



Fair Work (Transitional Provisions and Consequential Amendments) Amendment Regulations 2010 (No. 3)¹

Select Legislative Instrument 2010 No. 224

I, MARIE BASHIR, Administrator of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following Regulations under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

Dated 19 July 2010

MARIE BASHIR
Administrator

By Her Excellency's Command

SIMON CREAN
Minister for Employment and Workplace Relations

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1 Name of Regulations

These Regulations are the *Fair Work (Transitional Provisions and Consequential Amendments) Amendment Regulations 2010 (No. 3)*.

2 Commencement

These Regulations commence, or are taken to have commenced, as follows:

- (a) on 1 January 2010 — regulations 1 to 3 and Schedule 1;
- (b) on the day after they are registered — regulations 4 and 5 and Schedules 2 and 3.

3 Amendment of *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009*

Schedule 1 amends the *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009*, as amended by the *Fair Work (Transitional Provisions and Consequential Amendments) Amendment Regulations 2010 (No. 1)*.

4 Amendment of *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009*

Schedule 2 amends the *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009*.

5 Amendment of *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009*

Schedule 3 amends the *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009*, as amended by Schedule 2.

Schedule 1 Amendments taken to have commenced on 1 January 2010

(regulation 3)

[1] Regulation 3B.04, inserted Part 3A, inserted subitem 13A (1)

omit

, or a class of employees,

insert

or outworker, or a class of employees or outworkers,

[2] Regulation 3B.04, inserted Part 3A, inserted subitem 13A (2)

omit

An employee's *take-home pay* is the pay an employee actually receives

insert

An employee's or outworker's *take-home pay* is the pay an employee or outworker actually receives

[3] Regulation 3B.04, inserted Part 3A, inserted subitem 13A (3)

omit

, or a class of employees,

insert

or outworker, or a class of employees or outworkers,

[4] Regulation 3B.04, inserted Part 3A, inserted subitem 13A (3)

omit

employee or employees is

insert

employee, employees, outworker or outworkers are

[5] Regulation 3B.04, inserted Part 3A, inserted paragraphs 13B (3) (a) to (c)

substitute

- (a) an employee or outworker who has suffered a reduction in take-home pay; or
- (b) an organisation that is entitled to represent the industrial interests of such an employee or outworker; or
- (c) a person acting on behalf of a class of such employees or outworkers.

[6] Regulation 3B.04, inserted Part 3A, inserted subitem 13B (4)

omit

a class of employees

insert

outworker, or a class of employees or outworkers

[7] Regulation 3B.04, inserted Part 3A, inserted subitem 13B (4)

omit

employee or employees

insert

employee, employees, outworker or outworkers

[8] Regulation 3B.04, inserted Part 3A, inserted subitem 13C (1)

omit

class of employees

insert

outworker, or a class of employees or outworkers,

[9] Regulation 3B.04, inserted Part 3A, inserted paragraph 13C (1) (b)

omit

employee or employees

insert

employee, employees, outworker or outworkers

[10] Regulation 3B.04, inserted Part 3A, inserted paragraph 13C (2) (a)

omit

employee unless the employee

insert

employee or outworker unless the employee or outworker

[11] Regulation 3B.04, inserted Part 3A, inserted paragraph 13C (2) (b)

after each mention of

employee

insert

or outworker

[12] Regulation 3B.04, inserted Part 3A, inserted item 13D

substitute

13D Take-home pay order continues to have effect so long as modern award continues to cover employee, employees, outworker or outworkers

A take-home pay order made in relation to an employee or outworker, or a class of employees or outworkers, to whom a particular modern award applies continues to have effect in relation to the employee, employees, outworker or outworkers (subject to the terms of the order) for so long as the modern award continues to cover the employee, employees, outworker or outworkers, even if it stops applying to the employee, employees, outworker or outworkers because an enterprise agreement starts to apply.

[13] Regulation 3B.04, inserted Part 3A, inserted item 13E, heading

substitute

13E Describing classes of employees or outworkers

[14] Regulation 3B.04, inserted Part 3A, inserted item 13E

after each mention of

employees

insert

or outworkers

[15] Regulation 3B.04, inserted Part 3A, inserted item 13F

after each mention of

employee

insert

or outworker

Schedule 2 Amendment commencing on day after registration

(regulation 4)

[1] After Part 3B

insert

Part 3CA Transitional provisions for Schedule 6A to Act (State reference public sector modern awards)

3CA.01 State reference public sector transitional awards

- (1) This regulation is made for subitem 8 (1) of Schedule 2 to the Act.
- (2) Schedule 6A to the Act is modified by inserting the following item after item 5.

'5A Varying State reference public sector transitional awards on application

- (1) An employer or organisation that is covered by a State reference public sector transitional award (the *current award*) may apply to FWA to vary the coverage of the current award.
- (2) The application may be made only until the end of 31 December 2013.
- (3) FWA must not vary the coverage of the current award unless FWA is satisfied that, if the current award were to be varied, the employees who would cease to be covered by the current award would become covered by a modern award (other than the miscellaneous modern award) that, at the time of the variation, would be in operation and would be appropriate for them.

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- (4) In deciding whether to vary the coverage of the current award, FWA must take into account the following:
- (a) the likely impact of a decision to make, or not to make, the variation on the persons who, if the current award were to be varied, would cease to be covered by the current award;
 - (b) the views of the persons who would, if the variation were made, cease to be covered by the current award;
 - (c) any other matter prescribed by the regulations.
- (5) If FWA varies the coverage of the current award, the variation operates from the day specified in the decision to vary the current award.'

Schedule 3 Further amendments commencing on day after registration

(regulation 5)

[1] After Part 3B

insert

Part 3C Transitional provisions for Schedule 6 to Act (modern enterprise awards)

3C.01 Modern enterprise award or transitional arrangements resulting in reduction in take-home pay

- (1) This regulation is made for subitem 8 (1) of Schedule 2 to the Act.
- (2) Item 2 of Schedule 2 to the Act is modified by:
 - (a) replacing ‘subitem 11(2)’ in the definition of *take-home pay* with ‘subitems 11(2) and 16AA(2)’; and
 - (b) replacing ‘subitem 12(1)’ in the definition of *take-home pay order*, with ‘subitems 12(1) and 16AB(1)’.

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- (3) Schedule 6 to the Act is modified by inserting the following Division after Division 3 of Part 2.

‘Division 3A—Avoiding reductions in take-home pay from modern enterprise award or transitional arrangements

16AA Modern enterprise award terms giving FWA power to make take-home pay orders

- (1) A modern enterprise award may include terms that give FWA power to make an order (a *take-home pay order*) remedying a reduction in take-home pay suffered by an employee, or a class of employees, as a result of the making of a modern enterprise award or the operation of any transitional arrangements in relation to the award (whether or not the reduction in take-home pay is a modernisation-related reduction in take-home pay).
- (2) An employee’s *take-home pay* is the pay an employee actually receives:
- (a) including wages and incentive-based payments, and additional amounts such as allowances and overtime; but
 - (b) disregarding the effect of any deductions that are made as permitted by section 324 of the FW Act.

Note: Deductions permitted by section 324 of the FW Act may (for example) include deductions under salary sacrificing arrangements.

- (3) This Division applies to an employee, or a class of employees, to whom a modern enterprise award applies if the employee or employees are likely to suffer a reduction in take-home pay attributable to the making of a modern enterprise award or the operation of any transitional arrangements in relation to the award.

16AB Orders remedying reductions in take-home pay

- (1) If FWA makes a take-home pay order under the terms of a modern enterprise award it must do so in accordance with this Division.
- (2) Without limiting the kind of take-home pay order that may be made under the terms of a modern enterprise award, one or more of the following orders may be made:
- (a) an order compensating a reduction in take-home pay that has already been suffered;

- (b) an order requiring the payment of an amount of take-home pay;
 - (c) an order preventing a reduction in take-home pay from occurring.
- (3) FWA may make a take-home pay order only on application by:
 - (a) an employee who has suffered a reduction in take-home pay; or
 - (b) an organisation that is entitled to represent the industrial interests of such an employee; or
 - (c) a person acting on behalf of a class of such employees.
- (4) If FWA is satisfied that an application for a take-home pay order has already been made in relation to an employee or class of employees, FWA may dismiss any later application that is made in relation to the same employee or employees.

16AC Ensuring that take-home pay orders are confined to the circumstances for which they are needed

- (1) FWA must not make a take-home pay order in relation to an employee or class of employees if:
 - (a) FWA considers that the reduction in take-home pay is minor or insignificant; or
 - (b) FWA is satisfied that the employee or employees have been adequately compensated in other ways for the reduction.
- (2) FWA must ensure that a take-home pay order is expressed so that:
 - (a) it does not apply to an employee unless the employee has actually suffered a reduction in take-home pay; and
 - (b) if the take-home pay payable to the employee under the modern enterprise award increases after the order is made, there is a corresponding reduction in any amount payable to the employee under the order.

16AD Take-home pay order continues to have effect so long as modern enterprise award continues to cover the employee or employees

A take-home pay order made in relation to an employee or class of employees to whom a particular modern enterprise award applies continues to have effect in relation to the employee or employees (subject to the terms of the order) for so long as the modern enterprise award continues to cover the employee or employees, even if it stops applying to the employee or employees because an enterprise agreement starts to apply.

16AE Describing classes of employees

- (1) Without limiting the way in which a class of employees mentioned in items 16AA to 16AD may be described for the purposes of those items, the class may be described by reference to one or more of the following:
 - (a) a particular type of employment;
 - (b) a particular classification, job level or grade;
 - (c) a particular entitlement;
 - (d) a particular employer.
- (2) To avoid doubt, the description of a class is not required to include the names of the employees, or the number of employees, included in the class.

16AF Inconsistency with modern enterprise awards and enterprise agreements

A term of a modern enterprise award or enterprise agreement has no effect in relation to an employee to the extent that it is less beneficial to the employee than a term of a take-home pay order that applies to the employee.

16AG Application of provisions of FW Act to take-home pay orders

The FW Act applies as if the following provisions of that Act included a reference to a take-home pay order:

- (a) subsection 675(2);
- (b) subsection 706(2).

Note: For compliance with take-home pay orders, see item 7 of Schedule 16.

[2] After regulation 3CA.01

insert

3CA.02 State reference public sector modern award or transitional arrangements resulting in reduction in take-home pay

- (1) This regulation is made for subitem 8 (1) of Schedule 2 to the Act.
- (2) Item 2 of Schedule 2 to the Act is modified by:
 - (a) replacing ‘subitem 11(2)’ in the definition of *take-home pay* with ‘subitems 11(2) and 16AA(2)’; and
 - (b) replacing ‘subitem 12(1)’ in the definition of *take-home pay order*, with ‘subitems 12(1) and 16AB(1)’.
- (3) Schedule 6A to the Act is modified by inserting the following Division after Division 3 of Part 2.

‘Division 3A—Avoiding reductions in take-home pay from State reference public sector modern award or transitional arrangements**18A State reference public sector modern award terms giving FWA power to make take-home pay orders**

- (1) A State reference public sector modern award may include terms that give FWA power to make an order (a *take-home pay order*) remedying a reduction in take-home pay suffered by an employee or class of employees as a result of the making of a State reference public sector modern award or the operation of any transitional arrangements in relation to the award (whether or not the reduction in take-home pay is a modernisation-related reduction in take-home pay).
- (2) An employee’s *take-home pay* is the pay an employee actually receives:
 - (a) including wages and incentive-based payments, and additional amounts such as allowances and overtime; but
 - (b) disregarding the effect of any deductions that are made as permitted by section 324 of the FW Act.

Note: Deductions permitted by section 324 of the FW Act may (for example) include deductions under salary sacrificing arrangements.

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- (3) This Division applies to an employee or class of employees to whom a State reference public sector modern award applies if the employee or employees are likely to suffer a reduction in take-home pay attributable to the making of a State reference public sector modern award or the operation of any transitional arrangements in relation to the award.

18B Orders remedying reductions in take-home pay

- (1) If FWA makes a take-home pay order under the terms of a State reference public sector modern award it must do so in accordance with this Division.
- (2) Without limiting the kind of take-home pay order that may be made under the terms of a State reference public sector modern award, one or more of the following orders may be made:
- (a) an order compensating a reduction in take-home pay that has already been suffered;
 - (b) an order requiring the payment of an amount of take-home pay;
 - (c) an order preventing a reduction in take-home pay from occurring.
- (3) FWA may make a take-home pay order only on application by:
- (a) an employee who has suffered a reduction in take-home pay; or
 - (b) an organisation that is entitled to represent the industrial interests of such an employee; or
 - (c) a person acting on behalf of a class of such employees.
- (4) If FWA is satisfied that an application for a take-home pay order has already been made in relation to an employee or class of employees, FWA may dismiss any later application that is made in relation to the same employee or employees.

18C Ensuring that take-home pay orders are confined to the circumstances for which they are needed

- (1) FWA must not make a take-home pay order in relation to an employee or class of employees if:
- (a) FWA considers that the reduction in take-home pay is minor or insignificant; or
 - (b) FWA is satisfied that the employee or employees have been adequately compensated in other ways for the reduction.

- (2) FWA must ensure that a take-home pay order is expressed so that:
- (a) it does not apply to an employee unless the employee has actually suffered a reduction in take-home pay; and
 - (b) if the take-home pay payable to the employee under the State reference public sector modern award increases after the order is made, there is a corresponding reduction in any amount payable to the employee under the order.

18D Take-home pay order continues to have effect so long as State reference public sector modern award continues to cover the employee or employees

A take-home pay order made in relation to an employee or class of employees to whom a particular State reference public sector modern award applies continues to have effect in relation to the employee or employees (subject to the terms of the order) for so long as the State reference public sector modern award continues to cover the employee or employees, even if it stops applying to the employee or employees because an enterprise agreement starts to apply.

18E Describing classes of employees

- (1) Without limiting the way in which a class of employees mentioned in items 18A to 18D may be described for the purposes of those items, the class may be described by reference to one or more of the following:
- (a) a particular type of employment;
 - (b) a particular classification, job level or grade;
 - (c) a particular entitlement;
 - (d) a particular employer.
- (2) To avoid doubt, the description of a class is not required to include the names of the employees, or the number of employees, included in the class.

18F Inconsistency with State reference public sector modern awards and enterprise agreements

A term of a State reference public sector modern award or enterprise agreement has no effect in relation to an employee to the extent that it is less beneficial to the employee than a term of a take-home pay order that applies to the employee.

18G Application of provisions of FW Act to take-home pay orders

The FW Act applies as if the following provisions of that Act included a reference to a take-home pay order:

- (a) subsection 675(2);
- (b) subsection 706(2).

Note: For compliance with take-home pay orders, see item 7 of Schedule 16.'

Note

1. All legislative instruments and compilations are registered on the Federal Register of Legislative Instruments kept under the *Legislative Instruments Act 2003*. See <http://www.frli.gov.au>.