



Fair Work (State Referral and Consequential and Other Amendments) Bill 2009

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Glossary

AFPC	Australian Fair Pay Commission
AFPCS	Australian Fair Pay and Conditions Standard
AIRC	Australian Industrial Relations Commission
APCS	Australian Pay and Classification Scale
AWA	Australian workplace agreement
CA	Certified agreement
CP (IR) Act	Commonwealth Powers (Industrial Relations) Act 1996 (Vic)
ER Act	Employment Relations Act 1992 (Vic)
FW Act	Fair Work Act 2009
FW(RO) Act	Fair Work (Registered Organisations) Act 2009
FWA	Fair Work Australia
FWO	Fair Work Ombudsman
ITEA	individual transitional employment agreement
NES	National Employment Standards
NAPSA	notional agreement preserving State awards
T&C Bill	Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009
this Bill	Fair Work (State Referral and Consequential and Other Amendments) Bill 2009
WR Act	Workplace Relations Act 1996

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Fair Work (State Referral and Consequential and Other Amendments) Bill 2009

Date introduced: 27 May 2009

House: House of Representatives

Portfolio: Education Employment and Workplace Relations

Commencement: There are numerous commencement dates as set out in the table at clause 2 of the Bill. The bulk of Schedule 1 dealing with referring States commences on Royal Assent. The majority of the Schedules dealing with consequential amendments to other legislation commence immediately after commencement of Part 2-4 of the *Fair Work Act 2009*, expected to be 1 July 2009.

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:

- enables States to refer matters to the Commonwealth for the purpose of establishing a national workplace relations system under the *Fair Work Act 2009* (the FW Act)
- makes transitional and consequential amendments to other Commonwealth legislation required as a result of the FW Act and the Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009, and
- makes transitional referral arrangements for Victorian employees and employers, currently covered by the *Workplace Relations Act 1996* as a result of a 1996 reference of power.

Background

This is the third Bill in the package of workplace relations legislation aimed at implementing the Government's Forward with Fairness election commitment.¹ Minister

1. K. Rudd and J. Gillard: Forward with Fairness: Labor's Plan for Fairer and More Productive Australian Workplaces, April 2007 and Forward with Fairness, Implementation Plan, August 2007.

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Gillard foreshadowed this Bill in her second reading speech on the Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009²:

The first bill, which I am introducing here today, is the Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009.

[...]

A further bill will deal with the consequential amendments to all other Commonwealth legislation, which is likely to involve amendments to over 70 Commonwealth acts. That further bill will also deal with amendments consequential on any state referrals of power that have been completed by that time.

[...]

The arrangements set out in these two bills will phase in the new workplace relations system and ensure that the transition to the new system occurs in a seamless way.³

State referral

Section 51 (xxxvii) of the Commonwealth Constitution provides that the Commonwealth Parliament 'may make laws for the peace, order and good Government of the Commonwealth' with respect to:

Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to the States by whose Parliaments the matters is referred, or which afterwards adopt the law.

The most recent referral of a State's industrial power occurred through complimentary federal and state legislation, referring Victoria's industrial system to the Commonwealth in 1996. The Bills Digest reporting on the Commonwealth's referral Bill, the Workplace Relations and Other Legislation Amendment Bill (No 2) 1996, noted:

The scope of the (1996) Bill is in large measure determined by the 'matters' formally conferred on the Commonwealth by the Victorian Parliament via the Commonwealth Powers (Industrial Relations) Bill 1996 (the Victorian Bill). The potential reach of Commonwealth law is further restricted by certain implied constitutional limitations

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2. J Gillard, 'Second reading speech: Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009', House of Representatives, *Debates*, 19 March 2009, p. 3225.
 3. J Gillard, 'Second reading speech: Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009', p. 3225.

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on the capacity of the Commonwealth to pass laws which may affect functions of a State which are critical to its capacity to function as a government.⁴

The 1996 referral was limited. It gave greater effect to federal instruments, for example allowing Australian Workplace Agreements and Certified Agreements to be entered into by unincorporated Victorian businesses. On the other hand, the Victorian ‘state’ industrial system remained largely in tact, appearing as a schedule to the WR Act (Schedule 1A). Critics of the arrangement claimed that the referral had resulted in the contracting out of the administration of the state system to the Commonwealth.⁵ To overcome the disadvantage faced by Schedule 1A workers compared to federal award employees, the Victorian Government referred additional powers to the Commonwealth to enable the AIRC to make and vary common rule awards for Victoria by way of the *Federal Awards (Uniform System) Act 2003(Vic)*.⁶ The Explanatory Memorandum incorrectly attributes this additional referral to the CP(IR) Act (Vic).⁷

Similar constraints and limitations are likely to apply to the current Bill and complimentary state legislation. In the case of Victoria, state legislation facilitating a new referral was introduced into the Victorian Parliament on 2 June 2009. The Fair Work (Commonwealth Powers) Bill 2009 (Vic) is a move to a text-based referral, giving the Commonwealth the power to legislate for the State’s entire private sector workforces and much of its public service with the only matters excluded relating to core government functions such as the number, identity, appointment and redundancy of public sector employees and issues related to essential services employees and the police.⁸ A text-based referral⁹ was one of the referral options outlined in the report to the NSW Government on industrial relation referral options (the Williams report).¹⁰ According to Minister Gillard:

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4. B Bennett, *Workplace Relations and Other Legislation Amendment) Bill No 2 1996*, Bills digest, no. 66, 1996–97, Department of Parliamentary Library, Canberra, 1996, viewed 27 May 2009, <http://www.aph.gov.au/library/pubs/bd/1996-97/97bd066.htm>.
 5. Victorian industrial relations taskforce (R McCallum chair) Independent report of the Victorian industrial relations taskforce, 2000.
 6. Reciprocated by the Commonwealth in the Workplace Relations Amendment (Improved Protection for Victorian Workers) Act 2003.
 7. Explanatory Memorandum p.19.
 8. ‘Victorian IR referral bill hits State Parliament’, *Workplaceexpress.com.au*, 3 June 2009.
 9. A national system can be achieved by a full referral of powers, text-based referral, mirror legislation or harmonisation. Text-based referral involves the States referring actual legislative provisions. Text-based referral as opposed to full referral is seen as an option more likely to gain State agreement. For more information on the history and types of referrals the reader is referred the table compiled by Pamela Tate as part of her paper: [New Directions in Co-operative Federalism: Referrals of Legislative Power and Their Consequences](#)

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On 4 February 2009, the Victorian Minister for Industrial Relations, the Hon Martin Pakula MP, wrote to me confirming the Victorian Government's decision to make a new text-based referral to underpin the application of the Fair Work Act to all Victorian employers and their employees with effect from 1 July 2009.

The Australian Government anticipates that the Victorian Government's Bill to refer legislative power to this Parliament will be introduced into the Victorian Parliament shortly, and passed in time to coincide with the commencement of the Fair Work Act on 1 July 2009.

In respect of other States, she goes on to note that:

The Australian Government is continuing to work cooperatively with other States to secure references of power in time for full commencement of the system on 1 January 2010. In this context, the Government anticipates that the reference framework provided in the Bill may be further amended to take into account the views and needs of the other States concerning their national system participation.¹¹

Position of other States on referral

The other States are in different stages of determining what paths they would take. The positions outlined below should be regarded as indicative only.

Tasmania: has given in-principle support to referring powers to the Commonwealth, indicating the referral would be text-based and would apply only to the private sector.¹²

New South Wales: possibility of a text based referral but may seek to keep state public servants, local government workers, health and community workers and Catholic school teachers.¹³

Examples of Referrals from State Parliaments to the Commonwealth Parliament under section 51(xxxvii) of the Constitution:

http://www.gtcentre.unsw.edu.au/publications/papers/docs/2005/5_PamelaTate_Table.pdf

Viewed on 12 June 2009.

10. G Williams, Working Together: Inquiry into Options for a New National Industrial Relations System, report prepared for the New South Wales Government, November 2007.
11. J Gillard, 'Second reading speech: Fair Work (State Referral and Consequential and Other Amendments) Bill 2009', House of Representatives, *Debates*, 27 May 2009, pp. 4–9.
12. 'Tasmania, the third state to join national IR system', *Workplaceexpress.com.au*, 10 June 2009.
13. 'Victoria switching to text-based referral, full referral on the cards for Tasmania, as States take up different positions on unitary system, *Workplaceexpress.com.au*, 25 May 2009.

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South Australia: has given in-principle support to referring powers to the Commonwealth, indicating the referral would be text-based and would apply to the private sector but exclude the public sector and local government.¹⁴

Queensland: has indicated in-principle support for participating in the national system, subject to a number of issues (such as local government and compliance) being resolved.¹⁵

Western Australia: has committed only to working cooperatively to examine harmonising state and federal laws, where possible.¹⁶

Financial implications

The Bill's Explanatory Memorandum reports that the measures proposed by this Bill are Budget neutral.¹⁷

Main provisions

Schedule 1—Referring States

The provisions in this Schedule should be read in conjunction with the FW Act. For further background the reader is referred to the Bills Digest for the Fair Work Bill 2008.¹⁸

Schedule 1 to this Bill amends the FW Act to insert **new Division 2A**, Part 1-3 into the FW Act. New Division 2A would enable States to refer matters to the Commonwealth with a view to establishing a uniform national workplace relations system for employees and employers in the private sector, with scope for referring States to choose the extent to which the FW Act covers their public sector workforces.¹⁹

14. South Australia to refer IR coverage to Canberra, *Workplaceexpress.com.au*, 10 June 2009.

15. 'Queensland the latest to back national IR system, as Victoria and Canberra sign new deal', *Workplaceexpress.com.au*, 11 June 2009.

16. 'Bill dealing with referral to be introduced tomorrow', *Workplaceexpress.com.au*, 26 May 2009.

17. Explanatory Memorandum, Fair Work (State Referral and Consequential and Other Amendments) Bill 2009, p. 2 (hereon referred to as the Explanatory Memorandum).

18. *Fair Work Bill 2008*, Bills digest, no. 81, 2008–09, Parliamentary Library, Canberra, 2009, viewed 10 June 2009, http://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/S3OS6/upload_binary/s3os60.pdf;fileType=application/pdf#search=%22Fair%20Work%20Bill%202008%22

19. Explanatory Memorandum, p. 5.

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Items 1-9 replace or insert notes in respect of the meaning of various key definitions in the FW Act including:

- definitions of employee and national system employee and employer and national system employer in the FW Act at section 12 and in sections 13 and 14²⁰
- the definition of outworker entity in section 12
- the ordinary meaning of employee and employer in subsection 15(1).

The purpose of the amended notes is to cross reference new definitions in the new state referral provisions in Division 2A. For example the new note to the definition of national system employer in section 14 states that section 30D extends the meaning of national system employer in relation to a referring State (**item 4**).

Division 2A – Application of the FW Act in a referring State

Item 11 inserts **new Division 2A** – Application of the FW Act in a referring State into Part 1-3.

New section 30A defines a number of terms used in Division 2A. Of these:

- **referral law** means the law of the State that refers matters mentioned in subsection 30B(1) to the Commonwealth
- **referred provisions** mean the provisions of Division 2A of the FW Act to the extent to which they deal with matters that are included in the legislative powers of the Parliaments of the States
- **referred subject matters** include terms and conditions of employment, including terms and conditions under which an outworker work is performed; the rights and responsibilities of employees, employers, independent contractors, outworkers, outworker entities, associations of employees or employers concerning freedom of association, discrimination and termination.

Meaning of ‘referring State’

Proposed section 30B defines ‘referring State’ and is a key provision. A State is a referring State if its Parliament refers the matters set out in **new subsections 30B(3), 30B(4) and 30B(5)** to the Commonwealth Parliament, to the extent that these matters are not otherwise within Commonwealth legislative power and are within the State’s legislative power.

20. The Constitutional underpinning of the FW Act is based on the defined terms ‘national system employer’ and ‘national system employee’. For a fuller explanation the reader is referred to the *Fair Work Bill 2008 Bills digest*, pp. 17–19.

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- **New subsection 30B(3)** gives effect to a reference of matters relating to the text of the ‘referred provisions’ in Division 2A. Matters covered by this text will cover the regulation of unincorporated and public sector employers and their employees, outworker entities, and certain types of adverse action.²¹
- **New subsection 30B(4)** gives effect to a referral of matters relating to express amendments of the FW Act. This would allow the Commonwealth to amend the FW Act in relation to the referred subject matters by making express amendments of the FW Act.²²
- **Proposed subsection 30B(5)** gives effect to a referral of matters relating to the transition to the national system. This would enable the Commonwealth to transition Victorian employers and employees from the system in place under the WR Act to the new system created by the FW Act as extended in its operation by the Victorian Bill.²³

Proposed subsection 30B(2) clarifies that a State is still a referring State even if the State’s referral law provides for the reference to terminate in certain circumstances, or if it excludes certain matters relating to State public sector employment.

Proposed subsection 30A(6) provides for a State to cease to be a referring State if any or all of the initial, amendment, or transitional references terminate.

Extended meaning of national system employee and national system employer

New sections 30C and 30D are part of the referred text and extend the existing definitions of ‘national system employee’ and ‘national system employer’ in the FW Act to include any employee and any employer in a referring State who would otherwise be outside those definitions.

How the State referral would work

The Explanatory Memorandum explains how the initial referral would work in relation to Victoria:

New subsection 30B(3) envisages that a referring State would refer the provisions of new Division 2A to the Commonwealth, to the extent that they deal with matters within the State’s legislative power. The matters referred by this text cover the

21. Explanatory Memorandum, p. 7.

22. **New section 30A** defines amendment to mean the insertion, omission, repeal, substitution, addition or relocation of words or matter. Express amendment is defined to mean the direct amendment of the FW Act, but not the enactment of a provision having substantive effect other than as part of the text of the FW Act.

23. Explanatory Memorandum, p. 10.

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regulation of unincorporated and public sector employers and their employees, outworker entities, and certain types of adverse action.

The FW Act generally applies to national system employees and national system employers, and the extended definitions [in new sections 30D and 30E] apply the FW Act in a referring State, so far as it would not otherwise be supported by Commonwealth power.

It is anticipated that a reference from Victoria would enable the Commonwealth to amend the FW Act as originally enacted to include Division 2A to the extent within Victoria's legislative power. This would fix Victoria's initial reference to matters related to the FW Act as it exists at a particular time.²⁴

The Explanatory Memorandum goes on:

New subsection 30B(3) means that only Victoria is likely to meet the proposed definition of referring State. However, the framework established by Division 2A would be able to be amended in future to accommodate references from other States.²⁵

Referred subject matters and excluded subject matters

The referred subject matters (defined in new section 30A) correspond with matters regulated by the FW Act and include those listed above (eg terms and conditions of employment, the rights and responsibilities of employees etc)

The definition of 'excluded subject matters' in new section 30A are specific to Victoria's reference - that is:

- matters dealt with by Victoria's *Equal Opportunity Act 1995*, which is preserved in its application to national system employees and employers by subsection 27(1A) of the FW Act
- matters dealt with by state laws preserved under paragraph 27(1)(c) and subsection 27(2) of the FW Act such as occupational health and safety, public holidays, outworkers and workplace surveillance (but not matters prescribed by regulations under paragraph 27(2)(p)).

Public sector employment

Proposed paragraph 30B(2)(b) makes clear that a State could be a referring State even if the State's referral law excludes matters relating to State public sector employment.

24. Explanatory Memorandum, p. 8.

25. Explanatory Memorandum, p. 8.

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The Bill however has been drafted in anticipation that Victoria will refer matters to do with public sector employment, although this is subject to certain exclusions. The terms State public sector employee and State public sector employer are defined in **proposed section 30A** and according to the Explanatory Memorandum generally operate to recognise qualifications on matters expected to be referred by Victoria.²⁶ The Explanatory Memorandum provides a further explanation of the public sector exclusions in the Victorian reference and examples of how they would operate.²⁷

Schedule 2—Consequential and transitional provisions relating to referral of matters

Schedule 2 relates to the Victorian reference and is in two Parts: Part 1 amends the T&C Bill and deals with transitional arrangements in relation to transitional awards and common rules effecting Victorian employers and employees under the Victorian reference and Part 2 deals with public sector modern awards and public sector transitional awards for Victorian employers and employees.

Part 1– Treatment of transitional awards and common rules as transitional instruments etc.

Item 6 defines *State reference transitional award or common rule* to mean a State reference transitional award or a State reference common rule award (see below).

Items 8 to 10 amend Schedule 3 of the T&C Bill to replace notes and update definitions. **Item 11** inserts a new subitem 3A in item 2 of Schedule 3 to the T&C Bill, providing that State reference common rules that come into effect under this Bill are treated as transitional instruments for the purposes of the T&C Bill. **Item 12** amends paragraph 2(5)(a) of Schedule 3 to the T&C Bill to include State reference transitional awards or common rules in the definition of award-based transitional instrument. **Item 13 inserts a new subitem 2A of Schedule 3** containing the following definitions:

State reference common rule is defined to mean a common rule term of an award that covers specified State reference employers and their employees. A common rule is expressed to cover employers in an industry in respect of their employees. Provisions giving effect to common rules are underpinned by the *Federal Awards (Uniform System) Act 2003* (Vic) and the *Workplace Relations Amendment (Improved Protection for Victorian Workers) Act 2003* (Cth) in which the Victorian and Commonwealth Parliaments effected a referral enabling the AIRC to declare a term of a federal award or order to be a common rule in Victoria for an industry.

State reference employee is defined to mean an employee who is a national system employee only because of Victoria's reference of power.

26. Explanatory Memorandum, p. 10–11.

27. Explanatory Memorandum, p. 11.

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State reference employer is defined to mean an employer that is a national system employer only because of Victoria's reference of power.

State reference transitional award is defined to mean a transitional award that covers one or more specified State reference employers and their employees.

Transitional award is defined in continued WR Act's Schedule 6 and includes a transitional Victorian reference award.

Proposed subitem 2A(5) 'splits' transitional awards that cover both State reference employers and their employees and other employers and employees (that is, employers and employees that are not from a referring State). This is in reference to industry awards having been made on an 'interstate' basis²⁸

Item 14 amends **Part 2** of **Schedule 3** to the T&C Bill to add a **new item 8A** dealing with the continuing application of clauses 82 to 87 of Schedule 6 to the WR. This ensures that State reference common rules continue to operate under the new system and cover the same classes of employers and employees.

Item 15 inserts a **new item 12A** after **item 12** of **Schedule 3** to the T&C Bill. New item 12A gives effect to provisions of Part 10 of the WR Act that deal with variation and revocation of transitional awards by FWA so that these provisions apply from the WR Act repeal day in relation to State reference transitional awards.

Item 16 amends **Schedule 3** of the T&C Bill to add new provisions dealing with Victorian employment agreements, kept in operation by Division 12 of Part 21 of the WR Act. These are individual agreements which either came into effect under the former *Employee Relations Act 1992* (Vic) (ER Act) and were not replaced by an agreement under the WR Act, or were deemed into existence on the cessation of an ER Act collective employment agreement. From the WR Act repeal day, any Victorian employment agreement that is still in force will be treated as an enforceable contract.

Item 17 amends **subitem 2(2A)** of **Schedule 6** to the T&C Bill, providing that a State reference transitional award may also be an enterprise award-based and as such may apply, for example, to franchises.²⁹

Item 18 amends **Schedule 7** to the T&C Bill with the effect that a State reference transitional award or common rule is capable of being a designated award for the purposes of the no-disadvantage test (which is to apply during the bridging period).

28. Explanatory Memorandum, p. 19.

29. Explanatory Memorandum p. 21

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Item 19 amends **paragraph 13(2)(a)** of **Schedule 7** to the T&C Bill so that a reference to a modern award in that paragraph is also taken to be a reference to a State reference transitional award or common rule.

Items 20 and 21 amend **items 18 and 19 of Schedule 7** to the T&C Bill ensuring that only the relevant ‘unmodernised’ State reference transitional award or common rule is used for the purpose of assessing whether an enterprise agreement passes the better off overall test.

Item 22 extends the operation of **item 21 of Schedule 7** to the T&C Bill so that it also applies in relation to a State reference transitional award or common rule.

Item 23 amends **paragraph 25(3)(a)** of **Schedule 7** to the T&C Bill providing that where a workplace determination is made that will cover the employee, the workplace determination must also include outworker terms that are not detrimental to the employee in any respect, when compared to the State reference transitional award or common rule.

Item 24 amends the definition of instrument in **item 27 of Schedule 8** to the T&C Bill so that it also includes a State reference transitional award (but not a common rule).

Item 25 amends **item 5 of Schedule 9** to the T&C Bill so that certain provisions of Part 21 of the WR Act do not apply, ensuring that the transitional standard FMW applies in relation to State reference employers and employees from the WR Act repeal day, and that the AIRC may adjust wages whether or not employees work within a specific work classification.

Item 26 amends **paragraph 5(2)(d)** of **Schedule 10** to the T&C Bill so that the provisions continuing the application of equal remuneration orders made under the WR Act also apply in relation to a State reference transitional award or common rule.

Items 27 and 28 amend **items 2 and 5 of Schedule 11** to the T&C Bill so that Division 5 of Part 11 of the WR Act (re transmission of awards) has continued application in relation to State reference transitional awards.

Items 29 and 30 amend **item 8 of Schedule 11** to the T&C Bill so that the extended application of the FW Act by Schedule 11 in relation to a transfer of business applies in relation to a State reference transitional award.

Item 32 amends **Schedule 20** to the WR Act so that continued Schedule 6 does not apply in relation to State reference transitional awards and State reference common rules from the WR Act repeal day.

Part 2 – State reference public sector modern awards

Items 48 and 49 amend **item 6 of Schedule 5** to the T&C Bill, excluding State reference public sector modern awards from the first 2 year review of modern awards by FWA.

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Item 51 inserts a **new Schedule 6A** after Schedule 6 to the T&C Bill dealing with State reference public sector modern awards and gives effect to the State reference public sector transitional award modernisation process under the T&C Bill.

Item 2 of new Schedule 6A inserts new definitions into the T&C Bill relating to the State reference public sector transitional award modernisation process.

State reference public sector employee means a State reference employee who is also a State public sector employee.

State reference public sector employer means a State reference employer that is also a State public sector employer.

Item 3 of new Schedule 6A establishes the State reference public sector transitional award modernisation process. *State reference public sector modern award* means a modern award that is only expressed to cover one or more specified State reference public sector employers and State reference public sector employees of those employers. *State reference public sector transitional award* means a State reference transitional award or common rule that is only expressed to cover State reference public sector employers and their State reference public sector employees and also covers relevant organisations covered by the award.

Item 4 of new Schedule 6A allows the FWA to make State reference public sector modern awards to cover the persons identified in an application by a person who is covered by a State reference public sector transitional award which must be made between the WR Act repeal day and 31 December 2013.

Item 5 of new Schedule 6A provides that a State reference public sector transitional award may be terminated on application to FWA by a State reference public sector employer or organisation covered by the award between the WR Act repeal day and 31 December 2013.

Item 6 of new Schedule 6A provides that after 31 December 2013, FWA is required to deal with any remaining State reference public sector transitional awards that have not been modernised, either by varying the coverage of an appropriate State reference public sector modern award, or by making a new State reference public sector modern award, to replace the remaining State reference public sector transitional awards.

Item 7 of new Schedule 6A ensures that the modern awards objective and the minimum wages objective apply to the making of a State reference public sector modern award.

Items 8 and 9 of new Schedule 6A set out terms a State reference public sector modern award must contain including the class or classes of employers, employees and organisations who are covered by the award. Terms which may be included in a State reference public sector modern award are to be similar as for modern awards generally.

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Item 10 of **new Schedule 6A** ensures that once a State reference public sector modern award comes into operation, it replaces the State reference public sector transitional award that covered the parties to the modern award by terminating the transitional award.

Item 11 of new Schedule 6A provides that FWA by mid 2013 must notify all parties still covered by a State reference public sector transitional award that FWA will commence the State reference public sector transitional award modernisation.

Items 13, 14 and **15** of **new Schedule 6A** are similar to other provisions of the FW Act which seek to prevent award modernisation resulting in a reduction of employee take-home pay. The provisions confirm that the State public sector transitional award modernisation process is not intended to result in reduction in take-home pay. They provide for the FWA to make appropriate orders to effect a remedy and ensure that such orders apply only to the circumstances of a pay reduction arising from award modernisation. **Items 16 to 18** of **new Schedule 6A** provide that terms continue to apply to classes of employees when other instrument commence and that the terms of take-home pay orders displace terms of other instruments. **Items 19** and **20** of **new Schedule 6A** allows the State award modernisation process and any modernised awards to commence before 1 January 2010.

Schedule 3—Other amendments of the *Fair Work Act 2009*

Items 1 to 3 make amendments to the definition of ‘outworker entity’ in section 12 of the FW Act and are consequential on the extended definition of outworker entity in proposed section 30F in relation to a referring State. The amendments essentially align the definition of outworker entity in relation to a Territory with the definition of outworker entity in relation to a referring State in proposed section 30F³⁰. Under **proposed paragraph 12(e)**, a person will be an outworker entity, other than in their capacity as a national system employer, where:

- the person arranges for work to be performed for the person (either directly or indirectly)
- the work is of a kind that is often performed by outworkers, and
- the arrangement is connected with a Territory.

An arrangement is ‘connected with a Territory’ if any of the following apply:

- at the time the arrangement is made, one or more parties is in a Territory
- the work is to be performed in a Territory
- the person arranging the work carries on an activity (whether of a commercial, governmental or other nature) in a Territory, and the work is reasonably likely to be performed in that Territory or in connection with that activity.

30. See: **item 11, Schedule 1** of the Bill.

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Schedule 4—Agriculture, Fisheries and Forestry

Schedule 4 repeals the definition of ‘award’ in Acts administered under the Agriculture, Fisheries and Forestry portfolio. The Explanatory Memorandum states that the purpose is to give the term ‘award’ its ordinary meaning which would include awards and NAPSAs³¹ continued as transitional award-based instruments under Schedule 3 to the T&C Bill, transitional awards continued under Schedule 20 to the T&C Bill and FW Act modern awards.³²

Schedule 5—Attorney-General

Amendments relating to discrimination in compliance with industrial instruments and laws

The more significant amendments in Schedule 5 are located in **Part 2** and relate to the Human Rights and Equal Opportunity Commission (HREOC).

The *Human Rights and Equal Opportunity Commission Act 1986* permits HREOC to refer to the AIRC allegedly discriminatory industrial instruments. In particular, existing section 46PW applies to industrial instruments that have allegedly authorised an act that would be unlawful under the *Sex Discrimination Act 1984*.

Items 73 to 75 would expand the scope of section 46PW so that industrial instruments that might breach the *Age Discrimination Act 2004* and the *Disability Discrimination Act 1992*, (as well as the *Sex Discrimination Act 1984*) can also be referred by HREOC to FWA.

Items 67 to 72 make related amendments to the FW Act that would allow FWA to deal with matters referred by HREOC in relation to breaches of the *Age Discrimination Act* and the *Disability Discrimination Act* (as well as the *Sex Discrimination Act*).

Items 60 to 66 make consequential amendments to the *Age Discrimination Act* and the *Disability Discrimination Act* to ensure that the term ‘industrial instruments’ captures instruments made under the FW Act and transitional instruments within the meaning of the T&C Bill.

Miscellaneous consequential amendments

Part 1 of Schedule 5 contains miscellaneous consequential amendments to a number of Acts administered under the Attorney-General’s portfolio. For example Part 1 would:

- amend the definitions of ‘registered organisation’ in various Acts to ensure that registered organisations and recognised associations under the FW(RO) Act are included in these definitions

31. NAPSAs are notional agreement preserving State awards.

32. Explanatory Memorandum, p. 38.

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- replace references to the AIRC with references to FWA in a number of Acts
- amend the meaning of ‘industrial instrument’ in the *Bankruptcy Act 1966* so that it encompasses all Commonwealth, State and Territory laws regulating conditions of employment and awards, determinations and agreements made under such laws
- amends the definition of ‘Commonwealth authority’ in the *Crimes Act 1914* and the *Criminal Code Act 1995* so as to exclude from the definition organisations registered under the FW(RO) Act
- amend the definition of ‘trade union’ in the HREOC Act so as to include registered organisations or recognised associations under the FW(RO) Act
- amend the *Legislative Instruments Act 2003* confirming that a range of employment related instruments are not to be considered legislative instruments and subject to the requirements of the Legislative Instruments Act.

Schedule 6—Broadband, Communications and the Digital Economy

Schedule 6 makes three amendments to definitions in the *Telstra Corporation Act 1991* relating to long service leave entitlements of Telstra employees. The Explanatory Memorandum states the provisions have been amended so that they capture instruments and agreements made under both the WR Act and the FW Act.³³

Schedule 7—Defence

Schedule 7 amends the *Naval Defence Act 1910*. It replaces references to minimum standards in the AFPCS and WR Act awards with references to minimum standards in the NES and, where applicable, any relevant national minimum wage order or industrial award.

Schedule 8—Education, Employment and Workplace Relations

The majority of amendments in Schedule 8 are consequential amendments to the *Building and Construction Industry Improvement Act 2005* (the BCII Act). Many of the concepts in the BCII Act are closely connected to the WR Act and the purpose of the amendments is to bring terminology and definitions in BCII Act into line with the FW Act. For example there are amendments that:

- repeal definitions of building agreement, industrial dispute, Industrial Registrar, negotiating party
- insert new definitions that specifically draw their meaning from the FW Act including industrial body, bargaining representative, industrial body, enterprise agreement, independent contractor

33. Explanatory Memorandum, p. 50.

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- reword a number of definitions to reflect the changes brought about by the FW Act and the T&C Bill including the definition of award, Commonwealth industrial instrument, designated building law, occupier, premises, workplace agreement, and organisation.

Comment

It is of note that the amendments to the BCII Act are consequential on the enactment of the FW Act and do not represent the substantive reforms promised by the Labor Party prior to the 2007 election. Minister Gillard has recently been reported as stating that the Government intends to honour its election commitment to replace the ABCC with a specialist building and construction division of the inspectorate of FWA on 1 February 2010. There is speculation that introduction of the relevant legislation is imminent.³⁴

Schedule 9—Families, Housing, Community Services and Indigenous Affairs

Item 1 amends the definition of ‘trade union’ in the *Equal Opportunity for Women in the Workplace Act 1999* so as to include registered organisations, or recognised associations under the FW(RO) Act.

Items 2 and 3 amend the *Social Security Act 1991* so as to update references to tribunals which can make orders, directions or injunctions in relation to industrial action. The tribunals could include FWA or a prescribed State industrial authority within the meaning of the FW Act.

Schedule 10—Finance and Deregulation

Schedule 10 contains miscellaneous consequential amendments to a number of Acts administered under the Finance and Deregulation portfolio. For example the Schedule:

- amends the definition of ‘Commonwealth authority’ in the *Commonwealth Authorities and Companies Act 1997* so as to exclude from the definition organisations registered under the FW(RO) Act
- amends the definitions of ‘electoral matters’ in the *Commonwealth Electoral Act 1918* to replace the reference to WR Act ballots with a reference to FW Act and FW(RO) Act ballots.
- amends the definition of ‘registered industrial organisation’ in the Commonwealth Electoral Act to cover organisations registered under the FW(RO) Act (rather than those registered under the WR Act)
- amends and updates definitions in superannuation legislation including definitions of ‘industrial award’ and ‘approved organisation’.

34. Emma Rodges, ‘Gillard denies construction watchdog changes rushed’, *ABCNews*, 11 June 2009.
<http://www.abc.net.au/news/stories/2009/06/11/2595446.htm?section=justin>

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Schedule 11—Health and Ageing

Items 1 to 4 amend the *Commonwealth Serum Laboratories Act 1961* to remove references to WR Act awards and agreements and ensure that FW Act modern awards and enterprise agreements are included in the definition of industrial instrument.

Items 5 to 9 amend provisions in the *National Health Act 1953* relating to the Pharmaceutical Remuneration Tribunal that are consequential on the replacement of the AIRC by FWA.

Schedule 12—Immigration and Citizenship

Inspection powers and the Migration Act 1958

Schedule 12 amends the *Migration Act 1958*, the main purpose being to substantially align the powers of inspectors under the Migration Act with the powers of Fair Work Inspectors under the FW Act.³⁵ The Explanatory Memorandum to the Bill states that this consistency between the inspection regimes is appropriate because the same persons may be appointed as inspectors for the purposes of the FW Act and for the Migration Act, and these inspectors may exercise their powers under both Acts simultaneously.³⁶

Migration Amendment (Worker Protection) Act 2008

The purpose of the *Migration Amendment (Worker Protection) Act 2008* (the 2008 Act) was to amend the *Migration Act 1958* to create a new sponsorship framework with heightened enforcement mechanisms, including civil penalty provisions, monitoring and investigation powers, and information sharing provisions.³⁷ The 2008 Act has not yet commenced operation—commencement is to be either by Proclamation or 9 months after 18 December 2008 (ie Royal Assent day). The provisions in this Bill would amend the 2008 Act immediately after commencement.

Inspector powers for the new sponsorship framework are set out in sections 140X to 140Z. **Item 4** would repeal these provisions and replace them with **proposed sections 140X to 140XJ**. The new provisions essentially replicate sections 706 to 714 of the FW Act, with a couple of notable variations:

35. For further information on FW Inspector powers, the reader is referred to the *Fair Work Bill 2008*, Bills Digest, no. 81, 2008–09, Parliamentary Library, Canberra, 2009, pp.85-90.

36. Explanatory Memorandum, p. 68.

37. For further information the reader is referred to: E. Karlson, *Migration Legislation Amendment (Worker Protection) Bill 2008*, Bills digest, no. 51, 2008–09, Parliamentary Library, Canberra, 2008, viewed 10 June 2009, <http://www.aph.gov.au/Library/pubs/bd/2008-09/09bd051.pdf>

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- *Powers of inspectors to enter premises or places:* **proposed section 140XB** would allow inspectors to enter a business premises *or another place*³⁸— the rationale being that it is necessary for inspectors, for the purposes of sponsorship compliance verification, to be able to enter places such as residential premises due to the nature of some of the sponsorship obligations.³⁹ By way of contrast, Fair Work inspectors may enter business premises but only enter residential premises in limited circumstances— where reasonably satisfied that work is being carried out on that premises (section 708 of the FW Act).
- *Power to require persons to produce records or documents:* **proposed paragraph 140XF(2)(c)** allows a person 7 days to respond to a notice to produce records or documents. This is in contrast to paragraph 712(2)(c) of the FW Act that provides a minimum of 14 days to produce records or documents. The Explanatory Memorandum to the Bill states that there may be compelling reasons in special cases for requesting information in as few as 7 days, taking into account the special vulnerability to exploitation of non-citizens in Australia on temporary visas. In normal circumstances however inspectors will be expected to provide sponsors with at least 14 days in which to respond to a written notice.⁴⁰

Schedule 13—Infrastructure, Transport, Regional Development and Local Government

Schedule 13 makes only one amendment. It repeals and replaces section 292 of the *Navigation Act 1912* so that it provides that a transitional APCS, a transitional award, a modern award or a national minimum wage order which covers seamen employed in any part of the coasting trade is evidence of the rates of wages in Australia for those seamen.

Schedule 14—Innovation, Industry, Science and Research

Schedule 14 makes consequential amendments to various definitions in the *Independent Contractors Act 2006*. For example the amendments:

- replace a reference to a workplace inspector with a reference to a Fair Work Inspector
- convert the definition of organisation so that it is an organisation registered, or association recognised, under the FW(RO) Act, rather than the WR Act
- amend the definition of State or Territory industrial law so that it has the same meaning as in the FW Act (rather than in the WR Act)

38. This is in keeping with subsection 140X(1) of the 2008 Act.

39. Explanatory Memorandum, p. 69.

40. Explanatory Memorandum, p. 69.

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Schedule 15—Parliamentary Service

Part 1 of Schedule 15 amends the *Parliamentary Service Act 1999* and contains consequential amendments. Amongst other things the amendments update provisions which currently refer to the AFPCS and WR Act instruments so that they would encompass the NES and FW Act instruments.

Part 2, item 22 is a saving provision to ensure the continued operation of any determinations made under subsection 24(1) of the *Parliamentary Service Act 1999* before the commencement of this Bill.⁴¹

Schedule 16—Prime Minister and Cabinet

The more significant amendments in Schedule 16 relate to the *Privacy Act 1988*.

The Privacy Act applies to ‘acts and practices’ of agencies and organisations. Organisation is defined at section 6C as an individual, a body corporate, a partnership, any other unincorporated association or a trust. The Privacy Act does however contain a number of exemptions and exceptions. Of specific relevance to this Bill, the definition of organisation specifically excludes many small business operators, a small business operator being defined as those with an annual turnover of \$3 million or less (section 6D). However some small businesses that pose a higher risk to privacy—for example, small businesses that hold health information and provide health services or those that trade in personal information—are covered by the Act (section 6E).

Under Part 3-3 of the FW Act protected ballot operators have access to and collect personal information during the course of their conduct of a protected action ballot.

Item 2 inserts **proposed subsection 6E(1B)** into the Privacy Act, its purpose being to require small business operators who are protected action ballot agents to comply with the Privacy Act in connection with their conduct of a protected action ballot under Part 3-3 of the FW Act.⁴²

Item 2 also inserts **proposed subsection 6E(1C)** and makes a similar amendment in relation to employer and employee associations and organisations. Its purpose is to require registered or recognised associations under the FW(RO) Act to comply with the Privacy Act.

41. Subsection 24(1) deals with the Secretary’s power to make determinations concerning remuneration and terms of employments for Parliamentary Service employees.

42. Note there appears to be an error in the second sentence of paragraph 328 of the Explanatory Memorandum. ‘New subsection (1C)’ should read ‘New subsection (1B)’.

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The purpose of these amendments is to bring both groups under the obligations of the Privacy Act, despite the fact that they may in normal circumstances be exempt from that Act because of the small business exemption.

Schedule 16 also amends the *Public Service Act 1999*, the main purpose being to update terminology to take account of the various instruments that can be made under the FW Act.

Schedule 17—Resources, Energy and Tourism

Schedule 17 makes consequential amendments to definitions in various Acts administered by the Resources, Energy and Tourism portfolio. For example the Schedule would:

- repeal the definition of ‘award’ in the *Moomba-Sydney Pipeline System Sale Act 1994*— the effect being that the term would have its ordinary meaning and therefore include awards and NAPSAs continued as transitional award-based instruments under Schedule 3 to the T&C Bill, transitional awards continued under Schedule 20 to the T&C Bill and FW Act modern awards⁴³
- amend the definitions of ‘registered organisation’ and ‘workforce representative’ in the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* to ensure that registered organisations and recognised associations under the FW(RO) Act are included in these definitions.

Schedule 18—Treasury

Part 1 of Schedule 18 contains consequential amendments to various Acts administered by the Treasury portfolio. For example, the amendments:

- ensure that associations registered and recognised under the FW(RO) Act, rather than the WR Act, are referred to in various provisions (eg **items 5, 6, 11 and 12**).
- replace references to the WR Act with references to the T&C Bill or the FW Act.
- update provisions which currently refer to the AFPCS and WR Act instruments so that they would encompass the NES and FW Act instruments.

Schedule 19—Veterans’ Affairs

Schedule 19 amends the *Military Rehabilitation and Compensation Act 2004* by replacing references to the WR Act federal minimum wage or to an AFPCS with references to the relevant minimum wage set by a national minimum wage order under the FW Act.

43. Explanatory Memorandum, p. 78.

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Schedule 20—Regulations

Schedule 20 deals with regulations that can be made under this Act.

Item 1 sets out a general regulation making power to deal with matters under the Act. **Item 2** provides that regulations may modify the transitional Schedules in the Bill. This would effectively enable delegated legislation to override an earlier legislation. The Explanatory Memorandum justifies the provision on the grounds that it would enable any consequential issues that emerge in the future to be dealt with without requiring a further Bill.⁴⁴ The use of so called ‘Henry VIII clauses’⁴⁵ can be a source of concern to the Senate Scrutiny of Bills Committee if the provision is considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny. In this case, the Senate Committee has made no comment.⁴⁶

Item 3 allows regulations to have retrospective effect. Again, the justification is that this is necessary to prevent unforeseen difficulties that may arise in the transition from the legal framework of the WR Act to the new Fair Work system.⁴⁷ This retrospective application is modified to the extent that **subitem 3(2)** provides that if a regulation takes effect before it is registered, a person cannot be convicted of an offence or ordered to pay a penalty in relation to conduct contravening the regulation that occurred prior to registration. Again, the Senate Scrutiny of Bills Committee has made no comment.⁴⁸

Concluding comments

A revolution is underway with a move to a uniform national workplace relations system for the private sector underway. The force to break the ice has been the Commonwealth’s reliance on the Constitution’s corporations’ power in industrial relations legislation, buttressed with the High Court upholding ‘Work Choices’ in 2006. The effect has been to remove key enterprises and possibly industries of state economies from state industrial jurisdictions.

Professor Breen Creighton, RMIT law professor, has been reported as saying the generic approach to referral used in this Bill is interesting and that if it is successful will be an improvement on the first Victorian referral under the WR Act. Professor Creighton says it is possible there will need to be some ‘fine-tuning’ of the legislation as States make their

44. Explanatory Memorandum, p. 84.

45. 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.

46. Senate Scrutiny of Bills Committee, *Alert Digest*, 6/09, p. 45.

47. Explanatory Memorandum, p. 84.

48. Senate, *Alert Digest*, 6/09, p. 45.

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referrals – a prospect foreshadowed by Workplace Relations Minister Julia Gillard in her second reading speech for the Bill.⁴⁹ The Bill is to be commended for aiming to avoid having to legislate in detail for each referral. Whether each of the referrals will fit the ‘template’ created by the Bill will depend on the States’ legislation, particularly the extent they go beyond Victoria in terms of exclusions for employees in areas like the public service, local government and state-owned enterprises.⁵⁰

If the five state referrals conclude successful referrals, it may be difficult for Western Australia to justify its reluctance to make its referral. Although, notably in other cooperative national schemes such as family law and de facto relationships, Western Australia continues to remain apart. On the other hand, if the Rudd Government concludes a number of successful referrals, it may be tempted to include a referendum question on private sector industrial relations in any forthcoming federal election. It would be difficult to imagine a strong ‘No’ case being mounted, in light of referrals and the existing expansion of the federal jurisdiction since ‘Work Choices’.

There appears some general agreement between the Commonwealth and the states for state public services and local government to remain under state industrial jurisdictions, although Victoria proves the point that even these sectors are able to come under national administration.

49. J Gillard, ‘Second reading speech: Fair Work (State Referral and Consequential and Other Amendments) Bill 2009’, House of Representatives, *Debates*, 27 May 2009, p. 4.

50. ‘Broad support for Victorian IR referral, but public sector award modernisation raises questions; Federal concept is sound, says Creighton’ *Workplaceexpress*, 29 May 2009.

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