2008 - 2009

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

FAIR WORK AMENDMENT (STATE REFERRALS AND OTHER MEASURES) BILL 2009

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Employment and Workplace Relations, the Honourable Julia Gillard MP)

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OUTLINE

The Fair Work Amendment (State Referrals and Other Measures) Bill 2009 (the Bill) amends the *Fair Work Act 2009* (the FW Act) to enable States to refer workplace relations matters to the Commonwealth for the purposes of paragraph 51(xxxvii) of the Constitution.

The Bill also amends the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (the T&C Act) to establish arrangements for employees and employers transitioning from referring State systems to the national workplace relations system, and consequential amendments to other Commonwealth legislation required as a result of these arrangements.

State referrals

Schedule 1 to the Bill inserts Division 2B into Part 1-3 of the FW Act, which:

- enables States to refer matters that would extend the application of the FW Act in those States (so far as not otherwise within Commonwealth power) by extending the meaning of terms defined in the FW Act (including *national system employer*, *national system employee* and *outworker entity*) and the provisions of Part 3-1 (General protections);

- enables States to refer matters that would support Commonwealth amendments to the FW Act (so far as not otherwise within Commonwealth power) in relation to the subject matter of the FW Act as originally enacted, and arrangements for the transition to the national system; and

- envisages that State references may exclude matters relating to public sector employment and local government employment.

Schedule 1 also contains a number of amendments to Division 2A of Part 1-3 of the FW Act which gave effect to a reference of power from Victoria before 1 July 2009. These amendments are primarily to ensure consistency with new Division 2B.

Transitional arrangements

Schedule 2 to the Bill amends provisions of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* to transition employers and employees in referring States to the new national workplace relations system from State legislation relating to workplace relations or industrial relations, or the *Workplace Relations Act 1996* (as continued in operation by the T&C Act). Schedule 2 also amends the T&C Act to establish arrangements for the transition of employers and employees covered by federal awards and agreements made in reliance on the conciliation and arbitration power to the new national workplace relations system.

Part 1 of Schedule 2 to the Bill amends the T&C Act to insert a new Schedule 3A which sets out transitional provisions dealing with the treatment of State awards and State employment agreements of Division 2B referring States.

Part 2 of Schedule 2 to the Bill makes amendments to the FW Act and other Commonwealth Acts that are consequential on Division 2B referrals.

Other amendments

Schedule 3 to the Bill amends the FW Act to introduce a mechanism by which States may declare employers excluded from the coverage of the Act. It also amends the FW Act to enable a State Minister to intervene in court proceedings and make submissions in relation to matters before Fair Work Australia and to enable appeals from a decision of an eligible State or Territory court exercising summary jurisdiction to that State or Territory court, or another eligible State or Territory Court. Schedule 3 also makes a number of technical amendments to the T&C Act.

FINANCIAL IMPACT STATEMENT

The measures proposed in this Bill create additional workload for Fair Work Australia and the Fair Work Ombudsman in respect of South Australia and Tasmania. The cost of this work will be absorbed within existing operational capacity. The financial impact of the expansion of these measures to other States will be considered separately.

REGULATION IMPACT STATEMENT

A NATIONAL WORKPLACE RELATIONS SYSTEM FOR THE PRIVATE SECTOR

Problem

The presence of multiple workplace relations systems in Australia, that is, overlapping federal and state workplace relations regulation, is characterised by high levels of uncertainty and legal complexity. This is costly for business to navigate and comply with and for governments to administer. These costs have been widely recognised for decades by business, unions and governments.

This regulatory overlap is attributable to the limitations on the Commonwealth's constitutional powers to regulate workplace relations, whether under the corporations power or the conciliation and arbitration power.

Corporations power

Section 51(xx) of the Australian Constitution, typically referred to as the 'corporations power', allows the Commonwealth to make laws with respect to "foreign corporations, and financial or trading corporations formed within the limits of the Commonwealth." Collectively, such corporations are known as constitutional corporations. Financial and trading corporations are generally recognised by the courts as bodies incorporated under an Australian law and engaged in, or substantially engaged in, trading or financial activities.[1]

Utilising the corporations power, the *Fair Work Act 2009* (Cth) (the FW Act) applies to the following entities and their employees:

- constitutional corporations;
- the Commonwealth and its authorities; and
- employers who employ flight crews, maritime employees or waterside workers in connection with interstate or overseas trade and commerce.

The FW Act also applies to employers and employees in Victoria as a result of that State referring its powers in relation to workplace relations matters to the Commonwealth in 1996 to support the application of the *Workplace Relations Act 1996* (WR Act) to all employers and their employees in Victoria. In 2009 Victoria enacted new referral legislation to support the extension of the FW Act to all employers and employees in that State. The Victorian Government at the time in enacting the referral, argued that having a single system of workplace relations would reduce the regulatory burden for employers in the State.

The FW Act applies to employers and employees in the Northern Territory and Australian Capital Territory by virtue of section 122 of the Constitution, which allows the Commonwealth to make laws for the government of Australia's territories.

[1] *R v Judges of the Federal Court of Australia; Ex Parte Western Australian National Football League* (1979) 143 CLR 190

Despite the Commonwealth's reliance on the corporations power to support the FW Act, the corporations power has its limitations. Apart from unincorporated bodies, for instance small businesses such as sole traders or partnerships, incorporated entities that are not 'trading', 'financial' or 'foreign' are also beyond the scope of the corporations power.[2]

The practical effect of this gap is that the Commonwealth is unable to comprehensively regulate workplace relations for the private sector.

Definition of constitutional corporation

In addition to the above mentioned gap, there are inherent difficulties in determining what constitutes 'substantial' financial or trading activities when determining whether an entity is a constitutional corporation for the purposes of the FW Act and whether corporations that lack a commercial focus fall within the corporations power. This is particularly an issue for entities that operate in the charitable or community services sectors.[3]

This uncertainty adds another level of complexity to an already over regulated area of economic activity. For some businesses there may be no clear answer, with the issue only able to be resolved before a court of law.[4] Having to resort to legal proceedings to clarify which workplace relations system applies to a particular business is expensive both in terms of direct costs such as legal costs and the risk of orders to back-pay wages in the event the wrong system and obligation has been applied, but also the opportunity costs for business owners regarding the time they have to devote to lengthy legal proceedings (even in the absence of any appeal proceedings).

The uncertainty and complexity of the existing overlapping workplace relations regulation has been of concern to employers, employees, unions and governments for decades.

Private sector coverage of the Fair Work Act 2009

The reliance of the FW Act on the corporations power sees approximately 80.5 per cent of all Australian non-managerial private sector employees being definitively covered by the federal workplace relations system (see Table 1). A further 1.6 per cent of non-managerial private sector employees are definitively covered by State workplace relations systems (see Table 1).

Jurisdictional coverage of the remaining 17.9 per cent of all non-managerial private sector employees remains unclear from the Australian Bureau of Statistics (ABS) data. In other words, for almost one in five employees it is not clear what workplace relations arrangements apply. These employees, according to the ABS, are employed by unincorporated businesses and are either paid by an award, an unregistered collective agreement or individual arrangement, either in the federal transitional system or a state system. The available ABS data does not allow the determination of the jurisdiction of these employees.

[2] Peter Prince and Thomas John, '*The Constitution and industrial relations: Is a unitary system achievable?*', Research Brief No.8, 2005-06, Department of Parliamentary Services (Cth), Nov 2005, p.21
[3] Ibid, p.21
[4] Prince and Thomas op cit, p.22

Table 1 shows the proportion of non-managerial private sector employees broken down by state and territory that are definitively covered by the state and federal workplace relations systems. The percentages for federal and state coverage of non-managerial private sector employees differ between states.

The proportion of non-managerial private sector employees covered by state workplace relations systems includes those employed by unincorporated bodies and subject to state-registered collective agreements. The proportion of non-managerial private sector employees covered by the federal system is derived by combining figures for those employees definitively covered by the federal transitional system and those covered through the corporations power, a referral of power and by virtue of section 122 of the Constitution. The remaining proportion of employees refers to those employees whose coverage remains unclear for the reasons outlined above.

TABLE 1: Coverage of non-managerial private sector employees[(a)] (%) under the state and federal workplace relations systems, August 2008

Jurisdiction	State coverage (%)	Federal coverage (%)			Jurisdictional coverage is unclear (%)
		Corporation Power, Vic, ACT and NT	Federal transitional coverage	Total[(b)]	
New South Wales	1.2	76.3	1.9	78.2	20.6
Victoria	-	100.0	-	100.0	-
Queensland	3.5	65.4	3.3	68.7	27.9
South Australia	3.3	68.0	6.9	74.9	21.8
Western Australia	2.2	58.3	6.6	64.9	32.9
Tasmania	2.1	65.1	3.4	68.5	29.5
Northern Territory	-	100.0	-	100.0	-
Australian Capital Territory	-	100.0	-	100.0	-
Australia	**1.6**	**78.0**	**2.5**	**80.5**	**17.9**

Sources: ABS *Employee Earnings and Hours* (EEH) (Cat No 6306.0), August 2008 (unpublished data) and ABS, *Employment and Earnings, Public Sector* (Cat No 6248.0.55.002), 2007-08.

Notes: The EEH survey shows that there were 8,812,300 employees in August 2008. Of these, 6,433,500 were non-managerial private sector employees.

As estimates have been rounded, discrepancies may occur between sums of the component items and totals.

(a) The EEH survey does not include self-employed persons or employees in the Agriculture, forestry and fishing industry.

(b) These figures are derived by adding together the estimates of coverage for the corporations power and transitional coverage.

'Federal transitional coverage' in the above table describes the significant number of employers who are not constitutional corporations and who were previously covered by federal instruments made under the conciliation and arbitration power, which was the primary constitutional underpinning of the federal workplace relations system until early 2006. In the absence of referrals of power from all States, these federal transitional awards are scheduled to lapse in March 2011, with the relevant employers and employees 'falling out' of the national workplace relations system and back to the state systems. For example, federal transitional awards apply to many employers in the pastoral industry (with members of the National Farmers Federation bound by federal awards) and the social and community services sector.

Duplication and inconsistency

Separate workplace relations systems are currently maintained by the Commonwealth and five of the six states. The primary pieces of workplace relations legislation that govern the separate workplace relations systems are the:

- *Fair Work Act 2009* (Cth)
- *Industrial Relations Act 1996* (NSW)
- *Industrial Relations Act 1999* (Qld)
- *Fair Work Act 1994* (SA)
- *Industrial Relations Act 1979* (WA)
- *Industrial Relations Act 1984* (Tas)

In addition, while the FW Act explicitly seeks to exclude State industrial legislation from the regulation of the workplace relations of corporations, not all matters are excluded. Section 27 of the FW Act preserves the operation of State and Territory laws dealing with matters of regulatory interest to States, including among other matters:

- anti-discrimination and equal employment opportunity;
- workers compensation;
- occupational health and safety; and
- child labour.

The presence of these factors creates duplication that results in costly inefficiencies, conflict and inconsistency, confusion and uncertainty about coverage and which set of laws apply.

Reduced productivity and competitiveness

The multiplicity of jurisdictions and laws is generally accepted as a factor which creates barriers to productivity.[5] For example, it has been stated:

> *The cost of excessive regulation is felt throughout the economy. For consumers it means higher prices and less choice; for employees, fewer jobs and lower real wages; and for shareholders, lower returns on investment and fewer funds for retirement. While very real, these costs can be difficult to quantify.*[6]

The Business Council of Australia (BCA) has also noted that firms have expressed increasing concern that the overall regulatory environment in Australia is working against entrepreneurial risk taking and business transformation, and expressed its own concerns that:

> *These unnecessary regulatory imposts add costs and make it more difficult for companies to compete in international markets against companies from countries that have comparatively less onerous regulatory systems. Of greatest concern are those instances where the regulatory burden is sufficiently large to make businesses think twice and forego or defer expansion.*[7]

Inefficiencies of competing workplace relations system

The presence of competing systems, which overlap in workplaces, also creates significant costs for taxpayers in maintaining and enforcing those separate systems. Each of the states maintain their own workplace relations systems, each with an industrial tribunal or court similar to Fair Work Australia as well as separate Government departments for policy development, programme and education management, compliance and tribunal services.[8] Based on state annual reports, the cost to the taxpayer and the community of providing these services is upwards of $60 million per year. Delivery of these services by the Commonwealth alone will remove the service delivery duplication, thus providing efficiencies of scale and significantly reducing the overall costs to the taxpayer and the community. Precise costings for the Commonwealth delivery of these services and the savings and efficiencies which will be realised, will be determined once all states have indicated whether they intend to refer their workplace relations powers.

Competing systems also lead to increased compliance costs for individual workplaces which operate in more than one state or territory as they need to understand and comply with different and potentially competing legislation.[9]

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[5] Ibid, p.20

[6] Alexander J Brown and Jennifer A Bellamy (eds), '*Federalism and Regionalism in Australia: New Approaches, New Institutions?*', ANU Press, Canberra, ACT, 2007 cited in Business Council of Australia, '*Improving International Competitiveness in Australian Business*', Submission by the Business Council of Australia to the Review of Export Policies & Programs, June 2008, p.33

[7] Business Council of Australia, '*Improving International Competitiveness in Australian Business*', Submission by the Business Council of Australia to the Review of Export Policies & Programs, June 2008, p.35

[8] Fair Work Australia replaced the Australian Industrial Relations Commission on 1 July 2009

[9] Department of Employment, Workplace Relations and Small Business (DEWRSB) (Cth), '*Breaking the Gridlock: Towards a Simpler National Workplace Relations System, Discussion Paper 1: The Case for Change'*, 2000, p 14

Conflict and uncertainty caused by multiple systems

There is no clear demarcation between federal and state systems, and employers must often comply with more than one set of obligations.[10] For example, a recent research paper compiled by the NSW Parliamentary Library Research Service noted that:

> *…since the Fair Work reforms, both the Fair Work Act 2009 (Cth) and relevant State laws have provisions with respect to long service leave. Which Act applies depends on a series of circumstances, including whether an employee is covered by a modern award, pre-modernised award or enterprise agreements, as well as the commencement date of the award or agreement.* [11]

This conflict creates a great deal of uncertainty for businesses and employees, and was highlighted by the Australian Chamber of Commerce and Industry (ACCI) in an issues paper where it stated:

> *The parallel operation of different federal and State tribunals and federal and State legislation leads to confusion and uncertainty about the rights and obligations of employers and employees. Such a situation benefits no one and creates unnecessary difficulties and technicalities in the labour inspection and enforcement processes.* [12]

Where there is uncertainty of jurisdictional coverage or duplication or overlap in the application of legislation, a great deal of time and resources may have to be spent by courts and tribunals to determine which jurisdiction matters should be heard in, and in some cases may require the matter to be heard concurrently in separate jurisdictions.[13]

This is particularly the case for organisations that are unable to determine whether or not they are constitutional corporations. For example, some not-for-profit bodies (such as those providing community or municipal services) may engage in trading activities that are largely incidental to their core business, but which may be sufficient to bring them into the definition of "trading corporation". For example, a charitable organisation providing assistance to people with an illness or disability may operate a shop to raise funds. Some local councils that have corporate status by virtue of their establishing legislation may provide some services on a commercial basis and so be held to be 'trading corporations'.

Although the majority of employers who operate across state boundaries are trading corporations, there are a significant number of employers whose status as a 'trading corporation' is not clear and who are continuing to operate in multiple state systems, perhaps also with a federal transitional award. As previously mentioned, clarifying their coverage through the courts is a very expensive exercise which would be avoided by the certainty provided by a national workplace relations system for the private sector.

[10] Prince and Thomas op cit, p.12
[11] Jason Arditi, '*Industrial relations: The referral of powers*', Briefing Paper No.7/09, NSW Parliamentary Library research Service, 2009, p.20
[12] Australian Chamber of Commerce and Industry, '*Functioning federalism and the case for a national workplace relations system: Issues paper*', 2005, p.20
[13] Jason Arditi, '*Industrial relations: The referral of powers*', Briefing Paper No.7/09, NSW Parliamentary Library research Service, 2009, p.21

On this the ACCI noted:

> *…the existence of federal and State systems inevitably raises jurisdictional issues, which can be costly and difficult to resolve, and can result in delays in handling the real issues in dispute, and increase legal costs.*[14]

The complexity and uncertainty is compounded by the degree of uncertainty over the legal test to be applied to determine whether or not a particular entity is or is not a trading corporation was outlined by Professor Andrew Stewart and Professor George Williams in their analysis of the 2007 Work Choices decision of the High Court:

> ***The Next (Legal) Battleground: Defining a Trading Corporation***
>
> *In the Territories and the Commonwealth public sector, all employers are covered by the federal Workplace Relations Act. In the case of the Territories, this is possible because of the broad legislation power granted to the Commonwealth under section 122 of the Constitution. And unless Victoria revokes its 1996 reference of powers to the Commonwealth, all employers in that State too will be subject to the federal regulation.*
>
> *But in other States an employer will generally come within the federal system only if they area a "constitutional corporation": that is, a trading, financial or foreign corporation as listed in section 51(20) of the Constitution.*
>
> *As explained in Chapter 4, any company that is in business to make a profit is plainly a trading corporation. But on the current approach taken by the courts, a not-for-profit association can also be a trading corporation, provided it is incorporated and has enough trading activities. This can catch bodies such as sporting clubs, private schools, charities, community service organisations and the like. Most of these raise some of their income from selling goods or providing services in return for a fee. Even if this trading generates less than 10 per cent of their annual revenue, on the current view this may be enough to satisfy the requirement that they engage in "significant" or "substantial" trading activities.*
>
> *The same is true of a range of statutory corporations, such as local councils, universities and even public hospital. They may be established under State or Territory legislation to provide public services. But they can still qualify as trading corporations if they raise enough income from selling goods, providing services, renting out property and so on.*
>
> *In the Work Choices case, Justice Callinan noted that the question as to which corporations should be characterised as trading or financial corporations was "a very big question indeed, and (one) which will occupy, I believe, a deal of the time of the courts in the future."* [15]

[14] Australian Chamber of Commerce and Industry, '*Functioning federalism and the case for a national workplace relations system: Issues paper*', 2005, p.19

[15] Andrew Stewart and George Williams, *Work Choices: What the High Court Said*, federation press, 2007 at p.153

Inconsistency of multiple workplace relations systems

Under the current fractured system of workplace relations regulation in Australia there is the potential for inequalities and differences to occur among businesses and employees resulting from different regulations and wages and working conditions depending on the state in which they operate or are employed.[16]

Again, to quote ACCI:

> *One of the key reforms in many policy areas has been the rationalisation of competing and overlapping federal and state regulation. While the creation of rational/uniform approaches to regulation has been successfully achieved in many policy areas (e.g. Australia's uniform national corporations law), it has remained elusive in the area of workplace relations.*
>
> *This is a major national failing - the regulation of how we work is of vital national importance and is an area where good policy must prevail over political pragmatism. Workplace relations policy is too important for horse and buggy era approaches to persist.*
>
> *Having six separate workplace relations systems is bad enough, but the level of regulatory overlap and complexity in the interaction of our state and federal workplace relations systems provides an additional imperative for urgent reform.*
>
> *Businesses in the same industry, and even those operating on the same street, can be subject to entirely different workplace laws – with one business under one (state) set of laws and obligations and another under separate (federal) laws and obligations. Even worse, many businesses are subject to overlapping, multiple sets of regulation (both state and federal) within the one workplace. For example production staff may be under one federal award, transport staff under another federal award and clerical staff under a separate state award – all containing differing rights and obligations.*
>
> *This creates a situation in which employers and employees face profound difficulties in identifying workplace rights and obligations. This is contrary to the interests of employers and employees and detracts from the capacity of the workplace relations system to secure desired policy outcomes (including the protection of core employment standards for employees).*
>
> *The level of complexity created by competing state and federal workplace relations systems is a decades-old problem which has been thrown into sharp relief by our contemporary market economy. Replication, overlap and confusion between state and federal workplace regulation has become increasingly unsustainable.*[17]

[16] Joe Catanzariti, '*What should the IR system in NSW look like?*, Industrial Relations Society of NSW, Annual Convention, Blue Mountains, 13 May 2005, pp 2 – 3

[17] ACCI, '*ACCI Welcomes Historic Workplace Relations Reforms*' Media Release, 26 May 2005

Forum shopping

Forum shopping' is a strategy employed by parties to achieve favourable outcomes and in relation to workplace relations matters can involve 'shopping' around jurisdictions to find those most likely to provide access to working conditions or requirements that may be denied or not available in other jurisdictions.[18] Although 'forum shopping' is less common now than in the past, it undermines the integrity of the law in any one jurisdiction[19] and can result in costly legal argument about jurisdictional issues.[20]

In the current context, 'forum shopping' arises due to the different application of workplace relations laws and instruments to a business dependent on its status as a trading corporation. This may operate as an irrational factor in the decision a business makes about the trading structure it should adopt. For example:

- a professional services business (medical, legal, accounting, consultancy) that is incorporated will fall in the federal workplace relations system, while partnerships will fall in the State system

- A farmer may face different award obligations depending on whether he or she trades through a corporate structure or not. By incorporating, a farm business may lose access to drought relief or tax concessions.

This adds a complex additional factor to be considered by a business owner in deciding on the appropriate trading structure for their business.

OBJECTIVES OF THE NATIONAL WORKPLACE RELATIONS SYSTEM

The Australian Government's *Forward with Fairness*[21] policy provides that the Government will seek to achieve nationally consistent workplace relations laws for the private sector, either by governments referring powers for private sector workplace relations or other forms of cooperation and harmonisation.

The Government's objective is to deliver on its commitment to create a uniform national workplace relations system for the private sector and to reduce complexity and duplication and provide certainty of coverage to private sector employers and employees.

In recognition of the rights of states to manage their own workforces in the manner they choose, the Government has specifically allowed states to exclude state public sector and local government employees from the scope of this commitment. In particular, *Forward with Fairness* states:

> *Current arrangements for the public sector and local government can continue with many of these workers regulated by State industrial relations jurisdictions.*

[18] ACCI, *Functioning federalism and the case for a national workplace relations system: Issues paper*',2005 p.20
[19] DEWRSB op cit, p.14
[20] ACCI, op cit, p.20
[21] Kevin Rudd and Julia Gillard, '*Forward with Fairness: Labor's plan for fairer and more productive Australian workplaces*', Pre-election policy commitment, Australian Labor Party, April 2007, p.6

> *State Governments, working with their employees, will be free to determine the appropriate approach to regulating the industrial relations arrangements of their own employees and local government employees.*[22]

Victoria has elected to refer workplace relations powers in respect of its own public sector and local government employees.

OPTIONS

This regulation impact statement examines two possible paths of Government action in relation to the identified problem:

- State referrals of power for workplace relations matters through either a subject or text-based referral; and
- Maintaining the status quo.

Alternatives to state referrals of power are:

- harmonisation of workplace relations legislation through the enactment by State governments of legislation that mirrors the FW Act; and
- cooperation between governments to align State workplace relations legislation with the FW Act.

However, the alternatives are considered sub-optimal in that they would in large part deliver an outcome similar to the status quo. For instance, employers whose constitutional status is unclear, and their employees, would continue to face uncertainty over which jurisdiction applied to them and would continue to face jurisdictional arguments, notwithstanding the relevant laws were harmonised. Similarly, merely harmonising workplace relations with the federal system would mean that states continue to maintain significant workplace relations infrastructure for those private sector employers that are not constitutional trading corporations, at a cost to their taxpayers.

Given the above, these alternatives are not assessed for the purposes of this regulatory analysis.

The options of referral and the status quo are examined in more detail below.

Option 1 – Referral of power

Section 51(xxxvii) of the Constitution provides a mechanism through which state parliaments can refer powers over matters to the Commonwealth Parliament. The Commonwealth Parliament is consequently provided the power to make laws with respect to those referred matters, but only for those states from which the matter is referred.

It is important to note here that without enabling state legislation, the Commonwealth has no power to legislate over the referred matters.

[22] Ibid

Under this option, state governments can choose to make either a subject matter referral or text-based referral of power over workplace relations matters for the unincorporated private sector to the Commonwealth.

In line with the Government's commitments in Forward with Fairness such a referral is not intended to include public sector entities or employees, or local government entities and their employees covered by state law unless otherwise requested by the relevant state and agreed by the Commonwealth, and would include mechanisms to provide for such exclusions.

A referral of power would result in the application of the FW Act to private sector entities and their employees within the referring state who are currently not covered by the federal workplace relations system; that is, unincorporated organisations, partnerships and sole traders. Referral would also reduce the uncertainty of the workplace relations jurisdiction of those bodies where there is some ambiguity regarding their status as constitutional corporations, such as local government, not-for-profit and some incorporated associations.

A referral of power by a state government would necessarily include an amendment reference to enable amendments to the FW Act to automatically apply in the referring state. Consultation on amendments would be governed by a supporting inter-governmental agreement.

Option 2 – Status quo

This option involves maintaining the status quo. That is, that the Commonwealth and remaining state workplace relations legislation continue to operate in a juxtaposed regulatory manner.

IMPACT ANALYSIS

Option 1 – Referral of power

Benefits of Referral

As noted above, the existence of six separate workplace relations systems operating in Australia causes a significant number of problems. In particular, the regulatory overlap creates ongoing uncertainty and legal complexity for Australian businesses and employees in terms of determining the jurisdiction and laws by which they are covered. Further, the duplication across the various jurisdictions creates inefficiencies in terms of the use of government resources, as well as inconsistencies and conflict between the laws operating in the various systems.

Ultimately, all Australians pay the price for this through reduced economic activity as resources are directed away from productive activities/investment to unproductive expenses associated with clarifying coverage/meeting compliance costs.

Option 1 provides for states to be able to refer their workplace relations powers to the Commonwealth to create a national workplace relations system for the private sector in Australia. This option will enable many of the problems noted above to be rectified and will

provide businesses and employees with a simpler system and increased certainty and consistency with respect to workplace relations matters.

The section below outlines these benefits. While it is not possible to definitively quantify the magnitude of these benefits, the Government and other key stakeholders believe them to be significant.

More efficient use of community resources

The existence of numerous workplace relations systems creates significant costs for taxpayers and the community in maintaining those separate systems.[23] Access Economics in their *June 2009 Business Outlook* expressed support for the creation of a national system:

> *…the Feds are trying hard to create a national system of regulation for industrial relations…We are big supporters of this…the costs of admin and compliance in State-based IR systems has been too big for too long.*[24]

By referring their workplace relations powers to the Commonwealth, states will be able to reduce the taxpayer funds and government resources dedicated to operating and regulating the workplace relations system in their jurisdiction. Nationally, state governments spend upwards of $60 million of taxpayers' money each year maintaining duplicate administrative functions and regulation.

The ACCI, speaking on a national workplace relations system stated:

> *Current spending by the States of more than $100 million a year on State industrial systems that broadly duplicate the institutional structures of the Commonwealth system is a very questionable use of taxpayer funds. It will not be long before State industrial systems simply cover the corner fish and chip shop and milk bar and no workplaces in corporate Australia. At that point it will be very difficult to justify millions of dollars in expenditure on separate employment courts, tribunals and industrial inspectorates other than by reference to political opportunism or partisan allegiance to vested interests.*[25]

The ACCI went further to suggest:

> *A country of 20 million people, with less than half the population in the workforce, should no longer sustain six separate, different and overlapping workplace relations systems. Australia also needs a more flexible and less complex system that focuses on workplaces, not the sources of law. A national government should regulate workplace relations on a national basis, just as it makes national laws about taxation, trade practices and corporations.*[26]

[23] Jason Arditi *'Industrial Relations: The referral of powers'*, NSW Parliamentary Library Briefing Paper No. 7/09, 2009 p.19
[24] Access Economics '*Business Outlook'* June 2009, p60
[25] ACCI, op cit, p.30
[26] ACCI, op cit, p.30

And the Australian Industry Group has also noted the complexity and wastefulness of multiple systems:

> *On top of this, all but one of the states continued to develop and enhance their own industrial systems. No matter how well many of these systems operate the fact remains that no employer wants to be faced with dealing with six different systems in order to expand its business throughout Australia. The intermeshing and clash of these systems has nourished generations of industrial lawyers*.[27]

The Productivity Commission has also pointed to cases where multiple agencies in a jurisdiction perform the same function, and noted that the cost of running these public agencies is a major impost on Australian taxpayers and there is clearly an opportunity for rationalisation of the number of regulatory agencies.[28]

While states will still be required to maintain some infrastructure in order to administer their public sector workplace relations system and fulfil their service obligations agreed to under the referral, the savings as a result of referral of powers to the Commonwealth are likely to be substantial. This will represent significant savings to taxpayers and the community.

Reduced legal complexity and compliance costs

The uncertainty regarding workplace relations coverage for some business under the corporations power often results in businesses, even small non-profit businesses, workers and unions, being forced to seek potentially expensive constitutional law advice and/or legal proceedings to clarify or determine whether they are covered by the federal or state workplace relations system. Uncertainty and duplication can also lead to increased compliance costs for individual workplaces needing to comply with competing legislation.

While talking more broadly in terms of the costs of federalism, Access Economics in a report for the Business Council of Australia (BCA) noted that:

> *…the costs of an inefficient federation in these areas usually falls on businesses as higher costs of compliance with for example, eight regulatory regimes instead of one.*[29]

Further, uncertainty of jurisdictional coverage or duplication or overlap in the application of legislation can result in a great deal of time and resources being spent by courts and tribunals in determining which jurisdiction matters should be heard in. In some cases this may require the matter to be heard concurrently in separate jurisdictions. This has the potential to be extremely frustrating for businesses involved in such legal proceedings. There is also the opportunity cost of the courts being caught up in proceedings which would be avoided were a national workplace relations system for the private sector in place.

[27] Australian Industry Group, Chief Executive Heather Ridout, *Keeping the Edge, Australia needs workplace relations reform to stay in the global game*, October 2005
[28] Productivity Commission, '*Potential benefits of the National Reform Agenda*', Report to the Council of Australian Governments, 2006, pp.134-135
[29] Access Economic '*The costs of Federalism'*, Report prepared for the Business Council of Australia, 2006, p45.

Uncertainty and complexity also creates practical difficulties for enforcement agencies to ensure compliance with the correct workplace relations legislation and enforce such compliance. The creation of a national system also enables governments to achieve savings due to only requiring the enforcement of one set of workplace relations laws.

A uniform national system for the private sector removes jurisdictional uncertainty, eliminates much duplication and overlap in legislation and reduces business compliance costs.

Increased consistency and certainty

A uniform national workplace relations system would remove most of the inequalities and differences that currently occur among businesses and employees resulting from different regulations, wages and working conditions depending on the jurisdiction in which they operate or are employed.

For example, a company which falls within a state jurisdiction may be required to pay different minimum wages or conditions to its employees under a relevant state award compared with a company undertaking the same work in a similar location that falls within the federal jurisdiction. Similarly, there are on occasion considerable differences between the various state jurisdictions. Therefore, this inequality can impact on businesses both within and across state boundaries. Not only does this potentially result in a competitive disadvantage for companies, but also creates inequalities between employees performing the same work.

Some differences will persist as a result of the effect of s.27 of the FW Act, even with referral of powers, however the scope of differences that currently apply will be significantly reduced.

Further, a referral of power would provide businesses with greater certainty with respect to the set of laws applying to their business. This would reduce costs associated with seeking advice on their obligations and reduce the risk of non-compliance resulting from uncertainty. It should be observed that where relevant award obligations are substantially different between state and federal systems (for example if a test case wage increase has been awarded in one jurisdiction but not the other), the risk to a business of being in error about its status as a ‘trading corporation’ and being held to be in breach of award, obligations may be catastrophic.

Increased productivity and competitiveness

Reducing the number of jurisdictions, laws and regulations governing workplace relations will remove barriers to productivity growth stemming from duplication and inefficiencies. This will allow the workplace relations system to more readily adapt to global markets and competition.

This benefit has been recognised by a number of stakeholders, including the BCA, which has noted the costs of duplication and excessive regulation on several occasions:

> *The economic costs of regulation include the opportunity costs of foregone business activity due to overlapping regulation (particularly between the Commonwealth and the States) and disincentives to invest, innovate or expand.*[30]
>
> *"These unnecessary regulatory imposts add costs and make it more difficult for businesses to compete in international markets, particularly against businesses from countries with far more streamlined systems.*
>
> *Sometimes these imposts are merely a small nuisance, but at other times they require substantial business investment in compliance activities using resources that could be better deployed elsewhere. Of greatest concern are the instances where the impost is sufficiently large to make businesses think twice about investment or expansion, resulting in an 'opportunity cost' of activity forgone that ultimately affects us all.*[31]

The BCA has gone on to advocate that a simpler national regime for regulating workplace relations is one of a number of government reforms imperative to increasing Australia's international competitiveness and productivity.[32]

Business Impact

State referral of workplace relations powers for private sector unincorporated businesses is expected to incur only minor transitional costs to businesses in terms of their understanding and compliance with the FW Act.

However, these minimal costs will be far outweighed by the benefits of the simplicity, clarity, transparency and accessibility of the new streamlined workplace relations system. As outlined above, the economic benefits of a national workplace relations system for the private sector will benefit not only employers and employees but also the wider community as a result of the significant government efficiencies flowing from a national system.

Transition to the Fair Work system

Any transitional costs to business are likely to be one-off, short-term costs associated with becoming familiar with the federal workplace relations system under the FW Act.

While there may be some other minor costs for business such as updating payroll systems and human resources practices to take account of new pay rates and conditions under federal awards, these costs are also incurred under the existing arrangements when implementing award variations and/or enterprise agreements. As such, no additional cost is assessed as arising in this area.

[30] Business Council of Australia, Improving International Competitiveness in Australian Business, Submission by the Business Council of Australia to the Review of Export Policies & Programs, June 2008.
[31] BCA, 'Making Federalism Work: The Economic Imperatives', Address to the Australia and New Zealand School of Government, 12 September 2008.
[32] BCA, 'Improving International Competitiveness in Australian Business', Submission by the Business Council of Australia to the Review of Export Policies & Programs, June 2008.

In terms of familiarisation with the FW Act, the Department of Education, Employment and Workplace Relations has in place a Fair Work Education and Information Program. Under the Program, the Australian Government is providing $12.9m in funding to selected community, employee, employer and small business organisations to deliver free education and information programs, including webinars (online seminars), across Australia to help inform employees, employers and small businesses on how the FW Act will affect them.

A key focus of the Fair Work Education and Information Program is to ensure employers, particularly small businesses, learn about the new system and comply with it, including new aspects such as the Fair Dismissal Code for Small Business.

In addition to the Fair Work Education and Information Program, the Government has provided detailed information on the new system on the fairwork.gov.au website and is providing telephone advice services. The Government also proposes to further support workers and employers in referring states to successfully transition to the national workplace relations system through the implementation of a transitional educational service.

The transitional educational service will be contracted to state governments where possible and managed by the Commonwealth Fair Work Ombudsman (FWO) at a cost to the Government. This will allow the Commonwealth to utilise existing state education and advisory services.

The transitional educational service will include conducting face-to-face interactions with employers called Transitional Education Visits (TEVs). TEVs would be free, unobtrusive and focused exclusively on supporting employers to understand their workplace obligations. These activities are in addition to those which may be provided by industry organisations to their member businesses.

Transition to modern awards

The modernisation of the award system by the Australian Industrial Relations Commission (AIRC) involves the reduction and simplification of thousands of awards and instruments in the state and federal workplace relations systems to around 130 modern awards. Among other things, paragraph 576A(2)(a) of Schedule 2 to the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* requires that:

> *Modern awards must be simple to understand and easy to apply and must reduce the regulatory burden on business.*

The award modernisation request made by the Minister for Employment and Workplace Relations to the President of the AIRC states that the modernisation of awards is not intended to, inter alia, disadvantage employees or increase costs for business.

Against that background, the impact of changes to pay and conditions as a result of this process for employees transferring into the federal system will be different for each employee and employer, depending on their current minimum pay and conditions compared with the modern award.

Award modernisation will have minimal, or no impact on employers who currently pay their employees above minimum rates. In this regard, it is important to note that 83.5 per cent of employees are currently paid above the minimum rate of pay and that the impact on this group of any increase to minimum rates of pay is less significant. [33]

The award modernisation process has been overwhelmingly supported by employer and union groups who acknowledge the difficulty of the task and benefits which will accrue from its completion.

The Government has carefully monitored the award modernisation process and responded quickly to legitimate concerns raised by employer associations, business groups and unions regarding the potential for the award modernisation process to unreasonably increase costs for employers or reduce wages for employees in specific industries or industry sectors.

In this regard, the Government has made seven variations to the Award Modernisation Request and nine submissions to the AIRC. For instance, on 26 August 2009, the Government varied the award modernisation request to address concerns raised by the horticulture, retail, pharmacy and call centre industries. For example, in relation to the horticulture industry, the variation asked the AIRC to:

- enable employers in the horticulture industry to continue to pay piece rates of pay to casual employees who pick produce, as opposed to a minimum rate of pay supplemented by an incentive based payment;
- have regard to the perishable nature of the produce grown by particular sectors of the horticulture industry when setting hours of work provisions for employees who pick and pack such produce; and
- provide for roster arrangements and working hours in the horticulture industry that are sufficiently flexible to accommodate seasonal demands and restrictions caused by weather.

These changes have received strong support from stakeholders. For instance, a number of horticulture employer organisations, including AUSVEG CEO Mr Richard Mulcahy, welcomed Employment and Workplace Relations Minister Julia Gillard's intervention on behalf of the horticulture industry regarding the proposed awards modernisation process.

> *We are delighted that the Minister has requested that the Commission continue to enable employers in the horticulture industry to pay piece rates of pay to casual employees who pick produce. This will avoid wage increases and allow the industry to continue to be a major employee of Australian workers," said Mr Mulcahy.*
>
> *Furthermore, we are impressed that the Minister has asked that the Commission take stock of the perishable nature of produce grown in this industry and to set hours of work provisions accordingly, said Mr Mulcahy.*

[33] ABS data show that only 16.5 per cent of employees were paid the exact minimum rate of pay in August 2008 (ABS *Employee Earnings and Hours* Cat No 6306.0, August 2008)

> *In addition, we support the call for the provision of roster arrangements and working hours in the horticulture industry that will be sufficiently flexible to accommodate seasonal demands and restrictions caused by weather.*
>
> *These changes will avoid excessive wage increases, job losses and business failure.*[34]

In its decision of 2 September 2009, the AIRC indicated that it was prepared to re examine issues relating to piecework provisions and provisions relating to hours of work, overtime and penalties.

In addition to addressing stakeholder concern through award modernisation request variation and submissions, the Government has provided for the inclusion of transitional provisions in modern awards that enable a phased transition over a five year period (generally in five equal instalments) to new pay rates.

In its 2 September 2009 decision referred to above, the AIRC explained how the transition to modern awards will work in practice:

> *We have decided that phasing should apply both to increases in the specified wages and conditions and reductions in those wages and conditions and in most cases will be in five equal instalments. We have decided to utilise five instalments because that number was the one most commonly selected by parties who supported phasing…… We have decided that phasing should commence on 1 July 2010…… There will be a further four instalments on 1 July of each year concluding on 1 July 2014.*[35]

These dates will synchronise with the dates when any changes to modern award minimum wages determined by Fair Work Australia will take effect.

Stakeholders have overwhelmingly expressed support for these provisions:

> *The transitional provisions released today by the AIRC are sensible and adopt a number of key Ai Group proposals. The AIRC's approach will assist employers and employees in understanding all of the new requirements and will greatly alleviate the financial impacts upon employers and employees (Chief Executive of the Australian Industry Group, Heather Ridout, 2 September).*
>
> *"The gradual phase in of wage bill increases under the new retail award will give small retailers time to accommodate the changes and allow them to concentrate on holding onto staff at a time when security is a vital ingredient in continuing*

34 AUSVEG Media Release 28 August 209 – "AUSVEG welcomes Ministerial Intervention to Horticulture Industry Award"

35 Australian Industrial Relations Commission Decision, 2 September 2009 – transitional provisions for priority and Stage 2 modern awards, [2009] AIRCFB 800, paragraphs 28 and 30.

> *economic recovery (Yvonne Anderson, ARA employment relations spokeswoman, reported in the Daily Advertiser.)*
>
> *The Australian National Retailers Association welcomes the support of the Deputy Prime Minister for a five year transition to higher penalty rates under the modern retail award. "The Deputy Prime Minister's announcement today will ease some of the pressure on retailers who are doing all they can to retain staff… ANRA commends the Deputy Prime Minister for responding to employers' concerns (Australian National Retailers Association CEO Margy Osmond).*

The Government has also ensured that an employee cannot have his or her take-home pay reduced as a result of the making of a modern award by introducing take home pay orders through the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008*.

Businesses and employees will have access to an information and education program outlined and costed below, which will provide businesses with information on how to comply with the federal laws.

As a result of the Government's actions with respect to the award modernisation process, the existence of transitional provisions in modern awards and the provision of comprehensive information and education to employers and employees on the FW Act and modern awards, it is expected that the costs for employers associated with moving from state systems to the federal system will be negligible and considerably overweighed by the benefits of a simpler and more accessible system.

Calculation of impact

As a result of the free education and information services provided by the Government, the business cost associated with becoming familiar with the federal workplace relations laws would primarily relate to the staff time required to attend or undertake the Government run education sessions.

Businesses will receive the range of benefits noted in the previous section, due to the savings in time and money associated with reduced compliance costs and increased simplicity and certainty. While it is difficult to quantify these benefits, they will significantly outweigh the small additional cost to business associated with undertaking any familiarisation activity. It is also worth noting that the benefits will be ongoing, while the familiarisation costs will be a one-off cost. This is why the benefits are assessed as significantly outweighing the minimal costs associated with moving to a national workplace relations system.

Australian Bureau of Statistics (ABS) data is used to identify the number of affected businesses in each state.[36] The business cost is calculated under the assumption that one staff member from each business would be required to attend a Commonwealth funded education session for half a day (4 hours). The business benefit is calculated under the assumption that it would save the manager of each business one day of work (8 hours). Given the ongoing

[36] ABS Counts of Australian Businesses (Cat. No. 8165.0), June 2007, unpublished data

nature of the benefits of moving to a national system, this one-off quantification of the benefits significantly underestimates the value of the benefits to business and also completely ignores the wider community benefits that would flow from a national workplace relations system for the private sector, e.g. the over $60 million per annum which States currently spend on their workplace relations infrastructure.

In order to quantify the value of the staff time ABS estimates for average hourly ordinary time earnings for full-time adult managers of unincorporated businesses in each state are used.[37]

The business costs and benefit for each state, except Western Australia, have been calculated below using the methodology outlined in the Office for Best Practice Regulation's Business Cost Calculator.

Western Australia has been excluded from the calculations on the basis that the Western Australian Government has indicated that it does not intend to make a referral of power to the Commonwealth, but will instead participate in a national system through other means of cooperation and harmonisation. All other states have either indicated their intention to make a referral of power or are yet to make a decision on referral.

South Australia

ABS data show that there are 32,947 employing unincorporated businesses in South Australia. On average managers of unincorporated businesses in South Australia earn $27.80 per hour, equating to a cost of **$111 per business** to undertake the half day of education. Overall, there would be an additional business cost of **$3,663,706** for unincorporated businesses in South Australia.

The saving of one day of the manager's work equates to a benefit of **$222 per business**, or an overall benefit of **$7,327,413** for unincorporated businesses in South Australia.

This equates to a net benefit of **$111 per business** or **$3,663,706** for all unincorporated businesses in South Australia.

Tasmania

ABS data show that there are 9,455 employing unincorporated businesses in Tasmania. On average managers of unincorporated businesses in Tasmania earn $23.10 per hour, equating to a cost of **$92 per business** to undertake the half day of education. Overall, there would be an additional business cost of **$873,642** for unincorporated businesses in Tasmania.

The saving of one day of the manager's work equates to a benefit of $**185 per business**, or an overall benefit of **$1,747,284** for unincorporated businesses in Tasmania.

This equates to a net benefit of **$92 per business** or **$873,642** for all unincorporated businesses in Tasmania.

[37] ABS *Employee and Earnings and Hours* (Cat. No. 6306.0), August 2008, unpublished data

New South Wales

ABS data show that there are 110,293 employing unincorporated businesses in New South Wales. On average managers of unincorporated businesses in New South Wales earn $36.00 per hour, equating to a cost of **$144 per business** to undertake the half day of education. Overall, there would be an additional business cost of **$15,882,192** for unincorporated businesses in New South Wales.

The saving of one day of the manager's work equates to a benefit of **$288 per business**, or an overall benefit of **$31,764,384** for unincorporated businesses in New South Wales.

This equates to a net benefit of **$144 per business** or **$15,882,192** for all unincorporated businesses in New South Wales.

Queensland

ABS data show that there are 88,068 employing unincorporated businesses in Queensland. On average managers of unincorporated businesses in Queensland earn $26.50 per hour, equating to a cost of **$106 per business** to undertake the half day of education. Overall, there would be an additional business cost of **$9,335,208** for unincorporated businesses in Queensland.

The saving of one day of the manager's work equates to a benefit of **$212 per business**, or an overall benefit of **$18,670,416** for unincorporated businesses in Queensland.

This equates to a net benefit of **$106 per business** or **$9,335,208** for all unincorporated businesses in Queensland.

Overall

Overall, ABS data show that there are 240,763 employing unincorporated businesses in the states of South Australia, Tasmania, Queensland and New South Wales. For these states there will be an average cost of **$124 per business** to undertake the half day of education, with a total additional cost for unincorporated businesses in these states of **$29,754,748.**

The overall saving of one day of the manager's work equates to an average benefit of **$247 per business**, or an overall benefit of **$59,509,497** for unincorporated businesses in these four states.

This equates to a net benefit of **$124 per business** or **$29,754,748** for all unincorporated businesses in South Australia, Tasmania, Queensland and New South Wales.

It should be noted that in the absence of state referrals, businesses covered by the transitional federal system that have been in the federal system for a significant period of time (perhaps always) will transfer from the federal to a state system on 27 March 2011. These businesses will incur the full costs associated with ensuring they comply with the state workplace relations system. These costs will not be incurred by employers if their states refer.

Option 2 – Status Quo

Benefits and Costs

While there would be no additional regulatory or business costs associated with maintaining the status quo and states not referring their workplace relations powers to the Commonwealth, as noted above, the problems and costs associated with the current workplace environment will persist. These include a continuation of State governments spending over $60 million per annum to maintain their existing workplace relations infrastructure as well as the potentially significant costs incurred by business in clarifying their workplace relations coverage.

However, it is important to note that those businesses covered by the transitional federal system that have been in the federal system for a significant period of time (perhaps always) will transfer from the federal to a state system on 27 March 2011 in the absence of their state referring workplace relations powers. These businesses will incur the costs associated with becoming familiar with a new workplace relations system. These costs would be avoided under a national system for the private sector.

Some may argue that there are benefits from maintaining separate workplace relations systems in terms of competitive federalism and providing local flexibility. By maintaining the status quo, however, the costs to business from uncertainty, inefficiencies and additional compliance costs associated with duplication and inconsistencies among the various workplace relations laws will continue. Further, the inefficient allocation of taxpayer resources associated with maintaining and administering six different workplace relations system, along with the barriers to productivity and competitiveness resulting from the rigidities of a multi-jurisdiction system will continue to hamper the Australian economy.

Accordingly, the overall ongoing costs associated with this option far outweigh the small benefit associated with not placing any additional short-term regulatory or cost burden on businesses.

CONSULTATION

The Australian Government has been engaged in broad and ongoing consultation with stakeholders regarding the development of a national workplace relations system for the private sector.

Discussions with the states and territories about the creation of a national workplace relations system have been ongoing under the aegis of the Workplace Relations Ministers' Council (WRMC) since February 2008.

The Government understands that state and territory governments have also undertaken significant consultation with relevant stakeholders within their respective jurisdictions regarding their government's decisions to participate in the national system.

The Government has also consulted directly with a number of state-based stakeholders who have raised concerns regarding their respective state government's decisions whether or not to participate in the national system.

Wherever stakeholders have raised concerns regarding state referrals and the likely impact of this action on their jurisdictional coverage, the Government has considered those concerns and accommodated requests directed at ensuring certainty as to which workplace relations system (i.e. federal or state) will apply to their circumstance.

Broadly, there appears to be a prevailing view among governments and stakeholders that the development of a single workplace relations system for the private sector by way of state referrals of power would be beneficial not only to Australia as a nation, but also to those businesses and employees seeking certainty of jurisdictional coverage. Organisations that are recorded as supporting such action include the:

- Australian Chamber of Commerce and Industry;
- Australian Council of Trade Unions;
- National Farmers Federation;
- Australian Industry Group;
- Business Council of Australia; and
- Australian Mines and Metals Association.

CONCLUSION AND RECOMMENDED OPTION

As previously noted, there are a number of problems associated with Option 2, that is maintaining the status quo regarding workplace relations regulation in Australia, which will continue to place a burden on Australian businesses and hamper the Australian economy, including:

- uncertainty of jurisdictional coverage;
- inefficiencies with maintaining and administering six different workplace relations systems; and
- additional compliance costs associated with duplication and inconsistencies among the various workplace relations laws.

These costs outweigh the relatively small benefits associated with not placing any additional short-term regulatory or cost burden on businesses.

In contrast, Government pursuit of Option 1 is not only expected to address many of the problems currently associated with the status quo, including greater certainty to business and greater equality in working conditions for employees, but is also expected to incur relatively small costs associated with information and education to ensure compliance with the new workplace relations system. These costs to business are also expected to be further reduced by Government intervention by providing information and education through the provision of a Fair Work Education and Information Program and Transitional Education Visits. As outlined, beyond the transition period, the benefits to employers of a single, transparent and simple national workplace relations system will be of significant benefit to them over time.

It is the Department's view that the significant benefits associated with Option 1 far outweigh the associated short-term costs, and that conversely, the costs of maintaining the status quo under Option 2 far outweigh the benefits associated with not placing any additional short-term regulatory or cost burden on businesses.

Based on this assessment, Option 1 is the strongly recommended option.

IMPLEMENTATION AND REVIEW

Implementation

As Option 1 is the recommended option, it will be necessary for the Commonwealth and those states that choose to refer their private sector workplace relations powers to the Commonwealth to enact legislation to effect such referrals.

Referring states will be required to enact legislation which specifies those matters that are to be referred to the Commonwealth, to allow the Commonwealth to enact corresponding legislation regarding those referred matters.

In addition to Victoria, the state governments of South Australia and Tasmania have committed to referring their private sector workplace relations powers to the Commonwealth. The Queensland Government has indicated in-principle support for joining the national system subject to a number of key issues being resolved. The New South Wales Government has yet to confirm its position while the Western Australian Government has indicated its intention to consider opportunities for harmonisation with the new national workplace relations system.[38]

The Governments of South Australia and Tasmania have recently introduced legislation into their respective Parliaments to progress their referrals.

As earlier stated, the Northern Territory and ACT are currently covered by the federal workplace relations system by virtue of the Commonwealth's legislative power in relation to the Territories (see section 122 of the Constitution).

Inter-governmental agreement

States' participation in the proposed national workplace relations system for the private sector will also be governed by the Multilateral Intergovernmental Agreement (IGA) for a National Workplace Relations system for the Private Sector (the multilateral IGA), which outlines the principles of the national workplace relations system and the roles and responsibilities of the Commonwealth and participating states and the territories.

At a meeting of WRMC on 25 September 2009, the Commonwealth, Victoria, South Australia, the Northern Territory, the ACT and Tasmania agreed to and have signed the multilateral IGA.

[38] WRMC Communique, 11 June 2009

At the same meeting of WRMC, the Queensland Government agreed to the text of the multilateral IGA and indicated that, subject to resolving remaining issues, it would be prepared to sign the IGA at a later date.

The New South Wales Government is yet to determine whether or not it will refer its workplace relations powers to the Commonwealth, but indicated were it to do so it would not seek any amendment to the multilateral IGA.

Western Australia has noted the content of the IGA and the provisions that would apply in the event it elected to sign the IGA as a cooperating jurisdiction.

The Queensland and New South Wales Governments have agreed to work with the Commonwealth to resolve outstanding issues by late October 2009.

Review

The multilateral IGA, the text of which has been agreed by all states and territories except Western Australia, requires that the operation of the agreement be reviewed no later than 3 years from the date of commencement, or as otherwise agreed by the parties to the agreement.

The multilateral IGA also provides consultation and voting mechanisms for participating states and territories regarding amendments to the FW Act and related legislation and regulations.

NOTES ON CLAUSES

1. The following abbreviations are used in the Notes on Clauses:

AIRC	**Australian Industrial Relations Commission**
FW Act	***Fair Work Act 2009***
FW(RO) Act	***Fair Work (Registered Organisations) Act 2009***
FWA	**Fair Work Australia**
LSL	**Long service leave**
NES	**National Employment Standards**
NAPSA	**notional agreement preserving State awards**
first referral Act	***Fair Work (State Referral and Consequential and Other Amendments) Act 2009***
this Bill	**Fair Work Amendment (State Referrals and Other Measures) Bill 2009**
T&C Act	***Fair Work (Transitional Provisions and Consequential Amendments) Act 2009***
WR Act	***Workplace Relations Act 1996***

Clause 1 – Short Title

2. This is a formal provision specifying the short title of the Bill.

Clause 2 – Commencement

3. The table in this clause sets out when the provisions of the Bill will commence.

Clause 3 – Schedule(s)

4. This clause gives effect to the Schedules to the Bill by providing that each Act specified in the Schedules is amended or repealed as set out in the items of the Schedules. Any other item in the Schedules to the Bill has effect according to its terms.

Schedule 1 – Referring States

Fair Work Act 2009

1. The first referral Act amended the FW Act as originally enacted (that is, the FW Act as enacted on 7 April 2009) to include Division 2A in Part 1-3. Division 2A (which commenced on 25 June 2009) gave effect to Victoria's workplace relations reference to the Commonwealth, which commenced on 23 June 2009.

2. Schedule 1 to this Bill amends the FW Act to insert Division 2B into Part 1-3 to give effect to State references of workplace relations matters to the Commonwealth that take effect after 1 July 2009 but on or before 1 January 2010. Schedule 1 also makes a number of amendments to Division 2A of the FW Act to ensure consistency with Division 2B.

3. States would refer matters under paragraph 51(xxxvii) of the Constitution, which enables the Commonwealth Parliament to make laws with respect to matters referred by State Parliaments.

4. A State will be a referring State under Division 2B if it refers matters which, in effect, enable the Commonwealth (so far as not otherwise within Commonwealth power) to:

- include the text of Division 2B in the FW Act;
- amend the FW Act in relation to the subject matter dealt with by the FW Act as originally enacted; and
- make provision for the transition of referral employees and employers to the national workplace relations system under the FW Act.

5. Most provisions of the FW Act as originally enacted apply to the employers and employees within the scope of the corporations and other legislative powers (e.g., Territories) engaged by the definitions of *national system employee* and *national system employer* in sections 13 and 14 of the FW Act.

6. Like Division 2A of Part 1-3, Division 2B extends the meaning of *national system employee* and *national system employer* so that provisions of the FW Act that rely on these definitions apply to all employees and employers in the referring State (whether covered by sections 13 and 14 or not). However, this would be subject to exclusions in State referral laws of matters relating to State public sector employees and public sector employers, or matters relating to local government employees and employers.

7. Like Division 2A, Division 2B also extends the definition of *outworker entity*, and extends the general protections in Part 3-1 of the FW Act to all action in a Division 2B referring State.

Item 1 – Section 12 (note 2 at the end of the definition of *employee*)

Item 2 – Section 12 (note 2 at the end of the definition of *employer*)

Item 3 – Section 12 (note at the end of the definition of *national system employee*)

Item 4 – Section 12 (note at the end of the definition of *national system employer*)

Item 5 – Section 12 (note at the end of the definition of *outworker entity*)

Item 6 – Section 13 (note)

Item 7 – Section 14(1) (note 2)

Item 8 - Subsection 15(1) (note)

Item 9 - Subsection 15(2) (note)

Item 41 – Section 337 (note)

8. These items amend notes to sections 12, 13, 14, 15 and 337 of the FW Act to cross-reference new definitions and application provisions in Division 2B.

9. Section 12 (the Dictionary) is a list of defined terms in the FW Act. Terms are either defined in the Dictionary or in another provision of the FW Act (in which case the Dictionary signposts the definition in that provision). Notes to some of the terms also cross-reference provisions of the FW Act that define or extend the meaning of those terms.

10. To cross-reference the new definitions and application provisions in Division 2B, items 1-9 and item 41 amend notes to:

- signposts in section 12 to the definitions of *employee*, *employer*, *national system employee* and *national system employer* (items 1, 2, 3 and 4);
- the signpost in section 12 to the definition of *outworker entity* (item 5);
- the definitions of *national system employee* and *national system employer* in sections 13 and 14 (items 6 and 7);
- provisions about the ordinary meaning of employee and employer in subsections 15(1) and 15(2) (items 8 and 9); and
- section 337, which is about the application of Part 3-1 (General protections) (item 41).

Item 10 – Section 24

11. Item 10 amends the Guide to Part 1-3 of the FW Act (which is about the FW Act's application) in section 24 to reflect the addition of new Division 2B, which is about the extended application of the FW Act in States that refer to the Commonwealth workplace relations matters after 1 July 2009 and on or before 1 January 2010.

Item 11 – Division 2A of Part 1-3 (heading)

12. This item replaces the heading to Division 2A to make clear that it relates to States that referred workplace relations matters to the Commonwealth before 1 July 2009 (that is, Victoria).

Item 12 - Section 30A

Item 27 - At the end of section 30A

13. Item 27 amends section 30A to insert new subsection 30A(2), which provides that words and phrases in the definitions of *excluded subject matter* and *referred subject matters* that are defined in the FW Act (other than in Division 2A) have the meanings set out in the FW Act as in force on 1 July 2009. Item 12 inserts new subsection 30A(1) consequential on this amendment.

14. Victoria referred power to enable the Commonwealth to amend the FW Act (so far as not otherwise within Commonwealth power) in relation to the referred subject matters. This term is defined in section 30A and encompasses the matters dealt with by the FW Act as originally enacted, such as terms and conditions of employment and rights and responsibilities of employees and employers, but does not encompass excluded subject matter.

15. Certain terms in the definition of referred subject matters (transfer of business, outworker, outworker entity, employee and employer, industrial action) are defined in the FW Act, as are the terms employee and employer in the definition of excluded subject matter. This item makes clear that these terms have the meaning set out in the FW Act as in force on 1 July 2009 (that is, when the FW Act, as amended by the first referral Act, commenced). However, this does not affect the definition of excluded subject matter, which will be amended by item 15 (see below).

Item 13 – Section 30A (definition of *amendment*)

Item 16 – Section 30A (definition of *express amendment*)

16. Victoria has referred matters relating to the amendment of the FW Act, so far as otherwise outside Commonwealth power. Section 3 of the Victorian *Fair Work (Commonwealth Powers) Act 2009* (the Victorian referral Act) defines *express amendment* (in part) to mean the direct amendment of the text of the FW Act "whether by the insertion, omission, repeal, substitution or relocation of words or matter".

17. In the FW Act, these words are not contained in the definition of *express amendment,* but are instead contained in the definition of *amendment.* Section 30A of the FW Act defines *amendment* to mean the insertion, omission, repeal, substitution, addition or relocation of words or matter.

18. Item 16 amends the definition of *express amendment* in section 30A of the FW Act so that it is similar to the definition in the Victorian referral Act. Item 13 consequentially repeals the definition of *amendment* from section 30A.

19. These amendments are expressed to commence immediately after the commencement of item 11 of Schedule 1 to the first referral Act ,that is, on 25 June 2009.

Item 14 – Section 30A

Item 17 - Section 30A

Item 18 - Section 30A

Item 26 - Section 30A

Item 31 – Subsection 30B(6)

20. These items amend Division 2A to set out the circumstances in which a State that referred matters before 1 July 2009 may terminate its amendment reference but remain a referring State. These provisions are consistent with the arrangements set out in new Division 2B for States that refer matters after 1 July 2009 but on or before 1 January 2010.

21. Under subsection 30B(1), a State is a referring State if its Parliament refers to the Commonwealth (so far as not otherwise within Commonwealth legislative power) the matters covered by:

- the *initial reference* (see item 18) - that is, matters to which the referred provisions relate, which enable extension of the FW Act to regulate unincorporated and public sector employers and their employees, outworker entities, and certain types of adverse action;

- the *amendment reference* (see item 14) - that is, matters relating to amendments of the FW Act; and

- the *transition reference* (see item 26) - that is, matters relating to the transition from the regime provided for by the WR Act or of a law of a State relating to workplace relations to the national system.

22. Item 31 inserts new subsections 30B(6), 30B(7), 30B(8) and 30B(9). New subsection 30B(6) provides that a State ceases to be a referring State if the State terminates its initial reference, amendment reference (and neither subsection 30B(7) nor subsection 30B(8) applies), or transitional reference.

23. New subsections 30B(7) and 30B(8) enable a referring State to remain a referring State if its amendment reference is terminated by the State Governor by proclamation in the following circumstances:

- with six months notice, if the amendment references of other referring States all terminate on the same day; or

- with three months notice, if the Governor considers that an amendment to the FW Act is inconsistent with the *fundamental workplace relations principles.*

24. The *fundamental workplace relations principles* are set out in new subsection 30B(9). These principles encompass requirements that:

- the FW Act should provide for, and continue to provide, for:

  – a strong, simple and enforceable safety net of minimum employment standards;

  - genuine rights and responsibilities to ensure fairness, choice and representation at work;
  - collective bargaining at the enterprise level with no provision for individual statutory agreements;
  - fair and effective remedies through an independent umpire;
  - protection from unfair dismissal; and

- there should be and continue to be in connection with the operation of the FW Act:
  - an independent tribunal system; and
  - an independent authority able to assist employers and employees within a national workplace relations system.

Item 15 – Section 30A (definition of *excluded subject matter*)

25. This item amends section 30A to replace the existing definition of *excluded subject matter*.

26. States are required to refer matters that enable the Commonwealth to amend the FW Act (so far as not otherwise within Commonwealth power) in relation to the *referred subject matters*. This term is defined in section 30A and encompasses the matters dealt with by the FW Act as originally enacted, such as terms and conditions of employment and rights and responsibilities of employees and employers.

27. Certain matters are excluded from a State amendment reference. These are currently set out in the definition of *excluded subject matter* in section 30A, which cross-references the matters dealt with by State laws that are saved in their application to national system employees and national system employers by section 27 of the FW Act. The State laws that are saved by section 27 deal with matters such as discrimination, occupational health and safety, public holidays, outworkers and workplace surveillance.

28. Consistent with the definition of *excluded subject matter* in new Division 2B, this item provides a new definition of *excluded subject matter* in Division 2A that sets out the excluded matters expressly, rather than by cross-referencing the saved State laws. As is the case for the current definition, the new definition of *excluded subject matter* does not prevent the Commonwealth amending the FW Act in reliance on State amendment references in relation to any of these matters, to the extent that the FW Act as originally enacted deals with them (directly or indirectly) or requires or permits instruments made or given effect under the FW Act to deal with them.

Item 19 - Section 30A (definition of *law enforcement officer*)

29. Referring States can refer, or exclude from references, matters relating to State public sector employment, including law enforcement officers. This item inserts a new definition of *law enforcement officer* in Division 2A that is consistent with the definition of *law enforcement officer* in new Division 2B (explained below).

Item 20 – Section 30A

Item 21 – Section 30A

Item 30 – At the end of subsection 30B(2)

30. Consistent with paragraph 30L(2)(c) of new Division 2B, item 30 inserts new paragraph 30B(2)(c) of Division 2A, which enables a referring State to refer or to exclude from a reference matters relating to local government employment.

31. Items 20 and 21 insert new definitions of *local government employee* and *local government employer* in Division 2A that are consistent with the definitions of these terms in new Division 2B (explained below).

Item 22 – Section 30A (paragraph (c) of the definition of *referred subject matters*)

32. Paragraph (c) of the definition of *referred subject matters* in section 30A of the FW Act describes rights and responsibilities of specified persons (employees, employers etc.) and associations in relation to freedom of association and other protections. In certain circumstances Part 3-1 (General protections) of the FW Act imposes obligations on third parties other than those specified in paragraph (c), for example, by prohibiting any person from making misrepresentations about another person's workplace rights.

33. This item amends paragraph (c) in section 30A so that it refers to rights and responsibilities of *persons, including* employees, employers and others to ensure that it covers all persons that have rights and responsibilities under the general protections.

Item 23 – Section 30A (subparagraph (c)(i) of the definition of *referred subject matters*)

34. This item amends subparagraph (c)(i) of the definition of *referred subject matters* to make clear that the reference to 'freedom of association' means freedom of association in the context of workplace relations.

Item 24 – Section 30A (subparagraph (c)(viii) of the definition of *referred subject matters*)

35. This item amends subparagraph (c)(viii) of the definition of *referred subject matters* to make clear that the reference to "rights of entry and rights of access to records" relates to the rights of unions.

Item 25 - Section 30A (paragraphs (a) to (d) of the definition of *State public sector employer*)

36. Referring States can refer or exclude from references matters relating to State public sector employees and State public sector employers.

37. This item inserts a new definition of *State public sector employer* in Division 2A that is consistent with the definition of this term in new Division 2B (explained below).

Item 28 - Paragraph 30B(2)(b)

Item 29 - Paragraph 30B(2)(b)

38. Paragraph 30B(2)(b) in Division 2A provides that a State can be a referring State even if the State's referral law excludes particular matters relating to State public sector employees and State public sector employers from the referred matters.

39. For consistency with new Division 2B, items 28 and 29 amend paragraph 30B(2)(b) to make clear that:

- in addition to excluding particular matters, a State can exclude all matters relating to State public sector employment (item 28); and
- the matters from which State public sector employment are excluded are the matters covered by subsections 30B(3), 30B(4) and 30B(5) – that is, the initial, amendment and transitional references (item 29).

Item 32 - Paragraphs 30C(1)(a) and 30D(1)(a)

Item 33 - Subsection 30E(1)

Item 34 - Subsection 30E(2)

Item 35 - Subparagraphs 30F(1)(c)(i) to (iv)

Item 36 - Subsection 30G(1)

Item 37 - Section 30H

40. These items amend a number of provisions in Division 2A to replace references to 'a referring State' with references to 'a State that is a referring State because of this Division', consequential to the insertion of Division 2B into Part 1-3 of the FW Act (see item 39).

Item 38 - Section 30J

Item 40 – At the end of Division 4 of Part 1-3

New section 40A – Application of the Acts Interpretation Act 1901

41. Section 30J provides for the *Acts Interpretation Act 1901* (the AI Act) as in force on the day on which Division 2A commenced (25 June 2009) to apply to the FW Act, and that amendments of the AI Act made after that day do not apply to the FW Act.

42. Item 38 repeals section 30J and item 40 inserts a new section 40A that has the same effect. New section 40A will be relevant to both Divisions 2A and 2B.

Item 39 – After Division 2A of Part 1-3

43. This item inserts Division 2B into the FW Act to give effect to State references of workplace relations matters to the Commonwealth that take effect after 1 July 2009 but on or before 1 January 2010.

New section 30K – Meaning of terms used in this Division

44. New section 30K defines terms used in new Division 2B. The meaning of these terms is explained below.

New section 30L – Meaning of referring State

45. New subsection 30L(1) defines *referring State*. A State is a referring State if its Parliament, after 1 July 2009 but on or before 1 January 2010, refers the matters set out in new subsections 30L(3), 30L(4) and 30L(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.

46. New subsection 30L(2) is explained further below. This provision enables a State referral law to provide for a reference to terminate in certain circumstances, or to exclude any matters relating to State public sector or local government employment.

Initial reference

47. New subsection 30L(3) gives effect to a reference of matters relating to the text of new Division 2B (see the definition of *referred provisions* in new subsection 30K).

48. New subsection 30L(3) envisages that referring States would refer the provisions of new Division 2B to the Commonwealth, to the extent that they deal with matters within each State's legislative power. The matters referred enable extension of the FW Act to regulate unincorporated and public sector employers and their employees, outworker entities, and certain types of adverse action.

49. New sections 30M and 30N (explained further below), among other provisions, 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.

50. The FW Act generally applies to national system employees and national system employers, and these extended definitions further apply the FW Act in a referring State so far as it would not otherwise be supported by Commonwealth power.

51. It is anticipated that State references would enable the Commonwealth to amend the FW Act as originally enacted and as subsequently amended at any time before State referral laws commence (see new subsection 30L(3)) to include Division 2B. This would fix each States' references of matters relating to the FW Act as it exists at a particular time.

Amendment reference

52. New subsection 30L(4) requires referring States to refer matters relating to amendments of the FW Act. Such references would enable the Commonwealth to amend the FW Act (so far as this would not otherwise be within Commonwealth power) in relation to the *referred subject matters* (defined in new section 30K) by making express amendments of the FW Act.

53. New section 30K defines *express amendment* to mean the direct amendment of the text of the FW Act (whether by the insertion, omission, repeal, substitution or relocation of

words or matter), but not the enactment of a provision that has or will have substantive effect other than as part of the text of the FW Act.

54. The amendment reference provisions of Division 2B enable the FW Act (as supported by the Commonwealth power and State references) to be amended to apply to all employers and employees in the State (subject to State exclusions of matters relating to public sector and local government employment).

55. The referred subject matters (defined in new section 30K) correspond with matters regulated by the FW Act to cover:

- terms and conditions of employment, including:
  - employment standards, minimum wages and terms and conditions of employment in instruments;
  - bargaining in relation to terms and conditions of employment;
  - the effect of a transfer of business on terms and conditions of employment;
- terms and conditions under which an outworker entity may arrange for work to be performed for the entity;
- rights and responsibilities of persons including employees and employers and others, in relation to:
  - freedom of association in the context of workplace relations and related protections (such as workplace rights), and protection from discrimination in employment;
  - termination of employment (including unfair dismissal and notification and consultation obligations concerning employment termination);
  - industrial action (including the circumstance in which industrial action is protected and the circumstances in which payment may be made to an employee during a period of industrial action);
  - protection from payment of bargaining services fees;
  - sham independent contractor arrangements;
  - standing down employees without pay;
  - union rights of entry and rights of access to records;
- compliance with, and enforcement of, the FW Act;
- the administration and application of the FW Act; and
- matters incidental or ancillary to the operation of the FW Act or its instruments.

56. The amendment reference framework balances matters of regulatory interest to a referring State with the Commonwealth's concurrent or related regulatory interest in many of these areas.

57. It is anticipated that some matters would be excluded from State amendment references. These are reflected in the definition of *excluded subject matter* in new section 30K - that is:

- matters dealt with by the States' various equal opportunity or anti-discrimination Acts, which are preserved in their application to national system employees and employers by subsection 27(1A) of the FW Act as originally enacted;

- matters such as occupational health and safety, workers compensation, public holidays, outworkers, regulation of employee and employer associations and workplace surveillance (corresponding to the matters dealt with by State laws that are preserved in their application to national system employees and employers by paragraph 27(1)(c) and subsection 27(2) of the FW Act); and

- rights and remedies that are incidental to any of these matters.

58. However, the definition of *excluded subject matter* does not prevent the Commonwealth amending the FW Act in relation to any of these matters to the extent that the FW Act as originally enacted deals with them (directly or indirectly), or requires or permits instruments made or given effect under the FW Act to deal with them.

59. This framework reflects the fact that section 27 of the FW Act preserves the operation of State laws on certain matters by providing that they are not excluded from the workplace relations field covered by section 26 of the FW Act. Most of the preserved State laws deal with matters that are also subject to concurrent or related regulation in the FW Act. For example:

- Subsection 27(1A) of the FW Act preserves the named State anti-discrimination and equal opportunity Acts, and paragraphs 27(1)(c) and 27(2)(c) preserve State laws relating to occupational health and safety. However, Part 3-1 of the FW Act (General protections) also provides protection from discrimination in relation to employment, and protects workplace rights (including those set out in a State occupational health and safety law).

- Paragraphs 27(1)(c) and 27(2)(l) of the FW Act preserve State laws dealing with the regulation of employee and employer organisations and their members. However, various provisions of the FW Act regulate the rights and obligations of organisations, including in relation to bargaining, industrial action, standing to apply for court orders and representation of persons before FWA.

- The matters dealt with by preserved State laws may (depending on relevant instrument content rules) also be dealt with by federal instruments such as enterprise agreements and modern awards, subject to State laws in these areas (see subsection 29(2) of the FW Act).

60. Subsection 30K(2) provides that words and phrases in the definitions of *excluded subject matter* and *referred subject matters* that are defined in the FW Act (other than in Division 2B) have the meanings set out in the FW Act as in force on 1 July 2009.

61. Certain terms in the definition of *referred subject matters* (*transfer of business*, *outworker*, *outworker entity*, *employee* and *employer*, *industrial action*) are defined in the FW Act, as are the terms *employee* and *employer* in the definition of *excluded subject matter*.

This item makes clear that these terms have the meaning set out in the FW Act as in force on 1 July 2009 (that is, when the FW Act, as amended by the first referral Act, commenced). However, this does not affect the definition of *excluded subject matter*, which will commence after this time.

Transitional reference

62. New subsection 30L(5) requires a referring State to refer matters relating to the transition to the national system.

63. It is anticipated that State references would enable the Commonwealth to legislate to transition employers and employees from the workplace or industrial relations systems in these States, or from the WR Act as continued in operation by the T&C Act, to the national system under the FW Act. The reference in relation to the WR Act covers unincorporated employers and their employees who are currently covered by federal awards and agreements created in reliance on the conciliation and arbitration power of the Constitution.

- The T&C Act and Schedule 2 to this Bill (explained further below) make arrangements for the transition of employers and employees in referring States, and instruments that cover them, into the new system.

Reference exclusions

64. Referring States can refer or exclude from references matters relating to State public sector employment and local government employment. New paragraphs30L(2)(b) and (c) enable State referral laws to exclude any matters relating to these sectors. These provisions qualify the operation of new sections 30M and 30N, which otherwise extend the FW Act to any employer and any employee in a referring State.

65. Victoria (a referring State under Division 2A) has referred matters relating to its public sector and local government (subject to certain exceptions set out in its referral Act). It is anticipated that none of the Division 2B referring States will refer matters relating to public sector employment.

66. The terms *State public sector employee* and *State public sector employer* are defined in new section 30K.

67. A State public sector employee is an employee of a State public sector employer or a State employee specified in the regulations. The definition includes a *law enforcement officer* of the State.

68. A law enforcement officer is defined in section 30K to cover members of a police force or police service, police trainees and persons authorised to exercise police powers and duties. The definition also includes police reservists, recruits and cadets, a junior constable, a police medical officer, a special constable, an ancillary constable or a protective services officer. This definition is intended to be consistent with a range of definitions in a number of State laws.

69. A *State public sector employer* means:

- the State, a State Governor or Minister;

- a body corporate established for a public purpose by a State law, State Governor or State Minister;
- a body corporate in which the State has a controlling interest;
- a person who employs individuals for the purposes of an unincorporated body established for a public purpose by a State law, Governor or Minister; or
- a State employer specified in the regulations.

70. The definition includes an office holder who is deemed to be the employer of a law enforcement officer by a State referral law for the purposes of the FW Act.

71. *Local government employee* means an employee of a local government employer, or any other employee in the State specified in the regulations.

72. A *local government employer* means an employer that is:

- a local government body corporate established by or under a law of a State;
- a body corporate in which a local government body corporate has, or 2 or more such bodies together have, a controlling interest;
- a person who employs individuals for the purposes of an unincorporated local government body established by or under a law of a State; or
- any other local government body corporate, or person who employs individuals for the purposes of an unincorporated local government body, specified in the regulations.

Termination of reference

73. Under subsection 30L(1) a State is a *referring State* if its Parliament refers to the Commonwealth (so far as not otherwise within Commonwealth legislative power) the matters covered by:

- the initial reference - that is, matters to which the referred provisions relate, which enable extension of the FW Act to regulate unincorporated private sector employers, public sector employers and their employees (subject to exclusions in the State referral law), outworker entities and certain types of adverse action;
- the amendment reference - that is, matters relating to amendments of the FW Act; and
- the transition reference - that is, matters relating to the transition from State systems to the national system.

74. New paragraph 30L(2)(a) makes clear that a State is a referring State even if the State's referral law provides for any or all of the initial, amendment or transition references to terminate in certain circumstances, for example, by proclamation of the Governor in Council of the State.

75. New subsection 30L(6) provides that a State ceases to be a referring State if the State terminates its initial reference, amendment reference (and neither subsection 30L(7) nor subsection 30L(8) applies), or transitional reference.

76. New subsections 30L(7) and 30L(8) enable a referring State to remain a referring State if its amendment reference is terminated by the State Governor by proclamation in the following circumstances:

- with six months notice, if the amendment references of other referring States all terminate on the same day; or
- with three months notice, if the Governor considers that an amendment to the FW Act is inconsistent with the *fundamental workplace relations principles*.

77. The *fundamental workplace relations principles* are set out in new subsection 30L(9) and encompass requirements that:

- the FW Act should provide for, and continue to provide, for:
  - a strong, simple and enforceable safety net of minimum employment standards;
  - genuine rights and responsibilities to ensure fairness, choice and representation at work;
  - collective bargaining at the enterprise level with no provision for individual statutory agreements;
  - fair and effective remedies available through an independent umpire;
  - protection from unfair dismissal; and
- there should be and continue to be in connection with the operation of the FW Act:
  - an independent tribunal system, and
  - an independent authority able to assist employers and employees within a national workplace relations system.

New section 30M – Extended meaning of national system employee

New section 30N – Extended meaning of national system employer

78. Generally the FW Act applies to national system employees and national system employers. The existing definitions of *national system employee* and *national system employer* in sections 13 and 14 of the FW Act provide constitutional support for most parts of the FW Act by engaging Commonwealth powers to legislate with respect to trading and financial corporations and foreign corporations (constitutional corporations), the Territories and interstate and overseas trade and commerce, and the Commonwealth's power to regulate its own employment relationships.

79. Most parts of the FW Act regulate the employment relationship between national system employees and national system employers. Parts 6-3 and 6-4 of the FW Act are supported by the external affairs power and extend entitlements and obligations in relation to unpaid parental leave, notice of termination or payment in lieu of notice and unlawful termination of employment to employees and employers that are not within the national

system definitions. (This is discussed in more detail in the Explanatory Memorandum to the Fair Work Bill 2008.)

80. New subsections 30M(1) and 30N(1) extend the existing definitions of *national system employee* and *national system employer* to include any employee and any employer in a referring State that would otherwise be outside those definitions (subject to exclusions in State referral laws in relation to State public sector and local government employees and employers).

81. Consistent with sections 13 and 14 of the FW Act, new subsection 30M(1) encompasses an individual who is employed, or usually employed, by an employer, and new subsection 30N(1) encompasses a person who employs, or usually employs, an individual.

82. The Federal Court of Australia considered the meaning of 'usually employed' in *Australian Meat Industry Employees Union v Belandra Pty Ltd* [2003] FCA 910; (2003) 126 IR 165. The Court held that while an employer ceased operating for a period and did not have any employees during that time, it was still an employer for the purposes of then paragraph 298K(1)(c) of the WR Act. Other cases considered in that decision indicate that a casual or daily hire employee may still be an employee for the purposes of the WR Act, even though their employment relationship terminates at the end of each shift or daily period of employment.

83. The extended definition of *national system employee* makes clear that a person on a vocational placement (as defined in section 12 of the FW Act) is not within the definition.

84. Also, consistent with subsections 30C(1) and 30D(1) which are the extended definitions of *national system employee* and *national system employer* in Division 2A, subsections 30M(1) and 30N(1) include a law enforcement officer deemed to be a national system employee by a State referral law and an office-holder deemed by that law to be their employer.

85. New subsections 30M(2) and 30N(2) have the effect that sections 13 and 14 are not limited by the extended national system definitions. New subsections 30M(1) and 30N(1) would not affect employees or employers in referring States who are already within the national system definitions in sections 13 and 14 of the FW Act.

New section 30P – Extended ordinary meanings of employee and employer

86. New subsections 30P(1) and 30P(2) enable States to refer matters relating to law enforcement officers by extending the ordinary meaning of *employee* and *employer* to include (respectively) a law enforcement officer if a State referral law provides for this and an office-holder deemed to be the employer of a law enforcement officer, by a State referral law.

87. While it is anticipated that States that refer workplace relations matters under Division 2B will exclude matters relating to law enforcement officers, this provision ensures consistency with Division 2A, under which Victoria has referred certain matters relating to law enforcement officers.

New section 30Q – Extended meaning of outworker entity

88. This provision extends the meaning of *outworker entity* in a referring State.

89. Section 12 of the FW Act includes a definition of *outworker entity*.

90. New section 30Q extends this definition by setting out, in relation to a referring State, particular circumstances in which a person will be an outworker entity.

91. Under new section 30Q the definition of *outworker entity* will extend to a person, 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 one or more of the following applies:

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

New section 30R – General protections

92. Part 3-1 of the FW Act sets out a range of workplace protections and ensures fairness and representation at the workplace by recognising the right to freedom of association and preventing discrimination and other unfair treatment.

93. Part 3-1 largely applies to action by or affecting national system employers and employees and organisations (see sections 338 and 339). Action by employees and employers who are within the extended definitions of *national system employee* and *national system employer* under new subsections 30M(1) and 30N(1) are also covered.

94. New subsection 30R(1) extends the application of Part 3-1 to action in a referring State in the same way that paragraph 338(1)(d) of the FW Act applies the Part to action taken in a Territory or in a Commonwealth place. Extension of the Part to all action in referring States means that the Part may apply in circumstances such as the following:

- If an unincorporated principal terminated an unincorporated subcontractor's contract because the subcontractor was a member of a State industrial association or had given evidence in a proceeding before a State industrial body, such action is prohibited by Part 3-1 if the termination of the contract took place in a referring State.
- If a State industrial association, or any other person, coerced an unincorporated contractor not to engage an unincorporated subcontractor because the subcontractor had refused to join the association, the coercion action is prohibited by Part 3-1 if it took place in a referring State.

95. This provision applies despite section 337 of the FW Act (which limits the application of Part 3-1) and does not limit the operation of sections 338 and 339.

New section 30S – Division only has effect if supported by reference

96. New section 30S makes clear that provisions of the FW Act that are supported by State references only have effect to the extent that States refer matters mentioned in new

subsection 30L(1) – that is, the matters set out in new subsections 30L(3), 30L(4) and 30L(5). This has the effect that the FW Act is read down in accordance with any exclusion from a referring State's initial, amendment and transitional references relating to State public sector or local government employment.

Item 42 – Transitional – referring State

97. Item 41 is a transitional provision which makes clear that Victoria is taken to have been a referring State at the commencement of item 11 of the R&C Act and to continue to be a referring State after the commencement of this item.

Schedule 2 – Transitional matters related to State referrals under Division 2B of Part 1-3 of the Fair Work Act 2009

98. Part 1 of Schedule 2 to the Bill inserts new Schedule 3A into the T&C Act and amends related provisions of the T&C Act to transition employers and employees in referring States whose employment arrangements are regulated by State laws to the new national workplace relations system.

99. Part 1 of Schedule 2 also establishes arrangements for the transition of employers and employees covered by federal awards and agreements made in reliance on the conciliation and arbitration power to the new national workplace relations system. As is the case for Victoria, the constitutional basis of transitional awards and these agreements would be changed to reflect reliance on State references. As a result the sunset date of 26 March 2011 will no longer apply to the extent that these transitional instruments cover State referral employers and employees.

100. For employers and employees in referring States covered by transitional awards, these awards will generally be replaced by modern awards from 1 January 2010.

101. Part 2 of Schedule 2 to the Bill makes amendments to the FW Act and other Commonwealth Acts that are consequential on new Division 2B referrals.

Incoming State employers and employees

102. Referring States will refer power to support the transition of incoming State employers and employees from State systems to the national system. These references will support the transitional arrangements in the Bill.

103. At the referral commencement, notional federal awards and agreements in the same terms as the State awards and agreements would be deemed to come into existence. These are known as *Division 2B State awards* and *Division 2B State employment agreements* (collectively, *Division 2B State instruments*).

104. The transitional arrangements that the Bill proposes for incoming State instruments are broadly similar to the transitional arrangements that were put in place in the T&C Act for the transition of federal instruments to the national workplace relations system. The key features are discussed below.

<u>Universal application of the safety net</u>

105. Consistent with current rules, the NES and the transitional national minimum wage order (in the case of parties not covered by a State award) will apply to incoming employees and employers from 1 January 2010, and will prevail over a Division 2B State instrument where the instrument is detrimental in comparison. To the extent appropriate, current NES transition rules for national system employers and employees set out in the T&C Act will also operate in relation to incoming State reference employers and employees.

106. The Bill also contains rules dealing with the treatment of service before the Division 2B referral commencement for the purposes of calculating entitlements under the Division 2B State instrument, as well as rules for dealing with leave that is being, or is to be taken, under the source award or source agreement at the time of the Division 2B referral commencement.

Division 2B State awards and transition to modern awards

107. A Division 2B State award will govern the terms and conditions of employment for the relevant Division 2B State reference employees from the referral commencement (anticipated to be 1 January 2010) for a period of 12 months. After that time, a relevant modern award will come into operation. The 12 month rule does not apply to Division 2B State enterprise awards.

108. During the 12 month period FWA will be required to consider whether a modern award should be varied to provide appropriate transitional arrangements for incoming State employees and employers. This would be subject to the existing rules in the FW Act about what may be included in modern awards.

109. Given that the AIRC will have determined transitional arrangements for employers and employees covered by NAPSAs which are derived from State awards, there will be a framework already in place for translating Division 2B State reference employers and employees to coverage by modern awards.

110. FWA will be able to make remedial take-home pay orders where the take-home pay of one or more employees is reduced as a result of movement to the modern award.

111. Given the industry and occupational coverage of modern awards, it is expected that Division 2B State reference awards will be fully replaced by modern awards on 1 January 2011. However, if there are parties covered by a Division 2B State award for which there is no corresponding modern award at that time, they will be covered by the miscellaneous modern award.

112. State employers and employees who are not covered by a State award at referral commencement but who are capable of being covered by a modern award will become covered by that modern award from referral commencement.

113. During the 12 month period Division 2B State awards will only be able to be varied to:

- ensure effective operation with the NES;
- remove any ambiguity or uncertainty in the instrument;
- remove inconsistency with the general protections or to remove provisions that are discriminatory (on referral by the Australian Human Rights Commission); or
- reflect minimum wage adjustments.

114. An enterprise agreement made in the national system after 1 January 2010 will be required to result in referral employees being better off overall than:

- an applicable Division 2B State award, if an application for approval of the enterprise agreement is made to FWA in the 12 month period during which State awards are preserved; or
- an applicable modern award, if an application for approval of an enterprise agreement is made to FWA after the 12 month transitional period;

- an applicable Division 2B State enterprise award.

Division 2B State enterprise awards

115. Consistent with T&C Act arrangements for enterprise awards, parties to Division 2B State enterprise awards (i.e. State awards that apply to a single enterprise) will be able to apply to FWA within four years of the referral commencement day to have the instrument modernised (as is the case for federal enterprise awards). After that time non-modernised Division 2B State enterprise awards will cease to operate and the affected employers and employees will be covered by the relevant modern award.

Division 2B State employment agreements

116. Consistent with federal rules, Division 2B State employment agreements will continue to operate until:

- replaced at any time by a new enterprise agreement under the FW Act; or
- terminated by agreement of the parties at any time, with the termination approved by FWA; or
- terminated by FWA after the nominal expiry date on application by one party if FWA is satisfied that termination is not contrary to the public interest and is appropriate in all the circumstances.

117. Consistent with federal transition rules for agreements, all Division 2B State employment agreements would have the same content as they do now, subject to the NES (applied on a no detriment basis), and modern award (or national minimum wage order) rates of pay.

- If there is a relevant modern award that would cover employees to which a Division 2B State employment agreement applies, the modern award rates of pay are relevant for the comparison, but if there is no relevant modern award, then it is the national minimum wage order rate that is relevant.

118. State rules about interaction between instruments would also be preserved. Division 2B State employment agreements would prevail over modern awards to the extent of inconsistency.

119. Consistent with variation rules for federal transitional agreements, Division 2B State employment agreements will only be able to be varied by FWA:

- to resolve ambiguity or uncertainty in the instrument;
- to ensure that the instrument interacts effectively with the NES or a modern award; or
- to remove inconsistency with the general protections or to remove provisions that are discriminatory (on referral by the Australian Human Rights Commission).

120. This Bill also contains provisions governing the treatment of Division 2B individual State employment agreements. (Of the States contemplating referral, only Queensland provides for individual statutory agreements (QWAs).) The arrangements for these

agreements will be generally consistent with arrangements that currently apply in relation to individual statutory agreements in the federal system.

Long service leave

121. Incoming State reference employees who derive their LSL entitlement from a State LSL law would continue to derive their entitlement from that law because of the existing saving of State LSL laws in section 27 of the FW Act.

122. At the Division 2B referral commencement, some State reference employees may have entitlements under federal transitional awards made in reliance on the conciliation and arbitration power. Section 113 of the FW Act will be amended so that LSL entitlements from these instruments are included as part of the LSL NES.

123. Modern awards cannot deal with LSL but some incoming State system employees may have LSL entitlements under State awards. FWA will be given power to make orders preserving those LSL entitlements from 1 January 2010, which would operate alongside the modern award that covers an affected employee.

124. These State-award based LSL entitlements would be preserved for a maximum period of 5 years from 1 January 2010, pending the development of a uniform LSL NES.

Bargaining, agreement-making and industrial action

125. Consistent with T&C Act arrangements, bargaining and industrial dispute processes under State systems will not be carried over into the new system. Bargaining participants will either have to complete the bargaining process (that is, lodge an agreement for approval with a State industrial body) before the referral commencement or commence bargaining for a new enterprise agreement under the FW Act.

126. FWA will be able to take into account conduct of bargaining representatives in bargaining for a State system collective agreement when it is exercising its discretion under the bargaining and industrial action provisions of the FW Act.

127. Consistent with these arrangements, protected industrial action will not be able to be taken or bargaining orders applied for in the national system before the nominal expiry date of a preserved Division 2B State employment agreement.

Dispute resolution

128. This Bill provides a model dispute resolution clause to be prescribed by the regulations which applies in relation to Division 2B State awards.

129. In relation to Division 2B State employment agreements, this Bill enables dispute resolution terms in State employment agreements to continue as terms of the Division 2B State employment agreements derived from them.

130. Parties may apply to FWA to vary the dispute resolution terms in their Division 2B State employment agreement by consent, and for FWA to make such variation. Such variation could include giving FWA a role in dispute resolution (including arbitration by consent of the parties).

131. Where Division 2B State employment agreements confer power on State industrial bodies to resolve disputes, the State industrial bodies could continue to do so in their capacity as an independent third party (rather than in its capacity as a State industrial body), but because the dispute resolution power would arise under a federal instrument, they (like other third parties) would be required to exercise that power in a manner consistent with the FW Act. In particular, they could only arbitrate disputes with the consent of the parties and would be limited to making a final determination that is consistent with the parties' rights and obligations under the FW Act or under the instrument.

Transfer of business

132. The new transfer of business rules in the FW Act will apply to transfers that occur on or after the referral commencement. Division 2B State employment agreements and Division 2B State awards will be transferable instruments for the purposes of the FW Act transfer of business provisions.

133. This approach maintains FWA's powers to make certain orders in relation to coverage of transferable instruments with some modification. For example, FWA will not be able to 'switch off' a modern award in relation to the new employer's existing workforce and 'switch on' a Division 2B State award.

Treatment of conduct that occurred before referral commencement

134. As a general rule, proceedings in relation to conduct that occurred before the referral commencement will remain subject to State laws and be dealt with in State systems. So, for example, where an employee is dismissed from employment before the referral commencement, that employee will be able to seek a remedy under the relevant State law, even if the employee makes his or her application after the referral commencement.

Instrument-related proceedings before State industrial bodies

135. If an application to certify or approve, vary or terminate an agreement has been made in a State system before 1 January 2010 but has not been finalised by that date, a State tribunal can continue to deal with the application after 1 January 2010. The Bill will integrate the outcomes of these applications into the Division 2B State employment agreement framework.

136. Part-heard proceedings commenced before 1 January 2010 involving the making, variation or termination of State awards will terminate on 1 January 2010.

137. Appeals against State tribunal decisions to approve, vary or terminate an agreement, or to vary or terminate an award, could continue (if part-heard at 1 January 2010), or be instituted within 21 days of the date of decision. In the interests of certainty, appeals will lapse on 1 July 2010.

138. Appeals against a decision to make, or not to make, an award will lapse on 1 January 2010.

139. In general terms, if a decision is made in an award appeal, an agreement proceeding or agreement appeal under a State law that affects a source award or source agreement for a Division 2B State instrument, the change will be reflected in the Division 2B State instrument in the same way and from the same time as the source award or source agreement. However, this rule does not apply to decisions made in award appeals, in agreement proceedings or in

agreement appeals that affect the coverage terms of a source award or source agreement for a Division 2B State instrument.

Part 1 – Amendment of the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009

Item 1 – Item 2 of Schedule 2 (definition of *applies*)

Item 2 – Item 2 of Schedule 2

Item 3 – Item 2 of Schedule 2

Item 4 – Item 2 of Schedule 2 (definition of *conditional termination*)

Item 5 – Item 2 of Schedule 2 (at the end of definition of *covers*)

Item 6 – Item 2 of Schedule 2

Item 7 – Item 2 of Schedule 2

Item 8 – Item 2 of Schedule 2

Item 9 – Item 2 of Schedule 2

Item 10 – Item 2 of Schedule 2

Item 11 – Item 2 of Schedule 2

Item 12 – Item 2 of Schedule 2

Item 13 – Item 2 of Schedule 2

Item 14 – Item 2 of Schedule 2

Item 15 – Item 2 of Schedule 2

Item 16 – Item 2 of Schedule 2

Item 17 – Item 2 of Schedule 2

Item 18 – Item 2 of Schedule 2

Item 19 – Item 2 of Schedule 2

Item 20 – Item 2 of Schedule 2

Item 21 – Item 2 of Schedule 2

Item 22 – Item 2 of Schedule 2 (definition of *instrument content rules*)

Item 23 – Item 2 of Schedule 2 (definition of *instrument interaction rules*)

Item 24 – Item 2 of Schedule 2

Item 25 – Item 2 of Schedule 2

Item 26 – Item 2 of Schedule 2

Item 27 – Item 2 of Schedule 2

Item 28 – Item 2 of Schedule 2

Item 29 – Item 2 of Schedule 2

Item 30 – Item 2 of Schedule 2

Item 31 – Item 2 of Schedule 2

Item 32 – Item 2 of Schedule 2

Item 33 – Item 2 of Schedule 2

Item 34 – Item 2 of Schedule 2

Item 35 – Item 2 of Schedule 2 (definition of *take-home pay*)

Item 36 – Item 2 of Schedule 2 (definition of *take-home pay order*)

140. These items insert new definitions in item 2 of Schedule 2 to the T&C Act to cross-reference new definitions and application provisions relevant to new Schedule 3A dealing with transitional matters relating to State referrals under Division 2B of Part 1-3 of the FW Act.

141. Item 2 of Schedule 2 to the T&C Act (the Dictionary) is a list of defined terms used in the T&C Act. Terms are either defined in the Dictionary or in another provision of the T&C Act (in which case the Dictionary signposts the definition in that provision). Notes to some of the terms also cross-reference provisions of the T&C Act that define or extend the meaning of those terms.

Item 37 – At the end of subitem 7(1) of Schedule 2

Item 38 – At the end of subitem 7(2) of Schedule 2

142. These items amend the general regulation-making power in item 7 of Schedule 2 to the T&C Act to enable regulations of a transitional nature to be made to provide an effective transition from the various State industrial relations systems to the national workplace relations system. The regulations may make provisions of a transitional, application or saving nature in relation to:

- the transition from State industrial instruments to Division 2B State instruments; and

- the transition from Division 2B State instruments to modern awards and enterprise agreements.

143. Regulations made under item 7 of Schedule 2 to the T&C Act may modify the transitional provisions of the T&C Act where necessary.

144. Item 9 of Schedule 2 to the T&C Act ensures that any regulations made under item 7 cannot change the right of entry regime set out in the FW Act or the T&C Act or give inspectors additional compliance powers.

Item 39 – Subitem 2(1) of Schedule 3

145. This item amends subitem 2(1) of Schedule 3, consequential to item 41, which inserts new subitem 2(4A).

Item 40 – Paragraph 2(3)(a) of Schedule 3

146. This item amends paragraph 2(3)(a) to provide that a WR Act instrument in operation immediately before the WR Act repeal day does not include a *Division 2B State reference transitional award*.

Item 41 – After subitem 2(4) of Schedule 3

147. This item inserts new subitem 2(4A) in Schedule 3 to provide for the point in time when a Division 2B State reference transitional award becomes a *transitional instrument*.

148. A Division 2B State reference transitional award becomes a transitional instrument at the commencement of Division 2B of Part 1-3 of the FW Act. This is referred to as the *Division 2B referral commencement*.

Item 42 – Item 2A of Schedule 3 (heading)

149. This item amends the heading appearing before item 2A of Schedule 3 and is consequential on the amendments made by item 43.

Item 43 – After subitem 2A(1) of Schedule 3

150. This item inserts new subitem 2A(1A) in Schedule 3 which categorises State reference transitional awards according to whether they are *Division 2A State reference transitional awards* or *Division 2B State reference transitional awards*.

151. A *Division 2A State reference transitional award* covers Division 2A State reference employers and their employees (as defined in item 45)

152. A *Division 2B State reference transitional award* covers Division 2B State reference employers and their employees (as defined in item 45).

Item 44 – Subitem 2A(3) of Schedule 3

Item 46 – Subitem 2A(4) of Schedule 3

153. These items make amendments consequential on the amendments contained in new items 45 and 47.

Item 45 – After subitem 2A(3) of Schedule 3

154. This item inserts new subitem 2A(3A) in Schedule 3 to categorise State reference employees according to whether they *Division 2A State reference employees* or *Division 2B State reference employees*.

155. A *Division 2A State reference employee* is defined to mean an employee who is a national system employee because of section 30C of the FW Act, that is, an employee to which Victoria's reference of power applies.

156. A *Division 2B State reference employee* is defined to mean an employee who is a national system employee because of proposed new section 30M of the FW Act.

Item 47 – After subitem 2A(4) of Schedule 3

157. This item inserts new subitem 2A(4A) in Schedule 3 to categorise State reference employers as either *Division 2A State reference employers* or *Division 2B State reference employers*.

158. A *Division 2A State reference employer* is defined to mean an employer that is a national system employer because of section 30D of the FW Act, that is, an employer to which Victoria's reference of power applies.

159. A *Division 2B State reference employer* is defined to mean an employer that is a national system employer because of proposed new section 30N of the FW Act.

Item 48 – Paragraph 2A(5)(a) of Schedule 3

Item 49 – Subitem 2A(5) of Schedule 3

Item 50 – Paragraph 2A(5)(c) of Schedule 3

160. These items make minor amendments that insert, repeal and substitute certain words, the primary effect of which is to distinguish between transitional awards applying to Division 2A State reference employers and employees, and those applying to Division 2B State reference employers and employees.

Item 51 – At the end of item 2A of Schedule 3

161. This item amends Schedule 3 of the T&C Act by inserting new subitems 2A(6) and (7).

162. New subitem 2A(6) sets out the instrument rules that will apply in relation to transitional awards that are in force under Schedule 20 to the T&C Act on the Division 2B referral commencement.

163. New subitem 2A(6) has the effect of 'splitting' transitional awards that cover both Division 2B State reference employers and their employees and other employers and employees (that is, employers and employees that are not from a Division 2B referring State).

164. Subitem 2A(6) ensures that a Division 2B State reference transitional award only covers Division 2B State reference employers, Division 2B State reference employees and organisations in relation to Division 2B State reference employers and Division 2B State reference employees.

165. New subitem 2A(7) provides a definition of *referring State*. A *referring State* is either a *Division 2A referring State* as defined in proposed new section 30B of the FW Act or a *Division 2B referring State* as defined in proposed new section 30L of the FW Act.

Item 52 – Subparagraph 20(2)(b)(ii) of Schedule 3

Item 53 – Paragraphs 20(4)(b) and (6)(d) of Schedule 3

166. These are items are technical amendments to make clear that the references to State employment agreements in subparagraph 20(2)(b)(ii) and paragraphs 20(4)(b) and (6)(d) of Schedule 3 are references to State employment agreements within the meaning of the WR Act.

Item 54 – After Schedule 3

167. This item inserts Schedule 3A into the T&C Act, which deals with the treatment of State awards and State employment agreements of Division 2B referring States.

Schedule 3A – Treatment of State awards and State employment agreements of Division 2B referring States

Part 1 – Preliminary

New item 1 – Meanings of *employer* and *employee*

168. In this Schedule, the terms *employer* and *employee* have their ordinary meaning. The Schedule regulates the transition of Division 2B State reference employers and Division 2B State reference employees into the national workplace relations system. These employers and employees are necessarily national system employers and employees.

169. However, it is necessary to give *employer* and *employee* their ordinary meanings in the Schedule because some provisions refer to State employers and employees before they become national system employers and employees (see, for example, items 2, 3 and 5) and some provisions refer to State employers and employees who do not become national system employers and employees (see, for example, subitem 4(3)).

Part 2 – Division 2B State instruments

New item 2 – What are Division 2B State instruments?

New item 3 – Division 2B State awards

New item 5 – Division 2B State employment agreements

170. These items define *Division 2B State instruments*, which include *Division 2B State awards* and *Division 2B State employment agreements*.

171. State awards and State employment agreements (known as the source awards and source agreements) that were in operation under a State industrial law of a Division 2B referring State on the Division 2B referral commencement become Division 2B State instruments on that day.

172. Subject to other provisions in new Schedule 3A, the Division 2B State instrument is taken to include the same terms as were in the source award or agreement immediately before the Division 2B referral commencement.

173. In the following situations, the terms of the Division 2B State instrument may be affected on or after the Division 2B referral commencement:

- an order, decision or determination of a State industrial body affecting the terms of a State award (the source award) was in operation immediately before the Division 2B referral commencement;

- a State employment agreement comes into operation on or after the Division 2B referral commencement (see [new subitem 5(3)]).

New item 4 – The employees, employers etc. who are *covered* by a Division 2B State award and to whom it *applies*

New item 6 – The employees, employers etc. who are *covered* by a Division 2B State employment agreement and to whom it *applies*

174. The FW Act and the T&C Act adopt the concepts of *covers* and *applies* in relation to modern awards, enterprise agreements and former WR Act transitional instruments. These concepts are also used in relation to Division 2B State instruments.

175. Items 4 and 6 of Schedule 3A generally have the effect of preserving Division 2B State instruments in relation to those employers, employees, outworker entities and other persons (e.g. unions) who were *covered* by the instrument immediately before the Division 2B referral commencement as well as new employees engaged by those employers after that time (in the case of Division 2B State awards and collective Division 2B State employment agreements).

176. A Division 2B State instrument only *applies* to those employees, employers, outworker entities and other persons who are required to comply with, or can enforce, the terms of the instrument. However, a Division 2B State award will not apply to an employee

(or to an employer or other person in relation to the employee) when the employee is a *high income employee* (see section 329 of the FW Act).

New item 7 – Terms about disputes relating to matters arising under Division 2B State awards

177. This item provides that a term of a source award that provides a procedure for dealing with disputes will not be taken to be a term of the Division 2B State award derived from it. Instead, a Division 2B State award is taken to include the model term prescribed by the regulations.

178. The model term will not be able to be varied or removed from the Division 2B State award.

179. The model term will only apply to disputes about matters arising under the Division 2B State instrument after the Division 2B referral commencement.

New item 8 – Terms about disputes relating to matters arising under Division 2B State employment agreements

180. Division 2B State employment agreements will contain the same dispute resolution terms as were in the State employment agreement from which it was derived immediately prior to the Division 2B referral commencement.

181. This item provides that item 13 of this Schedule, which replaces references to State industrial bodies with references to FWA, does not apply to terms about dealing with disputes in Division 2B State employment agreements.

182. This means that where Division 2B State employment agreements confer power on State industrial bodies (or other third parties) to resolve disputes, the State industrial bodies (or other parties) will not be prevented from exercising the power.

183. However, because the dispute resolution power would arise under a federal instrument, the State industrial body or other independent third party will be required to exercise that power in a manner consistent with the FW Act. In particular, if an agreement permitted arbitration they could only arbitrate disputes with the consent of the parties and would be limited to making a final determination consistent with the parties' rights and obligations under the FW Act or under the instrument.

184. This item also enables parties to whom the Division 2B State employment agreement applies to agree to vary the dispute resolution terms in their Division 2B State employment agreement in any manner, by consent, and require FWA to make the variation. Such a variation could include giving FWA a role in dispute resolution.

New item 9 – Application to Division 2B State instruments of provisions of FW Act about dealing with disputes

185. This item provides that Subdivision B of Division 2 of Part 6-2 of the FW Act applies in relation to the model term in a Division 2B State award in the same way as it applies in relation to a term in a modern award about dealing with disputes. Subdivision B of Division 2 of Part 6-2 also applies in relation to terms about dealing with disputes in a Division 2B State

employment agreement in the same way as it applies to a term in an enterprise agreement about dealing with disputes.

186. This item deems Division 2B State awards and Division 2B State employment agreements to be fair work instruments for the purposes of subsections 739(5) and 740(4) of the FW Act.

New item 10 – Division 2B State instruments continue to be subject to the same instrument content rules

187. This item preserves the application of the relevant content rules of the source State to Division 2B State instruments (subject to modification by the regulations) as if they were Commonwealth laws, and as if references to source instruments (however described) were references to the appropriate Division 2B State instruments.

New item 11 – Division 2B State instruments continue to be subject to the same instrument interaction rules

188. This item preserves the application of the relevant instrument interaction rules of the source state to Division 2B State instruments (subject to modification by the regulations) as if they were Commonwealth laws, and as if references to source instruments (however described) were references to the appropriate Division 2B State instruments.

189. This item would preserve, for example, the capacity of one type of Division 2B State instrument to operate again when another Division 2B State instrument is terminated (see paragraphs 40(2)(a)(ii) and (b)(ii)).

190. This item makes it clear that instrument interaction rules are those provisions of a law that have the effect that one instrument has priority over or excludes another, or that one instrument ceases to operate because of another.

191. This item does not apply to the interaction between a Division 2B instrument and an instrument made under the FW Act. These rules are set out in Division 2 of Part 5 of this Schedule.

New item 12 – Division 2B State awards continue to be subject to the same outworker interaction rules

192. This item preserves the outworker interaction rules of the source State (subject to modification by the regulations) as in force immediately before the Division 2B referral commencement. These rules continue to apply as if they were provisions of a law of the Commonwealth and any references to State awards were instead references to Division 2B State awards.

New item 13 – References in Division 2B State instruments to State industrial bodies

193. Where a Division 2B State instrument confers a power or function on a State industrial body, or the registrar or a deputy registrar of a State industrial body, new item 13 provides for FWA or the General Manager of FWA to assume these powers or functions.

194. This item has effect subject to any contrary intention in the Bill, and subject to any regulations.

New item 14 – Non-accruing entitlements: counting service under the source award or source agreement

195. New item 14 provides that as a general rule an employee's service with an employer before the Division 2B referral commencement counts as service for the purpose of determining entitlements under the relevant Division 2B State instrument.

196. This rule does not apply to paid annual leave and paid personal/carer's leave – pre-commencement accrual of these entitlements is dealt with in new item 15.

197. A period of service will not be counted again for the purposes of calculating a Division 2B State instrument entitlement where an employee has already had the benefit of an entitlement of that kind, calculated by reference to that period of service. This is to prevent an employee 'double dipping'.

198. The intention of subitem 14(4) is to ensure that the rule in subitem 47(3) does not affect an employee's entitlement to accrue LSL in circumstances where they have taken an entitlement to leave after an initial qualifying period of service.

New item 15 – Accruing entitlements: leave accrued immediately before the Division 2B referral commencement

199. New item 15 provides that where an employee has accrued paid annual leave or paid personal/carer's leave under a State award, agreement or industrial law, immediately before the Division 2B referral commencement, the accrued leave is taken to have been accrued under the relevant Division 2B State instrument.

New item 16 – Leave that is being, or is to be, taken under the source award or source agreement

200. This item provides that an employee who is 'in the middle' of accessing a type of leave under a State award, agreement or industrial law immediately before the Division 2B referral commencement is taken to continue on that leave under the relevant Division 2B State instrument for the remainder of the period.

New item 17 – No loss of accrued rights or liabilities when Division 2B State instrument terminates or ceases to apply

201. New item 17 makes it clear that rights or liabilities that arise under a Division 2B State instrument are not affected if the instrument terminates or ceases to apply in relation to a person.

202. It also makes clear that any investigation, legal proceeding or remedy in relation to those rights or liabilities may be instituted, continued or enforced as if the Division 2B State instrument had not terminated or ceased to apply.

203. This item applies subject to any contrary intention in the Bill or the FW Act.

Part 3 – Variation and termination of Division 2B State instruments

New item 18 – Division 2B State instruments can only be varied or terminated in limited circumstances

204. New item 18 sets out the limited circumstances in which a Division 2B State instrument can be varied or terminated. It includes cross-references to other Schedules where the mechanism for variation or termination is not included in this Schedule. For example, a Division 2B State instrument can be varied under Schedule 11 which deals with transfers of business.

New item 19 – Variation to remove ambiguities etc.

205. New item 19 provides that Division 2B State instruments can be varied to:

- remove ambiguity or uncertainty in the instrument;
- for Division 2B State employment agreements, to resolve an uncertainty or difficulty relating to the interaction between the instrument and a modern award; or
- remove or vary terms that are inconsistent with the general protections framework in Part 3-1 of the FW Act.

206. A legislative note makes reference to item 40 of this Schedule which makes provision for Division 2B State instruments to be varied to resolve an uncertainty or difficulty relating to the interaction between the instrument and the NES.

207. This item also provides that variations will operate from a day specified in the determination, and that variations may have retrospective effect.

New item 20 – Variation on referral by Australian Human Rights Commission

208. New item 20 requires FWA to review a Division 2B State instrument referred to it by the Australian Human Rights Commission in accordance with section 46PW of the *Australian Human Rights Commission Act 1986* (which deals with discriminatory industrial instruments).

209. FWA must make a determination varying the Division 2B State instrument if it considers that the instrument requires a person to do an act that would be unlawful under certain Commonwealth anti-discrimination laws (but for the fact it was done in direct compliance with the transitional instrument).

New item 21 – Division 2B State awards: automatic termination after 12 months

210. New item 21 provides that all Division 2B State awards (except Division 2B enterprise awards) will terminate automatically at the end of the 12 month period starting from Division 2B referral commencement. Employees to whom a Division 2B State award applied will be covered by the relevant modern award from that time.

211. Any term of a Division 2B State award providing for an earlier termination is of no effect.

New item 22 – Collective Division 2B State employment agreements: termination by agreement

New item 23 – Collective Division 2B State employment agreements: termination by FWA

212. These new items provide for collective Division 2B State employment agreements to be terminated either by agreement or by FWA.

213. Item 22 provides that a collective Division 2B State employment agreement can be terminated under Subdivision C of Division 7 of Part 2-4 of the FW Act as if the instrument were an enterprise agreement. The employer(s) and employees covered by the instrument may jointly agree to terminate it. Any termination needs to be approved by FWA before coming into operation (see sections 223 and 224 of the FW Act).

214. Item 23 provides that a collective Division 2B State employment agreement can be terminated under Subdivision D of Division 7 of Part 2-4 of the FW Act as if the instrument were an enterprise agreement. An employer, employee or employee organisation covered by the agreement may apply to FWA, after the agreement's nominal expiry date, for it to be terminated. FWA must terminate the agreement if it is satisfied that it is not contrary to the public interest to do so and that it is appropriate to do so taking into account all the circumstances (see section 226 of the FW Act).

New item 24 – Individual Division 2B State employment agreements: termination by agreement

New item 25 – Individual Division 2B State employment agreements: termination conditional on enterprise agreement

New item 26 – Individual Division 2B State employment agreements: unilateral termination with FWA's approval

215. These new items provide rules for the termination of individual Division 2B State employment agreements.

216. Before a termination can take effect under any of these items, FWA must be satisfied that certain formal requirements have been met. As with the approval of enterprise agreements (and variations of enterprise agreements), it is intended that FWA will usually act speedily and informally to approve terminations. FWA may, but need not, hold a hearing.

217. New item 24 provides for the termination of an individual Division 2B State employment agreement by written agreement between the employer and employee to whom the instrument applies. Before it can operate, a termination agreement must be approved by FWA. FWA must approve a termination agreement if it is satisfied that the formal requirements for the termination agreement have been met and there are no other reasonable grounds for believing that the employee has not agreed to the termination.

218. New item 25 provides for the making of a conditional termination by agreement between an employer and an employee. Conditional terminations are intended to facilitate the orderly transition of employees covered by individual Division 2B State employment agreements to an enterprise agreement. A conditional termination has the effect of terminating

an individual Division 2B State employment agreement if an enterprise agreement that covers the employer and employee comes into operation. An employee who is covered by a conditional termination can fully participate in bargaining for an enterprise agreement whether or not the individual Division 2B State employment agreement to which the conditional termination relates has passed its nominal expiry date (see item 2 of Schedule 13 of the T&C Act which deals with bargaining and industrial action).

219. Where the individual Division 2B State employment agreement has not passed its nominal expiry date, a conditional termination must be signed by both the employer and employee. Where the individual Division 2B State employment agreement has passed its nominal expiry date, either the employer or the employee can unilaterally make a conditional termination.

220. When an enterprise agreement is made that covers an employee who is also covered by a conditional termination, the conditional termination must accompany any application to FWA for approval of the enterprise agreement. Provided the formal requirements relating to the conditional termination have been met, the individual Division 2B State employment agreement then terminates when the enterprise agreement comes into operation.

221. Item 26 provides for an individual Division 2B State employment agreement to be terminated unilaterally by either the employer or employee to whom the agreement applies provided the agreement has passed its nominal expiry date. FWA must approve a termination before it can have effect.

222. The employer or employee wishing to terminate the agreement must:

- make a written declaration identifying the instrument and stating that the employer or employee wishes to terminate it;
- at least 14 days before applying to FWA for the approval of the termination, provide a notice to the other person setting out certain matters; and
- having provided the notice as required, apply to FWA for approval of the termination.

223. FWA must approve the termination if it is satisfied that the individual Division 2B State employment agreement applies to the employer and employee and the formal requirements have been met. If the termination is approved, the individual Division 2B State employment agreement terminates on the 90th day after the day on which FWA approves the termination.

New item 27 – Meaning of *nominal expiry date* of Division 2B State employment agreement

224. New item 27 provides that the nominal expiry date of a Division 2B State employment agreement is either the day on which the source agreement would have nominally expired or, if the nominal term of the agreement is later than 3 years after the Division 2B referral commencement, 3 years from the Division 2B referral commencement.

New item 28 – Effect of termination

225. This item provides that a Division 2B State instrument ceases to cover, and can never again cover, any employees, employers or other persons when it terminates.

Part 4 – Transition of employees from Division 2B State awards to FW Act modern awards

Division 1 – FWA required to consider varying modern awards etc.

New item 29 – FWA to consider varying modern awards to continue effect of terms of Division 2B State awards

226. New item 29 provides that in the 12 months following the Division 2B referral commencement, FWA must consider varying modern awards to include transitional arrangements for employers and employees covered by Division 2B State awards (other than Division 2B enterprise awards).

227. FWA must only vary a modern award if the purpose of the variation is to continue (in whole or in part) the effect of terms that are contained in a Division 2B State award and the terms to be included deal with matters that are permitted to be included in modern awards by section 136 of the FW Act.

228. The variation must only apply to employers, employees and other persons covered by the Division 2B State award.

229. This item also makes clear that such terms may be included in a modern award despite section 154 of the FW Act which prohibits terms containing State-based differences.

230. Terms included in a modern award in accordance with this item will operate from the automatic termination of all Division 2B State awards until the expiry of 5 years after the Division 2B referral commencement, or if the terms are expressed to cease to have effect at an earlier time, that earlier time.

New item 30 – FWA to consider making orders to continue effect of long service leave terms of Division 2B State awards

231. New item 30 provides that in the 12 months following the Division 2B referral commencement FWA must consider whether any orders should be made for the purpose of continuing the effect of terms relating to LSL that are contained in a Division 2B State award (other than a Division 2B enterprise award).

232. Such orders must only apply to employers, employees and other persons covered by the Division 2B State award.

233. This item makes it clear that where a term of an enterprise agreement is detrimental to an employee when compared with such an order, the term of the enterprise agreement is of no effect in relation to that employee.

234. Regulations may be made to assist with determining whether terms of an enterprise agreement are detrimental to an employee

235. This item also provides that section 675 of the FW Act (which deals with contravening an order of FWA) applies to an order made under this item as if a reference to such an order was included in paragraph 675(1)(a).

236. An order made in accordance with this item will operate from the automatic termination of Division 2B State awards (that is, 12 months from referral commencement) until the expiry of 5 years after the Division 2B referral commencement, or if the terms are expressed to cease to have effect at an earlier time, that earlier time.

237. The rules in this item and in item 29 do not apply to Division 2B State enterprise awards, which have their own award modernisation process.

Division 2 – Avoiding reductions in take-home pay

New item 31 – Termination of Division 2B State awards is not intended to result in reduction in take-home pay

238. The termination of a Division 2B State award under item 21 is not intended to result in a reduction in take home pay for employees and outworkers previously covered by the instrument.

239. New item 31 provides that an employee's or outworker's take-home pay for the purposes of this Division means the pay that an employee or outworker actually receives, including wages and incentive-based payments and additional amounts such as allowances and overtime, but excluding deductions permitted by section 324 of the FW Act.

240. This item makes it clear that an employee only suffers a reduction in take-home pay for the purposes of this Division if:

- the employee becomes covered by a modern award because a Division 2B State award that covered them was terminated under item 21; and
- the employee is employed in the same (or a comparable) position as the one he or she was employed in immediately before the termination of the Division 2B State award; and
- the amount of the employee's take-home pay for working particular hours or for a particular quantity of work after the termination is less than the employee would have received immediately before the termination; and
- the reduction is a direct result of the termination of the Division 2B State award.

241. Likewise, this item makes it clear that an outworker only suffers a reduction in take-home pay for the purposes of this Division if:

- the outworker becomes a person to whom outworker terms in a modern award relate because a Division 2B State award was terminated under item 21; and
- the outworker is performing the same (or a similar) work as the work he or she was performing immediately before the termination of the Division 2B State award; and
- the amount of the outworker's take-home pay for working particular hours or for a particular quantity of work after the termination is less than the outworker would have received immediately before the termination; and
- the reduction is a direct result of the termination of the Division 2B State award.

New item 32 – Orders remedying reductions in take-home pay

242. New item 32 provides that FWA may make an order requiring or relating to the payment of an amount to an employee or employees if satisfied that the employee or employees have suffered a reduction in take-home pay as a result of a Division 2B State award ceasing to cover, and a modern award starting to cover, the employee or employees.

243. New item 32 provides that FWA may make an order requiring or relating to the payment of an amount to an outworker or outworkers if satisfied that the outworker or outworkers have suffered a reduction in take-home pay as a result of an outworker term in a Division 2B State award ceasing to cover, and an outworker term in a modern award starting to cover, the outworker or outworkers.

244. Take-home pay orders may only be made on an application by an employee or outworker who has suffered a reduction in take-home pay, an organisation entitled to represent such an employee or outworker, or a person acting on behalf of a class of such employees or outworkers.

245. Only one take-home pay order may be made in relation to an employee or outworker.

New item 33 – Ensuring that take-home pay orders are confined to the circumstances for which they are needed

246. New item 33 provides that FWA must not make a take-home pay order under item 32 if FWA considers that the reduction is minor or insignificant, or is satisfied that the employee or employees, or outworker or outworkers, have been adequately compensated in other ways for the reduction.

247. This item also requires FWA to express a take-home pay order made under item 32 so that it does not apply to an employee or outworker unless he or she has actually suffered a reduction in take-home pay to which item 31 applies, and so that if the take-home pay payable to the employee or outworker under the modern award increases in the future (e.g. because of changes to wages), there is a corresponding reduction in the amount payable under the order.

New item 34 – Take-home pay order continues to have effect so long as modern award continues to cover the employee or employees

248. New item 34 provides that a take-home pay order made under item 32 in relation to an employee or class of employees to whom a modern award applies continues to have effect in relation to those employee or employees even if the modern award stops applying to them because an enterprise agreement begins applying to them.

New item 35 – Inconsistency with modern awards and enterprise agreements

249. This item makes it clear that terms of a modern award or enterprise agreement have no effect in relation to an employee or outworker to the extent that they are less beneficial to the employee or outworker than a term of a take-home pay order that applies to the employee or outworker.

New item 36 – Application of provisions of FW Act to take-home pay orders

250. This item provides that the provisions of the FW Act apply as if subsection 675(2) (which deals with contravening an order of FWA) and subsection 706(2) (which deals with the purposes for which the powers of inspectors may be exercised) included a reference to a take-home pay order made under item 32.

Part 5 – Division 2B State instruments and the FW Act

Division 1 – Interaction between Division 2B State instruments and the National Employment Standards

New item 37 – The no detriment rule

251. New item 37 provides that a term of a Division 2B State 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 (subitem 37(1)).

252. Subitem 37(1) is not intended to affect a term of a Division 2B State instrument that is permitted by a provision of the NES as it has effect under item 38.

253. This means that terms in Division 2B State instruments about matters such as taking and cashing out of annual leave and substitution of public holidays may continue to operate, subject to the requirements of the NES.

254. Subitem 37(4) allows regulations to be made to assist in determining whether terms of a Division 2B State instrument are detrimental to an employee, when compared to the NES.

255. The item ensures that an employee to whom a Division 2B State instrument applies retains the benefit of comparable and more favourable terms and conditions in the Division 2B State instrument.

256. New item 40 allows FWA to vary Division 2B State instruments to resolve difficulties arising from the interaction of the NES with Division 2B State instruments. In that context, subitem 150(2) sets out the methods by which FWA can compare entitlements between the instruments and the NES.

Illustrative example

Under the Division 2B State employment agreement that applies to her employment, Fiona is entitled to six weeks' paid annual leave per year of service with the leave to be paid at Fiona's usual rate of pay (including overtime and allowances). Both the amount of leave and payment provisions in the agreement would continue to operate as they are more beneficial entitlements than the corresponding entitlements in the annual leave NES.

New item 38 – Provisions of the NES that allow instruments to contain particular kinds of terms

257. New item 38 ensures that certain provisions of the NES have effect as if a reference to a modern award or enterprise agreement included a reference to a Division 2B State

instrument. The relevant provisions of the NES are identified in paragraphs (a) to (h) of subitem 38(1).

258. The intention of this item is to ensure the continued application, subject to the no detriment test, of terms in a Division 2B State instrument that provide for matters that are similar to these NES provisions.

259. For example, this rule would enable the continued operation of a term in a Division 2B State instrument for the cashing out of paid annual leave, but subject to the protections set out in subsection 93(2) of the FW Act. Therefore, in order to cash out annual leave under the provision in the Division 2B State instrument, the employee must retain a minimum balance of four weeks' leave, the agreement to cash out must be a separate written agreement and the cashed out leave must be paid at the full amount the employee would have received had the employee taken the leave forgone.

New item 39 – Shiftworker annual leave entitlement

260. New item 39 ensures that subsections 87(3)-(5) of the FW Act apply to an employee to whom a Division 2B State instrument applies as if the employee was award/agreement free as contemplated by those subsections. This means that an employee meeting the description in the shiftworker definition in section 87 of the FW Act would be entitled to the shiftworker annual leave entitlement provided under that section (which provides five weeks of annual leave for shiftworkers).

New item 40 – Resolving difficulties about application of this Division

261. New item 40 enables a person covered by a Division 2B State instrument to apply to FWA to resolve any difficulties about the application of the rules about the interaction between Division 2B State instruments and the NES set out in this Division.

262. Under this item, FWA may vary the instrument to resolve an uncertainty or difficulty relating to the interaction between the instrument and the NES, or to make the instrument operate effectively with the NES.

263. Any variation of the instrument operates from the day specified in the determination (which may be a day before the determination is made).

New Division 2 – Interaction between Division 2B State instruments and FW Act modern awards, enterprise agreements and workplace determinations

New item 41 – Modern awards and Division 2B State instruments

264. New item 41 provides that if a Division 2B State employment agreement and a modern award both apply to an employee, or to an employer or other person in relation to the employee, the Division 2B State employment agreement prevails over the modern award to the extent of any inconsistency.

265. The legislative notes make it clear that this item operates subject to item 42 of this Schedule (which deals with modern award terms about outworker conditions) and item 17 of Schedule 9 (which requires that the base rate of pay under a Division 2B State employment agreement be not less than the modern award rate).

New item 42 – Terms of modern awards about outworker conditions continue to apply

266. New item 42 creates an exception to the rule in item 41 to ensure that the existing special rules governing agreements that apply to outworkers are maintained.

New item 43 – Modern awards and Division 2B State awards

267. New item 43 provides that while a Division 2B State award that covers an employee or an employer or other person in relation to the employee is in operation a modern award does not cover the employee or an employer or other person in relation to the employee.

268. This item also provides that outworker terms in a modern award do not cover an outworker entity while a Division 2B State award that contains outworker terms that cover the outworker entity is in operation.

269. The notes to subitems 43(1) and (2) make it clear that Division 2B State awards (other than Division 2B State enterprise awards) will terminate 12 months after the Division 2B referral commencement.

New item 44 – FW Act enterprise agreements and workplace determinations, and Division 2B State employment agreements

270. Consistent with the T&C Act arrangements for collective agreement-based transitional instruments, new subitem 44(1) provides that where an enterprise agreement or workplace determination made under the FW Act starts to apply, then a collective Division 2B State employment agreement ceases to cover the relevant persons. A collective Division 2B State employment agreement can be replaced at any time with an enterprise agreement, regardless of whether the collective Division 2B State employment agreement has passed its nominal expiry date.

271. New subitem 44(2) provides that an FW Act enterprise agreement or workplace determination does not apply to an employer and employee while an individual Division 2B State employment agreement applies to the employer and employee. This is similar with the T&C Act provision governing the relationship between FW Act enterprise agreements and workplace determinations, and WR Act individual agreement-based transitional instruments.

New item 45 – FW Act enterprise agreements and workplace determinations, and Division 2B State awards

272. New item 45 provides that where an enterprise agreement or workplace determination made under the FW Act applies to an employee, or an employer or other person in relation to the employee, a Division 2B State award ceases to apply but can continue to cover the employee.

273. However, the Division 2B State award can again start to apply to the employee, and the employer or other person in relation to the employee, if the enterprise agreement or workplace determination made under the FW Act ceases to apply to the employee.

New item 46 – Designated outworker terms of Division 2B State award continue to apply

274. New item 46 provides that if an enterprise agreement applies to an employer and a Division 2B State award that contains one or more outworker terms covers the employer

(whether in the capacity of employer or outworker entity), then the outworker terms in the Division 2B State award will continue to apply despite the existence of the enterprise agreement.

New Division 3 – Other general provisions about how the FW Act applies in relation to Division 2B State instruments

New item 47 – Employee not award/agreement free if Division 2B State instrument applies

275. New item 47 provides that if a Division 2B State instrument applies to an employee, the employee is not an award/agreement-free employee for the purposes of the FW Act.

276. The NES includes a range of provisions for award/agreement-free employees dealing with matters that, for employees to whom a modern award or enterprise agreement applies, are able to be dealt with in the modern award or enterprise agreement. These provisions are not required for employees to whom a Division 2B State instrument applies as the Division 2B State instrument is able to deal with these matters. The manner in which a Division 2B State instrument interacts with the NES is set out in Division 1 of this Part (see items 37 – 40 of this Schedule).

277. There is an exception to this general rule in new item 39 which deals with shiftworker annual leave entitlements.

278. This item also includes a regulation making power to set, for employees to whom a Division 2B State instrument applies, the base rate of pay and full rate of pay either generally or for the purposes of entitlements under the NES and also to prescribe whether such an employee is a pieceworker for the purposes of the FW Bill. This power is necessary to ensure that the provisions of the NES, and other provisions of the FW Act such as section 206, which rely on these concepts operate effectively in all cases – for example, where an employee is a commission only pieceworker, they will not have a base rate of pay (because, as defined, 'base rate of pay' does not include commissions or incentive-based payments).

New item 48 – Employee's ordinary hours of work

279. The concept of an employee's ordinary hours of work is central to the accrual and payment rules for a number of entitlements under the NES. Therefore, it is essential that rules are in place to ensure an employee's ordinary hours of work can be identified.

280. New item 48 provides that where a Division 2B State instrument applies to an employee's employment, that employee's ordinary hours of work for the purposes of the FW Act are determined by the Division 2B State instrument.

281. Where there are no ordinary hours specified in the Division 2B State instrument, the ordinary hours of work are the hours agreed between the employee and their employer.

282. Where there is no such agreement and the employee's ordinary hours are not specified in the Division 2B State 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 38 hours a week or their usual weekly hours (whichever is lower).

283. If the Division 2B State instrument does not specify an employee's ordinary hours of work, and the agreed ordinary hours for an employee who is not a full-time employee are less than the employee's usual weekly hours, the ordinary hours of work for that employee shall be the lesser of 38 hours or the employee's usual weekly hours of work.

284. For an employee who is not a full-time employee and who does not have usual weekly hours of work, the regulations can prescribe, or provide for the determination of, hours that are taken to be the employee's usual weekly hours of work.

New item 49 – Payment of wages

285. New item 49 provides that Division 2 of Part 2-9 of the FW Act (which deals with payment of wages) applies as though a reference to an enterprise agreement included a reference to a Division 2B State employment agreement and a reference to a modern award included a reference to a Division 2B State award.

286. This enables, for example, a Division 2B State instrument to specify a method of payment of wages (see paragraph 323(2)(d) of the FW Act) or to authorise permitted deductions from wages (see paragraphs 324(b) and 324(c) of the FW Act).

New item 50 – Guarantee of annual earnings

287. New item 50 provides that Division 3 of Part 2-9 of the FW Act (guarantee of annual earnings) applies as if a reference to a modern award in that Division included a reference to a Division 2B State award and a reference to an enterprise agreement includes a reference to a Division 2B State employment agreement.

288. Subsection 47(2) of the FW Act provides that a modern award does not apply to an employee who has guaranteed annual earnings that are more than the high income threshold (defined in Division 3 of Part 2-9 of the FW Act).

289. Subitem 4(6) of new Schedule 3A makes similar provision in relation to Division 2B State awards to ensure that they do not operate in relation to an employee (or to an employer, or an employee organisation, in relation to the employee) while the employee is a high income employee.

New item 51 – Application of unfair dismissal provisions

290. New item 51 ensures that a person will be protected from unfair dismissal under clause 382 of the FW Act if the person is covered by a Division 2B State award, or if a Division 2B State employment agreement applies to the person in relation to their employment.

291. This item also ensures that the requirement to consult about genuine redundancy under subsection 389(2) of the FW Act applies if there is an obligation to consult about the redundancy in a Division 2B State instrument.

New item 52 – Regulations may deal with other matters

292. New item 52 contains a regulation-making power to deal with matters that may arise in relation to the interaction between Division 2B State instruments and the FW Act.

Part 6 – Ongoing operation of State laws for transitional purposes

Division 1 – Preliminary

New item 53 – Definitions

293. This item inserts new definitions for the purpose of Part 6 of new Schedule 3A which deals with the ongoing operation of State laws for transitional purposes.

294. Subitem 53(2) permits regulations to provide that certain proceedings are within or are not within the scope of the definitions of *agreement appeal*, *agreement proceeding*, *award appeal* and *award proceeding.*

New item 54 - Part does not affect variations or terminations related to a proposed transfer of business

295. This item provides that nothing in Part 6 affects section 26 of the FW Act applying to a law of a Division 2B referring State where the State law relates to variations or terminations of a Division 2B State instrument in anticipation of a transfer of business.

New item 55 – Commencement or completion of award appeals

296. This item provides that an appeal against a decision made by a State industrial body in relation to the variation or termination of a State award can be commenced or completed (if it is part-heard) under a law of a Division 2B referring State on or after the Division 2B referral commencement.

297. The note following subitem 55(1) makes clear that award proceedings and award appeals that are against a decision to make or not make an award are not able to be commenced or completed on or after the Division 2B referral commencement.

298. Subitem 55(2) provides the following time limitations on the commencement and completion of an award appeal for the purposes of subitem 55(1):

- an award appeal must be commenced no more than 21 days after the day on which the decision was made;
- an award appeal must be completed by the end of the period of 6 months from the Division 2B referral commencement.

New item 56 – Completion of agreement proceedings

299. This item provides that a proceeding before a State industrial body that commenced before the Division 2B referral commencement in relation to the approval, variation or termination of a State employment agreement (an agreement proceeding) remains subject to the laws of the Division 2B referring State. Such agreement proceedings must be completed by the end of the period of 6 months from the Division 2B referral commencement (subitem 56(2)).

New item 57 – Agreement appeals

300. This item provides that an appeal against a decision made by a State industrial body in relation to an agreement proceeding (an agreement appeal) can be commenced or completed (if it is part-heard) under the laws of a Division 2B referring State on or after the Division 2B referral commencement.

301. Subitem 57(2) provides the following time limitations on the commencement and completion of an agreement appeal for the purposes of subitem 57(1):

- an agreement appeal will only be subject to the laws of a Division 2B referring State if it is commenced within 21 days after the day on which the decision was made;
- an agreement appeal must be completed by the end of the period of 6 months from the Division 2B referral commencement.

New item 58 – Decisions made in award appeals, agreement proceedings and agreement appeals

302. This item provides that decisions made in award appeals, in agreement proceedings or in agreement appeals come into operation in accordance with the laws of the relevant Division 2B referring State.

303. Subitem 58(2) provides that if a decision is made in an award appeal, an agreement proceeding or an agreement appeal that affects a source award or source agreement for a Division 2B State instrument, the Division 2B State instrument is affected in the same way and from the same time as the source award or the source agreement.

304. Subitem 58(3) makes clear that subitem 58(2) does not apply to decisions made in award appeals, in agreement proceedings or in agreement appeals that affect the coverage terms of a source award or a source agreement for a Division 2B State instrument.

305. Subitem 58(4) provides that any alteration of an entitlement under a Division 2B State instrument because of a decision in an award appeal, an agreement proceeding or an agreement appeal takes effect on the later of the day on which the decision is made and the day on which the decision comes into operation.

New item 59 – Agreements etc. that had not come into operation by the Division 2B referral commencement

306. This item applies where a State employment agreement, or variation or termination of such an agreement, has been approved (or made in the case of a variation or termination) by a State industrial body before the Division 2B referral commencement but the agreement, variation or termination has not yet come into effect. In that instance, a law of the Division 2B referring State continues to apply to the extent that it provides for when the agreement, or variation or termination of such an agreement, comes into operation.

307. The note following subitem 59(1) makes clear that a Division 2B State employment agreement comes into operation immediately after a State employment agreement comes into operation (see item 5 of this Schedule).

308. Subitem 59(2) further provides that a Division 2B State employment agreement is taken to be varied in the same way or terminated immediately after the source agreement is varied or terminated (as mentioned in subitem 59(1)).

309. Subitem 59(3) makes clear that subitem 59(2) does not apply to a variation that affects the coverage terms of a source award or a source agreement for a Division 2B State employment agreement.

New item 60 – Proceedings relating to entitlements or obligations that arose before the Division 2B referral commencement

310. Subitem 60(1) provides that the FW Act does not exclude laws of a Division 2B referring State to the extent that the law relates to compliance with an entitlement or obligation that arose before the Division 2B referral commencement under a State industrial law and relates to an act or omission that occurred prior to the Division 2B referral commencement.

311. However, because the Bill makes specific provision in relation to these matters, subitem 60(2) makes clear that subitem 60(1) does not apply to entitlements or obligations that relate to:

- the making, variation or termination of State awards or State employment agreements; or
- bargaining or industrial action.

312. Subitem 60(3) provides that the FW Act does not exclude laws of a Division 2B referring State to the extent that the laws relate to a termination of employment that occurred before the Division 2B referral commencement. This includes laws of a Division 2B referring State relating to appeals.

313. Subitem 60(4) provides that the FW Act does not apply to laws of a Division 2B referring State to the extent that the law relates to proceedings that were commenced before the Division 2B referral commencement and provides for the variation or setting aside of obligations and entitlements under an employment contract or other arrangement that a court or State industrial body finds is unfair.

New item 61 – Continuation of orders and injunctions of State industrial bodies

314. This item provides for the continuation of orders or injunctions granted by a State industrial body or court of a Division 2B referring State to prevent or stop industrial action (however described) that was in operation immediately before the Division 2B referral commencement.

Item 55 – Before item 5 of Part 3 of Schedule 4

315. This item inserts a new heading into Part 3 of Schedule 4 and creates Division 1 of that Part.

New item 5A – Application of this Division

316. New item 5A provides that the newly created Division 1 only applies to employees who are not Division 2B State reference employees.

Item 56 – At the end of Part 3 of Schedule 4

317. Item 56 inserts a new heading into Part 3 of Schedule 4 and creates Division 2 of that Part. It also inserts new items 15 to 21.

New item 15 – Application of this Division

318. New item 15 provides that the newly created Division 2 only applies to Division 2B State reference employees.

New item 16 – Non-accruing entitlements: counting service before the Division 2B referral commencement

319. New subitem 16(1) provides that, as a general rule, an employee's service with an employer before the Division 2B referral commencement counts as service for the purpose of determining entitlements under the NES.

320. This rule does not apply to paid annual leave and paid personal/carer's leave – pre-commencement accrual of these entitlements is dealt with in item 17. Specific provision is also made in relation to redundancy entitlements (see new subitems 16(4) and (5)).

321. A period of service will not be counted again for the purposes of calculating a NES entitlement where an employee has already had the benefit of an entitlement of that kind, calculated by reference to that period of service (new subitem 16(2)). This is to prevent an employee 'double dipping'.

322. The intention of new subitem 16(3) is to ensure that the rule in new subitem 16(2) does not affect an employee's entitlement to accrue LSL in circumstances where they have taken an entitlement to leave after an initial qualifying period of service.

323. The general rule in new subitem 16(1) does not apply to the calculation of redundancy pay under the NES if an employee's terms and conditions of employment immediately before the Division 2B referral commencement did not provide any entitlement to redundancy pay (new subitem 16(4)). This is to prevent an employer suddenly incurring a contingent liability to pay redundancy pay when they have not previously been required to make provision in their accounts for this entitlement.

324. New subitem 16(5) provides that in circumstances where a State industrial body could have made an order granting an employee an entitlement to redundancy if the employee had been made redundant prior to the Division 2B referral commencement, then for the purposes of new subitem 16(4) the terms and conditions of the employee are taken to have provided for an entitlement to redundancy pay.

325. This item deals with the way in which pre-commencement service is counted for determining NES entitlements. However, no implication should be drawn that this item limits counting pre-commencement service for other provisions in the FW Act, including for

determining an employee's period of employment for unfair dismissal purposes under section 384.

New item 17 – Accruing entitlements: leave accrued immediately before the Division 2B referral commencement

326. This item provides that where an employee has accrued paid annual leave or paid personal/carer's leave under a State industrial law or the source award or source agreement for a Division 2B State instrument immediately before the Division 2B referral commencement, 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.

327. This means that paid personal/carer's and paid annual leave that has accrued prior to commencement is treated as if it were accrued under the NES with the NES rules applying to that leave, as a minimum. More favourable arrangements will continue to apply.

328. So, for example, if an employee is entitled to a higher rate of pay than guaranteed by the NES, this will continue to apply.

329. Crediting leave in advance is more favourable than the NES 'progressive accrual' rule – however, if the amount credited in advance is less than the NES guaranteed minimum entitlement (e.g., 8 days' personal/carer's leave instead of the 10 days guaranteed by the NES), the shortfall will need to be made up over the course of the year (but not so as to provide a double entitlement). This is the effect of the NES rules applying as a minimum standard.

New item 18 – Leave that, immediately before the Division 2B referral commencement, is being, or is to be, taken under Division 6 of Part 7 of the WR Act or a State industrial law

330. An employee who is 'in the middle' of accessing a type of leave under Division 6 of Part 7 of the WR Act (parental leave) or a State industrial law that is also covered by the NES on the Division 2B referral commencement is entitled to continue on the equivalent type of leave under the NES for the remainder of the period (new subitem 18(1)).

331. However, this subitem does not affect any more favourable arrangements that were in place for the taking of such leave (e.g., more favourable rate of pay).

332. The amount, time and arrangements for taking that leave may be adjusted as necessary in accordance with the provisions of the NES (new subitem 18(2)).

333. Similarly, an employee who has applied for, but not started, their leave on the Div 2B referral commencement is taken to have applied for the leave under the equivalent provision in the NES (new subitem 18(3)). This means, for example, that an employee who has complied with the notice and evidence requirements in the relevant State industrial law to take maternity leave does not have to also comply with the notice and evidence requirements in section 74 of the FW Act for the taking of parental leave.

334. If an employee is deemed to have taken a step to apply for leave under the NES due to the operation of new subitem 18(3), they are entitled to adjust this step consistently with the

provisions of the NES (new subitem 18(4)). A legislative note after this subitem provides as an example an employee varying the content of a notice given to the employer in relation to the leave, or varying the amount of leave they intend to take.

335. An example of the operation of new subitems 18(2) and (4) is that it will allow an employee who is absent on, or who has applied for (but not yet started), a period of parental leave to access the additional entitlement in the NES to request additional parental leave under section 76 of the FW Act.

336. New subitem 18(5) allows the regulations to deal with other matters relating to how the NES applies to leave that immediately before commencement of the NES is being, or is to be, taken under Division 6 of Part 7 of the WR Act or under a State industrial law of a Division 2B referring State.

New item 19 – Notice of termination

337. This item provides that the NES notice of termination provisions (Subdivision A of Division 11) apply only to terminations of employment occurring on or after the Division 2B referral commencement (new subitem 19(1)). The NES does not apply if notice of the termination was given before the Division 2B referral commencement (new subitem 19(2)) – the relevant State industrial law continues to apply in such cases.

338. This means that if an employee's employment is terminated, or the employee is given notice of termination of their employment prior to the Division 2B referral commencement (even if the actual date of termination falls after the Division 2B referral commencement), the employer is not also required to provide notice under the NES.

New item 20 – Redundancy pay

339. This item provides that the entitlement to redundancy pay under the NES applies to terminations of employment due to an employee's position being made redundant that occur on or after the Division 2B referral commencement, even if notice of termination was given before that date. This means that even where an employee is given notice of termination under a State law prior to the Division 2B referral commencement, an employer will still be liable to pay redundancy pay (to an eligible employee) if the date of termination falls after the Division 2B referral commencement.

New item 21 – Fair Work Information Statement

340. This item is intended to make it clear that there is no obligation to provide the Fair Work Information Statement to employees who were employed by the employer before the Division 2B referral commencement. The obligation on an employer to give a new employee the Statement under section 125 of the FW Act only applies to employees who commence employment with the employer on or after the Division 2B referral commencement.

New item 22 – Regulations

341. This item allows regulations to be made that provide for how the NES apply to, or are affected by, things done or matters occurring on or after Division 2B referral commencement.

Item 57 – At the end of subitem 2(1) of Schedule 6

342. Item 57 amends the definition of enterprise instrument to include a Division 2B enterprise award. Consistent with T&C Act arrangements for enterprise awards, the effect of this item and item 61 is that parties to Division 2B State enterprise awards (that is, State awards that apply to a single enterprise) will be able to apply to FWA within four years of the referral commencement to have the instrument modernised (as is the case for federal enterprise awards). After that time non-modernised Division 2B State enterprise awards will cease to operate and the affected employers and employees will be covered by the relevant modern award.

Item 58 – Subitem 2(2B) of Schedule 6

343. Item 58 clarifies that the reference to a State award in subitem 2(2B) of Schedule 6 to the T&C Act means a State award within the meaning of the WR Act.

Item 59 – Paragraph 2(3)(a) of Schedule 6

344. Item 59 clarifies that the reference to a State award in paragraph 2(3)(a) of Schedule 6 to the T&C Act means a State award within the meaning of the WR Act.

Item 60 – Paragraph 2(3)(a) of Schedule 6

345. Item 60 clarifies that the reference to a State employment agreement in paragraph 2(3)(a) of Schedule 6 to the T&C Act means a State employment agreement within the meaning of the WR Act.

Item 61 – At the end of item 2 of Schedule 6

346. This item defines a Division 2B enterprise award as a Division 2B State award that regulates the terms and conditions of employment in a single enterprise or part of a single enterprise or one or more enterprises, if the employers all carry on similar business activities under the same franchise as franchisees of the same franchisor, or related bodies corporate of the same franchisor, or any combination of the two.

Item 62 – Item 9 of Schedule 6 (heading)

347. This is a minor amendment to the heading of item 9 of Schedule 6 consequential on items 63 and 64.

Item 63 – After subparagraph 9(2)(b)(ii) of Schedule 6

348. This item provides that as soon as practicable after FWA makes a modern enterprise award it must terminate the enterprise instrument (which may be a Division 2B enterprise award) and vary or terminate other Division 2B State awards so that those awards no longer cover the employees who are covered by the modern enterprise award.

Item 64 – Subitem 9(2) of Schedule 6 (note 1)

349. This item amends note 1 to provide the reader with a reference to the main provisions about both transitional Australian Pay and Classification Scales and Division 2B State awards.

Item 65 – Subitems 2(2) and (3) of Schedule 6A

350. This item brings State public sector employers and employees in Division 2B referring States within the meaning of *State reference public sector employer* and *State reference public sector employee* for the purposes of Schedule 6A to the T&C Act, and so extends the application of Schedule 6A to the T&C Act to Division 2B State public sector employers and their employees.

Item 66 – Paragraph 9(a) of Schedule 7

Item 67 – Paragraph 9(b) of Schedule 7

351. These are minor amendments consequential on the insertion of new Schedule 3A to make clear that the references to *State award* and *State employment agreement* are to the expressions as defined in the WR Act.

Item 68 – After Part 4 of Schedule 7

Part 4A – Transitional provisions to apply the better off overall test to enterprise agreements that cover Division 2B State award covered employees

New item 20A – Application of better off overall test to making of enterprise agreements that cover Division 2B State award covered employees

352. New item 20A applies only to enterprise agreements made on or after the Division 2B referral commencement, where one or more employees to whom the enterprise agreement would apply are covered by a Division 2B State award.

353. This item provides that, despite subsection 193(1) of the FW Act and item 18 of Schedule 7 to the T&C Act, enterprise agreements only pass the better off overall test if FWA is satisfied that:

- the requirements in subsection 193(1) of the FW Act and paragraph (2)(b) of item 18 of Schedule 7 to the T&C Act (non-greenfields agreements) or subsection 193(3) of the FW Act and paragraph (3)(b) of item 18 of Schedule 7 to the T&C Act (greenfields agreements) have been satisfied in relation to the agreement; and

- as at the test time, each Division 2B State award covered employee, and each prospective Division 2B State award covered employee, would be better off overall if the enterprise agreement applied to them than if the relevant Division 2B State award applied to them.

354. This item makes it clear that FWA is entitled to assume (in the absence of evidence to the contrary) that an employee would be better off overall if the employee belonged to a class of employees that would be better off if the enterprise agreement applied to that class rather than the Division 2B State award.

New item 20B – Application of better off overall test to variation of enterprise agreements that cover Division 2B State award covered employees

355. New item 20B applies only to a variation of an enterprise agreement made on or after the Division 2B referral commencement, where one or more employees to whom the enterprise agreement applies are covered by a Division 2B State award.

356. This item provides that despite subsections 211(4) and (5) of the FW Act, an enterprise agreement as proposed to be varied only passes the better off overall test if FWA is satisfied at the test time that:

- the requirements in subitem 19(3) of Schedule 7 to the T&C Act have been met; and
- that each Division 2B State award covered employee, and each prospective Division 2B State award covered employee, would be better off overall if the enterprise agreement applied to them than if the relevant Division 2B State award applied to them.

357. The note to subitem 20B(3) makes it clear that a variation to which this item applies will not be tested against a modern award.

358. This item makes it clear that FWA is entitled to assume (in the absence of evidence to the contrary) that an employee would be better off overall if the employee belonged to a class of employees that would be better off if the enterprise agreement applied to that class rather than the Division 2B State award.

359. This item also makes it clear that FWA must disregard any individual flexibility agreement that has been entered into under the enterprise agreement for the purposes of applying the better off overall test.

New item 20C – Definitions

360. This item defines a number of terms used in this Part.

361. Key definitions are explained below:

- *Division 2B State award covered employee* means an employee who is covered by an enterprise agreement and, at the test time, is covered by a Division 2B State award that is in operation, that would cover the employee in relation to the work to be performed under the agreement and that covers the employer;
- *prospective Division 2B State award covered employee* means a person who, if he or she were an employee of an employer covered by the enterprise agreement at the test time, would be covered by an enterprise agreement and would be covered by a Div 2B State award that is in operation, that would cover the employee in relation to the work to be performed under the agreement and that covers the employer;
- *test time* is either the time the application for approval of the enterprise agreement by FWA was made under section 185 of the FW Act or the time the application for approval of the variation of the enterprise agreement by FWA was made under section 210 of the FW Act (as the case may be).

Item 69 – Part 4 of Schedule 9 (heading)

362. This item repeals the heading in Part 4 of Schedule 9 and replaces it with 'Part 4 – Universal application of minimum wages to employees: transitional instruments.'

Item 70 – At the end of Schedule 9

363. This item inserts Part 5 at the end of Schedule 9 to the T&C Act, which deals with minimum wages for Division 2B State reference employees.

Part 5 – Provisions relating to Division 2B State instruments

Division 1 – Universal application of minimum wages to employees: Division 2B State reference employees

New item 16 – Base rate of pay under Division 2B State award must not be less than national minimum wage order rate etc.

364. This item operates where a Division 2B State award applies to an employee. If the Division 2B State award provides a lesser base rate of pay that the national minimum wage order that would apply if the employee were an award/agreement free employee, the employee will be entitled to a base rate of pay that is equal to the national minimum wage order.

365. This item ensures that on or after the Division 2B referral commencement, all Division 2B State reference employees to whom a Division 2B State award applies are entitled to at least the relevant safety net minimum wage.

New item 17 – Base rate of pay under Division 2B State employment agreement must not be less than Division 2B State award rate or modern award rate, or the national minimum wage order rate etc.

366. This item ensures that on or after the Division 2B referral commencement, all Division 2B State reference employees to whom a Division 2B State employment agreement applies are entitled to at least the relevant safety net minimum wage – from either the relevant modern award, Division 2B State award or, if the employee is award/agreement free, the national minimum wage order.

367. If the Division 2B State employment agreement provides a lesser base rate of pay, the relevant safety net minimum wage applies.

New item 18 – FWA may make determinations to phase-in the effect of rate increases resulting from item 16 or 17 etc.

368. This item provides that an employer to whom a Division 2B State instrument applies can make an application to FWA for an order that allows them to phase-in the effect of increases in base rates of pay that result from the operation of item 16 or 17. FWA may only make such an order where the phasing-in of the increases is necessary to ensure the ongoing viability of the employer's enterprise.

New item 19 – Award/agreement free Division 2B State reference employee not to be paid less than State minimum amount

369. This item operates in relation to Division 2B State reference employees that are award/agreement free and to whom no Division 2B State instrument applies. If, during a period on or after the Division 2B referral commencement, the amount that is payable to the employee under the national minimum wage order is less than the amount that would be payable to the employee under the State minimum wages instruments (the State minimum amount), the employee will be entitled to the State minimum amount.

370. It is possible that the national minimum wage order amount under paragraph 19(1)(d) could be a nil amount for a particular employee. This may occur if, for example, a State minimum wage instrument sets a minimum wage for employees to whom training arrangements apply and there is no equivalent special minimum wage for employees under the national minimum wage order. In this case, the employee would continue to be entitled to the State minimum amount until an equivalent national minimum wage order applies.

371. State minimum wages instruments are defined in subitem 19(4) as orders, decisions or rulings (however described) as in force immediately before the Division 2B referral commencement that were made by a State industrial body under a State industrial law of the Division 2B referring State and that provide for, or affect the entitlement of employees to be paid, a minimum wage or rate of remuneration.

372. Any increases of rates that would have taken effect after the Division 2B referral commencement under the State minimum wages instruments are to be disregarded (subitem 19(3)).

373. This item has effect subject to regulations which may be made under subitem 19(5).

Division 2—Other matters

New item 20 – Variation of Division 2B State awards in annual wage reviews under the FW Act

374. This item allows FWA to vary the terms of a Division 2B State award relating to wages as part of an annual wage review.

375. With the exception of section 292 of FW Act (which relates to publication of varied wage rates), all of Division 3 of Part 2-6 of the FW Act applies to the terms of a Division 2B State award relating to wages in the same way as it applies to a modern award.

Item 71 – At the end of subitem 3(2) of Schedule 10

376. This item amends the list of instruments and orders in subitem 3(2) of Schedule 10 to include a Division 2B State instrument. The effect of this item is that a term of a Division 2B State instrument has no effect in relation to an employee to the extent that it is less beneficial than a term of an equal remuneration order that is made under the FW Act and applies to the employee.

Item 72 – Division 1 of Part 3 of Schedule 11 (heading)

377. This item repeals the heading in Division 1 of Part 3 of Schedule 11 and replaces it with 'Division 1–Transfers of business: transitional instruments.'

Item 73 – Before item 7 of Schedule 11

New item 6A – Application of this Division

378. This item clarifies that Division 1 of Part 3 of Schedule 11 to the T&C Act applies in relation to a transfer of business and transferable instruments that are WR Act transitional instruments. The legislative note following item 6A provides that transfers of business affecting Division 2B State instruments are dealt with in Division 4 of Part 3 of Schedule 11.

Item 74 – At the end of Part 3 of Schedule 11

379. This item inserts Division 4 of Part 3 of Schedule 11, which deals with transfers of business affecting Division 2B State instruments.

New Division 4 – Transfer of business: Division 2B State instruments

New item 14 – Application of this Division

380. This item provides that Division 4 applies in relation to a transfer of business and transferable instruments that are Division 2B State instruments.

New item 15 – Application of FW Act in relation to transferring employees covered by Division 2B State instrument

381. This item provides for the application of the transfer of business provisions in Part 2-8 of the FW Act in relation to transferring employees covered by a Division 2B State instrument.

New item 16 – Modification—application of FW Act in relation to Division 2B State instruments

382. This item modifies the application of Part 2-8 of the FW Act to make clear that the definition of transferable instrument in subsection 312(1) of the FW Act is extended to cover a Division 2B State instrument. This means that where a transfer of business occurs and the old employer was covered by a Division 2B State instrument in relation to a transferring employee, that instrument covers the new employer and the transferring employee.

383. The item further provides that, subject to certain exceptions in subitems 16(3) to (5), a reference in Part 2-8 of the FW Act to an enterprise agreement or a modern award is taken to include a reference to a Division 2B State employment agreement or a Division 2B State award respectively.

384. If a transferable instrument is a Division 2B State award, subitem 16(7) provides that FWA cannot make an order under paragraph 319(1)(c) of the FW Act to switch-off a modern award or enterprise agreement that already covers the new employer and non-transferring employees.

Item 75 – At the end of Schedule 12

New item 4 – Application in relation to Division 2B State instruments

385. This item provides that a reference in Part 3-1 of the FW Act (General Protections) to an enterprise agreement or a modern award is taken to include a reference to a Division 2B State employment agreement or a Division 2B State award respectively.

Item 76 – After paragraph 2(3)(b) of Schedule 12A

386. This item provides that, where a Division 2B State instrument applies to a person (who is not a casual employee), their ordinary hours of work are determined in accordance with item 48 of Schedule 3A for unfair dismissal purposes.

Item 77 – Item 2 of Schedule 13 (heading)

Item 78 – Subitem 2(1) of Schedule 13

Item 79 – Paragraphs 2(2)(a) and (b) of Schedule 13

Item 80 – At the end of paragraph 2(2)(b) of Schedule 13

Item 81 – Subitem 2(2) of Schedule 13 (note)

Item 82 – Subitem 2(2) of Schedule 13 (note)

Item 83 – Paragraphs 2(3)(a) and (b) of Schedule 13

Item 84 – At the end of paragraph 2(3)(b) of Schedule 13

387. These items make clear that item 2 of Schedule 13 to the T&C Act applies to an employee covered by an individual Division 2B State employment agreement.

388. An employee covered by such an agreement is taken to be an employee who will be covered by a proposed enterprise agreement if the nominal expiry date of the individual Division 2B State employment agreement has passed or a conditional termination has been made under subitem 25(2) of Schedule 3A.

Item 85 – Item 3 of Schedule 13

Item 86 – Item 3 of Schedule 13

Item 87 – Paragraphs 3(a) to (e) of Schedule 13

Item 88 – Paragraph 3(f) of Schedule 13

389. These items amend item 3 of Schedule 13 to provide that the time limitations specified in subsection 229(3) of the FW Act also apply to applications for bargaining orders where a collective Division 2B State employment agreement applies to an employee, or employees, who will be covered by a proposed enterprise agreement.

Item 89 – Item 4 of Schedule 13 (heading)

Item 90 – Subitem 4(1) of Schedule 13

Item 91 – Subitem 4(2) of Schedule 13

Item 92 – Subitem 4(2) of Schedule 13

Item 93 – At the end of subitem 4(2) of Schedule 13

Item 94 – Subitem 4(2) of Schedule 13 (note)

Item 95 – Subitem 4(3) of Schedule 13

Item 96 – Subitem 4(3) of Schedule 13

Item 97 – At the end of item 6 of Schedule 13

390. These items amend item 4 of Schedule 13 to include Division 2B State employment agreements. This means that section 417 of the FW Act and item 14 of the table in subsection 539(2) of the FW Act apply in relation to a Division 2B State employment agreement in a corresponding way to the way that those provisions apply in relation to an enterprise agreement.

391. This ensures that an employee who is covered by a Division 2B State employment agreement cannot organise or engage in industrial action until after the nominal expiry date of that agreement has passed. However, items 93 and 94 make clear that this rule does not apply to an individual Division 2B State employment agreement in relation to which a conditional termination has been made under subitem 25(2) of Schedule 3A.

Item 98 – Item 17 of Schedule 13 (heading)

Item 99 – Subitem 17(1) of Schedule 13

Item 100 – Paragraphs 17(1)(a) to (e) of Schedule 13

Item 101 – Subitem 17(2) of Schedule 13

392. These items make clear that item 17 of Schedule 13 applies where a collective Division 2B State employment agreement covers the employees who will be covered by a proposed enterprise agreement. An application for a protected action ballot order must not be made under subsection 437(1) of the FW Act earlier than 30 days before the latest nominal expiry date of the transitional instruments or collective Division 2B State employment agreements that cover the employees.

Item 102 – Part 5 of Schedule 13 (heading)

393. This item repeals the heading in Part 5 of Schedule 13 and replaces it with 'Part 5– Effect of conduct engaged in while bargaining for WR Act collective agreement or collective State employment agreement.'

Item 103 – Item 18 of Schedule 13 (heading)

394. Item 103 is a minor amendment to the heading of item 18 of Schedule 13 to remove the reference to 'WR Act'. This amendment is consequential to the amendments made by items 104 and 105.

Item 104 – After subitem 18(1) of Schedule 13

Item 105 – Subitem 18(2) of Schedule 13

395. These items provide that when FWA makes certain decisions under the FW Act, it may take into account conduct engaged in by a bargaining representative for a proposed enterprise agreement in relation to a proposed collective State employment agreement before the Division 2B referral commencement. Item 18 applies where the employees and employer who are to be covered by the proposed enterprise agreement would have been subject to, and bound by, respectively, the proposed collective State employment agreement.

Item 106 – Paragraph 20(a) of Schedule 13

Item 107 – Paragraph 20(b) of Schedule 13

396. These items ensure that the strike pay provisions apply to Division 2B State instruments in the same way as they apply to fair work instruments and transitional instruments.

Item 108 – At the end of item 3 of Schedule 14

397. This item inserts a Division 2B State instrument in the list of instruments in item 3 of Schedule 14. This allows entry onto premises to investigate a suspected contravention of a Division 2B State instrument.

Item 109 – At the end of Schedule 15

New item 4 – Application of FW Act – stand down under Division 2B State instruments

398. This item provides that arrangements for stand downs under Division 2B State instruments are treated in the same way as for enterprise agreements under subsection 524(2) of the FW Act and transitional instruments under the T&C Act. This means that a stand down provision in a Division 2B State instrument generally continues to apply from the Division 2B referral commencement.

399. However, the default stand down provision under subsection 524(1) of the FW Act applies if a Division 2B State instrument does not deal with a circumstance allowing stand down under the FW Act, or does not deal with stand down at all.

Item 110 – After item 4 of Schedule 16

New item 4A – Compliance with Division 2B State instruments

400. This item provides that a person to whom a Division 2B State award or Division 2B State employment agreement applies must not contravene a term of the award or agreement. The prohibitions are civil remedy provisions.

New item 4B – Compliance with obligations relating to conditional terminations of individual Division 2B State employment agreements

401. This item inserts civil remedy provisions for contraventions of the conditional termination provisions for individual Division 2B State employment agreements.

Item 111 – At the end of subitem 12(1) of Schedule 16

Item 112 – At the end of subparagraph 13(1)(b)(iv) of Schedule 16

402. These items provide that the civil remedy provisions in relation to non-disclosure of information also apply where an employee is covered by an individual Division 2B State employment agreement.

Item 113 – Paragraph 16(1)(c) of Schedule 16

Item 114 – Paragraph 16(1)(d) of Schedule 16

Item 115 – Paragraph 16(1)(da) of Schedule 16

Item 116 – Subitem 16(1) of Schedule 16 (after table item 44)

Item 117 – Subitem 16(2) of Schedule 16

Item 118 – Subparagraph 16(2)(b)(i) of Schedule 16

403. These items amend item 16 of Schedule 16 to provide that the civil remedy provisions set out in this Bill are subject to the rules regarding standing, jurisdiction and maximum penalties set out in the table contained in item 116, as if these rules were included as part of the table in subsection 539(2) of the FW Act.

404. This means that, subject to the modifications set out in these items, Part 4-1 of the FW Act applies to the civil remedy provisions in this Bill in the same way that it applies to civil remedy provisions in the FW Act.

Item 119 – After paragraph 17(a) of Schedule 16

405. This item provides that the Federal Court and the Federal Magistrates Court cannot order an injunction or an interim injunction in relation to a contravention of a Division 2B State instrument.

Item 120 – After item 14 of Schedule 18

New item 14A – Conduct after Division 2B referral commencement—application of Part 5-2 of FW Act

406. This item provides that Part 5-2 of the FW Act (which relates to the functions of the Fair Work Ombudsman) applies to conduct that occurs on or after the Division 2B referral commencement.

Item 121 – After item 623 of Schedule 22

New item 623A – Division 2B State awards and Division 2B State employment agreements

407. This item ensures that references in the FW(RO) Act to modern awards and enterprise agreements will be read as including references to Division 2B State awards and Division 2B State employment agreements respectively.

Part 2—Amendment of other Acts

Age Discrimination Act 2004

Item 122 – Subparagraph 39(8)(b)(ii)

408. This item amends the *Age Discrimination Act 2004* to provide that an act done in direct compliance with a Division 2B State instrument is not unlawful.

Australian Human Rights Commission Act 1986

Item 123 – Subsection 46PW(7) (paragraph (b) of the definition of *industrial instrument*)

409. This item amends the definition of industrial instrument to include a Division 2B State instrument.

Disability Discrimination Act 1992

Item 124 – Subparagraph 39(8)(b)(ii)

410. This item amends the *Disability Discrimination Act 1992* to provide that an act done in direct compliance with a Division 2B State instrument is not unlawful.

Fair Work Act 2009

Item 125 – Paragraph 113(3)(a)

Item 126 – Subparagraph 113(3)(a)(i)

Item 127 – Paragraph 113(3)(b)

Item 128 – After subsection 113(3)

411. These items amend section 113 of the FW Act to ensure that Division 2B State reference employees are entitled to LSL in accordance with the applicable award-derived LSL terms. It preserves the effect of LSL terms in a State reference transitional award as the award stood immediately before the Division 2B referral commencement.

412. To determine whether there are applicable award-derived LSL terms, it is necessary to consider the award that would have applied to the employee's current employment if the employee had been in that employment immediately before commencement (paragraph 113(3)(a)).

Item 129 – Paragraph 168E(3)(a)

Item 130 – Paragraph 168E(3)(b)

Item 131 – paragraph 168E(4)(a)

Item 132 – Paragraph 168E(4)(b)

413. These items amend provisions of the FW Act which deal with the State reference public sector award modernisation process to extend the application of those provisions to Division 2B State public sector employers and their employees.

Legislative Instruments Act 2003

Item 133 – Subsection 7(1) (table item 18A)

414. This item will have the effect that Division 2B State instruments are excluded from the definition of legislative instrument under the *Legislative Instruments Act 2003.*

415. Because Division 2B State instruments are notional in nature, there is a question as whether they are legislative in character. However, the Legislative Instruments Act already makes clear that other transitional instruments within the meaning of the T&C Act are not legislative instruments. This includes award-based transitional instruments and agreement-based transitional instruments that are NAPSAs or preserved State agreements. This amendment will ensure that the treatment of Division 2B State instruments for the purposes of the Legislative Instruments Act is consistent with other T&C Act instruments.

Sex Discrimination Act 1984

Item 134 – Subparagraph 40(1)(g)(ii)

416. This item amends the *Sex Discrimination Act 1984* to ensure that it does not make unlawful anything done in direct compliance with a Division 2B State instrument.

Superannuation Guarantee (Administration) Act 1992

Item 135 – Subsection 12A(1)

417. This item has the effect that a reference to a Division 2B State instrument in the *Superannuation Guarantee (Administration) Act 1992* has the same meaning as in the T&C Act.

Item 136 – After subsection 32C(6B)

418. This item ensures that a contribution to a fund by an employer is made in compliance with the choice of fund requirements under the *Superannuation Guarantee (Administration) Act 1992* if it is made under or in accordance with a Division 2B State instrument.

Item 137 – Regulations may make consequential amendments of Acts

419. This item includes a power for regulations to be made to amend Acts (other than the FW Act) to enable any consequential issues that emerge in the future to be dealt with.

Item 138 – Regulations may take effect from date before registration

420. This item allows for regulations to be made with retrospective effect. This is necessary to deal with any unintended consequences that may arise in the transition of employees and employers in Division 2B referring States into the national workplace relations system.

421. Subitem 138(2) ensures that any regulations made under item 137 may not retrospectively subject a person to civil liability.

422. Subitem 138(2) provides that if a regulation takes effect before it is registered on the Federal Register of Legislative Instruments, a person cannot be convicted of an offence or ordered to pay a penalty in relation to conduct contravening the regulation that took place between the regulation coming into effect and its registration.

Schedule 3 – Other amendments

Part 1 – Main amendments

Fair Work Act 2009

Item 1 – Section 14

Item 2 – At the end of section 14 (after the notes)

423. These items amend section 14 of the FW Act which deals with the meaning of *national system employer*.

424. Item 2 inserts a mechanism under which certain employers may be declared by or under a State or Territory law not to be national system employers. To be effective, a declaration must be endorsed by the Minister administering the FW Act.

425. Such a declaration may only be made in respect of:

- entities established for a public purpose by or under a State or Territory law, by the Governor of a State, the Administrator of a Territory or a Minister of a State of Territory; and
- entities established for a local government purpose by or under a State or Territory law and wholly-owned or controlled subsidiaries of such entities.

426. However, a declaration cannot be made in relation to an employer that:

- generates, supplies or distributes electricity;
- supplies or distributes gas;
- provides services for the supply, distribution or release of water; or
- operates a rail service or a port;

unless the employer is a local government employer or a wholly-owned or controlled subsidiary of such an employer.

427. In addition, a State or Territory is not permitted to make an exclusion declaration in relation to an employer that is an Australian university (within the meaning of the *Higher Education Support Act 2003*).

428. An employer will be required to be specifically named in the exclusion law or instrument declaration. This is because a key objective of the national workplace relations system is to ensure certainty of coverage for compliance purposes.

429. If a declaration is made by or under a State or Territory law, and endorsed by the Minister, then the employer specified in the declaration will not be a national system employer and will not generally be subject to the FW Act. This will also mean that the employer's employees will not be national system employees (because only employees of national system employers are national system employees) and will not generally be subject to the FW Act.

430. If the Minister does not endorse the declaration the employer will continue to be subject to the FW Act. If a declaration is revoked by the Minister, the employer specified in the declaration will again be subject to the FW Act.

431. To ensure transparency of the FW Act's coverage, the endorsement or revocation instrument will be tabled in the Parliament. An endorsement or revocation instrument will be a legislative instrument for the purposes of the Legislative Instruments Act, but will not be subject to the disallowance or sunsetting provisions of that Act.

432. The exemptions from the disallowance and sunsetting provisions of the Legislative Instruments Act are necessary to ensure certainty of rights and entitlements for the employers and employees that will potentially be subject to this exclusion mechanism.

Item 3 – After section 14

433. This item inserts new section 14A into the FW Act, which permits regulations of a transitional, application or saving nature to be made in relation to:

- employers ceasing to be national system employers because of a State declaration and a Ministerial endorsement (and individuals ceasing to be national system employees as a result); and

- employers becoming national system employers because of a revocation of a Ministerial endorsement that applies to them (and individuals becoming national system employees as a result).

434. Regulations made under new section 14A may modify provisions of the FW Act or provide for the application of provisions of the FW Act to matters to which they would otherwise not apply. This regulation-making power provides a mechanism to deal with any unintended consequences that may arise as a result of the exclusion of an employer from the coverage of the FW Act.

Item 4 – After subparagraph 423(7)(b)(ii)

Item 5 – After subparagraph 424(2)(b)(ii)

Item 6 – After paragraph 426(6)(b)

435. Sections 423, 424 and 426 of the FW Act permit certain persons, including the Commonwealth Minister, to apply to FWA for orders suspending or terminating protected industrial action for a proposed enterprise agreement in certain circumstances.

436. These items amend those sections to include the Minister of a State or Territory in circumstances where the industrial action is being engaged in, or is threatened, impending or probable, in that State or Territory.

Item 7 – After subsection 565(1)

Item 8 – At the end of subsection 565(2)

Item 9 – Subsection 565(3)

437. These items amend section 565 of the FW Act to enable an appeal from a decision of an eligible State or Territory court of summary jurisdiction in a matter arising under the FW Act to be heard by an eligible State or Territory court as provided for by a law of the relevant State or Territory.

438. The jurisdiction of eligible State or Territory courts to hear such appeals is concurrent with the jurisdiction of the Federal Court.

439. Appeals from appellate decisions of eligible State or Territory courts may only be heard by the Federal Court.

440. Item 8 makes it clear that it is not necessary to obtain leave to appeal to the Federal Court.

Item 10 – After section 569

441. This item inserts new section 569A into the FW Act, which allows a State or Territory Minister with portfolio responsibility for workplace relations to intervene on behalf of the relevant State or Territory, in a proceeding in any court in any matter arising under the FW Act if he or she believes that it is in the public interest of that State or Territory to do so.

442. If a Minister intervenes in a proceeding, he or she will be taken to be a party to the proceeding and may appeal from any judgment in the proceeding.

443. The general rule that parties carry their own costs in proceedings arising under the FW Act (see section 570) will not apply where a State or Territory Minister has intervened in a proceeding or instituted an appeal under this section.

444. This section does not otherwise limit the power of courts to allow interveners pursuant to a statute or the rules of a court.

Item 11 – At the end of subsection 570(1) (before the note)

Item 12 – Subsection 570(1) (at the end of the note)

445. These items amend subsection 570(1) of the FW Act (and the note to that subsection) to make it clear that a court can make a costs order against a State or Territory Minister if that Minister intervenes in a matter or institutes an appeal from a judgment in a matter in which the Minister has intervened in accordance with section 569A.

Item 13 – At the end of Subdivision C of Division 3 of Part 5-1

446. This item inserts section 597A into the FW Act, which allows a State or Territory Minister with portfolio responsibility for workplace relations to make submissions for consideration in relation to a matter before a Full Bench of FWA if it is in the public interest of the relevant State or Territory for the Minister to do so.

447. Section 597A applies whether or not FWA holds a hearing in relation to the matter.

Item 14 – Subsection 604(1)

Item 15 – Subsection 607(1)

Item 16 – Paragraph 613(2)(a)

448. These items amend sections 604, 607 and 613 of the FW Act to ensure that decisions of the General Manager of FWA (or a delegate of the General Manager) made under the FW(RO) Act may be appealed or reviewed. Those sections previously dealt only with decisions of FWA.

Item 17 – Subsection 649(1)

449. This item amends subsection 649(1) of the FW Act to require the President of FWA to perform his or her functions in a manner that not only facilitates, but also encourages, cooperation between FWA and prescribed State industrial authorities.

Part 2 – Minor technical amendments

Fair Work (Transitional Provisions and Consequential Amendments) Act 2009

Item 18 – Paragraph 12(1)(d) of Schedule 2

Item 19 – Item 11 of Schedule 3 (heading)

Item 20 – Subitem 11(1) of Schedule 3

450. These items are technical amendments to change the reference to the *Human Rights and Equal Opportunity Commission Act 1986* to the *Australian Human Rights Commission Act 1986.*

Item 21 – Paragraph 38(3)(a) of Schedule 3

451. This item amends paragraph 38(3)(a) of Schedule 3 to the T&C Act to omit and substitute a reference to subitems 20(2) and (3). Paragraph 38(3)(a) provides for the continuation of redundancy provisions in certain circumstances. This is a technical amendment that is not connected to Division 2B references.

Item 22 – Subitem 8(5) of Schedule 11

Item 23 – Subitem 4(3) of Schedule 13

452. These items are technical amendments to the T&C Act, to amend an incorrect label and to replace an incorrect cross-reference to the WR Act with a reference to the FW Act.