



Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009

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Glossary

ACCI	Australian Chamber of Commerce and Industry
ACTU	Australian Council of Trade Unions
AFPC	Australian Fair Pay Commission
AFPCS	Australian Fair Pay and Conditions Standard
AHRC	Australian Human Rights Commission
AiG	Australian Industry Group
AIRC	Australian Industrial Relations Commission
AIR	Australian Industrial Registry
AMMA	Australian Mines and Metals Association
APCS	Australian Pay and Classification Scales
ASU	Australian Services Union
AWA	Australian Workplace Agreement
AWU	Australian Workers Union
BOOT	Better Off Overall Test
DEEWR	Department of Education, Employment and Workplace Relations
FMW	Federal Minimum Wage
FWA	Fair Work Australia
FWO	Fair Work Ombudsman
FW Act	Fair Work Act
IARWD	Industrial Action Related Workplace Determinations
ITEA	Individual Transitional Employment Agreement
NAPSA	Notional Agreement Preserving State Award
NDT	No Disadvantage Test
NES	National Employment Standards
NUW	National Union of Workers
OFWO	Office of the Fair Work Ombudsman
RCA	Restaurant and Catering Australia
RSRA	Recognised State-registered Associations
SDA	Shop Distributive and Allied Employees Association
Work Choices	The Workplace Relations Amendment (Work Choices) Act 2005. This Act amended the WR Act as from 2006, and the current WR Act is often referred to as 'Work Choices'.
WA	Workplace Authority
WR Act	<i>Workplace Relations Act 1996</i>

Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009

Date introduced: 19 March 2009

House: House of Representatives

Portfolio: Education, Employment and Workplace Relations

Commencement: Most of the Bill commences on the day on which Part 2-4 of the *Fair Work Act 2009*¹ commences — anticipated to be 1 July 2009. However Schedule 6, Part 3 commences immediately after commencement of Part 2-3 of the Fair Work Act — anticipated to be 1 January 2010.

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>

Purpose

The Bill would:

- repeal the *Workplace Relations Act 1996* (WR Act) (other than Schedules 1 and 10) and rename it the Fair Work (Registered Organisations) Act 2009 to reflect its remaining content
- make transitional arrangements for the movement from the old WR Act to the new federal workplace relations system as set out in the *Fair Work Act 2009* (FW Act)
- make consequential amendments to other legislation for the operation of the FW Act.

Committee consideration

The Bill has been referred to the Senate Education, Employment and Workplace Relations Committee for inquiry and report by 7 May 2009. Details of the inquiry including its terms of reference, transcripts of committee hearings of the Bill, submissions and the final report can be found at:

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1. For analysis, background and policy of the Fair Work Bill 2008, refer to the Parliamentary Library's [Bills Digest No. 81, 2008–09](#). Note that a further fair work consequential amendments bill is to be introduced to Parliament later in May 2009 which will deal with amendments to Commonwealth legislation and amendments consequential on any state referrals of power that have been completed by that time.

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http://www.aph.gov.au/Senate/committee/eet_ctte/provisions_fairwork/index.htm

Overview of proposed commencements and terminations of instruments, institutions and legislation effected by the Bill

Safety net

- NES and modern awards to take effect from 1 January 2010, with existing agreements required to meet the NES
- AFPC standards to continue as ‘transitional minimum wage instruments’ between 1 July 2009 and 1 January 2010
- Fair Work Australia's first annual minimum wage review to be completed by 30 June 2010
- Special minimum wages for junior employees and trainees are to be dealt with in the second yearly review.

Agreements and transitional instruments

- All collective and individual agreements made before FW Act to become ‘transitional instruments’ from 1 July 2009
- Rules on prohibited content and interaction for transitional instruments continue to be set by the Act under which they were made; for example, prohibited content rules in the WR Act will continue to apply to workplace agreements made between 27 March 2006 and 30 June 2009
- ITEAs can be made until 31 December 2009
- Conditional termination arrangements for individual agreements to be available from 1 July 2009
- Pre-reform agreements and NAPSAs can be extended or varied until 31 December 2009. Instruments applying to non-national system employers, for example, pre-reform agreements made under the conciliation and arbitration power, terminate on 27 March 2011. NAPSAs sunset date set for 31 December 2013, or later date set by regulation.

Bargaining and industrial action

- Protected action ballot orders, authorisations for industrial action and notifications of intention to take industrial action lapse on 1 July 2009
- Industrial action started before 1 July 2009 will no longer be protected on or after that date without an order from Fair Work Australia
- Enterprise agreements lodged between 1 July 2009 and 1 January 2010 will continue to be vetted against the NDT.

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Transfer of business

- Transmission of business before 1 July 2009 dealt with under WR Act (with some modifications), even if employees are yet to have been engaged by new employer
- Transfer of business occurring from 1 July 2009 covered by FW Act, even if employees were terminated by the old employer before that time.

Institutions

- Fair Work divisions of Federal Magistrates Court and Federal Court to operate from 1 July 2009
- WO abolished and functions assumed by OFWO from 1 July 2009
- FWA to commence from 1 July 2009 and AIRC and AIR to cease operations on 31 December 2009, with Commissioners to hold dual appointments in the interim and
- WA to operate until 31 January 2010 to finish assessing agreements made before 1 July 2009 (including ITEAs) +
- AFPC to cease on July 31, 2009.²

Position of significant interest groups

Key employer and union bodies such as the AiG and ACTU noted in their respective submissions to the Senate Education, Employment and Workplace Relations Committee's inquiry into the Bill that provision for registered organisations to appear in the Federal Court or Federal Magistrates' Court in their own right in a matter pertaining to the FW Act have not been carried over from the WR Act (sections 854 and 855) and sought to have this matter remedied.³

The AiG believes that the current system of industrial matters being distributed across a number of Federal Court judges has led to 'better outcomes for the Australian community' and raises concerns over the Bill's proposal for judges to be assigned to the Court's Fair Work Division.

The ACTU has called for the Constitution's conciliation and arbitration power (section 51(xxxv)) to continue to provide a constitutional foundation for federal industrial laws as it believes that many workers will be left without a safety net if the link is severed, as it

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2. This information supplied by DEEWR in Submission No. 18 to the Senate Standing Committee on Education, Employment and Workplace Relations, as summarised in *workplaceexpress.com.au*: 'DEEWR defends award modernisation impact on employers' 15 April 2009.
 3. AiG, Submission No. 4 and ACTU, Submission No. 14.

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may well be that the state industrial systems will not have in place adequate alternative instruments in 2011 as fall-back arrangements (when old IR agreements and transitional awards cease). The ACTU has also expressed concern with the Bill's new bargaining arrangements, claiming that the 1 July 2009 cut-off date could see unions and employers delay bargaining rounds until after 1 July. It argues for the registered organisations provisions to be included in the FW Act rather than under separate legislation.⁴

ACCI argues that the Bill is a technical piece of legislation having broader consequences than merely effecting machinery changes. It argues that many issues of complication and concern would not occur if the new industrial relations system took effect on and from 1 January 2010, as originally indicated by the Government. It argues that the Bill imposes additional costs and regulatory burdens on employers and is concerned that there has not been a cost benefit analysis of these increased costs.⁵

The NFF shares a similar concern to the ACTU over the operation of awards based on the Constitution's conciliation and arbitration power. It notes that the Bill's Schedule 20 ensures continuation of Schedule 6 of the WR Act and current transitional federal awards will continue to apply under the Bill until 27 March 2011. The NFF believes that the capacity of federally registered organisations should be extended to enable them to take on new members to give effect to coverage under the transitional award. (Note that proposed Schedule 21 does allow for ongoing application of provisions of one award based on the conciliation and arbitration power; see below under Main Provisions).

RCA raised concerns on award modernisation using its submission to warn of the cost impacts for the restaurant and catering industry of the recently made (but still inoperative) modern Hospitality Industry (General) Award.⁶ On the other hand, the SDA warned that the modernisation of certain retail awards (and NAPSA's) is likely to result in lower pay and conditions under the modern enterprise awards than under the modern Fast Food Industry Award 2010.⁷ The ASU similarly raised its concerns over the possibility of its members being seriously disadvantaged under the modern Clerks Private Sector Award, arguing that it removed entitlements for employees earning above an 'exemption rate' and this severely limits the coverage of the Award in situations where employees earn 15 per cent more than the highest rate in the modern award.⁸

The AMMA and CFMEU (construction and general division) have both criticised the Bill's proposed representation order provisions but for different reasons with the employer group arguing they don't make clear that applications for orders can be made before

4. ACTU, Submission No. 14.

5. ACCI, Submission No. 7.

6. RCA, Submission No. 11.

7. SDA, Submission No. 15.

8. ASU, Submission No. 8.

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disputes arise, while the union maintains they are too broad and will generate disagreement and litigation. AMMA also argues that the transitional bill doesn't allow for the automatic transfer of current demarcation orders to the new system and doesn't provide for employer's wishes to be considered.⁹ However the CFMEU argues that proposed section 137A (to be inserted into Schedule 1 of the WR Act which will become the Fair Work (Registered Organisations) Act) does not confine disputes to demarcation disputes between unions, allowing employers to seek orders to preference a particular union. The CFMEU therefore suggests an amendment requiring that an employer be directly affected as a consequence of a disagreement between unions over representation rights before seeking and obtaining orders which may result in a loss of representation rights for unions.¹⁰

Main provisions

Schedule 1 — Repeals

Items 1 to 3 repeal all of the WR Act except Schedules 1 and 10. Schedule 1 (which deals with registered organisations) and Schedule 10 (which deals with transitionally registered organisations) will remain part of the WR Act, and the WR Act will be renamed the *Fair Work (Registered Organisations) Act 2009*.¹¹ This repeal will occur on the day on which Part 2-4 of the *Fair Work Act 2009* commences (expected to be 1 July 2009).

Schedule 2 — Overarching Schedule about transitional matters

Schedule 2 is in three Parts: Part 1 (**items 1–6**) contains definitions relevant to the Bill, Part 2 (**items 7–10**) deals with regulation making powers in regard to transitional matters and Part 3 (**items 11–13**) provides general rules regarding conduct that occurs before repeal of the WR Act.

Items 1 to 4 are definitional provisions for the remainder of this Bill. They include the widely used phrases:

- bridging period – which is the period starting on the WR Act repeal day and ending immediately before the FW (safety net provisions) commencement day
- FW (safety net provisions) commencement day – which is the day on which Parts 2-2 (NES), 2-3 (Modern awards) and 2-6 (Minimum wages) of the FW Bill commence (expected to be 1 January 2010)
- WR Act repeal – which is the commencement of Schedule 1 to this Bill (Repeals), and

9. AMMA, Submission No. 19.

10. CFMEU, Submission No. 12.

11. See **item 3** of **Schedule 22** to this Bill and p. 38 of this Digest.

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- WR Act repeal day – which means the day on which the WR Act repeal commences (expected to be 1 July 2009).
- The WR Act – which is the WR Act as in force immediately before the WR Act repeal day (**subitem 3(1)**). This means that subject to a contrary intention, the WR Act is continued by other provisions of this Bill as it was at the time of the repeal of the WR Act. The Explanatory Memorandum explains how a contrary intention could apply.¹²

Subitem 3(3) is an important formalising provision. It gives effect to other provisions of this Bill which provide for the WR Act to continue to apply after the WR Act repeal day. For example Schedule 20 ensures that Schedule 6 of the WR Act continues.

Item 5 ensures that relevant regulations or other instruments made under the WR Act necessary for the effectual operation of the continued WR Act provisions will also continue to apply.

Item 4 provides that subject to the dictionary in **item 2**, expressions defined in the WR Act or the FW Act and used in this Bill are given the same meaning as in the WR Act or the FW Act.

Regulation making powers

Items 7–10 set out the regulation making powers about transitional matters and are drafted to give broad scope. **Item 7** provides that regulations may be made for the purpose of transferring from the WR Act regime to the FW Act regime and may have the effect of:

- modifying provisions of the FW Act or providing for the application of provisions of the FW Act to matters to which they would otherwise not apply
- providing for the application (with or without modifications) of provisions of the WR Act on and after the WR Act repeal day.

Note, subitem 7(1) uses the term ‘old WR Act’. ‘Old’ would appear not to be necessary and is not used anywhere else in the Bill.

Item 8 provides that regulations may modify the transitional Schedules in the Bill and **item 10** allows regulations to have retrospective effect.

12. Explanatory Memorandum, Fair Work (Transitional Provisions and Consequential Amendments) Bill, p.7, (hereon referred to as the Explanatory Memorandum).

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Item 9 states that any regulations made under items 7 and 8 cannot change the right of entry regime set out in the FW Act and this Bill or give inspectors additional compliance powers under Part 5.2 of the FW Act.¹³

Comment

The Senate Standing Committee for the Scrutiny of Bills (the Scrutiny of Bills Committee) raises questions regarding the regulation making power in Schedule 2, particularly in regard to **subitem 10(2)** and **items 7 and 8**.¹⁴

Subitem 10(2) provides that, despite subsection 12(2) of the *Legislative Instruments Act 2003*, regulations may be expressed to take effect before the regulations are registered under that Act. The Scrutiny of Bills Committee notes that the Explanatory Memorandum states that the regulations can ‘modify the transitional provisions in this Bill’. The Committee seeks the Minister’s advice as to the reasons for the use of the regulations for these purposes and also draws the Senators’ attention to the provision as it may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny.¹⁵

The Scrutiny of Bills Committee also draws the Senators’ attention to items 7 and 8. These are ‘Henry VIII’ clauses as they enable delegated legislation to override an earlier Act.¹⁶ As the Alert Digest notes, such provisions clearly involve a delegation of legislative power and are usually a matter of concern to the Committee.

In this case, the Committee notes that the effect of the provisions is ameliorated by item 9 in Schedule 2 which places a limitation on the power to make regulations. As the Explanatory Memorandum explains (at paragraph 18) ‘regulations made under items 7 and 8 cannot change the right of entry regime set out in the [Fair Work Act] and this Bill or give inspectors additional compliance powers’.

The Committee also notes that any regulations will be subject to scrutiny by the Senate Regulations and Ordinances Committee.

In the circumstances, the Committee makes no further comment on these provisions.¹⁷

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13. Under Part 5-2 of the FW Act, the OFWO may appoint Fair Work Inspectors with compliance powers.
 14. Senate Standing Committee for the Scrutiny of Bills, *Alert Digest*, No. 5 of 2009, 13 May 2009.
 15. *ibid*, p. 9.
 16. A ‘Henry VIII’ clause is an express provision which authorises the amendment of either the empowering legislation, or any other primary legislation, by means of delegated legislation.
 17. Scrutiny of Bills Committee, *op. cit.*, p. 10.

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Conduct that occurred before the WR Act repeal day

Item 11 is a central provision. It provides a general rule that conduct that occurred before the WR Act repeal day remains subject to the WR Act provisions. This general rule is subject to the specific rules in other Schedules to the Bill (**subitem 11(3)**).¹⁸ The Explanatory Memorandum explains that item 11 continues the WR Act (including all substantive, procedural and jurisdictional 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. For example, it continues the unfair dismissal provisions of the WR Act in relation to a dismissal that occurred before the WR Act repeal day.

Item 12 modifies the general rule in item 11. Amongst other things, **item 12** provides that on or after the WR Act repeal day, applications that could have been made to the AIRC or the Australian Industrial Registry because of item 11 are to be made only to FWA. The Explanatory Memorandum explains:

Thus an unfair dismissal application in relation to a dismissal that occurred before the WR Act repeal day is to continue before the AIRC, but an application in relation to a dismissal that occurred on or after the WR Act repeal day is to be made to FWA.¹⁹

Australian Business Industrial (ABI) sees potential difficulties with items 11 and 12. ABI is concerned that the general transitional rule which favours the transfer of matters proceeding under the WR Act which have commenced before the AIRC because of conduct which occurred prior to FW repeal day to FWA might be confusing to employers and employees and give rise to unnecessary technical errors. ABI asks whether the test for the continued operation of the WR Act— the time of the relevant ‘conduct’ — could give rise to confusion and technical complication. It proposes that the Government consider whether item 11 should be amended for greater clarity.²⁰

Schedule 3 — Continued existence of awards, workplace agreements and certain other WR Act instruments

Item 2 ensures that the following WR Act instruments (approximately dated in this Digest to assist readers) operating before WR Act repeal day (intended to be 1 July 2009) such as:

- an award (pre 2010)
- a notional agreement preserving State awards (2006)

18. For instance, the Explanatory Memorandum states that Schedule 13 to this Bill contains provisions which ensure that most industrial action processes in train at the WR Act repeal day do not continue under the WR Act. Explanatory Memorandum, p. 9.

19. Explanatory Memorandum, p. 9.

20. ABI, Submission No. 20, p. 1, 11–13.

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- a workplace agreement (2006-2009 including pre Fairness Test, Fairness Test and NDT agreements)
- a workplace determination (2006-2009)
- a preserved State agreement (2006)
- an AWA (2006-2008)
- a pre-reform certified agreement (1997-2006)
- a pre-reform AWA (1997-2006)
- an old IR agreement (certified agreements made between 1988-1996)
- a section 170MX award (1997-2006), and
- an Individual Transitional Employment Agreement (2008-2009)

continue in force as transitional instruments. These instruments are further grouped under **subitem 2(5)** as

- award-based transitional instruments or
- agreement-based transitional instruments, being either collective agreement-based transitional instruments or individual agreement-based transitional instruments.

Item 3 states that transitional instruments *cover* (in the FW Act sense) the same employees, employers and any others that they would have covered had the WR Act continued in operation. **Subitem 3(2)** ensures that a transitional instrument *applies* (in the FW Act sense) to the same employers, employees and others in respect of compliance and enforcement of its terms.

Item 4 ensures that instrument content rules (such as ‘prohibited content’ rules) applicable under the WR Act continue to apply to transitional instruments.

Item 5 ensures that instrument interaction rules such as an AWA overriding the terms of an award or certified agreement, in place before WR Act repeal continue to apply to transitional instruments.

Item 6 provides that where provisions of transitional instruments confer a power or function on the AIRC and AIR, the provisions continue to have effect after WR Act repeal day.

Where a transitional instrument terminates, **item 7** provides that any right or liability including investigation accruing to a person continues to apply.

Item 8 ensures that the provisions of certain transitional instruments such as AWAs, workplace agreements and pre-reform certified agreements (1997-2006) continue to displace prescribed conditions of employment stipulated in Commonwealth law.

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Item 9 sets out the limited circumstances in which a transitional instrument may be varied or terminated such as where the instrument requires variation as a result of award modernisation, or varied such as a result of a transfer of business process.

Item 10 allows the FWA, upon an application, to vary a transitional instrument to remove ambiguities, including remove terms which are inconsistent with the FW Act's general protections provisions.

Item 11 allows FWA to vary a transitional instrument upon a referral of terms of the instrument to FWA following an inquiry and report by AHRC under the *Human Rights and Equal Opportunity Commission Act 1986*.

Item 12 allows Divisions 5 and 6 of Part 10 of the WR Act to continue on and after WR Act repeal day allowing awards to be varied to maintain safety net entitlements or to bind additional employers.

Item 13 applies WR Act provisions (Clause 2A of Schedule 7) for the variation of pre-reform certified agreements.

Item 14 continues to apply clause 16A of Schedule 8 of the WR Act for the variation of transitional instruments that are preserved State (collective) agreements.

Items 15 and 16 allow the FW Act's termination of enterprise agreements provisions (Part 2–4, Division 7) apply to collective-based transitional instruments.

Item 17 provides for the termination of individual agreement-based transitional instruments by written agreement between the employer and employee covered by the instrument.

Item 18 allows the making of a conditional termination of an individual-based transitional instrument (eg AWA) between an employer and an employee, meaning that an employee covered by a conditional termination can participate in bargaining for an enterprise agreement. Other provisions of the clause set out processes for termination.

Item 19 provides for individual agreement-based transitional instruments to be terminated unilaterally by either the employer or employee covered by the instrument provided the instrument has passed its nominal expiry date.

Item 20 deals with sunset provisions for certain transitional instruments. **Subitem 20(1)** provides for NAPSAs to terminate on the 4th anniversary of the FW safety net commencement day, expected to be 1 January 2014. **Subitems 20(2) to 20(6)** deal with the termination of the following transitional instruments:

- 'Division 3' pre-reform certified agreements (1997-2006 made under the conciliation and arbitration power)

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- Old IR Agreements (pre 1996) and
- Section 170MX awards (1997-2006)

These will terminate on 27 March 2011 unless the instrument has passed its nominal expiry date (where applicable) and has been replaced by a State employment agreement (except where the employer becomes a national system employer (eg incorporates), in which case the instrument continues).

- **Item 21** stipulates that except for the preservation of certain redundancy arrangements under clauses 38 to 40, where a transitional instrument terminates it ceases to cover employees, employers and other persons.
- **Item 22** provides for the continued operation of existing AFPCS interaction rules as these apply to WR Act instruments during the bridging period. Subclause 22(4) defines AFPCS interaction rules to be provisions which determine that AFPCS components (eg the adult minimum wage, the 38hour week and so-on) prevail over an instrument, or, the provisions of an instrument prevail over the AFPCS.

Item 23 introduces the no detriment rule for transitional instruments. **Subitem 23(1)** provides that a term of a transitional instrument has no effect to the extent that it is detrimental to an employee, in any respect, when compared to an entitlement of the employee under the NES. The provision takes effect at the end of the bridging period.

Item 24 gives effect to certain NES standards from FW (safety net provisions) commencement day as if a reference in the NES to a modern award or enterprise agreement included a reference to a transitional instrument: NES terms include: averaging of hours of work, cashing out and taking paid annual leave, cashing out paid personal/carer's leave, evidence, requirements for paid personal/carer's leave, substitution of public holidays giving notice to terminate employment, terms specifying situations in which the redundancy pay entitlement does not apply and terms providing for school-based apprentices and trainees to be paid loadings in lieu.

Item 25 provides that where an employee is a shiftworker as defined in the WR Act, and employed under a transitional instrument, they are entitled to the shiftworker annual leave entitlement provided under clause 87 of the FW Act.

Item 26 allows FWA to resolve difficulties about the NES and transitional instruments and **item 27** ensures that transitional instruments are not affected by NES interactions until FW (safety net provisions) commencement day.

Item 28 provides that a modern award does not apply where a workplace agreement, workplace determination, preserved state agreement, AWA or pre-reform AWA applies, a modern award does not apply, however if a pre-reform certified agreement, an old IR agreement or a section 170MX award *and* a modern award applies, the agreement-based transitional instrument applies over the modern award to the extent of any consistency.

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Item 29 provides that if a modern award that covers an employee, comes into operation, then an award-based transitional instrument ceases to cover (and can never again cover) the employee. It also provides that while an award-based transitional instrument is in operation, the miscellaneous modern award will not cover the employee. Other provisions of the clause allow a modern award containing outworker terms to displace an otherwise applicable transitional instrument.

Item 30 provides that FW Act enterprise agreements or workplace determinations do not apply where a pre-reform AWA, an ITEA or AWA applies, but do apply over collective-based transitional instruments.

Item 31 provides that where an enterprise agreement or workplace determination made under the FW Act applies, an award-based transitional instrument ceases to *apply* but can continue to *cover* the employee. The award-based transitional instrument may again start to apply where the agreement or determination ceases to apply.

Item 32 provides that if a transitional instrument applies to an employee, the employee is not an award/agreement-free employee for the purposes of the FW Act.

Item 33 provides that where a transitional instrument applies, an employee's ordinary hours of work for the purposes of the FW Act are determined by the transitional instrument. Where there are no ordinary hours specified in the transitional instrument, the ordinary hours of work are the hours agreed between the employee and their employer. Where there is no such agreement and the employee's ordinary hours are not specified in the transitional instrument, a full-time employee's ordinary hours are 38 hours a week and the ordinary hours for an employee who is not a full-time employee are either the lesser of 38 hours a week or their usual weekly hours.

Item 34 allows the FW Act payment of wages provisions (Division 2 of Part 2-9) to apply from WR Act repeal day, as though the term enterprise agreement included a reference to an agreement-based transitional instrument and the term modern award included a reference to an award-based transitional instrument.

Item 35 provides that Division 3 of Part 2-9 of the FW Act (re guarantee of annual earnings) applies from FW (safety net provisions) commencement day as if references in that Division to a modern award include a reference to an award-based transitional instrument and a transitional APCS and references to an enterprise agreement include a reference to an agreement-based transitional instrument.

Item 36 stipulates that Part 3–2 of the FW Act (re dismissals) applies from WR Act repeal day if the person is covered by an award-based transitional instrument, or if an agreement-based transitional instrument applies to the person in relation to their employment.

Items 38 and 40 provides for the preservation of redundancy provisions in certain agreement-based transitional instruments where the instrument is terminated at the

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initiative of the employer and were binding on persons immediately before the WR Act repeal day. **Item 39** applies where FWA makes a decision to terminate an agreement (on or after the WR Act repeal day) and one or more redundancy provisions in the terminated instrument continue to apply to affected persons. It sets out the matters that must be included in FWA's decision.

Schedule 4 — National Employment Standards

Items 2, 3 and 4 save WR Act minimum entitlement provisions during the bridging period, specifically in respect of the AFPCS, entitlements to meal, breaks, public holidays, the application of parental leave to non-national system employees and application of WR Act notice of termination provisions.

Item 5 sets out a general rule that an employee's service with an employer before FW (safety net provisions) commencement, counts as service for the purpose of determining the employee's NES entitlements except for redundancy pay. It prevents 'double dipping' where an employee's service has been considered for an entitlement, by excluding that service in the service calculation for any similar entitlement under the NES.

Item 6 provides that where an employee has accrued paid annual leave or paid personal/carer's leave under the AFPCS, a transitional instrument or otherwise, immediately before commencement of the NES, the provisions of the NES relating to the taking of the leave (including payment for the leave) and cashing out of that leave will apply, as a minimum standard, to the leave.

Item 7 allows employees who are using or commencing use of a type of leave under the AFPCS that is covered by the NES (when the NES commences to continue) on the equivalent type of leave under the NES for the remainder of the period and balances will be adjusted in accordance with the NES.

Item 8 applies the NES community service leave provisions to an employee who is absent from work on or after the commencement of the NES, even if the period of absence began before commencement. NES standards in respect of redundancy pay and notice of termination only apply at the time of FW (safety net provisions) commencement under items 9 and 10.

Item 9 and 10 stipulates that the NES notice of termination provisions and NES redundancy pay provisions only apply to terminations of employment occurring on or after NES commencement.

Item 11 ensures that the NES transfer of employment provisions under the FW Act's definitions do not apply to transfers occurring before NES commencement.

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Item 12 protects the WR Act exclusion of recognised emergency management bodies (usually established within State Emergency Services) as bodies set up for the purpose of enabling employees to seek protection from unlawful termination.

Item 13 makes clear that there is no obligation to provide the Fair Work Information Statement to employees who were employed by the employer before the NES commences.

Item 14 allows regulations to provide for how the NES apply before NES commencement.

Schedule 5 — Modern awards (other than enterprise awards)

Item 2 requires the AIRC to complete the award modernisation process stipulated under Part 10A of the WR Act, as directed (and varied) by an award modernisation request from the minister but prohibiting a variation to a modern award after it comes into operation.

Item 3 requires FWA to terminate any award-based transitional instruments and transitional APCs (pay scales), or vary the coverage of these, where it considers these are completely replaced by a modern award made under the Part 10A. FWA can establish a decision-making process to terminate or vary these instruments.

Item 4 provides that Part 10A modernised awards are taken to be modern awards for the purposes of Part 2-3 of the FW Act as from or the day on which the FW (safety net provisions) commence or, if after that day, from the day on which the award is made, irrespective of section 49 of the FW Act.

Item 5 allows FWA, on an application or under its own initiative, to vary a modern award to correct technical problems arising to the commencement of Part 10A (prior to FW Act commencement).

Item 6 requires FWA to conduct a review of modern awards (excluding for enterprise awards) after 2 years for the purposes of ascertaining whether the modern awards objective (FW Act at s.134) is being achieved, and whether modernised awards are operating effectively. This might include, for example, whether award modernisation encourages collective bargaining or assists in applying the principle of equal remuneration for work of equal or comparable value. FWA may remedy any such deficiencies.

Item 7 allows FWA to review transitional arrangements that have been included in modern awards (review terms) as part of award modernisation, but only where the award provision so authorises.

Item 8 stipulates that Part 10A award modernisation is not intended to result in a reduction in take-home pay of employees and outworkers. The item defines take-home pay and sets out the circumstances where an employee and where an outworker may suffer a modernisation-related reduction in take-home pay (such as working in the same position and working similar hours or performing the same work). **Item 9** allows FWA to make

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orders remedying any shortfall. **Item 10** prevents take-home pay orders being made where the shortfall amount is trivial, or has been made up in other ways. **Item 11** ensures that a take-home pay order continues to have effect for so long as the modern award continues to cover the employee/s and **item 12** ensures that a take home pay order is not overridden by a less beneficial term of a modern award or enterprise agreement.

Schedule 6 — Modern enterprise awards

Item 2 defines enterprise instruments to be an enterprise award-based instrument or an enterprise preserved collective State agreement (formerly known as a NAPSA). **Item 3** defines single enterprise and part of a single enterprise.

Item 4 enables FWA on application by a person covered by the enterprise instrument, to make a modern enterprise award, subject to certain matters being taken into account including the circumstances which lead to the enterprise instrument being made (rather than an instrument of more general application).

Item 5 allows a person covered by an enterprise instrument to apply to FWA to either terminate the instrument, or to treat the application under item 4. **Item 6** stipulates that the modern awards objective and the minimum wages objective apply to the modern enterprise awards objective which includes recognition of terms tailored to reflect employment arrangements in relation to the relevant enterprise.

Item 7 provides that the terms which may be included in modern enterprise awards are the same as for modern awards generally, but include phasing in of any increase in employee entitlements as well as industry-specific redundancy schemes.

Item 8 provides that a modern enterprise award must include coverage terms which set out the enterprise or enterprises to which the modern enterprise award relates as well as the employer or employers, employees and organisations that are covered. **Subitem 8(8)** prevents a modern enterprise award from covering certain employees who either have not been covered by awards (such as managerial staff) or who perform work not traditionally subject to award regulation.

Item 9 provides that an enterprise preserved State collective agreement terminates when a modern enterprise award replacing it comes into operation. Remaining enterprise preserved State collective agreements will terminate on 31 December 2013. **Item 10** requires that FWA give persons still covered by the enterprise instrument 6 months notice prior to its 2013 termination date. **Items 11 and 12** set out to prevent employees suffering a reduction in take-home pay from employee instrument modernisation, allowing FWA to make orders to correct any such reductions. **Items 13 to 16** are similar in purpose to items 9 to 12 in Schedule 5 above. **Item 17** states how the FW Act applies to modern awards made as a result of the enterprise instrument modernisation process.

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Items 18 to 27 introduce amendments to the FW Act to reflect modern enterprise awards. **Section 12 (definitions) of the FW Act is amended** to add a reference to enterprise instrument modernisation process under the definition of award modernisation process by **item 18**. **Items 19 to 23** make further additions to the FW Act's definitions. **Item 25 inserts new subsections 8 and 9 to section 143 of the FW Act** to prevent modern awards from covering employees covered by a modern enterprise award (or enterprise instrument). **Item 26** inserts a new clause 143A which contains rules regarding the coverage terms of modern enterprise awards. These terms include the enterprise which the award relates to; specified employer and its employees, organisations, outworker entities but must exclude covering employees who have not been traditionally covered by awards due to their seniority or role; or who perform work not traditionally regulated by awards.

Item 27 inserts new Division 7 at the end of the FW Act's Part 2-3, containing the following provisions relating to modern enterprise awards. **New clause 168A** defines a modern enterprise award as an award that regulates terms and conditions of employment in a single enterprise or part of a single enterprise or one or more enterprises, if the employers carry on similar business activities under the same franchise. **New clause 168B** contains the modern enterprise awards objective (see item 6 above) and prevents FWA from making new modern enterprise awards under this Part. **New clause 168C** ensures that coverage of a modern enterprise award cannot be varied so that the award ceases to be an enterprise award. A modern enterprise award can be revoked if the award is obsolete, or if FWA, having taken into account specified factors, is satisfied that a modern award (other than the miscellaneous modern award) that is appropriate will apply to the employees instead. **New clause 168D** provides that FWA is not permitted to extend the coverage of a modern enterprise award if the effect of the variation would be that the instrument ceases to be a modern enterprise award.

Item 28 adds the requirement to publish modern enterprise award wage rates as soon as practicable to the publication of modern award wage rates following an annual wage review.

Schedule 7 — Enterprise agreements and workplace determinations made under the FW Act

Item 2 provides that the no-disadvantage test applies to enterprise agreements and variations to enterprise agreements made during the bridging period instead of the FW Act's better off overall test (BOOT).

Item 3 defines designated award, industrial instrument, reference instrument and relevant general instrument and defines the application of enterprise agreements made during the bridging period to any variations and prospective employees.

Item 4 provides that an enterprise agreement made during the bridging period must pass the no-disadvantage test. An enterprise agreement passes the no-disadvantage test if FWA is satisfied that an enterprise agreement would not result, on balance, in a reduction in the

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employees' overall terms and conditions of employment under any reference instrument relating to one or more employees.

Item 5 defines reference instrument to be any relevant general instrument (meaning an award-based transitional instrument), or where there is no such instrument, a designated award.

Under **item 6** FWA must consider whether an enterprise agreement passes the NDT at test time which is the time when the application for NDT approval was made under the FW Act.

Item 7 authorises FWA, subject to certain criteria, to determine an award to be the designated award on application from an employer before an enterprise agreement is submitted for approval. **Item 8** authorises the FWA to determine a designated award for the purposes of approving an enterprise agreement after application for approval where there is no relevant general instrument.

Item 9 allows the FWA to choose a State award as a designated award where the State award applied to employees prior to 2006.

Item 10 outlines the matters which FWA must take into account when assessing an agreement under the NDT or when determining a designated award. These may include the employees' work obligations and contacting various parties about its provisions.

Items 11 and 12 waive FW Act's requirements that an agreement does not contravene the NES and its requirements for terms settling disputes in relation to an enterprise agreement (or variation) made during the bridging period. **Item 13** modifies the application of clause 200 of the FW Act (which deals with requirements relating to outworkers) in relation to agreements or variations made during the bridging period. provides that clause 206 of the FW Act (which deals with base rates of pay under enterprise agreements) does not apply during the bridging period. **Item 14** provides that clause 206 of the FW Act (which deals with base rates of pay under enterprise agreements) does not apply during the bridging period.

Items 15 and 16 provide that FW Act paragraphs 185(3)(b) and 210(3)(b) of the FW Act (which deal with extending the period within which an application must be made to FWA for approval of an enterprise agreement or a variation of an enterprise agreement) do not apply in relation to an enterprise agreement or variation made during the period of 14 days before the end of the bridging period.

Item 17 stipulates that an enterprise agreement made during the bridging period prevails over State or Territory laws which deal with long service leave.

Item 18 provide that enterprise agreements only pass the better off overall test if FWA is satisfied that the requirements in FW Act's subclause 193(1) (non-greenfields

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agreements) or subclause 193(3) (greenfields agreements) have been satisfied in relation to the agreement and at the test time, unmodernised award covered employees (including prospective employees) would be better off overall if the enterprise agreement applied to them than if the relevant award-based transitional instrument and transitional APCS applied to them. **Item 19** makes similar provision to item 18 but in the case of variations to enterprise agreements. **Item 20** defines certain terms pertaining to items 18 and 19.

Items 21 to 26 deal with transitional provisions pertaining to workplace determinations.

Item 21 modifies the application of substitutes ‘awards together with the Australian Fair Pay and Conditions’ for ‘modern awards together with the National Employment Standards’ in subclause 262(3) of the FW Act. **Item 22** ensures that the special low-paid workplace determination requirement for an employer not to have been covered by a previous collective agreement continues to apply during the bridging period. **Item 23** ensures that the NDT applies in assessing workplace determinations made during the bridging period. **Item 24** makes a similar modification to subsection 272(4) of the FW Act as provided in item 23. **Item 25** provides that subsection 272(5) of the FW Act does not apply to workplace determinations made during the bridging period. Special protections apply to outworkers as provided above under item 13 of this Schedule. **Item 26** makes minor changes to the application of provisions under section 273 during the bridging period.

Item 27 ensures that the AFPCS prevails over an enterprise agreement or workplace agreement during the bridging period to the extent that the AFPCS provides a more favourable outcome for an employee.

Schedule 8 — Workplace agreements and workplace determinations under the WR Act

Items 2 to 8 preserve and modify various provisions of Part 8 of the WR Act that allow for the lodgment of collective agreements (and variations) with the WA until WR Act repeal day, and continue the WA’s assessment of the agreement/variation against the NDT. They provide that where a collective agreement or variation has been made but not lodged with the WA by WR Act repeal day, it must be lodged within 14 days after it is approved or in the case of a greenfields agreement, it is made. Where an agreement or variation is so lodged, the WA must consider whether the agreement or variation passes the NDT as preserved under Division 5A of Part 8 of the WR Act (and modified by items 5 and 9). Agreements/variations lodged after this time are not be considered against the NDT.

Items 10 and 11 provide that where a collective agreement has been approved to be terminated as at the WR Act repeal day but the termination has not been lodged with the WA, it may still be lodged within 14 days after the termination was approved. **Items 12 and 13** preserve the Part 8 rules in relation to unilateral terminations of workplace agreements, if a declaration to terminate the agreement has been lodged before the WR

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Act repeal day and applications for terminations of workplace agreements by the Commission made before WR Act repeal day.

Items 14 to 17 preserve certain provisions of Part 8 of the WR Act in relation to ITEAs and variations of ITEAs made before the WR Act repeal day. The preserved provisions relate to the lodgment of ITEAs and variations to ITEAs, the NDT and prohibited content. They also provide that where an ITEA made before the WR Act repeal day that operates from approval or a variation of an ITEA does not pass the NDT, the employer can lodge a variation of the ITEA to pass the NDT, subject to the same modifications as set out in relation to item 5.

Item 18 preserves various provisions of Part 8 of the WR Act in relation to a termination of an ITEA, if the termination is approved before the WR Act repeal day but not lodged by that time. **Item 19** preserve the Part 8 rules in relation to termination of ITEAs, if a declaration to terminate is lodged before the WR Act repeal day. **Item 20** preserves the Part 8 rules in relation to terminations of ITEAs by written notice given before the WR Act repeal day. **Item 21** provides that despite the repeal of Part 8 of the WR Act an ITEA may be made under the Part during the bridging period and it preserves the Part 8 rules about lodgement, the no-disadvantage test and prohibited content, subject to certain modifications. **Item 22** allows FW Act enterprise agreements and workplace determinations to be instruments under the WR Act's Part 8 for the purpose of applying the NDT to ITEAs made during the bridging period. **Item 23** allows an ITEA which has operated from approval but not subject to an NDT test to be varied to meet the NDT. **Item 24** preserves the WR Act's prohibition on duress in connection with making an ITEA. **Item 25** ensures that, during the bridging period, a prospective employer does not infringe FW Act workplace rights by refusing to employ a person who refuses to when make an ITEA.

Items 26 and 27 preserve and modify provisions of Division 7A of Part 11 of the WR Act which deal with the application of the NDT to workplace agreements that operate from lodgement where there is a transmission of business or transfer of business while the agreement is still to be assessed under the NDT. Where there is a transmission or transfer of business and one of these agreements ceases to operate because the WA determines that it does not pass the NDT, the instrument (eg workplace agreement, NAPSA, award and others) that is capable of covering the new employer and that would have covered the old employer and the transferring employees applies. If there is no such instrument, the designated award (within the meaning of Division 5A of Part 8 of the WR Act) covers the new employer and the transferring employees.

Item 30 item provides that a workplace determination made under the WR Act before the WR Act repeal day continues to be subject to the provisions of the WR Act dealing with prohibited content (except section 358 of the WR Act) after the WR Act repeal day. **Item 31** preserves provisions of the WR Act in relation to the termination of a workplace determination that is approved before the WR Act repeal day but not lodged before that day. However, a termination of a workplace determination has been approved but not

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lodged, it may still be lodged with the WA following the WR Act repeal day within 14 days after it is approved. **Item 33** preserves WR Act Part 8 rules in relation to applications for terminations of workplace determinations by the Commission made before the WR Act repeal day.

Schedule 9 — Minimum wages

Items 2 to 4 deal with FWA's first annual wage review in respect of concluding the first review by mid 2010, collecting information for the review and not obliging the FWA to determine a minimum wage for **all** classes of employee specified in the relevant provisions of the FW Act.

Item 5 provides for the continuation of APCSs, the standard federal minimum wage, special minimum wages and the default casual loading (together constituting transitional minimum wage instruments) after WR Act repeal day, as well as the obligation to continue to pay employees these minimum rates. The transitional minimum wage instruments continue until replaced by a wage provision of a modern award

Item 6 excludes transitional minimum wage instruments from covering high income employees (per the FW Act). **Item 7** allows transitional minimum wage instruments to be varied by the AFPC as part of its final wage review under the WR Act, or FWA as part of an annual wage review. **Item 10** allows FWA to vary a transitional APCS in an annual wage review while **item 11** provides that a transitional APCS ceases to cover an employee when a modern award commences to cover. **Item 12** provides that the FMW, special FMWs, the default casual loading and the guarantee of the FMW (and hours worked) cease on FW (safety net) commencement when FWA is taken to have made a transitional national minimum wage order.

Item 13 ensures that from FW (safety net) commencement, all employees are entitled to the relevant safety net wage being either the wage provision in the relevant modern award, transitional APCS or national minimum wage order (for award/agreement free employees). Where any agreement provides a lesser rate of pay, the relevant safety net wage applies (note also section 206 of the FW Act). A similar rule applies under **item 15** for enterprise agreements. **Item 14** allows employers to phase in increases to base rates effected by this Schedule, or Schedule 3.

Schedule 10 — Equal remuneration

Item 2 requires FWA to take into account the outcome of the AFPC's last wage review under the WR Act when deciding whether to make an equal remuneration order under the FW Act's Part 2–7, in the period from WR Act repeal day to the day when FWA completes its first annual wage review.

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Item 3 provides that a term of an equal remuneration order made under the FW Act prevails over a transitional instrument, an order of the AIRC made under the WR Act or a transitional APCS.

Item 4 allows FWA to vary or revoke an equal remuneration order under subsection 603(1) and (2) of the FW Act as if it were an order made under Part 2–7 of the FW Act.

Item 5 provides that equal remuneration orders made under the WR Act prevail over FW Act instruments (including a modern award, enterprise agreement, FWA order, award-based transitional instrument, agreement-based transitional instrument or an order made by the AIRC to the extent that the instrument is less beneficial than the order.

Schedule 11 — Transfer of business

Item 2 ensures that where a transmission of business commenced before WR Act repeal day, certain provisions of Part 11 and Schedule 9 of the WR Act continue to apply as modified by items 5 and 6 of this Schedule.

Item 3 provides that a new employer will remain covered by a transitional instrument until either: the instrument is terminated, the transmission period ends, as defined in Part 11 and Schedule 9 and does not apply in relation to Division 3 pre-reform certified agreements, or the instrument otherwise ceases to cover the new employer in relation to the transferring employee. **Item 3** also allows continued application of Division 6 of Part 11 of the WR Act in the case of a transitional APCS and a transferring employee.

Item 4 provides that an industry specific redundancy scheme in a modern award prevails over another redundancy provision that applies to a new employer and a transferring employee.

Item 5 retains the powers of the AIRC over transmissions of business in respect of collective instruments operating under the WR Act, and to make orders on these, where necessary, before the WR Act repeal day.

Item 7 provides for the application of the transfer of business provisions in Part 2-8 of the FW Act, following WR Act repeal day, in relation to transferring employees covered by transitional instruments and makes clear that Part 2-8 applies whether the transferring employee's employment was terminated by the old employer, or the transferring employee was employed by the new employer, before, on or after the WR Act repeal day.

Item 8 modifies the application of Part 2-8 to make clear that the definition of transferable instrument (FW Act at subsection 312(1)) also covers transitional instruments.

Item 9 provides that a preserved redundancy provision (defined in Schedule 3) applies to a new employer and the transferring employee after the time the employee becomes employed by the new employer and applies regardless of whether the transferring

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employee's employment was terminated by the old employer, or whether the transferring employee was employed by the new employer, before, on or after the WR Act repeal day. Where a modern award provides an industry-specific redundancy scheme, or is superior to the preserved provision, the modern award provision applies.

Items 10 to 12 create notification obligations with FWA for new employers in respect of transferred preserved redundancy provisions.

Item 13 provides for the transfer of entitlements under the AFPCS during the bridging period and ensures that AFPCS entitlements may transfer regardless of whether the transferring employee was terminated by the old employer, or was employed by the new employer before, on or after the WR Act repeal day.

Schedule 12—General Protections

Items 2 and 3 ensure that the general protections provisions in Part 3-1 of the FW Act provide employees protection from undue influence over the cashing out of or taking leave, or averaging of hours, from 1 July 2009 by providing that during the bridging period, a reference in that Part to the NES is taken to include a reference to the AFPCS and a reference to a modern award or an enterprise agreement is taken to include a reference to an award-based transitional instrument or an agreement-based transitional instrument respectively.

Schedule 13—Bargaining and Industrial Action

Item 2 provides that an employee covered by an individual agreement-based transitional instrument can only be taken to be an employee that will be covered by a replacement enterprise agreement if the nominal expiry date of the transitional instrument has passed or a conditional termination of the instrument has been made. The effect of the provisions, inter alia, renders an instrument-covered employee ineligible to vote for an enterprise agreement. However an employer is still required to give an employee a notice of employee representational rights under clause 173 of the FW Act.

Item 3 provides that where a collective agreement based transitional instrument applies to an employee, an application for a bargaining order under FW Act section 229, in respect to a proposed enterprise agreement, may only be made if it is more than 90 days before the nominal expiry date of the transitional instrument, or after an employer has agreed to bargain or has initiated bargaining.

Item 4 applies section 417 and item 14 of the table in subsection 539(2) of the FW Act after the WR Act repeal day in relation to agreement-based transitional instruments, preventing employee who is covered by such an instrument from organising or engaging in industrial action until after the nominal expiry date of the instrument has passed, (with

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the exception of individual agreement employees who have obtained a conditional termination of that agreement).

Item 5 requires the AIRC or Court to consider applications made under WR Act sections 496 and 497 (re orders and injunctions to stop industrial action) but not finally dealt with as at the WR Act repeal day, in accordance with the WR Act. **Item 6** ensures that any orders made or injunctions granted under those provisions continue in operation after the WR Act repeal day.

Item 7 applies the civil remedy provisions of the FW Act to a breach of an order under section 496 of the WR Act that occurs after the WR Act repeal day.

Item 8 ensures that if an order terminating a bargaining period is in force before the WR Act repeal day, then FWA may make an IARWD in relation to that proposed collective agreement in accordance with clauses 266, 267 and 268 of the FW Act.

Item 9 prevents the AIRC from continuing to hear an application for suspension or termination of a bargaining period made before WR Act repeal day.

Item 10 renders an order suspending or terminating a bargaining period under Division 2 of Part 9 of the WR Act of no effect after the WR Act repeal day, other than as referred to in item 8. Similarly a notice of intention to take industrial action is of no effect after WR Act repeal day.

Items 12 and 13 provide that the AIRC must not, on or after the WR Act repeal day, deal with any application, appeal or review relating to a ballot order under subsection 451(1) of the WR Act. Any authorisation under such an order, is of no effect after the WR Act repeal day. **Item 14** continues in operation section 476, subsections 477(1) to (6) and section 479 of the WR Act in relation to ballots completed before the WR Act repeal day so as to give effect to ballot outcomes. **Items 15 and 16** deal with liability for the costs of ballots up to and after WR Act repeal day and require record-keeping documents pertaining to ballots to be kept.

Item 17 provides that if employees are to be covered by a proposed enterprise agreement but are covered by one of the agreement-based transitional instruments, then an application for a protected action ballot order must not be made under subclause 438(1) of the FW Act earlier than 30 days before the latest nominal expiry date of the transitional instrument.

Item 18 allows FWA to take into account conduct by a bargaining representative (seeking to conclude a collective agreement under the WR Act) as to whether it is reasonable in the circumstances to make a bargaining order or scope order in relation to a FW Act enterprise agreement.

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Item 19 provides that Division 9 of Part 9 of the WR Act (prohibiting ‘strike’ pay) continues to apply in relation to industrial action engaged in before the WR Act repeal day and also applies in relation to a period of industrial action that bridges the commencement of Division 9 of Part 3-3 of the FW Act, and also provides that Part 3-1 (General Protections) has no operation to the extent that Division 9 of Part 9 of the WR Act has operation.

Item 20 deem FW Act strike pay reference to a modern award (Part 3-3 Division9) to include a reference to an award-based transitional instrument. Similarly an enterprise agreement is deemed to include a reference to an agreement-based transitional instrument.

Schedule 14—Transitional arrangements for right of entry

The right of union officials to enter workplaces to inspect conditions, standards and documents, or talk to employees for purposes of information-gathering or recruitment, is set out in Part 3-4, **sections 478 – 521** of the FW Act and in Part 15, **sections 736 – 777** of the WR Act. The two regimes are similar in many respects with the FW Act retaining much of the right of entry regime as introduced by WorkChoices.²¹

The transitional arrangements for right of entry set out in **Schedule 14** of the Bill include the following:

- existing entry permits and other right of entry instruments issued under the WR Act are deemed to be instruments issued under the FW Act and subject to terms and conditions (including expiry date) like those to which it was subject under the WR Act (**item 1**)
- entry notices and exemption certificates given before the WR Act repeal day have effect after the repeal as if given under the FW Act (**item 2**)
- entry onto premises to investigate a suspected breach of the FW Act or a fair work instrument under subsection 481(1) of the FW Act is to also include entry to investigate a suspected breach of the WR Act or WR Act instruments or transitional instruments²² (**item 3**)
- suspension or revocation of entry permits under section 510 of the FW Act is to be interpreted as to include references to the equivalent provisions in the WR Act (**item 6**). This is to ensure that relevant conduct that occurred under the WR Act can continue to be considered under section 510 of the FW Act.

21. Although the FW Act does expand union rights in two significant respects: namely to allow union access to non-union employee records in certain circumstances; and to remove the prohibition on union right of entry for discussions with employees in workplaces where all employees are either on AWAs or bound by non-union collective agreements.

22. Transitional instruments are defined in item 2 of Schedule 3 of the Bill.

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- **item 7** addresses the bridging period after the repeal of the WR Act in which both WR Act institutions and FWA will deal with right of entry matters. Subitems 7(3) and 7(4) displace the operation of item 11 of Schedule 2 as far as it could relate to disputes about the operation of the right of entry provisions in Part 15 of the WR Act.²³ Such disputes may only be dealt with by FWA under section 505 of the FW Act. **Subitem 7(4)** gives FWA the power to deal with disputes about the operation of Part 15 of the WR Act in the same manner as it deals with disputes about the operation of Part 3-4 of the FW Act.
- **item 5** provides that a conscientious objection certificate endorsed by the Registrar under subsection 762(2) of the WR Act and in force immediately before the repeal of that Act remains valid after the repeal of the WR Act and will have the same effect as one issued under subclause 485(3) of the FW Act.

Comment

Note that **item 5** does not appear to fully reflect late amendments made to the Fair Work Bill that removed conscientious objection provisions relating to right of entry. Subclause 485(3) was removed from the Bill through Senate amendments proposed by Senator Bob Brown.

The AiG notes that **item 6** is particularly important to ensure that conduct that occurred under the WR Act can be considered under section 510 of the FW Act in respect of the revocation or suspension of an entry permit.²⁴

Schedule 15 — Stand down

Under subsection 524(1) of the FW Act an employer may stand down an employee in certain circumstances.²⁵ Subclause 524(2) provides that these statutory provisions are subject to any relevant enterprise agreement or employment contract stand down provisions.

Schedule 15 deals with the interaction between these stand down provisions under the FW Act, and stand down provisions under a transitional instrument. **Item 2 in Schedule 15** provides that arrangements for stand downs under transitional instruments are treated in the same way as for enterprise agreements under subsection 524(2) of the FW Act—meaning that a stand down provision in a transitional instrument generally continues to apply from and after the WR Act repeal day. Where there is no stand down provision in

23. For an explanation of item 11 Schedule 2 see above at p. 12 of the Digest.

24. AiG, Submission No. 4, p. 28.

25. For example during a period in which the employee cannot usefully be employed because of industrial action (other than such action organised or engaged in by the employer).

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the transitional instrument then the stand down provisions in subsection 524(1) of the FW Act would apply.

Comment

Master Builders supports the default stand down provision under subsection 524(1) of the FW Act applying where a transitional instrument does not deal with a circumstance allowing stand down under the FW Act, or does not deal with stand down at all.²⁶

Schedule 16 — Compliance

Like the equivalent Part 4–1 of the FW Act, the enforcement and compliance provisions of the Bill have been consolidated into this one Schedule.

Items 2 to 8 and **items 10 to 15** set out civil remedy provisions for specified contraventions of this Bill, and provisions of the WR Act that are preserved by this Bill. They include for example offences for contravention of the terms of transitional instruments; contravention of take-home pay orders; and contravention of minimum entitlement obligations. **Item 16(1)(a)** states that these provisions are to apply as if they were provisions of the FW Act.

Item 9 provides that Subdivision C of Division 11 of Part 8 of the WR Act²⁷ continues to apply after WR Act repeal day in relation to certain contraventions of provisions of the WR Act that are preserved by Schedule 8 to this Bill. The effect is that the Federal Court and Federal Magistrates Court will retain powers under the WR Act after its repeal in relation to the contraventions specified in this item in addition to the powers under Part 4–1 of the FW Act.²⁸

Item 16 is a central provision and has the effect of applying Part 4–1 of the FW Act to the civil remedy provisions in the Bill. The table in item 16 sets out the standing, jurisdiction and maximum penalties for all civil remedy provisions in the Bill. Proceedings in relation to civil remedy provisions in this Schedule are subject to rules regarding standing, jurisdiction and maximum penalties set out in this table as if these rules were included as part of the table in subsection 539(2) of the FW Act (**item (16)(1)(b)**). The Explanatory Memorandum gives examples of how Schedule 16 would effectively be incorporated into Part 4–1 of the FW Act.²⁹

Item 17 provides that the Federal Court and the Federal Magistrates Court cannot order an injunction in relation to contravention, or a proposed contravention of a transitional

26. Master Builders Australia, Submission No. 5, p. 27.

27. Subdivision C sets out rules dealing with contravention of civil penalty provisions.

28. Explanatory Memorandum, p. 93.

29. *ibid.*

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instrument, a continuing Schedule 6 instrument or certain provisions of the WR Act as preserved by this Bill.

AiG submits that **item 17** be amended to prevent the Federal Court and the Federal Magistrates Court ordering an injunction in relation to, not only the contravention or proposed contravention of a transitional instrument, but also in respect of an employee's entitlement to the benefit of a transitional instrument.³⁰

Schedule 17 — Amendments relating to the Fair Work Divisions of the Federal Court and the Federal Magistrates Court

Schedule 17 proposes amendments to the *Federal Court of Australia Act 1976* and the *Federal Magistrates Act 1999* to establish new Fair Work Divisions within the Federal Court and the Federal Magistrates Court. The Explanatory Memorandum states that the new Divisions will operate from 1 July 2009 in relation to matters arising under the Bill, the provisions of the WR Act as continued by the Bill, the *Fair Work (Registered Organisations) Act 2009* and the FW Act. **Items 3, 6, 7, 12 and 13** are the most relevant amendments.

Item 6 inserts **proposed section 13** into the Federal Court Act and provides that the Federal Court comprises two Divisions, a General Division and a Fair Work Division. The Fair Work Division will hear and determine matters that are required by any other Act to be heard and determined in the Fair Work Division and also matters incidental to this jurisdiction (**proposed subsection 13(3)**). The General Division will hear all other matters (**proposed subsection 13(4)**).

Item 3 inserts **proposed section 6A** and provides that the Governor-General may assign a Judge to a particular Division of the Federal Court as part of their initial commission to the Court, or at a later time with the consent of the Judge. Note that existing Judges are taken not to be assigned to the Divisions and therefore will be able to hear and determine matters in both Divisions, unless they consent to being assigned to a particular Division after commencement (**subitem 19(2)**).

Item 7 inserts **proposed subsections 15(1A) to 15(1D)** that deal with the exercise of powers of the two Divisions. Amongst other things it provides that in general, judges assigned to a specific Division may only exercise the powers of the Court in that Division.³¹

30. AiG, Submission No.4, p. 29.

31. However the Chief Justice may arrange for a Justice assigned to a particular Division to deal with a matter in the other Division (**proposed subsection 15(1B)**).

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Items 12 and 13 propose equivalent amendments to the Federal Magistrates Court Act in relation setting up a General Division and a Fair Work Division and the assignment of magistrates to those Divisions.

Items 9, 14 and 15 deal with costs and confirm the rule in section 570 of the FW Act that costs are not normally ordered in workplace relations matters.

Item 18 amends Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act). Its effect is to provide that decisions made under the FW Act, the *Fair Work (Registered Organisations) Act 2009* and this Bill are not subject to administrative review under the ADJR Act. The Explanatory Memorandum states this is in keeping with the current arrangement that decisions under the WR Act and the *Building and Construction Industry Improvement Act 2005* are not reviewable under the ADJR Act.

Items 19 and 20 are application provisions. The proposed amendments setting up the new Divisions in the Federal Court and Federal Magistrates Court are to apply to all proceedings on foot immediately prior to commencement and proceedings commenced after that time (**items 19 and 20**). **Subitems 19(2) and 20(2)** clarify that Judges or Magistrates currently appointed will continue to be able to exercise jurisdiction in both the General Division and the Fair Work Division of their respective courts.

Items 21 to 27 deal with jurisdiction of the Federal Court and Federal Magistrates Court. **Item 21** confers original jurisdiction on the Federal Court in relation to any *civil* or *criminal* matter arising under this Bill or the WR Act as continued in operation by this Bill. **Item 22** sets out circumstances where this jurisdiction is to be exercised by the Fair Work Division. **Item 25** confers jurisdiction on the Federal Magistrates Court in relation to all *civil matters* arising under this Bill or the WR Act as continued in operation by this Bill. **Item 26** sets out circumstances where this jurisdiction is to be exercised by the Fair Work Division of that Court.

Comment

AiG does not support the approach of assigning Judges to a specific Division, noting that the current approach of having a large number of Federal Court Judges dealing with industrial matters has led to much better outcomes for the Australian community than the previous approach of having a small number of Judges dealing with all industrial relations matters via the Industrial Relations Court of Australia. Their submission to the Senate inquiry states that there was widespread concern amongst employers with the structures and outcomes of that Court and it would be a retrograde step to allow a similar structure to be implemented whereby a small number of Judges handle all of the industrial relations cases. AiG therefore recommends that item 7 should be amended with the effect that all

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Federal Court Judges are taken to not be assigned to a particular Division and are able to hear and determine matters in both Divisions of the Court.³²

Announcement of restructure of Federal Courts

On 5 May 2009, the Attorney-General, the Hon Robert McClelland, announced that the Rudd Government plans a restructure of Federal Courts involving a merger of the Federal Magistrates court into the Family Court and Federal Court.³³

This announcement would appear to have some impact on the proposals in the Bill regarding the creation of the new Fair Work Divisions.

In relation to the structure of the Federal Court, the Attorney-General's fact sheet states:

- The Federal Court will be the single court dealing with all general federal law matters:
- The restructured Federal Court will have two tiers:
 - Appeals and other complex work will generally be heard in the first tier, with shorter less complex matters redirected to the second tier
 - Existing judges of the Federal Court will operate in the first tier
 - Federal magistrates will operate in the second tier
- Upper and lower level Fair Work Divisions, which will hear matters under the Government's new workplace relations system, will be maintained and provide a one stop shop for employers and employees
- Federal Magistrates appointed to the Federal Court will have expertise in general federal law matters and will continue to be named magistrates.³⁴

Schedule 18 — Institutions

The FW Act in Part 5.1 provides for the establishment of FWA as an independent statutory agency, replacing five existing agencies (the AIRC, the AIR, the AFPC, the FPC Secretariat and the Workplace Authority).³⁵ **Schedule 18** of the Bill deals with transitional arrangements affecting this transfer.

32. AiG, Submission No. 4, p. 30.

33. Robert McClelland, 'Rudd Government to reform Federal Courts', *Media Release* 5 May 2009.

34. *ibid.*

35. See the Fair Work Bill 2008, [Bills Digest No. 81, 2008–09](#), pp.71–84.

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Initial appointment of FWA Members

Item 1 of Schedule 18 provides that the President of the AIRC is taken to be appointed as the President of FWA from commencement of Part 5-1 of the FW Act which establishes FWA. All other Presidential Members and substantive Commissioners of the AIRC are taken to be appointed as Deputy Presidents and Commissioners of FWA respectively, by subsequent proclamation. These initial members of FWA would hold dual appointments as members of the AIRC until it is abolished (**subitem 1(3)**).

Item 2 provides that the terms and conditions of these initial members of FWA continue to be governed by the WR Act, and this will continue to apply after WR Act repeal day. **Item 4** preserves the seniority of members of the AIRC under section 65 of the WR Act.

Item 5 permits the President of FWA to make procedural rules prior to the appointment of any other FWA Members notwithstanding the consultation normally required in subsection 609(1) of the FW Act. **Item 6** enables the President of the AIRC to give directions to a person who holds concurrent appointments to both the AIRC and FWA as to the performance of his or her functions as a member of the AIRC. Such directions are not legislative instruments (**subitem 6(1)**).

WR Act bodies and offices cessation dates

Item 7 sets out the timing for when existing agencies under the WR Act will cease to exist. These dates are subject to change by Ministerial declaration.

- The AIRC and the Australian Industrial Registry will cease on 31 December 2009. The Department of Education, Employment and Workplace Relations (DEEWR) submission to the Senate inquiry states that until this date the AIRC will complete matters and processes commenced under the WR Act, including award modernisation and existing unfair dismissal applications.³⁶
- The Workplace Authority will continue to operate until 31 January 2010. The DEEWR submission states this is in order to finish assessing collective agreements made before 1 July 2009 against the current no-disadvantage test and to process ITEAs which can be made until 31 December 2009 under saved provisions of the WR Act.³⁷
- The Australian Fair Pay Commission (AFPC) and its Secretariat will cease to exist on 31 July 2009. The DEEWR submission states this will allow the AFPC to complete its final wage review. The functions of the AFPC will then be assumed by a specialist minimum wages panel within FWA.³⁸

36. DEEWR Submission No. 18, p.16.

37. *ibid.*

38. *ibid.*

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The note following **subitem 7(1)** confirms that FWA will take over some of the work of WR Act bodies and offices before their cessation times.

Item 8 sets out the obligations on office holders of the various WR Act institutions regarding the transfer of assets on WR Act repeal day. Asset transfer rules will also apply to the transfer of records or of other information (**subitem 8(4)**). These asset rules can be changed by Ministerial determination (**subitem 8(2)**).

Item 10 would allow the General Manager of FWA to enter into arrangements with, and provide assistance to, the Australian Industrial Registry, Workplace Authority and the AFPC Secretariat in the period between WR Act repeal day and the cessation dates for the particular body or office.

Item 11 provides that after the cessation time for a WR Act body or office, the powers, functions and duties are to be exercised and performed by FWA or any other body as determined by the Minister in writing. Such a determination is not a legislative instrument (**subitem 11(4)**).

Transitional role for Fair Work Ombudsman and Inspectors

As the DEEWR submission states, from 1 July 2009 the functions of the Workplace Ombudsman will be taken over by the Fair Work Ombudsman and the Workplace Ombudsman will be abolished. **Items 12 to 14** confirm these arrangements. **Item 12** states that there is no continued role for the Workplace Ombudsman or workplace inspectors once the WR Act is repealed.

Items 13 and 14 set out the role of the FWO and Fair Work Inspectors (FW inspectors) in relation to conduct that occurred before the WR Act repeal day or in relation to instruments or provisions of the WR Act that are saved by this Bill. In particular:

- **subitem 13(1)** would give FW inspectors standing to bring or continue proceedings in relation to breaches of the WR Act under the WR Act notwithstanding its repeal
- **subitem 13(2)** and **item 14** provide that from the WR Act repeal day, Part 5-2 of the FW Act applies to conduct that occurred before or after the WR Act repeal day. This means that FW inspectors are able to exercise the compliance powers contained in Part 5-2 of the FW Act and the Office of the FWO is able to perform its functions under Part 5-2 of the FW Act in relation to conduct that occurred before or after the WR Act repeal day.³⁹

39. Explanatory Memorandum, p. 109.

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Part 4 – Miscellaneous

Items 17 to 20 deal with various reporting obligations and make provision to cover the transitional periods when FW Act institutions commence operation and WR Act institutions cease to exist.

Several provisions in this Schedule of the Bill dealing with appointment of FWA members also replicate provisions contained in Schedule 1 of the FW Act.⁴⁰ **Item 22** would repeal Schedule 1 of the FW Act upon commencement of this Bill.

Comment on Schedule 18

Professor Andrew Stewart supports the decision to allow some agencies that will ultimately be replaced by the new FWA to continue in operation while selected tasks are completed—such as the approval of ITEAs by the Workplace Authority, and the finalisation of award modernisation by the AIRC.⁴¹

AiG support of the appointment of all existing members of the AIRC to Fair Work Australia⁴² but argues the cessation time for the Workplace Authority would appear to be potentially problematic. Their submission to the Senate inquiry notes that under the Bill, the Workplace Authority has the role of approving ITEAs lodged during the bridging period and that a cessation time of 31 January 2010 may be a little premature given that a large number of ITEAs are likely to be made during the bridging period. It may be more efficient and less costly to allow the Workplace Authority to operate until, the end of February or March 2010 instead of transferring the task of approving the remaining ITEAs to FWA.⁴³

Schedule 19 — Dealing with disputes

Item 1 provides for the continued application of the WR Act after its repeal for the purposes of dealing with certain disputes in relation to matters arising under:

- a transitional instrument
- the Australian Fair Pay Commissions Standard, other than in relation to wages

40. Specifically items 1, 2, 4, 5, 8 and 10 that deal with the initial appointment of all full time AIRC Members to FWA and the preservation of their terms and conditions under the WR Act.

41. Professor Andrew Stewart, Submission No. 1, p. 2.

42. AiG, Submission No. 4, p. 31.

43. *ibid*, although as the submission notes, item 7 would allow the Minister to determine that a WR Body ceases to exist on an earlier or later date than that set out in the Bill.

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- minimum entitlements set out in Part 12 of the WR Act (e.g. notice of termination and public holidays) until the NES commences on 1 January 2010.

Subitem 2(3) provides that where *an application* has been made to the AIRC in relation to the dispute *before the WR Act repeal day* and the AIRC is dealing with, or has dealt with, the dispute the AIRC will continue to deal with that matter.

However, *on and after the WR Act repeal day*, *an application* in relation to a dispute that could have been made to the AIRC may be made only to FWA. FWA will exercise the same powers that the AIRC could have exercised under the WR Act in relation to the dispute (**subitem 2(1)**). The Explanatory Memorandum provides examples.⁴⁴

Schedule 20 — WR Act transitional awards etc.

Schedule 6 of the WR Act was inserted by the Work Choices amendments in 2006.⁴⁵ Its purpose was to provide transitional arrangements for (non-corporate) employers under federal awards to remain respondent to those awards for a transitional period of five years.

The purpose of **Schedule 20** of the Bill is to provide for the continued operation of Schedule 6 after the repeal of the WR Act.

Item 1 provides for the continued operation of Schedule 6 to the WR Act on and after the WR Act repeal day. It states:

- Schedule 6 continues to apply as *continued Schedule 6*.
- Transitional awards and common rules continue as *continuing Schedule 6 instruments*.

Item 2 provides that references to the AIRC in continued Schedule 6 are taken to be references to FWA.

Item 3 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 (section 19).

Item 4 incorporate protected action ballots provisions from the FW Act into continuing Schedule 6.

Schedule 21 — Clothing Trades Award 1999

The Schedule provides that the outworker terms of the Clothing Trades Award 1999 is always taken to have been made under Part VI of the WR Act (ie pertaining to the

44. Explanatory Memorandum, pp. 111–112.

45. Note Schedule 6 was formerly Schedule 13 and was inserted by Act No 153 of 2005 Schedule 1 item 359. It commenced on 27 March 2006.

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Constitution's Conciliation and Arbitration power (s.51(35)) and those terms are always taken to have been terms about allowable award matters under section 513 of the WR Act (following amendments to the WR Act by the *Workplace Relations Amendment (Work Choices) Act 2005*).

Schedule 22—Registered organisations

A new Act—*Fair Work (Registered Organisations) Act 2009*

Schedule 22 makes amendments to Schedules 1 and 10 to the WR Act and renames them the *Fair Work (Registered Organisations) Act 2009* (FW (RO) Act). The new Act contains provisions dealing with registered organisations and State-registered associations.

Schedule 1 to the WR Act which deals with the registration and regulation of trade unions and employer associations (ie 'organisations') will become the main body of the FW (RO) Act.

Schedule 10 to the WR Act, which deals with transitionally registered associations⁴⁶ will become Schedule 1 to the FW (RO) Act and transitionally registered associations will become transitionally recognised associations.

A new Schedule 2 to the FW (RO) Act will deal with recognised State-registered associations.

There is considerable overlap between the FW Act and the proposed FW (RO) Act and the two pieces of legislation, rely on many uniform concepts and approaches. Many of the amendments in Schedule 22 are therefore consequential reflecting the repeal of the WR Act and the creation of the new industrial system created under the FW Act.

Item 1 changes the long title of the Act to be 'An Act relating to registered organisations, and for other purposes'.

Item 2 repeals the heading of Chapter 1 of Schedule 1 of the WR Act and substitutes a new heading for Chapter 1 of the FW (RO) Act. **Items 3 to 6** repeal headings and provisions that will be redundant after the amendments to Schedule 1 to the WR Act.

Item 7 would insert **proposed section 5B**, which gives effect to Schedule 1 to the FW (RO) Act. Schedule 1 of the FW (RO) Act will deal with *transitionally recognised associations*.

46. Schedule 10 was part of the Work Choices amendments. Formerly Schedule 17 it was inserted and renumbered by Act No. 153 of 2005 and commenced 27 March 2006. Its purpose was to allow a state-registered association to apply for transitional registration.

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Clause 6 of Schedule 1 to the WR Act is a definitions section. **Items 8 to 34** would amend this definitions provision to reflect the new workplace relations framework created by the FW Act. For example it would:

- insert definitions of applies, covers, Deputy President, enterprise agreement, Fair Work Act, FWA, FWA Member, General Manager, modern award, protected industrial action, this Act
- repeal the definitions of award, collective agreement, Commission, Deputy Industrial Registrar, Industrial Registrar, Industrial Registry, Presidential Member, Registrar, registry, Registry official, this Schedule, workplace inspector, Workplace Relations Act, and
- substitute new definitions of industrial action, prescribed and State award.

Item 45 repeals and replaces **section 338** of Schedule 1 to the WR Act, to confer jurisdiction on the Federal Court for any matter (civil and criminal) arising under the FW(RO) Act. **Item 46** inserts **new section 339A** which lists the circumstances in which the jurisdiction conferred on the Federal Court under the FW(RO) Act must be exercised in the Fair Work Division.

Item 49 inserts **new section 343A** in Chapter 11 of the FW(RO) Act, which allows the General Manager of FWA to delegate certain of his or her powers or functions. **Subsection 343A(2)** sets out the functions and powers of the General Manager that cannot be delegated and **subsection 343A(3)** sets out the functions and powers of the General Manager that can only be delegated to an SES employee or equivalent.

Item 50 inserts **new section 351A**, which allows the Minister to intervene on behalf of the Commonwealth in proceedings arising under the FW(RO) Act if the Minister believes it is in the public interest to do so. This replicates provisions that appeared in Part 20 of the WR Act that are to be repealed by Item 3 of Schedule 1 (Repeals) to this Bill.

Item 52 renumbers Schedule 10 to the WR Act as Schedule 1 to the FW (RO) Act.

Miscellaneous consequential amendments (Parts 4 to 8)

Parts 4 to 8 of Schedule 22 contain miscellaneous consequential amendments to Schedules 1 and 10 of the WR Act. They include replacing multiple references to:

- ‘the Workplace Relations Act 1996’ (**Part 5**)
- ‘the Commission’ (**Part 6**), and
- the ‘Registrar’ and the ‘Industrial Registry’ (**Part 7**).

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State and federal organisations (Part 2)

Part 2 (items 54–84) of Schedule 22 of the Bill amends Schedule 1 to the WR Act to provide amongst other things:

- an ongoing period of transitional recognition of State-registered associations, and
- to create a new Schedule (Schedule 2 to the FW (RO) Act) dealing with recognised State-registered associations (RSRAs).

Transitional recognition of State-registered associations

Item 54 inserts **new section 5C**. It gives effect to Schedule 2 to the FW(RO) Act. Schedule 2 (inserted by **item 84**) is about recognised State registered associations.

Items 55 to **58** amend section 6 of Schedule 1 by inserting new definitions of federal counterpart, recognised State-registered association and transitionally recognised association, and repealing the definition of transitionally registered association.

Section 19 of Schedule 1 to the WR Act sets out the criteria for registration as an organisation in the federal system. **Item 59** amends section 19 by adding **new subsection (5)**. The new subsection will require FWA to **reject** an application for registration as an organisation by an association registered under the law of a State or Territory if that association has a federal counterpart. A federal counterpart, is defined as a federally registered organisation that has a branch in that State that has substantially the same officers and eligibility rules (**item 55**). A federal counterpart also includes an organisation of which the association has purported to function as a branch.

Several items between **item 60** and **item 83** omit references in Schedule 10 to ‘registered’ and ‘registration’ in respect of transitionally registered associations and substitute references to ‘recognised’ and ‘recognition’. These amendments reflect the name change from ‘transitionally registered association’ to ‘transitionally recognised association’ throughout the FW (RO) Act. **Item 65** is consequential to this name change, repealing the definition of transitionally registered association in clause 1 of Schedule 10 to the WR Act.

Item 62 inserts Subdivision BA (**new sections 154A** and **154B**) which deals with branches of organisations. **New section 154A** allows organisations to make provision in their rules for the autonomy of a branch in matters affecting only the members of the branch and for State matters. **New section 154B** allows an organisation to make provision in its rules for the fund of a branch that will be managed and controlled through the rules of the branch. Subsection 154B(2) lists the items that may make up the branch fund.

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Comment

The effect of these changes, as well as Clause 6 of Schedule 10, will be to bolster recognition of the federally registered entity under the FW system, in effect addressing long standing issues of federal organisations vis a vis their state registered branches, i.e. of the *Moore v Doyle* variety.⁴⁷ However, it is not clear whether the provisions in themselves will remedy (or are capable of remedying) *Moore v Doyle* issues of, in particular, registration of federal and state branches of unions.

Section 158 of Schedule 1 deals with alteration of the eligibility rules of organisations. **Item 63** repeals and replaces **subsection 158(5)**. The effect of the new subsection is to give FWA a further power to authorise an amendment to an organisation's eligibility rules in certain circumstances including where satisfied:

- the alteration will not extend the eligibility rules of the organisation beyond those of its counterpart State association;
- the alteration will not apply outside the limits of the State or Territory in which the association is registered; and
- the State association has been actively representing the members who are covered by the rules relevant to the alteration.

The Explanatory Memorandum states this extended discretion is intended to allow an organisation to expand State eligibility rules to pick up the coverage of its counterpart State association.⁴⁸ The ACTU supports federal unions being able to expand their eligibility rules to reflect the broader coverage of a counterpart State-registered union. They also support the Government's intention that such expansion should be available where the State counterpart 'has never used that wider coverage'. However the ACTU submission argues that the Bill, does not achieve this objective in that it appears to require the federal union to demonstrate active representation in every case. 'This would potentially deprive employees in certain sectors of representation by any union at all.'⁴⁹

Clause 3 of Schedule 10 to the WR Act provides for the application of the FW (RO) Act to transitionally recognised associations. **Item 70** inserts a **new subclause 3(2)** to clarify that the provisions of the FW (RO) Act do not confer on a transitionally recognised association a separate legal identity that it would not otherwise have, or the right to represent its members' industrial interests outside of the State in which the transitionally recognised association is registered. This means that a transitionally recognised association has full representation rights in the federal system as if it were a registered organisation but that

47. *Moore v Doyle* (1969) 15 FLR 59.

48. Explanatory Memorandum, p. 123.

49. ACTU, Submission no 14.

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these rights can only be exercised within the State in which the transitionally recognised association is registered.⁵⁰

Clause 6 of Schedule 10 of the WR Act deals with the expiry dates of a transitionally recognised association. **Item 82** amends clause 6 to provide that the recognition of all transitionally recognised associations will end on the 5 year anniversary of the commencement of this Part or a later date as prescribed. The Explanatory Memorandum states that the extension of time is intended to provide adequate time for State associations and federal organisations to adjust to the new registration and accountability framework and make necessary alterations to their affairs. After the 5 year period has expired, transitionally recognised associations would have to gain full registration (if they have no federal counterpart), become an RSRA (if they have no federal counterpart – see below) or arrange with their federal counterpart for the federal counterpart to represent members in the federal system.⁵¹ The ACTU supports this longer period of recognition in order to allow counterpart State and federal unions to harmonise their operations.⁵²

Recognised State-registered associations

Item 84 inserts **new Schedule 2** into the FW (RO) Act. The new Schedule deals with the recognition of State associations as recognised State-registered associations (RSRAs). Note that section 5C of the FW (RO) Act (**item 54** above) gives effect to Schedule 2.

New clause 1 deals with the process of obtaining recognition of State-registered associations under this Schedule. State-registered associations may make an application to the General Manager of FWA for recognition in the federal system as an RSRA. The General Manager can only grant recognition under Schedule 2 if:

- the State registered association has no federal counterpart (as defined), and
- the association is registered in a State whose industrial relations legislation has been prescribed in the regulations.

New clause 2 states that the provisions of the FW Act and Part 3 of Chapter 4 of the FW (RO) Act⁵³ apply in relation to an RSRA in the same way that they apply to a registered organisation and as if the RSRA were a person. However, **subclause 2(1)** clarifies that these provisions do not confer on a State-registered association a separate legal identity or the right to represent its members' industrial interests outside of the State in which the association is registered. The Explanatory Memorandum states that this means that an RSRA has full representation rights in the federal system as if it were a registered

50. Explanatory Memorandum, p. 125.

51. Explanatory Memorandum, p. 120.

52. ACTU, Submission No. 14.

53. Part 3 of Chapter 4 of the new FW (RO) Act would contain the new provisions regarding representation orders.

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organisation but that these rights can only be exercised within the State in which the RSRA is registered.⁵⁴

New clause 3 of Schedule 2 define the grounds on which an RSRA may have its federal recognition cancelled by the Federal Court (**subclauses 3(1) to 3(4)**), by FWA (**subclause 3(5)**) or by the General Manager of FWA (**subclause 3(6)**). As the Explanatory Memorandum notes, the ground for cancellation by the Federal Court are modelled on existing grounds for cancellation of the registration of a federal organisation.⁵⁵ Similarly the grounds on which FWA may cancel recognition mirror the existing provisions that allow the AIRC to cancel the registration of a transitionally registered association in Schedule 10 to the WR Act. FWA may cancel the recognition of a RSRA under **subparagraph 3(5)(b)(iii)** on the additional ground that the RSRA has been found by the industrial commission of the relevant State to have contravened a State industrial law, and that the contravention constitutes serious misconduct.

The Queensland Council of Unions notes that under this provision, recognition of state registered unions could be cancelled in a very wide range of circumstances, including cases where a substantial number of the union's members take unprotected industrial action (whether or not authorised by the union) which hinders the activities of their employer, or another corporation. The submission notes this is contrary to the FW Act which provides that unions are not held responsible for the acts of members where the union took all reasonable steps to prevent those acts (subsection 363(3)). The Council argues that new clause 3 should be amended.⁵⁶

Representation orders (Part 3)

The provisions in Part 3 dealing with representation orders have been the subject of most comment in relation to Schedule 22 of the Bill.

Chapter 3 of Schedule 1 of the WR Act deals with representation orders. It enables the AIRC (or in the future, FWA) to make orders about the representation rights of organisations of employees. Currently WR Act section 133 of Schedule 1 enables the AIRC to make representation orders in relation to 'demarcation disputes'. The Commission may only make such orders if satisfied that:

- the conduct or threatened conduct is preventing, obstructing the performance of work, or

54. Explanatory Memorandum, p. 126.

55. The grounds for cancellation are where the organisation (or a substantial number of its members) breaches FWA orders; takes unprotected industrial action that interferes with the activities of federal system employers or federal and state governments; or takes unprotected industrial action that threatens community welfare.

56. QCU, Submission No. 3, paragraphs 97–99.

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- is harming the business of an employer, or
- the consequences of such conduct has ceased but is likely to recur or are imminent.

Part 3 of Schedule 22 (item 89) would insert **new section 137A** into the existing chapter dealing with representation orders. The new section would empower FWA to make a new and additional form of representation order, in this case to specify that a union has the exclusive right to represent the employees in a particular ‘workplace group’, or conversely that a particular union does not have that right. ‘Workplace group’ is to be defined in section 6 of the new Act to mean a class or group of employees, all of whom perform work for the same employer, or at the same workplace, or both (**item 86**). The new power can only be exercised in relation to a dispute about the entitlement of an organisation of employees to represent the industrial interests of employees. **New section 137B** sets out the factors FWA is required to consider before making an order.

The making of such an order will, among other things, affect a union’s capacity under the FW Act to be a bargaining representative, to organise protected industrial action, to make greenfields agreements, or to exercise a right of entry.⁵⁷

Comment on Schedule 22

Representation orders and the need for a dispute

On empowering FWA to make a new form of representation order via section 137, Professor Andrew Stewart notes that as the Bill stands now, the new power can only be exercised ‘in relation to *a dispute* about the entitlement of an organisation of employees to represent . . . the industrial interests of employees’. He says that on the face of it, therefore, there must be some actual disagreement or difference of opinion between identified parties over representation issues at a workplace. There is nothing to suggest that ‘dispute’ includes a ‘threatened, impending or probable dispute’ as was the situation prior to Work Choices.

Stewart states that if this is the case, it is hard to see that it adds much to the existing (and more general) power under what is currently section 133 of Schedule 1 to the WR Act to make representation orders on demarcation disputes. Stewart argues that this interpretation of section 137 is not consistent with the explanation in the Explanatory Memorandum. The Explanatory Memorandum suggests that the new power is able to be exercised where there is merely the *potential* for a demarcation dispute to arise.⁵⁸ Stewart has no particular objection to the conferral of such a power on FWA but suggests that if there is the

57. Professor Andrew Stewart, Submission No. 1, p. 6.

58. Stewart also suggests that the ‘Spokey Dokes’ example on page 129 of the Explanatory Memorandum supports the view that the provision is intended to cover potential demarcation disputes.

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intention to include *potential* disputes then the new section 137 should be amended to make that clear.⁵⁹

The ACTU, on the other hand, is strongly opposed to this new provision citing several reasons including:

It is unnecessary— since 2000 there have only be two substantive demarcation disputes that led to the making of representation orders by the AIRC. “There is no reason to think that the minor changes to the right of entry rules made by the Fair Work Act⁶⁰ will prompt unions to ignore longstanding informal demarcation arrangements and undermine the current period of harmony in inter-union relations.

Even if inter-union competition were to increase the FW Act contains a range of very effective remedies to control this activity including good faith bargaining order, orders in relation to right of entry and representation orders under section 133 of Schedule 1.

The provisions undermine the rights under the FW Act to have representation at work and the right to freedom of association.

The provisions allow orders to be made even in the absence of any harm caused to the party.⁶¹

Master Builders, on the other hand, supports the proposed new representation orders indicating that their concerns about demarcation disputes in the building and construction industry had led to lobbying of the Government to include provisions of this kind. Master Builders also recommends amendment that would broaden FWA discretion in issuing such orders and would broaden the criteria to be considered by FWA to include reference to the conduct of the organisations leading up to the making of the order and the views of the relevant employer and the effect on the business.⁶²

The majority report in the Senate Report on the Bill took the view that the new provisions were unnecessary and should be abandoned, stating that existing provisions would allow orders to be made even in the absence of any harm caused to a party. The report recommended that:

59. *ibid.*

60. The FW Act removes the prohibition on union right of entry for discussions with employees in workplaces where all employees are either on AWAs or bound by non-union collective agreements

61. ACTU, Submission No. 14.

62. MBA, Submission No. 5, pp. 28–29.

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the criteria in clause 135 [of the WR Act] should be expanded to include the factors listed in clause 137B of the transitional bill, to ensure that any representation order reflects the industrial relations arrangements in force at the workplace.⁶³

A separate Act

There has been mixed reaction to the proposal to create a separate Act to deal with registered organisations.

Professor Andrew Stewart supports the decision not to include provisions on the registration and regulation of trade unions and employer associations in the FW Act itself.⁶⁴

AiG do not object to a separate Act being created for registered organisations but their submission states that it is not their preferred approach:

Registered organisations are vital elements of the workplace relations system and, in our view, such organisations should be regulated through provisions of the FW Act. This would reinforce the important rights and responsibilities that registered organisations have under the workplace relations system.⁶⁵

Master Builders supports the registration of organisations being regulated under a distinct and separate statute because matters of workplace relations organisational governance are often better dealt with separately from the substance of the law.⁶⁶

The ACTU notes that since 1904 the regulation of trade unions has been considered part of ‘federal industrial relations law’ and so has been included in the main workplace law statute. Their submission states:

We have some concern that locating the rights and responsibilities of trade unions in a separate Act weakens the fundamental nexus between organisations and workplace law and also weakens the nexus between the incorporation and regulation of unions and the regulation of corporations. Accordingly ACTU submits that Schedules 1 and 10 should be attached to the Fair Work Act.⁶⁷

63. See Recommendation 17 at p. 41 of the Senate Report.

64. Professor Andrew Stewart, Submission No. 1, p. 3.

65. AiG, Submission No. 4, p. 6.

66. MBA, Submission No. 5, p. 6.

67. ACTU, Submission No. 14, paragraph 6.1.

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Conclusion

Professional individuals and associations have noted the complexity of this Bill, attributable in part to the plethora of industrial instruments which the Bill is attempting to round up, but not uniformly terminate, as well as to the different start up dates for certain of its provisions. It is not a Bill for the faint hearted. The Bill is certain to be amended if only to reflect the revised definition of small business to businesses with less than 15 *full time equivalent* employees, which the Government agreed to with Senator Fielding on 19 March 2009 in order to have the principal Act, the FW Act, passed by Parliament.

Other amendments may follow as response to the Senate Report on the Bill, although the Government appears to have rejected one recommendation of the Senate Majority report to allow FWA to terminate 'substandard' workplace agreements.⁶⁸

On the other hand, coverage concerns raised by unions about the proposed clerical award and rostering arrangements raised by employers in respect of the proposed mining award appear to have been addressed through a variation by Minister Gillard to the request directing the AIRC to modernise awards.⁶⁹

In any case, the Bill is crucial to the start-up of the new FW system and to effect the repeal of 'Work Choices'; without the Bill passing Parliament, rumours, let alone more forthright statements, of the demise of Work Choices will have been greatly exaggerated.

68. See Recommendation 1 at p. 9 of the Senate Committee Report, *Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009* (May 2009). *Workplace Express* reported on 8 May that Minister Julia Gillard 'has today made it clear that she is unlikely to adopt yesterday's recommendation by her ALP Senate colleagues to allow Fair Work Australia to terminate substandard Work Choices deals within their nominal expiry dates'.

69. 'Gillard varies award exemption and industry arrangements', *Workplaceinfo.com.au*, 11/5/2009.

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