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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

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

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments to be moved on behalf of the Government

(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**

The proposed Government amendments would amend provisions of the *Workplace Relations Act 1996* and the *Workplace Relations Amendment (A Stronger Safety Net) Bill 2007*. The amendments would introduce new provisions to deal with the operation of the fairness test where there is a transmission of business while the fairness test is being applied to a workplace agreement.

A number of other technical or consequential amendments to the Bill are also proposed, including amendments that would:

- confirm that a workplace agreement covering an employee who is employed in an industry or occupation that was, immediately before commencement of the workplace relations reforms on 27 March 2006, usually regulated by a State award is subject to the fairness test; and
- require the Workplace Authority Director to gazette a Workplace Relations Fact Sheet which contains information about the Australian Fair Pay and Conditions Standard, protected award conditions, the fairness test and the role of the Workplace Authority Director and the Workplace Ombudsman and require an employer to provide a copy of the Workplace Relations Fact Sheet to each employee within a specified period.

**FINANCIAL IMPACT STATEMENT**

The proposed amendments are not expected to have any impact on Commonwealth expenditure.

## NOTES ON AMENDMENTS

### **Amendment 1 – Clause 2, page 2 (at the end of the table)**

1. This amendment would insert Item 7 to the table, to provide for the commencement of Schedule 6 (to be inserted by amendment 44).

### **Amendment 2 – Schedule 1, item 1, page 4 (after line 10)**

### **Amendment 3 – Schedule 1, item 1, page 4 (after line 27)**

### **Amendment 4 – Schedule 1, item 1, page 5 (after line 24)**

2. These amendments would insert new definitions into new subsection 346B(1), as part of a series of amendments dealing with the operation of the fairness test in the context of transmission of business.

3. The definitions to be inserted are: *business being transferred; new employer; old employer; time of transmission; transferring employee; transmission period.*

4. The new definitions all take their meaning from Part 11 of the Act, which provides for transfer of employer obligations under certain instruments where the whole, or part of, an employer's business is transmitted to another person, along with transferring employees.

### **Amendment 5 – Schedule 1, item 1, page 6 (after line 20)**

*Section 346CA – Industry or occupation usually regulated by State award before the reform commencement – extended operation of certain provisions*

5. This amendment would insert a new section 346CA which would, in conjunction with proposed sections 346E and 346F, enable a workplace agreement (or a workplace agreement as varied) to be subject to the fairness test if it binds an employee who is employed in an industry or occupation in which terms and conditions of the kind of work to be performed were usually regulated by a State award, before 27 March 2006 (when the reforms to federal legislation commenced).

6. This provision would also, in conjunction with proposed sections 346K and 346L, enable the Workplace Authority to designate a federal award in relation to such an employee for the purpose of the fairness test.

7. This amendment will apply where an agreement might otherwise fall outside the scope of the fairness test – because:

- it applies in an industry or occupation in which terms and conditions of the kind of work to be performed were not usually regulated by a federal award; or
- immediately before the agreement is lodged, the employer and employee or employees are not bound by a preserved State agreement, or a notional agreement preserving State awards (which are federal instruments).

### **Amendment 6 – Schedule 1, item 1, page 7 (after line 6)**

*Section 346DA – Transmission of business – where no decision under section 346M at time of transmission*

8. This amendment would insert new section 346DA, which will deal with the situation where a workplace agreement becomes binding on a new employer and

transferring employees before the Workplace Authority has applied the fairness test to the agreement.

9. Proposed subsection 346DA(1) would state that the section applies where the Workplace Authority is required to apply the fairness test to the workplace agreement under proposed section 346M, but before doing so, the workplace agreement becomes binding on a new employer because of the operation of either section 583 (for an AWA) or under section 585 (for a collective agreement).

10. Proposed subsection 346DA(2) makes clear that, for the purposes of applying the fairness test, it is the circumstances of the old employer that are to be taken into account. The provision also makes clear that the *relevant award* for the purposes of the application of the test is the award that was binding on the old employer in respect of the transferring employees.

11. Proposed subsection 346DA(3) would apply when the Workplace Authority has been notified that a workplace agreement is binding on the new employer and a transferring employee or transferring employees. This subsection would require the Workplace Authority to issue the following notices to both the old employer and the new employer:

- notice that the Workplace Authority is required to decide, or not decide, whether the workplace agreement passes the fairness test (proposed subsections 346J(1) and (2));
- notice that the workplace agreement passes the fairness test (proposed subsection 346P(1));
- notice that the workplace agreement does not pass the fairness test, advice on how it could be varied so that it does, and advice that compensation may be payable to the employees (proposed subsections 346P(2) and (3)); and
- notice as to whether a workplace agreement as varied passes, or does not pass, the fairness test (proposed subsections 346U(1) and (3)).

12. Proposed subsection 346DA(4) provides that where a workplace agreement does not pass the fairness test, it is the new employer who has the opportunity to vary the workplace agreement so that it passes the fairness test, or to give a written undertaking in relation to the agreement.

13. Where the new employer lodges a variation to the workplace agreement, proposed paragraph 346DA(4)(b) would make clear that it is the old employer's circumstances that are to be taken into account by the Workplace Authority for the purposes of assessing whether the agreement as varied passes the fairness test.

14. Note 1 at the end of new subsection 346DA(4) would direct the reader to new section 346YA, which sets out the employment arrangements that will have effect in relation to the new employer and transferring employees should the workplace agreement cease operating as a consequence of not having passed the fairness test.

15. Note 2 would direct the reader to new section 346ZD which makes clear that compensation is payable by both the old employer and the new employer in respect of the period during which the employee was employed by the relevant employer, and sets out how that compensation is to be calculated.

*Section 346DB – Transmission of business – where no decision on a varied agreement under section 346U at time of transmission*

16. New section 346DB would deal with the situation where a workplace agreement that was varied after assessment becomes binding on a new employer and transferring employees before the Workplace Authority has decided whether the agreement, as varied, passes the fairness test.

17. Proposed subsection 346DB(1) would state that the section applies where the Workplace Authority is required to apply the fairness test to the workplace agreement under proposed section 346U, but before doing so, the workplace agreement becomes binding on a new employer because of the operation of either section 583 (for an AWA) or under section 585 (for a collective agreement) of the Act.

18. Proposed subsection 346DB(2) makes clear that, for the purposes of applying the fairness test, it is the circumstances of the old employer that are to be taken into account.

19. Proposed subsection 346DB(3) would apply when the Workplace Authority has been notified that a workplace agreement is binding on the new employer and a transferring employee or transferring employees. This subsection would require the Workplace Authority to issue a notice as to whether a workplace agreement as varied passes, or does not pass, the fairness test (proposed section 346U) to both the old employer and the new employer.

*New section 346DC – Transmission of business – employees still employed by old employer*

20. New section 346DC is an avoidance of doubt provision, dealing with the case where a workplace agreement continues to bind the old employer after the time of transmission. This situation will arise in the case where the old employer transfers part of its business to a new employer, but continues to operate the rest of the business after the time of transmission. In these circumstances the workplace agreement will continue to bind the old employer in respect of employees who continue to be employed in the part of the business that has not transferred.

21. Where an agreement continues to bind the old employer in relation to employees that are not transferring employees, the fairness test provisions will continue to apply to the old employer on their terms. In other words, the fairness test applies to an old employer in respect of employees who have not transferred as if the old employer were an employer in the usual sense for the purposes of Division 5A.

**Amendment 7 – Schedule 1, item 1, page 7 (lines 14 to 21)**

**Amendment 8 – Schedule 1, item 1, page 8 (lines 11 to 19)**

**Amendment 9 – Schedule 1, item 1, page 8 (line 33) to page 9 (line 3)**

**Amendment 10 – Schedule 1, item 1, page 9 (lines 28 to 36)**

22. Proposed section 346E of the Bill outlines the circumstances in which the Workplace Authority is obliged to decide whether an AWA or a collective agreement passes the fairness test.

23. One of the requirements is that, on the date the agreement is lodged, the employee is employed in an industry or occupation in which terms and conditions of

the kind of work to be performed by the employee are ‘usually regulated’ by an award (proposed paragraphs 346E(1)(b) and 346E(2)(b)).

24. It could be argued that these provisions do not make it absolutely clear that an agreement should be tested in circumstances where an employer is actually bound by an award, even though the industry or occupation is not generally award covered. This is not the intention of this provision.

25. Amendments 7 and 8 would repeal and replace proposed paragraphs 346E(1)(b) and 346E(2)(b). The amendments would put beyond doubt that a workplace agreement would be subject to the fairness test where, immediately before the date the agreement is lodged, the employer was bound by an award in respect of the kind of work performed by the relevant employees.

26. Amendments 9 and 10 would make equivalent amendments to proposed section 346F (which relates to the application of the fairness test when an agreement is varied).

**Amendment 11 – Schedule 1, item 1, page 13 (lines 9 to 15)**

**Amendment 12 – Schedule 1, item 1, page 15 (lines 7 to 13)**

27. Amendments 11 and 12 would omit the notes to proposed subsections 346K(3)(c) and 346L(3)(c).

28. Proposed sections 346K and 346L would enable the Workplace Authority to designate an appropriate federal award for the purpose of applying the fairness test where there is no relevant award that binds the employer.

29. These proposed notes were intended only to provide an example of when it may not be appropriate for the Authority to designate an award under proposed sections 346K or 346L. However, the example may be taken as directing the Workplace Authority to act in a particular way. To avoid this possibility, it is proposed that the notes be omitted.

**Amendment 13 – Schedule 1, item 1, page 22 (line 27)**

30. Amendment 13 would replace proposed paragraph 346U(4)(b) which specifies what must be contained in a notice issued by the Workplace Authority informing relevant parties whether or not a workplace agreement as varied (under proposed section 346R) passes the fairness test.

31. Proposed section 346U requires the Workplace Authority to test any workplace agreement that has been varied under proposed section 346R and decide whether the workplace agreement as varied passes the fairness test. It also requires the Workplace Authority to notify relevant parties of its decision.

32. As currently drafted, proposed paragraph 346U(4)(b) requires that a notice specify ‘the effect of the notice’. The proposed amendment would amplify the matters required to be contained in a notice.

### *Status of the agreement*

33. Proposed subparagraphs 346U(4)(b)(i) and 346U(4)(c)(i) would provide that, where the Workplace Authority has tested a workplace agreement that has been varied under proposed section 346R, the Workplace Authority must include, in the notice issued under proposed section 346U, a statement to the effect that:

- if the agreement as varied passes the fairness test — that the agreement continues to operate; or
- if the agreement as varied does not pass the fairness test — that the agreement ceases to operate from the date of issue of the notice.

### *Agreement passes test because of variation or undertaking*

34. Proposed subparagraph 346U(4)(b)(ii) would provide that, where an employer has lodged a variation or written undertaking in respect of an agreement and, because of that variation or undertaking the agreement as varied passes the fairness test, the notice issued by the Workplace Authority under proposed section 346U must include a statement that effect a variation or undertaking has been made.

### *Compensation*

35. Proposed subparagraphs 346U(4)(b)(iii) and 346U(4)(c)(ii) would provide that, where the Workplace Authority has tested a workplace agreement that has been varied under proposed section 346R, the notice issued under proposed section 346U must include a statement to the effect that an employee or employees are entitled to compensation under proposed section 346ZD for any shortfall in entitlements during the fairness test period.

### **Amendment 14 – Schedule 1, item 1, page 24 (after line 38)**

36. This amendment would insert new subsection 346Y(4A) to clarify that proposed section 346Y does not operate to bind new employers and transferring employees to instruments or to a designated award should a workplace agreement cease to operate as a result of not having passed the fairness test. Rather, proposed section 346YA is the relevant provision, and the legislative note directs the reader to proposed section 346YA.

### **Amendment 15 - Schedule 1, item 1, page 25 (after line 16)**

#### *Section 346YA - Employment arrangements if a workplace agreement ceases to operate because it does not pass fairness test – transmission of business*

37. This amendment would insert a new section 346YA to specify the employment arrangements that apply to a new employer and a transferring employee whose employment was subject to a workplace agreement in circumstances where a transferred workplace agreement ceases to operate because it has not passed the fairness test under proposed section 346R or proposed section 346W.

38. Proposed subsection 346YA(1) would provide that the section applies if:

- a workplace agreement has ceased to operate because it does not pass the fairness test; and
- the new employer and a transferring employee are bound by the workplace agreement because of section 583 (for an AWA) or section 585 (for a collective agreement) of the Act; and

- the day on which the workplace agreement ceased to apply falls within the transmission period.

39. For the purposes of proposed section 346YA:

- the day on which a workplace agreement that is binding on a new employer and a transferring employee ceases to operate is referred to as the ‘cessation day’; and
- the transferred workplace agreement that has ceased to operate because it did not pass the fairness test is referred to as the ‘original agreement’.

40. The legislative note at the end of proposed subsection 346YA(1) would provide clarification that where the cessation day occurs after the transmission period ends, Division 5A would not apply to determine the employment arrangements for the new employer and a transferring employee. Rather, the usual rules under the Act (for example, Part 11 of the Act, which deals with the arrangements that apply when a transmitted workplace agreement ceases to operate) would apply.

41. Proposed subsection 346YA(2) would provide that, on and from the cessation day, the parties will be bound by the instrument that would have bound them but for the original agreement having come into operation. However, the instrument would only bind the parties if it:

- would have bound the old employer and the transferring employee immediately before the time of transmission; and
- is an instrument capable of binding the new employer under Part 11 of, or Schedules 6 or 9 to, the Act (which deal with transmission of business); and
- would not, had the instrument bound the new employer because of Part 11 of, or Schedules 6 or 9 to, the Act, have ceased to operate because of the end of the transmission period.

42. This means if a period of 12 months has passed from the time of transmission, proposed section 346YA would not apply to determine the employment arrangements between a new employer and a transferring employee. Rather, the new employer and the transferring employee would be bound by whatever instrument would apply to them under Part 11 of the Act because the transmission period has ended. For example, section 584 provides that where a transferred AWA ceases to operate because the transmission period has ended, a workplace agreement or an award may have effect in relation to the transferring employee’s employment with the new employer.

43. The definition of ‘instrument’ is limited in proposed subsection 346YA(5) to those instruments that could transfer to bind a new employer under the Act. That is, only a workplace agreement, award, pre-reform certified agreement and pre-reform AWA are an ‘instrument’ for the purposes of proposed section 346YA. Other instruments, such as old IR agreements and 170MX awards, are not instruments for the purposes of proposed section 346YA, because these are not instruments that can transfer to bind a new employer under the Act.

44. The note alerts the reader to the possibility that an ‘instrument’ may also be a preserved State agreement or a notional agreement preserving State awards. However, these instruments are dealt within Schedule 8 to the Act (amendments 37 and 41). A transitional Victorian reference award and a transitional award to the extent that it is

binding on an excluded employer in respect of the employment of employees in Victoria may also be instruments for the purposes of this section (amendments 30 and 31).

45. If under proposed subsection 346YA(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 an old employer and a transferring employee immediately before the time of transmission (proposed subsection 346YA(4)). However, to avoid doubt, a workplace agreement that has ceased operating because it has not passed the fairness test can never be an 'instrument' for the purposes of section 346YA.

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

47. Proposed section 346YA does not affect the way in which the Australian Fair Pay and Conditions Standard (including an Australian Pay and Classification Scale (an APCS)) operates in relation to the instruments, or to a new employer and a transferring employee. For example, an APCS that transferred to bind a new employer and a transferring employee on transmission of business under Division 6 of Part 11 would continue to bind the employer regardless of the operation of the fairness test. That is, if on transmission of business a new employer is bound by an APCS in relation to a transferring employee, the APCS will continue to bind the new employer; section 346YA would not displace the operation of the APCS.

48. Proposed subsection 346YA(3) provides that a new employer would also be bound by any preserved redundancy provisions that bound the old employer and a transferring employee immediately before the time of transmission, if a workplace agreement ceases to operate as a result of not passing the fairness test. The preserved redundancy provisions would apply to the new employer and the transferring employee on the cessation day until the earliest of the following:

- the end of the period of 12 months beginning on the first day on which the old employer became bound by the preserved redundancy provision;
- the time when the transferring employee ceases to be employed by the new employer;
- the time when another workplace agreement comes into operation in relation to the new employer and the transferring employee.

**Amendment 16 – Schedule 1, item 1, page 25 (line 17)**

**Amendment 19 – Schedule 1, item 1, page 27 (line 16)**

**Amendment 26 – Schedule 1, item 5, page 32 (line 31)**

**Amendment 27 – Schedule 1, item 6, page 33 (line 9)**

**Amendment 28 – Schedule 1, item 7, page 33 (line 21)**

**Amendment 32 – Schedule 1, item 33, page 38 (line 34)**

**Amendment 33 – Schedule 1, item 34, page 39 (line 8)**

**Amendment 34 – Schedule 1, item 39, page 40 (line 20)**

**Amendment 35 – Schedule 1, item 40, page 40 (line 30)**

49. These amendments are minor technical amendments consequential on Amendment 15. The amendments would ensure that provisions of the Bill that refer to the employment arrangements that apply under section 346Y to an employer and an employee also refer to the employment arrangements that apply under section 346YA to a new employer and a transferring employee.

**Amendment 17 – Schedule 1, item 1, page 25 (line 18)**

50. This amendment is a minor technical amendment consequential on Amendment 18.

**Amendment 18 - Schedule 1, item 1, page 26 (after line 4)**

51. This amendment would insert new subsection 346Z(2), to provide that if a new employer and a transferring employee are bound by an instrument under section 346YA, then that instrument is taken to bind the employer and employee from the cessation day until the end of the transmission period.

52. Subsection 346Z(2) would also provide that such an instrument operates in relation to the new employer and the transferring employee as if the employer and employee had become bound by the instrument under Part 11 of, or Schedules 6 and 9 to, the Act (which deal with transmission of business). This means, for example, that the interaction rules in Part 11 that apply to regulate the relationship between transmitted Australian Workplace Agreements and a new employer's existing instruments apply to an Australian Workplace Agreement that binds a new employer and a transferring employee pursuant to sections 346YA and 346Z.

**Amendment 20 – Schedule 1, item 1, page 27 (line 34)**

**Amendment 21 – Schedule 1, item 1, page 28 (lines 6 to 13)**

**Amendment 22 – Schedule 1, item 1, page 28 (after line 13)**

53. Under proposed section 346ZD, 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 value of the employee's entitlements under the 'unfair' agreement is less than the value of entitlements under an otherwise applicable instrument (for example, an award), or the protected award conditions in a designated award, had they applied during the fairness test period.

54. As currently drafted, the calculation of compensation under proposed section 346ZD would not include redundancy provisions and undertakings made under section 394 as these sources of entitlements are not defined as 'instruments' for the purposes of section 346ZD. Neither does proposed section 346ZD expressly regulate the right of an employee to recover underpayments arising under legislation (including the Australian Fair Pay and Conditions Standard) or the contract of employment.

55. Proposed amendments 20, 21 and 22 would amend proposed section 346ZD to provide that, in calculating any shortfall, regard must be had not only to any applicable instrument or designated award but also to any redundancy provision preserved under a designated provision, any undertaking made under existing section 394 and any other applicable law, agreement or arrangement. The effect of this amendment would be that the calculation of compensation payable when an

agreement does not pass the fairness test would have regard to any redundancy provisions that are preserved after an agreement is unilaterally terminated and undertakings made by an employer when an agreement is unilaterally terminated.

56. In addition, the amendment would remove any doubt that proposed section 346ZD does not affect the way, if any, in which the Australian Fair Pay and Conditions Standard operates in relation to the relevant instrument. Nor would this amendment affect any other applicable law, agreement or arrangement (eg a contract of employment) that would have operated.

**Amendment 23 – Schedule 1, item 1, page 28**

57. This amendment would insert proposed subsection 346ZD(2B) to provide that a transferring employee is able to receive compensation in relation to a workplace agreement that does not pass the fairness test where the employee was employed by both a new and old employer during the fairness test period. Proposed subsection 346ZD(2B) would also set out how compensation is to be calculated in respect of employment with each employer.

58. Proposed paragraph 346ZD(2B)(a) would provide that a transferring employee is entitled to receive compensation from the:

- old employer for periods of employment during the fairness test period that the employee was bound by the workplace agreement and employed by the old employer calculated in accordance with subsection 346ZD(2A); and
- new employer for periods of employment after the time of transmission, during the fairness test period that the employee was bound by the workplace agreement and employed by the new employer.

59. It is important to note that section 346Y would determine the instrument that is relevant for the purposes of calculating the compensation payable by the old employer.

60. For the purposes of calculating compensation in respect of the new employer, subsection 346ZD(2A) will apply with the following modifications:

- the instrument that binds (or would have bound, but for the transmission period ending) the new employer under section 346YA is the relevant instrument for the purposes of calculating the compensation payable by the new employer; and
- the redundancy provisions referred to in paragraph 346ZD(2A)(b) are taken to mean the redundancy provisions that would have bound the new employer, but for the workplace agreement.

61. An APCS that is binding on the new employer in relation to the transferring employee would be a relevant ‘applicable law’ under paragraph 346ZD(2A)(d) for the purposes of calculating compensation.

62. Because of the operation of the transmission of business rules in the Act, this means that the instrument that is relevant for the calculation of compensation in respect of the old employer may not be the same instrument as relevant to the new employer under section 346YA.

63. It is intended that a transferring employee cannot receive compensation in respect of the same period of employment from both the old and new employer.

**Amendment 24 – Schedule 1, item 1, page 28 (after line 35)**

64. This amendment is a technical amendment consequential on Amendments 22 and 23. The amendment would provide that for the purposes of section 346ZD a designated provision has the same definition as in section 346ZA.

**Amendment 25 – Schedule 1, item 1, page 29 (after line 25)**

*Section 346ZEA – Notice requirements in relation to transmission of business*

65. This amendment would insert new section 346ZEA which would create a requirement that an old employer must take reasonable steps to notify the Workplace Authority that a workplace agreement (or a variation) that has not been assessed is now binding on a new employer because of the transmission of business provisions of the Act.

- The Workplace Authority Director can delegate functions under proposed subsection 153C(1) of the Bill. Delegations operate subject to any directions issued by the Workplace Authority (proposed subsection 153C(2)). For this reason, the explanatory memorandum refers to decisions and actions of the Workplace Authority.

66. An old employer would be required to provide a notice to the Workplace Authority where:

- the old employer has received a notice before the time of transmission under proposed section 346J that a workplace agreement (or variation) must be assessed by the Workplace Authority;
- the workplace agreement has become binding on a new employer because of section 583 (for an AWA) or section 585 (for a collective agreement) of the Act; and
- at the time of transmission, the Workplace Authority has not decided whether the workplace agreement passes the fairness test.

67. Proposed subsection 346ZEA(2) would provide that where an old employer is required to give a notice to the Workplace Authority, the notice must:

- identify the workplace agreement;
- state whether the old employer remains bound by the workplace agreement;
- specify the date of the end of the transmission period; and
- identify the new employer.

68. Proposed subsection 346ZEA(3) would provide that subsection 346ZEA(2) is a civil remedy provision.

69. The note would alert the reader to Division 11 of Part 8 of the Act which deals with enforcement.

**Amendment 29 – Schedule 1, item 15, page 35 (after line 6)**

70. This amendment is consequential on Amendment 25 and would set a maximum penalty of 30 penalty units that may be imposed on an old employer that fails to take reasonable steps to give notice to the Workplace Authority as required by proposed section 346ZEA.

**Amendment 30 – Schedule 1, item 30, page 37 (line 34)**

**Amendment 31 – Schedule 1, item 32, page 38 (line 20)**

71. These amendments are technical amendments which are consequential on Amendment 15.

72. These amendments would ensure that a transitional Victorian reference award and a transitional award to the extent that it is binding on an excluded employer in respect of the employment of employees in Victoria may also be instruments for the purposes of proposed section 346YA. It is important to note that these awards would only bind a new employer in respect of a transferring employee, if the employer is an ‘employer’ within the meaning of section 858 (an ‘employer’ as defined by section 3 of the *Commonwealth Powers (Industrial Relations) Act 1996*). This is because an employer within the meaning of section 6 of the Act (for example, a constitutional corporation) is not able to be bound by a transitional Victorian reference award or a transitional award under Schedule 6 to the Act.

**Amendment 36 – Schedule 1, item 41, page 41 (line 30)**

73. This amendment is a minor technical amendment consequential on Amendment 15. The amendments would omit the application of paragraphs 346Y(2)(b) and 346YA(2)(b) for the purposes of clause 25B (in relation to preserved State agreements). The effect of this amendment is that where there is no instrument for the purposes of paragraphs 346Y(2)(a) and 346YA(2)(a), an employer and an employee (including a new employer and a transferring employee) would be covered by the protected preserved conditions that were taken to be contained in the original agreement (rather than protected award conditions from a designated award). In addition, the protected preserved conditions are enforceable as if they were workplace agreements.

**Amendment 37 – Schedule 1, item 41, page 41 (line 38)**

**Amendment 41 – Schedule 1, item 42, page 43 (line 27)**

74. These amendments are technical amendments consequential on Amendment 15. The amendments would extend the definition of ‘instrument’ for the purposes of proposed sections 346Y and 346YA to include preserved State agreements and notional agreements preserving State awards.

**Amendment 38 – Schedule 1, item 41, page 42 (line 4)**

**Amendment 42 – Schedule 1, item 42, page 43 (line 30)**

75. These amendments are minor technical amendments consequential on Amendment 22.

**Amendment 39 – Schedule 1, item 41, page 42 (line 8)**

76. This amendment is a minor technical amendment consequential on Amendment 15. The amendment would ensure that where protected preserved conditions are taken to apply to a new employer and a transferring employee under new subsection 346YA the conditions are enforceable as if they were a workplace agreement in operation.

**Amendment 40 – Schedule 1, item 42, page 43 (line 26)**

77. This amendment is a technical amendment consequential on Amendment 15. The amendment would modify clause 52AAA of Schedule 8 to the Act so that, for the purposes of the application of the fairness test in relation to an employer bound by a notional agreement preserving State awards that contains protected notional conditions, a reference to paragraph 346YA(2)(b) is omitted.

78. This reflects the fact that protected notional conditions in a notional agreement preserving State awards in fact determine terms and conditions for the employees concerned. Therefore, the old employer would never be designated an award under the fairness test as applied by Schedule 8.

**Amendment 43 – Schedule 2, item 2, page 53, after Division 3 (after line 24)**

**Division 3A – Workplace Relations Fact Sheet**

79. These amendments would insert a new Division 3A, which would require the Workplace Authority Director to gazette a Workplace Relations Fact Sheet which contains information about the Australian Fair Pay and Conditions Standard, protected award conditions, the fairness test and the role of the Workplace Authority Director and the Workplace Ombudsman.

80. These amendments would also require an employer to provide a copy of the Workplace Relations Fact Sheet to each employee within a week of the employee commencing employment. As a transitional measure, the proposed amendments would require an employer to provide each existing employee with a copy of the Fact Sheet within three months of the Workplace Relations Fact Sheet first being gazetted.

*Section 154A – Workplace Authority Director must issue Workplace Relations Fact Sheet*

81. Proposed subsection 154A would require the Workplace Authority Director to gazette a Workplace Relations Fact Sheet which contains information about employee entitlements under the Australian Fair Pay and Conditions Standard, protected award conditions and the fairness test. The Fact Sheet must also provide information about the roles of the Workplace Authority Director and the Workplace Ombudsman. For example, in exercising workplace agreement functions and powers, a key role of the Workplace Authority Director is to have particular regard to the needs of young people. Similarly, in promoting compliance under the Act, a key role of the Workplace Ombudsman is to bring proceedings on behalf of employees in relation to allegations of duress in agreement making.

82. Proposed subsection 154A(3) would allow regulations to prescribe other matters relating to the content, form or manner of providing the Workplace Relations Fact Sheet.

83. Proposed subsection 154A(4) is included to assist readers to understand that the Workplace Relations Fact Sheet is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

*Section 154B – Employer must give a Workplace Relations Fact Sheet to new employees*

84. Proposed section 154B would require an employer to provide a Workplace Relations Fact Sheet to a person once they become an employee of that employer.

The amendment would require the employer to take reasonable steps to ensure that the employee is given a copy of a Workplace Relations Fact Sheet within 7 days of the person becoming an employee of the employer.

85. Proposed subsection 154B(2) would provide that proposed subsection 154B(1) is a civil remedy provision.

*Section 154C – Employer must give a Workplace Relations Fact Sheet to existing employees*

86. Proposed section 154C is a transitional provision that would require an employer to take reasonable steps to ensure that each employee who is an employee of the employer on the day the Workplace Authority Director gazettes the first Workplace Relations Fact Sheet under section 154A, is given a copy of that fact sheet within 3 months of gazettal.

87. Proposed subsection 154C(2) would provide that proposed subsection 154B(1) is a civil remedy provision.

*Section 154D – Penalties for contravention of civil remedy provisions*

88. Proposed section 154D would provide penalties for contravention of the civil remedies provisions provided for in proposed Division 3A.

89. Under proposed subsection 154D(1) a Court may, on the application of a workplace inspector or an employee affected by the contravention, impose a penalty on the employer for failing to provide a copy of the Workplace Relations Fact Sheet to each employee. These amendments would provide a maximum penalty of one penalty unit.

#### **Amendment 44 – Page 83 (after line 19) at the end of the Bill**

#### **Schedule 6—Minor technical amendments**

#### ***Workplace Relations Act 1996***

#### **Item 1 – Paragraph 354(1)(b)**

#### **Item 2 – Subsection 354(4)**

88. Section 354 of the Act provides that protected award conditions apply to an employee who is subject to a workplace agreement if, but for that workplace agreement, those conditions would have effect in relation to the employee's employment.

89. Proposed section 346C of the Bill would provide that protected award conditions apply to an employee who is subject to a workplace agreement if, but for that workplace agreement, a previous workplace agreement or another industrial instrument, those conditions would have effect in relation to the employee's employment.

90. As section 354 does not refer to previous workplace agreements or other industrial instruments there is a possibility that it may be taken to have a more limited application than proposed section 346C. This is not intended to be the case.

91. Accordingly, items 1 and 2 would make a consequential amendment to section 354 so that protected award conditions may be applicable in circumstances where

their operation has been affected not only by a workplace agreement, but also by a previous agreement or another industrial instrument.

92. Item 1 would amend existing section 354 of the Act, so that protected award conditions may be applicable in circumstances where their operation has been affected not only by a workplace agreement, but also by a previous agreement, or another industrial instrument.

93. Item 2 would amend existing subsection 354(4) of the Act to include a definition of *industrial instrument* which is consistent with proposed section 346C. *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).

### **Item 3 – Application**

94. Item 3 would provide that the amendments made to section 354 of the Act only apply to workplace agreements lodged on or after the day the amendments would commence.