

2008 - 2009

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**FAIR WORK (TRANSITIONAL PROVISIONS AND CONSEQUENTIAL
AMENDMENTS) BILL 2009**

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 Julia Gillard MP)

AMENDMENTS TO THE FAIR WORK (TRANSITIONAL PROVISIONS AND CONSEQUENTIAL AMENDMENTS) BILL 2009

OUTLINE

The Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009 (this Bill) was introduced into the House of Representatives on 19 March 2009. It is the first of two Bills (the other being the Fair Work (State Referral and Consequential Amendments of Other Legislation) Bill 2009) which make transitional and consequential provisions in relation to the new federal workplace relations system set out in the *Fair Work Act 2009* (FW Act).

This Bill was immediately referred to the Senate Standing Committee on Education, Employment and Workplace Relations (the Committee). The Committee's report was tabled on 7 May 2009. In the report, the Committee made recommendations for various changes to this Bill, a number of which are reflected in these amendments to be moved on behalf of the Government.

Significant amendments to be moved to this Bill are outlined below.

Special low-paid workplace determinations

Amendments so that FWA will be able to make special low-paid workplace determinations if an employer and employees who will be covered by the determination have been previously covered by a collective agreement-based transitional instrument that is no longer in operation.

Transfer of staff to the new Fair Work institutions

Amendments to ensure that continuity and certainty of terms and conditions of employment for staff transferring from WR Act institutions to the new Fair Work institutions are preserved.

Validation of registration of organisations

Amendments to validate the registration of any organisation that did not have a 'purging rule' at the time it was registered.

Availability of representation orders

Amendments to make it clear that representation orders can be made with respect to 'threatened, impending or probable' disputes.

Technical and minor amendments

A number of technical and minor amendments to this Bill are also being moved, including:

- clarification of the rule relating to the preservation of the WR Act as it relates to conduct and other processes occurring before the WR Act repeal day;
- a new interaction rule that will preserve the existing interaction rules between transitional instruments and State and Territory laws;

- provision to allow applications for enterprise instrument modernisation to be made before modern awards commence on 1 January 2010;
- maintaining protections for outworker terms in transitional agreements, by ensuring that the interaction between a transitional agreement and a modern award does not override existing outworker protections, and ensuring that enterprise agreements under the new system do not override specific terms in a transitional award-based instrument that provide protections for outworkers;
- provision of standing to employee organisations to enforce outworker terms in transitional agreements even when the organisation is not covered by the agreement (an equivalent amendment is also proposed for agreements made under the new system);
- preservation of the transmission of business rules in the WR Act in relation to transitional awards;
- representation rights for organisations and peak councils so that they can represent themselves and their members in the Fair Work Divisions of the Federal Court and the Federal Magistrates Court; and
- provision for a review of the first three years of operation of the new unfair dismissal system.

A small number of amendments to the FW Act are also being moved in this Bill, including:

- clarification of the definition of named employer award in section 312 of the FW Act so that it includes an enterprise award that covers an employer by reference to a specified class; and
- provision of standing to employee organisations to enforce outworker terms in agreements even when the organisation is not covered by the agreement.

FINANCIAL IMPACT STATEMENT

Fair Work Australia — implementation of workplace relations legislation

Expense (\$m)	2008-09	2009-10	2010-11	2011-12	2012-13
Office of the Fair Work Ombudsman	-	25.1	24.2	22.5	19.7
Workplace Authority	-	20.4	-	-	-
Fair Work Australia	-	11.2	7.1	6.5	6.6
Total	-	56.6	31.3	29.0	26.3
<i>Related capital (\$m)</i>					
<i>Fair Work Australia</i>	-	2.3	1.0	-	-
<i>Office of the Fair Work Ombudsman</i>	-	2.3	1.0	-	-
<i>Total</i>	-	4.5	2.0	-	-

The Government will provide \$149.7 million (including capital of \$6.5 million) over four years for the implementation of the Government's new workplace relations arrangements.

Fair Work Australia and the Office of the Fair Work Ombudsman will commence full operations on 1 July 2009.

Source: Budget Measures 2009-10 Budget Paper No. 2 (p165)

NOTES ON AMENDMENTS

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

AFPC	Australian Fair Pay Commission
AFPCS	Australian Fair Pay and Conditions Standard
AIRC	Australian Industrial Relations Commission
APCS	Australian Pay and Classification Scale
AWA	Australian workplace agreement
FW Act	<i>Fair Work Act 2009</i>
FWA	Fair Work Australia
FWO	Fair Work Ombudsman
ITEA	individual transitional employment agreement
NES	National Employment Standards
NAPSA	notional agreement preserving State awards
pre-reform WR Act	<i>Workplace Relations Act 1996</i> as in force before the commencement of Schedule 1 to the <i>Workplace Relations Amendment (Work Choices) Act 2005</i> (27 March 2006)
this Bill	Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009
WR Act	<i>Workplace Relations Act 1996</i>
WR Regulations	<i>Workplace Relations Regulations 2006</i>

Amendment No.1 – clause 2, page 2 (at the end of the table)

1. The table in clause 2 sets out when this Bill’s provisions commence. This amendment amends the table to include commencement provisions for the changes made by this Bill.

Amendment No.2 – Schedule 2, item 1, page 5 (line 12)

2. This amendment amends subparagraph 1(b)(iii) to include in the transitional Schedules the amendments to the FW Act being inserted by Amendment Nos.81-85.

Amendment No.3 – Schedule 3, item 2, page 7 (after line 9)

Amendment No.12 – Schedule 3, after item 5, page 21 (after line 3)

3. Amendment No.12 inserts a new item 5A into Part 2 of Schedule 3, dealing with rules about the interaction of industrial instruments with State and Territory laws.

4. The WR Act included rules about the interaction of industrial instruments with State and Territory laws. For example, subsection 17(1) of the WR Act provides that workplace agreements and awards prevail over State and Territory laws and State industrial instruments to the extent of any inconsistency. However, subsection 17(2) of the WR Act provides that workplace agreements and awards have effect subject to State and Territory laws dealing with matters such as occupational health and safety. (Similar rules for pre-reform certified agreements are set out in section 170LZ of the pre-reform WR Act, as preserved by paragraph 2(1)(g) of Schedule 7 to the WR Act).

5. Amendment No.12 preserves such rules, as they applied immediately before the WR Act repeal day, in relation to instruments that become transitional instruments.

6. Amendment No.12 also inserts a note to inform the reader that most of the State and Territory interaction rules were in the WR Act. The reference to the WR Act includes the WR Regulations, such as Regulations 1.5 and 1.6 of Chapter 2 of the WR Regulations.

7. Amendment No.3 inserts a definition of State and Territory interaction rules in item 2 of Schedule 2 by reference to new item 5A of Schedule 3.

Amendment No.4 – Schedule 2, item 7, page 11 (line 7)

8. Amendment No.4 is a technical amendment to item 7 of Schedule 2 to remove an incorrect reference to the ‘old’ WR Act.

Amendment No.5 – Schedule 2, item 11, page 14 (before line 4)

Amendment No.6 – Schedule 2, item 11, page 14 (after line 7)

Amendment No.7 – Schedule 2, item 11, page 14 (line 11)

Amendment No.11 – Schedule 2, item 13, page 15 (after line 14)

9. Amendment Nos.5, 6, 7 and 11 add new subitem (1A) to item 11 of Schedule 2 and make consequential amendments to items 11 and 13 of Schedule 2.

10. The new subitem 11(1) continues the WR Act (including all substantive, procedural and jurisdiction provisions and associated instruments and orders) for pre-repeal conduct which was subject to court enforcement or to processes in the AIRC or the Australian Industrial Registry. It is, in effect, a default rule which applies where specific provision is not made in the rest of this Bill and applies principally to conduct the subject of the unfair dismissal provisions (i.e., the dismissal) and the civil penalty and offence provisions (e.g., a breach of the AFPCS or the freedom of association provisions).

11. New subitem (1A) makes separate provision to continue the WR Act in relation to the variation or termination of a WR Act instrument where the variation or termination process was started before the WR Act repeal day. A WR Act instrument is one of the instruments listed in subitem 2(2) of Schedule 3 (such as an award, workplace agreement or pre-reform certified agreement), all of which become transitional instruments under Part 2 of Schedule 3 on the WR Act repeal day. As transitional instruments, they are subject to the variation and termination rules in Part 2 of Schedule 3. However, subitem (1A) ensures that, if a variation or termination process had been started before the WR Act repeal day, the WR Act rules (rather than the Schedule 3 rules) will apply to the variation or termination.

12. For this purpose, a process will have been started where an application has been made to, or a notice lodged with, the AIRC or the Workplace Authority, or some other step required by the statute has been taken (such as gaining approval for the termination of a pre-reform certified agreement from a valid majority of employees under section 170MG of the pre-reform WR Act as continued by paragraph 2(1)(k) of Schedule 7 to the WR Act).

13. New subitem (1A) means that the WR Act is continued for all variations and terminations of WR Act instruments commenced before the WR Act repeal day, not just pre-reform AWAs (see the Explanatory Memorandum to this Bill at paragraph 23).

14. Whether FWA or a WR Act body deals with variations and terminations of WR Act instruments under the continued WR Act will depend on the operation of item 12 of Schedule 2.

- If the variation or termination process involves the Workplace Authority, item 12 does not apply and the Workplace Authority will perform its functions under the continued WR Act.
- If the variation or termination process involves the AIRC, item 12 operates to require any new (non-interim) application relating to the variation or termination (e.g., to approve or order the termination of a pre-reform certified agreement) to be made to FWA. However, if an application relating to the variation or termination has been made to the AIRC before the WR Act repeal day, the AIRC will continue to perform its functions under the continued WR Act.

Amendment No.8 – Schedule 2, item 12, page 14 (line 21)

Amendment No.9 – Schedule 2, item 12, page 14 (line 30)

Amendment No.10 – Schedule 2, item 12, page 15 (after line 10)

15. Amendment Nos.8-10 amend item 12 of Schedule 2 to clarify that FWA will deal with matters commenced on or after the WR Act repeal day and will not take over matters partly dealt with by the AIRC or the Australian Industrial Registry before that day. It does this by ensuring that item 12 operates only on an application or process which initiates a substantive matter in the AIRC or the Australian Industrial Registry and not on applications made or processes that occur during the course of the conduct of the matter (such as procedural applications and applications for interim orders). The latter applications and processes are labelled interim applications and processes and are defined in new subitem 12(4) of Schedule 2.

Illustrative example

An employee is dismissed on 15 June 2009 and lodges an unfair dismissal application with the AIRC on 25 June 2009. After an unsuccessful conciliation conference on 2 July 2009, the employer elects to challenge the jurisdiction of the AIRC to deal with the matter because the employer alleges that the employee was a fixed-term employee. The motion to dismiss the application for want of jurisdiction would be made to the AIRC because it is in the nature of an interim application.

Amendment No.13 – Schedule 3, item 24, page 32 (line 28)

Amendment No.14 – Schedule 3, item 24, page 33 (after line 13)

16. Sections 93 and 101 of the FW Act allow a modern award or an enterprise agreement to include terms dealing with the cashing out of paid annual leave and paid personal/carer's leave respectively. These provisions require award and agreement terms to contain certain protections (including a requirement that an employee retain a minimum amount of leave after the cashing out).

17. Item 23 of Schedule 3 provides that the NES apply to transitional instruments from the FW (safety net provisions) commencement day on a no detriment basis. Item 24 makes it clear that this includes the provisions in the NES that authorise modern awards and enterprise agreements to deal with specified matters (such as cashing out of leave).

18. Amendments Nos.13 and 14 amend item 24 to ensure that the protections that apply to the cashing out of annual leave and personal/carer's leave apply to transitional instruments. Where a transitional instrument deals with cashing out, but does not contain these protections, they will be taken to be included in the transitional instrument.

Amendment No.15 – Schedule 3, page 34 (after line 36)

19. Subitem 28(1) of Schedule 3 provides that where an agreement-based transitional instrument applies to an employee, a modern award that covers the employee does not apply. This general rule does not reflect the special interaction rule that applies under the WR Act where an agreement contains outworker terms.

20. Amendment No.15 inserts new item 28A to address this and ensure that the existing special rule governing agreements that apply to outworkers is maintained.

21. New item 28A qualifies item 28 in relation to outworker terms. New item 28A ensures that despite item 28 and any terms of an agreement-based transitional instrument that are detrimental to the employee in any respect when compared with the terms of the modern award, outworker terms will continue to apply to an employee, an employer and each employee organisation to which the modern award applies.

Amendment No.16 – Schedule 3, page 36 (after line 32)

22. Item 31 of Schedule 3 provides that an award-based transitional instrument will cease to apply to an employee, employer or other person in relation to the employee where an enterprise agreement or a workplace determination applies.

23. Amendment No.16 inserts new item 31A to make an exception in relation to designated outworker terms in an award-based transitional instrument. New item 31A ensures that designated outworker terms in an award-based transitional instrument continue to apply even where an enterprise agreement or a workplace determination applies.

24. For the purposes of new item 31A, the definition of designated outworker terms in section 12 of the FW Act applies to award-based transitional instruments.

25. This provision reflects the specific interaction rule contained in the FW Act where an enterprise agreement contains designated outworker terms (section 57A of the FW Act).

Amendment No.17 – Schedule 4, page 46 (after line 29)

26. Part 2 of Schedule 4 continues certain WR Act minimum entitlements provisions during the bridging period (pending commencement of the NES).

27. Amendment No.17 inserts new item 4A to ensure that the continued provisions operate effectively with enterprise agreements made under the FW Act during the bridging period (this is relevant, for example, in relation to cashing out of leave). New item 4A does this by providing that a reference in the continued provisions to a workplace agreement includes a reference to an enterprise agreement.

Amendment No.18 – Schedule 5, item 2, page 53 (after line 16)

28. Amendment No.18 amends item 2 of Schedule 5 to add new subitem (5). New subitem (5) requires that in continuing and completing the award modernisation process, the AIRC must continue to have regard to the state of the national economy and the likely effects on the national economy of any modern award that the AIRC is considering or proposing to make. This reflects the current obligation that the AIRC has under section 103 of the WR Act.

Amendment No.19 – Schedule 5, item 6, page 56 (after line 3)

29. Item 6 of Schedule 5 requires FWA to conduct a review of modern awards after 2 years. Amendment No.19 amends item 6 to make express the requirement that in conducting the 2 year review, FWA must review each modern award. This does not mean that FWA may not review 2 or more modern awards at the same time. The new provision reflects the requirements governing the conduct of the regular 4 yearly reviews by FWA (see subsection 156(5) of the FW Act).

Amendment No.20 – Schedule 6, item 2, page 63 (lines 9 to 16)

Amendment No.21 – Schedule 6, item 2, page 63 (line 27)

30. Amendment No.20 makes a technical amendment to the definition of an enterprise award-based instrument to ensure that it correctly defines enterprise instruments derived from former State awards. The amendment makes clear that only NAPSAs that were derived from a former State enterprise award are within the definition.

31. Amendment No.21 is a consequential amendment.

Amendment No.22 – Schedule 6, item 4, page 64 (lines 30 and 31)

Amendment No.23 – Schedule 6, item 4, page 65 (lines 7 to 11)

Amendment No.24 – Schedule 6, item 4, page 65 (after line 26)

Amendment No.25 – Schedule 6, item 4, page 65 (before line 27)

Amendment No.26 – Schedule 6, item 5, page 65 (lines 32 and 33)

Amendment No.27 – Schedule 6, item 5, page 66 (lines 10 to 14)

Amendment No.28 – Schedule 6, item 5, page 66 (after line 29)

Amendment No.29 – Schedule 6, item 5, page 66 (line 31)

Amendment No.30 – Schedule 6, item 6, page 67 (line 3)

Amendment No.31 – Schedule 6, item 6, page 67 (after line 4)

Amendment No.32 – Schedule 6, item 7, page 67 (after line 8)

Amendment No.33 – Schedule 6, item 9, page 69 (after line 35)

Amendment No.34 – Schedule 6, page 73 (before line 2)

32. Amendment Nos.22-34 enable FWA to receive an application to make a modern enterprise award, or terminate an existing enterprise instrument, from the WR Act repeal day – i.e., before the commencement of modern awards and the NES. Any modern enterprise award made, or decision to terminate, must not come into effect before modern awards commence.

33. The process of dealing with an application to make a modern enterprise award requires FWA to consider whether there is any relevant modern award and the content of that award, as well as the implications of making the modern enterprise award for those who would be covered by both the proposed modern enterprise award and the relevant modern award.

34. Award modernisation will still be underway on the WR Act repeal day. This means that a relevant modern award may not have been made (or if it has been made may still be subject to variation) when an application for a modern enterprise award is made.

35. The changes made by Amendment Nos.22-34 are designed to ensure that although FWA is able to commence the process of considering whether to make a modern enterprise award, it must also ensure that the ongoing modernisation process is reflected in any final decision.

36. Amendment No.22 enables FWA to receive an application for the making of a modern enterprise award from the WR Act repeal day. This means that FWA can receive an application for the making of a modern enterprise award and commence the process of considering the application before the modern award system commences.

37. Amendment No.23 makes changes to item 4 of Schedule 6 to vary the matters that FWA must take into account in deciding whether or not to make a modern enterprise award and in determining the content of that award. These changes are designed to ensure that although FWA is able to commence the process of considering whether to make a modern enterprise award, it must also ensure that the ongoing modernisation process is reflected in any final decision.

38. This Bill currently requires that FWA consider whether there is a modern award (other than the miscellaneous modern award) that would, but for the enterprise instrument, cover the persons who are covered by the enterprise instrument and, if so, the content of that award.

39. The amended criteria require FWA to consider, where there is no relevant modern award, whether it is likely that an award will be made in the award modernisation process and, if so, the likely content of such an award.

40. The amended criteria also require FWA to consider variations that are likely to be made to a modern award in the award modernisation process. Amendment No.24 inserts a legislative note that explains that such variations may result from, for example, the inclusion of transitional arrangements in the modern award, or following the final AFPC wage decision later in 2009.

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41. It is anticipated that in many cases where an application is made before the new modern award system commences, FWA will decide not to finalise an application to make a modern enterprise award pending the making or variation of a relevant modern award. In these circumstances, FWA will still be able to receive the application to make the modern award and may take any steps it considers appropriate in considering the application.
42. Amendment No.25 inserts a new subitem to ensure that a modern enterprise award does not commence before the FW (safety net provisions) commencement day. This amendment ensures that modern enterprise awards do not commence before other modern awards and the NES.
43. Amendment No.26 enables FWA to receive an application to terminate an enterprise instrument from the WR Act repeal day. This means that FWA can receive an application to terminate an enterprise instrument and commence the process of considering the application before the modern award system commences.
44. Amendment No.27 make changes to item 5 of Schedule 6 to vary the matters that FWA must take into account in deciding whether or not to terminate an enterprise instrument. These changes are designed to ensure that although FWA is able to commence the process of considering such an application, it must also have regard to the ongoing modernisation process in any final decision. Amendment No.28 inserts a legislative note.
45. The amendments made by Amendments Nos.27 and 28 reflect the amendments outlined above in relation to applications to make a modern enterprise award (see Amendment Nos.23 and 24).
46. Amendment No.29 amends item 5 to ensure that a decision to terminate an enterprise instrument cannot come into effect before the FW (safety net provisions) commencement day. This amendment ensures that enterprise instruments are not terminated before modern awards and the NES commence.
47. Amendments Nos.30, 31 and 32 insert notes to refer to new item 16A.
48. Amendment No.33 ensures that where FWA decides not to make a modern enterprise award before the FW (safety net provisions) commencement day, the decision must not take effect before the FW (safety net provisions) commencement day. This ensures that enterprise instruments do not cease to have effect before modern awards and the NES commence.
49. Amendment No.34 inserts new item 16A into the Bill. New item 16A treats specified provisions of the FW Act as if they had already commenced for the purposes of FWA dealing with an application to make a modern enterprise award before the FW (safety net provisions) commencement day.

Amendment No.35 – Schedule 7, item 13, page 92 (line 9)

Amendment No.36 – Schedule 7, item 13, page 92 (line 11)

50. Subitem 13(2) modifies the application of section 200 of the FW Act (which deals with requirements relating to outworkers) in relation to agreements or variations made during the bridging period. The modifications to the application of section 200 made by subitem 13(2) are:

- references to a modern award are taken to be references to an award; and
- references to outworker terms are taken to be references to outworker terms as defined in section 564 of the WR Act.

51. Amendments Nos.35 and 36 amend subitem 13(2) so that:

- references to a modern award are taken to be references to an award or to a NAPSA; and
- references to outworker terms are taken to be references to outworker terms that are (or that would be, if the terms were included in an award) outworker terms as defined in section 564 of the WR Act.

Amendment No.37 – Schedule 7, item 22, page 98 (line 17)

Amendment No.38 – Schedule 7, item 22, page 98 (after line 22)

52. Item 22 of Schedule 7 has the effect of preventing FWA making a special low-paid determination where an employer and employees to be covered by the determination are covered, or have previously been covered, by a collective agreement-based transitional instrument.

53. These amendments modify the effect of item 22 to provide that FWA may, where it considers it appropriate to do so, make a special low-paid workplace determination if an employer that will be covered by the determination has been previously covered by a collective agreement-based transitional instrument that has ceased to operate.

54. Amendment No.38 inserts subitem 22(3) in Schedule 7 to require FWA, in deciding whether it is appropriate to make a special low-paid workplace determination in these circumstances, to take into account the objects set out in section 241 of the FW Act in relation to low-paid bargaining.

55. Where an employer and employees were once covered by a collective agreement-based transitional instrument that has ceased operation, FWA would be required to consider, for example, constraints on their ability to bargain at the enterprise level, including constraints relating to a lack of skills, resources, bargaining strength or previous bargaining experience (see paragraph 241(c) of the FW Act). This will involve an examination of the history of bargaining between these parties.

56. FWA must also be satisfied the other requirements for making a special low-paid workplace determination in sections 262 and 263 of the FW Act are met.

Amendment No.39 – Schedule 8, item 4, page 105 (lines 8 to 13)

Amendment No.40 – Schedule 8, item 4, page 105 (lines 20 to 22)

Amendment No.42 – Schedule 8, item 8, page 107 (lines 31 to 36)

Amendment No.43 – Schedule 8, item 8, page 108 (lines 4 to 6)

57. These amendments make clear that union collective agreements (and variations of union collective agreements and union greenfields agreements) must be both made and approved by employees before the WR Act repeal day in order to be subject to the relevant provisions of the WR Act.

58. Under the WR Act, some collective agreements (i.e., employee collective agreements), and variations of such agreements are made at the time when the agreement or variation is approved. However, the following agreements and variations are made and then approved at different points in time:

- union collective agreements (see sections 333 and 340 of the WR Act); and
- variations of union collective agreements and union greenfields agreements (see sections 368 and 373 of the WR Act).

59. A union collective agreement is made or varied when the employer and union agree on terms of the agreement or variation (sections 333 and 368 of the WR Act). A union collective agreement (or a variation of a union collective agreement or union greenfields agreement) must then be approved by a majority of employees, as required by sections 340 and 373 of the WR Act.

60. The effect of Amendment Nos.39 and 42 is that:

- a union collective agreement; or
- a variation of a union collective agreement or union greenfields agreement;

must be both made and approved before the WR Act repeal day and lodged within 14 days of the day on which it was approved in order to come into operation. Employee collective agreements or variations of such agreements must be made (as defined in sections 333 and 368 of the WR Act) before the WR Act repeal day and lodged within 14 days of being made in order to come into operation.

61. Amendment Nos.40 and 43 substitute new legislative notes under items 4 and 8 of Schedule 8 to reflect these changes.

Amendment No.41 – Schedule 8, item 5, page 106 (lines 24 to 26)

Amendment No.44 – Schedule 8, item 9, page 109 (lines 1 to 3)

Amendment No.45 – Schedule 8, item 15, page 113 (lines 13 to 15)

Amendment No.46 – Schedule 8, item 17, page 115 (lines 1 to 3)

62. These amendments clarify the transitional arrangements relating to the specified period within which an employer may lodge a variation of a workplace agreement (or variation to a variation of such an agreement) that operates from approval for the purpose of passing the no-disadvantage test.

63. The specified period within which an employer may lodge such a variation is 37 days from the later of the WR Act repeal day or the date specified in the notice issued under subsection 346M(2) of the WR Act in relation to the agreement. The specified period of 37 days is calculated by reference to a period of 7 days after the date specified in the notice plus an additional 30 days to allow the parties to make a variation for the purposes of passing the no-disadvantage test.

64. These amendments will ensure that employers have sufficient time to lodge a variation for the purposes of passing the no-disadvantage test where, for example, the Workplace Authority Director issued the notice shortly before the WR Act repeal day but a variation for the purpose of passing the no-disadvantage test has not been made (or lodged).

Amendment No.47 – Schedule 8, page 124 (after line 3)

65. This amendment inserts new item 28A into Schedule 8. The effect of this amendment is that from the WR Act repeal day an employer can only lodge one variation for the purposes of passing the no-disadvantage test regardless of how many of those variations they have lodged before WR Act repeal day.

66. If the Workplace Authority Director decides that an agreement as varied (for the purposes of passing the no-disadvantage test) does not pass the no-disadvantage test, the employer and its employees will be required to bargain for an enterprise agreement under the FW Act.

Amendment No.48 – Schedule 9, page 132 (after line 6)

67. Item 5 of Schedule 9 sets out how the wage provisions of the WR Act continue to apply, and when they cease to operate.

68. To ensure that the provisions continue to operate as intended once the new system commences, amendment No.48 inserts new item 5A. New item 5A provides that a reference in the continued provisions to a workplace agreement includes a reference to an enterprise agreement.

Amendment No.49 – Schedule 9, item 13, page 137 (after line 3)

69. This amendment is designed to clarify the transitional rules about wages.

70. The amendment inserts a note advising the reader that, in addition to the rules in item 13 of Schedule 9, an employee's base rate of pay may also be affected by the AFPCS interaction rules in item 22 of Schedule 3. The effect of that item is that the rules that prevent the minimum wage rates on APCs applying to some employees cease to operate from the FW (safety net provisions) commencement day.

Amendment No.50 – Schedule 11, item 6, page 147 (line 17)

Amendment No.51 – Schedule 11, item 6, page 147 (line 23)

Amendment No.52 – Schedule 11, item 6, page 147 (line 29)

Amendment No.53 – Schedule 11, item 6, page 148 (line 3)

Amendment No.54 – Schedule 11, item 13, page 155 (line 2)

71. These technical amendments insert references to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* in items 6 and 13 of Schedule 11.

Amendment No.55 – Schedule 14, item 3, page 169 (line 21)

72. This amendment inserts a reference to subsection 483A(1) of the FW Act into item 3 in Schedule 14 and is consequential to the insertion of section 483A in the FW Bill. Section 483A provides for entry onto premises to investigate suspected contraventions of the FW Act and associated instruments in relation to textile, clothing and footwear outworkers (TCF outworkers). The effect of this amendment is to allow permit holders to enter premises also to investigate suspected contraventions of the WR Act, WR Act instruments and transitional instruments relating to TCF outworkers.

Amendment No.56 – Schedule 14, item 4, page 169 (line 28)

Amendment No.57 – Schedule 14, item 4, page 169 (line 32) to page 170 (line 2)

73. Amendment No.57 removes subitem (2) from item 4 of Schedule 14. Subitem (2) provides that an order made by the AIRC under subsections 748(9) and (10) of the WR Act allowing access to non-member records will have no effect after the repeal of that Act. As permit holders may now only access non-member records with an order from FWA or the consent of the non-member, it is necessary that any orders made by the AIRC under subsections 748(9) and (10) be saved.

74. Amendment No.56 makes a numbering change consequential to amendment No.57.

Amendment No.58 – Schedule 14, item 5, page 170 (lines 3 to 10)

75. This amendment removes item 5 of Schedule 14. Item 5 provides that a conscientious objection certificate endorsed under the WR Act and in force immediately before the repeal of that Act has effect, on and after that day, as if it were done by FWA under subsection 485(3) of the FW Act. However, the ability for FWA to endorse a conscientious objection certificate and for this to be grounds to restrict union right of entry was removed from the Fair Work Bill, and this item is therefore no longer required.

Amendment No.59 – Schedule 16, item 15, page 179 (line 15)

Amendment No.60 – Schedule 16, item 15, page 179 (line 16)

Amendment No.61 – Schedule 16, item 15, page 179 (line 18)

Amendment No.62 – Schedule 16, item 15, page 179 (line 19)

Amendment No.63 – Schedule 16, item 15, page 179 (after line 20)

76. These amendments amend item 15 of Schedule 16 to insert new subitem 15(2). The new subitem is a civil remedy provision that specifies contraventions of certain notification obligations for transitional employers where there is a transmission of a transitional award under continued Schedule 6 to the WR Act.

Amendment No.64 – Schedule 16, item 16, page 179 (after line 36)

Amendment No.67 – Schedule 16, item 16, page 180 (cell at table item 40, column headed “Civil remedy provision”)

Amendment No.68 – Schedule 16, item 16, page 180, after table item 40

Amendment No.72 – Schedule 16, item 16, page 185 (line 2)

77. These amendments ensure that a contravention or a proposed contravention of an outworker term in a collective agreement-based transitional instrument may be enforced by an employee organisation with representation rights whether or not the instrument applies to that employee organisation.

78. These amendments mean that outworker protections in a collective agreement-based transitional instrument can be enforced in the same way as outworker protections in an award-based transitional instrument, and alleviates difficulties with compliance. This reflects the special vulnerability of outworkers.

79. The amendments ensure that where there is a contravention or proposed contravention of an outworker term, an employee organisation will be able to seek to enforce the term, provided the organisation is entitled to represent the industrial interests of an outworker to whom the term relates.

Amendment No.65 – Schedule 16, item 16, page 180 (cell at table item 38, column headed “Civil remedy provision”)

Amendment No.66 – Schedule 16, item 16, page 180 (cell at table item 39, column headed “Civil remedy provision”)

80. These amendments ensure that items 38 and 39 of the table in item 16 of Schedule 16 apply to both contraventions and proposed contraventions of a term of an award-based transitional instrument.

Amendment No.69 – Schedule 16, item 16, page 185 (table item 60, column 1)

Amendment No.70 – Schedule 16, item 16, page 185 (table item 61, column 1)

Amendment No.71 – Schedule 16, item 16, page 185 (at the end of the table)

81. These amendments modify existing table items and insert an additional table item in item 16 of Schedule 16. New table item 62 sets out the rules regarding standing, jurisdiction and maximum penalties in relation to the civil remedy provision contained in subitem 15(2) of Schedule 16.

Amendment No.73 – Schedule 17, item 12, page 193 (line 21)

82. Amendment No.73 is a technical amendment to proposed item 12 of Schedule 17 to correct a drafting error.

Amendment No.74 – Schedule 18, item 4, page 204 (lines 7 to 15)

83. Amendment No.74 amends proposed item 4 of Schedule 18 to make it clear that the order of precedence assigned to Presidential Members of the AIRC under section 65 of the WR Act is preserved on and after the WR Act repeal day, and will apply to their appointments as Deputy Presidents of FWA.

Amendment No.75 – Schedule 18, item 10, page 207 (line 16)

Amendment No.76 – Schedule 18, item 10, page 207 (line 17)

Amendment No.77 – Schedule 18, item 10, page 207 (after line 23)

84. These amendments amend item 10 of Schedule 18 to empower the FWO to enter into arrangements with the Workplace Authority Director to provide assistance to the Workplace Authority in the period between the WR Act repeal day and its cessation time.

Amendment No.78 – Schedule 18, Part 2, page 208 (after line 19)

85. Amendment No.78 inserts new item 11A in Part 2 of Schedule 18 about the appointments of inspectors. New item 11A is intended to facilitate a smooth transition of inspectors by ensuring that the appointments of workplace inspectors can continue under the FW Act for the

remainder of the term of their appointments under the WR Act, or until the inspector can be appointed as a Fair Work Inspector (FW Inspector).

86. It is intended that the appointment of a workplace inspector that was in force immediately prior to the WR Act repeal day continue in force for any unexpired period of the appointment, as if the person had been appointed as a FW Inspector. It is intended that an identity card issued under the WR Act be treated as though it was an identity card issued under the FW Act.

87. It is not intended that this saving provision should preclude revocation or suspension of that person's appointment by the FWO where necessary (see subsection 33(4) of the *Acts Interpretation Act 1901*).

Amendment No.79 – Schedule 18, page 213 (after line 5)

88. This amendment inserts a new item 20A into Schedule 18.

89. This item requires the General Manager of FWA to prepare a written report dealing with the experiences of employers (in particular small and medium-sized enterprise employers) and employees of the new unfair dismissal system.

90. The report is to be about the first 3 years of operation of the unfair dismissal system.

91. In preparing the report, the General Manager may do such things as seek public submissions, conduct surveys of employers, employees and any other persons affected by, or who have had experience with, the unfair dismissal system, hold public hearings and gather information in any other way he or she thinks fit.

92. The General Manager must provide the Minister with a written report of the review as soon as practicable, but no later than 6 months after the end of the period to which the report relates. The Minister must ensure a copy of the report is tabled in each House of the Parliament within 15 sitting days of the Minister receiving the report.

Amendment No.80 – Schedule 18, page 213, after proposed item 20A

93. Amendment No.80 inserts new item 20B into Schedule 18 and relates to the transfer of staff from the WR Act institutions to FWA and the Office of the FWO. The purpose of these amendments is to provide continuity and certainty in relation to the terms and conditions of employment of transferring staff.

94. Staff will be transferred from the WR Act institutions to the new FW Act institutions under section 72 of the *Public Service Act 1999* which deals with the transfer of employees arising from machinery of government changes. This will ensure that an employee's annual salary will not be reduced from those provided immediately before the transfer.

95. In addition, subitems 20B(1) and (2) preserve the operation of all existing statutory workplace agreements (collective agreements, AWAs and pre-reform AWAs) that apply to staff

in the WR Act institutions until the new Agency Head is able to negotiate a new enterprise agreement with employees in the new Agency.

96. For new employees, subitem 20B(3) allows the Agency Head of the new Agency to nominate which preserved collective agreement will apply to the employment of new employees.

97. Subitem 20B(4) enables regulations to be made in relation to the transfer of employees from the old Agency to the new Agency to address any other unforeseen issues associated with the transfer of staff.

Amendment No.81 – Schedule 18, page 213 (after line 8)

Amendment No.82 – Schedule 18, page 213, after proposed item 21A

98. Paragraph 575(2)(d) of the FW Act currently provides that FWA consists of a minimum of 4, and no more than 6, Minimum Wage Panel Members. Item 21A reduces the minimum number of Minimum Wage Panel Members required to be appointed to FWA from 4 to 3. This will ensure a balance between specialist and generalist expertise on the Minimum Wage Panel.

99. Paragraph 622(2)(a) of the FW Act currently provides that where a FWA Member becomes unavailable, the Minimum Wage Panel may continue to deal with a matter so long as the Minimum Wage Panel still consists of the President and at least 3 Minimum Wage Panel Members. Item 21B reduces the number of Minimum Wage Panel Members required to remain on the Minimum Wage Panel from 3 to 2.

Amendment No.83 – Schedule 18, page 213, after proposed item 21B

100. Item 21C inserts new section 629A into the FW Act, which provides that the President has the same status as a Judge of the Federal Court. The amendment ensures that the FW Act operates in conjunction with the *Judges' Pensions Act 1968* and *Judges (Long Leave Payments) Act 1979*.

Amendment No.84 – Schedule 18, page 213, after proposed item 21C

101. Subsection 654(2) of the FW Act currently permits the regulations to prescribe information or documents relating to a decision of FWA made under the FW Act, or a notice, notification or application that is made or given to FWA under the FW Act.

102. These amendments expand the matters that can be prescribed to all decisions of FWA and notices, notifications and applications made or given to FWA, whether under the FW Act or under another Act.

Amendment No.85 – Schedule 18, page 213 (after line 8)

103. Amendment No.85 inserts a new section into the FW Act, which allows regulations to be made that confer functions on FWA or the General Manager of FWA.

Amendment No.86 – Schedule 20, items 2 to 4, page 215 (line 19)

104. Item 1 of Schedule 20 provides for the continued operation of Schedule 6 to the WR Act on and after the WR Act repeal day.

105. Amendment No.86 makes a number of modifications to the continued Schedule 6 that are consequential to the commencement of the FW Act. The modifications are contained in new items 2-5 and 8-11. (Items 6 and 7 reflect existing items 3 and 4 and are reinserted unamended.)

106. New item 2 makes a number of changes to terms and references used in continued Schedule 6 to reflect the FW Act and institutional framework established by the FW Act.

107. New item 3 modifies the application of section 578 of the FW Act to ensure that FWA gives effect to the objects of continued Schedule 6. This item also provides for certain provisions of the FW Act, relating to the conduct of matters before FWA, not to apply. The application of these provisions is not required as continued Schedule 6 sets out how continued Schedule 6 matters are to be dealt with.

108. New item 4 modifies and removes certain clauses in continued Schedule 6 to the WR Act. The item makes clear that the provisions of Schedule 6 to the WR Act that provide notification obligations for transitional employers continue to apply as if those provisions were a reference to item 15 of Schedule 16 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*. Schedule 20 of this Bill will preserve the transmission of business provisions in Part 6A of Schedule 6 to the WR Act in relation to the transmission of transitional awards for the remainder of the transitional period (i.e., until 26 March 2011).

109. New item 5 ensures that Part 3-1 of the FW Act (which relates to general protections) applies to continued Schedule 6 rather than Part 16 of the WR Act.

110. New item 6 amends the definition of industrial action in clause 3 of continued Schedule 6 to align it with the definition of that term under the FW Act. As noted, this item was previously included in this Bill as item 3 of Schedule 20. It has been inserted in the same form.

111. New item 7 confers certain functions relating to secret ballots on presidential members of FWA. (These functions are conferred on presidential members of the AIRC under the WR Act.) It also extends the compliance regime that applies in relation to protected action ballots under the WR Act to secret ballots and related orders made under continued Schedule 6. As noted, this item was previously included in this Bill as item 4 of Schedule 20. It has been inserted in the same form.

112. New item 8 ensures that Part 3-4 of the FW Act (which relates to right of entry) applies to continued Schedule 6 rather than Part 15 of the WR Act.

113. New item 9 provides for sections 535 and 536 of the FW Act, relating to employee records, to apply to continued Schedule 6 rather than section 836 of the WR Act.

114. New item 10 omits clauses 106 and 106 relating to compliance. Compliance with continuing Schedule 6 instruments is separately provided for in item 15 of Schedule 16 of this Bill.

115. New item 11 provides for the regulations to deal with other matters relating to how the FW Act applies in relation to continuing Schedule 6 instruments.

Amendment No.87 – Schedule 22, page 219 (after line 15)

Amendment No.88 – Schedule 22, page 219 (after line 28)

Amendment No.89 – Schedule 22, page 220 (after line 7)

Amendment No.90 – Schedule 22, page 220 (after line 26)

Amendment No.91 – Schedule 22, page 222 (after line 1)

Amendment No.92 – Schedule 22, page 222 (after line 12)

Amendment No.93 – Schedule 22, page 222, after proposed item 37A

116. These amendments insert items that amend section 6 of Schedule 1 to the WR Act by substituting new definitions of federal system employer, federal system employee, employer, employee, and repealing definitions of constitutional trade and commerce, designated Commonwealth authority, flight crew officer, maritime employee, and waterside worker. These amendments also insert items that make consequential amendments to sections 18C and 18D of Schedule 1 to the WR Act that are a result of the amendments to section 6.

117. The amendments substituting new definitions of federal system employer, federal system employee, employer and employee are intended to ensure that the coverage of the FW Act and the proposed *Fair Work (Registered Organisations) Act 2009* is consistent. These amendments achieve this by largely adopting the national system employer and national system employee concepts, and the ordinary meanings of employer and employee, contained in the FW Act. All the other items make amendments that are consequential to those changes.

Amendment No.94 – Schedule 22, page 222 (before line 13)

118. This amendment inserts a new item in Schedule 22 of this Bill. Item 37E amends Schedule 1 to the WR Act by inserting proposed section 26A. This amendment addresses uncertainty regarding the registration of certain associations under the WR Act in light of the decision of the Full Federal Court in *Australian Education Union v Lawler* [2008] FCAFC 135. This decision held that if an association did not include in its rules a provision removing from membership people who were no longer eligible to be members of the association, then that association was not validly registered under the WR Act.

119. This decision could have significant ramifications for federal organisations that were registered without a means of ‘purging’ members who were no longer eligible to be members of the association under the WR Act. The decision enables the validity of those registrations to be

called into question, as could any instruments (e.g., agreements or awards) to which such organisations are a party and any action the association has taken in reliance on its registered status.

120. To avoid these potential ramifications, section 26A validates the registration of any association the purported registration of which as an organisation would be invalid because the association's rules did not have the effect of terminating the membership of people who were not of a particular kind.

121. Section 26A validates the federal registration of associations that were invalidly registered as an employer organisation, an employee organisation or an enterprise association. From the commencement of section 26A, the registration of these associations will be taken to be valid and to have always been valid. However, section 26A does not validate the registration of an association that was invalid for any other reason than that specified in paragraph 26A(b).

Amendment No.95 – Schedule 22, page 222 (after line 24)

122. This amendment inserts a new item in Schedule 22 of this Bill. Item 40A amends Schedule 1 to the WR Act by inserting section 171A. This amendment is intended to ensure that an organisation does not have members who would cause the organisation to not be federally registrable within the meaning of sections 18A, 18B or 18C of Schedule 1 to the WR Act.

123. The section has the effect of terminating a person's membership of a registered organisation if the person is not or is no longer a person of a kind mentioned in:

- paragraphs 18A(3)(a), (b), (c) or (d);
- paragraphs 18B(3)(a), (b), (c) or (d); or
- paragraphs 18C(3)(a), (b), (c) or (d).

124. This section ensures that organisations cannot have members who would cause the organisation to not be federally registrable. It operates, in effect, as a legislative 'purging' rule.

125. This section applies despite anything in the rules of the organisation.

Amendment No.96 – Schedule 22, page 222 (before line 25)

126. This amendment inserts a new item in Schedule 22 to this Bill. Item 40B amends paragraph 230(2)(b) of Schedule 1 to the WR Act. The effect of this amendment is that an organisation must remove from their register of members the name and address of any person who has ceased to be a member of the organisation because of the operation of proposed section 171A within 28 days of the person ceasing to be a member. This amendment is consequential to Amendment No.95.

Amendment No.97 – Schedule 22, item 49, page 25 (line 10)

127. Amendment No.97 amends item 49 of Schedule 22 to this Bill to include a regulation making power that allows the General Manager of FWA to delegate specified functions or powers to a class of employees prescribed by the regulations. This new ability to delegate is in addition to the existing delegation power in the provision. This ability to prescribe in the regulations a class of employees who are able to undertake the functions or powers set out in subsection 343A(3) provides the General Manager with greater flexibility to manage the distribution of tasks under the proposed *Fair Work (Registered Organisations) Act 2009* and is consistent with the approach adopted under the FW Act.

Amendment No. 98 – Schedule 22, page 226 (after line 5)

128. Amendment No.98 inserts new section 353A into the proposed *Fair Work (Registered Organisations) Act 2009*, which makes it clear that in proceedings in the Fair Work Divisions of the Federal Court and Federal Magistrates Court, in addition to any other means of representation allowed by those courts:

- an organisation may be represented by an officer or employee of that organisation, or an officer or employee of a peak council to which the organisation is affiliated; and
- a party that is not an organisation may be represented by an officer or employee of an organisation of which the party is a member, or an officer or employee of a peak council to which an organisation of which the party is a member is affiliated.

129. However, consistent with the position under the WR Act, this item also provides that these additional representation rights do not apply:

- in relation to appeals from State or Territory courts under section 565 of the FW Act, or to proceedings in relation to offences; and
- in proceedings relating to the determination of a question of law referred to the Federal Court by FWA under section 608 of the FW Act, unless the relevant court gives leave.

Amendment No.99 – Schedule 22, item 55, page 227 (lines 9 to 20)

130. Amendment No.99 amends the definition of federal counterpart in proposed section 6 of Schedule 1 to the WR Act to remove the substantive definition of the term and insert a reference to proposed section 9A (inserted by amendment No.100) where the new definition will be located. This amendment is consequential to amendment No.102.

Amendment No.100 – Schedule 22, page 228 (after line 3)

131. Amendment No.100 inserts item 58A into Schedule 22. Item 58A inserts section 9A into Schedule 1 to the WR Act (which will become part of the *Fair Work (Registered Organisations) Act 2009*) to define the meaning of federal counterpart.

132. Section 9A provides that a federal counterpart of a State-registered association is a federally registered organisation that is prescribed by the regulations. The intention is to prescribe federal counterparts for State-registered associations in the regulations. Prescribing a federal counterpart for State-registered associations will clarify the operation of this definition by avoiding the need as required by the current provisions of this Bill for FWA to determine whether each State-registered association has a federal counterpart.

133. If an organisation is not prescribed by the regulations, section 9A provides that an organisation will be a State-registered association's federal counterpart where the organisation has a branch in that State which has, or purports to have, substantially the same eligibility rules as the association and a history of integrated operation with the association. Where this criterion cannot be met, an organisation will be a State-registered association's federal counterpart where the State-registered association has purported to have functioned as a branch of that organisation.

134. The requirement that the federal organisation have had a history of integrated operation with the association will allow FWA to holistically consider the operation of the two entities over time rather than focussing on a similarity of office holders (as currently required by this Bill) which may be only one aspect of integrated operations. This amendment therefore allows FWA to consider a wide range of factors to determine whether, in each unique circumstance, the organisation is the federal counterpart for the State association.

Amendment No.101 – Schedule 22, page 232 (after line 1)

Amendment No.102 – Schedule 22, item 82, page 232 (lines 8 to 13)

135. Amendment No.102 amends item 82 of Schedule 22 which itself amends clause 6 of Schedule 10 to the WR Act (which will become part of the *Fair Work (Registered Organisations) Act 2009*). The amendment allows the five year transition period during which transitionally recognised associations (TRAs) are recognised in the federal system to be extended by FWA on application by a TRA. This amendment allows FWA to extend the recognition of TRAs on a case-by-case basis where those bodies can demonstrate that they have made progress towards restructuring their internal affairs to integrate with those of their federal counterparts. In order to be granted an extended transitional period, a TRA must be able to satisfy FWA that it has made progress towards either becoming an organisation or rationalising its internal affairs with its federal counterpart. If satisfied of these matters, FWA may grant an extension for 12 months. Where a TRA seeks a further extension of its transition period, FWA must be satisfied that the TRA has made further progress towards becoming an organisation or rationalising its affairs with its federal counterpart. In addition, FWA must be satisfied that there are extenuating circumstances justifying the further extension before an additional 12 month period of transitional recognition can be granted.

136. Amendment No.101 is a consequential amendment to Amendment No.102 which inserts item 79A to create a new subsection under clause 6 of Schedule 10.

Amendment No.103 – Schedule 22, item 89, page 238 (line 13)

137. Amendment No.103 amends item 89 of Schedule 22 to clarify that a representation order may be sought in relation to a wide range of disputes, including those that are threatened, impending or probable. This amendment addresses concerns that the existing provision of this Bill is unclear as to the level of disputation that is required before a representation order can be sought. This amendment clarifies that an applicant should be able to point to a genuine disagreement between organisations that either has the real potential to materialise or is already occurring. It is not, however, necessary for an applicant to demonstrate that real, threatened or impending harm has occurred or is likely to occur to the business concerned as a result of the dispute.

Amendment No.104 – Schedule 22, item 96, page 242 (lines 20 to 22)

138. Amendment No.104 removes item 96 of Schedule 22. Item 96 would have amended subsection 485(2) of the FW Act. The amendment contained in item 96 is no longer necessary as subsection 485(2) was omitted from the Fair Work Bill.

Amendment No.105 – Schedule 22, items 102 and 103, page 243 (lines 10 to 15)

Amendment No.106 – Schedule 22, item 187, page 251 (lines 10 to 12)

Amendment No.107 – Schedule 22, items 189 and 190, page 251 (lines 16 to 21)

139. Amendments Nos.105, 106 and 107 omits items 102, 103, 187, 189 and 190 from Schedule 22. These amendments are consequential upon the inclusion of a new definition of federal system employee and federal system employer in Schedule 1 to the WR Act (which will become part of the *Fair Work (Registered Organisations) Act 2009*) by Schedule 22.

Amendment No.108 – Schedule 22, items 193 and 194, page 252 (lines 1 to 7)

140. Amendment No.108 is a technical amendment to items 193 and 194 of Schedule 22.

141. Item 193 amends the definitions of State-registered association and transitionally registered association. However, the definition of transitionally registered association is deleted by item 58 of Schedule 22. This amendment removes this inconsistency.

142. Item 194 amends the definition of vocational placement to ensure that the reference to vocational placement contained in the definition of employee in Amendment No.88 has the same meaning as in the FW Act.

Amendment No.109 – Schedule 22, item 627, page 296 (lines 6 to 10)

143. Amendment No.109 is a technical amendment to item 627 of Schedule 22. It replaces incorrect references to transitionally recognised organisations and transitionally recognised organisation with references to transitionally recognised associations and transitionally recognised association respectively.

Amendment No.110 – page 296 (after line 10)

144. Amendment No.110 inserts new Schedule 23. New Schedule 23 makes a number of amendments to the FW Act.

Item 1 – At the end of section 3

145. This item adds an additional object to section 3 of the FW Act to acknowledge the special circumstances of small and medium-sized businesses.

Item 2 – section 12 (definition of civil remedy provision)

Item 17 – at the end of section 539

146. Item 17 amends Part 4-1 the FW Act to extend the compliance framework in the FW Act to contraventions of civil penalties contained in the regulations. It is intended that Part 4-1 of the FW Act apply to a civil remedy provision in the regulations in the same way that it applies to a civil remedy provision in the Act.

- For example, section 550 of the FW Act would operate so that a person who is involved in a contravention of a civil remedy provision in the regulations will be taken to have contravened that provision.

147. A legislative note clarifies that this item does not enable civil penalties to be created in the regulations by referring the reader to section 798 of the FW Act. Section 798 of the FW Act sets the maximum penalty for civil penalties that are prescribed in the regulations.

148. Item 2 is a consequential amendment to the definition of civil remedy provision in section 12 of the FW Act.

Item 3 – Section 63

Item 4 – Section 63 (note)

Item 5 – Section 64

Item 6 – Section 64 (note)

149. These items amend the FW Act to clarify the operation of the maximum hours of work provisions in the NES.

150. Section 62 of the FW Act provides that an employer must not request or require an employee to work more than a specified number of hours in a week, unless the additional hours are reasonable. The specified hours are 38 hours (for a full time employee) or the lesser of 38 hours and the employee's ordinary hours of work in a week (for an employee who is not a full time employee). Section 62 includes a non-exhaustive list of factors that must be taken into account in determining whether additional hours are reasonable or unreasonable.

151. Section 63 of the FW Act permits a modern award or enterprise agreement to include terms providing for the averaging of hours over a specified period. The average weekly hours must not exceed 38 hours (for a full time employee), or the lesser of 38 hours or the employee's ordinary hours of work in a week (for an employee other than a full time employee). Section 64 makes equivalent provision for award/agreement free employees.

152. These amendments clarify the interaction between the reasonable additional hours requirements in section 62 and the averaging of hours provisions in sections 63 and 64.

153. The amendments make clear that an averaging arrangement in a modern award or enterprise agreement (under section 63) or a written agreement for an award/agreement free employee (under section 64) can provide for average weekly hours in excess of 38, provided that the additional hours are reasonable in accordance with section 62.

154. This means that a roster cycle could provide for an average of more than 38 per week. The additional hours would need to be reasonable in accordance with section 62.

Item 7 – At the end of subsection 140(1)

155. This item amends the FW Act by inserting a note under subsection 140(1).

156. Subsection 140(1) authorises the inclusion of outworker terms in a modern award. Outworker terms may relate to the conditions under which an employee outworker may be employed, or the conditions under which an outworker entity may arrange for the performance of work by contract outworkers.

157. The new note reminds readers that a person who is an employer may also be an outworker entity. The note is included to avoid doubt, and reflects the fact that a person who is a national system employer may also be an outworker entity when operating in a capacity other than in their capacity as a national system employer.

Item 8 – Subsection 312(2)

158. Item 8 repeals and substitutes subsection 312(2) of the FW Act. New subsection 312(2) amends the definition of named employer award to make clear that it also includes a modern enterprise award that is expressed to cover one or more specified classes of employers, but not a modern enterprise award that relates to one or more enterprises as described in paragraph 168A(2)(b).

159. The legislative note under subsection 312(2) makes clear that paragraph 168A(2)(b) deals with employers that carry on similar business activities under the same franchise.

160. The effect of this item is that a named employer award that is expressed to cover one or more named employers or one or more employers by class will be capable of transferring on a transfer of business.

Item 9 – Part 2-9 (heading)

161. This item corrects the heading to Part 2-9.

Item 10 – Paragraph 411(c)

Item 11 – Paragraph 411(d)

Item 12 – At the end of Subdivision C of Division 2 of Part 3-3 of Chapter 3

162. Item 11 repeals paragraph 411(d) of the FW Act which provides that employer response action is protected industrial action if it does not affect the continuity of employees' employment in the circumstances prescribed in the regulations. Item 10 is consequential to item 11.

163. Item 12 of Schedule 23 amends the FW Act to insert new section 416A. New section 416A deems that a consequence of employer response action is that the continuity of employees' employment is not affected, for the purposes prescribed in the regulations. Following consultation with employer and employee stakeholders, it was concluded that the more appropriate policy outcome is to deem the continuity of employees' employment when an employer engages in protected action (new section 416A) rather than have it as a prerequisite for the protected action (the effect of paragraph 411(d)).

Item 13 – Subsection 539(2) (cell at table item 2, column headed “Civil remedy provision”)

Item 14 – Subsection 539(2) (cell at table item 3, column headed “Civil remedy provision”)

164. These items ensure that items 2 and 3 of the table in section 539 of the FW Act apply to both contraventions and proposed contraventions of a term of a modern award.

Item 15 – Subsection 539(2) (cell at table item 4, column headed “Civil remedy provision”)

Item 16 – Subsection 539(2) (after table item 4)

Item 18 – Subsection 540(2)

Item 19 – Subsection 540(3)

Item 20 – Subsection 540(4)

165. These items ensure that a contravention or a proposed contravention of an outworker term in an enterprise agreement may be enforced by an employee organisation with representation rights whether or not the enterprise agreement applies to that employee organisation.

166. This means that outworker protections in enterprise agreements can be enforced in the same way as outworker protections in modern awards, and alleviates difficulties with compliance. This reflects the special vulnerability of outworkers.

167. These items also ensure that where there is a contravention or proposed contravention of an outworker term, an employee organisation will be able to seek to enforce the term, provided the

organisation is entitled to represent the industrial interests of an outworker to whom the term relates.

Item 21 – subsection 558(2)

Item 22 – subsections 799(3) and (4)

168. Item 21 amends subsection 558(2) of the FW Act to clarify that the maximum penalty that can be set out in an infringement notice is 1/10th of the penalty that a court could impose if it were satisfied that a person (either an individual or a body corporate) had contravened the obligation.

169. For example, the maximum penalty that could be set out in an infringement notice for an alleged contravention of the record-keeping obligations in section 535 of the FW Act would be:

- 3 penalty units for an individual; or
- 15 penalty units for a body corporate.

170. The maximum penalty that could be set out in an infringement notice for an alleged contravention of a civil remedy provision in the regulations would be:

- 2 penalty units for an individual; or
- 10 penalty units for a body corporate.

171. This is because the maximum penalty that a court could impose for a contravention of the regulations is 20 penalty units for an individual and 100 penalty units for a body corporate (see section 798 of the FW Act).

172. Item 22 is a consequential amendment that repeals subsections 799(3) and (4) of the FW Act. These subsections deal with infringement notices for civil penalties in the regulations and are no longer necessary.