop bullying. If a worker suffers discrimination, adverse action or dismissal as a result of raising a bullying matter, they will continue to be entitled to pursue remedies under the FW Act or the WHS Act.

128. This is consistent with the Committee’s recommendation that all workers who have been bullied should have access to a quick and cost-effective individual remedy. The Committee acknowledged that workplace bullying can be addressed through many existing regulatory avenues; however, some of these avenues were not tailored specifically to address bullying, and in some instances did not provide a remedy for a bullied worker. The Committee recognised in some instances it is appropriate that the bullying matter be pursued through other available avenues, including workers’ compensation or criminal law, to ensure a fair and just outcome.

**Application of amendments**

129. Item 1 of Schedule 7 inserts new Schedule 4 to the FW Act. Item 8 of new Schedule 4 provides that the amendments made by this Part apply in relation to an application that is made under new section 789FC after the commencement of the amendments.



## **SCHEDULE 4 – RIGHT OF ENTRY**

### **Overview**

130. Part 3-4 of the FW Act confers rights on officials of organisations who hold entry permits to enter premises and exercise certain powers while on those premises. The object of the Part is to establish a framework under which permit holders may enter premises for investigation and discussion purposes, which appropriately balances the rights of organisations to represent their members in the workplace, the right of employees to be represented at work and the right of occupiers of premises and employers to go about their business without undue inconvenience.

131. The Bill will make amendments to:

- provide for interviews and discussions to be held in rooms or areas agreed to by the occupier and permit holder, or in the absence of agreement, in any room or area in which one or more of the persons who may be interviewed or participate in the discussions ordinarily take meal or other breaks and is provided by the occupier for that purpose;
- give the FWC capacity to deal with disputes about the frequency of visits to premises for discussion purposes;
- facilitate, where agreement cannot be reached, accommodation and transport arrangements for permit holders in remote areas and to provide for limits on the amounts that an occupier can charge a permit holder under such arrangements to cost recovery; and
- give the FWC capacity to deal with disputes in relation to accommodation and transport arrangements and ensure appropriate conduct by permit holders while being accommodated or transported under an accommodation or transport arrangement.

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

132. Part 3-4 of the FW Act confers rights on officials of organisations who hold entry permits to enter premises and exercise certain powers while on those premises. Permit holders may enter premises for investigation and discussion purposes. Schedule 4 amends Part 3-4 in relation to the particular location of discussions and interviews and transport and accommodation arrangements for the facilitation of entry to premises in remote areas. The Schedule also amends the FWC's dispute settlement powers in relation to transport and accommodation arrangements and frequency of entry to hold discussions.

### **Item 1 – Section 12**

133. Item 1 inserts signpost definitions of 'accommodation arrangement' and 'transport arrangement' into the dictionary in section 12 and refers to their definitions in new sections 521A and 521B respectively.

### **Item 2 – At the end of section 478**

134. Item 2 inserts an explanation of new Division 7 in the Guide to Part 3-4 to deal with accommodation and transport arrangements in remote areas.

### **Item 3 – At the end of subsection 481(1)**

### **Item 4 – Subsection 483A(1) (note)**

### **Item 5 – At the end of subsection 483A(1)**

### **Item 6 – At the end of section 484**

**Item 8 – Section 500 (note)**

**Item 9 – At the end of section 500**

135. Items 3 and 5 insert notes to subsection 481(1) and subsection 483A(1), and respectively to refer the reader to:

- the FWC’s power under section 508 to deal with the misuse of rights by a permit holder or organisation; and
- obligations on persons under sections 501 and 502 not to refuse or unduly delay entry by a permit holder, or intentionally hinder or obstruct a permit holder.

136. Item 6 inserts notes to section 484 to refer the reader to:

- the FWC’s power under section 508 to deal with the misuse of rights by a permit holder or organisation;
- obligations on persons under sections 501 and 502 not to refuse or unduly delay entry by a permit holder, or intentionally hinder or obstruct a permit holder; and
- the requirement in paragraph 487(1)(b) to provide notice to the occupier for discussion purposes and the fact that once a permit holder has provided such notice, he or she may hold discussions with any eligible person on the premises.

137. Item 9 inserts a note to section 500 to refer the reader to:

- the FWC’s power under section 508 to deal with the misuse of rights by a permit holder or organisation; and
- obligations on persons under section 502 not to intentionally hinder or obstruct a permit holder.

138. Items 4 and 8 renumber existing notes.

**Item 7 – Section 492**

139. Section 492 deals with the conduct of interviews or discussions in a particular location. This item repeals and replaces existing section 492 of the FW Act. New subsection 492(1) provides that the permit holder must conduct interviews or hold discussions in the rooms or areas of the premises agreed with the occupier of the premises.

140. New subsections 492(2) and (3) provide that if there is no agreement, the default location for interviews and discussions will any room or area in which one or more of the persons who may be interviewed or participate in the discussions ordinarily take meal or other breaks and is provided by the occupier for that purpose. The requirement means, for example, that a permit holder would not be authorised to hold discussions in a personal office or workspace or a room or location which is not provided for or used for meals or other breaks unless it is agreed.

141. Notes to new section 492 refer the reader to:

- the FWC’s power under section 508 to deal with the misuse of rights by a permit holder or organisation; and
- obligations on persons under section 502 not to intentionally hinder or obstruct a permit holder.

142. An example of a misuse of rights under section 508 in these circumstances may be where a permit holder repeatedly seeks to have discussions with a person in a lunch room to encourage that person to become a member of an organisation when the person has made it clear to the permit holder that they do not wish to participate in such discussions.

143. This item also inserts new section 492A, which substantively replicates existing paragraph 492(1)(b), which requires a permit holder to comply with any reasonable request made by an occupier of premises that a permit holder take a particular route to reach a room or area for interviews or discussions determined under new section 492 (subsection 492A(1)). The request must be a reasonable request. A permit holder must comply with a reasonable request otherwise she or he will not be authorised to enter or remain on the premises because of the operation of section 486.

144. A note to new subsection 492A(1) alerts the reader to the FWC's powers under section 505 to deal with a dispute about whether a request is reasonable.

145. New subsection 492A(2) clarifies that a request to take a particular route to reach that location is not unreasonable only because the route is not the one the permit holder would have chosen.

146. Additional circumstances in which a request is or is not reasonable may be prescribed by regulations (see new subsection 492A(3)). This replicates a regulation making power in existing subsection 492(4), which has not been utilised to date.

#### **Item 10 – Subsection 505(1)**

147. This item repeals and replaces subsection 505(1) of the FW Act. Section 505 allows the FWC to deal with a dispute about the operation of this Part. New subsection 505(1) is modelled on existing subsection 505(1) and provides a list of the kinds of disputes with which the FWC may deal. The list is non-exhaustive and is not intended to be a comprehensive list of all the matters that would constitute a dispute about the operation of this Part.

148. Specific examples of disputes that the FWC may deal with are set out in new subsection 505(1) and include disputes about:

- whether a request under section 491, 492A or 499 is reasonable;
- when a right of the kind referred to in section 490 may be exercised on premises in remote areas within the meaning of subsections 521C(1) or 521D(1), despite section 490;
- whether accommodation is reasonably available (see new subsection 521C(1)) or premises are reasonably accessible (see new subsection 521D(1));
- whether providing accommodation or transport would cause the occupier of premises undue inconvenience (see new paragraphs 521C(2)(a) and 521D(2)(a)); or
- whether a request to provide accommodation or transport is made within a reasonable period (see new paragraphs 521C(2)(c) or 521D(2)(c)).

149. Notes to new section 505(1) refer the reader to the matters dealt with in section 490, section 491, new section 492A, section 499, new section 521C and new section 521D.

#### **Item 11 – Subsection 505(5)**

150. This item repeals and replaces subsection 505(5) of the FW Act. New subsection 505(5) is modelled on existing subsection 505(5) and provides that when the FWC is dealing with a dispute about the operation of this Part, it must not confer rights on a permit holder that are in addition to or inconsistent with rights exercisable in accordance with Division 2, 3 or 7 of

Part 3-4. This limitation on the exercise of the FWC’s powers does not apply to disputes about the matters set out in paragraphs 505(5)(a)-(e):

- whether a request under section 491, 492A or 499 is reasonable;
- when a right of the kind referred to in section 490 may be exercised on premises in remote areas within the meaning of subsections 521C(1) or 521D(1), despite section 490;
- whether accommodation is reasonably available (see new subsection 521C(1)) or premises are reasonably accessible (see new subsection 521D(1));
- whether providing accommodation or transport would cause the occupier of premises undue inconvenience (see new paragraphs 521C(2)(a) and 521D(2)(a)); or
- whether a request to provide accommodation or transport is made within a reasonable period (see new paragraphs 521C(2)(c) or 521D(2)(c)).

**Item 12 – After section 505**

151. This item inserts new section 505A. The effect of this item is to enable the FWC to deal with a dispute about frequency of entry to hold discussions and is modelled on existing section 505.

152. The FWC will be able to deal with a dispute if a permit holder or permit holders from the same organisation enter premises under section 484 to hold discussions with one or more employees or TCF award workers, and an employer or occupier disputes the frequency with which the permit holder or permit holders from the same organisation enter the premises (see new subsection 505A(1)).

153. In dealing with a dispute, new section 505A allows the FWC to make any order it considers appropriate to resolve the dispute, including an order to suspend, revoke or impose conditions on entry permits or the future issue of entry permits to one or more persons (see subsection 505A(3)).

154. The FWC may only make an order under section 505A if it is satisfied that the frequency of entry by the permit holder or permit holders from the same organisation would require an unreasonable diversion of the occupier’s critical resources (see new subsection 505A(4)). This is intended to be an appropriately high threshold since disputes under new section 505A have the potential to displace a permit holder’s legitimate right to enter premises for authorised purposes, in the absence of any intentional misbehaviour or wrongdoing by the permit holder. What will amount to an unreasonable diversion of an occupier’s critical resources will be for the FWC to determine on the particular circumstances before it.

155. The FWC is empowered to take action under this section of its own motion (see new paragraph 505A(5)(a)), or on application by those persons listed in new paragraph 505A(5)(b), provided the dispute relates to them.

156. When dealing with a dispute under section 505A, the FWC must have regard to fairness between the parties to the dispute (see new subsection 505A(6)).

**Item 13 – At the end of section 506**

157. This item amends section 506 to provide that a person who is subject to an order made under new subsection 505A(3) must comply with the terms of the order.

158. Section 506 is a civil remedy provision under Part 4-1.

**Item 14 – At the end of Part 3-4**

159. This item inserts new Division 7 into Part 3-4 to deal with circumstances in which permit holders and/or an organisation and occupiers have been unable to reach agreement on accommodation and transport arrangements in remote areas. What is a remote area will depend on the particular circumstances but is limited to circumstances where the only realistic means for the permit holder to access the premises is by transport provided by the occupier or where the only accommodation at the location, if it is required, is that provided by the occupier. These considerations, rather than the actual location of the premises, will be determinative. For example, if public transport is available to the location, or access can reasonably be achieved via travel on public roads in the permit holder's own vehicle or one provided by the permit holder's organisation, the provisions would not generally apply.

160. New sections 521A and 521B provide definitions of 'accommodation arrangement' and 'transport arrangement'. An 'accommodation arrangement' means an arrangement with an occupier of premises under which a permit holder is provided with accommodation for the purpose of assisting the permit holder to exercise rights under Part 3-4 (new section 521A). A 'transport arrangement' means an arrangement with an occupier of premises under which a permit holder is provided with transport for the purpose of assisting the permit holder to exercise rights under Part 3-4 (new section 521B). These arrangements may be entered into by an occupier and an organisation or an occupier and a permit holder.

161. New sections 521C and 521D confer obligations to facilitate accommodation and transport for permit holders in certain circumstances. In particular, the obligations only apply if the parties cannot privately agree to an accommodation or transport arrangement.

162. New subsection 521C(1) provides that the obligation to provide accommodation only applies where a permit holder is seeking to enter premises that are located in a place where accommodation is not reasonably available to the permit holder, unless the occupier of the premises on which the rights are to be exercised provides the accommodation, or causes it to be provided.

163. New subsection 521C(2) requires an occupier of premises in circumstances set out in subsection 521C(1) to enter into an accommodation arrangement for the purpose of assisting a permit holder to exercise rights under Part 3-4 in remote areas. However, the facilitative obligation only applies if:

- accommodating the permit holder would not cause the occupier of the premises undue inconvenience;
- the permit holder, or the organisation of which the permit holder is an official, requests the occupier to provide accommodation;
- the request is made within a reasonable period before the accommodation is required; and
- the permit holder, and the organisation of which the permit holder is an official, have been unable to enter into an accommodation arrangement with the occupier by consent.

164. A note to new subsection 521C(2) refers the reader to the FWC's ability to deal with certain disputes about accommodation arrangements.

165. What will amount to an 'undue inconvenience' will depend on the circumstances and is a matter for the FWC to determine. Examples of matters that may cause the occupier of premises undue inconvenience are:

- where the premises are an offshore installation and all accommodation quarters on deck are currently occupied by employees and/or contractors of the occupier; or
- where all commercially available accommodation at a remote location is fully occupied, as is private occupier provided accommodation.

166. In these circumstances, an occupier would not be expected to remove, or cause to be removed, individuals currently occupying such accommodation to make way for the permit holder.

167. New subsection 521C(3) limits the fee that may be charged to an organisation or a permit holder under an accommodation arrangement to no more than is necessary to cover the costs incurred by the occupier as a direct result of providing the accommodation or causing it to be provided. It is not intended that incidental costs, such as electricity costs, be included.

168. A note to new subsection 521C(3) informs the reader that this is a civil remedy provision.

169. New subsection 521D(1) provides that the obligation to provide transport only applies where a permit holder is seeking to enter premises that are located in a place that is not reasonably accessible to the permit holder unless the occupier of the premises on which the rights are to be exercised provides the transport, or causes it to be provided.

170. New subsection 521D(2) requires an occupier of premises in circumstances set out in subsection 521D(1) to enter into a transport arrangement for the purpose of assisting a permit holder to exercise rights under Part 3-4 in remote areas if:

- transporting the permit holder to the premises would not cause the occupier undue inconvenience;
- the permit holder, or the organisation of which the permit holder is an official, requests the occupier to provide transport to the premises;
- the request is made within a reasonable period before transport is required; and
- the permit holder, and the organisation of which the permit holder is an official, have been unable to enter into a transport arrangement with the occupier by consent.

171. A note to new subsection 521D(2) refers the reader to the FWC's ability to deal with certain disputes about transport arrangements.

172. It is only intended that an occupier be required to provide transport to the extent that it is necessary in order to make the premises accessible to the permit holder (see subsection 521D(1)). For example, if it would be reasonable for the permit holder to travel part of the way using the permit holder's own transport or commercially available transport, the occupier would not be obliged to provide transport for that portion of the permit holder's trip to the premises. In the case of an agricultural property, if it is accessible by road, it would generally be reasonable to expect the permit holder to drive to the premises in their own vehicle, or one provided by the permit holder's organisation.

173. New subsection 521D(3) limits the fee that may be charged to an organisation or a permit holder under a transport arrangement to no more than is necessary to cover the costs incurred by the occupier as a direct result of providing the transport or causing it to be provided. It is not intended that incidental costs, such as insurance premiums be included. A permit holder continue to be responsible for ensuring they comply with any workplace health and safety requirements applying to the occupier's premises.

174. A note to new subsection 521D(3) informs the reader that this is a civil remedy provision.

175. Various provisions throughout Part 3-4 outline types of conduct that are prohibited throughout the Part. New subsections 521C(4) and 521D(4) allow the FWC to treat the conduct of a permit holder while accommodated under an accommodation arrangement or being transported under a transport arrangement as conduct engaged in as part of the exercise of rights under Part 3-4. This is to ensure that appropriate standards of conduct are maintained and means, for example, that conduct of a permit holder whilst travelling under a transport arrangement can be considered in the context of a misuse of rights application under section 508. New subsections 521C(4) and 521D(4) apply whether the accommodation or transport arrangement was entered into by consent or as a requirement of new sections 521C and 521D.

**Item 15 – Subsection 539(2) (at the end of the cell at table item 25, column headed “Civil remedy provision”)**

176. Item 15 amends the table in subsection 539(2) to include new subsections 521C(3) and 521D(3) in the list of civil remedy provisions at item 25 of the table.

**Application of amendments**

177. Item 1 of Schedule 7 inserts new Schedule 4 to the FW Act. Item 9 of Schedule 4 provides for:

- the amendment in item 7 of Schedule 4 to apply in relation to interviews conducted and discussions held after the commencement of that item;
- the amendments in items 12 and 13 of Schedule 4 to apply in relation to frequency of entry after the commencement of those items; and
- the amendments in items 14 and 15 of Schedule 4 to not apply to arrangements entered into before the commencement of those items.

## **SCHEDULE 5 – FUNCTIONS OF THE FWC**

### **Overview**

178. This Schedule amends section 576 of the FW Act, which sets out the functions of the FWC.

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

#### **Item 1 – After paragraph 576(1)(n)**

#### **Item 2 – At the end of subsection 576(1)**

179. Subsection 576(1) lists the broad areas in which the FWC has functions by reference to other Parts of the FW Act. Items 1 and 2 insert a reference to the functions conferred on the FWC in relation to transfer of business from a State public sector employer (set out in Part 6-3A) and special provisions about TCF outworkers (Part 6-4A).

#### **Item 3 – Before paragraph 576(2)(a)**

180. This item expressly confers on the FWC the function of promoting more co-operative and productive workplace relations and the prevention of disputes. It is intended to provide greater clarity about the FWC's functions in this regard.



## **SCHEDULE 6 – TECHNICAL AMENDMENTS**

### **Overview**

181. This Schedule includes amendments correcting a number of technical issues in the FW Act and the *Fair Work Amendment Act 2012* (FW Amendment Act 2012).

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

#### **Item 1 – Section 12 (definition of *default fund employee*)**

182. This amendment is a technical amendment relating to the definition of ‘default fund employee’ in s 12 of the FW Act, and consequential upon the repeal of section 149A by item 12 of Schedule 1 to the FW Amendment Act 2012.

183. The definition of ‘default fund employee’ was inserted by item 1 of Schedule 4 to the *Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Act 2012*.

184. The definition is a signpost definition, referring to subsection 149A(2), which is to be repealed on 1 January 2014.

185. Item 1 omits the reference to subsection 149A(2) in the definition of ‘default fund employee’ and substitutes a reference to new subsection 149C(2), which is to be inserted by item 13 of Schedule 1 to the FW Amendment Act 2012.

186. A ‘default fund employee’ is an employee who has no chosen fund, within the meaning of the *Superannuation Guarantee (Administration) Act 1992*.

#### **Item 2 – Subsection 176(4)**

187. There is incorrect punctuation in subsection 176(4) of the FW Act. Item 2 corrects that punctuation.

#### **Item 3 – Subsection 400(1)**

188. Item 3 corrects a reference from Fair Work Australia (FWA) to the Fair Work Commission (FWC).

#### **Item 4 – Subsection 515(5)**

189. There is a grammatical error in subsection 515(5) of the FW Act. Item 4 corrects that error.

#### **Item 5 – Paragraph 584(1)(a)**

190. Item 5 corrects a reference from the Minimum Wage Panel to the Expert Panel.

#### **Item 6 – Subsection 603(1)**

191. There is a grammatical error in subsection 603(1) of the FW Act. Item 6 corrects that error.

#### **Item 7 – Subsection 603(1) (note)**

192. There is a grammatical error in the note to subsection 603(1) of the FW Act. Item 7 corrects that error.

**Item 8 – Paragraph 670(2)(a)**

193. Item 8 corrects a reference from FWA to the FWC.

***Fair Work Amendment Act 2012***

**Item 9 – Item 40 of Schedule 8 (heading)**

194. Item 9 amends the heading to item 40 of Schedule 8 to the FW Amendment Act 2012, so that it correctly refers to subsection 644(1) of the FW Act rather than section 644.

**Item 10 – Item 41 of Schedule 8**

195. Item 10 amends item 41 of Schedule 8 to the FW Amendment Act 2012 to remove an unnecessary comma.

**Item 11 – Item 414 of Schedule 9 (heading)**

196. Item 11 amends the heading to item 414 of Schedule 9 to the FW Amendment Act 2012 to remove an incorrect reference to subsection 401(1).

**Item 12 – Item 1144 of Schedule 9**

197. Item 12 corrects an incorrect reference in item 1144 of Schedule 9 to the FW Amendment Act 2012.

**Item 13 – Item 1252 of Schedule 9**

198. Item 13 replaces existing item 1252 of Schedule 9 to the FW Amendment Act 2012 with a new item 1252, so that it correctly replaces all references to FWA in subitem 2(1) of Schedule 20 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* with references to the FWC.

**Item 14 – Item 1364 of Schedule 9**

199. Item 14 repeals item 1364 of Schedule 9 to the FW Amendment Act 2012. Item 1364 of Schedule 9 sought to replace a reference in the heading to section 768BD of the FW Act (which was inserted into that Act by the *Fair Work Amendment (Transfer of Business) Act 2012*). However, item 1364 of Schedule 9 became redundant because of amendments that were made to the *Fair Work Amendment (Transfer of Business) Act 2012*.