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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

**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)



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

### OUTLINE

The Government will move amendments to the Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009 (this Bill). The more significant of the amendments are outlined below:

#### Protected action ballots

This Bill provides that protected action ballot orders and authorisations under the *Workplace Relations Act 1996* (WR Act) are of no effect from 1 July 2009.

The Government proposes amendments to allow preservation of WR Act protected action ballot authorisations after 1 July 2009 on application by a bargaining representative to Fair Work Australia (FWA). Strict criteria will need to be met before FWA may make such an order.

#### Unfair dismissal – Transitional definition of small business employer

An amendment is proposed to provide a transitional definition of small business employer (i.e., less than 15 full-time equivalent employees) until 1 January 2011 for unfair dismissal purposes. This amendment gives effect to the agreement reached between the Government and Senator Fielding to secure passage of the now *Fair Work Act 2009* (FW Act).

The calculation of the number of full-time equivalent employees is based on the number of ordinary hours of an employer's employees over the previous 4 weeks. Where an employee has been on leave associated with the birth or adoption of a child for more than 4 weeks, their hours of leave are excluded from the calculation.

#### Registered organisations

The Government proposes a number of amendments to further assist State and federally registered organisations to rationalise their affairs and simplify their operations across multiple jurisdictions. The amendments include changes to:

- the provisions allowing federal organisations to extend their eligibility rules to reflect the broader rules of an equivalent State organisation; and
- ensure that settled demarcations are not reopened by allowing FWA to make a federal representation order that reflects a State order in situations where a federal organisation has altered its eligibility rules to reflect those of a State equivalent organisation.

### FINANCIAL IMPACT STATEMENT

The measures proposed in this Bill are budget neutral.

**.NOTES ON AMENDMENTS**

1. 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
this Bill	Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009
WR Act	<i>Workplace Relations Act 1996</i>

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**Amendment 1 – clause 2, page 2 (table item 9, column 1)**

**Amendment 2 – clause 2, page 2 (after table item 13)**

**Amendment 3 – clause 2, page 2 (after table item 15)**

1. The table in clause 2 sets out when this Bill's provisions commence. These amendments amend the table to include commencement provisions for the changes made by this Bill.

**Amendment 4 – page 165 (before line 1)**

2. Amendment 4 inserts new Schedule 12A which provides for a transitional definition of small business employer for unfair dismissal purposes.

**Item 1 – Meanings of *employee* and *employer***

3. In this Schedule, the terms employer and employee have their ordinary meanings.

**Item 2 – Meaning of *small business employer*, for unfair dismissal purposes, prior to 1 January 2011**

4. For the purposes of the unfair dismissal provisions in Part 3-2 of the FW Act, this item provides that a national system employer is a small business employer if the employer has fewer than 15 full-time equivalent employees at the relevant time. This definition only applies to dismissals occurring before 1 January 2011. After this transitional period, a small business employer will be defined in accordance with section 23 of the FW Act.

5. The method statement for calculating an employer's number of full-time equivalent employees is set out in subitem (2). It is calculated by:

- working out the total number of ordinary hours of all employees in the 4 weeks immediately before the notice of dismissal or dismissal (whichever occurs first) (step 1);
- working out the number of hours of leave to which subitem (4) applies (being hours of leave that a person has taken that they are entitled to on the birth or adoption of a child provided the criteria in subitem (4) are met) (step 2);
- subtracting the total number of hours calculated in step 2 from step 1 (step 3), and
- dividing the result from step 3 by 152 (step 4).

6. The number 152 is based on the maximum number of hours that a full-time employee could work over 4 weeks (being 38 hours per week), excluding reasonable additional hours. The number 152 will be used even where the ordinary full-time hours in the particular business are not 38 hours per week.

7. An employee's ordinary hours are as specified in subitem (3). In most cases the ordinary hours will be contained in the relevant industrial instrument. However, for casual

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employees, paragraph (e) provides that the ordinary hours for a casual employee are the hours the person actually worked, to a maximum of 152 hours over the 4 week period.

8. It is not the actual hours of work that form the basis for the calculation of ordinary hours, since the ordinary hours of an employee include hours of leave. However, subitem (4) operates to exclude any hours of leave whether paid or unpaid, where the entitlement to take that leave is associated with the birth or adoption of a child (subject to certain pre-requisites) and the leave extends for more than 4 weeks at the time of the count. The entitlement to take that leave may be derived from a variety of sources, including a Commonwealth, State or Territory law, industrial instrument or employment contract and it does not matter if other paid leave (e.g., annual leave) has been taken concurrently.

9. For the purposes of working out an employer's number of full-time equivalent employees, associated entities are taken to be one entity. Associated entity is defined in section 12 of the FW Act. The hours of any employee working for an associated entity must be taken into account for the purposes of this provision.

### **Example 1**

Jillian owns a furniture shop in Melbourne. She employs 17 employees and has given 4 weeks' notice of termination to one of her full-time employees on 3 March 2010 for continued under performance. Jillian's business has no associated entities.

As the dismissal will occur before 1 January 2011, the provisions in Schedule 12A will apply in defining a small business employer.

Jillian looks at her business records for the previous 4 weeks. She employs 13 full-time employees and 4 casuals.

Jillian has one full-time employee who has been working regular overtime, in excess of her ordinary hours. However, she is treated as working ordinary hours for the purposes of the small business employer test.

There is an enterprise agreement applying to all of Jillian's employees that provides for ordinary hours of 38 hours per week for full-time employees.

The 4 casual employees all work different hours. Jillian consults her records to work out the hours that each of them have actually worked in the previous 4 weeks.

The 4 casuals have worked the following hours:

Nadia: 25 hours per week each week;

Fred: 10 hours per week each week;

Marco: 20 hours per week for 2 weeks and no hours for the other 2 weeks; and

Kate: 40 hours per week each week.

Kate has worked 160 hours in the 4 week period. However, only 152 of her hours can be included in the calculation in accordance with paragraph (3)(e). Taking this into account, the total hours worked by all the casual employees is 332 hours.

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**Step 1:**

- $13 \times (4 \times 38) = 1976$  hours. This is the total number of hours over the previous 4 week period for full-time employees, ending on 3 March 2010, being the time that notice of termination was given.
- $(25 \times 4) + (10 \times 4) + (20 \times 2) + 152 = 332$  hours. This is the total number of hours for casual employees.
- $1976 + 332 = 2308$  hours.

**Steps 2 and 3:**

No employee is on leave as described in subitem (4), so proceed directly to Step 4.

**Step 4:**

$2308 \div 152 = 15.18$  being the number of full-time equivalent employees.

Jillian is therefore not a small business employer at the time she gave the employee notice of termination.

**Example 2**

Rachel who owns a restaurant dismisses an employee for continued underperformance giving 4 weeks' notice of termination on 15 June 2010. She has the same number of full-time employees that Jillian had (13) and the 4 casuals have all been working the same number of hours as in the example above. However, one of the full-time employees, Katarnya, has recently returned from 8 weeks leave following the birth of her child. Looking at her records for the previous 4 week period, Rachel confirms that Katarnya has been back at work for the last 2 weeks of the previous 4 week period.

**Step 1:**

- $13 \times (4 \times 38) = 1976$  hours. This is the total number of hours over the previous 4 week period for full time employees, ending on 15 June 2010, being the time that notice of termination was given.
- $(25 \times 4) + (10 \times 4) + (20 \times 2) + 152 = 332$  hours. This is the total number of hours for casual employees.
- $1976 + 332 = 2308$  hours.

**Step 2:**

$2 \times 38 = 76$  hours. This is because Katarnya has taken leave as described in subitem (4).

**Step 3:**

$2308 - 76 = 2232$  hours.

**Step 4:**

$2232 \div 152 = 14.68$  being the number of full-time equivalent employees.

Rachel is therefore a small business employer at the time she gave the employee notice of termination.

**Amendment 5 – Schedule 13, item 13, page 172 (line 16)**

10. New Item 14A modifies the effect of subitem 13(1) to allow for the limited preservation of protected action ballots under the WR Act after the WR Act repeal day. The amendment to subitem 13(2) is consequential to item 14A. It makes clear that item 13 is also subject to new item 14A.

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**Amendment No. 6 – Schedule 13, page 172 (after line 27)**

11. This amendment inserts new item 14A into Schedule 13 of this Bill. It enables FWA, on application by a bargaining representative for a proposed enterprise agreement, to order that industrial action authorised under the WR Act in relation to a proposed collective agreement is taken to be authorised in relation to the proposed enterprise agreement by a protected action ballot under the FW Act if certain conditions are met.
12. First, the bargaining representative for the proposed enterprise agreement that applies for the order must have been an applicant specified in the WR Act protected action ballot order in relation to a proposed collective agreement.
13. Further, the application must be made within 28 days of the WR Act repeal day. This is to ensure that bargaining representatives do not seek to indefinitely rely on WR Act ballot authorisations after the WR Act repeal day.
14. In deciding whether to make an order, FWA must be satisfied the bargaining representative first organised or engaged in industrial action in relation to the proposed collective agreement prior to the WR Act repeal day. Furthermore, industrial action must have been engaged in or organised on or after 1 March 2009. This ensures the action is relatively current.
15. FWA must also be satisfied that any industrial action taken was protected action within the meaning of the WR Act. For example, if industrial action approved by a WR Act protected action ballot was subsequently taken in support of claims for prohibited content, the action will be unprotected under the WR Act and an order under item 14A will not be available.
16. In addition, paragraph (3)(d) of item 14A ensures that an order under this item will not be available if a collective agreement covering the employees is approved by those employees prior to the WR Act repeal day. The proposed enterprise agreement must cover the employees that would have been covered by the proposed collective agreement to which the WR Act protected action ballot authorisation related.
17. FWA must also be satisfied that the applicant for the order is genuinely trying to reach agreement in relation to the proposed enterprise agreement.
18. The final requirement for an item 14A order is that FWA must be satisfied it is reasonable in all the circumstances to make the order.
19. Subitem 14A(4) makes clear that an order under this item only authorises action being taken after the WR Act repeal day by the same group of employees that were authorised to take the action under the WR Act.
20. An order under item 14A has the effect that the bargaining representative for a proposed enterprise agreement has met the requirement in subsection 459(1) of the FW Act of industrial action being authorised by a protected action ballot. The bargaining representative must still satisfy other requirements under the FW Act for the industrial action to be protected action.
21. Subitem 14A(5) has the effect of ensuring the bargaining representative must issue a fresh notice of intention to take industrial action after the order under item 14A is made.

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**Amendment 7 – Schedule 22, page 246 (after line 28)**

**Amendment 8 – Schedule 22, item 63, page 246 (line 29) to page 247 (line 24)**

**Amendment 9 – Schedule 22, page 247 (before line 25)**

22. These amendments relate to the provisions of this Bill that allow FWA to consent to an application by an organisation to alter its eligibility rules.

23. Amendment 8 will remove current item 63 of Schedule 22 to this Bill. That item will be replaced by item 63A which will be inserted by amendment 9. The effect of amendment 9 is to insert new section 158A into Schedule 1 to the WR Act. The new section will require the General Manager to consent to an application by an organisation to alter its eligibility rules to incorporate any broader eligibility rules of an equivalent State registered association where he or she is satisfied of certain matters. These matters are listed in proposed paragraphs 158A(1)(a)-(e).

24. Applications under new section 158A must not be made before 1 January 2011 or such later day as declared by the Minister (see subsection 158A(2)). These additional criteria will be prescribed by regulations made under paragraph 158A(1)(e). The delayed operation of this section will also assist in ensuring that the heavy workload of FWA is more evenly distributed over the first few years of the new institution's existence.

25. A declaration by the Minister under subsection 158A(2) would be a legislative instrument for the purposes of the *Legislative Instruments Act 2003*. However, the declaration would be exempt from the provisions of that Act concerning disallowance (see subsection 158A(3)). This exemption will ensure that organisations cannot make applications under new section 158A until all of the legislative framework associated with these provisions is in place (including any necessary regulations). The declaration is akin to a proclamation commencing provisions of legislation. Proclamations are also exempt from disallowance under the *Legislative Instruments Act 2003*.

26. Amendment 9 also provides for the date that an alteration to an organisation's eligibility rules becomes effective.

27. Amendment 7 repeals existing subsection 158(1) of Schedule 1 to the WR Act and replaces it with a new subsection. This amendment ensures that the changes to this Bill made by amendment 9 do not disturb the existing framework which allows FWA to consent to changes in the name or eligibility rules of an organisation.

**Amendment 10 – Schedule 22, item 82, page 249 (lines 18 to 21)**

**Amendment 11 – Schedule 22, item 82, page 249 (line 25)**

**Amendment 12 – Schedule 22, item 82, page 249 (line 28)**

28. These amendments relate to item 82 of Schedule 22 to this Bill which sets out the time at which a transitionally recognised association's recognition is taken to end. The amendments provide that recognition of all transitionally recognised associations will end on the fifth anniversary of the earliest day on which an organisation can make an application in accordance with section 158A (this section is inserted by amendment 9). However, if a transitionally recognised association is granted an extension or further extension to its recognition by FWA

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under clause 6 of Schedule 10 to the WR Act (these provisions are inserted by item 82A of Schedule 22 to this Bill), these amendments will ensure that the recognition of those associations does not end until the sixth or seventh anniversary respectively of the earliest day an application could have been made under section 158A.

29. These amendments ensure that state associations and federal organisations continue to have adequate time to rationalise their affairs in light of the insertion of new section 158A.

**Amendment 13 – Schedule 22, item 89, page 257 (line 23)**

30. This amendment makes a technical change to item 89 of Schedule 22 to this Bill. It replaces a reference to ‘employee organisations’ with a reference to ‘organisations of employees’.

**Amendment 14 – Schedule 22, item 89, page 258 (after line 12)**

31. This amendment alters item 89 of Schedule 22 to this Bill by amending proposed section 137B. That section sets out the factors FWA must have regard to when considering whether to make a representation order. This amendment alters the way in which FWA must apply those factors in certain circumstances.

32. This amendment provides that if the eligibility rules of a federal organisation have been altered under section 158A (inserted by amendment 9) to incorporate the broader rules of an equivalent State registered association, then a reference to an organisation in section 137B includes a reference to the equivalent State registered association. This ensures that the factors to which FWA must have regard do not operate unfairly against an organisation that has only recently expanded its eligibility rules. It ensures, for example, that an organisation that recently extended its rules resulting in members of a State registered association being eligible for membership, can rely on the conduct of its equivalent State association when seeking to show the extent to which it represented employees in the workplace group (as per paragraph 137B(1)(c)).

**Amendment 15 – Schedule 22, item 89, page 258 (after line 30)**

33. This amendment alters item 89 of Schedule 22 to this Bill by inserting new section 137F. The new section allows FWA to make an order that is to the same effect, or substantially the same effect, as a representation order made by a State industrial authority.

34. Orders under this new section can only be made if FWA if:

- a federal organisation had altered its eligibility rules under proposed section 158A (inserted by amendment 9) resulting in members of a State registered association becoming eligible to become members of the organisation (see paragraphs 137F(1)(a) and (b)); and
- immediately before the alteration took effect, a State representation order made by a State industrial authority was in effect in relation to the State association the rules of which were absorbed by the federal organisation under proposed section 158A (see paragraph 137F(1)(c)).

35. Applications for orders under this new section may be made by the organisation that altered its rules under proposed section 158A or a party to the State representation order. Orders

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will apply to each organisation that is a federal counterpart to the State registered association the rules of which have been incorporated into those of the organisation. The orders will also apply to the federal counterpart of each association of employees registered under a State or Territory industrial law to which the State representation order applied (see subsection 137F(2)).

36. This amendment will ensure that demarcations settled in State industrial relations systems cannot be reopened when a federal organisation expands its eligibility rules to incorporate any broader eligibility rules of an equivalent State registered association.

**Amendment 16 – Schedule 22, item 353, page 285 (lines 24 and 25)**

37. This amendment removes item 353 of Schedule 22 from this Bill. The item would have replaced a reference to the ‘Commission’ with a reference to ‘FWA’. The removal of this item is the result of the removal of subsection 158(1) by amendment 7.

**Amendment 17 – Schedule 22, page 286 (after line 9)**

38. This amendment inserts new item 359A into Schedule 22 of this Bill. The item replaces a reference to the ‘Commission’ with a reference to ‘FWA’ in subsection 158(5) of Schedule 1. This amendment is consequential to amendment 8.

**Amendment 18 – Schedule 23, page 315, (after item 10),**

39. This amendment inserts new items 2A-2E into Schedule 23 of this Bill.

40. The new items amend section 22 of the FW Act to enable periods to be excluded from calculation of an employee’s ‘continuous service’ by regulation – an exclusion might either be general or for particular purposes. This will enable regulations to address any areas of uncertainty that might emerge.

41. The concept of continuous service is relevant most particularly in the context of access to ‘service based’ entitlements under the NES – i.e., redundancy, notice of termination, access to parental leave and the right to request flexible work.

**Amendment 19 – Schedule 23, page 316 (after line 26)**

42. This amendment amends subsection 371(2) of the FW Act to provide that once FWA has issued a certificate under section 369, a person has 14 days (or such longer period as a court would allow) to make a general protections court application.

43. This amendment also inserts a legislative note at the end of section 371 of the FW Act that refers the reader to the case of *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298, in which the Industrial Relations Court of Australia set down principles relating to the exercise of its discretion under a similarly worded provision of the *Industrial Relations Act 1988*.

**Amendment 20 – Schedule 23, page 319 (after line 29)**

44. Amendment No inserts new items 21A – 21C.

45. Item 21A corrects an incorrect cross reference in the FW Act. The reference in paragraph 722(a) now correctly refers to Division 3 of Part 6-4.

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46. Items 21B and 21C amend subsection 779(2) of the FW Act to provide that once FWA has issued a certificate under section 777, a person has 14 days (or such longer period as a court would allow) to make an unlawful termination court application.

47. These items also insert a legislative note at the end of section 779 of the FW Act that refers the reader to the case of *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298, in which the Industrial Relations Court of Australia set down principles relating to the exercise of its discretion under a similarly worded provision of the *Industrial Relations Act 1988*.