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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

**WORKPLACE RELATIONS AMENDMENT
(A STRONGER SAFETY NET) BILL 2007**

REVISED EXPLANATORY MEMORANDUM

THIS MEMORANDUM TAKES ACCOUNT OF AMENDMENTS MADE BY
THE HOUSE OF REPRESENTATIVES
TO THE BILL AS INTRODUCED

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

WORKPLACE RELATIONS AMENDMENT (A STRONGER SAFETY NET) BILL 2007

OUTLINE

This Bill would amend the *Workplace Relations Act 1996* (the Act) to:

- establish the Workplace Ombudsman and the Workplace Authority Director as statutory office holders appointed by the Governor-General, and create the Office of the Workplace Ombudsman and the Workplace Authority as statutory agencies;
- require the Workplace Authority Director to be satisfied that specified workplace agreements provide fair compensation in lieu of the modification or exclusion of protected award conditions that apply to an employee or employees (the fairness test);
- establish a compliance framework to ensure the effective operation of the fairness test;
- clarify and simplify the provisions in the Act and the Workplace Relations Regulations 2006 (the Regulations) that mean that bargaining services fees and other objectionable provisions must not be included in workplace agreements; and
- remove the requirement that federally registered organisations must have a majority of members in the federal system in order to become registered, or remain registered under Schedule 1 to the Act.

Fairness test – Schedule 1

Schedule 1 of the Bill would introduce a fairness test that would apply to workplace agreements (and variations to workplace agreements) lodged on or after 7 May 2007 that:

- cover employees who work in industries or occupations usually regulated by awards, and
- modify or exclude protected award conditions.

The test would not apply to Australian Workplace Agreements (AWAs) covering employees with full-time (or full-time equivalent) base salaries of \$75,000 or more.

Protected award conditions would be those that apply under a federal award, or a preserved State instrument, which binds the employer. If there is no such instrument, the protected award conditions would be those in an award designated as appropriate by the Workplace Authority Director for the purpose of the fairness test.

The fairness test would require the Workplace Authority Director to be satisfied that:

- in the case of an AWA - the agreement provides fair compensation to the employee in lieu of the modification or removal of the employee's protected award conditions
- in the case of a collective agreement - on balance, the agreement provides fair compensation, in its overall effect on employees, in lieu of the modification or removal of the employees' protected award conditions.

In determining whether fair compensation has been provided, the Workplace Authority Director would primarily consider the value of any monetary and non-monetary compensation. The Workplace Authority Director would also be able to consider the personal circumstances of employees, including their family responsibilities. In exceptional circumstances, and where it is not contrary to the public interest to do so, the Workplace Authority Director would also be able to have regard to the employer's industry, location or economic circumstances and the employment circumstances of the employee or employees.

If a workplace agreement does not provide fair compensation in lieu of the protected award conditions, the Workplace Authority Director would provide advice on how the agreement could be varied to pass the fairness test. The employer would have 14 days to vary the agreement (including by way of an undertaking).

If the employer does not vary the agreement within this period, the agreement would cease to operate. If the employer does vary the agreement within this period, the Workplace Authority Director would test the varied agreement. If the agreement still does not pass the test, the workplace agreement would cease to operate.

- In either of these situations, when the agreement ceases to operate the employer and the employee would be bound by the instrument that would have applied to them, but for the unfair agreement. This instrument could be an earlier agreement, the award, or a preserved State instrument. In the case of an employee for whom an award was designated (and where no other instrument applies), the protected award conditions from the designated award would apply.
- The Australian Fair Pay and Conditions Standard would continue to operate, in accordance with the existing provisions of the Act. Any applicable preserved redundancy provisions, or undertakings made by the employer, following unilateral termination of an earlier agreement would also have effect.

Where an agreement does not pass the fairness test, the Bill would entitle an employee to recover compensation for any shortfall arising if the value of entitlements under the ‘unfair’ agreement is less than the value of entitlements under an otherwise applicable instrument, or the protected award conditions in a designated award, had they applied during the fairness test period.

To ensure the effective operation of the fairness test the Bill would:

- prohibit an employer from dismissing an employee for the sole or dominant reason that an agreement fails, or may fail, the fairness test;
- prohibit an employer from coercing an existing employee to agree to modify or remove a protected award condition; and
- require an employer to pay any compensation to which the employee is entitled within specified time limits.

These would be civil remedy provisions.

In addition, the Act would be amended to make clear that the current prohibition against AWA duress applies to the situation where an employer who has purchased a business requires an existing employee of that business to make an AWA as a condition of ongoing employment. This amendment clarifies the existing law and does not involve the creation of a new penalty provision.

Workplace Authority Director - Schedule 2

Schedule 2 would establish the Workplace Authority Director as a statutory office holder to be appointed by the Governor-General.

Schedules 2 would also create the Office of the Workplace Ombudsman and the Workplace Authority as statutory agencies for the purposes of the *Financial Management and Accountability Act 1997*.

Workplace Ombudsman - Schedule 3

Schedule 3 of the Bill would establish the Workplace Ombudsman as a statutory office holder to be appointed by the Governor-General. Schedule 3 would also create the Office of the

Workplace Ombudsman, a statutory agency for the purposes of the *Financial Management and Accountability Act 1997*.

Prohibited Content – Schedule 4

Schedule 4 of the Bill would clarify and simplify the provisions in the Act and the Regulations that mean that bargaining services fees and other objectionable provisions must not be included in workplace agreements.

The amendments would expressly provide that objectionable provisions as set out in the freedom of association provision in Chapter 16 of the Act, including bargaining services fees, are prohibited content. A workplace agreement must not be lodged if it contains prohibited content and a term of the workplace agreement is void to the extent that it contains prohibited content.

The amendments do not affect other matters that are prohibited content as set out in the Regulations.

Membership requirements for registered organisations – Schedule 5

Schedule 5 would remove the requirement that federally registered organisations must have a majority of members in the federal system in order to become registered, or remain registered under Schedule 1 to the Act.

The amendments would provide that only some or all members of an organisation need to be federal system employers or federal system employees to be registered under Schedule 1.

Further, the amendments would align the definitions of federal system employer and federal system employee in Schedule 1 with those in sections 5 and 6 of the Act.

FINANCIAL IMPACT STATEMENT

The Government's proposed legislation will introduce a stronger safety net for working Australians through the introduction of a Fairness Test that will guarantee entitlements such as penalty rates and public holiday pay are not traded off without adequate compensation. In addition, the Workplace Ombudsman will provide additional protection for workers, with the enhanced role of investigating employers who fail to meet their obligations under the workplace laws.

Estimated costs associated with the proposed amendments are as follows:

	2007-08 (mill)	2008-09 (mill)	2009-10 (mill)	2010-11 (mill)	Total (mill)
Workplace Authority	86.5	69.6	73.3	74.1	303.5
Workplace Ombudsman	18.5	15.2	15.1	15.3	64.1
Department of Employment & Workplace Relations	1.7	1.0	-	-	2.7
Estimated costs:	106.7	85.8	88.4	89.4	370.3

This funding will be provided in the 2007-08 Additional Estimates and will be outlined in the Employment and Workplace Relations Portfolio Additional Estimates Statements.

NOTES ON CLAUSES

Clause 1 – Short title

1. This clause would specify the short title of the enacted Bill. Once enacted, the Bill would be known as *Workplace Relations Amendment (A Stronger Safety Net) Act 2007*.

Clause 2 – Commencement

2. This clause would specify when the various provisions of the Bill are proposed to commence. The time the commencement of the particular provisions would be set out in a table in subclause 2(1).

3. Item 1 of the table would provide that the preliminary provisions of the Bill (short title, commencement and effect of Schedules) would commence on Royal Assent.

4. Items 2, 3, and 4 of the table would provide that, respectively, Schedule 1 (which contains the amendments relating to the fairness test), Schedule 2 (which contains the amendments relating to the Workplace Authority), Schedule 3 (which contains the amendments relating to the Workplace Ombudsman) and would commence on a single day to be fixed by Proclamation. However, if any provisions in the Schedules not proclaimed to commence within 6 months of the Act receiving Royal Assent, they would commence on the day following that period. It is expected that the Schedules would be proclaimed to commence before the expiration of the 6 month period.

5. Item 5 of the table would provide that Schedule 4 (which contains the amendments relating to prohibited content) would commence on Royal Assent.

6. Item 6 of the table would provide that Schedule 5 (which contains the amendments relating to the membership requirements for registered organisations) would commence on a single day to be fixed by Proclamation. However, if any provisions in Schedule 5 are not proclaimed to commence within 6 months of the Act receiving Royal Assent, they would commence on the day following that period. It is expected that the Schedule 5 would be proclaimed to commence before the expiration of the 6 month period.

7. Subclause 2(2) would provide that Column 3 of the table contained additional information that is not part of the amendment Act. Information in this column could be added to or edited in any published version of the Act.

Clause 3 – Schedule(s)

8. Subclause 3(1) would provide that each Act, and set of regulations, that is Specified in a Schedule is amended or repealed as set out in that Schedule, and any other item in a Schedule to this Act has effect according to its terms according to its terms.

9. Subclause 3(2) would provide that the amendment of any regulation does not prevent the regulation, as so amended, from being amended or repealed by the Governor General.

Schedule 1 – The Fairness Test

Part 1 – Main amendments

Workplace Relations Act 1996

Item 1 – After Division 5 of Part 8

10. Item 1 would insert new Division 5A in Part 8 of the *Workplace Relations Act 1996* (the Act) establishing a fairness test for certain workplace agreements. Under the fairness test, the Workplace Authority would assess whether employees are fairly compensated where a workplace agreement modifies or excludes any or all of the protected award conditions that apply to an employee under an award.

- Separate amendments are proposed to deal with employers and employees who moved into the federal system on 27 March 2006, and remain covered by transitional instruments. These amendments are set out in Items 41 and 42 of Schedule 1.

An expanded safety net for agreement making

11. Presently, the Australian Fair Pay and Conditions Standard (the Standard) sets out the minimum wages and conditions of employment that apply to employees in the federal workplace relations system. The Standard is the safety net for agreement making; employees must receive pay and conditions equal to, or more favourable than, those in the Standard.

12. The new fairness test would enhance the safety net for those making workplace agreements. It will allow employers and employees to modify or exclude protected award conditions but only where employees are fairly compensated. The stronger safety net will provide significant additional protection for vulnerable employees, including young people and workers from a non-English speaking background.

Protected award conditions

13. The fairness test would guarantee the following protected award conditions or fair compensation in lieu of those conditions:

- rest breaks;
- incentive-based payments and bonuses;
- annual leave loadings;
- monetary allowances;
- observance of and payment for public holidays;
- overtime and shift loadings; and
- penalty rates.

14. The protected award conditions for an employee will be those in the federal award which binds the employer in respect of the kind of work performed by the employee. If there is no such instrument, and the employee is working in an industry or occupation usually regulated by a federal award, an appropriate federal award may be designated by the Workplace Authority for the purposes of applying the fairness test.

Agreements to which the fairness test will apply

15. The fairness test will apply to workplace agreements lodged on or after 7 May 2007.

16. Where an agreement, including an agreement made before 7 May 2007, is varied the whole agreement will be subject to the fairness test, where the variation excludes or modifies protected award conditions.

17. The fairness test will apply to Australian Workplace Agreements covering employees with a gross basic salary of less than \$75,000 per annum who are employed in an industry or occupation in which the terms and conditions are usually regulated by an award, where the agreement excludes or modifies protected award conditions.

18. Collective agreements covering employees in an industry or occupation in which the terms and conditions are usually regulated by an award and where the agreement excludes or modifies protected award conditions will also be subject to the fairness test.

How does the fairness test work?

19. In assessing whether fair compensation has been provided, the Workplace Authority will primarily consider the value of the monetary and non-monetary compensation that is provided in lieu of any protected award conditions that are modified or excluded. The Workplace Authority will also be able to consider the personal circumstances of the employee or employees covered by the agreement – in particular, their family responsibilities. In exceptional circumstances, and where it is not contrary to the public interest to do so, the Workplace Authority may also have regard to the industry, location or economic circumstances of the employer and the employment circumstances of the employer or employees covered by the agreement.

What happens if an agreement does not pass the fairness test?

20. If an agreement does not pass the fairness test, the employer will have 14 days to rectify the situation by varying the agreement. If the employer does not vary the agreement, or if the agreement as varied does not pass the fairness test, the agreement will cease to operate. The employee will revert to the instrument that would have applied to them at the point the agreement did not pass, had they not made the agreement. Where an award is designated for the purposes of applying the fairness test, the employee would retain an entitlement to the protected award conditions from that designated award (but only where there is no other instrument that could apply). The employer would be required to pay compensation in respect of the period when an agreement did not pass the fairness test.

Functions of the Workplace Authority Director

21. Powers are given to the Workplace Authority Director to administer the fairness test, but the Director can delegate some functions under proposed subsection 153C(1) (see Schedule 2). Delegations operate subject to any directions issued by the Workplace Authority (proposed subsection 153C(2)). For this reason, this explanatory memorandum refers to decisions and actions of the Workplace Authority.

Division 5A – The fairness test

Subdivision A – Preliminary

Section 346B – Definitions

22. Proposed subsection 346B(1) would define a number of terms that are used in this Division. Key definitions are explained below.

23. *Designated award* would mean an award determined by the Workplace Authority under either of proposed sections 346K and 346L. Where there is no relevant award, an award may be designated for the purposes of ascertaining whether or not the Workplace Authority is required to decide under section 346M whether a workplace agreement or workplace agreement as varied

passes the fairness test. Where an award is designated, then this is the source of the protected award conditions for the purpose of applying the fairness test.

24. *Enterprise award* would mean an award that regulates terms and conditions of employment for an employee or employees employed in a single business. This definition is relevant to the process of designating an award, as an enterprise award cannot be designated.

25. *Industrial instrument* would be defined to include a pre-reform Australian Workplace Agreement (AWA), a pre-reform certified agreement, a workplace determination, a section 170MX award and an old IR agreement (within the meaning of Schedule 7).

26. *Protected award conditions* would have the same meaning as in subsection 354(4) but would be subject to proposed subsection 346B(2).

27. *Protected award conditions* as defined in subsection 354(4) are terms of an award that:

- are about protected allowable award matters; and
- are not about matters that are specified as not allowable award matters under section 515.

28. The list of protected allowable award matters is contained in subsection 354(4) and includes rest breaks, incentive-based payments and bonuses, annual leave loadings, public holidays, monetary allowances, overtime and shift work loadings and penalty rates.

29. Proposed subsection 346B(2) would provide that, for the purposes of the definition of protected award conditions in proposed subsection 346B(1), outworker conditions are not about protected allowable award matters.

30. It is not necessary to include outworker conditions in the operation of this Division. Subsection 354(3) already provides that protected award conditions about outworker conditions cannot be excluded or modified and will have effect despite any terms of a workplace agreement that provide, in a particular respect, a less favourable outcome for the outworker. Division 5A of Part 8 would have effect in relation to workplace agreements as affected by subsection 354(3).

31. *Reference award* would mean a *relevant award* or, if there is no relevant award, a *designated award*. The fairness test must be applied to certain workplace agreements that exclude or modify *protected award conditions* in a reference award.

32. *Relevant award* would mean an award that:

- but for the operation of a workplace agreement or other industrial instrument in relation to the employee, regulates (or would regulate) any term or condition of employment of persons engaged in the same kind of work as that performed by the employee under their workplace agreement; and
- was binding on the employee's employer immediately before the day on which the employee's workplace agreement was lodged.

33. The kind of work performed by an employee can be determined by considering the major and substantial purpose for which the employee was engaged. It would not include work that an employee may perform from time to time during the course of his or her employment but which is merely incidental to his or her primary role, for example incidental clerical work.

34. *Salary* would be defined as gross salary. It would exclude incentive-based payments and bonuses, loadings (other than casual loadings), monetary allowances, penalty rates, any other separately identifiable entitlements that are similar to these entitlements or employer superannuation contributions. The proposed definition is relevant to determining whether an AWA is subject to the fairness test.

35. Proposed subsection 346B(3) would make clear that, unless the contrary intention appears, this Division applies to a workplace agreement as varied under Division 8 in the same way that it applies to a workplace agreement.

36. One effect of this is that the fairness test applies to agreements as varied, even if the original agreement was made before 7 May 2007, where a variation to the agreement modifies or excludes one or more protected award conditions. This is important because under the Act agreements can continue to operate after their nominal expiry date.

Section 346C – When protected award conditions apply to an employee

37. Proposed section 346C would outline the circumstances in which protected award conditions apply to an employee whose employment is subject to a workplace agreement.

38. Proposed paragraph 346C(1)(a) would provide that if:

- the employee’s employment is subject to a workplace agreement; and
- but for that agreement (or a previous agreement or other industrial instrument), the protected award conditions would have effect in relation to the employee’s employment under a relevant award that was binding on the employee’s employer,

the protected award conditions applying to the employee would be derived from the relevant award.

39. Proposed paragraph 346C(1)(b) would provide that, where there is no relevant award, but an award is designated, and:

- the employee’s employment is subject to a workplace agreement; and
- the protected award conditions would have effect in relation to the employee’s employment if assuming that a designated award was binding on the employee’s employer, but for that agreement (or a previous agreement or other industrial instrument),

the protected award conditions applying to the employee under the designated award would be taken to apply.

40. Proposed subsection 346C(2), together with proposed section 346H, deal with the manner in which protected award conditions apply to an agreement where an award has been designated.

41. Under the existing Act, protected award conditions apply to parties bound by an award, unless a workplace agreement expressly excludes or modifies them.

42. Under proposed Division 5A, an agreement that excludes or modifies protected award conditions will (if other prerequisites are met) be subject to the fairness test.

43. However, where the parties are not bound by an award, and they have not yet sought a designated award, their agreement may not expressly exclude or modify protected award conditions, even though the intent of the parties was to change the award entitlements. The effect of this would be that the agreement would not be subject to the fairness test.

44. To ensure that such an agreement remains subject to the fairness test, proposed section 346H provides that a workplace agreement is taken to modify or exclude protected award conditions that apply to an employee or employees under a designated award if the condition or conditions:

- do not have effect under the agreement; or
- have a different effect under the agreement than they would have under the designated award.

45. In order for this to be effective, it is also necessary to ensure that existing section 354 does not deem protected award conditions in to the agreement. This is the effect of proposed subsection 346C(2).

Section 346D – Application of Division to workplace agreements

46. Proposed section 346D would ensure the application of new Division 5A to workplace agreements that have ceased operation (for example, because they have been terminated under Division 9 of Part 8). This is a machinery provision necessary for the purpose of new Subdivision D, which deals with the consequences of a workplace agreement not passing the fairness test. Proposed section 346D ensures that such an agreement that has ceased to operate must still be tested. This is important because compensation may still be payable in respect of the period that an agreement was in operation, if the agreement does not pass the fairness test.

47. Proposed subsection 346D(3) would ensure that a reference to an employee is taken to include a reference to a future employee.

Subdivision B – Workplace agreements to which the fairness test applies

Section 346E – Workplace Authority must apply the fairness test to certain workplace agreements

48. Proposed section 346E would outline the circumstances in which the Workplace Authority is obliged to decide whether an AWA or a collective agreement passes the fairness test set out in proposed section 346M.

49. Proposed subsection 346E(1) would provide that the Workplace Authority must decide whether an AWA passes the fairness test if:

- the AWA is lodged on or after 7 May 2007 (proposed paragraph 346E(1)(a)); and
- on the date the agreement is lodged, the employee is employed in an industry or occupation which the terms and conditions of the kind of work performed by the employee are usually regulated by an award (proposed paragraph 346E(1)(b)); and
- on the date the agreement is lodged, the employee has an annual rate of salary (or full-time equivalent rate of salary) of less than \$75,000 (for full-time employees paid a piece rate of pay and employees other than full-time employees, the full-time or full-time equivalent annual salary is to be calculated in accordance with proposed section 346G) (proposed paragraph 346E(1)(c)); and
- the AWA modifies or excludes one or more protected award conditions that apply to the employee under a reference award in relation to the employee (proposed paragraph 346E(1)(d)).

Example 1:

Jack is an electrician employed on a casual basis by Quality Electronics Pty Ltd that is bound by a federal award. Jack approved an AWA with his employer which was lodged with the Workplace Authority on 8 May 2007. Under the terms of his AWA, Jack's hourly rate of pay is \$35 per hour (including a casual loading of 20 per cent). There is no provision for the payment of penalty rates on public holidays in the agreement, as is the case under his award.

Applying the requirements of proposed subsection 346E(1), the Workplace Authority is required to decide whether Jack's AWA passes the fairness test.

- Jack's AWA was lodged after 7 May 2007 (on 8 May 2007).
- As an electrician, Jack is employed in an industry or occupation in which the terms and conditions of the kind of work he performs are usually regulated by an award.
- Based on his hourly rate of pay of \$35, if Jack were a full-time employee (working 38 hours per week), his annual rate of pay would be \$69,160 (calculated at \$35 x 38 hours x 52 weeks) which is less than \$75,000.
- Jack's AWA does not provide for the payment of penalty rates on public holidays as is the case under his award, meaning that the agreement excludes this protected award condition.

Example 2:

Nick is a part-time employee of Mick's Motor Mechanics Pty Ltd. Nick and Mick's Motor Mechanics approved an AWA and then lodged it with the Workplace Authority in August 2007. Under the terms of his AWA, Nick works 20 hours per week at a rate of pay of \$45 per hour.

Based on an hourly rate of pay of \$45, if Nick was a full-time employee (working 38 hours per week), his annual rate of pay would be \$88,920 (calculated at \$45 x 38 hours x 52 weeks). On the date the agreement was lodged, his pro-rata annual rate of salary was greater than \$75,000. Therefore, because of proposed paragraph 346E(1)(c), the Workplace Authority is not required to decide whether Nick's AWA passes the fairness test.

50. Proposed subsection 346E(2) would provide that the Workplace Authority must decide whether a collective agreement passes the fairness test if:

- the agreement is lodged on or after 7 May 2007 (proposed paragraph 346E(2)(a)); and
- on the date the agreement is lodged, one or more of the employees whose employment is subject to the agreement is employed in an industry or occupation in which the terms and conditions of the kind of work performed by the employee are usually regulated by an award (proposed paragraph 346E(2)(b)); and
- the agreement modifies or excludes one or more protected award conditions that apply to one of more of those employees under a reference award in relation to the employee or employees (proposed paragraph 346E(2)(c)).

51. There is no monetary threshold for collective agreements.

Section 346F – Workplace Authority Director must apply the fairness test to certain workplace agreements as varied

52. Proposed section 346F would outline the circumstances in which the Workplace Authority is obliged to decide whether an AWA or a collective agreement as varied under Division 8 of Part 8 (the agreement making provisions of the Act) passes the fairness test.

- In conjunction with proposed subsection 346B(3) (which would deem all references to workplace agreements to include variations to workplace agreements), proposed section 346F would limit the ability of parties to avoid the fairness test by varying old agreements rather than making new ones.
53. Proposed subsection 346F(1) would provide that the Workplace Authority must decide whether an AWA (as varied under Division 8) passes the fairness test if:
- the variation of the AWA is lodged on or after 7 May 2007 (proposed paragraph 346F(1)(a)); and
 - on the date the variation of the agreement is lodged, the employee is employed in an industry or occupation in which the terms and conditions of the kind of work performed by the employee are usually regulated by an award proposed paragraph 346F(1)(b)); and
 - on the date the variation of the agreement is lodged, the employee has an annual rate of salary (or full-time equivalent rate of salary) of less than \$75,000 (for full-time employees paid a piece rate of pay and employees other than full-time employees, the full-time or full-time equivalent annual salary is to be calculated in accordance with proposed section 346G) (proposed paragraph 346F(1)(c)); and
 - the variation of the AWA modifies or excludes one or more protected award conditions that apply to the employee under a reference award in relation to the employee (proposed paragraph 346F(1)(d)).
54. Proposed subsection 346F(2) would provide that the Workplace Authority must decide whether a collective agreement (as varied under Division 8) passes the fairness test if:
- the variation of the agreement is lodged on or after 7 May 2007 (proposed paragraph 346F(2)(a));
 - on the date the variation of the agreement is lodged, one or more of the employees whose employment is subject to the agreement as varied is employed in an industry or occupation in which the terms and conditions of the kind of work performed by the employee are usually regulated by an award (proposed paragraph 346F(2)(b));
 - the variation of the agreement modifies or excludes one or more protected award conditions that apply to one or more of those employees under a reference award in relation to the employee or employees (proposed paragraph 346F(2)(c)).

Section 346G – Provisions about annual rate of salary

55. Proposed section 346G would contain a number of machinery provisions relating to the calculation of the annual rate of salary under proposed sections 346E and 346F. These provisions are necessary because an AWA with an annual rate of salary of less than \$75,000 (or the full-time equivalent) is subject to the fairness test.
56. Proposed subsection 346G(1) would allow regulations to be made that increase the annual rate of salary below which an AWA would be subject to the fairness test. The annual rate of salary cannot be decreased by the regulations.
57. The remaining provisions would prescribe the manner of calculating an employee's annual rate of salary for the purposes of proposed paragraphs 346E(1)(c) and 346F(1)(c).
58. Proposed subsection 346G(2) would provide that, for an employee other than a full-time employee (for example a part-time or casual employee) who is paid a periodic rate of pay (that is, a rate of pay for a period worked, for example, weekly or fortnightly), the full-time equivalent amount of salary for the purposes of proposed subparagraphs 346E(1)(c)(iii) or 346F(1)(c)(iii) is

the salary the employee would earn if the employee were employed on a full-time basis and paid at their periodic rate of pay.

59. For the purpose of proposed subsection 346G(2), proposed subsection 346G(3) would provide that the salary the employee would earn is to be calculated for the 12 month period beginning on the date the AWA is lodged.

60. Proposed subsection 346G(4) would provide that, for a full-time employee who is paid a piece rate of pay (a rate of pay that is expressed as a rate for a quantifiable output or task — as opposed to being expressed as a rate for a period worked), the employee’s full time salary for the purposes of proposed subparagraphs 346E(1)(c)(ii) or 346F(1)(c)(ii) is the salary that the employer reasonably estimates the employee would earn.

61. Proposed subsection 346G(5) would provide that, for an employee who is not a full-time employee who is paid a piece rate of pay, the full time equivalent amount of salary for the purposes of proposed subparagraphs 346E(1)(c)(iii) or 346F(1)(c)(iii) is the salary that the employer reasonably estimates the employee would earn if the employee were employed on a full-time basis.

62. Proposed subsection 346G(6) would allow regulations to be made that prescribe a method or methods by which an employer may reasonably estimate the salary of an employee who is paid a piece rate of pay for the purposes of proposed subsections 346G(4) and (5). A method or methods may be prescribed in relation to classes of employees who are paid piece rates of pay, by the kind of work performed by such employees, or otherwise.

63. For the purpose of subsections 346G(4) and (5), proposed subsection 346G(7) would provide that the salary the employee would earn is to be estimated for the 12 month period beginning on the date the AWA is lodged.

64. Proposed subsection 346G(8) would allow regulations to be made that prescribe a different definition of salary for an employee who is paid a piece rate of pay for the purposes of proposed subparagraphs 346E(1)(c) or 346F(1)(c).

Section 346H – Protected award conditions and designated awards — deemed exclusion or modification

65. Proposed section 346H is a deeming provision that would clarify the circumstances in which an AWA or collective agreement is taken to exclude or modify protected award conditions that apply to an employee or employees under a designated award for the purposes of subparagraphs 346E(1)(d), 346F(1)(d), 346E(2)(c) and 346F(2)(c).

66. Under existing section 354, if:

- a workplace agreement is lodged; and
- but for the agreement, protected award conditions would apply (i.e. because an award bound the employer and employees before the agreement was lodged); and
- the agreement is silent with respect to those protected award conditions

then the protected award conditions are taken to be included in the agreement. By contrast, the protected award conditions do not have effect if the agreement expressly excludes or modifies them.

67. Under existing section 354, where the parties to the agreement are not bound by an award, protected award conditions do not apply. A workplace agreement would not need to expressly exclude or modify these conditions in order for them not to have effect.

68. However, under the proposed fairness test arrangements, even though the parties are not bound by a relevant award, their agreement may still be subject to the fairness test if (among other things) the agreement applies to work in an industry or occupation that is usually regulated by an award, and the agreement excludes or modifies protected award conditions.

- The award against which such an agreement would be tested would be the award designated by the Workplace Authority for the purpose of the fairness test. Such an award can be designated in advance by the Workplace Authority on application by an employer under proposed section 346K. This section would enable (but not compel) an employer to ascertain before making an agreement what protected award conditions are applicable, and make provision in the agreement about the extent to which those conditions apply, or about the compensation to be provided in lieu of thereof.

69. If an employer (that is not bound by a relevant award) lodges an agreement that is silent about protected award conditions, proposed section 346H would ensure that the agreement remains subject to the fairness test, even though it does not expressly exclude or modify those conditions.

70. This section would provide that a workplace agreement is taken to exclude or modify protected award conditions that apply to an employee or employees under a designated award if the condition or conditions:

- do not have effect under the agreement; or
- have a different effect under the agreement than they would have under the designated award.
 - So, for example, if an employer who is not bound by a relevant award lodges an agreement that is silent about protected award conditions, those conditions do not have effect under the agreement. Under section 346H the agreement is taken to exclude the protected award conditions, and the fairness test applies.

71. Proposed subsection 346C(2) is also relevant to how proposed section 346H operates.

Section 346J – Notice requirements

72. Proposed section 346J would outline the Workplace Authority’s obligations to notify relevant parties about whether the Workplace Authority is or is not required to apply the fairness test to a workplace agreement.

73. Proposed subsection 346J(1) would provide that, if the Workplace Authority is required to decide whether a workplace agreement passes the fairness test, the Director must give written notice to that effect to the following parties:

- the employer in relation to the workplace agreement (proposed paragraph 346J(1)(a)); and
- if the agreement is an AWA — the employee whose employment is subject to the AWA (proposed paragraph 346J(1)(b)); and
- if the agreement is a union collective agreement or a union greenfields agreement — the organisation or organisations bound by the agreement (proposed paragraph 346J(1)(c)).

74. Proposed subsection 346J(2) would provide that, if the Workplace Authority is not required to decide whether a workplace agreement passes the fairness test, it must give written notice to that effect to the parties listed in proposed subsection 346J(1). This ensures that parties are made aware of the Workplace Authority’s decisions about the application of the fairness test to the agreement.

75. Proposed subsection 346J(3) would clarify that a written notice given under this section is not required to be given at the same time as the copy of the receipt is given under existing section 345 in respect of the lodgment of a declaration for the workplace agreement concerned.

76. The note under proposed subsection 346J(3) would inform readers that where the agreement is a collective agreement, proposed section 346ZE requires that employers given notice under this section must inform employees of the contents of the notice. This is consistent with the approach taken for other notification requirements in relation to collective agreements under Part 8 (for example, existing section 346).

Section 346K – Designated awards – before a workplace agreement or variation is lodged

77. Proposed section 346K would prescribe the circumstances in which the Workplace Authority may determine that an award is a designated award in relation to an AWA or collective agreement that is yet to be lodged or varied.

78. Proposed subsection 346K(1) would enable an employer to apply to the Workplace Authority to make a determination designating an award in relation to an employee or employees of that employer.

79. However, under proposed subsection 346K(2), the Workplace Authority would only be able to make such determination if the Director is satisfied that:

- the employee works in an industry or occupation in which the terms and conditions of the kind of work to be performed are usually regulated by an award; and
- there is no other award that was binding on the employer immediately before the day on which the workplace agreement was lodged that regulates any term or condition of employment of persons performing the same kind of work (that is, there is no relevant award within the meaning of proposed section 346B).

80. Proposed subsection 346K(3) would limit the type of awards that the Workplace Authority may designate to:

- an award or awards regulating (or that would, but for a workplace agreement or other industrial instrument, regulate) the terms or conditions of employment of employees engaged in the same kind of work as that to be performed by the employee or employees (proposed paragraph 346K(3)(a));
- an award or awards that would be appropriate the purposes of proposed section 346L if a workplace agreement or a variation were to be lodged (proposed paragraph 346K(3)(b));
- an award that is not an enterprise award (proposed paragraph 346K(3)(c)).

81. The question of whether there is an appropriate award is a matter for the Workplace Authority. A note to proposed subsection 346K(3) would provide an example of a case where the Workplace Authority may consider that there is not an appropriate award. This would be where an award regulates terms and conditions of the kind of work to be performed by an employee in an industry or occupation in one State only, but terms and conditions of that kind of work are not regulated by awards in other States.

82. As noted, proposed paragraph 346K(3)(c) would provide that the Workplace Authority must not determine an enterprise award for the purposes of section 346K. Enterprise awards are excluded because they bind a specific employer and are typically tailored to the circumstances of that employer. Such an award is not an appropriate basis for assessing a workplace agreement made by another employer.

83. Where the Workplace Authority makes a determination designating an award under proposed subsection 346K(2) prior to a workplace agreement or a proposed variation being lodged, the award designated would be used to apply the fairness test if that workplace agreement or variation was subsequently lodged (proposed subsection 346K(4)) unless the Workplace Authority considers that circumstances have changed. In this situation, the Workplace Authority would designate another award or awards under proposed section 346L (proposed subsection 346K(5)).

84. The Workplace Authority may designate different awards in respect of different employees (proposed subsection 346K(6)). For example, if the scope of the proposed workplace agreement regulates the terms and conditions of employment of cleaners and clerical staff, the Workplace Authority may designate an award that is appropriate to regulate the terms and conditions of employment for cleaners, and another award that is appropriate to regulate the terms and conditions of employment for the clerical staff.

85. Proposed subsection 346K(7) would ensure that, for the purpose of this section, any reference to an employee or employees of an employer includes future employees of that employer. This is necessary to ensure that an award may be designated by the Workplace Authority for a new venture where there are not yet any employees at the time the application for designation of an award is made.

86. Proposed subsection 346K(8) makes clear that a determination made by the Workplace Authority under section 346K is not a legislative instrument. This is not a substantive provision; rather, it is included to assist readers, as a determination under this section would not be a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

Section 346L – Designated awards – after a workplace agreement or variation is lodged

87. Proposed section 346L sets out the circumstances in which the Workplace Authority is required to determine that an award is a designated award in relation to a workplace agreement (or variation) that has been lodged.

88. Proposed subsection 346L(1) would set out when section 346L would apply (that is, in relation to agreements to which the fairness test applies).

89. Proposed subsection 346L(2) would provide that the Workplace Authority must determine a designated award to ascertain whether it is required to apply the fairness test (that is, does it exclude or modify protected award conditions) and, if so, whether the agreement passes the fairness test.

90. Proposed subsection 346L(3) would limit the type of award that the Workplace Authority may determine is a designated award under proposed subsection 346L(2) to an award that:

- regulates (or would regulate) the terms or conditions of employment of employees engaged in the same kind of work as the work performed by the employee or employees under the workplace agreement; and
- is an appropriate award in the opinion of the Workplace Authority; and
- is not an enterprise award.

91. Where the Workplace Authority has previously designated an award under section 346K, that award is taken to have been designated for the purposes of section 346L unless the Workplace Authority considers that the circumstances have changed in such a way that it is necessary to designate another award.

92. Proposed subsection 346L(4) would allow the Workplace Authority to determine a different designated award in relation to different employees.

93. Proposed subsection 346L(5) would provide that a determination made by the Workplace Authority under section 346L is not a legislative instrument. This is not a substantive provision; rather, it is included to assist readers, as the instrument is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

Subdivision C – The fairness test

Section 346M – When does an agreement pass the fairness test?

94. Proposed section 346M would set out the fairness test.

95. In the case of an AWA, paragraph 346M(1)(a) would provide that the AWA passes the fairness test if the Workplace Authority is satisfied that the AWA provides reasonable compensation to the employee in lieu of the exclusion or modification of protected award conditions.

96. In the case of collective agreements, paragraph 346M(1)(b) would provide that the Workplace Authority is required to be satisfied that, on balance, the collective agreement provides fair compensation, in its overall effect on employees bound to the agreement, in lieu of the exclusion or modification of protected award conditions that apply to some or all of those employees. This modified approach for collective agreements reflects the fact that the test must be applied to a number of employees.

97. Proposed subsection 346M(2) would set out the principal factors that the Workplace Authority must have regard to in determining whether a workplace agreement provides fair compensation to the employee or employees and passes the test. These factors are:

- the monetary and non-monetary compensation that the employee or employees will receive under the workplace agreement, in comparison to the protected award conditions that apply to the employee or employees under a reference award; and
- the work obligations of the employee or employees under the workplace agreement (for example, the rostering arrangements or shift patterns of the employee or employees).

98. Proposed subsection 346M(3) would provide that, in addition to the factors in proposed subsection 346M(2), the Workplace Authority may also have regard to the personal circumstances of the employee or employees, particularly their family responsibilities, in considering whether an workplace agreement meets the test. This would enable factors such as flexible working hours to be considered. However, it would not enable the Workplace Authority to look at any period of unemployment of the employee or employees – which may only be considered in exceptional circumstances, and where it is not contrary to the public interest to do so, under proposed subsection 346M(4) (outlined further below).

Example 1:

Jason is a salesman employed by Shiny Trinkets Pty Ltd. He is currently employed under an award that provides for the payment of penalty rates and overtime loadings. Jason's employer recently offered him an AWA, which he accepts. Under the terms of the proposed AWA, Jason's employer would meet the cost of child care for his children. The AWA expressly excludes the payment of penalty rates or overtime loadings, which are payable under Jason's award. However, the annual value of his child care payments is greater than the value of the penalty rates and overtime loadings that Jason would have expected to earn. No other changes are made to Jason's terms and conditions. As Jason's annual rate of salary is less than \$75,000, the Workplace Authority is obliged to decide whether Jason's agreement passes the fairness test.

Under proposed subsection 346M(1), Jason's AWA would pass the fairness test if the Workplace Authority is satisfied that the AWA provides fair compensation in lieu of the exclusion or

modification of protected award conditions. When determining whether Jason’s AWA provides fair compensation, the Workplace Authority would consider:

- the monetary and non-monetary compensation Jason will receive under his AWA, in comparison to the protected award conditions under the reference award; and
- Jason’s work obligations under the AWA.

The Workplace Authority may consider whether the payment of child care offsets the removal of his penalty rates and overtime loadings. In order to do this, the Workplace Authority may take into account Jason’s usual work pattern to determine the penalty rates and overtime loadings he would have been entitled to receive under his award.

After considering these factors, the Workplace Authority would make a decision about whether Jason’s AWA passes the fairness test. Given that the annual value of his child care payments is greater than the amount of penalty rates and overtime loadings that Jason would have expected to earn, it would be open to the Workplace Authority to conclude that Jason’s AWA passes the fairness test.

Example 2:

Reliable Plant Repairs is bound by a federal award. The employees of Reliable Plant Repairs approved a collective agreement made by the employer and the relevant union. The collective agreement provides for an increased rate of pay in return for the removal of penalty rates as well as travel, uniform and shift allowances which are payable under this award.

The Workplace Authority is obliged to decide whether the collective agreement passes the fairness test.

The collective agreement would pass the fairness test if the Workplace Authority is satisfied that the agreement provides fair compensation in lieu of the exclusion or modification of protected award conditions. When determining whether the agreement provides fair compensation, the Workplace Authority would consider:

- the monetary and non-monetary compensation the employees will receive under the agreement, in comparison to the protected award conditions under the reference award; and
- the employees’ work obligations under the agreement.

For example, the Workplace Authority may consider whether the increased rate of pay offsets the removal of penalty rates as well as the shift and other allowances. In order to do this, the Workplace Authority may take into account employees’ usual shift patterns to determine the shift allowances they would normally be entitled to receive under the award. The Workplace Authority may also have regard to the personal circumstances of the employees covered by the agreement.

After considering these factors, the Workplace Authority would make a decision about whether the collective agreement passes the fairness test. If the Workplace Authority is satisfied that the agreement in its overall effect on employees (including increased rates of pay) provides fair compensation to offset the removal of protected award conditions, it would be open to the Workplace Authority to conclude that the collective agreement passes the fairness test.

Example 3:

Jaimee is a salesperson employed by Music Heaven, a music retailer in Sydney’s CBD. She is currently employed under an award that provides for the payment of penalty rates for work performed on Sundays.

Jaimee asks her employer to enter into AWA. Under the terms of the proposed AWA, Jaimee’s

employer would provide her with a permanent car-parking space. In exchange, the AWA expressly excludes the payment of penalty rates for work performed on Sundays, which are payable under Jaimee's award. The car-parking space is non-monetary compensation for the removal of these protected award conditions. Because of the location of the business, the annual value of the car-parking space is greater than the value of the penalty rates that Jaimee would have received under the award. The employer agrees to Jaimee's request because of the extra flexibility the AWA would give to open on Sundays. Jaimee's annual salary is less than \$75,000. No other protected award conditions have been modified. The AWA is lodged with the Workplace Authority.

After considering the factors set out in proposed subsections 346M(2) and (3), the Workplace Authority would make a decision about whether Jaimee's AWA passes the fairness test. Given that the annual value of her car-parking space is greater than the value of the penalty rates that Jaimee would have expected to earn, and no other changes are made to work conditions, it would be open to the Workplace Authority to conclude that Jaimee's AWA passes the fairness test.

Example 4:

Joel is a plumber employed by Water Wise Pty Ltd. Joel and Water Wise made an AWA which was lodged with the Workplace Authority in June 2007.

Joel has 2 young children and wants to finish work at 3pm on weekdays. Joel's wife, Mindy, has recently returned to full-time work as an engineer. The ability to collect the children from school is very important to Joel who places great value in being able to pick up his children from school. Joel and his employer agreed that, in exchange for Joel being able to leave work at 3pm, he will work on Saturdays at his ordinary time rate of pay (removing the award entitlement to penalty rates for weekend work). Joel's annual salary under the AWA is less than \$75,000.

In considering whether Joel's AWA would pass the fairness test in this case the Workplace Authority would need to have regard to Joel's personal circumstances, particularly his family responsibilities.

If the Workplace Authority is satisfied that the increased flexibility in working hours Joel enjoys under his AWA provides fair compensation for the exclusion of penalty rates for Saturday work, it would be open to the Workplace Authority to decide that Joel's AWA passes the fairness test.

Example 5:

Zita is an administrative officer employed by a mailing list company. Her work is mostly computer based.

Zita has two children of school age and wants to drop them off at school and be at home when they arrive after school. She enters into an AWA with her employer that enables her to alter her start and finish times, and perform work from home after her children have gone to bed. In exchange, the AWA excludes the penalty rates that would have been payable under the relevant award.

Zita agrees to the AWA because of the extra flexibility it gives her to balance her work and family life.

In considering whether Zita's AWA would pass the fairness test in this case the Workplace Authority would need to have regard to her personal circumstances, particularly her family responsibilities.

If satisfied that the increased flexibility in working hours Zita enjoys under her AWA provides

fair compensation for the exclusion of penalty rates, it would be open to the Workplace Authority to decide that Zita's AWA passes the fairness test.

99. In exceptional circumstances, and provided it is not contrary to the public interest to do so, proposed subsection 346M(4) would allow the Workplace Authority to have regard to the industry, location or economic circumstances of the employer and the employment circumstances of the employee. This consideration would apply in addition to the matters specified in proposed subsections 346M(2) and (3).

100. Proposed subsection 346M(5) sets out an example for the purposes of subsection 346M(4) of a case where the Workplace Authority may be satisfied that it is not contrary to the public interest to have regard to the industry location or economic circumstances of the employer. The example is where the workplace agreement is part of a reasonable strategy to deal with a short-term crisis in, and to assist in the revival of, the employer's business. This reflects the example that applied to the former no-disadvantage test.

Example 1:

David is employed as a waiter at Bill's Steakhouse. He is required to work evenings and weekends. David and Bill's Steakhouse made an AWA, which has been lodged with the Workplace Authority. The AWA provides for an hourly rate of pay slightly higher than David would receive under the pay scale derived from the award but reduces the penalty rates than David would be entitled to under the pay scale. Based on his usual shift pattern, David will earn less under the AWA than he would with penalty rates under the award.

David was out of work for more than one year prior to accepting this job and he lives in a regional area where there are limited jobs. He has just started a full-time TAFE course in hospitality. This job is particularly suitable for David as he is still able to attend TAFE and is gaining experience that is relevant to his course.

Under proposed subsection 346M(1), David's AWA would pass the fairness test if the Workplace Authority is satisfied that the AWA provides fair compensation in lieu of the exclusion or modification of protected award conditions. If the Workplace Authority is not satisfied that the agreement provides fair compensation for the removal of protected award conditions having regard to:

- the monetary and non-monetary compensation David will receive under his AWA, in comparison to the protected award conditions under the reference award;
- David's work obligations under the AWA; and
- David's personal circumstances, including family responsibilities,

the agreement will generally not pass the fairness test.

However, it is only if there are exceptional circumstances and it is not contrary to the public interest to do so, that the Workplace Authority may also consider the industry, location or economic circumstances of the employer and the employment circumstances of the employee.

Example 2:

Rick owns a farming supplies company in a regional town. His business is severely affected by the drought and is struggling financially.

Joan is employed by Rick's company as an administrative assistant under the terms of an award. Because of his financial difficulties, Rick draws up a restructuring plan to ensure the viability of the business over the next 2 years. He discusses his situation with Joan, and they agree to enter into a short-term AWA. The AWA excludes penalty rates and allowances that Joan would be

entitled to under her award. Despite this, Joan agrees to the AWA because she wants to assist Rick's business to get out of its financial difficulties, and there are not many other employment opportunities in the town. The AWA provides that the agreement will cease to operate 2 years after lodgment.

If the Workplace Authority is not satisfied that the agreement provides fair compensation in lieu of the removal of protected award conditions having regard to:

- the monetary and non-monetary compensation Joan will receive under her AWA, in comparison to the protected award conditions under the reference award;
- Joan's work obligations under the AWA; and
- Joan's personal circumstances, including family responsibilities,

the agreement will generally not pass the fairness test.

However, if there are exceptional circumstances and it is not contrary to the public interest to do so, the Workplace Authority may also consider the industry, location or economic circumstances of the employer and the employment circumstances of the employee. In this case, if there are exceptional circumstances and it is not contrary to the public interest to do so, the Workplace Authority would need to consider whether the employment agreement provides fair compensation to Joan having regard to the short term business difficulties that Rick's business faces and Joan's employment circumstances.

101. Proposed subsection 346M(6) would confer a broad discretion on the Workplace Authority to inform itself about whether an agreement passes, or does not pass, the fairness test. For example, the Workplace Authority may contact the employer or any employee who is subject to the agreement by phone to ask questions about an agreement that has been lodged. This ensures that the Workplace Authority can seek sufficient information to make a decision as to whether or not a workplace agreement passes the fairness test.

102. Proposed subsection 346M(7) would provide a definition of *non-monetary compensation* for the purpose of applying the fairness test. Non-monetary compensation would encompass compensation that:

- has a money equivalent or to which a money value can be assigned (for example a car-parking space, child care or shares in the employer's company); and
- confers a benefit or advantage on the employee which is of significant value to the employee.

103. This definition is intended to ensure that protected award conditions cannot be excluded or modified by a workplace agreement in exchange for non-monetary compensation that is of little or no value to the employee or employees subject to the agreement. It would be expected, for example, that meals (such as a pizza at the end of a shift) would not constitute adequate compensation for removal of protected award conditions.

Section 346N – Agreements to be tested as at lodgment date

104. Proposed subsections 346N(1) and (2) would make clear that in deciding whether an agreement or an agreement as varied passes or does not pass the fairness test, the Workplace Authority must consider the workplace agreement or agreement as varied as in force immediately after lodgment.

105. Proposed subsection 346N(3) would deal with the situation where a workplace agreement is lodged and a subsequent variation to that agreement is lodged before the Workplace Authority decides whether the original agreement passes or does not pass the fairness test.

106. Proposed subsection 346N(3) would provide that if:

- the Workplace Authority is required to decide whether a workplace agreement passes the fairness test; and
- before it decides, a variation to that agreement is lodged and the Workplace Authority is required (under proposed section 346F) to determine whether the agreement as varied passes the fairness test;

then the Workplace Authority must consider the workplace agreement and the workplace agreement as varied as part of the same process.

107. However, the Workplace Authority would be required to make a separate decision in respect of the workplace agreement and the workplace agreement as varied. This is because the variation may affect the extent to which an employee may be entitled to compensation under proposed section 346ZD. This is necessary as different entitlements to compensation may flow from each decision.

Section 346P – Workplace Authority Director must notify of decision

108. Proposed section 346P would outline the Workplace Authority’s obligations to notify relevant parties about whether a workplace agreement passes the fairness test.

109. Proposed subsection 346P(1) would provide that, if the Workplace Authority decides that a workplace agreement passes the fairness test, the Director must give notice of his or her decision to the following parties:

- the employer in relation to the workplace agreement (proposed paragraph 346P(1)(a)); and
- if the agreement is an AWA — the employee whose employment is subject to the AWA (proposed paragraph 346P(1)(b)); and
- if the agreement is a union collective agreement or a union greenfields agreement — the organisation or organisations bound by the agreement (proposed paragraph 346P(1)(c)).

110. Proposed subsection 346P(2) would provide that, if the Workplace Authority decides that a workplace agreement does not pass the fairness test, it must give notice of its decision to the parties listed above.

111. Proposed subsection 346P(3) would provide that, if the Workplace Authority decides that a workplace agreement does not pass the fairness test, the Director must also:

- for a workplace agreement that is operating on the date of issue specified in the notice — provide advice about how the agreement could be varied in order to pass the fairness test; and
- state that compensation may be payable by the employer to the employee or employees in accordance with proposed section 346ZD.

112. If proposed subsection 346N(3) requires the Workplace Authority to consider and make a decision in relation to a workplace agreement and the workplace agreement as varied as part of the same process, proposed subsection 346P(4) would require that the notice provided by the Workplace Authority deal with both agreements.

113. Proposed subsection 346P(5) would provide that a notice given under this section must be in writing and specify the date of issue of the notice. The date of issue of the notice is relevant in calculating compensation payable (if any) under proposed section 346ZD.

114. The note under proposed subsection 346P(5) would inform readers that where the agreement is a collective agreement, section 346ZE requires that employers given notice under

this section must inform employees of the contents of the notice. This is consistent with the approach taken for other notification requirements in relation to collective agreements under Part 8 (for example, section 346).

Subdivision D – Consequences if a workplace agreement does not pass the fairness test

115. Proposed Subdivision D would set out the consequences of a decision by the Workplace Authority under section 346M that a workplace agreement does not pass the fairness test.

Section 346Q – Agreement does not pass fairness test — agreement not in operation

116. Proposed section 346Q would deal with the situation where the workplace agreement has ceased to operate in relation to any employee before the date of the decision by the Workplace Authority that the workplace agreement does not pass the fairness test. For example, this could happen where the agreement is terminated before the agreement is tested.

117. In this situation, the employee or employees whose employment was subject to the workplace agreement may have an entitlement to compensation under proposed section 346ZD in respect of any period they were subject to the agreement. Note that the Workplace Authority must test an agreement that has ceased operation (proposed subsection 346D(1)).

Section 346R – Agreement does not pass fairness test – agreement in operation

118. Proposed section 346R would deal with the situation where the workplace agreement is in operation immediately before the date of a decision by the Workplace Authority that the workplace agreement does not pass the fairness test.

119. Proposed subsection 346R(1) sets out the circumstances in which the provision would apply.

120. Proposed subsection 346R(2) would provide the employer with an opportunity to vary the AWA or collective agreement (the Workplace Authority would provide advice about how the agreement could be varied to pass the fairness test) (see proposed section 346P).

- For the purposes of section 346R, a variation may be made by the employer providing the Workplace Authority with a written undertaking. An undertaking is taken to be a variation of the agreement (see proposed subsection 346T(3)). This reflects the arrangements that were in place under the previous no disadvantage test.
- If the agreement is an AWA, the employer may either lodge a variation of the AWA or a written undertaking. In order to expedite the agreement-making process, a variation for the purposes of new subsection 346R(2) is not required to comply with all of the usual procedural requirements that apply to variations under Division 8 of Part 8 – see proposed subsections 346R(5) and (6). However, a variation to an AWA must be signed and witnessed by the parties, and, where the employee is under 18, signed and witnessed by an appropriate person such as a parent or guardian.

121. If the employer lodges a variation or undertaking, the Workplace Authority must test the varied agreement under section 346U.

122. Proposed subsection 346R(3) would provide that if the employer takes no action within the relevant period the workplace agreement ceases to operate and the employee or employee whose employment was at any time subject to the workplace agreement may have an entitlement to be paid compensation under section 346ZD in respect of that period.

123. Proposed subsection 346R(4) would provide that if the Workplace Authority has made separate decisions that:

- a workplace agreement did not pass the fairness test; but

- the workplace agreement as varied did pass the fairness test

the workplace agreement as varied continues in operation.

124. Proposed subsection 346R(7) would define the relevant period as the period of 14 days beginning on the date of issue specified in the notice that the agreement has not passed the fairness test, or such other longer period that is prescribed by the regulations. The regulations may also prescribe the circumstances in which the Workplace Authority may extend the relevant period in relation to a particular workplace agreement

Section 346S – Lodging of variation documents with the Workplace Authority Director

125. Proposed section 346S would set out the procedural requirements for lodging a variation or giving an undertaking as permitted by proposed section 346R.

126. Variation or an undertaking must be annexed to a declaration that meets the form requirements Gazetted by the Workplace Authority. Variation and declaration must be received by the Workplace Authority.

Section 346T – Operation of 346R variations

127. Proposed section 346T would provide rules about when variations made under proposed subsection 346R(2) come into operation. These rules are necessary because not all of the procedural requirements of Division 8 of Part 8 apply to variations under proposed subsection 346R(2).

128. Proposed subsection 346T(1) would provide that an AWA variation under paragraph 346R(2)(a) comes into operation when the variation is lodged with the Workplace Authority under that paragraph in accordance with proposed section 346S. This means that the AWA is lodged when the variation and accompanying declaration are received by the Workplace Authority.

129. Proposed subsection 346T(2) would provide that a variation to an AWA or a collective agreement by written undertaking under paragraph 346R(2)(b) comes into operation when the undertaking is given to the Workplace Authority under that paragraph in accordance with proposed section 346S. This means that the undertaking is given when the undertaking and accompanying declaration are received by the Workplace Authority. Proposed subsection 346T(3) would provide that an undertaking is taken to be a variation to a workplace agreement.

Section 346U – Workplace Authority Director must test varied agreement

130. Proposed subsection 346U(1) would require the Workplace Authority to test any workplace agreement that has been varied under section 346R and decide whether the workplace agreement as varied passes the fairness test set out in proposed section 346M. Note that the decision on the varied agreement is made under subsection 346U(1) – which means there is no opportunity for further variation.

131. Proposed subsections 346U(2) and (3) would require the Workplace Authority to notify in writing the following of its decision:

- in the case of all workplace agreements – the employer;
- in the case of an AWA – the employee whose employment is subject to the AWA; and
- in the case of a union collective agreement or a union greenfields agreement – the organisation or organisations bound by the agreement.

132. Proposed subsection 346U(4) would require that such notice be in writing and specify the date of issue of the notice. This requirement is relevant for determining the time a workplace

ceases to operate if the varied agreement does not pass the fairness test (see proposed section 346W).

133. The note under proposed subsection 346U(4) would inform readers that where the agreement is a collective agreement, section 346ZE requires that employers given notice under this section must inform employees of the contents of the notice. This is consistent with the approach taken for other notification requirements in relation to collective agreements under Part 8 (for example, section 346).

134. Proposed subsection 346U(5) would confer a broad discretion on the Workplace Authority to inform itself about whether an agreement passes, or does not pass, the fairness test. For example, the Workplace Authority may contact the employer or any employee who is subject to the agreement by phone to ask questions about an agreement that has been lodged. This ensures that the Workplace Authority can be appropriately informed before making a decision as to whether or not a workplace agreement passes the fairness test.

Section 346V – Effect if varied agreement does not pass fairness test – agreement not in operation

135. Proposed section 346V would deal with the situation where the Workplace Authority decides under subsection 346U(1) that a workplace agreement as varied does not pass the fairness test and the workplace agreement is not in operation in relation to any employee immediately before the date of the decision (for example, where an employee subject to an AWA resigned before the variation was tested).

136. Despite the fact the agreement has ceased to operate, the employee or employees whose employment was subject to the workplace agreement at any time it was in operation may have an entitlement to compensation under section 346ZD in respect of that period. This is why proposed section 346D requires the Workplace Authority to test an agreement even if it is no longer in operation.

Section 346W – Effect if varied agreement does not pass fairness test – agreement in operation

137. Proposed section 346W would provide that if the agreement as varied does not pass the fairness test, the agreement ceases to operate on that date and the employee or employees whose employment was subject to the workplace agreement at any time during its operation may have an entitlement to compensation under section 346ZD in respect of that period.

Section 346X – Effect if varied agreement passes fairness test – agreement in operation

138. Proposed section 346X would provide that if the agreement as varied passes the fairness test, the workplace agreement continues to operate and the employee or employees whose employment is subject to the workplace agreement may have an entitlement to compensation under section 346ZD in respect of the time they were subject to the agreement during the period between the agreement being lodged and the variation being lodged (that is, the period when the agreement did not pass the fairness test).

Section 346Y – Employment arrangements that apply if a workplace agreement ceases to operate because it does not pass the fairness test

139. Proposed section 346Y would specify the employment arrangements that will apply to the employer and the employee whose employment was subject to a workplace agreement in circumstances where that workplace agreement ceases to operate because it has not passed the fairness test under section 346R or section 346W.

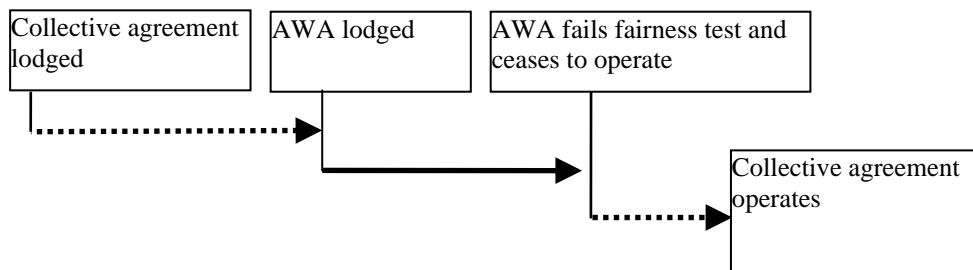
140. Proposed subsection 346Y(1) would apply when a workplace agreement ceases to operate because it does not pass the fairness test. For the purposes of this section:

- the day on which a workplace agreement ceases to operate is referred to as the ‘cessation day’; and
- the workplace agreement that ceases to operate is referred to as the ‘original agreement’.

141. Proposed subsection 346Y(2) would provide that, on and from cessation day, the parties will be bound by the instrument or instruments that would have bound them but for the original agreement having come into operation.

142. The term ‘instrument’ is broadly defined in proposed subsection 346Y(5) to include a workplace agreement, an award, a pre-reform AWA, a pre-reform certified agreement, a workplace determination, a Victorian employment agreement, an exceptional matters order, a section 170MX award and an old IR agreement. It is also possible that terms and conditions may come from a preserved State agreement or notional agreements preserving State awards - these instruments are dealt with in Schedule 8 to the Act (see items 41 and 42 of this Schedule).

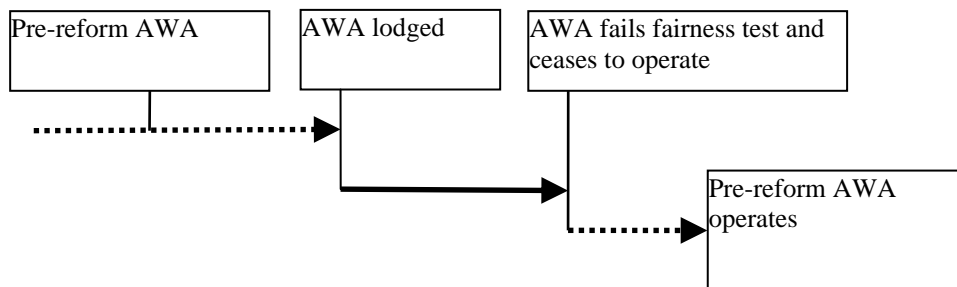
Example 1:



Henry started working for his employer in August 2006, and a collective agreement regulated the employees’ terms and conditions of employment. Henry subsequently approves an AWA, and it is lodged with the Workplace Authority.

The Workplace Authority determines that Henry’s AWA fails the fairness test. From this date Henry’s AWA ceases to operate, and Henry’s terms and conditions are instead governed by the instrument that, but for the AWA coming into operation, would have applied (ie as if the AWA had not come into operation). Because Henry would have been bound by a collective agreement, it applies.

Example 2:



Ollie is a part time bulldozer for Maggie’s construction company – Princess Foundations Pty Ltd. When Ollie started working for Maggie in July 2004, he made an AWA with Maggie. This agreement continued to operate after its nominal expiry date (as a pre-reform AWA) and

regulated his terms and conditions of employment. In June 2007 Maggie and Ollie agree to make a new AWA, and lodge it with the Workplace Authority.

The Workplace Authority determines that Ollie’s new AWA does not pass the fairness test. From this time Ollie’s AWA ceases to operate, and Ollie’s terms and conditions are instead governed by the instrument that, but for the AWA coming into operation, would have applied (ie as if the AWA had not come into operation). Ollie would therefore be subject to the pre-reform AWA.

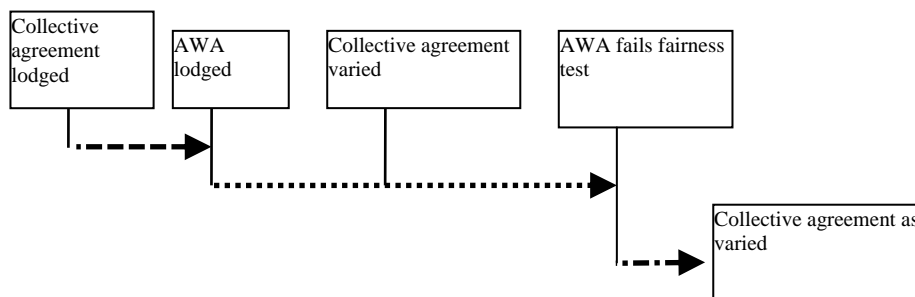
143. If under proposed subsection 346Y(1) the original agreement is a workplace agreement as varied under Division 8 of Part 8, then the workplace agreement in force before the variation was lodged is capable of being an instrument that binds the employer and an employee or employees in relation to the terms and conditions of employment (proposed subsection 346Y(3)).

144. Proposed subsection 346Y(4) makes clear that, if an instrument has ceased operating because the original agreement came into operation, it is still capable of being an instrument to which an employer and employee or employees may be bound after the original agreement ceases to operate because it has failed the fairness test. Part 2 of this Schedule contains consequential amendments to relevant provisions of the Act that reflect this principle (see for example items 5, 6 and 7).

145. Where there is no instrument of the kind specified in proposed subsection 346Y(5), on and from cessation day, the parties will be bound by the protected award conditions contained in the designated award (proposed paragraph 346Y(2)(b)).

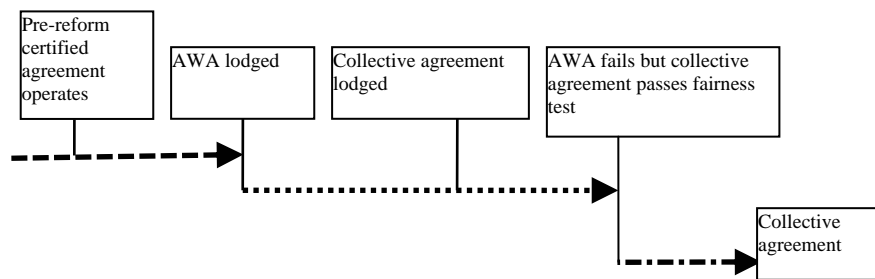
146. This section does not affect the way, if any, in which the Australian Fair Pay and Conditions Standard operates in relation to the relevant instrument.

Example 1:



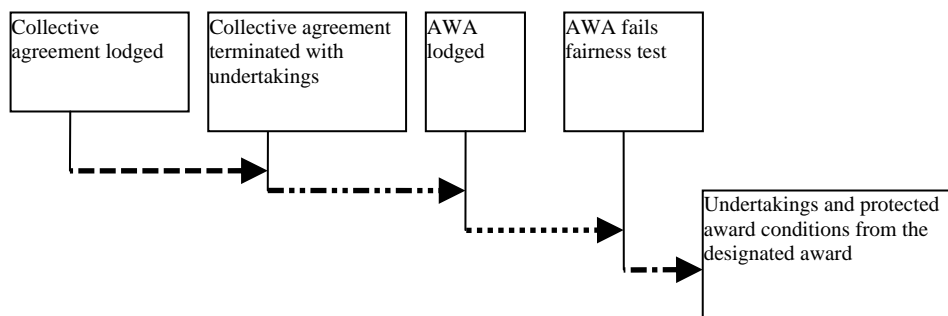
In December 2006 Bells Consulting Pty Ltd lodged a collective agreement with the (former) Office of the Employment Advocate. When Trixie started working for Bells Consulting in July 2007, she approved an AWA. On 23 July 2007, Bells Consulting lodges a variation to the collective agreement with the Workplace Authority. As the variation does not modify protected award conditions, the varied collective agreement is not subject to the fairness test.

The Workplace Authority determines that Trixie’s AWA does not pass the fairness test. From this date Trixie’s AWA ceases to operate, and her terms and conditions are governed by the instrument that, but for the AWA coming into operation, would have applied (ie as if the AWA had not come into operation). As the collective agreement as varied would have applied to Trixie, it governs her terms and conditions from this date.

Example 2:

In December 2004 the Australian Industrial Relations Commission certified the Huender Pty Ltd certified agreement. In August 2007, Bec starts working for Huender Pty Ltd, and approves an AWA. Her AWA is lodged with the Workplace Authority. A week later Huender Pty Ltd lodges a collective agreement with the Workplace Authority.

The Workplace Authority determines that Bec's AWA does not pass the fairness test. The collective agreement does pass the fairness test. As a result Bec's AWA ceases to operate, and from this date her terms and conditions are governed by the instrument that, but for the AWA coming into operation, would have applied (that is, as if the AWA had not come into operation) – in this case, the collective agreement.

Example 3:

Liza works for Marina's Dental Care Pty Ltd (which is not a respondent to an award). Liza's terms and conditions are determined by a collective agreement, which was lodged with the (former) Office of the Employment Advocate on 20 April 2006, and had a nominal expiry date of 20 April 2007. Marina's Dental Care decides to unilaterally terminate the collective agreement (after its nominal expiry date has passed), and makes undertakings to the employees bound by the agreement to preserve rates of pay and some other conditions in the agreement after its termination. These are lodged with the (former) Office of the Employment Advocate on 23 April 2007. Liza, having just finished her studies to qualify as a dentist, negotiates an AWA with Marina's Dental Care, and it is lodged with the Workplace Authority on 6 June 2007.

Because Marina's Dental Care is not a respondent to an award, the Workplace Authority designates the Dental Health (Public Hospital) Award for the purposes of the fairness test. The Workplace Authority decides that Liza's AWA does not pass the fairness test. From this date, Liza's terms and conditions will be determined by the instrument that, but for the AWA coming into operation, would have applied. In this case, the undertakings made by Marina's Dental Care when it terminated the collective agreement, and the protected award conditions from the designated award (that is, the Dental Health (Public Hospital) Award) will apply to Liza.

Section 346Z – Effect of section 346Y in relation to instruments

147. Proposed section 346Z would deal with the circumstance where, on cessation day, the parties become bound by an instrument that would (because of proposed section 346Y) have bound the parties but for the original agreement ceasing to operate because it did not pass the fairness test. In this situation, despite any other provision of the Act, the instrument:

- is taken to have come into operation on the cessation day; and
- will bind the employer and the employee or employees.

148. There are a number of amendments to the provisions in Part 8 which deal with the operation of agreements that ensure these instruments are able to operate in these circumstances (see items 5, 6 and 7).

149. A reference to an instrument means the instruments listed in proposed subsection 346Y(5).

Section 346ZA – Redundancy provisions and section 394 undertakings

150. Under proposed section 346ZA, a workplace agreement that does not pass the fairness test will not affect:

- preserved redundancy provisions; or
- the operation of undertakings under section 394, following unilateral termination of a workplace agreement with 90 days notice.

151. Proposed subsection 346ZA(2) ensures that an employer who is bound by a redundancy provision is again bound by that provision after a workplace agreement ceases to operate as a result of not passing the fairness test, until the earliest of the following:

- the end of the period of 12 months from the time the workplace agreement was terminated;
- the employee is no longer employed by the employer; or
- a new workplace agreement comes into operation in relation to the employee and employer.

152. Proposed subsection 346ZA(4) ensures that this rule applies to preserved redundancy provisions derived from workplace agreements, pre-reform AWAs and pre-reform certified agreements.

153. Subsection 394(1) enables an employer to make undertakings about an employee's or employees' terms and conditions of employment after an agreement is terminated unilaterally by the employer in accordance with Division 9 of Part 8. These types of undertakings operate as if they were a workplace agreement for the purposes of their enforcement. Proposed subsection 346ZA(3) would ensure that any undertakings made under subsection 394(1) apply again to the employer and employee where a subsequent workplace agreement does not pass the fairness test under sections 346R or 346W. In such a case, the employer is taken to be bound by the undertaking until either:

- the employee's employment ceases with that employer; or
- another workplace agreement comes into operation.

Section 346ZB – Operation of workplace agreements

154. Proposed section 346ZB would make clear that a workplace agreement that has ceased operating because it does not pass the fairness test can never operate again.

155. The note would explain that this provision operates subject to subsection 346Y(3). This means that, if a workplace agreement as varied under Division 8 does not pass the fairness test,

then the workplace agreement in force before the variation was lodged is capable of being an instrument that binds the employer and an employee or employees in relation to the terms and conditions of employment.

Section 346ZC – Regulations may make provision for operation of provisions of revived instruments

156. Proposed section 346ZC would enable regulations to be made to provide for and in relation to the operation of instruments that are revived by operation of section 346Y.

Subdivision E – Entitlement to compensation

Section 346ZD – Employee is entitled to compensation in respect of fairness test period

157. Proposed section 346ZD would apply to an employee who may be entitled to compensation from their employer because their agreement did not pass the fairness test (proposed subsection 346ZD(1)). Sections 346Q, 346R, 346V, 346W and 346X each specify when an employee's entitlement to compensation arises.

158. Proposed subsection 346ZD(2) would outline the method for calculating what (if any) compensation an employer is required to pay an employee in relation to the 'fairness test period', where a workplace agreement did not pass the fairness test.

159. The 'fairness test period' begins on the day on which the workplace agreement is lodged and ends on either:

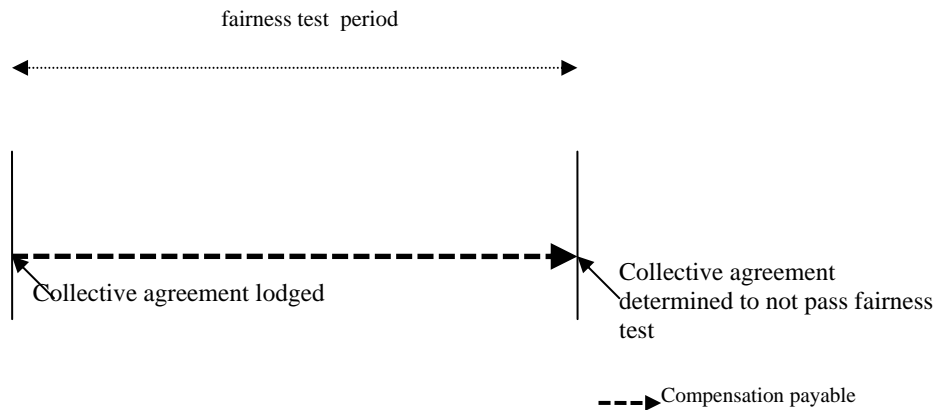
- the day on which the workplace agreement ceases to operate; or
- if the workplace agreement is varied (under section 346R or otherwise) in such a way that it passes the fairness test – the day on which the variation was lodged.

160. An employee would be entitled to recover, by way of compensation, any shortfall in entitlements during the fairness test period. A shortfall arises if the total value of the entitlements to which the employee was entitled under the agreement is less than the total value of the entitlements to which the employee would have become entitled if, during the fairness test period, their employment was covered by the instrument that, but for the workplace agreement which has failed the test, would have applied (for example, an award), or by protected award conditions contained in a designated award.

161. Proposed subsection 346ZD(3) would provide that an employer breaches section 346ZD if the employer does not pay to the employee the amount of compensation to which the employee is entitled within 14 days of the agreement ceasing to operate. Proposed section 346ZD would be an 'applicable provision' for the purposes of Part 14 of the Act which deals with compliance. Failure to pay compensation within the required period may lead to a court imposing a civil penalty. An employee or a workplace inspector would also be entitled to take legal proceedings to recover any compensation owing after the 14 day period.

162. Proposed subsection 346ZD(4) would define the 'fairness test period' and 'instrument'.

Example 1: A collective agreement does not pass the fairness test



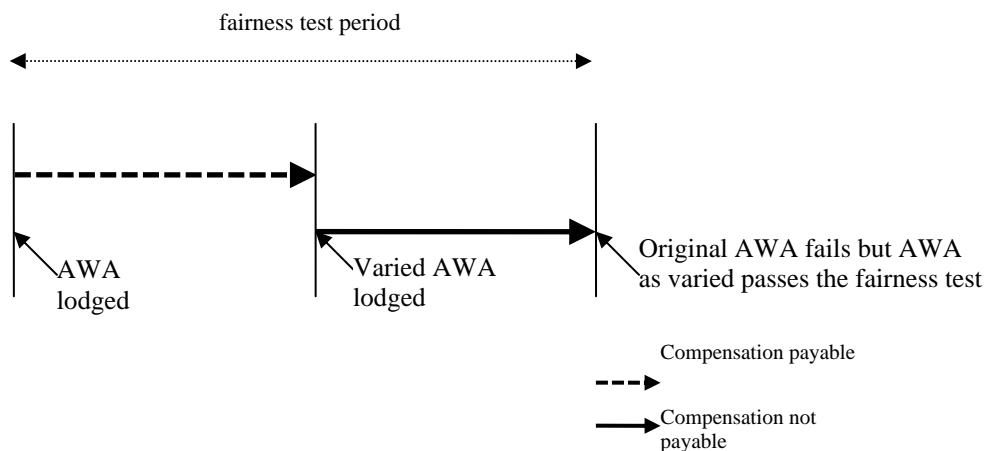
AB Chapman Pty Ltd is bound by a federal award. Under the pay scale derived from this award Fred was paid \$960.00 a week (the weekly equivalent of \$50,000 per year). Under the award, Fred was entitled to 15 percent superannuation and provided a \$50 weekly bonus if he reaches set performance targets. Fred meets his performance target each week.

AB Chapman’s employees approve a new collective agreement, which gives Fred an annual 4 percent pay rise, but removed the performance bonus (a protected award condition) and reduced the superannuation to 12 per cent. AB Chapman lodges the collective agreement with the Workplace Authority. Fred is paid \$1000 a week (\$52,000 per year) under the collective agreement. Subsequently, the Workplace Authority determines that the collective agreement does not pass the fairness test.

Fred is entitled to compensation for the period between the collective agreement being lodged and the date it failed the fairness test. The amount of compensation is based on any shortfall in entitlements he received under the (unfair) collective agreement and what he would have received under the federal award had it operated during the test period.

The shortfall is calculated against the entitlements Fred would have received if the collective agreement had not come into operation and the award had operated during this period. This includes the value of unpaid super contributions and is not limited to protected award conditions.

Example 2: An AWA fails the fairness test, but is varied and passes the fairness test



Max has been working for his employer, Pashka’s Playground Pty Ltd, since December 2005. He earns \$1200 a week (the weekly equivalent of \$62,000 per year). Pashka’s Playground

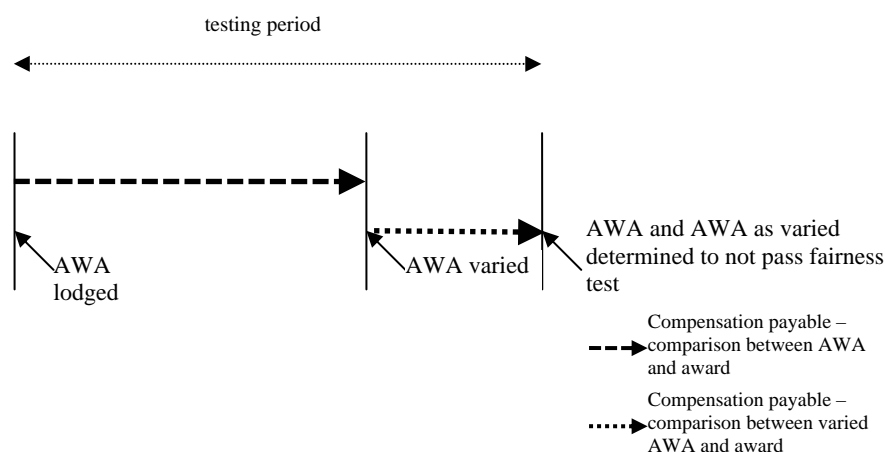
lodged a collective agreement with the former Employment Advocate on 25 January 2006, which did not remove or modify the protected award conditions from the award to which Pashka’s Playground was bound.? Subsequently, Pashka’s Playground offers Max an AWA which he approves. The AWA gives Max a higher salary of \$1230 a week (the equivalent of \$64,000 a year) but no longer contains weekend penalty rates. The AWA is lodged with the Workplace Authority on 20 July 2007 and will be subject to the fairness test.

After lodging the AWA, Pashka’s Playground realises Max’s AWA does not provide sufficient compensation for the removal of his weekend penalty rates because of the amount of weekend work he does (Max usually receives \$60 a week in penalty rates). The overall salary Max receives under the AWA is less than what he would have received if he had been paid the combined salary and weekend penalty rates under the collective agreement. Pashka’s Playground and Max agree to vary the AWA to further increase his annual salary to \$1270 per week (the equivalent of \$66,000 per year) and lodge the varied AWA with the Workplace Authority shortly after the original AWA was lodged.

The Workplace Authority assesses both the original AWA and the AWA as varied as part of the same process (as required by subsection 346N(3)). The Workplace Authority determines that Max’s original AWA does not pass the fairness test because he did not receive fair compensation for the removal of the weekend penalty rates. However, the Workplace Authority is satisfied that the AWA as varied passes the fairness test.

Max is entitled to compensation for the period he was paid in accordance with the original AWA (ie between the lodgment of the AWA and when the variation was lodged). The amount of compensation would be the difference between what Max was paid under the AWA and what he would have been paid for that period if the collective agreement had operated.

Example 3: An AWA is varied before passing the fairness test and neither the AWA or variation pass the fairness test



Megan started a new job as a sales assistant with Jeff’s Street Wear. Megan approves an AWA which excludes all protected award conditions with the exception of overtime payments. Shortly after, Megan was promoted to shift supervisor, and she and Jeff’s Street Wear agreed on a higher salary. To cover Megan’s promotion, Jeff’s Street Wear lodges a variation to the AWA with the Workplace Authority, which excludes all protected award conditions including the overtime payment.

The Workplace Authority determines that neither the AWA nor the AWA as varied pass the fairness test. Megan is entitled to compensation for 2 periods. The first period is between when

the AWA, and the variation to it, were lodged. The second period is when the AWA as varied was lodged and the day the Workplace Authority determined that neither the AWA nor the AWA as varied pass the fairness test.

Subdivision F – Civil remedy provisions

Section 346ZE – Employer must notify employees

163. Proposed subsection 346ZE(1) would provide that an employer who receives a notice from the Workplace Authority about whether the Director is required to apply the fairness test to a collective agreement or whether a collective agreement passes the fairness test, must take reasonable steps to ensure a copy of the notice is given to all employees currently subject to the agreement, as soon as practicable.

164. Proposed subsection 346ZE(2) would provide that failure to comply with the requirements of proposed subsection 346ZE(1) may result in civil penalties being imposed on the employer. Breach of subsection 346ZE(1) will attract a maximum pecuniary penalty of 30 penalty units. The note would remind readers that the enforcement provisions are located in Division 11 of Part 8 of the Act.

Section 346ZF – Employer not to dismiss etc. employee because agreement does not pass the fairness test

165. Proposed subsection 346ZF(1) would prohibit an employer from dismissing (or threatening to dismiss) an employee if the sole or dominant reason for doing so is that a workplace agreement does not (or may not) pass the fairness test.

166. Proposed subsection 346ZF(2) would provide that failure to comply with the requirements of proposed subsection 346ZF(1) may result in civil penalties being imposed on the employer. Breach of subsection 346ZF(1) will attract a maximum pecuniary penalty of 60 penalty units. This provision would be enforceable by workplace inspectors appointed by the Workplace Ombudsman. An employee who is dismissed in breach of proposed subsection 346ZF(1) would be entitled to compensation under Division 5A of Part 8 of the Act.

167. Proposed subsection 346ZF(3) would provide that, where proceedings are taken for an alleged contravention of subsection 346ZF(1), it is presumed that the employer's sole or dominant purpose for dismissing the employee was that the workplace agreement does not, or may not, pass the fairness test. The effect of this provision is to reverse the onus of proof to require the employer to establish (on the balance of probabilities) that the sole or dominant purpose for dismissing the employee was not a contravention of subsection 346ZF(1). The onus of proof is reversed because of the substantial evidentiary difficulty an applicant would face if they were required to prove what the 'purpose' of an employer was in dismissing the employee – matters that would be peculiarly within the knowledge of the employer and would be easier for the employer to disprove than for the applicant to prove.

168. A breach of this provision is enforceable by the workplace inspectors appointed by the Workplace Ombudsman.

Section 346ZG – Other remedies for the contravention of section 346ZF

169. New section 346ZG would enable the Court to make orders if an employer dismisses (or threatens to dismiss) an employee for the sole or dominant reason that a workplace agreement does not (or may not) pass the fairness test (that is, if an employer contravenes new section 346ZF).

170. Subsection 346ZG(1) provides that the orders that the Court may make are:

- an order requiring the employer to pay a specified amount of compensation for damages suffered by the employee; or
- any other order that the Court thinks appropriate.

171. Other orders that the Court may make could include reinstatement or injunctions.

172. An eligible person may apply to the Court seeking such relief. Under proposed subsection 346ZG(3), an eligible person means:

- a workplace inspector;
- an employee effected by the contravention; or
- a person prescribed by the regulations.

173. An organisation of employees may also apply on behalf of the employee concerned, provided that:

- it has been requested to do in writing by the employee concerned; and
- it has a member employed by the employee's employer; and
- is entitled to represent the industrial interests of the employee under its eligibility rules.

Section 346ZH – Employer not to require employee to agree to exclude or modify a protected award condition

174. Proposed subsection 346ZH(1) would prohibit an employer, by any act or omission in relation to a workplace agreement, coercing an existing employee to agree, or not to agree, to modify or exclude a protected award condition.

175. Proposed subsection 346ZH(2) would provide that the prohibition in proposed subsection 346ZH(1) would not apply to protected industrial action engaged by the employer which is protected action within the meaning of section 435.

176. Proposed subsection 346ZH(3) would provide that subsection 346ZH(1) is a civil remedy provision. Breach of subsection 346ZH(1) will attract a maximum pecuniary penalty of 60 penalty units.

177. A breach of this provision would be enforceable by workplace inspectors appointed by the Workplace Ombudsman.

Part 2 – Consequential amendments

Workplace Relations Act 1996

Item 2 – After paragraph 337(4)(c)

178. Item 2 is a minor amendment consequential on the amendments made by Part 1 of Schedule 1, relating to the fairness test. It would require the information statement an employer is obliged to give an employee prior to their agreement to contain information about when the Workplace Authority is required to decide whether an agreement passes the fairness test.

Item 3 – Subsection 344(5)

179. Item 3 is consequential on the amendments made by Part 1 of Schedule 1 relating to the fairness test. The Workplace Authority is currently not required to consider or determine whether the requirements of Part 8 have been met in relation to the making or content of anything annexed to a declaration lodged with the Workplace Authority in relation to a workplace agreement. The amendment would make clear that this does not apply to Division 5A (the fairness test) as the Workplace Authority would be required to examine the content of an agreement to determine whether it passes the fairness test.

Item 4 – After paragraph 347(4)(b)

180. Item 4 is consequential on the amendments made by Part 1 of Schedule 1 relating to the fairness test. Subsection 347(4) sets out certain circumstances where a workplace agreement ceases to operate. Item 4 would provide that, in addition to the existing circumstances, a workplace agreement also ceases to be in operation in the following situations:

- if the Workplace Authority decides under proposed section 346R that it does not pass the fairness test and the agreement is not varied within the required time period; and
- if the Workplace Authority decides under proposed section 346W that the agreement as varied does not pass the fairness test.

Item 5 – After subsection 347(7)

Item 6 – After subsection 347(8)

Item 7 – After subsection 347(9)

181. These items are consequential on proposed sections 346Y and 346Z to be inserted by Part 1 of Schedule 1. Proposed sections 346Y and 346Z ensure that the employee or employees who were subject to an agreement that does not pass the fairness test become covered by the instrument that would have applied to their employment, but for the failed agreement coming into operation. These items would provide that an agreement that has ceased to operate can operate again if the reason it ceased to operate was that it was replaced on or after 7 May 2007 by an agreement which did not pass the fairness test. This would be the case despite subsection 347(7), (8) and (9) which provide (in respect of an AWA, collective agreement and multi-business agreement respectively) that an agreement that has ceased to operate because it has been replaced can never operate again in relation to that employee.

182. Items 22, 27, 33, 34, 35, 37, 38, 39, 40 would operate in the same way for workplace determinations, Victorian employment agreements (certain agreements entered into under the Employee Relations Act 1992 of Victoria before 1 January 1997), pre-reform certified agreements, pre-reform AWAs, section 170MX awards, exceptional matters orders, old IR agreements, preserved State agreements and notional agreements preserving State awards respectively.

Item 8 – At the end of subsection 354(2)

183. Section 354 deals with protected award conditions. Item 8 would include a note at the end of subsection 354(2) to remind readers that a workplace agreement that excludes or modifies certain protected award conditions is subject to Division 5A (which relates to the application of the fairness test).

Item 9 – After paragraph 367(2)(a)

184. Item 9 would make a minor amendment consequential on proposed section 346R. It would provide that one of the circumstances in which a workplace agreement can be varied is in accordance with proposed section 346R (which deals with variations to agreements that do not pass the fairness test).

Item 10 – Subsection 377(5)

185. Item 10 is consequential on the amendments made by Part 1 of Schedule 1 relating to the fairness test. The Workplace Authority is currently not required to consider or determine whether the requirements of Part 8 have been met in relation to the making or content of anything annexed to a declaration lodged with the Workplace Authority in relation to a variation to a workplace agreement. The amendment would make clear that this does not apply to Division 5A (the fairness test) as the Workplace Authority would be required to examine the content of a variation to a workplace agreement and determine whether it passes the fairness test.

Item 11 – At the end of section 394

186. Item 11 is consequential on proposed section 346ZA. Section 346ZA would revive an employer undertaking made on unilateral termination of an agreement under section 394 where:

- the undertaking ceased to operate in relation to an employee when the employee's employment became subject to a later workplace agreement; and
- that later agreement ceases to operate because it does not pass the fairness test.

187. This item would amend section 394 to enable an undertaking to operate again under proposed section 346ZA despite subsection 394(7) which provides that an undertaking that has ceased to operate in relation to an employee can never operate again in relation to that employee.

Items 12 – At the end of subsection 400(6)

Item 13 – After subsection 400(6)

Item 14 – At the end of section 400

188. These items would amend section 400 to clarify that the prohibition on applying duress to an employer or employee in connection with an AWA applies to the engagement of employees as part of a transmission of business.

189. Under subsection 400(5) of the Act a person is prohibited from applying duress in connection with an AWA. Subsection 400(6) provides that it is not duress merely for an employer to offer a prospective employee an AWA as a condition of engagement.

190. Item 12 would amend subsection 400(6) to provide an exception in the circumstance described in new subsection 400(6A).

191. Item 13 would insert a new subsection 400(6A) specifying those circumstances – namely, a new employer in a transmission of business requiring a person employed in the business being transferred to make an AWA as a condition of employment by the new employer.

192. Item 14 would insert a new subsection 400(8) defining terms used in new subsection 400(6A). The definitions ensure that subsection 400(5) applies to all transmissions of business dealt with by the Act.

193. The combined effect of these provisions is to clarify that the prohibition on applying duress to an employer or employee in connection with an AWA applies to the engagement of employees as part of a transmission of business and that an employer who seeks to make continued employment conditional on making an AWA cannot rely on subsection 400(6).

194. These provisions spell out the existing law in this area. Courts have found duress to have occurred in circumstances where existing employees would be in a less favourable position than they are currently in by refusing to accept an AWA, and had some legitimate expectation that they should not be placed in that position. Transferring employees can be regarded as being in a similar position to existing employees. The Federal Court has found that, in the context of a transmission of business, a requirement to make an AWA may amount to duress: *Schanka v Employment National (Administration) Pty Ltd* [2001] FCA 579.

Item 15 – After paragraph 407(2)(ja)

195. Item 15 would amend subsection 407(2) to provide maximum levels of pecuniary penalties for contraventions of the following civil remedy provisions:

- a failure by an employer to notify employees about certain decisions made by the Workplace Authority in relation to the application of the fairness test to a collective agreement – subsection 346ZE(1) – attracts a maximum penalty of 30 penalty units;
- an employer dismissing, or threatening to dismiss, an employee if the sole or dominant reason for doing so is that a workplace agreement does not (or may not) pass the fairness test – subsection 346ZF(1) – attracts a maximum penalty of 60 penalty units; and
- any act or omission by an employer in relation to a workplace agreement, with the intention of coercing an existing employee to agree, or not to agree, to modify or remove a protected award condition test – subsection 346ZH(1) – attracts a maximum penalty of 60 penalty units.

196. A penalty unit is currently \$110. The specified levels of penalties apply to individuals. Breaches by bodies corporate attract a maximum penalty of five times that specified in subsection 407(2) - (that is, \$33,000).

Item 16 – Paragraph 416(1)(a)

Item 17 – Paragraph 416(1)(d)

Item 18 – At the end of subsection 416(1)

Item 19 – Paragraph 417(1)(a)

Item 20 – Paragraph 417(1)(g)

Item 21 – Paragraph 417(1)(k)

197. These items are consequential on proposed sections 346S, 346J, 346P, 346K and 346L to be inserted by Part 1 of Schedule 1. These items would provide the Workplace Authority Director with power to issue a verified copy of, or a certificate relating to, a declaration, notice or determination that was provided or issued under the listed sections.

Item 22 – At the end of section 506

198. This item is consequential on proposed sections 346Y and 346Z to be inserted by Part 1 of Schedule 1. It would operate in the same way as items 5, 6 and 7 in relation to workplace determinations.

Item 23 – Section 717 (after paragraph (a) of the definition of *applicable provision*)

Item 24 – Subsection 718(1) (after item 5 of the table)

Item 25 – Subsection 718(2)

Item 26 – After paragraph 718(6)(b)

199. These items would amend sections 717 and 718 to provide that an employee who is affected because their agreement did not pass the fairness test, an organisation of employees (in respect of a breach that relates to an employee who is a member of that organisation) or an inspector may apply for a penalty or other remedy in relation to a breach of proposed section 346ZD under Division 2 of Part 14. Proposed section 346ZD would require an employer to pay compensation to an employee within a specified period. Breach of this provision may give rise to a civil penalty or other remedy, for example recovery of the amount owing.

Item 27 – At the end of section 890

200. This item is consequential on proposed sections 346Y and 346Z to be inserted by Part 1 of Schedule 1. It would operate in the same way as items 5, 6 and 7 in relation to Victorian employment agreements.

Item 28 – At the end of clause 89 of Schedule 6

201. Item 28 would insert proposed subclause 89(3) into Schedule 6 of the Act. Proposed subclause 89(3) would provide that a common rule award that was binding on an employer and employee immediately before the day on which a workplace agreement was lodged, will be taken to be that employer and employee's relevant award for the purposes of Division 5A of Part 8 of the Act relating to the fairness test.

202. In addition, proposed paragraph 89(3)(d) would extend the definition of instrument in subsection 346Y(5) of Part 8 to include a common rule award, so that an employer and employee who were bound by a common rule immediately before a workplace agreement was lodged could be covered by that common rule, if a workplace agreement does not pass the fairness test.

Item 29 – Clause 95 of Schedule 6

203. Item 29 is a minor technical amendment consequential on item 30.

Item 30 – At the end of clause 95 of Schedule 6

204. Item 30 would insert proposed subclause 95(2) into Schedule 6 of the Act. Proposed subclause 95(2) would provide that a transitional Victorian reference award that was binding on an employer and employee immediately before the day on which a workplace agreement was lodged, will be taken to be that employer and employee's relevant award for the purposes of Division 5A of Part 8 of the Act.

205. In addition, proposed paragraph 95(2)(d) would extend the definition of *instrument* in subsection 346Y(5) of Part 8 to include a transitional Victorian reference award, so that an employer and employee who were bound by a transitional Victorian reference award immediately before a workplace agreement was lodged could be covered by that award where their workplace agreement does not pass the fairness test.

Item 31 – Clause 102 of Schedule 6

206. Item 31 is a minor technical amendment consequential on item 32.

Item 32 – At the end of clause 102 of Schedule 6

207. Item 32 would insert proposed subclause 102(2) into Schedule 6 of the Act. Proposed subclause 102(2) would provide that a transitional award (other than a Victorian reference award) that was binding on an excluded employer in respect of the employment of employees in Victorian immediately before the day on which a workplace agreement was lodged, will be taken to be that employer and an employee's relevant award for the purposes of Division 5A of Part 8 of the Act.

208. In addition, proposed paragraph 102(2)(d) would extend the definition of instrument in subsection 346Y(5) of Part 8 to include a transitional award (other than a Victorian reference award) that was binding on an excluded employer in respect of the employment of employees in Victoria, so that an employer and employee who were bound by that type of transitional award immediately before a workplace agreement was lodged could be covered by that type of transitional award where their workplace agreement does not pass the fairness test.

Item 33 – After subclause 3(5) of Schedule 7

Item 34 – At the end of clause 18 of Schedule 7

Item 35 – At the end of clause 25 of Schedule 7

Item 36 – Clause 27 of Schedule 7

Item 37 – At the end of clause 27 of Schedule 7

Item 38 – At the end of clause 28 of Schedule 7

Item 39 – At the end of clause 15G of Schedule 8

Item 40 – At the end of clause 38A of Schedule 8

209. These items are consequential on proposed sections 346Y and 346Z to be inserted by Part 1 of Schedule 1. They would operate in the same way as items 5, 6 and 7 in relation to pre-reform certified agreements, pre-reform AWAs, section 170MX awards, exceptional matters orders, old IR agreements, preserved State agreements and notional agreements preserving State awards respectively.

Item 41 – At the end of Division 6A of Part 2 of Schedule 8

210. Item 41 would insert proposed clause 25B into Schedule 8 to extend the application of, with modification, Division 5A of Part 8 of the Act relating to the fairness test to workplace agreements in the circumstances that an employer and employee were bound by a preserved State agreement immediately before the workplace agreement came into operation. The fairness test would assess whether employees are fairly compensated where a workplace agreement modifies or excludes any or all of an employee's protected preserved conditions, such as penalty rates.

Clause 25B – Application of fairness test where employment was subject to preserved State agreement

211. Proposed paragraphs 25B(1)(a),(b) and (c) are application provisions that would prescribe the circumstances in which clause 25B operates to extend the application of the fairness test to employers and employees bound by a preserved State agreement.

212. In order for clause 25B to apply, an employer and employee must have:

- lodged a workplace agreement with the Workplace Authority; and
- been bound by a preserved State agreement (either individual or collective) immediately before the day on which the workplace agreement was lodged.

213. In addition, the workplace agreement must contain a protected preserved condition because of paragraph 25A(2)(a) of Schedule 8 to the Act.

214. Paragraph 25A(2)(a) of Schedule 8 to the Act provides that protected preserved conditions are taken to be included in a workplace agreement where an employee's employment was subject to a preserved State agreement that has ceased to apply to that employee because the employee is bound by a workplace agreement.

215. Therefore, if an employer and employee are bound by a workplace agreement that is not taken to include a protected preserved condition, that is, if the conditions in proposed paragraphs 25B(1)(a), (b) and (c) are not met, then clause 25B would not extend the operation of the fairness test to that workplace agreement. Rather, if the workplace agreement should be subject to the fairness test, Part 8 of the Act itself would apply the fairness test to that workplace agreement. This would mean that where necessary, an employer and employee could be designated a federal award under Division 5A for the purposes of the fairness test. However, an employee cannot be designated an award under clause 25B. This is because an employee covered by that clause would already have applicable protected preserved conditions and would not require a designated award for the purposes of the fairness test.

216. If the conditions in proposed paragraphs 25B(1)(a), (b) and (c) are met in relation to a workplace agreement, then the fairness test in Part 8 would apply to the workplace agreement, subject to the modifications contained in proposed paragraphs 25B(1)(d) to (m) and subclauses 25B(2), (3) and (4).

217. Proposed paragraph 25B(1)(d) would provide that a reference in Division 5A of Part 8 of the Act to protected award conditions should be read as if it were substituted with a reference to protected preserved conditions. Protected preserved condition is defined for the purposes of this clause in proposed subclauses 25B(3) and (4).

218. Proposed paragraph 25B(1)(e) would provide that a reference in Division 5A of Part 8 to a relevant award or reference award should be read as if it were substituted with a reference to relevant preserved State agreement. A relevant preserved State agreement is defined for the purposes clause 25B in proposed subclause 25B(3).

219. Proposed paragraph 25B(1)(f) would provide that paragraph 346C(1)(a) does not apply to employers and employee or employees bound by a workplace agreement within the scope of clause 25B. Rather, paragraph 346C(1)(a) should be replaced with the words "if the protected preserved conditions are taken to be included in the workplace agreement because of paragraph 25A(2)(a) of Schedule 8". This modification ensures that protected preserved conditions will apply for the purposes of Division 5A, where they are included in a workplace agreement. This is necessary because unlike protected award conditions that are terms of an award, protected preserved conditions are not terms contained in a preserved State agreement, but rather operate in conjunction with it.

220. Proposed paragraph 25B(1)(g) would provide that paragraphs 346C(b) and subsection 346C(2) of new Division 5A (relating to the application of protected award conditions contained in designated awards) would not apply to an employer and employee or employees bound by workplace agreements that are within the scope of clause 25B. This is because a workplace agreement covered by clause 25B must, by virtue of the application provisions in paragraphs

25B(1)(a),(b) and (c), contain protected preserved conditions, therefore it would not be necessary to designate an award to these employers and employees. Therefore, any provision in Part 8 relating to designated awards would not extend to employers and employees covered by clause 25B.

221. Proposed paragraph 25B(1)(h) would provide that paragraphs 346E(1)(b), 346E(2)(b), 346F(1)(b) and 346F(2)(b) of new Division 5A of Part 8 do not operate as part of the fairness test as applied under clause 25B. Paragraphs 346E(1)(b), 346E(2)(b), 346F(1)(b) and 346F(2)(b) limit the application of the fairness test to only those workplace agreements that bind employees employed in an industry or occupation in which the terms and conditions of the kind of work performed by the employee are usually regulated by an award.

222. This prerequisite does not apply under clause 25B. Rather, it is intended that any employee bound by a workplace agreement lodged on or after 7 May 2007 that is taken to include protected preserved conditions would have the fairness test applied to it (subject to the other pre-requisites for assessment being met). This ensures that any employee that has a protected preserved condition modified or excluded by their workplace agreement would not lose the benefit of that condition without fair compensation in return.

223. Proposed paragraph 25B(1)(i) would provide that sections 346H, 346K and 346L would not apply to employers and employees bound by workplace agreements within the scope of clause 25B. This is because employers and employees bound by a preserved State agreement that is taken to include protected preserved conditions cannot be designated an award for the purposes of the fairness test under this clause when they lodge a workplace agreement.

224. Proposed paragraph 25B(1)(j) would provide that subsection 346Y(2)(b) does not apply to employers and employees bound by workplace agreements within the scope clause 25B. This is because an employer and employee that were bound by these agreements could not have been designated an award for the purposes of the fairness test under that clause. As such, it is not necessary to include scope for an employer and employee to be covered by the terms of a designated award in the event that no other instrument is capable of applying.

225. Rather, those employers and employees that are not bound by another instrument will be covered by any protected preserved condition that would be taken to be included in the workplace agreement that has ceased to apply because the workplace agreement did not pass the fairness test. These protected preserved conditions will have effect in relation to the employer and employee as if the agreement did not purport to exclude or modify their application. This outcome is consistent with the consequences of terminating a preserved State agreement under the Act.

226. In that case, where the employer and employee or employees are not bound by another instrument, for example an award, the employer and employee would be taken to be bound by protected preserved conditions.

227. Proposed paragraph 25B(1)(k) would modify subsection 346Y(5) to include a preserved State agreement in the definition of instrument for the purposes of section 346Y. This paragraph would ensure that an employer and employee or employees that were bound by a preserved State agreement immediately before the original workplace agreement was lodged could again be bound by the preserved State agreement if a workplace agreement does not pass the fairness test.

228. Note, however, that a preserved State agreement that has been terminated in accordance with clause 21 of Schedule 8 after the workplace agreement was lodged would not be an instrument for the purposes of section 346Y. This is because a terminated preserved State agreement has not ceased to operate because the new workplace agreement was lodged; rather it has ceased to operate because it was terminated.

229. Proposed paragraph 25B(1)(l) would provide that a reference in subsection 346ZA(4) to section 399A should be substituted with a reference to either subclause 21A or 21D of Schedule 8. This means that the operation of redundancy provisions preserved under clauses 21A or 21D of Schedule 8 would be revived if those provisions applied to an employer and employee immediately before a workplace agreement was lodged, and that workplace agreement did not pass the fairness test.

230. Proposed paragraph 25B(1)(m) would provide that subparagraph 346ZD(2)(b)(ii) does not apply to an employer and employee bound by a workplace agreement within the scope of clause 25B. This is because a designated award is not relevant to these employers and employees.

231. Rather, if an employer and employee are not bound by an instrument (within the meaning of the definition of instrument in section 346Y) the protected preserved conditions that have effect in relation to the employee by virtue of subsection 346Z(2)(b) would be relevant for the assessment of compensation that is payable to the employee.

232. Proposed subclause 25A(2) would provide that Parts 6 and 14 of the Act (which relate to inspectors powers and compliance and enforcement respectively) apply to a protected preserved condition that has effect because of paragraph 346Y(2)(b) as if that condition were a workplace agreement in operation. In particular, where a protected preserved condition has effect in relation to an employee because the employee was bound by an AWA that did not pass the fairness test, Parts 6 and 14 apply to the protected preserved condition as if it were an AWA in operation.

233. Further, where a protected preserved condition has effect in relation to an employee because the employee was bound by a collective agreement that did not pass the fairness test, Parts 6 and 14 apply to the protected preserved condition as if it were a collective agreement in operation.

234. Proposed subclause 25B(3) would provide definitions of terms relevant to clause 25B. For the purposes of clause 25B a *protected preserved condition* and *relevant preserved State agreement* are defined.

235. Proposed subclauses 25B(3) and (4) would provide a definition of *protected preserved condition* for the purposes of clause 25B. Protected preserved condition would have the same meaning as in subclause 25A(4) but would be subject to proposed subclause 25B(4).

236. As is the case in the definition of protected award conditions in section 346B, it is not necessary to include outworker conditions in the operation of this clause. Subclause 25A(3) already provides that protected preserved conditions about outworker conditions cannot be excluded or modified and will have effect despite any terms of a workplace agreement that provide, in a particular respect, a less favourable outcome for the outworker. Clause 25B would have effect in relation to workplace agreements as affected by subclause 25A(3).

Item 42 – At the end of Division 6 of Part 3 of Schedule 8

237. Item 42 would insert new clause 52AAA into Schedule 8 to extend the application of, with modification, Division 5A of Part 8 of the Act relating to the fairness test to workplace agreements in the circumstances that an employer and employee were bound by a notional agreement preserving State awards immediately before the workplace agreement came into operation. The fairness test would assess whether employees are fairly compensated where a workplace agreement modifies or excludes any or all of an employee's protected notional conditions, such as penalty rates.

Clause 52AAA – Application of fairness test where employment was subject to notional agreement preserving State awards

238. Proposed paragraphs 52AAA(1)(a),(b) and (c) are application provisions that would prescribe the circumstances in which clause 52AAA operates to extend the application of the fairness test to employers and employees bound by a notional agreement preserving State awards.

239. In order for clause 52AAA to apply, an employer and employee must have:

- lodged a workplace agreement with the Workplace Authority; and
- been bound by a notional agreement preserving State awards immediately before the day on which the workplace agreement was lodged.

240. In addition, the workplace agreement must contain a protected notional condition because of paragraph 52(2)(a) of Schedule 8 to the Act.

241. Paragraph 52AAA(2)(a) of Schedule 8 to the Act provides that protected notional conditions are taken to be included in a workplace agreement where an employee's employment was subject to a notional agreement preserving State awards that has ceased to apply to that employee because the employee is bound by a workplace agreement.

242. Therefore, if an employer and employee are bound by a workplace agreement that is not taken to include a protected notional condition, that is, if the conditions in proposed paragraphs 52AAA(1)(a), (b) and (c) are not met, then clause 52AAA would not extend the operation of the fairness test to that workplace agreement. Rather, if the workplace agreement should be subject to the fairness test, Part 8 of the Act itself would apply the fairness test to that workplace agreement. This would mean that where necessary, an employer and employee could be designated a federal award under Division 5A for the purposes of the fairness test. However, an employee cannot be designated an award under clause 52AAA because an employee covered by that clause would already have applicable protected notional conditions and would not require a designated award for the purposes of the fairness test.

243. If the conditions in proposed paragraphs 52AAA(1)(a), (b) and (c) are met in relation to a workplace agreement, then the application of the fairness test in Part 8 would apply to the workplace agreement, subject to the modifications contained in proposed paragraphs 52AAA(1)(d) to (m) and subclauses 52AAA(2) and (3).

244. Proposed paragraph 52AAA(1)(d) would provide that a reference in Division 5A of Part 8 of the Act to protected award conditions should be read as if it were substituted with a reference to protected notional conditions. Protected notional conditions are defined for the purposes of this clause in proposed subclauses 52AAA(2) and (3).

245. Proposed paragraph 52AAA(1)(e) would provide that a reference in Division 5A of Part 8 to a relevant award or reference award should be read as if it were substituted with a reference to relevant notional agreement preserving State awards. A relevant notional agreement preserving State awards is defined for the purposes of clause 52AAA in proposed subclause 52AAA(2).

246. Proposed paragraph 52AAA(1)(f) would provide that paragraphs 346C(1)(b) and subsection 346C(2) (relating to the application of protected award conditions contained in designated awards) would not apply to an employer and employee or employees bound by workplace agreements that are within the scope clause 52AAA. This is because a workplace agreement covered by clause 52AAA must, by virtue of the application provisions in paragraphs 52AAA(1)(a),(b) and (c), contain protected notional conditions, and so it would not be necessary to designate an award to these employers and employees. Therefore, any provision in Part 8

relating to designated awards would not extend to employers and employees covered by clause 52AAA.

247. Proposed paragraph 52AAA(1)(g) would provide that paragraphs 346E(1)(b), 346E(2)(b), 346F(1)(b) and 346F(2)(b) of new Division 5A do not operate as part of the fairness test as applied 52AAA. Paragraphs 346E(1)(b), 346E(2)(b), 346F(1)(b) and 346F(2)(b) limit the application of the fairness test to only those workplace agreements that bind employees that are employed in an industry or occupation which the terms and conditions of the kind of work performed by the employee are usually regulated by an award.

248. This prerequisite does not apply under clause 52AAA. Rather, it is intended that any employee bound by a workplace agreement lodged on or after 7 May 2007 that is taken to include protected notional conditions would have the fairness test applied to it (subject to the other prerequisites for assessment being met). This ensures that any employee that has a protected notional condition modified or excluded by their workplace agreement would not lose the benefit of that condition without fair compensation in return.

249. Proposed paragraph 52AAA(1)(h) would provide that sections 346H, 346K and 346L of new Division 5A do not apply to employers and employees bound by workplace agreements within the scope of clause 52AAA. This is because employers and employees bound by these agreements cannot be designated an award for the purposes of the fairness test under that clause.

250. Proposed paragraph 52AAA(1)(i) would provide that subsection 346Y(2)(b) does not apply to employers and employees bound by workplace agreements within the scope clause 52AAA. This is because an employer and employee that were bound by these agreements could not have been designated an award for the purposes of the fairness test under that clause.

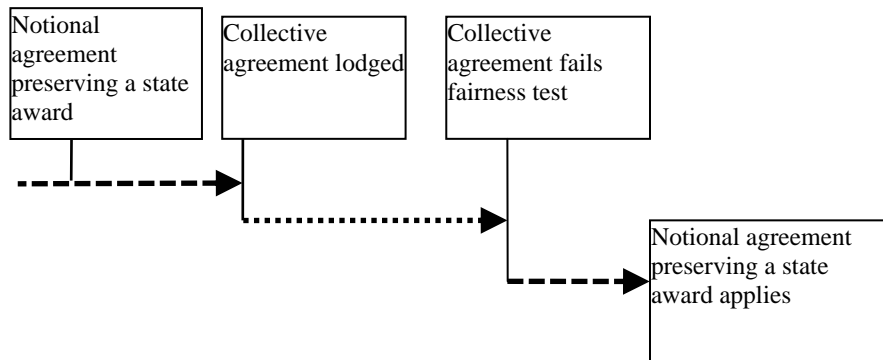
251. Proposed paragraph 52AAA(1)(j) would modify subsection 346Y(5) to include a notional agreement preserving State awards in the definition of *instrument* for the purposes of section 346Y. This paragraph would ensure that an employer and employee or employees that were bound by a notional agreement preserving State awards immediately before the original workplace agreement was lodged could again be bound by the notional agreement preserving State awards if a workplace agreement does not pass the fairness test.

252. Proposed paragraph 52AAA(1)(j) would provide that subparagraph 346ZD(2)(b)(ii) does not apply to an employer and employee bound by a workplace agreement within the scope of clause 52AAA. This is because a designated award is not relevant to these employers and employees.

253. Proposed subclause 52AAA(3) and (4) would provide definitions of terms relevant to clause 52AAA. For the purposes of clause 52AAA *protected notional conditions* and *relevant notional agreement preserving State awards* are defined.

254. As is the case in the definition of protected award conditions in section 346B, the definition of protected notional conditions excludes outworker conditions. It is not necessary to include outworker conditions in the operation of this clause. Subclause 52(2A) already provides that protected notional conditions about outworker conditions cannot be excluded or modified and will have effect despite any terms of a workplace agreement that provide, in a particular respect, a less favourable outcome for the outworker. Clause 52AAA would have effect in relation to workplace agreements as affected by subclause 52(2A).

Example 1:



DREF Pty Ltd is bound by a notional agreement preserving a state award (NAPSA). DREF’s employees approve a new collective agreement which is lodged with the Workplace Authority. The Workplace Authority determines that the collective agreement does not pass the fairness test.

From this day, DREF’s employees’ collective agreement ceases to operate. From this date DREF’s terms and conditions are governed by the instrument that, but for the collective agreement, would have applied (ie as if the collective agreement had not come into operation). Because DREF Pty Ltd was bound by a NAPSA, it applies.

Schedule 2 – Workplace Authority

Part 1–Main Amendments

Workplace Relations Act 1996

Item 1 – Part 5 (heading)

255. This item would repeal the heading for Part 5 and substitute ‘Part 5 – Workplace Authority Director’.

Item 2 – Divisions 1 and 2 of Part 5

256. This item would repeal Divisions 1 and 2 of Part 5 and substitute the following Divisions:

Division 1 – Workplace Authority Director

Division 2 – Workplace Authority Deputy Directors

Division 3 – Staff, delegations etc

257. Item 2 would provide for the appointment of the Workplace Authority Director. It would also establish the Workplace Authority as a statutory agency and provide for the appointment of Workplace Authority Deputy Directors.

258. The Workplace Authority Director would perform the functions of the Employment Advocate, as well as be responsible for:

- administering the fairness test under proposed Division 5A of Part 8;
- providing a pre-lodgment facility to check agreements against the fairness test;
- providing information and advice to employees and employers about workplace agreement making and Commonwealth workplace relations laws;
- providing a comprehensive information service about pay and conditions issues; and
- providing advice specifically targeted at young people and people from a non-English speaking background.

Division 1 – Workplace Authority Director

259. Proposed Division 1 would provide for the appointment of a Workplace Authority Director to head the Workplace Authority and set out his or her functions, including those that relate to workplace agreements and the fairness test.

Subdivision A – Establishment and Functions

Section 150A – Workplace Authority Director

260. Proposed section 150A would establish the statutory office of the Workplace Authority Director. Proposed section 151A would provide for the Workplace Authority Director to be appointed by the Governor-General.

Section 150B – Functions of Workplace Authority Director

261. Proposed subsection 150B(1) would set out the Workplace Authority Director’s broad functions. These are to:

- promote an understanding of Commonwealth workplace relations legislation, including by making available to the public general information and guidance about the operation of the legislation;

- provide education, assistance and advice to employees, employers and organisations in relation to their rights and obligations under Commonwealth workplace relations legislation;
- promote the making of workplace agreements;
- provide education, assistance and advice to employees, employers (especially employers in small business) and organisations in relation to workplace agreements;
- accept lodgement of workplace agreements and notices about transmission of instruments;
- decide under Division 5A of Part 8 whether workplace agreements pass the fairness test;
- authorise multiple-business agreements in accordance with the regulations;
- analyse workplace agreements;
- refer matters to the Workplace Ombudsman and workplace inspectors; and
- perform any other function conferred on the Workplace Authority Director by Commonwealth workplace relations legislation, the Registration and Accountability of Organisations Schedule or another Act.

262. Proposed subsection 150B(2) would require the Workplace Authority Director, when performing his or her functions in relation to workplace agreements, to have particular regard to:

- the needs of workers in disadvantaged bargaining positions, including for example women, people from a non-English speaking background, young people, apprentices, trainees and outworkers;
- encouraging parties to agreement-making to have regard to those needs;
- assisting workers to balance work and family responsibilities; and
- the need to prevent and eliminate discrimination.

Section 150C – Minister may give directions to Workplace Authority Director

263. Proposed section 150C would allow the Minister to give written directions to the Workplace Authority Director about the performance of his or her functions. These directions would be a legislative instrument under the *Legislative Instruments Act 2003* and subject to public scrutiny.

264. Such directions must be of a general nature, for example to give particular attention to providing information and advice specifically targeted at young people. The Minister would be expressly precluded from giving directions in relation to a specific case or in relation to the Workplace Authority Director's performance of functions, or exercise of powers as an Agency head under the Public Service Act 1999 (proposed subsections 150C(2) and (3)). This restriction ensures the independence of the Workplace Authority.

265. The Workplace Authority Director would be required to comply with any direction given by the Minister under this provision (proposed subsection 150C(4)).

266. Despite section 44 of the *Legislative Instruments Act 2003*, which provides that Ministerial directions are not disallowable, proposed subsection 150C(5) expressly provides that a direction by the Minister would be a disallowable instrument.

Subdivision B – Appointment and terms and conditions

267. This Division would provide for the appointment and entitlements of the Workplace Authority Director.

Section 151A – Appointment of Workplace Authority Director

268. Proposed subsection 151A(1) would provide for the Governor-General to appoint the Workplace Authority Director by written instrument.

269. Proposed subsection 151A(2) would require that before the Governor-General may appoint a person as the Workplace Authority Director, the Minister must be satisfied that the person has suitable qualifications or experience, and is of good character.

270. The length of an appointment would be specified in the written instrument of appointment, but cannot exceed 5 years (proposed subsection 151A(3)). The Workplace Authority Director would be appointed on a full-time basis (proposed subsection 151A(4)). The Workplace Authority Director could be reappointed for a further term.

Section 151B – Remuneration

271. Proposed subsection 151B(1) would provide that the Remuneration Tribunal would determine the remuneration of the Workplace Authority Director or, in the absence of a determination, the regulations could set the remuneration. In addition, the Workplace Authority Director would be paid any allowances prescribed by regulation (proposed subsection 151B(2)).

272. Proposed subsection 151B(3) would provide that this section has effect subject to the *Remuneration Tribunal Act 1973*. This would ensure that general provisions of the *Remuneration Tribunal Act 1973* are not displaced by this section.

Section 151C – Leave of absence

273. Proposed subsection 151C(1) would provide that the Remuneration Tribunal would determine the recreation leave entitlements for the Workplace Authority Director.

274. Proposed subsection 151C(2) would allow the Minister to grant the Workplace Authority Director leave of absence, other than recreation leave, on such terms and conditions as he or she determines.

Section 151D – Other terms and conditions

275. Proposed section 151D would provide that the Governor-General may determine terms and conditions relating to matters not covered by the Act in relation to the Workplace Authority Director.

Section 151E – Outside employment

276. Proposed section 151E would provide that the Workplace Authority Director cannot engage in other paid employment without the Minister's approval.

277. These arrangements are complemented by proposed paragraph 151J(2)(c) which would allow the Governor-General to terminate the Workplace Authority Director's appointment if the requirements of proposed subsection 151E are contravened.

Section 151F – Disclosure of interests

278. Proposed section 151F would require the Workplace Authority Director to give the Minister written notice of all pecuniary or other interests that could conflict with the proper performance of the Workplace Authority Director's functions.

279. These arrangements are complemented by proposed paragraph 151J(2)(d) which would allow the Governor-General to terminate the Workplace Authority Director's appointment if the requirements of proposed section 151F are contravened without reasonable excuse.

Section 151G – Acting appointments

280. Proposed section 151G would allow the Minister to appoint a person to act as the Workplace Authority Director when necessary, including on a recurring basis. The Minister would need to be satisfied that any person appointed to act in this position has suitable qualifications or experience and is of good character (proposed subsection 151G(2)).

281. Proposed subsection 151G(3) would provide that anything done by a person appointed to act in the Workplace Authority Director's position would not be invalid simply because of a defect or irregularity in connection with the appointment.

Section 151H – Resignation

282. Proposed section 151H would allow the Workplace Authority Director to resign from his or her appointment by giving a written resignation to the Governor-General. The resignation would take effect either on the day the resignation is received, or a later date where specified (proposed subsection 151H(2)).

Section 151J – Termination of appointment

283. Proposed section 151J would provide grounds for termination of the appointment of the Workplace Authority Director.

284. Proposed subsection 151J(1) would allow the Governor-General to terminate the appointment of the Workplace Authority Director for misbehaviour or physical or mental incapacity.

285. Proposed subsection 151J(2) would allow the Governor-General to terminate the appointment of the Workplace Authority Director if the Workplace Authority Director:

- becomes bankrupt or takes specified steps related to insolvency; or
- is absent from duty (except on authorised leave) for 14 consecutive days or for 28 days in any 12 month period; or
- engages in unapproved paid employment outside the duties of his or her office; or
- fails to disclose pecuniary or other interests that could conflict with the proper performance of his or her functions (proposed section 151F) without reasonable excuse.

Division 2 – Workplace Authority Deputy Directors

286. Proposed Division 2 would provide for the arrangements for the appointment and entitlements of Workplace Authority Deputy Directors. The function of the Workplace Authority Deputy Directors is to assist the Workplace Authority Director in the performance of his or her functions.

287. It would be expected that many of the functions and powers of the Workplace Authority Director would be delegated to Workplace Authority Deputy Directors under proposed section 153C (for example to decide under proposed Division 5A of Part 8 whether workplace agreements pass the fairness test or to promote an understanding of Commonwealth workplace relations legislation).

Section 152A – Workplace Authority Deputy Directors

288. Proposed section 152A would provide for the Workplace Authority Director to be assisted in his or her functions by Workplace Authority Deputy Directors.

Section 152B – Appointment of Workplace Authority Deputy Director

289. Proposed subsection 152B(1) would provide for the Minister to appoint Workplace Authority Deputy Directors by written instrument.

290. Proposed subsection 152B(2) would require that, before the Minister may appoint a person as a Workplace Authority Deputy Director, the Minister must be satisfied that the person has suitable qualifications or experience, and is of good character.

291. The length of an appointment would be specified in the written instrument of appointment, but cannot exceed 5 years (proposed subsection 152B(3)). A Workplace Authority Deputy Director would be appointed on a full-time or part-time basis (proposed subsection 152B(4)). A Workplace Authority Deputy Director can be reappointed for a further term.

Section 152C – Remuneration

292. Proposed subsection 152C(1) would provide that the Remuneration Tribunal would determine the remuneration of a Workplace Authority Deputy Director or, in the absence of a determination, the regulations could set the remuneration. In addition, Workplace Authority Deputy Directors would be paid any allowances prescribed by regulation (proposed subsection 152C(2)).

293. Proposed subsection 152C(3) would provide that this section has effect subject to the *Remuneration Tribunal Act 1973*. This would ensure that general provisions of the *Remuneration Tribunal Act 1973* are not displaced by this section.

Section 152D – Leave of absence

294. Proposed subsection 152D(1) would provide that the Remuneration Tribunal would determine the recreation leave entitlements for a full-time Workplace Authority Deputy Director.

295. Proposed subsection 152D(2) would allow the Minister to grant a full-time Workplace Authority Deputy Director leave of absence, other than recreation leave, on such terms and conditions as he or she determines.

296. Proposed subsection 152D(3) would allow the Minister to grant a part-time Workplace Authority Deputy Director leave of absence on such terms and conditions as he or she determines.

Section 152E – Other terms and conditions

297. Proposed section 152E would provide that the Minister may determine terms and conditions relating to matters not covered by the Act for the office of Workplace Authority Deputy Directors.

Section 152F – Outside employment

298. Proposed subsection 152F(1) would provide that a full-time Workplace Authority Deputy Director cannot engage in other paid employment without the Minister's approval.

299. Proposed subsection 152F(2) would provide that a part-time Workplace Authority Deputy Director must not engage in any other paid employment that conflicts or may conflict with the proper performance of his or her duties.

300. These arrangements are complemented by proposed paragraphs 152J(2)(c) and (d) which would allow the Minister to terminate a Workplace Authority Deputy Director's appointment if the requirements of subsection 152F are contravened.

Section 152G – Disclosure of interests

301. Proposed section 152G would require a Workplace Authority Deputy Director to give the Minister written notice of all pecuniary or other interests that could conflict with performance of the Workplace Authority Deputy Director's functions.

302. These arrangements are complemented by proposed paragraph 152J(2)(e) which would allow the Minister to terminate a Workplace Authority Deputy Director's appointment if the requirements of proposed section 152G are contravened.

Section 152H – Resignation

303. Proposed subsection 152H(1) would allow a Workplace Authority Deputy Director to resign from his or her appointment by giving a written resignation to the Minister. The resignation would take effect either on the day the resignation is received, or a later date where specified (proposed subsection 152H(2)).

Section 152J – Termination of appointment

304. Proposed section 152J would provide grounds for termination of the appointment of a Workplace Authority Deputy Director.

305. Proposed subsection 152J(1) would allow the Minister to terminate the appointment of a Workplace Authority Deputy Director for misbehaviour or physical or mental incapacity.

306. Proposed subsection 152J(2) would allow the Minister to terminate the appointment of a Workplace Authority Deputy Director if the Workplace Authority Deputy Director:

- becomes bankrupt or takes specified steps related to insolvency; or
- is engaged on a full-time basis and is absent from duty (except on authorised leave) for 14 consecutive days or for 28 days in any 12 month period; or
- is engaged on a full-time basis and engages in unapproved paid employment outside the duties of his or her office;
- is engaged on a part-time basis and engages in paid employment that conflicts or could conflict with the proper performance of the duties of his or her office; or
- fails to comply with proposed section 152G, without reasonable excuse.

Division 3 – Staff, delegations etc.

307. Proposed Division 3 would establish the Workplace Authority as a statutory agency, provide the delegation of his or her functions and provide for the engagement of staff to assist the Workplace Authority Director.

Section 153A – Staff

308. Proposed section 153A would require that staff assisting the Workplace Authority Director in the performance of the Workplace Authority Director's functions must be engaged under the *Public Service Act 1999*.

Section 153B – Workplace Authority

309. Proposed subsection 153B(1) would provide for the establishment of the Workplace Authority.

310. Proposed subsection 153B(2) would provide that the Workplace Authority consist of:

- the Workplace Authority Director;
- the Workplace Authority Deputy Directors; and

- the staff necessary to assist the Workplace Authority Director.

311. Proposed subsection 153B(3) would provide that the Workplace Authority would be a Statutory Agency for the purposes of the *Public Service Act 1999*, headed by the Workplace Authority Director.

Section 153C – Delegation

312. Proposed subsection 153C(1) would allow the Workplace Authority Director to delegate any of his or her powers and functions to a person appointed or employed by the Commonwealth.

313. Given the broad functions of the Workplace Authority Director, proposed subsection 153C(1) does not impose limitations on the categories of persons who may exercise delegated powers or functions of the Workplace Authority Director. The Workplace Authority Director would of course be expected to only to choose delegates suitably qualified to exercise particular powers or functions.

314. For example, it would be expected that the function of providing education, assistance and advice to employees, employers and organisations in relation to their rights and obligations under Commonwealth workplace relations legislation would be delegated more broadly. However, deciding under Division 5A of Part 8 whether workplace agreements pass the fairness test may be a more restricted delegation.

315. In exercising delegated powers or functions the delegate would be required to comply with any directions given by the Workplace Authority Director (proposed subsection 153C(2)).

Item 3 – Division 3 of Part 5 (heading)

316. This item would repeal the heading and substitute ‘Division 4 – Reporting and disclosing information’.

Item 4 – Before section 165

317. This item would insert a new Subdivision A relating to reporting and a new Subdivision B relating to disclosing of information.

Division 4 – Reporting and disclosing information

Subdivision A - Reporting

318. Proposed Subdivision A would set out requirements for the Workplace Authority Director to report to the Minister.

Section 163A - Minister may require reports

319. Proposed subsection 163A(1) would allow the Minister to direct the Workplace Authority Director to provide specified reports relating to the Workplace Authority Director’s functions. The Workplace Authority Director would be required to comply with the direction (subsection 163A(2)).

320. Proposed subsections 163A(3) and (4) are included to assist the public to understand that a direction by the Minister given under proposed section 163A or a report given under that section, would not be a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

Section 163B – Annual report

321. Proposed section 163B would require the Workplace Authority Director to provide an annual report to the Minister on the operations of the Workplace Authority for each financial

year. The report must be prepared “as soon as practicable” after the end of the financial year. The report would be presented to Parliament.

322. A legislative note directs the reader to section 34C of the *Acts Interpretation Act 1901* for additional requirements relating to annual reports.

Section 163C – Reports not to include information relating to an individual’s affairs

323. Proposed subsection 163C(1) would provide that information relating to the affairs of an individual may not be included in a report under proposed sections 163A or 163B if the individual has been named or otherwise specifically identified as the individual to whom the information relates or it is reasonably likely that people generally would be able to ascertain the identity of the person.

324. Proposed subsection 163C(2) would provide relevant factors that must be taken into account in determining whether it is reasonably likely a person could be identified by people generally, i.e. the context in which the information appears, any other publicly available information and any other relevant matter.

Subdivision B – Disclosing information

325. Proposed Subdivision B would provide for disclosure of information by workplace agreement officials in certain circumstances.

326. A workplace agreement official would be defined to mean the Workplace Authority Director (or a delegate thereof), or a Workplace Authority Deputy Director, or a *member* of the Workplace Authority.

Section 164A – Disclosure of information by workplace agreement officials

327. Proposed subsection 164A(1) would allow a workplace agreement official to disclose information acquired in the course of exercising powers, or performing functions, as an official, if he or she considers on reasonable grounds that it is necessary or appropriate to do so in the course of exercising his or her powers, or performing his or her functions, as a workplace agreement official.

328. Proposed subsection 164A(2) would allow a workplace agreement official to provide the Minister with aggregated statistical data and information and copies of documents in accordance with regulations. A regulation made under proposed subsection 164A(3) may require information to be deleted from copies of documents provided to the Minister, as necessary to prevent individuals being identified (proposed subsection 164A(3)).

329. Proposed subsection 164A(4) would allow a workplace agreement official to disclose information to the Workplace Ombudsman or workplace inspectors where information has been requested by, and relates to the functions of, the Workplace Ombudsman or workplace inspectors, respectively. The Workplace Authority Director would also be allowed to disclose information to the Workplace Ombudsman or workplace inspectors if the Workplace Authority Director considers, on reasonable grounds, that the information would assist the Workplace Ombudsman or workplace inspectors in performing their functions (proposed paragraph 164A(4)(c)).

330. Proposed subsection 164A(5) would allow regulations to prescribe persons to whom a workplace agreement official could disclose prescribed kinds of information for prescribed purposes.

331. Proposed subsection 164A(6) would allow regulations to prescribe persons to whom a workplace agreement official could not disclose prescribed kinds of information for prescribed purposes, despite proposed subsections 164A(1), (2) and (4).

332. Proposed subsection 164A(7) would provide that workplace agreement officials would not be able to disclose information to the Minister that relates to a decision under Division 5A of Part 8:

- whether a particular workplace agreement passes the fairness test; or
- whether a particular workplace agreement is subject to the fairness test.

333. Proposed section 164A would provide an authorisation for disclosure of information pursuant to Information Privacy Principle 11(1)(d) of the *Privacy Act 1988*.

334. Proposed subsection 164A(8) would confirm that a disclosure of personal information in accordance with section 154A would be taken as authorised by law for the purpose of the *Privacy Act 1988*.

335. Proposed subsection 164A(9) would confirm that disclosure of protected information (as defined in section 165) under this section would, for the purposes of section 165, be taken as permitted by the Act.

Part 2–Consequential Amendments

Division 1–Workplace Relations Act 1996

336. Division 1 proposes amendments to the Act, including to definitions, primarily of a minor or technical nature and consequential to the main amendments in Part 1 to Schedule 2. These amendments would primarily relate to updating definition sections and replacing references to the ‘Employment Advocate’ with ‘Workplace Authority Director’.

Item 5 - Subsection 4(1) (definition of *Employment Advocate*)

337. This item would repeal the definition of *Employment Advocate*.

Item 6 – Subsection 4(1)

338. This item would define a *member* of the Workplace Authority as a person covered by proposed subsection 153B(2).

Item 7 – Subsection 4(1)

339. This item would define a *workplace agreement official*, as meaning:

- the Workplace Authority Director (or a delegate);
- a Workplace Authority Deputy Director; or
- a staff member of the Workplace Authority.

Item 8 – Subsection 4(1)

Item 9 – Subsection 4(1)

340. Items 8 and 9 would insert definitions for *Workplace Authority Deputy Director* and *Workplace Authority Director*.

Item 10 – Paragraph 120(3)(e)

341. This item would repeal the paragraph and substitute a paragraph that provides for the Workplace Authority Director to institute an appeal to the Full Bench in relation to a decision by the Australian Industrial Relations Commission to vary, or not to vary, an award.

Item 11 – Subsection 165(2) (definition of *workplace agreement official*)

342. This item would repeal the definition of *workplace agreement official*.

Item 12 – Sections 166, 332, 335, 337, 344, 345, 346A, 357 and 358

Item 13 – Subsection 359(1)

Item 14 – Subsection 359(2)

Item 15 – Sections 360, 361, 363, 370, 377, 378, 380, 381, 384, 389, 390, 392, 393, 395, 396, 416, 417, 418, 578, 583, 585, 595, 598A, 603, 603B and 604

343. These items would omit references to ‘Employment Advocate’ and substitute ‘Workplace Authority Director’.

Item 16 – Section 6 of Schedule 1 (definition of *Employment Advocate*)

344. This item would repeal the definition of *Employment Advocate*.

Item 17 – Subparagraph 337A(b)(ii) of Schedule 1

345. This item would repeal subparagraph 337A(b)(ii) of Schedule 1 and substitute ‘a workplace agreement official’ (as defined in the Act).

Item 18 – Paragraphs 2(2)(m), (n) and (o) of Schedule 2

Item 19 – Paragraphs 3(2)(f), (g) and (h) of Schedule 2

Item 20 – Paragraphs 4(2)(m) and (n) of Schedule 2

346. These items would ensure that references to ‘employee’, ‘employer’ and ‘employment’ have their ordinary meaning when used in relation to the functions of the Workplace Authority Director.

Item 21– Clauses 72B, 72G, 72K and 72L of Schedule 6

Item 22 – Clauses 9 and 15B of Schedule 8

Item 23 – Subclause 19(1) of Schedule 8

Item 24 – Subclause 19(2) of Schedule 8

Item 25 – Subclause 19(3), (5), (9), (10), (11) and (12) of Schedule 8

Item 26 – Subclause 42(1) of Schedule 8

Item 27 – Subclause 42(2) of Schedule 8

Item 28 – Subclauses 42(3), (5), (9), (10), (11) and (12) of Schedule 8

Item 29 – Clauses 2, 7, 10, 19, 27A, 29, 29B and 30 of Schedule 9

347. These items are consequential amendments and omit references to ‘Employment Advocate’ or ‘Employment Advocate’s’ and substitute ‘Workplace Authority Director’ or ‘Workplace Authority Director’s’.

Division 2 – Other legislation

348. Division 2 proposes amendments to the *Coal Mining Industry (Long Service Leave Funding) Act 1992* and the *Financial Management and Accountability Regulations 1997* consequential on the amendments to the Act.

Coal Mining Industry (Long Service Leave Funding) Act 1992

Item 30 – Subsection 4(1) (definition of *industrial authority*)

349. This item would amend the *Coal Mining Industry (Long Service Leave Funding) Act 1992* to include “the Workplace Authority Director” in the definition of *industrial authority*.

Financial Management and Accountability Regulations 1997

Item 31 – At the end of Part 1 of Schedule 1

350. This item would amend the *Financial Management and Accountability Regulations 1997* to prescribe the Workplace Authority as a prescribed agency for purposes of the *Financial Management and Accountability Act 1997*.

Part 3–Transitional Provisions

351. Part 3 would provide for transitional arrangements in relation to matters that were, prior to commencement of the proposed amendments, the responsibility of the Employment Advocate and which would become the responsibility of the Workplace Authority Director.

Item 32 – General transitional provision

352. This item would provide that, for the purposes of the operation of an Act, or an instrument (including regulations) or agreement made under an Act, in relation to a time on or after commencement of this Schedule, anything done by the Employment Advocate before commencement of the Schedule would be taken to be done by the Workplace Authority Director.

Item 33 – Substitution of parties to proceedings

353. This item would provide that the Workplace Authority Director would substitute the Employment Advocate as a party in any court or tribunal proceedings that were pending immediately before commencement of the Schedule.

Item 34 – Gazette notices of requirements

354. This item would ensure that requirements set by the Employment Advocate in accordance with certain provisions of the Act, that were published in the *Gazette* and in force immediately prior to the amendments, would remain in effect after commencement of this Schedule. The requirements relate to form and content of information statements, notices and declarations relating to pre-lodgment and lodgment procedures for the making, variation and termination of workplace agreements.

355. Subitem 34(3) would provide that the item would not prevent amendment or revocation of such a requirement.

Item 35 – Workplace agreement officials

356. Subitem 35(1) would provide that a person taken to be a workplace agreement official for the purpose of section 165 (which provides for an offence in relation to disclosure of certain information relating to parties of an Australian Workplace Agreement), prior to commencement of the amendments, would continue to be a workplace agreement official after the amendments.

357. Subitem 35(2) would clarify that this item does not limit the amended definition of *workplace agreement official* under subsection 4(1) of the Act.

Item 36 – Annual report on Employment Advocate’s operations

358. This item is a transitional item relating to the annual reporting requirement for the Employment Advocate under section 155 of the Act. The item would confirm that an annual report on the Employment Advocate’s operations for the year of repeal (or financial year proceeding repeal), would be required, despite repeal of section 155. The Workplace Authority Director would be required to prepare the report.

Schedule 3 – Workplace Ombudsman

Part 1–Amendments

Division 1–Main amendments

Workplace Relations Act 1996

Item 1 – Subsection 4(1)

Item 2 – Subsection 4(1)

Item 3 – Subsection 4(1) (definition of *workplace inspector*)

Item 4 – Subsection 4(1)

359. Proposed items 1, 2 and 4 would amend the general definitions provision of the Act to include definitions of *Commonwealth workplace relations legislation*, *member* of the Office of the Workplace Ombudsman and *Workplace Ombudsman*.

360. The proposed definition of *Commonwealth workplace relations legislation* would define the expression to mean the *Workplace Relations Act 1996*, the *Independent Contractors Act 2006* and any regulations made under the *Independent Contractors Act 2006*. The legislative note would make clear that the definition of *Commonwealth workplace relations legislation* does not cover the Registration and Accountability of Organisations Schedule or regulations made under that Schedule, because the definition of *this Act* excludes them both. However, the definition of ‘this Act’ includes regulations made under the Act).

361. The proposed definition of *Workplace Ombudsman* would mean the Workplace Ombudsman holding office under Part 5A.

362. The proposed definition of *member* of the Office of the Workplace Ombudsman would mean a person covered by subsection 166P(2).

363. Proposed item 3 would replace the definition of *workplace inspector* with a new definition defined to mean a person who is a workplace inspector under section 167. A transitional amendment made by item 18 would ensure that a workplace inspector appointed under section 167(2) of the Act prior to commencement of this Schedule would remain in effect after commencement of this Schedule.

Item 5 – After Part 5

364. Proposed item 5 would insert new Part 5A in the Act to provide for the appointment of the Workplace Ombudsman. This Part would also establish the Office of the Workplace Ombudsman as a statutory agency.

365. The Workplace Ombudsman would provide additional protection for workers by ensuring that employers comply with their obligations under Commonwealth workplace relations legislation.

366. The Workplace Ombudsman would have a range of powers to ensure that all parties under the federal workplace relations system comply with Commonwealth workplace relations legislation (as defined). For example, the Workplace Ombudsman would be able to investigate alleged breaches, undertake compliance audits and prosecute breaches.

Part 5A – Workplace Ombudsman

Division 1 – Establishment and functions

367. This Division would provide for the appointment of the Workplace Ombudsman to head the Office of the Workplace Ombudsman and set out his or her functions.

Section 166A – Workplace Ombudsman

368. Proposed section 166A would establish the statutory office of the Workplace Ombudsman. Proposed section 166D would provide for the Workplace Ombudsman to be appointed by the Governor-General.

Section 166B – Functions of the Workplace Ombudsman

369. Proposed section 166B would set out the Workplace Ombudsman's broad functions. These are to:

- assist employees and employers understand their obligations under Commonwealth workplace relations legislation;
- monitor and promote compliance with Commonwealth workplace relations legislation;
- investigate suspected contraventions of Commonwealth workplace relations legislation;
- inquire into any act or practice that may be inconsistent with or contrary to Commonwealth workplace relations legislation;
- refer matters to relevant authorities;
- institute proceedings to enforce Commonwealth workplace relations legislation;
- appoint and give directions to workplace inspectors;
- represent an employee in a proceeding where the Workplace Ombudsman considers that providing the representation would promote compliance with this Act; and
- any other function conferred by Commonwealth workplace relations legislation.

370. Relevant authorities that may have matters referred to include agencies and bodies.

371. The legislative note to section 166B would make it clear that the Workplace Ombudsman also has the functions and powers of a workplace inspector.

Section 166C – Minister may give directions to Workplace Ombudsman

372. Proposed section 166C would allow the Minister to give written directions to the Workplace Ombudsman about the performance of his or her functions. These directions would be a legislative instrument under the *Legislative Instruments Act 2003* and subject to public scrutiny.

373. Such directions must be of a general nature, for example to focus on helping ensure that employers are meeting their obligations to young working Australians. The Minister would be expressly precluded from giving directions in relation to a specific case or in relation to the Workplace Ombudsman's performance of functions, or exercise of powers as an Agency head under the *Public Service Act 1999* (proposed subsections 166C(2) and 166C(3)). This restriction ensures the independence of the Workplace Ombudsman.

374. The Workplace Ombudsman would be required to comply with any direction given by the Minister under this provision (proposed subsection 166C(4)).

375. Despite section 44 of the *Legislative Instruments Act 2003*, which provides that Ministerial directions are not disallowable, proposed subsection 166C(5) expressly provides that a direction by the Minister would be a disallowable instrument.

Division 2 – Appointment and terms and conditions

376. This Division would provide for the appointment and entitlements of the Workplace Ombudsman.

Section 166D – Appointment of Workplace Ombudsman

377. Proposed section 166D would provide for the Governor-General to appoint the Workplace Ombudsman by written instrument.

378. Proposed subsection 166D(2) would require that before the Governor-General may appoint a person as the Workplace Ombudsman, the Minister must be satisfied that the person has suitable qualifications or experience, and is of good character.

379. The length of an appointment would be specified in the written instrument of appointment, but cannot exceed 5 years (proposed subsection 166D(3)). The Workplace Ombudsman would be appointed on a full-time basis (proposed subsection 166D(4)). The Workplace Ombudsman could be reappointed for a further term.

Section 166E – Remuneration

380. Proposed subsection 166E(1) would provide that the Remuneration Tribunal would determine the remuneration of the Workplace Ombudsman or, in the absence of a determination, the regulations could set the remuneration. In addition, the Workplace Ombudsman would be paid any allowances prescribed by regulation (subsection 166E(2)).

381. Proposed subsection 166E(3) would provide that this section has effect subject to the *Remuneration Tribunal Act 1973*. This would ensure that general provisions of the *Remuneration Tribunal Act 1973* are not displaced by this section.

Section 166F – Leave of absence

382. Proposed section 166F would provide that the Remuneration Tribunal would determine the recreation leave entitlements for the Workplace Ombudsman.

383. Proposed subsection 166F(2) would allow the Minister to grant the Workplace Ombudsman leave of absence, other than recreation leave, on such terms and conditions as he or she determines.

Section 166G – Other terms and conditions

384. Proposed section 166G would provide that the Governor-General may determine terms and conditions relating to matters not covered by the Act in relation to the Workplace Ombudsman.

Section 166H – Outside employment

385. Proposed section 166H would provide that the Workplace Ombudsman cannot engage in other paid employment without the Minister's approval.

386. These arrangements are complemented by proposed paragraph 166M(2)(c) which would allow the Governor-General to terminate the Workplace Ombudsman's appointment if the requirements of proposed subsection 166H are contravened.

Section 166J – Disclosure of interests

387. Proposed section 166J would require the Workplace Ombudsman to give the Minister written notice of all pecuniary or other interests that could conflict with the proper performance of the Workplace Ombudsman's functions.

388. These arrangements are complemented by proposed paragraph 166M(2)(d) which would allow the Governor-General to terminate the Workplace Ombudsman's appointment if the requirements of section 166J are contravened without reasonable excuse.

Section 166K – Acting appointments

389. Proposed section 166K would allow the Minister to appoint a person to act as the Workplace Ombudsman when necessary, including on a recurring basis. The Minister would need to be satisfied that any person appointed to act in this position has suitable qualifications or experience and is of good character (proposed subsection 166K(2)).

390. Proposed subsection 166K(3) would provide that anything done by a person appointed to act in the Workplace Ombudsman's position would not be invalid only because of a defect or irregularity in connection with the appointment.

Section 166L – Resignation

391. Proposed section 166L would allow the Workplace Ombudsman to resign from his or her appointment by giving a written resignation to the Governor-General. The resignation would take effect either on the day the resignation is received, or a later specified date (subsection 166L(2)).

Section 166M – Termination of appointment

392. Proposed section 166M would provide grounds for termination of the appointment of the Workplace Ombudsman.

393. Subsection 166M(1) would allow the Governor-General to terminate the appointment of the Workplace Ombudsman for misbehaviour or physical or mental incapacity.

394. Proposed subsection 166M(2) would allow the Governor-General to terminate the appointment of the Workplace Ombudsman if the Workplace Ombudsman:

- becomes bankrupt or takes specified steps related to insolvency; or
- is absent from duty (except on authorised leave) for 14 consecutive days or for 28 days in any 12 month period; or
- engages in unapproved paid employment outside the duties of his or her office; or
- fails to disclose pecuniary or other interests that could conflict with the proper performance of his or her functions without reasonable excuse (proposed section 166J).

Division 3 – Staff, delegations etc.

395. Proposed Division 3 would establish the Office of the Workplace Ombudsman as a statutory agency, provide for the delegation of the Workplace Ombudsman's functions and powers and provide for the engagement of staff to assist the Workplace Ombudsman.

Section 166N – Staff

396. Proposed section 166N would require that staff assisting the Workplace Ombudsman in the performance of his or her functions must be engaged under the *Public Service Act 1999*.

Section 166P – Office of the Workplace Ombudsman

397. Proposed section 166P would provide for the establishment of the Office of the Workplace Ombudsman.

398. Proposed subsection 166P(2) would provide that the Office of the Workplace Ombudsman would consist of:

- the Workplace Ombudsman;
- staff assisting the Workplace Ombudsman; and
- workplace inspectors appointed under section 167.

399. Proposed subsection 166P(3) would provide that the Workplace Ombudsman and the staff assisting the Workplace Ombudsman would be a Statutory Agency for the purposes of the *Public Service Act 1999*, headed by the Workplace Ombudsman.

Section 166Q – Delegation

400. Proposed section 166Q would allow the Workplace Ombudsman to delegate any of his or her functions and powers under Commonwealth workplace relations legislation to a Senior Executive Service (SES) employee, or acting SES employee in the Office of the Workplace Ombudsman.

401. In exercising delegated powers or functions the delegate would be required to comply with any direction given by the Workplace Ombudsman (subsection 166Q(2)).

402. Proposed subsection 166Q(3) would provide that the Workplace Ombudsman cannot delegate the functions and powers of a workplace inspector which the Workplace Ombudsman has because of section 167.

403. The legislative note to proposed subsection 166Q(3) would make it clear that the Workplace Ombudsman is able to appoint an SES employee or acting SES employee as a workplace inspector under section 167. This would allow the SES employee or acting SES employee to exercise any of the powers or functions of a workplace inspector.

Division 4 – Reporting and disclosing information

404. This Division would provide for the reporting and disclosing of information by the Workplace Ombudsman.

Subdivision A – Reporting to Minister

Section 166R – Minister may require reports

405. Proposed section 166R would allow the Minister to direct the Workplace Ombudsman to provide specified reports relating to the Workplace Ombudsman's functions. For example, the Minister could request a report on activities associated with a direction under proposed section 166C (i.e. to focus on helping ensure that employers are meeting their obligations to young working Australians). Similarly, the Minister to direct the Workplace Ombudsman to report on compliance audits in particular industries. The Workplace Ombudsman would be required to comply with the direction (proposed subsection 166R(2)).

406. Proposed subsections 166R(3) and (4), are included to assist the public understand that a direction by the Minister under proposed section 166R or a report given under that section would not be a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

Section 166S – Annual report

407. Proposed section 166S would require the Workplace Ombudsman to provide an annual report on the operations of the Office of the Workplace Ombudsman for each financial year. The report must be prepared “as soon as practicable” after the end of the financial year. The report would be presented to Parliament.

408. A legislative note directs the reader to section 34C of the *Acts Interpretation Act 1901* for additional requirements relating to annual reports

Section 166T – Reports not to include information relating to an individual’s affairs

409. Proposed section 166T would provide that information relating to the affairs of an individual must not be included in a report to the Minister under sections 166R or 166S if the individual has been named or otherwise specifically identified as the individual to whom the information relates or it is reasonably likely that people generally would be able to ascertain the identity of the person.

410. Proposed subsection 166T(2) would provide relevant factors that must be taken into account in determining whether it is reasonably likely that a person could be identified by people generally, i.e. the context in which the information appears, any other publicly available information and any other relevant matter.

Subdivision B – Disclosing information

411. Proposed Subdivision B would provide for disclosure of information by a member of the Office of the Workplace Ombudsman, in certain circumstances.

412. A *member* of the Office of the Workplace Ombudsman would be defined to mean a person covered by proposed subsection 166P(2), namely the Workplace Ombudsman (or a delegate), staff assisting the Workplace Ombudsman, and the appointed workplace inspectors.

Section 166U – Disclosure of information by members of the Office of the Workplace Ombudsman

413. Proposed section 166U would set out circumstances in which a member of the Office of Workplace Ombudsman could disclose information.

414. Proposed subsection 166U(1) would allow a member of the Office of the Workplace Ombudsman to disclose information in the course of exercising powers, or performing functions, as such a member, if he or she considers on reasonable grounds that it is necessary or appropriate to do so in the course of exercising his or her powers, or performing his or her functions, as a member.

415. Proposed subsection 166U(2) would allow a member of the Office of the Workplace Ombudsman to disclose information to an officer of the Department administered by the Minister who administers the *Migration Act 1958* if he or she considers on reasonable grounds that the disclosure of the information is likely to assist the officer in the administration of that Act.

416. Proposed subsection 166U(3) would allow regulations to prescribed persons to whom members of the Office of the Workplace Ombudsman could disclose prescribed kinds of information for prescribed purposes.

417. Proposed subsection 166U(4) would allow a member of the Office of the Workplace Ombudsman to disclose information to an officer of a State who has powers or functions in relation to the administration of a workplace relations or other employment related system, if he

or she considers on reasonable grounds that the disclosure of the information is likely to assist the officer in the administration of that system.

418. Proposed subsection 166U(5) would allow a member of the Office of the Workplace Ombudsman to disclose information to a person appointed to or employed by the Commonwealth, a State or a Territory, or an authority of the Commonwealth, a State or Territory if he or she considers on reasonable grounds that the disclosure of the information is likely to assist the person or authority in discharging a responsibility relating to the administration of a Commonwealth, State or Territory law.

419. Proposed section 166U would provide an authorisation for disclosure of information pursuant to Information Privacy Principle 11(1)(d) of the *Privacy Act 1988*. Subsection 166U(6) would confirm that a disclosure of personal information in accordance with proposed section 166U is taken to be authorised by law for the purposes of the *Privacy Act 1988*.

Section 166V – Directions about the exercise of powers to disclose information

420. Proposed section 166V would allow the Workplace Ombudsman to give written directions, by legislative instrument, about the disclosure of information under proposed section 166U.

421. Any directions given under this section would only be of a general nature only (proposed subsection 166V(2)) and a member of the Office of the Workplace Ombudsman would be required to comply with such a direction (proposed subsection 166V(3)).

Item 6 – After subsection 167(1)

Item 7 – Subsection 167(2)

Item 8 – Subsections 167(7) and (8)

Item 9 – Subsection 168(1)

Item 10 – Subsection 168(1)

Item 11 – Paragraph 168(3)(b)

Item 12 – Section 170

422. Items 6, 7, 8, 9, 10, 11, and 12, would make amendments that are consequential to the Workplace Ombudsman’s function to appoint and give directions to workplace inspectors.

423. Item 6 would insert subsection 167(1A) to provide that the Workplace Ombudsman is also a workplace inspector.

424. Item 7 would omit “Minister” and substitute “Workplace Ombudsman” in subsection 167(2).

425. Item 8 would repeal subsections 167(7) and (8) and replace them with new subsections.

426. Proposed subsection 167(7) would provide that a workplace inspector must comply with any directions of the Workplace Ombudsman.

427. Proposed subsection 167(8) would provide that if a direction under subsection 167(7) is of general application, the direction is a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

428. Proposed subsection 167(9) would provide that if a direction under subsection 167(7) relates to a particular case, the direction is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

429. Item 9 would omit “Minister” and substitute “Workplace Ombudsman” in subsection 168(1).

430. Item 10 would omit “prescribed form” and substitute “form approved by the Workplace Ombudsman” in subsection 168(1).

431. Item 11 would omit “Secretary of the Department” and substitute “Workplace Ombudsman” in paragraph 168(3)(b).

432. Item 12 would repeal section 170 of the Act. This section would be replaced by proposed section 166U.

Item 13 – Subparagraph 337A(b)(v) of Schedule 1

433. Item 13 would repeal subparagraph 337A(b)(v) of Schedule 1 of the Act, which referred to a ‘workplace inspector’ and insert ‘a member of the Office of the Workplace Ombudsman’ into that paragraph. This would ensure that a whistleblower who discloses information to a member of the Office of the Workplace Ombudsman is protected.

Item 14 – Before paragraph 2(2)(p) of Schedule 2

434. This item would insert paragraphs 2(2)(oa) and 2(2)(ob) into Schedule 2 of the Act to ensure that the references to employee in this Schedule are given its ordinary meaning.

Item 15 – Before paragraph 3(2)(i) of Schedule 2

435. This item would insert paragraph 3(2)(ha) into Schedule 2 of the Act to ensure the reference to employment in this Schedule is given its ordinary meaning.

Item 16 – Paragraph 4(2)(o) of Schedule 2

436. This item would repeal paragraph 4(2)(o) of Schedule 2 of the Act and insert paragraphs 4(2)(o), 4(2)(oa) and 4(2)(ob) to ensure that references to employment in this Schedule are given its ordinary meaning.

Division 2–Consequential amendment

Financial Management and Accountability Regulations 1997

Item 17 – Part 1 of Schedule 1 (after table item 140AA)

437. This item would amend the *Financial Management and Accountability Regulations 1997* to prescribe the Office of the Workplace Ombudsman as a prescribed agency for purposes of the *Financial Management and Accountability Act 1997*.

Part 2–Transitional and application provisions

Item 18 – Workplace inspectors

438. This item would ensure that appointments of workplace inspectors made under subsection 167(2) of the Act prior to commencement of this Schedule would remain in effect after commencement of this Schedule.

Item 19 – Identity cards

439. This item would ensure that identity cards issued under subsection 168(1) of the Act prior to commencement of this Schedule would remain in effect after commencement of this Schedule.

Item 20 – Disclosures qualifying for whistleblowers’ protection

440. This item would ensure that protection for a person who discloses information to a workplace inspector under Part 4A of Chapter 11 of Schedule 1 to the Act would remain in effect after commencement of this Schedule.

Schedule 4 – Prohibited Content

Workplace Relations Act 1996

Item 1 – Subsection 4(2)

Item 2 – Section 356

441. Section 356 of the Act currently provides that the Regulations may specify matters that are prohibited content for the purposes of the Act. A workplace agreement must not be lodged if it contains prohibited content and a term of the workplace agreement is void to the extent that it contains prohibited content.

442. Item 2 would repeal and replace existing section 356. Proposed section 356 would provide that prohibited content is matters set out in paragraphs 356(1)(a) to 356(1)(e) plus any matters specified in the Regulations (proposed paragraph 356(1)(f)).

443. The matters that would be listed as prohibited content in the Act are provisions that:

- require or permit conduct that would contravene the freedom of association provisions outlined in Part 16 of the Act (proposed paragraph 356(1)(a)). The freedom of association provisions protect the right of a person to freely choose whether or not to belong to a union;
- directly or indirectly require a person to encourage or discourage another person to become, or remain, a member of an industrial association (paragraph 356(1)(b));
- indicate support or opposition for persons becoming members of an industrial association (proposed paragraphs 356(1)(c) and 356(1)(d)); and
- require or permit payment of a bargaining services fee. This would mean that, for example, any clause that required non-union employees to pay a union an annual fee for negotiating an agreement would be prohibited content (proposed paragraph 356(1)(e)).

444. Each of the matters listed in paragraphs 356(1)(a) to 356(1)(d) is already prohibited content. Regulations made under existing section 356 provide that a term of a workplace agreement is prohibited content to the extent that it is an objectionable provision within the meaning of the Act (subregulation 8.5(7)). What constitutes an objectionable provision is set out in section 810 of the Act.

445. Proposed paragraphs 356(1)(a) to 356(1)(d) would replicate paragraphs 810(1)(a) to 810(1)(d) of the Act.

446. Proposed paragraph 356(1)(e) would largely replicate paragraph 810(1)(e) of the Act but remove the existing requirement that the fee must be paid to an industrial association.

447. Consequently, the prohibition would apply to any bargaining services fee. Proposed subsection 356(2) would provide that any terms used in section 356 will have the same meaning as they have when used in section 810. Therefore, the definition of ‘bargaining services’ and ‘bargaining services fee’ in section 779 would apply in relation to proposed paragraph 356(1)(e).

448. This means that the prohibition on bargaining services fees would apply to fees paid to someone else in lieu of an industrial association and in circumstances where the fee is to be paid for services provided on behalf of an industrial association. This would ensure that industrial associations cannot rely on related third parties to try and avoid the prohibition on bargaining services fees.

449. Item 1 would make a consequential amendment to subsection 4(2). Subsection 4(2) currently refers to regulations made under section 356. This reference would be amended to refer to regulations made under paragraph 356(1)(f).

Item 3 – Transitional – regulations made for the purposes of section 356 of the *Workplace Relations Act 1996*

450. As item 2 would repeal and replace existing section 356, this item saves the existing regulations by providing that regulations previously made under the repealed section 356 have effect as if they were made for the purposes of proposed paragraph 356(1)(f).

451. This item does not apply to subregulation 8.5(7) of the Regulations as this is the subregulation which is now effectively replicated in proposed paragraphs 356(1)(a) to 356(1)(e).

Schedule 5 – Membership requirements for registered organisations

Workplace Relations Act 1996

Item 1 –Section 6 of Schedule 1

Item 2 - Section 6 of Schedule 1

Item 3 - Section 6 of Schedule 1 (definition of *federal system employee*)

Item 4 - Section 6 of Schedule 1 (definition of *federal system employer*)

Item 5 –Section 6 of Schedule 1

Item 6 –Section 6 of Schedule 1

Item 7 –Section 6 of Schedule 1

Item 8 –Section 6 of Schedule 1

1. Items 1 to 8 would make a number of amendments as part of aligning the definitions of *federal system employee* and *federal system employer* with the definition of employee and employer in sections 5 and 6 of the Act.
2. Item 3 would repeal and replace the existing definition of *federal system employee* in section 6 of Schedule 1 to the Act. Paragraph (a) of the new definition of *federal system employee* would replicate the definition of 'employee' under section 5 of the Act.
3. Paragraph (b) of the new definition would also apply to a person employed in Victoria, to the extent that the provisions of Schedule 1 that would apply fall within the legislative power referred to the Commonwealth under the *Commonwealth Powers (Industrial Relations) Act 1996* of Victoria. It would also include an independent contractor who if he or she was an employee performing the same sort of work would be a federal system employee. This is consistent with the definition of *federal system employee* in existing paragraphs 18B(2)(d) and 18B(2)(e) of Schedule 1, which is being repealed.
4. Item 4 would repeal and replace the existing definition of *federal system employer*. The new definition of *federal system employer* would replicate the definition of *employer* in paragraphs 6(1)(a)-(f) of the Act. It would also apply to an employer in Victoria, to the extent that the provisions of Schedule 1 that would apply fall within the legislative power referred to the Commonwealth under the *Commonwealth Powers (Industrial Relations) Act 1996* of Victoria. This is consistent with the definition of *federal system employer* in existing paragraphs 18A(2)(d) and 18A(b)(d) which are being repealed.
5. Items 1, 2, 5, 6, 7 and 8 would insert definitions of various terms used in the new definitions of *federal system employee* and *federal system employer*. With the exception of Item 2, each of these terms is defined as having the same meaning as in the Act. Item 2 inserts a new definition of *designated Commonwealth authority*. This definition is the same as the definition of *Commonwealth authority* in section 4 of the Act. However, as Schedule 1 already has a slightly different definition of *Commonwealth authority*, it was necessary to refer to a designated *Commonwealth authority* for the purposes of the membership provisions.

Item 9 – Paragraph 18A(1)(b) of Schedule 1

6. Currently Schedule 1 to the Act provides that an association of employers is federally registrable if the majority of its members are federal system employers (the majority membership requirement).

7. Item 9 would remove the majority membership requirement from paragraph 18A(1)(b) and instead provide that an association of employers is federally registrable if some or all of its members are federal system employers.

Item 10 – Subsection 18A(2) of Schedule 1

8. Subsection 18A(2) of Schedule 1 to the Act currently provides a definition of a federal system employer.

9. Item 10 would repeal the definition of a *federal system employer* in subsection 18A(2). Federal system employer would instead be defined in section 6 of Schedule 1 to the Act.

Item 11 – Paragraph 18A(4)(b) of Schedule 1

10. Paragraph 18A(4)(b) of Schedule 1 to the Act currently provides that an association of employers is not federally registrable if it is only a body corporate by virtue of being registered under the Schedule and a majority of its members are not federal system employers.

11. In line with the removal of the majority membership requirement, Item 11 would repeal existing paragraph 18(4)(b) and provide that an association of federal system employers is not federally registrable if it is only a body corporate by virtue of being registered under the Schedule and it is not the case that some or all the association's members are federal system employers.

Item 12 – Paragraph 18B(1)(b) of Schedule 1

12. Paragraph 18B(1)(b) of Schedule 1 to the Act currently provides that an association of employees is federally registrable if the majority of its members are federal system employees.

13. Item 12 would remove the majority membership requirement from paragraph 18B(1)(b) and instead provide that an association of employees is federally registrable if some or all its members are federal system employees.

Item 13 – Subsection 18B(2) of Schedule 1

14. Subsection 18B(2) of Schedule 1 to the Act currently provides a definition of a federal system employee.

15. Item 13 would repeal the definition of federal system employee in subsection 18B(2). *Federal system employee* would instead be defined in section 6 of Schedule 1 to the Act.

Item 14 – Paragraph 18B(5)(b) of Schedule 1

16. Paragraph 18B(5)(b) of Schedule 1 to the Act currently provides that an association of employees is not federally registrable if it is only a body corporate by virtue of being registered under the Schedule and a majority of its members are not federal system employees.

17. In line with the removal of the majority membership requirement, Item 14 would repeal existing paragraph 18B(5)(b) and provide that an association of federal system employees is not federally registrable if it is only a body corporate by virtue of being registered under the Schedule and it is not the case that some or all the association's members are federal system employees.

Item 15 – Paragraph 18C(2)(b) of Schedule 1

18. Paragraph 18C(2)(b) of Schedule 1 to the Act currently provides that an enterprise association is not federally registrable if the majority of its members are not federal system employers.

19. Item 15 would remove the majority membership requirement from paragraph 18C(2)(b). It would provide that an enterprise association is federally registrable if some or all its members are federal system employees.

Item 16 – Subparagraph 18C(3)(c)(i) of Schedule 1

20. Subparagraph 18C(3)(c)(i) of Schedule 1 to the Act currently provides that an enterprise association is not federally registrable if an employee performing work in the relevant enterprise cannot be characterised as a federal system employee as set out in existing paragraphs 18B(2)(a) to (d).

21. In line with the changes to the definition of *federal system employee*, Item 16 would repeal subparagraph 18C(3)(c)(i) and refer to the new definition of *federal system employee* in section 6 of Schedule 1.

Item 17 – Subsection 18D(1) of Schedule 1

Item 18 – Subsection 18D(3) of Schedule 1

22. Section 18D of Schedule 1 contains provisions dealing with constitutional validity. Subsections 18D(1) and 18D(3) of Schedule 1 to the Act currently provide that if Parliament had insufficient legislative power to provide for the registration of an association in relation to a particular class of federal system employers or employees, when working out whether the majority of its members were federal system employers or employees, the definition of the term would continue to apply as if it did not contain a reference to that particular class of persons.

23. As a consequence of the removal of the majority membership requirement, Items 17 and 18 amend subsections 18D(1) and 18D(3) to refer to the new definitions of *federal system employee* and *federal system employer* that will be inserted in section 6 by these amendments.