



Fair Work Amendment (State Referrals and Other Measures) Act 2009

No. 124, 2009

**An Act to amend the *Fair Work Act 2009*, and for
related purposes**

Note: An electronic version of this Act is available in ComLaw (<http://www.comlaw.gov.au/>)

Contents

1	Short title.....	1
2	Commencement.....	2
3	Schedule(s).....	4
Schedule 1—Referring States		5
	<i>Fair Work Act 2009</i>	5
Schedule 2—Transitional matters related to State referrals under Division 2B of Part 1-3 of the Fair Work Act 2009		24
Part 1—Amendment of the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009		24
Part 2—Amendment of other Acts		105
	<i>Age Discrimination Act 2004</i>	105
	<i>Australian Human Rights Commission Act 1986</i>	105
	<i>Disability Discrimination Act 1992</i>	105
	<i>Fair Work Act 2009</i>	105
	<i>Legislative Instruments Act 2003</i>	106
	<i>Sex Discrimination Act 1984</i>	106
	<i>Superannuation Guarantee (Administration) Act 1992</i>	106
Schedule 3—Other amendments		108
Part 1—Main amendments		108
	<i>Fair Work Act 2009</i>	108
	<i>Fair Work (Transitional Provisions and Consequential Amendments) Act 2009</i>	114
Part 2—Minor technical amendments		116
	<i>Fair Work (Transitional Provisions and Consequential Amendments) Act 2009</i>	116



Fair Work Amendment (State Referrals and Other Measures) Act 2009

No. 124, 2009

An Act to amend the *Fair Work Act 2009*, and for related purposes

[Assented to 9 December 2009]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Fair Work Amendment (State Referrals and Other Measures) Act 2009*.

2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	9 December 2009
2. Schedule 1, items 1 to 6	A day or days to be fixed by Proclamation. However, if any of the provision(s) do not commence within the period of 6 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.	
3. Schedule 1, item 7	Immediately after the commencement of item 2 of Schedule 3.	
4. Schedule 1, items 8 to 12	A day or days to be fixed by Proclamation. However, if any of the provision(s) do not commence within the period of 6 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.	
5. Schedule 1, item 13	Immediately after the commencement of item 11 of Schedule 1 to the <i>Fair Work (State Referral and Consequential and Other Amendments) Act 2009</i> .	25 June 2009
6. Schedule 1, items 14 and 15	A day or days to be fixed by Proclamation. However, if any of the provision(s) do not commence within the period of 6 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.	
7. Schedule 1,	Immediately after the commencement of	25 June 2009

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
item 16	item 11 of Schedule 1 to the <i>Fair Work (State Referral and Consequential and Other Amendments) Act 2009</i> .	
8. Schedule 1, items 17 to 41	A day or days to be fixed by Proclamation. However, if any of the provision(s) do not commence within the period of 6 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.	
9. Schedule 1, item 42	The day this Act receives the Royal Assent.	9 December 2009
10. Schedule 2, items 1A to 128	At the same time as item 39 of Schedule 1.	
11. Schedule 2, items 129 to 132	Immediately after the commencement of section 168E of the <i>Fair Work Act 2009</i> .	1 January 2010
12. Schedule 2, items 133 to 138	At the same time as item 39 of Schedule 1.	
13. Schedule 3, items 1A to 17	A day or days to be fixed by Proclamation. However, if any of the provision(s) do not commence within the period of 6 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.	
13A. Schedule 3, items 17A to 17E	The day this Act receives the Royal Assent.	9 December 2009
14. Schedule 3, Part 2	At the same time as item 39 of Schedule 1.	

Note: This table relates only to the provisions of this Act as originally passed by both Houses of the Parliament and assented to. It will not be expanded to deal with provisions inserted in this Act after assent.

(2) Column 3 of the table contains additional information that is not part of this Act. Information in this column may be added to or edited in any published version of this Act.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Referring States

Fair Work Act 2009

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

Omit “subsection 15(1) and subsection 30E(1)”, substitute “subsections 15(1), 30E(1) and 30P(1)”.

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

Omit “subsection 15(2) and subsection 30E(2)”, substitute “subsections 15(2), 30E(2) and 30P(2)”.

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

Omit “Section 30C extends”, substitute “Sections 30C and 30M extend”.

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

Omit “Section 30D extends”, substitute “Sections 30D and 30N extend”.

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

Omit “Section 30F extends”, substitute “Sections 30F and 30Q extend”.

6 Section 13 (note)

Omit “Section 30C extends”, substitute “Sections 30C and 30M extend”.

7 Subsection 14(1) (note 2)

Omit “Section 30D extends”, substitute “Sections 30D and 30N extend”.

8 Subsection 15(1) (note)

Omit “Subsection 30E(1) extends”, substitute “Subsections 30E(1) and 30P(1) extend”.

9 Subsection 15(2) (note)

Omit “Subsection 30E(2) extends”, substitute “Subsections 30E(2) and 30P(2) extend”.

10 Section 24

Omit “Division 2A is about the extended application of this Act in a State that has”, substitute “Divisions 2A and 2B are about the extended application of this Act in States that have”.

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

Repeal the heading, substitute:

Division 2A—Application of this Act in States that refer matters before 1 July 2009

12 Section 30A

Before “In this Division”, insert “(1)”.

13 Section 30A (definition of *amendment*)

Repeal the definition.

14 Section 30A

Insert:

amendment reference of a State means the reference by the Parliament of the State to the Parliament of the Commonwealth of the matters covered by subsection 30B(4).

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

Repeal the definition, substitute:

excluded subject matter means any of the following matters:

- (a) a matter dealt with in a law referred to in subsection 27(1A) of this Act;
- (b) superannuation;
- (c) workers compensation;
- (d) occupational health and safety;
- (e) matters relating to outworkers (within the ordinary meaning of the term);

-
- (f) child labour;
 - (g) training arrangements;
 - (h) long service leave;
 - (i) leave for victims of crime;
 - (j) attendance for service on a jury, or for emergency service duties;
 - (k) declaration, prescription or substitution of public holidays;
 - (l) the following matters relating to provision of essential services or to situations of emergency:
 - (i) directions to perform work (including to perform work at a particular time or place, or in a particular way);
 - (ii) directions not to perform work (including not to perform work at a particular time or place, or in a particular way);
 - (m) regulation of any of the following:
 - (i) employee associations;
 - (ii) employer associations;
 - (iii) members of employee associations or of employer associations;
 - (n) workplace surveillance;
 - (o) business trading hours;
 - (p) claims for enforcement of contracts of employment, except so far as a law of a State provides for the variation or setting aside of rights and obligations arising under a contract of employment, or another arrangement for employment, that a court or tribunal finds is unfair;
 - (q) rights or remedies incidental to a matter referred to in a preceding paragraph of this definition;
- except to the extent that this Act as originally enacted deals with the matter (directly or indirectly), or requires or permits instruments made or given effect under this Act so to deal with the matter.

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

Omit “amendment of this Act”, substitute “amendment of the text of this Act (whether by the insertion, omission, repeal, substitution or relocation of words or matter)”.

17 Section 30A

Insert:

fundamental workplace relations principles: see subsection 30B(9).

18 Section 30A

Insert:

initial reference of a State means the reference by the Parliament of the State to the Parliament of the Commonwealth of the matters covered by subsection 30B(3).

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

Repeal the definition, substitute:

law enforcement officer means:

- (a) a member of a police force or police service; or
- (b) a person appointed to a position for the purpose of being trained as a member of a police force or police service; or
- (c) a person who has the powers and duties of a member of a police force or police service;

and, without limiting paragraphs (a), (b) and (c), includes a police reservist, a police recruit, a police cadet, a junior constable, a police medical officer, a special constable, an ancillary constable or a protective services officer.

20 Section 30A

Insert:

local government employee, of a State, means:

- (a) an employee of a local government employer of the State; or
- (b) any other employee in the State of a kind specified in the regulations.

21 Section 30A

Insert:

local government employer, of a State, means an employer that is:

- (a) a body corporate that is established for a local government purpose by or under a law of a State; or

- (b) a body corporate in which a body to which paragraph (a) applies has, or 2 or more such bodies together have, a controlling interest; or
- (c) a person who employs individuals for the purposes of an unincorporated body that is established for a local government purpose by or under a law of a State; or
- (d) any other body corporate that is a local government body in the State of a kind specified in the regulations; or
- (e) any other person who employs individuals for the purposes of an unincorporated body that is a local government body in the State of a kind specified in the regulations.

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

After “responsibilities of”, insert “persons, including”.

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

After “association”, insert “in the context of workplace relations,”.

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

Before “rights of entry”, insert “union”.

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

Repeal the paragraphs, substitute:

- (a) the State, the Governor of the State or a Minister of the State;
or
- (b) a body corporate that is established for a public purpose by or under a law of the State, by the Governor of the State or by a Minister of the State; or
- (c) a body corporate in which the State has a controlling interest;
or
- (d) a person who employs individuals for the purposes of an unincorporated body that is established for a public purpose by or under a law of the State, by the Governor of the State or by a Minister of the State; or

- (e) any other employer in the State of a kind specified in the regulations;

26 Section 30A

Insert:

transition reference of a State means the reference by the Parliament of the State to the Parliament of the Commonwealth of the matters covered by subsection 30B(5).

27 At the end of section 30A

Add:

- (2) Words or phrases in the definition of *excluded subject matter* in subsection (1), or in the definition of *referred subject matters* in subsection (1), that are defined in this Act (other than in this Division) have, in that definition, the meanings set out in this Act as in force on 1 July 2009.

27A Subsection 30B(1)

After “State has”, insert “, before 1 July 2009,”.

28 Paragraph 30B(2)(b)

After “particular matters”, insert “, or all matters,”.

29 Paragraph 30B(2)(b)

Omit “those matters”, substitute “the matters covered by subsections (3), (4) and (5); or”.

30 At the end of subsection 30B(2)

Add:

- (c) the State’s referral law provides that particular matters, or all matters, relating to local government employees, or local government employers, of the State are not included in any or all of the matters covered by subsections (3), (4) and (5).

31 Subsection 30B(6)

Repeal the subsection, substitute:

Effect of termination of reference

- (6) Despite anything to the contrary in a referral law of a State, a State ceases to be a **referring State** if any or all of the following occurs:
- (a) the State's initial reference terminates;
 - (b) the State's amendment reference terminates, and neither of subsections (7) and (8) apply to the termination;
 - (c) the State's transition reference terminates.
- (7) A State does not cease to be a **referring State** because of the termination of its amendment reference if:
- (a) the termination is effected by the Governor of that State fixing a day by proclamation as the day on which the reference terminates; and
 - (b) the day fixed is no earlier than the first day after the end of the period of 6 months beginning on the day on which the proclamation is published; and
 - (c) that State's amendment reference, and the amendment reference of every other referring State (other than a referring State that has terminated its amendment reference in the circumstances referred to in subsection (8)), terminate on the same day.
- (8) A State does not cease to be a **referring State** because of the termination of its amendment reference if:
- (a) the termination is effected by the Governor of that State fixing a day by proclamation as the day on which the reference terminates; and
 - (b) the day fixed is no earlier than the first day after the end of the period of 3 months beginning on the day on which the proclamation is published; and
 - (c) the Governor of that State, as part of the proclamation by which the termination is to be effected, declares that, in the opinion of the Governor, this Act:
 - (i) is proposed to be amended (by an amendment introduced into the Parliament by a Minister); or
 - (ii) has been amended;in a manner that is inconsistent with one or more of the fundamental workplace relations principles.

(9) The following are the *fundamental workplace relations principles*:

- (a) that this Act should provide for, and continue to provide for, the following:
 - (i) a strong, simple and enforceable safety net of minimum employment standards;
 - (ii) genuine rights and responsibilities to ensure fairness, choice and representation at work, including the freedom to choose whether or not to join and be represented by a union or participate in collective activities;
 - (iii) collective bargaining at the enterprise level with no provision for individual statutory agreements;
 - (iv) fair and effective remedies available through an independent umpire;
 - (v) protection from unfair dismissal;
- (b) that there should be, and continue to be, in connection with the operation of this Act, the following:
 - (i) an independent tribunal system;
 - (ii) an independent authority able to assist employers and employees within a national workplace relations system.

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

Omit “a referring State”, substitute “a State that is a referring State because of this Division”.

33 Subsection 30E(1)

Omit “a referring State”, substitute “a State that is a referring State because of this Division”.

34 Subsection 30E(2)

After “a State”, insert “that is a referring State because of this Division”.

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

Omit “a referring State”, substitute “a State that is a referring State because of this Division”.

36 Subsection 30G(1)

Omit “a referring State”, substitute “a State that is a referring State because of this Division”.

37 Section 30H

Omit “a referring State”, substitute “a State that is a referring State because of this Division”.

38 Section 30J

Repeal the section.

39 After Division 2A of Part 1-3

Insert:

Division 2B—Application of this Act in States that refer matters after 1 July 2009 but on or before 1 January 2010

30K Meaning of terms used in this Division

(1) In this Division:

amendment reference of a State means the reference by the Parliament of the State to the Parliament of the Commonwealth of the matters covered by subsection 30L(4).

excluded subject matter means any of the following matters:

- (a) a matter dealt with in a law referred to in subsection 27(1A) of this Act;
- (b) superannuation;
- (c) workers compensation;
- (d) occupational health and safety;
- (e) matters relating to outworkers (within the ordinary meaning of the term);
- (f) child labour;
- (g) training arrangements;
- (h) long service leave;
- (i) leave for victims of crime;

- (j) attendance for service on a jury, or for emergency service duties;
- (k) declaration, prescription or substitution of public holidays;
- (l) the following matters relating to provision of essential services or to situations of emergency:
 - (i) directions to perform work (including to perform work at a particular time or place, or in a particular way);
 - (ii) directions not to perform work (including not to perform work at a particular time or place, or in a particular way);
- (m) regulation of any of the following:
 - (i) employee associations;
 - (ii) employer associations;
 - (iii) members of employee associations or of employer associations;
- (n) workplace surveillance;
- (o) business trading hours;
- (p) claims for enforcement of contracts of employment, except so far as a law of a State provides for the variation or setting aside of rights and obligations arising under a contract of employment, or another arrangement for employment, that a court or tribunal finds is unfair;
- (q) rights or remedies incidental to a matter referred to in a preceding paragraph of this definition;

except to the extent that this Act as originally enacted deals with the matter (directly or indirectly), or requires or permits instruments made or given effect under this Act so to deal with the matter.

express amendment means the direct amendment of the text of this Act (whether by the insertion, omission, repeal, substitution or relocation of words or matter), but does not include the enactment by a Commonwealth Act of a provision that has, or will have, substantive effect otherwise than as part of the text of this Act.

fundamental workplace relations principles: see subsection 30L(9).

initial reference of a State means the reference by the Parliament of the State to the Parliament of the Commonwealth of the matters covered by subsection 30L(3).

law enforcement officer means:

- (a) a member of a police force or police service; or
- (b) a person appointed to a position for the purpose of being trained as a member of a police force or police service; or
- (c) a person who has the powers and duties of a member of a police force or police service;

and, without limiting paragraphs (a), (b) and (c), includes a police reservist, a police recruit, a police cadet, a junior constable, a police medical officer, a special constable, an ancillary constable or a protective services officer.

local government employee, of a State, means:

- (a) an employee of a local government employer of the State; or
- (b) any other employee in the State of a kind specified in the regulations.

local government employer, of a State, means an employer that is:

- (a) a body corporate that is established for a local government purpose by or under a law of a State; or
- (b) a body corporate in which a body to which paragraph (a) applies has, or 2 or more such bodies together have, a controlling interest; or
- (c) a person who employs individuals for the purposes of an unincorporated body that is established for a local government purpose by or under a law of a State; or
- (d) any other body corporate that is a local government body in the State of a kind specified in the regulations; or
- (e) any other person who employs individuals for the purposes of an unincorporated body that is a local government body in the State of a kind specified in the regulations.

referral law, of a State, means the law of the State that refers matters, as mentioned in subsection 30L(1), to the Parliament of the Commonwealth.

referred provisions means the provisions of this Division to the extent to which they deal with matters that are included in the legislative powers of the Parliaments of the States.

referred subject matters means any of the following:

- (a) terms and conditions of employment, including any of the following:
 - (i) minimum terms and conditions of employment, (including employment standards and minimum wages);
 - (ii) terms and conditions of employment contained in instruments (including instruments such as awards, determinations and enterprise-level agreements);
 - (iii) bargaining in relation to terms and conditions of employment;
 - (iv) the effect of a transfer of business on terms and conditions of employment;
 - (b) terms and conditions under which an outworker entity may arrange for work to be performed for the entity (directly or indirectly), if the work is of a kind that is often performed by outworkers;
 - (c) rights and responsibilities of persons, including employees, employers, independent contractors, outworkers, outworker entities, associations of employees or associations of employers, being rights and responsibilities relating to any of the following:
 - (i) freedom of association in the context of workplace relations, and related protections;
 - (ii) protection from discrimination relating to employment;
 - (iii) termination of employment;
 - (iv) industrial action;
 - (v) protection from payment of fees for services related to bargaining;
 - (vi) sham independent contractor arrangements;
 - (vii) standing down employees without pay;
 - (viii) union rights of entry and rights of access to records;
 - (d) compliance with, and enforcement of, this Act;
 - (e) the administration of this Act;
 - (f) the application of this Act;
 - (g) matters incidental or ancillary to the operation of this Act or of instruments made or given effect under this Act;
- but does not include any excluded subject matter.

referring State: see section 30L.

State public sector employee, of a State, means:

- (a) an employee of a State public sector employer of the State; or
- (b) any other employee in the State of a kind specified in the regulations;

and includes a law enforcement officer of the State.

State public sector employer, of a State, means an employer that is:

- (a) the State, the Governor of the State or a Minister of the State; or
- (b) a body corporate that is established for a public purpose by or under a law of the State, by the Governor of the State or by a Minister of the State; or
- (c) a body corporate in which the State has a controlling interest; or
- (d) a person who employs individuals for the purposes of an unincorporated body that is established for a public purpose by or under a law of the State, by the Governor of the State or by a Minister of the State; or
- (e) any other employer in the State of a kind specified in the regulations;

and includes a holder of an office of the State whom the State's referral law provides is to be taken, for the purposes of this Act, to be an employer of law enforcement officers of the State.

transition reference of a State means the reference by the Parliament of the State to the Parliament of the Commonwealth of the matters covered by subsection 30L(5).

- (2) Words or phrases in the definition of **excluded subject matter** in subsection (1), or in the definition of **referred subject matters** in subsection (1), that are defined in this Act (other than in this Division) have, in that definition, the meanings set out in this Act as in force on 1 July 2009.

30L Meaning of *referring State*

Reference of matters by State Parliament to Commonwealth Parliament

- (1) A State is a ***referring State*** if the Parliament of the State has, after 1 July 2009 but on or before 1 January 2010, referred the matters covered by subsections (3), (4) and (5) in relation to the State to the Parliament of the Commonwealth for the purposes of paragraph 51(xxxvii) of the Constitution:
- (a) if and to the extent that the matters are not otherwise included in the legislative powers of the Parliament of the Commonwealth (otherwise than by a reference under paragraph 51(xxxvii) of the Constitution); and
 - (b) if and to the extent that the matters are included in the legislative powers of the Parliament of the State.

This subsection has effect subject to subsection (6).

- (2) A State is a ***referring State*** even if:
- (a) the State's referral law provides that the reference to the Parliament of the Commonwealth of any or all of the matters covered by subsections (3), (4) and (5) is to terminate in particular circumstances; or
 - (b) the State's referral law provides that particular matters, or all matters, relating to State public sector employees, or State public sector employers, of the State are not included in any or all of the matters covered by subsections (3), (4) and (5); or
 - (c) the State's referral law provides that particular matters, or all matters, relating to local government employees, or local government employers, of the State are not included in any or all of the matters covered by subsections (3), (4) and (5).

Reference covering referred provisions

- (3) This subsection covers the matters to which the referred provisions relate to the extent of making laws with respect to those matters by amending this Act, as originally enacted, and as subsequently amended by amendments enacted at any time before the State's referral law commenced, to include the referred provisions.

Reference covering amendments

- (4) This subsection covers the referred subject matters to the extent of making laws with respect to those matters by making express amendments of this Act.

Reference covering transitional matters

- (5) This subsection covers making laws with respect to the transition from the regime provided for by:
- (a) the *Workplace Relations Act 1996* (as it continues to apply because of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*); or
 - (b) a law of a State relating to workplace relations or industrial relations;
- to the regime provided for by this Act.

Effect of termination of reference

- (6) Despite anything to the contrary in a referral law of a State, a State ceases to be a **referring State** if any or all of the following occurs:
- (a) the State's initial reference terminates;
 - (b) the State's amendment reference terminates, and neither of subsections (7) and (8) apply to the termination;
 - (c) the State's transition reference terminates.
- (7) A State does not cease to be a **referring State** because of the termination of its amendment reference if:
- (a) the termination is effected by the Governor of that State fixing a day by proclamation as the day on which the reference terminates; and
 - (b) the day fixed is no earlier than the first day after the end of the period of 6 months beginning on the day on which the proclamation is published; and
 - (c) that State's amendment reference, and the amendment reference of every other referring State (other than a referring State that has terminated its amendment reference in the circumstances referred to in subsection (8)), terminate on the same day.
- (8) A State does not cease to be a **referring State** because of the termination of its amendment reference if:
-

- (a) the termination is effected by the Governor of that State fixing a day by proclamation as the day on which the reference terminates; and
 - (b) the day fixed is no earlier than the first day after the end of the period of 3 months beginning on the day on which the proclamation is published; and
 - (c) the Governor of that State, as part of the proclamation by which the termination is to be effected, declares that, in the opinion of the Governor, this Act:
 - (i) is proposed to be amended (by an amendment introduced into the Parliament by a Minister); or
 - (ii) has been amended;in a manner that is inconsistent with one or more of the fundamental workplace relations principles.
- (9) The following are the *fundamental workplace relations principles*:
- (a) that this Act should provide for, and continue to provide for, the following:
 - (i) a strong, simple and enforceable safety net of minimum employment standards;
 - (ii) genuine rights and responsibilities to ensure fairness, choice and representation at work, including the freedom to choose whether or not to join and be represented by a union or participate in collective activities;
 - (iii) collective bargaining at the enterprise level with no provision for individual statutory agreements;
 - (iv) fair and effective remedies available through an independent umpire;
 - (v) protection from unfair dismissal;
 - (b) that there should be, and continue to be, in connection with the operation of this Act, the following:
 - (i) an independent tribunal system;
 - (ii) an independent authority able to assist employers and employees within a national workplace relations system.

30M Extended meaning of *national system employee*

- (1) A *national system employee* includes:
 - (a) any individual in a State that is a referring State because of this Division so far as he or she is employed, or usually employed, as described in paragraph 30N(1)(a), except on a vocational placement; and
 - (b) a law enforcement officer of the State to whom subsection 30P(1) applies.
- (2) This section does not limit the operation of section 13 (which defines a national system employee).

Note: Section 30S may limit the extent to which this section extends the meaning of *national system employee*.

30N Extended meaning of *national system employer*

- (1) A *national system employer* includes:
 - (a) any person in a State that is a referring State because of this Division so far as the person employs, or usually employs, an individual; and
 - (b) a holder of an office to whom subsection 30P(2) applies.
- (2) This section does not limit the operation of section 14 (which defines a national system employer).

Note: Section 30S may limit the extent to which this section extends the meaning of *national system employer*.

30P Extended ordinary meanings of *employee* and *employer*

- (1) A reference in this Act to an employee with its ordinary meaning includes a reference to a law enforcement officer of a referring State if the State's referral law so provides for the purposes of that law.
- (2) A reference in this Act to an employer with its ordinary meaning includes a reference to a holder of an office of a State if the State's referral law provides, for the purposes of that law, that the holder of the office is taken to be the employer of a law enforcement officer of the State.

- (3) This section does not limit the operation of section 15 (which deals with references to employee and employer with their ordinary meanings).

Note: Section 30S may limit the extent to which this section extends the meanings of *employee* and *employer*.

30Q Extended meaning of *outworker entity*

- (1) An *outworker entity* includes a person, other than in the person's capacity as a national system employer, so far as:
- (a) the person arranges for work to be performed for the person (either directly or indirectly); and
 - (b) the work is of a kind that is often performed by outworkers; and
 - (c) one or more of the following applies:
 - (i) at the time the arrangement is made, one or more parties to the arrangement is in a State that is a referring State because of this Division;
 - (ii) the work is to be performed in a State that is a referring State because of this Division;
 - (iii) the person referred to in paragraph (a) carries on an activity (whether of a commercial, governmental or other nature) in a State that is a referring State because of this Division, and the work is reasonably likely to be performed in that State;
 - (iv) the person referred to in paragraph (a) carries on an activity (whether of a commercial, governmental or other nature) in a State that is a referring State because of this Division, and the work is to be performed in connection with that activity.
- (2) This section does not limit the operation of the definition of *outworker entity* in section 12.

Note: Section 30S may limit the extent to which this section extends the meaning of *outworker entity*.

30R General protections

- (1) Part 3-1 (which deals with general protections) applies to action taken in a State that is a referring State because of this Division.

- (2) This section applies despite section 337 (which limits the application of Part 3-1), and does not limit the operation of sections 338 and 339 (which set out the application of that Part).

Note: Section 30S may limit the extent to which this section extends the application of Part 3-1.

30S Division only has effect if supported by reference

A provision of this Division has effect in relation to a State that is a referring State because of this Division only to the extent that the State's referral law refers to the Parliament of the Commonwealth the matters mentioned in subsection 30L(1) that result in the Parliament of the Commonwealth having sufficient legislative power for the provision so to have effect.

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

Add:

40A Application of the *Acts Interpretation Act 1901*

- (1) The *Acts Interpretation Act 1901*, as in force on 25 June 2009, applies to this Act.
- (2) Amendments of the *Acts Interpretation Act 1901* made after that day do not apply to this Act.

41 Section 337 (note)

Omit "Section 30G extends", substitute "Sections 30G and 30R extend".

42 Transitional—referring State

Victoria is taken, for the purposes of the *Fair Work Act 2009*:

- (a) to have been a **referring State** at and after the commencement of item 11 of Schedule 1 to the *Fair Work (State Referral and Consequential and Other Amendments) Act 2009* until immediately before the commencement of this item; and
- (b) to continue to be a **referring State** at and after the commencement of this item, subject to section 30B (meaning of **referring State**) of the *Fair Work Act 2009*.

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

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

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

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

1A Item 2 of Schedule 2

Insert:

affected employee of an employer: see subitem 43(6) of Schedule 3 and subitem 30A(4) of Schedule 3A.

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

Repeal the definition, substitute:

applies:

- (a) in relation to a transitional instrument: see subitem 3(2) of Schedule 3; and
- (b) in relation to a Division 2B State award: see item 4 of Schedule 3A; and
- (c) in relation to a Division 2B State employment agreement: see item 6 of Schedule 3A.

2 Item 2 of Schedule 2

Insert:

collective Division 2B State employment agreement: see subitem 5(5) of Schedule 3A.

3 Item 2 of Schedule 2

Insert:

collective State employment agreement: see subitem 2(6) of Schedule 3A.

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

Repeal the definition, substitute:

conditional termination:

- (a) in relation to an individual agreement-based transitional instrument: see subitem 18(1) of Schedule 3; and
- (b) in relation to an individual Division 2B State employment agreement: see subitem 25(1) of Schedule 3A.

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

Add:

- ; and (c) in relation to a Division 2B State award: see item 4 of Schedule 3A; and
- (d) in relation to a Division 2B State employment agreement: see item 6 of Schedule 3A.

6 Item 2 of Schedule 2

Insert:

Division 2A referring State: see subitem 2A(7) of Schedule 3.

7 Item 2 of Schedule 2

Insert:

Division 2A State reference employee: see subitem 2A(3A) of Schedule 3.

8 Item 2 of Schedule 2

Insert:

Division 2A State reference employer: see subitem 2A(4A) of Schedule 3.

9 Item 2 of Schedule 2

Insert:

Division 2A State reference transitional award: see subitem 2A(1A) of Schedule 3.

10 Item 2 of Schedule 2

Insert:

Division 2B enterprise award: see subitem 2(4) of Schedule 6.

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

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

11 Item 2 of Schedule 2

Insert:

Division 2B referral commencement: see subitem 2(4A) of Schedule 3.

12 Item 2 of Schedule 2

Insert:

Division 2B referring State: see subitem 2A(7) of Schedule 3.

13 Item 2 of Schedule 2

Insert:

Division 2B State award: see item 3 of Schedule 3A.

14 Item 2 of Schedule 2

Insert:

Division 2B State employment agreement: see item 5 of Schedule 3A.

15 Item 2 of Schedule 2

Insert:

Division 2B State instrument: see item 2 of Schedule 3A.

16 Item 2 of Schedule 2

Insert:

Division 2B State reference employee: see subitem 2A(3A) of Schedule 3.

17 Item 2 of Schedule 2

Insert:

Division 2B State reference employer: see subitem 2A(4A) of Schedule 3.

18 Item 2 of Schedule 2

Insert:

Division 2B State reference outworker entity: see subitem 4(3) of Schedule 3A.

19 Item 2 of Schedule 2

Insert:

Division 2B State reference transitional award: see subitem 2A(1A) of Schedule 3.

20 Item 2 of Schedule 2

Insert:

individual Division 2B State employment agreement: see subitem 5(6) of Schedule 3A.

21 Item 2 of Schedule 2

Insert:

individual State employment agreement: see subitem 2(7) of Schedule 3A.

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

Repeal the definition, substitute:

instrument content rules:

- (a) in Schedule 3: see subitem 4(2) of Schedule 3; and
- (b) in Schedule 3A: see subitem 10(2) of Schedule 3A.

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

Repeal the definition, substitute:

instrument interaction rules:

- (a) in Schedule 3: see subitem 5(2) of Schedule 3; and
- (b) in Schedule 3A: see subitem 11(2) of Schedule 3A.

24 Item 2 of Schedule 2

Insert:

nominal expiry date, in relation to a Division 2B State employment agreement: see item 27 of Schedule 3A.

25 Item 2 of Schedule 2

Insert:

outworker interaction rules: see subitem 12(2) of Schedule 3A.

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

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

26 Item 2 of Schedule 2

Insert:

referring State: see subitem 2A(7) of Schedule 3.

27 Item 2 of Schedule 2

Insert:

source agreement, in relation to a Division 2B State employment agreement: see subitem 5(1) of Schedule 3A.

28 Item 2 of Schedule 2

Insert:

source award, in relation to a Division 2B State award: see subitem 3(1) of Schedule 3A.

29 Item 2 of Schedule 2

Insert:

source State:

- (a) in relation to a Division 2B State award: see subitem 3(1) of Schedule 3A; and
- (b) in relation to a Division 2B State employment agreement: see subitem 5(1) of Schedule 3A.

30 Item 2 of Schedule 2

Insert:

State award: see item 2 of Schedule 3A.

31 Item 2 of Schedule 2

Insert:

State employment agreement: see item 2 of Schedule 3A.

32 Item 2 of Schedule 2

Insert:

State industrial body means a commission performing or exercising functions under a State industrial law, and includes a member of such a commission and a registrar or deputy registrar of such a commission.

33 Item 2 of Schedule 2

Insert:

State industrial law means a law of a State that is a State or Territory industrial law as defined in section 26 of the FW Act.

34 Item 2 of Schedule 2

Insert:

State minimum wages instruments: see item 19 of Schedule 9.

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

After “see”, insert “subitem 31(2) of Schedule 3A,”.

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

After “see”, insert “subitems 32(1) and (2) of Schedule 3A,”.

36A Item 2 of Schedule 2

Insert:

transitional pay equity order: see subitem 43(1) of Schedule 3 and subitem 30A(1) of Schedule 3A.

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

Add:

- ; (c) the transition from the regime provided for by State industrial laws of Division 2B referring States to the regime provided for by this Act and the FW Act, including:
 - (i) the transition from State awards and State employment agreements to Division 2B State instruments; and
 - (ii) the transition from Division 2B State instruments to modern awards and enterprise agreements;
- (d) the amendments and repeals made by the *Fair Work Amendment (State Referrals and Other Measures Act) 2009*.

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

Add:

- ; (c) provide for the application (with or without modifications), as laws of the Commonwealth, of provisions of State industrial laws of Division 2B referring States on and after the Division 2B referral commencement.

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

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

39 Subitem 2(1) of Schedule 3

Omit “subitems (3) and (4)”, substitute “subitems (3) to (4A)”.

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

After “WR Act instrument”, insert “(other than a Division 2B State reference transitional award)”.

41 After subitem 2(4) of Schedule 3

Insert:

- (4A) A Division 2B State reference transitional award becomes a *transitional instrument* on the Division 2B referral commencement. The *Division 2B referral commencement* is the time when Division 2B of Part 1-3 of the FW Act commences.

42 Item 2A of Schedule 3 (heading)

Repeal the heading, substitute:

2A Meaning of *State reference transitional award* and various other expressions associated with State references

43 After subitem 2A(1) of Schedule 3

Insert:

- (1A) State reference transitional awards are classified as follows:
- (a) if the employers and employees covered are Division 2A State reference employers and Division 2A State reference employees—the State reference transitional award is a *Division 2A State reference transitional award*;
 - (b) if the employers and employees covered are Division 2B State reference employers and Division 2B State reference employees—the State reference transitional award is a *Division 2B State reference transitional award*.

44 Subitem 2A(3) of Schedule 3

After “section 30C”, insert “or 30M”.

45 After subitem 2A(3) of Schedule 3

Insert:

(3A) State reference employees are classified as follows:

- (a) employees who are national system employees because of section 30C of the FW Act are *Division 2A State reference employees*;
- (b) employees who are national system employees because of section 30M of the FW Act are *Division 2B State reference employees*.

46 Subitem 2A(4) of Schedule 3

After “section 30D”, insert “or 30N”.

47 After subitem 2A(4) of Schedule 3

Insert:

(4A) State reference employers are classified as follows:

- (a) employers that are national system employers because of section 30D of the FW Act are *Division 2A State reference employers*;
- (b) employers that are national system employers because of section 30N of the FW Act are *Division 2B State reference employers*.

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

Repeal the paragraph, substitute:

- (a) a transitional award (the *current award*), as in force on the WR Act repeal day, covers one or more Division 2A State reference employers, and Division 2A State reference employees of those employers; and

49 Subitem 2A(5) of Schedule 3

After “instead”, insert “, on and after that day (subject to subitem (6)),”.

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

Omit “a State reference”, substitute “a Division 2A State reference”.

51 At the end of item 2A of Schedule 3

Add:

(6) If:

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

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

- (a) a transitional award (the *current award*), as in force on the Division 2B referral commencement, covers one or more Division 2B State reference employers, and Division 2B State reference employees of those employers; and
- (b) the current award also covers:
 - (i) other employees of those employers; or
 - (ii) other employers, and employees of those other employers;

then, for the purposes of this Act, the current award is taken instead, on and after the Division 2B referral commencement, to constitute 2 separate transitional awards as follows:

- (c) a Division 2B State reference transitional award covering:
 - (i) the employers, and the employees of those employers, referred to in paragraph (a); and
 - (ii) if the current award covers an organisation, in relation to certain employers or employees referred to in paragraph (a)—that organisation in relation to those employers or employees;
- (d) a transitional award covering:
 - (i) the employers, and the employees of those employers, referred to in paragraph (b); and
 - (ii) if the current award covers an organisation, in relation to certain employers or employees referred to in paragraph (b)—that organisation in relation to those employers or employees.

(7) A *referring State* is:

- (a) a State (a *Division 2A referring State*) that is a referring State as defined in section 30B of the FW Act; or
- (b) a State (a *Division 2B referring State*) that is a referring State as defined in section 30L of the FW Act.

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

After “State employment agreement”, insert “(within the meaning of the WR Act)”.

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

After “State employment agreement”, insert “(within the meaning of the WR Act)”.

53A At the end of Schedule 3

Add:

**Part 8—Transitional pay equity order taken to have
been made by FWA—Division 2B State
reference transitional awards**

**43 FWA taken to have made a transitional pay equity order to
continue the effect of State pay equity orders**

- (1) On the Division 2B referral commencement, FWA is taken to have made an order (the *transitional pay equity order*) under this item.
- (2) The transitional pay equity order applies to an employer if:
 - (a) a modern award applies to the employer on or after the Division 2B referral commencement; and
 - (b) the employer is prescribed by the regulations for the purposes of this paragraph, or is included in a class of employers prescribed by the regulations for the purposes of this paragraph; and
 - (c) immediately before the Division 2B referral commencement, a transitional award (the *relevant transitional award*) applied to the employer.

Note: *Transitional award* has the same meaning as in Schedule 6 to the WR Act. Schedule 6 is continued in operation by Schedule 20 to this Act.

- (3) An employer must not be prescribed by regulations for the purposes of paragraph (2)(b) unless:
 - (a) an order, decision or determination of a State industrial body (the *source pay equity order*) would have applied to the employer if the relevant transitional award had not applied to the employer; and
 - (b) the source pay equity order satisfies subitem (4).
 - (4) A source pay equity order satisfies this subitem if it:
 - (a) was made before 15 September 2009; and
 - (b) provided for increases in rates of pay payable to a particular class of employees (whether the increases were expressed to take effect before, on or after the Division 2B referral commencement); and
-

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

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

- (c) was made wholly or partly on the ground of work value, pay equity or equal remuneration (however described); and
 - (d) is prescribed by the regulations for the purposes of this paragraph.
- (5) If the transitional pay equity order applies to an employer, the employer is required to pay to each affected employee of the employer a base rate of pay, in respect of a period, that is not less than the base rate of pay that the employee would have been entitled to be paid if the source pay equity order had applied to the employer in respect of the period.
- (6) An employee of an employer to which this item applies is an *affected employee* of the employer if the employee performs work of a kind, at a classification level (however described), in relation to which the source pay equity order determines a base rate of pay.
- (7) The transitional pay equity order takes effect in relation to the employer immediately after the modern award begins to apply to the employer.
- (8) A term of a modern award is of no effect to the extent that:
 - (a) an employee is entitled to be paid by an employer a base rate of pay under the transitional pay equity order in respect of a particular period; and
 - (b) the term of the modern award requires the employer to pay a base rate of pay, in respect of that period, that is less than the base rate of pay referred to in paragraph (a).
- (9) However, to avoid doubt, a term of a modern award continues to have effect so far as it requires an employer to pay a base rate of pay, in respect of a period, that is equal to or more than the base rate of pay referred to in paragraph (8)(a).

54 After Schedule 3

Insert:

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

Part 1—Preliminary

1 Meanings of *employer* and *employee*

In this Schedule, *employer* and *employee* have their ordinary meanings.

Part 2—Division 2B State instruments

2 What are Division 2B State instruments?

- (1) A *Division 2B State instrument* is a Division 2B State award (see item 3) or a Division 2B State employment agreement (see item 5).
- (2) Subject to subitem (3), a *State award* is an instrument in relation to which the following conditions are satisfied:
 - (a) the instrument regulates terms and conditions of employment;
 - (b) the instrument was made under a State industrial law by a State industrial body;
 - (c) the instrument is referred to in that law as an award.

Note: This definition does not apply to a reference in a provision of this Act to a State award if the provision expressly refers to the meaning that was given by the WR Act.

- (3) The regulations may provide that an instrument of a specified kind:
 - (a) is a *State award*; or
 - (b) is not a *State award*.
- (4) Subject to subitem (5), a *State employment agreement* is:
 - (a) an agreement in relation to which the following conditions are satisfied:
 - (i) the agreement is between an employer and one or more employees of the employer, or between an employer and an association of employees registered under a State industrial law;
 - (ii) the agreement determines terms and conditions of employment of one or more employees of the employer;

-
- (iii) the agreement was made under a State industrial law; or
 - (b) a determination in relation to which the following conditions are satisfied:
 - (i) the determination determines terms and conditions of employment;
 - (ii) the determination was made under a State industrial law by a State industrial body;
 - (iii) the determination was made in a situation in which parties who were negotiating for the making of an agreement of a kind described in paragraph (a) had not been able to reach an agreement;
 - (iv) the purpose of the determination was to resolve the matters that were at issue in those negotiations.

Note: This definition does not apply to a reference in a provision of this Act to a State employment agreement if the provision expressly refers to the meaning that was given by the WR Act.

- (5) The regulations may provide that an instrument of a specified kind:
 - (a) is a *State employment agreement*; or
 - (b) is not a *State employment agreement*.
- (6) A State employment agreement is a *collective State employment agreement* unless:
 - (a) it is an agreement of a kind that, under the relevant State industrial law, could only be entered into by a single employee and a single employer; or
 - (b) the agreement is of a kind prescribed by the regulations for the purpose of this paragraph.
- (7) A State employment agreement referred to in paragraph (6)(a) or (b) is an *individual State employment agreement*.

3 Division 2B State awards

- (1) If, immediately before the Division 2B referral commencement:
 - (a) a State award (the *source award*) was in operation under a State industrial law of a Division 2B referring State (the *source State*); and
 - (b) the source award covered (however described in the source award or a relevant law of the source State) employers and employees who become Division 2B State reference

employers and Division 2B State reference employees on the
Division 2B referral commencement (whether or not the
source award also covered other persons);

a **Division 2B State award** is taken to come into operation immediately
after the Division 2B referral commencement.

Note 1: A Division 2B State award is a notional federal instrument derived from the source
award.

Note 2: In addition to provisions of this Schedule, the following other provisions affect the
existence of Division 2B State awards:

- (a) Division 2 of Part 2 of Schedule 6 (which deals with the
enterprise instrument modernisation process);
- (b) Schedule 11 (which deals with transfer of business).

(2) Subject to this Schedule, the Division 2B State award is taken to include
the same terms as were in the source award immediately before the
Division 2B referral commencement.

Note: For the meanings of **Division 2B referral commencement**, **Division 2B referring State**,
Division 2B State reference employee and **Division 2B State reference employer**, see
items 2 and 2A of Schedule 3.

(3) If the terms of the source award were affected by an order, decision or
determination of a State industrial body or a court of the source State
that was in operation immediately before the Division 2B referral
commencement, the terms of the Division 2B State award are taken to
be similarly affected by the terms of that order, decision or
determination.

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

Meaning of covers

(1) A Division 2B State award ***covers*** the same employees, employers,
outworker entities and any other persons that the source award covered
(however described in the award or a relevant law of the source State)
immediately before the Division 2B referral commencement.

Note: The expression ***covers*** is used to indicate the range of employees, employers etc. to
whom the Division 2B State award potentially ***applies*** (see subitem (5)). The
employees, employers etc. who are within this range will depend on the terms of the
award, and on any relevant provisions of the law of the source State.

(2) The Division 2B State award also ***covers*** any employees who become
employed by an employer on or after the Division 2B referral

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

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

commencement, and who would have been covered by the source award if they had become so employed immediately before that commencement.

- (3) However, the Division 2B State award does not *cover*:
- (a) any employees, employers or outworker entities that are not Division 2B State reference employees, Division 2B State reference employers or Division 2B State reference outworker entities; or
 - (b) any employees, employers or outworker entities that are covered by an award-based transitional instrument.

A *Division 2B State reference outworker entity* is an entity that is an outworker entity only because of section 30Q of the FW Act.

- (4) If:
- (a) after the Division 2B referral commencement, a person (the *employer*) starts to employ employees to do work of a kind that was regulated by the source award immediately before that commencement; and
 - (b) the employer did not employ employees to do that kind of work immediately before that commencement;

then the Division 2B State award also does not *cover* any of the following, in relation to that kind of work:

- (c) the employer;
- (d) employees of the employer;
- (e) any other persons, in relation to the employer or employees of the employer.

Meaning of applies

- (5) A Division 2B State award *applies* to the same employees, employers, outworker entities and any other persons that the Division 2B State award covers as would have been required by the law of the source State to comply with terms of the source award, or entitled under the law of the source State to enforce terms of the source award, if:
- (a) the State had not been a referring State; and
 - (b) the law of the source State had continued to apply.

Note 1: The expression *applies* is used to indicate the range of employees, employers etc. who are required to comply with, or can enforce, the terms of the Division 2B State award.

Note 2: The Division 2B State award does not apply to any employers, employees or other persons that it does not cover, whether because of subitem (3) or (4) or otherwise.

- (6) However, a Division 2B State award does not *apply* to an employee (or to an employer, or an employee organisation, in relation to the employee) at a time when the employee is a high income employee (see section 329 of the FW Act).

Note: Item 50 deals with the application of section 329 of the FW Act to Division 2B State awards.

Item has effect subject to other provisions

- (7) This item has effect subject to:
- (a) the instrument interaction rules (see item 11); and
 - (b) the termination of Division 2B State instruments as referred to in item 18; and
 - (c) Division 2 of Part 5 of this Schedule (which deals with interaction between Division 2B State instruments and FW Act modern awards, enterprise agreements and workplace determinations); and
 - (d) Schedule 11 (which deals with transfer of business).

References to laws of States

- (8) References in this item to the law of a State are references to the law of the State as in force immediately before the Division 2B referral commencement.

5 Division 2B State employment agreements

State employment agreements that were in operation immediately before the Division 2B referral commencement

- (1) If, immediately before the Division 2B referral commencement:
- (a) a State employment agreement (the *source agreement*) was in operation under a State industrial law of a Division 2B referring State (the *source State*); and
 - (b) the source agreement covered (however described in the source agreement or a relevant law of the source State) employers and employees who become Division 2B State referral employers and Division 2B State referral employees

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

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

on the Division 2B referral commencement (whether or not the source agreement also covered other persons);

a ***Division 2B State employment agreement*** is taken to come into operation immediately after the Division 2B referral commencement.

Note 1: A Division 2B State employment agreement is a notional federal instrument derived from the source agreement.

Note 2: In addition to provisions of this Schedule, the following other provisions affect the existence of Division 2B State employment agreements:

- (a) Division 2 of Part 2 of Schedule 6 (which deals with the enterprise instrument modernisation process);
- (b) Schedule 11 (which deals with transfer of business).

Note 3: For the meanings of ***Division 2B referral commencement***, ***Division 2B referring State***, ***Division 2B State reference employee*** and ***Division 2B State reference employer***, see items 2 and 2A of Schedule 3.

- (2) Subject to this Schedule, the Division 2B State employment agreement is taken to include the same terms as were in the source agreement immediately before the Division 2B referral commencement.

State employment agreements that come into operation on or after the Division 2B referral commencement

- (3) If, on or after the Division 2B referral commencement:

- (a) a State employment agreement (the ***source agreement***) comes into operation under a State industrial law of a Division 2B referring State (the ***source State***); and
- (b) the source agreement covers (however described in the source agreement or a relevant law of the source State) employers and employees who are Division 2B State referral employers and Division 2B State referral employees when the source agreement comes into operation (whether or not the source agreement also covers other persons);

a ***Division 2B State employment agreement*** is taken to come into operation immediately after the source agreement comes into operation.

Note 1: A Division 2B State employment agreement is a notional federal instrument derived from the source agreement.

Note 2: There is limited scope for State employment agreements that cover Division 2B State referral employers and employees to come into operation on or after the Division 2B referral commencement: see Part 6 of this Schedule.

Note 3: In addition to provisions of this Schedule, the following other provisions affect the existence of Division 2B State employment agreements:

-
- (a) Division 2 of Part 2 of Schedule 6 (which deals with the enterprise instrument modernisation process);
 - (b) Schedule 11 (which deals with transfer of business).

- (4) Subject to this Schedule, the Division 2B State employment agreement is taken to include the same terms as were in the source agreement when it came into operation.

Collective and individual Division 2B State employment agreements

- (5) If the source agreement in relation to a Division 2B State employment agreement is a collective State employment agreement, the Division 2B State employment agreement is a ***collective Division 2B State employment agreement***.
- (6) If the source agreement in relation to a Division 2B State employment agreement is an individual State employment agreement, the Division 2B State employment agreement is an ***individual Division 2B State employment agreement***.

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

Meaning of covers

- (1) A Division 2B State employment agreement ***covers*** the same employees, employers and any other persons that the source agreement covered (however described in the agreement or a relevant law of the source State) immediately before the Division 2B State employment agreement came into operation.

Note: The expression ***covers*** is used to indicate the range of employees, employers etc. to whom the Division 2B State employment agreement potentially ***applies*** (see subitem (4)). The employees, employers etc. who are within this range will depend on the terms of the agreement, and on any relevant provisions of the law of the source State.

- (2) The Division 2B State employment agreement also ***covers*** any employees who become employed by an employer on or after the time when the agreement came into operation, and who would have been covered by the source agreement if they had become so employed immediately before that time.

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

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

-
- (3) However, the Division 2B State employment agreement does not *cover*:
- (a) any employees or employers that are not Division 2B State reference employees or Division 2B State reference employers; or
 - (b) any employees or employers that are covered by an award-based transitional instrument.

*Meaning of **applies***

- (4) A Division 2B State employment agreement *applies* to the same employees, employers and any other persons that the Division 2B State employment agreement covers as would have been required by the law of the source State to comply with terms of the source agreement, or entitled under the law of the source State to enforce terms of the source agreement, if:
- (a) the source State had not been a referring State; and
 - (b) the law of the source State had continued to apply.

Note 1: The expression *applies* is used to indicate the range of employees, employers etc. who are required to comply with, or can enforce, the terms of the Division 2B State employment agreement.

Note 2: The Division 2B State employment agreement does not apply to any employers, employees or other persons that it does not cover, whether because of subitem (3) or otherwise.

Item has effect subject to other provisions

- (5) This item has effect subject to:
- (a) the instrument interaction rules (see item 11); and
 - (b) the termination of Division 2B State instruments as referred to in item 18; and
 - (c) Division 2 of Part 5 of this Schedule (which deals with interaction between Division 2B State instruments and FW Act modern awards, enterprise agreements and workplace determinations); and
 - (d) Schedule 11 (which deals with transfer of business).

References to laws of States

- (6) References in this item to the law of a State are references to the law of the State as in force immediately before the Division 2B referral commencement.

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

- (1) If the source award for a Division 2B State award includes a term that provides for disputes relating to matters arising under the award to be settled by:
- (a) a State industrial body; or
 - (b) a person who is independent of the employers, employees or organisations covered by the source award;

the Division 2B State award is taken not to include that term.

- (2) Each Division 2B State award is taken to include the model term that is prescribed by the regulations for dealing with disputes relating to matters arising under Division 2B State awards.

Note: This subitem applies whether or not the source award included a term as mentioned in subitem (1).

- (3) The model term does not apply to disputes about matters arising under the source award before the Division 2B referral commencement.

- (4) The model term, as taken to be included in a Division 2B State award:
- (a) cannot be varied; and
 - (b) cannot be removed from the award.

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

- (1) This item applies if the source agreement for a Division 2B State employment agreement includes a term that provides for disputes relating to matters arising under the agreement to be settled by:
- (a) a State industrial body; or
 - (b) a person who is independent of the employers, employees or organisations covered by the source agreement.

- (2) Item 13 of this Schedule does not apply in relation to the term.

Note: Item 13 would otherwise result in references in the term to a State industrial body having effect as if they were references to FWA.

- (2A) However, if the term provides for disputes relating to matters arising under the source agreement to be settled by a State industrial body, then, despite anything in the source agreement or a law of the source State:

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

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

- (a) the State industrial body may settle, or decline to settle, such a dispute; and
 - (b) FWA may settle such a dispute if the State industrial body:
 - (i) ceases to exist; or
 - (ii) declines to settle the dispute.
- (3) FWA must, on application in accordance with subitem (4), vary the term in accordance with the application.
- (4) For the purpose of subitem (3), an application must be made:
 - (a) by an employer to which the Division 2B State employment agreement applies, or by an organisation that is entitled to represent the industrial interests of such an employer, with the consent of:
 - (i) one or more employees to whom the agreement applies; or
 - (ii) an organisation that is entitled to represent the industrial interests of one or more such employees; or
 - (b) by an employee to whom the Division 2B State employment agreement applies, or by an organisation that is entitled to represent the industrial interests of such an employee, with the consent of:
 - (i) an employer to which the Division 2B State employment agreement applies; or
 - (ii) an organisation that is entitled to represent the industrial interests of such an employer.

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

- (1) Subdivision B of Division 2 of Part 6-2 of the FW Act applies (including for the purpose of section 595 of the FW Act) as follows:
 - (a) the Subdivision applies in relation to the model term that is taken by item 7 to be included in a Division 2B State award in the same way as the Subdivision applies in relation to a term in a modern award that provides a procedure for dealing with disputes;
 - (b) the Subdivision applies in relation to a term to which item 8 applies that is included in a Division 2B State employment agreement in the same way as the Subdivision applies in
-

relation to a term in an enterprise agreement that provides a procedure for dealing with disputes.

- (2) The reference in subsections 739(5) and 740(4) of the FW Act to a decision that is inconsistent with this Act, or a fair work instrument that applies to the parties, is taken to include a reference to a decision that is inconsistent with a Division 2B State instrument that applies to the parties.

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

- (1) The instrument content rules (as in force immediately before the Division 2B referral commencement) of the source State apply, in relation to a Division 2B State instrument, as if:
- (a) the rules were provisions of a law of the Commonwealth; and
 - (b) any references in the rules to State awards or State employment agreements (however described in the rules) were instead (respectively) references to Division 2B State awards or Division 2B State employment agreements; and
 - (c) any other modifications of those rules prescribed by the regulations were made.
- (2) ***Instrument content rules***, in relation to a State, are provisions of a law of the State of any of the following kinds:
- (a) provisions about what may, or must, be included in an instrument;
 - (b) provisions to the effect that a particular term of an instrument is of no effect (however described):
 - (i) either completely or to a limited extent; and
 - (ii) either permanently or for a limited period;
 - (c) provisions to the effect that a particular term is taken to be included in an instrument.

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

- (1) The instrument interaction rules (as in force immediately before the Division 2B referral commencement) of the source State apply, in relation to a Division 2B State instrument, as if:
- (a) the rules were provisions of a law of the Commonwealth; and
-

- (b) any references in the rules to State awards or State employment agreements (however described in the rules) were instead (respectively) references to Division 2B State awards or Division 2B transitional State employment agreements; and
 - (c) any other modifications of those rules prescribed by the regulations were made.
- (2) ***Instrument interaction rules***, in relation to a State, are provisions of a law of the State, the effect of which is that:
- (a) one instrument has priority over, or excludes, another instrument:
 - (i) either completely or to a particular extent; and
 - (ii) either permanently or for a particular period; or
 - (b) one instrument ceases to operate because of another instrument:
 - (i) either completely or to a particular extent; and
 - (ii) either permanently or for a particular period.

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

- (1) The outworker interaction rules (as in force immediately before the Division 2B referral commencement) of the source State apply, in relation to a Division 2B State award, as if:
- (a) the rules were provisions of a law of the Commonwealth; and
 - (b) any references in the rules to State awards (however described in the rules) were instead references to Division 2B State awards; and
 - (c) any other modifications of those rules prescribed by the regulations were made.
- (2) ***Outworker interaction rules***, in relation to a State, are provisions of a law of the State, the effect of which is that:
- (a) a State award prevails over, or excludes, a law of the State relating to outworkers; or
 - (b) a State award has effect subject to a law of the State relating to outworkers.

13 References in Division 2B State instruments to State industrial bodies

- (1) Subject to subitem (2), if a term of a Division 2B State instrument is expressed to confer a power or function on a State industrial body, that term has effect as if references in it to the body were instead references to FWA.
- (2) If a term of a Division 2B State instrument is expressed to confer a power or function on the registrar, or a deputy registrar, of a State industrial body, that term has effect on and after the Division 2B referral commencement as if references in it to the registrar or a deputy registrar were instead references to the General Manager of FWA.
- (3) This item has effect subject to:
 - (a) a contrary intention in this Act; and
 - (b) the regulations.

Note 1: A Division 2B State award will be taken not to include a term from the source award that provides for the settlement of disputes relating to matters arising under the award: see item 7.

Note 2: This item does not apply to a term of a Division 2B State employment agreement that provides for the settlement of disputes relating to matters arising under the agreement: see item 8.

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

General rule

- (1) Subitem (2) applies for the purpose of determining the entitlements of a Division 2B State reference employee under a Division 2B State instrument (other than an entitlement to leave of a kind to which item 15 applies).
- (2) Service of the employee with an employer before the Division 2B referral commencement that counted for the purpose of the application to the employee of the source award or source agreement also counts as service of the employee with the employer for the purpose of the application to the employee of the Division 2B State instrument.

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

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

No double entitlement

- (3) If, before the Division 2B referral commencement, the employee has already had the benefit of an entitlement, the amount of which was calculated by reference to a period of service, subitem (2) does not result in that period of service with the employer being counted again when calculating the employee's entitlements of that kind under the Division 2B State instrument.
- (4) To avoid doubt, subitem (3) does not require an employee to serve any initial qualifying period of service for long service leave again.

Note: For how the kinds of matters covered by this item and items 15 and 16 are dealt with in relation to entitlements under the National Employment Standards, see Division 2 of Part 3 of Schedule 4.

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

- (1) This item applies to leave of the following kinds:
 - (a) annual leave (however described) that accrues to an employee;
 - (b) personal leave or carer's leave (however described) that accrues to an employee.
- (2) If a Division 2B referral employee to whom a Division 2B State instrument applies had, immediately before the Division 2B referral commencement, an accrued entitlement to an amount of leave to which this item applies (whether the leave accrued under the source award or source agreement, or under a State industrial law), the accrued leave is taken to have accrued under the Division 2B State instrument.

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

- (1) If a Division 2B State reference employee was, immediately before the Division 2B referral commencement, taking a period of leave under the source award or source agreement, the employee is entitled to continue on that leave under the Division 2B State instrument for the remainder of the period.
 - (2) If a Division 2B State reference employee has, before the Division 2B referral commencement, taken a step that the employee is required to take so that the employee can, on or after the Division 2B referral
-

commencement, take a period of leave under the source award or source agreement, the employee is taken to have taken the step under the Division 2B State instrument.

- (3) The regulations may deal with other matters relating to how a Division 2B State instrument applies to leave that, immediately before the Division 2B referral commencement, is being, or is to be, taken by a Division 2B State reference employee under the source award or source agreement.

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

- (1) If a Division 2B State instrument terminates, or ceases to apply in relation to a person, that does not affect:
- (a) any right or liability that a person acquired, accrued or incurred before the instrument terminated or ceased to apply; or
 - (b) any investigation, legal proceeding or remedy in respect of any such right or liability.
- (2) Any such investigation, legal proceeding or remedy may be instituted, continued or enforced as if the Division 2B State instrument had not terminated or ceased to apply.
- (3) This item has effect subject to a contrary intention in this Act or in the FW Act.

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

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

- (1) A Division 2B State instrument cannot be varied except under:
- (a) a provision of this Part or the regulations; or
 - (b) item 8 (which deals with terms about disputes relating to matters arising under Division 2B State employment agreements); or

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

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

- (c) item 40 (which deals with resolving difficulties with the interaction between Division 2B State instruments and the National Employment Standards); or
 - (d) Part 6 of this Schedule (which deals with ongoing operation of State laws for transitional purposes); or
 - (e) Division 2 of Part 2 of Schedule 6 (which deals with the enterprise instrument modernisation process); or
 - (f) item 20 of Schedule 9 (which deals with variation of Division 2B State awards in annual wage reviews); or
 - (g) Schedule 11 (which deals with transfer of business).
- (2) A Division 2B State instrument cannot be terminated (or otherwise brought to an end) except under:
- (a) a provision of this Part or the regulations; or
 - (b) Part 6 of this Schedule; or
 - (c) Division 2 of Part 2 of Schedule 6; or
 - (d) Schedule 11.

19 Variation to remove ambiguities etc.

- (1) On application by a person covered by a Division 2B State instrument, FWA may make a determination varying the instrument:
- (a) to remove an ambiguity or uncertainty in the instrument; or
 - (b) if the instrument is a Division 2B State employment agreement—to resolve an uncertainty or difficulty relating to the interaction between the instrument and a modern award; or
 - (c) to remove terms that are inconsistent with Part 3-1 of the FW Act (which deals with general protections), or to vary terms to make them consistent with that Part.

Note: For variation of a Division 2B State instrument to resolve an uncertainty or difficulty relating to the interaction between the instrument and the National Employment Standards, see item 40.

- (2) A variation of a Division 2B State instrument operates from the day specified in the determination, which may be a day before the determination is made.

20 Variation on referral by Australian Human Rights Commission

- (1) This item applies if a Division 2B State instrument is referred to FWA under section 46PW of the *Australian Human Rights Commission Act 1986* (which deals with discriminatory industrial instruments).
- (2) If the instrument is a Division 2B State award, section 161 of the FW Act applies in relation to the referral of the instrument as if the instrument were a modern award.
- (3) If the instrument is a Division 2B State employment agreement, section 218 of the FW Act applies in relation to the referral of the instrument as if the instrument were an enterprise agreement.

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

- (1) A Division 2B State award terminates at the end of 12 months after the Division 2B referral commencement.
- (2) A term of a Division 2B State award that provides for the award to terminate before the end of that 12 month period is of no effect.
- (3) This item does not apply to a Division 2B enterprise award.

Note: Schedule 6 (modern enterprise awards) applies to Division 2B enterprise awards.

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

Subdivision C of Division 7 of Part 2-4 of the FW Act (which deals with termination of enterprise agreements by employers and employees) applies in relation to a collective Division 2B State employment agreement as if a reference to an enterprise agreement included a reference to a collective Division 2B State employment agreement.

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

Subdivision D of Division 7 of Part 2-4 of the FW Act (which deals with termination of enterprise agreements after their nominal expiry date) applies in relation to a collective Division 2B State employment agreement as if a reference to an enterprise agreement included a reference to a collective Division 2B State employment agreement.

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

- (1) The employee and employer covered by an individual Division 2B State employment agreement (the *Division 2B agreement*) may make a written agreement (a *termination agreement*) to terminate the Division 2B agreement in accordance with the following requirements:
 - (a) the termination agreement must be signed by the employee and the employer;
 - (b) if the employee is under 18, it must also be signed by a parent or guardian of the employee;
 - (c) the signatures must be witnessed.
- (2) The termination has no effect unless it has been approved by FWA.
- (3) The employer or employee may apply to FWA for approval of the termination agreement. The application must be made:
 - (a) within 14 days after the termination agreement was made; or
 - (b) if in all the circumstances FWA considers it fair to extend that period—within such further period as FWA allows.
- (4) If an application for FWA to approve the termination agreement is made under subitem (3), FWA must approve the termination of the Division 2B agreement if:
 - (a) FWA is satisfied that the requirements of subitem (1) have been complied with; and
 - (b) FWA is satisfied that there are no other reasonable grounds for believing that the employee has not agreed to the termination.
- (5) If the termination is approved under subitem (4), the termination operates from the day specified in the decision to approve the termination.

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

- (1) This item provides for the making of an instrument (a *conditional termination*) that will have the effect of terminating an individual Division 2B State employment agreement (the *Division 2B agreement*) if:

- (a) an enterprise agreement (the *proposed enterprise agreement*) is made that covers the employee and the employer; and
 - (b) the proposed enterprise agreement comes into operation.
- (2) If the Division 2B agreement has not passed its nominal expiry date, the conditional termination must be a written agreement signed by the employer and the employee. The signatures must be witnessed.
 - (3) If the Division 2B agreement has passed its nominal expiry date, the conditional termination must be in writing and signed either by the employee or the employer. The signature must be witnessed.
 - (4) If the conditional termination is signed by the employee, and the employee is under 18, it must also be signed by a parent or guardian of the employee.
 - (5) Any other requirements of the regulations relating to the form, content or making of the conditional termination must also be complied with.
 - (6) The employer must give the employee a copy of the conditional termination if:
 - (a) the conditional termination is an agreement signed by the employee and the employer in the circumstances covered by subitem (2); or
 - (b) the conditional termination is signed by the employer in the circumstances covered by subitem (3).

Note 1: For compliance with this obligation, see subitem 4B(1) of Schedule 16.

Note 2: Failure to comply with this obligation does not affect the operation of subitem (8).

- (7) The conditional termination must accompany any application to FWA for approval of the proposed enterprise agreement under section 185 of the FW Act.

Note 1: For compliance with this obligation, see subitem 4B(2) of Schedule 16.

Note 2: Failure to comply with this obligation does not affect the operation of subitem (8), or the validity of an approval by FWA of the proposed enterprise agreement.

- (8) If the requirements of subitems (2) to (5) have been complied with in relation to the conditional termination, the Division 2B agreement terminates when the proposed enterprise agreement comes into operation.

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

- (1) This item applies to an employer or employee:
 - (a) to whom an individual Division 2B State employment agreement (the *Division 2B agreement*) that has passed its nominal expiry date applies; and
 - (b) who wants to terminate the Division 2B agreement.
- (2) The employer or employee may:
 - (a) make a written declaration that identifies the Division 2B agreement and that states that the employer or employee wants to terminate the agreement; and
 - (b) apply to FWA for the approval of the termination.
- (3) The employer or employee cannot make an application as mentioned in paragraph (2)(b) unless, at least 14 days before the day on which the application is made, the employer or employee gives the other of them a notice complying with the following requirements:
 - (a) the notice must identify the Division 2B agreement;
 - (b) the notice must state that the employer or employee intends to apply to FWA for approval of the termination of the agreement;
 - (c) the notice must state that, if FWA approves the termination, the agreement will terminate on the 90th day after the day on which FWA makes the approval decision;
 - (d) the notice must comply with any other requirements of the regulations.
- (4) FWA must approve the termination if FWA is satisfied that:
 - (a) the Division 2B agreement applies to the employer and the employee; and
 - (b) the requirements of subitems (2) and (3) have been complied with.
- (5) If FWA approves the termination, the Division 2B agreement terminates on the 90th day after the day on which FWA makes the approval decision.

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

The *nominal expiry date* of a Division 2B State employment agreement is:

- (a) the day on which the source agreement would nominally have expired under the relevant State industrial law of the source State; or
- (b) if that day falls after the end of a period of 3 years beginning on the Division 2B referral commencement—the last day of that 3 year period.

28 Effect of termination

If a Division 2B State instrument terminates, it ceases to cover (and can never again cover) any employees, employers or other persons.

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.

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

- (1) During the period of 12 months starting on the Division 2B referral commencement, FWA:
 - (a) must consider whether any modern awards should be varied to include terms in relation to which the following conditions are satisfied:
 - (i) the purpose of including the terms is to continue (in whole or in part) the effect of terms that are contained in a Division 2B State award, other than a Division 2B enterprise award;
 - (ii) the terms only relate to employees, employers or other persons covered by the Division 2B State award;
 - (iii) the terms deal with matters of a kind that are permitted by section 136 of the FW Act to be included in modern awards; and
 - (b) may make one or more determinations varying modern awards to include such terms.

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

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

-
- (2) Terms may be included in a modern award in accordance with this item despite section 154 of the FW Act.
- (3) Terms included in a modern award in accordance with this item:
- (a) take effect at the end of 12 months after the Division 2B referral commencement; and
 - (b) cease to have effect:
 - (i) at the end of 5 years after the Division 2B referral commencement; or
 - (ii) if the terms are expressed to cease to have effect at an earlier time—at that earlier time.

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

- (1) During the period of 12 months starting on the Division 2B referral commencement, FWA:
- (a) must consider whether any orders should be made in relation to which the following conditions are satisfied:
 - (i) the purpose of making the order is to continue (in whole or in part) the effect of terms relating to long service leave that are contained in a Division 2B State award, other than a Division 2B enterprise award;
 - (ii) the order only relates to employees, employers or other persons covered by the Division 2B State award; and
 - (b) may make one or more such orders.
- (2) An order under subitem (1):
- (a) takes effect at the end of 12 months after the Division 2B referral commencement; and
 - (b) ceases to have effect:
 - (i) at the end of 5 years after the Division 2B referral commencement; or
 - (ii) if the order is expressed to cease to have effect at an earlier time—at that earlier time.
- (3) Paragraph 675(1)(a) of the FW Act has effect as if it also included a reference to an order under subitem (1).
- (4) To the extent that a term of a Division 2B State award, or of an enterprise agreement, is detrimental to an employee, in any respect,
-

when compared to an order under subitem (1), the term of the award or agreement is of no effect.

Note: A term of a Division 2B State award, or of an enterprise agreement, that provides an entitlement that is at least as beneficial to an employee as a corresponding entitlement of the employee under the order will continue to have effect.

- (5) The regulations may make provisions that apply to determining, for the purpose of this item, whether terms of a Division 2B State award or an enterprise agreement are, or are not, detrimental in any respect when compared to an order under subitem (1).

Division 1A—Transitional pay equity order taken to have been made by FWA—Division 2B State awards

30A FWA taken to have made a transitional pay equity order to continue the effect of State pay equity orders

- (1) On the Division 2B referral commencement, FWA is taken to have made an order (the *transitional pay equity order*) under this item.
- (2) The transitional pay equity order applies to an employer if:
- (a) a Division 2B State award that applies to the employer terminates at a time (the *termination time*) after the Division 2B referral commencement; and
 - (b) the base rate of pay payable immediately before the termination time to some or all of the employees to whom the Division 2B State award applied was determined in whole or part by, or in accordance with, an order, decision or determination (the *source pay equity order*) of a State industrial body that:
 - (i) was made before 15 September 2009; and
 - (ii) provided for increases in rates of pay payable to a particular class of employees (whether the increases were expressed to take effect before, on or after the Division 2B referral commencement); and
 - (iii) was made wholly or partly on the ground of work value, pay equity or equal remuneration (however described); and
 - (c) immediately after the termination time, a modern award applies to the employer.

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

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

Note: After the Division 2B referral commencement, a source pay equity order may have effect either because of subitem 3(3) of this Schedule, or because the terms of the source pay equity order had been incorporated in the source award from which the Division 2B State award was derived.

- (3) If the transitional pay equity order applies to an employer, the employer is required to pay to each affected employee of the employer a base rate of pay, in respect of a period, that is not less than the base rate of pay that the employee would have been entitled to be paid under the Division 2B State award in respect of that period, assuming that:
- (a) the Division 2B State award had not terminated; and
 - (b) the base rate of pay had continued to be determined in whole or part by, or in accordance with, the source pay equity order in respect of that period.
- (4) An employee of an employer to which this item applies is an *affected employee* of the employer if:
- (a) all of the following conditions are satisfied:
 - (i) the employee was employed by the employer at the termination time;
 - (ii) the Division 2B State award applied to the employee at the termination time;
 - (iii) the employee's base rate of pay under the Division 2B State award was determined in whole or part by, or in accordance with, the source pay equity order at the termination time; or
 - (b) all of the following conditions are satisfied:
 - (i) the employee becomes employed by the employer after the termination time;
 - (ii) a Division 2B State award would have applied to the employee if he or she had been employed by the employer immediately before the termination time;
 - (iii) the employee's base rate of pay under the Division 2B State award would have been determined in whole or part by, or in accordance with, the source pay equity order at the termination time.
- (5) The transitional pay equity order takes effect in relation to the employer immediately after the modern award begins to apply to the employer.
- (6) A term of a modern award is of no effect to the extent that:

- (a) an employee is entitled to be paid by an employer a base rate of pay under the transitional pay equity order in respect of a particular period; and
 - (b) the term of the modern award requires the employer to pay a base rate of pay, in respect of that period, that is less than the base rate of pay referred to in paragraph (a).
- (7) However, to avoid doubt, a term of a modern award continues to have effect so far as it requires an employer to pay a base rate of pay, in respect of a period, that is equal to or more than the base rate of pay referred to in paragraph (6)(a).

Division 2—Avoiding reductions in take-home pay

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

- (1) The termination of a Division 2B State award by item 21 is not intended to result in a reduction in the take-home pay of employees or outworkers.
 - (2) An employee's or outworker's *take-home pay* is the pay an employee or outworker actually receives:
 - (a) including wages and incentive-based payments, and additional amounts such as allowances and overtime; but
 - (b) disregarding the effect of any deductions that are made as permitted by section 324 of the FW Act.
- Note: Deductions permitted by section 324 of the FW Act may (for example) include deductions under salary sacrificing arrangements.
- (3) An employee suffers a reduction in take-home pay to which this item applies if, and only if:
 - (a) when a Division 2B State award terminates because of item 21, the employee becomes a person to whom a modern award applies; and
 - (b) the employee is employed in the same position as (or a position that is comparable to) the position he or she was employed in immediately before the termination of the Division 2B State award; and
 - (c) the amount of the employee's take-home pay for working particular hours or for a particular quantity of work after the

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

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

-
- termination of the Division 2B State award is less than what would have been the employee's take-home pay for those hours or that quantity of work immediately before the termination; and
- (d) that reduction in the employee's take-home pay is attributable to the termination of the Division 2B State award.
- (4) An outworker who is not an employee suffers a reduction in take-home pay to which this item applies if, and only if:
- (a) when a Division 2B State award terminates because of item 21, the outworker becomes a person to whom outworker terms in a modern award relate; and
- (b) the outworker is performing the same work as (or work that is similar to) the work he or she was performing immediately before the termination of the Division 2B State award; and
- (c) the amount of the outworker's take-home pay for working particular hours or for a particular quantity of work after the termination of the Division 2B State award is less than what would have been the outworker's take-home pay for those hours or that quantity of work immediately before the termination; and
- (d) that reduction in the outworker's take-home pay is attributable to the termination of the Division 2B State award.

32 Orders remedying reductions in take-home pay

Employees

- (1) If FWA is satisfied that an employee, or a class of employees, to whom a modern award applies has suffered a reduction in take-home pay to which item 31 applies, FWA may make any order (*a take-home pay order*) requiring, or relating to, the payment of an amount or amounts to the employee or employees that FWA considers appropriate to remedy the situation.

Outworkers

- (2) If FWA is satisfied that an outworker, or a class of outworkers, to whom outworker terms in a modern award relate has suffered a reduction in take-home pay to which item 31 applies, FWA may make
-

any order (a *take-home pay order*) requiring, or relating to, the payment of an amount or amounts to the outworker or outworkers that FWA considers appropriate to remedy the situation.

General provisions

- (3) FWA may make a take-home pay order only on application by:
- (a) an employee or outworker who has suffered a reduction in take-home pay to which item 31 applies; or
 - (b) an organisation that is entitled to represent the industrial interests of such an employee or outworker; or
 - (c) a person acting on behalf of a class of such employees or outworkers.
- (4) If FWA is satisfied that an application for a take-home pay order has already been made in relation to an employee or a class of employees, or an outworker or a class of outworkers, FWA may dismiss any later application that is made under these provisions in relation to the same employee or employees, or the same outworker or outworkers.

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

- (1) FWA must not make a take-home pay order under item 32 in relation to an employee or class of employees, or an outworker or a class of outworkers, if:
- (a) FWA considers that the reduction in take-home pay is minor or insignificant; or
 - (b) FWA is satisfied that the employee or employees, or outworker or outworkers, have been adequately compensated in other ways for the reduction.
- (2) FWA must ensure that a take-home pay order is expressed so that:
- (a) it does not apply to an employee or outworker unless the employee or outworker has actually suffered a reduction in take-home pay to which item 31 applies; and
 - (b) if the take-home pay payable to the employee or outworker under the modern award increases after the order is made, there is a corresponding reduction in any amount payable to the employee or outworker under the order.

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

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

35 Inconsistency with modern awards and enterprise agreements

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

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

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

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

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

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

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

37 The no detriment rule

- (1) To the extent that a term of a Division 2B State instrument is detrimental to an employee, in any respect, when compared to an entitlement of the employee under the National Employment Standards, the term of the instrument is of no effect.
-

Note 1: A term of a Division 2B State instrument that provides an entitlement that is at least as beneficial to an employee as a corresponding entitlement of the employee under the National Employment Standards will continue to have effect.

Note 2: Division 3 (which contains other general provisions about how the FW Act applies in relation to Division 2B State instruments) is also relevant to how the National Employment Standards apply in relation to employees to whom Division 2B State instruments apply.

Note 3: References to the National Employment Standards include a reference to the extended parental leave provisions and the extended notice of termination provisions (see sections 746 and 761 of the FW Act).

- (2) If there is a dispute about the application of this item which must be resolved by FWA in accordance with item 40, FWA may compare the entitlements which are in dispute:
- (a) on a 'line-by-line' basis, comparing individual terms; or
 - (b) on a 'like-by-like' basis, comparing entitlements according to particular subject areas; or
 - (c) using any combination of the above approaches FWA sees fit.
- (3) Subitem (1) does not affect a term of a Division 2B State instrument that is permitted by a provision of the National Employment Standards as it has effect under item 38.
- (4) The regulations may make provisions that apply to determining, for the purpose of this item, whether terms of a Division 2B State instrument are, or are not, detrimental in any respect when compared to entitlements under the National Employment Standards.

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

- (1) The following provisions of the National Employment Standards have effect, on and after the Division 2B referral commencement, as if a reference to a modern award or an enterprise agreement included a reference to a Division 2B State instrument:
- (a) section 63 (which allows terms dealing with averaging of hours of work);
 - (b) section 93 (which allows terms dealing with cashing out and taking paid annual leave);
 - (c) section 101 (which allows terms dealing with cashing out paid personal/carer's leave);

- (d) subsection 107(5) (which allows terms dealing with evidence requirements for paid personal/carer's leave etc.);
 - (e) subsection 115(3) (which allows terms dealing with substitution of public holidays);
 - (f) section 118 (which allows terms dealing with an employee giving notice to terminate his or her employment);
 - (g) subsections 121(2) and (3) (which allow terms specifying situations in which the redundancy pay entitlement under section 119 does not apply);
 - (h) section 126 (which allows terms providing for school-based apprentices and trainees to be paid loadings in lieu).
- (2) If:
- (a) a Division 2B State instrument includes terms referred to in subsection (1) of section 93 or 101 of the National Employment Standards; but
 - (b) the terms do not include the requirements referred to in subsection (2) of that section;
- the instrument is taken to include terms that include the requirements.

39 Shiftworker annual leave entitlement

Subsections 87(3) to (5) of the FW Act apply in relation to an employee to whom a Division 2B State instrument applies in the same way as they apply to an award/agreement free employee.

Note: If the employee qualifies for the shiftworker annual leave entitlement under those subsections, the employee will be entitled to 5 (rather than 4) weeks of paid annual leave.

40 Resolving difficulties about application of this Division

- (1) On application by a person covered by a Division 2B State instrument, FWA may make a determination varying the instrument:
- (a) to resolve an uncertainty or difficulty relating to the interaction between the instrument and the National Employment Standards; or
 - (b) to make the instrument operate effectively with the National Employment Standards.
-

- (2) A variation of a Division 2B State instrument operates from the day specified in the determination, which may be a day before the determination is made.

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

41 Modern awards and Division 2B State employment agreements

Collective Division 2B State employment agreements

- (1) If a collective 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.

Note: This subitem has effect subject to item 42 of this Schedule, and to item 17 of Schedule 9 (which requires that the base rate of pay under a Division 2B State employment agreement must not be less than the modern award rate).

Individual Division 2B State employment agreements

- (2) While an individual Division 2B State employment agreement applies to an employee, or to an employer or other person in relation to an employee, a modern award does not apply to the employee, or to the employer or other person in relation to the employee.

Note 1: However, a modern award can continue to cover the employee while the individual Division 2B State employment agreement continues to apply.

Note 2: This subitem has effect subject to item 42 of this Schedule, and to item 17 of Schedule 9 (which requires that the base rate of pay under a Division 2B State employment agreement must not be less than the modern award rate).

42 Terms of modern awards about outworker conditions continue to apply

- (1) This item applies if, at a particular time:
- (a) a Division 2B State employment agreement applies to an employee; and

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

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

-
- (b) outworker terms (within the meaning of the FW Act) in a modern award would, but for the Division 2B State employment agreement, apply to the employee.
- (2) Despite item 41 and despite any terms of the Division 2B State employment agreement that are detrimental to the employee in any respect when compared to the terms of the modern award, the outworker terms apply at that time to the following persons:
- (a) the employee;
 - (b) the employer;
 - (c) each employee organisation to which the modern award applies.
- (3) To avoid doubt, to the extent to which terms of a modern award apply to an employee, an employer or an employee organisation because of subitem (2), the modern award applies to the employee, employer or organisation.

43 Modern awards and Division 2B State awards

Employees and employers

- (1) 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 the employer or other person in relation to the employee.

Note: When the Division 2B State award terminates, a modern award will start to cover the employee, or the employer or other person in relation to the employee.

Outworker entities

- (2) While a Division 2B State award that contains outworker terms that cover an outworker entity is in operation, outworker terms in a modern award do not cover the outworker entity.

Note: When the Division 2B State award terminates, a modern award will start to cover the outworker entity.

- (3) ***Outworker terms*** in a Division 2B State award are terms that would be outworker terms as defined in the FW Act if they were in a modern award.

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

Collective Division 2B State employment agreements

- (1) If an enterprise agreement or workplace determination (under the FW Act) starts to apply to an employee, or an employer or other person in relation to the employee, then a collective Division 2B State employment agreement ceases to cover (and can never again cover) the employee, or the employer or other person in relation to the employee.

Note 1: The fact that a collective Division 2B State employment agreement applies to employees does not prevent those employees and their employer from replacing that agreement at any time with an enterprise agreement, regardless of whether the collective Division 2B State employment agreement has passed its nominal expiry date.

Note 2: Industrial action must not be taken before the nominal expiry date of a collective Division 2B State employment agreement (see item 4 of Schedule 13).

Individual Division 2B State employment agreements

- (2) While an individual Division 2B State employment agreement applies to an employee, or to an employer in relation to the employee, an enterprise agreement or workplace determination (under the FW Act) does not apply to the employee, or the employer in relation to the employee.

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

If an enterprise agreement or workplace determination (under the FW Act) applies to an employee, or an employer or other person in relation to the employee, then:

- (a) a Division 2B State award ceases to apply to the employee, and the employer or other person in relation to the employee; but
- (b) the Division 2B State award can (subject to the other provisions of this Part) continue to cover the employee, and the employer or other person in relation to the employee.

Note: Subject to the other provisions of this Part, 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 (under the FW Act) ceases to apply to the employee.

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

- (1) This item applies if, at a particular time:
- (a) an enterprise agreement or workplace determination (under the FW Act) applies to an employer; and
 - (b) a Division 2B State award covers the employer (whether the award covers the employer in the employer's capacity as an employer or an outworker entity); and
 - (c) the Division 2B State award includes one or more designated outworker terms.
- (2) Despite item 45, the designated outworker terms of the Division 2B State award apply at that time to the following:
- (a) the employer;
 - (b) each employee who is both:
 - (i) a person to whom the enterprise agreement or workplace determination applies; and
 - (ii) a person who is covered by the Division 2B State award;
 - (c) each employee organisation that is covered by the Division 2B State award.
- (3) To avoid doubt:
- (a) Division 2B State awards are taken to be instruments to which the definition of *designated outworker term* in section 12 of the FW Act applies; and
 - (b) designated outworker terms of a Division 2B State award can apply to an employer under subitem (2) even if none of the employees of the employer is an outworker; and
 - (c) to the extent to which designated outworker terms of a Division 2B State award apply to an employer, an employee or an employee organisation because of subitem (2), the award applies to the employer, employee or organisation.

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

**47 Employee not award/agreement free if Division 2B State
instrument applies**

- (1) An employee is not an award/agreement free employee for the purposes of the FW Act if a Division 2B State instrument applies to the employee.
- (2) The regulations may make provision in relation to any of the following in relation to employees to whom Division 2B State instruments apply:
 - (a) what is the base rate of pay of such an employee for the purposes of the FW Act (either generally or for the purposes of entitlements under the National Employment Standards);
 - (b) what is the full rate of pay of such an employee for the purposes of the FW Act (either generally or for the purposes of entitlements under the National Employment Standards);
 - (c) whether such an employee is a pieceworker for the purposes of the FW Act.

48 Employee's ordinary hours of work

Item applies for purpose of determining employee's ordinary hours of work for the FW Act

- (1) For the purposes of the FW Act, the ordinary hours of work of an employee to whom a Division 2B State instrument applies are to be determined in accordance with this item.

Ordinary hours as specified in Division 2B State instrument

- (2) If a Division 2B State instrument that applies to the employee specifies, or provides for the determination of, the employee's ordinary hours of work, the employee's **ordinary hours of work** are as specified in, or determined in accordance with, that instrument.

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

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

If subitem (2) does not apply and there is agreement

- (3) If subitem (2) does not apply, the employee's **ordinary hours of work** are the hours agreed by the employee and his or her employer as the employee's ordinary hours of work.

If subitem (2) does not apply and there is no agreement

- (4) If subitem (2) does not apply but there is no agreement under subitem (3), the **ordinary hours of work** of the employee in a week are:
- (a) if the employee is a full time employee—38 hours; or
 - (b) if the employee is not a full-time employee—the lesser of:
 - (i) 38 hours; and
 - (ii) the employee's usual weekly hours of work.

If subitem (2) does not apply: agreed hours are less than usual weekly hours

- (5) If:
- (a) subitem (2) does not apply; and
 - (b) the employee is not a full-time employee; and
 - (c) there is an agreement under subitem (3) between the employee and his or her employer, but the agreed ordinary hours of work are less than the employee's usual weekly hours of work;
- the **ordinary hours of work** of the employee in a week are the lesser of:
- (d) 38 hours; and
 - (e) the employee's usual weekly hours of work.

Regulations may prescribe usual weekly hours

- (6) For an employee who is not a full-time employee and who does not have usual weekly hours of work, the regulations may prescribe, or provide for the determination of, hours that are taken to be the employee's usual weekly hours of work for the purposes of subitems (4) and (5).

49 Payment of wages

Division 2 of Part 2-9 of the FW Act (which deals with payment of wages) applies, on and after the Division 2B referral commencement, in relation to a Division 2B State instrument as if:

- (a) a reference to an enterprise agreement included a reference to a Division 2B State employment agreement; and
- (b) a reference to a modern award included a reference to a Division 2B State award.

50 Guarantee of annual earnings

Division 3 of Part 2-9 of the FW Act (which deals with the guarantee of annual earnings) applies, on and after the Division 2B referral commencement, as if:

- (a) a reference to an enterprise agreement included a reference to a Division 2B State employment agreement; and
- (b) a reference to a modern award included a reference to a Division 2B State award.

51 Application of unfair dismissal provisions

Part 3-2 of the FW Act (which deals with unfair dismissal) applies, on and after the Division 2B referral commencement, as if:

- (a) the reference in subparagraph 382(b)(i) and paragraph 389(1)(b) of that Act to a modern award included a reference to a Division 2B State award; and
- (b) the reference in subparagraph 382(b)(ii) and paragraph 389(1)(b) of that Act to an enterprise agreement included a reference to a Division 2B State employment agreement.

52 Regulations may deal with other matters

The regulations may deal with other matters relating to how the FW Act applies in relation to Division 2B State instruments.

Part 6—Ongoing operation of State laws for transitional purposes

53 Definitions

- (1) Subject to subitem (2), in this Part:
 - agreement appeal*** means an appeal to a State industrial body against a decision made by a State industrial body in an agreement proceeding.
 - agreement proceeding*** means a proceeding (other than an agreement appeal) before a State industrial body for the body to:

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

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

- (a) approve a State employment agreement; or
- (b) approve a variation or termination of a State employment agreement; or
- (c) vary or terminate a State employment agreement.

approve, in relation to a State employment agreement or a variation or termination of a State employment agreement, means:

- (a) approve or certify (however described) the agreement, or the variation or termination, under a State industrial law; and
- (b) do any other things (for example, register the agreement) that are required to be done under that law after approval or certification in order for the agreement, or the variation or termination, to come into operation.

award appeal means an appeal to a State industrial body against a decision made by a State industrial body in an award proceeding.

award proceeding means a proceeding (other than an award appeal) before a State industrial body for the body to:

- (a) make a State award; or
- (b) vary or terminate a State award.

coverage terms of a source award or source agreement are terms setting out the employees, employers, outworker entities or other persons that are covered (however described) by the award or agreement.

terminate, in relation to a State employment agreement, means terminate or rescind (however described) the agreement under a State industrial law.

vary, in relation to a State employment agreement, means vary or amend (however described) the agreement under a State industrial law.

- (2) The regulations may provide that a certain proceeding:
 - (a) is, or is not, an agreement appeal as defined in subitem (1); or
 - (b) is, or is not, an agreement proceeding as defined in subitem (1); or
 - (c) is, or is not, an award appeal as defined in subitem (1); or
 - (d) is, or is not, an award proceeding as defined in subitem (1).

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

Nothing in this Part affects the application of section 26 of the FW Act to a law of a Division 2B referring State so far as the law provides for the variation or termination of a State award or a State employment agreement because of a proposed transfer of business (however described).

55 Commencement or completion of award appeals

- (1) Section 26 of the FW Act does not apply to a law of a Division 2B referring State so far as the law relates to the commencement or completion of an award appeal in relation to which the following conditions are satisfied:
- (a) the decision appealed against was made before the Division 2B referral commencement in an award proceeding;
 - (b) the decision was:
 - (i) to vary, or not to vary, an award; or
 - (ii) to terminate, or not to terminate, an award.

Note: The following (to the extent they relate to Division 2B State reference employees and Division 2B State reference employers) are not able to be commenced or completed on or after the Division 2B referral commencement:

- (a) award proceedings;
- (b) award appeals, if the appeal is against a decision to make, or not make, an award.

- (2) Subitem (1):
- (a) does not apply to the commencement of an award appeal more than 21 days after the day on which the decision appealed against was made; and
 - (b) ceases to apply to an award appeal if the appeal has not been completed by the end of the period of 6 months starting on the Division 2B referral commencement.

56 Completion of agreement proceedings

- (1) Section 26 of the FW Act does not apply to a law of a Division 2B referring State so far as the law relates to the completion of an agreement proceeding that had commenced before the Division 2B referral commencement.

Note: Agreement proceedings (to the extent they relate to Division 2B State reference employees and Division 2B State reference employers) are not able to be commenced on or after the Division 2B referral commencement.

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

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

-
- (2) Subitem (1) ceases to apply to an agreement proceeding if the proceeding has not been completed by the end of the period of 6 months starting on the Division 2B referral commencement.

57 Agreement appeals

- (1) Section 26 of the FW Act does not apply to a law of a Division 2B referring State so far as the law relates to the commencement or completion of an agreement appeal (whether the decision appealed against is or was made before, on or after the Division 2B referral commencement).
- (2) Subitem (1):
- (a) does not apply to the commencement of an agreement appeal more than 21 days after the day on which the decision appealed against was made; and
 - (b) ceases to apply to an agreement appeal if the appeal has not been completed by the end of the period of 6 months starting on the Division 2B referral commencement.

58 Decisions made in award appeals, agreement proceedings and agreement appeals

- (1) Section 26 of the FW Act does not apply to a law of a Division 2B referring State so far as the law provides for when any of the following decisions (a *State decision*) come into operation:
- (a) a decision made in award appeal to which subitem 55(1) applies;
 - (b) a decision made in an agreement proceeding to which subitem 56(1) applies;
 - (c) a decision made in an agreement appeal to which subitem 57(1) applies.

Note: If a State employment agreement comes into operation on or after the Division 2B referral commencement under a State industrial law of a Division 2B referring State, a Division 2B State employment agreement is taken to come into operation immediately afterwards: see item 5 of this Schedule.

- (2) Subject to subitems (3) and (4), if a State decision affects the source award or source agreement for a Division 2B State instrument, the Division 2B State instrument is taken to be affected by the State decision in the same way, and from the same time, as the source award or source agreement is affected by the State decision.

- (3) Subitem (2) does not apply to a State decision that affects the coverage terms of the source award or source agreement.
- (4) Any resulting alteration of an entitlement under the Division 2B State instrument takes effect only from the later of the day on which the State decision is made and the day on which the decision comes into operation.

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

- (1) Section 26 of the FW Act does not apply to a law of a Division 2B referring State so far as the law provides:
 - (a) for when a State employment agreement comes into operation, if the State employment agreement was approved by a State industrial body before the Division 2B referral commencement, but the agreement had not yet come into operation by that commencement; or
 - (b) for when a variation or termination of a State employment agreement comes into operation, if the variation or termination was approved or made by a State industrial body before the Division 2B referral commencement, but the variation or termination had not yet come into operation by that commencement.

Note: If a State employment agreement comes into operation on or after the Division 2B referral commencement under a State industrial law of a Division 2B referring State, a Division 2B State employment agreement is taken to come into operation immediately afterwards: see item 5 of this Schedule.

- (2) Subject to subitem (3), if, at a time when a Division 2B State employment agreement is in operation, a variation or termination of the source agreement comes into operation as mentioned in subitem (1), the Division 2B State employment agreement is taken to have been varied in the same way, or to have been terminated, (as the case requires) immediately after that time.
- (3) Subitem (2) does not apply to a variation that affects the coverage terms of the source agreement.

60 Proceedings relating to entitlements or obligations that arose before the Division 2B referral commencement etc.

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

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

-
- (1) Section 26 of the FW Act does not apply to a law of a Division 2B referring State so far as the law relates to compliance with an entitlement or obligation:
- (a) that arose before the Division 2B referral commencement under a State industrial law; and
 - (b) that relates to an act or omission which occurred before that commencement.
- (2) Subitem (1) does not apply to entitlements or obligations relating to any of the following:
- (a) the making, variation or termination of State awards or State employment agreements;
 - (b) bargaining or industrial action.
- Note: Orders and injunctions of State industrial bodies relating to industrial action that are in operation immediately before the Division 2B referral commencement can continue to have effect, and be enforced, under State law after the Division 2B referral commencement: see item 61.
- (3) Section 26 of the FW Act does not apply to a law of a Division 2B referring State so far as the law relates to a termination of employment that occurred before the Division 2B referral commencement.
- (4) Section 26 of the FW Act does not apply to a law of a Division 2B referring State so far as the law:
- (a) relates to proceedings that commenced before the Division 2B referral commencement; and
 - (b) provides for the variation or setting aside of entitlements and obligations arising under a contract of employment, or another arrangement for employment, that a court or a State industrial body of the State finds is unfair.

61 Continuation of orders and injunctions of State industrial bodies or courts

Despite section 26 of the FW Act:

- (a) an order made, or an injunction granted, by a State industrial body or a 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 may continue to have effect under the law of the State on and after that day; and

- (b) the order or injunction may continue to be enforced under the law of the State on or after that day.

55 Before item 5 of Part 3 of Schedule 4

Insert:

Division 1—Operation in relation to employees other than Division 2B State reference employees

5A Application of this Division

This Division applies in relation to employees other than Division 2B State reference employees.

56 At the end of Part 3 of Schedule 4

Add:

Division 2—Operation in relation to Division 2B State reference employees

15 Application of this Division

This Division applies in relation to Division 2B State reference employees.

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

General rule

- (1) An employee's service with an employer before the Division 2B referral commencement counts as service of the employee with the employer for the purpose of determining the employee's entitlements under the National Employment Standards, other than entitlements to:
- (a) paid annual leave; and
 - (b) paid personal/carer's leave.

Note 1: References to the National Employment Standards include a reference to the extended parental leave provisions and the extended notice of termination provisions (see sections 746 and 761 of the FW Act).

Note 2: Interaction between the National Employment Standards and Division 2B State instruments is dealt with in Division 1 of Part 5 of Schedule 3A to this Act.

No double entitlement

- (2) If, before the Division 2B referral commencement, the employee has already had the benefit of an entitlement, the amount of which was calculated by reference to a period of service, subitem (1) does not result in that period of service with the employer being counted again when calculating the employee's entitlements of that kind under the National Employment Standards.
- (3) To avoid doubt, subitem (2) does not require an employee to serve any initial qualifying period of service for long service leave again.

Limitation on application of general rule to redundancy pay

- (4) Subitem (1) does not apply in relation to an employee and an employer for the purposes of Subdivision B of Division 11 of the National Employment Standards (which deals with redundancy pay) if the terms and conditions of employment that applied to the employee's employment by the employer immediately before the Division 2B referral commencement did not provide for an entitlement to redundancy pay.
- (5) If, had an employee's employment been terminated for redundancy (however described) before the Division 2B referral commencement, a State industrial body could have made an order giving the employee an entitlement to redundancy pay (however described):
 - (a) the terms and conditions of the employee's employment referred to in subitem (4) are taken to have provided for an entitlement to redundancy pay; and
 - (b) paragraph 121(1)(b) of the FW Act does not apply in relation to the employee during the period of 12 months starting on the Division 2B referral commencement.

Note: Because of paragraph (b), the employee may therefore be entitled to redundancy pay under section 119 of the FW Act if the employee's employment is terminated during the 12 month period starting on the Division 2B referral commencement, even if the employer is a small business employer.

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

- (1) This item applies if an employee had, immediately before the Division 2B referral commencement, an accrued entitlement to an amount of paid annual leave or paid personal/carer's leave, whether the
-

leave accrued under a State industrial law, the source award or source agreement for a Division 2B State instrument, or otherwise.

- (2) The provisions of the National Employment Standards relating to taking that kind of leave (including rates of pay while taking leave), or cashing-out that kind of leave, apply, as a minimum standard, to the accrued leave as if it had accrued under the National Employment Standards.

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

- (1) If:
- (a) an employee was, immediately before the Division 2B referral commencement, taking a period of a type of leave under:
 - (i) Division 6 of Part 7 of the WR Act; or
 - (ii) a State industrial law; and
 - (b) there is an equivalent type of leave under the National Employment Standards;

the employee is entitled to continue on leave of the equivalent type under the National Employment Standards for the remainder of the period.

Note: For example, if an employee was taking parental leave under Division 6 of Part 7 of the WR Act immediately before the Division 2B referral commencement, the employee is entitled to continue on unpaid parental leave under the National Employment Standards.

- (2) If an employee, or his or her spouse or de facto partner (if the spouse or de facto partner is also an employee), continues on leave under the National Employment Standards in accordance with subitem (1), the employee is entitled to adjust any of the following consistently with the provisions of the National Employment Standards in relation to that type of leave:
- (a) the amount of leave the employee is taking or will take;
 - (b) the time at which the leave is taken;
 - (c) the arrangements for taking the leave.

Note: If the employee's spouse or de facto partner is also an employee, the employees will be an employee couple for the purposes of the parental leave provisions of the National Employment Standards.

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

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

-
- (3) If, before the Division 2B referral commencement:
- (a) an employee has taken a step that the employee is required to take so that the employee can, on or after the Division 2B referral commencement, take a type of leave referred to in subitem (1); and
 - (b) an equivalent step is required under the National Employment Standards;
- the employee is taken to have taken the step under the National Employment Standards.

Note: For example, if an employee has given the employer an application under section 271 of the WR Act so that the employee can take ordinary maternity leave, the employee is taken to have given the employer notice under section 74 of the FW Act of the taking of unpaid parental leave.

- (4) If an employee is taken, by subitem (3), to have taken a step, in relation to leave, under the National Employment Standards, the employee is entitled to adjust the step consistently with the provisions of the National Employment Standards in relation to that type of leave.

Note: For example, an employee could vary the content of a notice given to the employer in relation to the leave, or vary the amount of leave the employee has notified the employer that the employee intends to take.

- (5) The regulations may deal with other matters relating to how the National Employment Standards apply to 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 under a State industrial law of a Division 2B referring State.

19 Notice of termination

- (1) Subdivision A of Division 11 of the National Employment Standards applies only to terminations of employment occurring on or after the Division 2B referral commencement.
- (2) However, that Subdivision does not apply to a termination if notice of the termination was given before the Division 2B referral commencement.

20 Redundancy pay

Subdivision B of Division 11 of the National Employment Standards applies only to terminations of employment occurring on or after the Division 2B referral commencement, even if notice of the termination was given before that day.

21 Fair Work Information Statement

The obligation in section 125 of the National Employment Standards for an employer to give an employee the Fair Work Information Statement only applies to an employee who starts employment with the employer on or after the Division 2B referral commencement.

22 Regulations

The regulations may make provision in relation to how the National Employment Standards apply to, or are affected by, things done or matters occurring before the Division 2B referral commencement.

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

Add:
; (c) a Division 2B enterprise award.

58 Subitem 2(2B) of Schedule 6

After “a State award”, insert “(within the meaning of the WR Act)”.

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

After “a State award”, insert “(within the meaning of the WR Act)”.

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

After “State employment agreement”, insert “(within the meaning of the WR Act)”.

61 At the end of item 2 of Schedule 6

- Add:
- (4) A *Division 2B enterprise award* is a Division 2B State award that covers:
- (a) a single enterprise (or a part of a single enterprise) only; or
 - (b) one or more enterprises, if the employers all carry on similar business activities under the same franchise and are:
 - (i) franchisees of the same franchisor; or
-

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

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

-
- (ii) related bodies corporate of the same franchisor; or
 - (iii) any combination of the above.

62 Item 9 of Schedule 6 (heading)

Omit “transitional instruments etc.”, substitute “instruments”.

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

Insert:

- (iii) other Division 2B State awards;

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

Omit “and the main provisions about transitional APCs are in Schedule 9”, substitute “the main provisions about transitional APCs are in Schedule 9, and the main provisions about Division 2B State awards are in Schedule 3A”.

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

After “section 30A”, insert “or 30K”.

66 Paragraph 9(a) of Schedule 7

After “a State award”, insert “(within the meaning of the WR Act)”.

67 Paragraph 9(b) of Schedule 7

After “State employment agreement”, insert “(within the meaning of the WR Act)”.

68 After Part 4 of Schedule 7

Insert:

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

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

- (1) This item applies in relation to an enterprise agreement made on or after the Division 2B referral commencement, if one or more of the employees covered by the agreement is a Division 2B State award covered employee.

Non-greenfields agreements

- (2) Despite section 193 of the FW Act, if the enterprise agreement is not a greenfields agreement, the agreement passes the better off overall test under that section only if:
- (a) FWA is satisfied as referred to in subsection (1) of that section, and paragraph (2)(b) of item 18 of this Schedule, in relation to the agreement (to the extent that those provisions are applicable); and
 - (b) FWA is satisfied, as at the test time, that each Division 2B State award covered employee, and each prospective Division 2B State award covered employee, for the agreement would be better off overall if the agreement applied to the employee than if the relevant Division 2B State award applied to the employee.

Note: Section 193 of the FW Act and item 18 of this Schedule deal with testing enterprise agreements against other instruments (such as modern awards). An enterprise agreement to which this subitem applies will not be tested against one or more such other instruments in relation to Division 2B State award covered employees.

Greenfields agreements

- (3) Despite section 193 of the FW Act, if the enterprise agreement is a greenfields agreement, the agreement passes the better off overall test under that section only if:
- (a) FWA is satisfied as referred to in subsection (3) of that section and paragraph (3)(b) of item 18 of this Schedule in relation to the agreement (to the extent that those provisions are applicable); and
 - (b) FWA is satisfied, as at the test time, that each prospective Division 2B State award covered employee for the agreement would be better off overall if the agreement applied to the employee than if the relevant Division 2B State award applied to the employee.

Note: Section 193 of the FW Act and item 18 of this Schedule deal with testing enterprise agreements against other instruments (such as modern awards). An enterprise agreement

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

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

to which this subitem applies will not be tested against one or more such other instruments in relation to prospective Division 2B State award covered employees.

FWA may assume employee better off overall in certain circumstances

- (4) For the purposes of determining whether an enterprise agreement passes the better off overall test, if a class of employees to which a particular employee belongs would be better off if the agreement applied to that class than if the relevant Division 2B State award applied to that class, FWA is entitled to assume, in the absence of evidence to the contrary, that the employee would be better off overall if the agreement applied to the employee.

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

- (1) This item applies in relation to a variation of an enterprise agreement if:
- (a) the variation is made on or after the Division 2B referral commencement; and
 - (b) one or more of the employees covered by the agreement is a Division 2B State award covered employee.
- (2) Despite subsections 211(4) and (5) of the FW Act, subitems (3) and (4) apply in relation to the variation for the purposes of FWA being satisfied that the agreement as proposed to be varied passes the better off overall test.

Modification of the better off overall test

- (3) An enterprise agreement as proposed to be varied passes the better off overall test only if:
- (a) FWA is satisfied, as at the test time, as mentioned in subitem 19(3) of this Schedule in relation to the agreement as proposed to be varied (to the extent that subitem 19(3) is applicable); and
 - (b) FWA is satisfied, as at the test time, that each Division 2B State award covered employee, and each prospective Division 2B State award covered employee, for the agreement would be better off overall if the agreement

applied to the employee than if the relevant Division 2B State award applied to the employee.

Note: Item 19 of this Schedule deals with testing enterprise agreements as proposed to be varied against other instruments (such as modern awards). A variation to which this subitem applies will not be tested against one or more such other instruments in relation to Division 2B State award covered employees.

FWA may assume employee better off overall in certain circumstances

- (4) For the purposes of determining whether the enterprise agreement as proposed to be varied passes the better off overall test, if a class of employees to which a particular employee belongs would be better off if the agreement applied to that class than if the relevant Division 2B State award applied to that class, FWA is entitled to assume, in the absence of evidence to the contrary, that the employee would be better off overall if the agreement applied to the employee.

FWA must disregard individual flexibility arrangement

- (5) For the purposes of determining whether an enterprise agreement as proposed to be varied passes the better off overall test, FWA must disregard any individual flexibility arrangement that has been agreed to by a Division 2B State award covered employee and his or her employer under the flexibility term in the agreement.

20C Definitions

In this Part:

Division 2B State award covered employee, for an enterprise agreement, means an employee who:

- (a) is covered by the agreement; and
- (b) at the test time, is covered by a Division 2B State award (the ***relevant Division 2B State award***) that:
 - (i) is in operation; and
 - (ii) covers the employee in relation to the work that he or she is to perform under the agreement; and
 - (iii) covers his or her employer.

prospective Division 2B State award covered employee, for an enterprise agreement, means a person who, if he or she were an employee at the test time of an employer covered by the agreement:

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

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

- (a) would be covered by the agreement; and
- (b) would be covered by a Division 2B State award (the *relevant Division 2B State award*) that:
 - (i) is in operation; and
 - (ii) would cover the person in relation to the work that he or she would perform under the agreement; and
 - (iii) covers the employer.

test time:

- (a) for the purposes of item 20A—means the time the application for approval of the enterprise agreement by FWA was made under section 185 of the FW Act; and
- (b) for the purposes of item 20B—means the time the application for approval of the variation of the enterprise agreement by FWA was made under section 210 of that Act.

68A At the end of Schedule 7

Add:

Part 7—Transitional provision about the operation of the better off overall test if a transitional pay equity order applies

28 Operation of better off overall test if a transitional pay equity order applies to employer

- (1) This item applies to an enterprise agreement, or a variation of an enterprise agreement, if:
 - (a) an application for approval of the agreement or variation has been made under the FW Act; and
 - (b) FWA must decide whether the agreement, or the agreement as proposed to be varied, passes the better off overall test; and
 - (c) an employer covered by the agreement, or the agreement as proposed to be varied, is an employer to which a transitional pay equity order applies; and
 - (d) an employee covered by the agreement, or the agreement as proposed to be varied, is an affected employee of the employer referred to in paragraph (c).
-

- (2) For the purposes of determining whether the affected employee would be better off overall if the agreement, or the agreement as proposed to be varied, applied to the employee than if the relevant modern award applied to the employee, the base rate of pay payable under the relevant modern award to the employee is taken to be increased so that it is equal to the amount payable to the employee under the transitional pay equity order.

Note: For the meanings of *transitional pay equity order* and *affected employee*, see item 2 of Schedule 2.

69 Part 4 of Schedule 9 (heading)

Repeal the heading, substitute:

Part 4—Universal application of minimum wages to employees: transitional instruments

70 At the end of Schedule 9

Add:

Part 5—Provisions relating to Division 2B State instruments

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

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

- (1) If, on or after the Division 2B referral commencement:
- (a) a Division 2B State award applies to a Division 2B State reference employee; and
 - (b) a national minimum wage order would, if the employee were an award/agreement free employee, require the employee's employer to pay the employee a base rate of pay (the *employee's order rate*) that at least equals the national minimum wage, or a special national minimum wage, set by the order;

the base rate of pay payable to the employee under the Division 2B State award (the *award rate*) must not be less than the employee's order rate.

- (2) If the award rate is less than the employee's order rate, the Division 2B State award has effect in relation to the employee as if the award rate were equal to the employee's order rate.

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.

If employee is covered by a Division 2B State award or modern award that is in operation

- (1) If, on or after the Division 2B referral commencement:
- (a) a Division 2B State employment agreement applies to a Division 2B State reference employee; and
 - (b) a Division 2B State award or a modern award that is in operation covers the employee;

the base rate of pay payable to the employee under the agreement (the *agreement rate*) must not be less than the base rate of pay that would be payable to the employee under the Division 2B State award or the modern award (the *award rate*) if the Division 2B State award or the modern award applied to the employee.

- (2) If the agreement rate is less than the award rate, the Division 2B State employment agreement has effect in relation to the employee as if the agreement rate were equal to the award rate.

If employee is not covered by a Division 2B State award or modern award that is in operation

- (3) If, on or after the Division 2B referral commencement:
- (a) a Division 2B State employment agreement applies to a Division 2B State reference employee; and
 - (b) the employee is not covered by a Division 2B State award or a modern award that is in operation; and
 - (c) a national minimum wage order would, if the employee were an award/agreement free employee, require the employee's

employer to pay the employee a base rate of pay (the *employee's order rate*) that at least equals the national minimum wage, or a special national minimum wage, set by the order;

the base rate of pay payable to the employee under the Division 2B State employment agreement (the *agreement rate*) must not be less than the employee's order rate.

- (4) If the agreement rate is less than the employee's order rate, the Division 2B State employment agreement has effect in relation to the employee as if the agreement rate were equal to the employee's order rate.

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

- (1) On application by an employer to whom a Division 2B State instrument applies, FWA may make a determination the effect of which is to phase-in the effect of increases in base rates of pay that would otherwise take effect on a particular day because of item 16 or 17.
- (2) FWA must not make a determination under this item in relation to an employer unless it is satisfied that the determination is necessary to ensure the ongoing viability of the employer's enterprise.
- (3) Items 16 and 17 have effect in relation to an employer subject to any determinations FWA makes under this item.

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

- (1) This item applies in relation to an employee and a period if:
- (a) the employee is a Division 2B State reference employee; and
 - (b) the transitional national minimum wage order, or another national minimum wage order, is in operation throughout the period; and
 - (c) the employee is an award/agreement free employee throughout the period, and no Division 2B State instrument applies to the employee at any time in the period; and

- (d) the amount that is payable to the employee in relation to the period under the national minimum wage order is less than the amount (the *State minimum amount*) that would be payable to the employee in relation to the period under the State minimum wages instruments (see subitem (4)).
- (2) The national minimum wage order has effect, in relation to the employee and the period, as if it instead required the employer to pay the employee the State minimum amount.
- (3) In working out the State minimum amount, any increases of rates (whether because of indexation or otherwise) that would have taken effect after the Division 2B State referral commencement under State minimum wages instruments are to be disregarded.
- (4) The *State minimum wages instruments*, in relation to the employee, are orders, decisions or rulings (however described), as in force immediately before the Division 2B referral commencement:
 - (a) that were made by a State industrial body under a State industrial law of the Division 2B referring State; and
 - (b) that provide for employees to be paid a minimum wage or a minimum rate of remuneration, or that affect the entitlement of such employees to be paid a minimum wage or a minimum rate of remuneration.
- (5) This item has effect subject to the regulations, which may:
 - (a) provide for how amounts referred to in paragraph (1)(d) are to be worked out (for example, in relation to casual employees); or
 - (b) provide for how a national minimum wage order has effect because of subitem (2); or
 - (c) provide that certain orders, decisions or rulings (however described) made by a State industrial body are, or are not, State minimum wages instruments as defined in subitem (4).

Division 2—Other matters

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

- (1) In an annual wage review, FWA may make a determination varying terms of a Division 2B State award relating to wages.
-

- (2) For that purpose, Division 3 of Part 2-6 of the FW Act (other than section 292) applies to terms of a Division 2B State award relating to wages in the same way as it applies to a modern award.

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

Add:

; (d) a Division 2B State instrument.

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

Repeal the heading, substitute:

Division 1—Transfers of business: transitional instruments

73 Before item 7 of Schedule 11

Insert:

6A Application of this Division

This Division applies in relation to a transfer of business and transferable instruments that are transitional instruments.

Note: Transfers of business affecting Division 2B State instruments are dealt with in Division 4 of this Part.

74 At the end of Part 3 of Schedule 11

Add:

Division 4—Transfers of business: Division 2B State instruments

14 Application of this Division

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

Note: Transfers of business affecting transitional instruments are dealt with in Division 1 of this Part.

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

- (1) This item applies if:
-

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

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

-
- (a) there is a transfer of business from an employer (the *old employer*) to another employer (the *new employer*), as described in subsection 311(1) of the FW Act; and
 - (b) the connection between the old employer and the new employer referred to in paragraph 311(1)(d) of the FW Act occurs on or after the Division 2B referral commencement.
- (2) Part 2-8 of the FW Act (as modified by item 16 of this Schedule) applies in relation to the transfer of business.

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

- (1) Subsection 312(1) of the FW Act applies in relation to the transfer of business as if the following paragraph were added at the end:
; (d) a Division 2B State instrument.
- (2) Except as provided in subitems (3) to (5), Part 2-8 of the FW Act applies in relation to the transfer of business as if:
- (a) a reference to an enterprise agreement included a reference to a Division 2B State employment agreement; and
 - (b) a reference to a modern award included a reference to a Division 2B State award.
- (3) Paragraph (2)(a) does not apply in relation to the reference to an enterprise agreement in paragraph 312(1)(a) or 319(1)(c) of the FW Act.
- (4) Paragraph (2)(b) does not apply in relation to the reference to a modern award in subsection 312(2) or paragraph 319(1)(c) of the FW Act.
- (5) The following provisions of Part 2-8 of the FW Act apply in relation to the transfer of business as if a reference to an enterprise agreement included a reference to a collective Division 2B State employment agreement:
- (a) subsection 315(3);
 - (b) paragraphs 318(1)(b) and (2)(c);
 - (c) paragraph 319(2)(c).
- (6) Paragraph 319(1)(b) of the FW Act applies in relation to the transfer of business as if the words “(other than an individual Division 2B State

employment agreement)” were inserted after the words “a transferable instrument”.

- (7) If a transferable instrument that is a Division 2B State award starts to cover the new employer in relation to the transfer of business as mentioned in paragraph 313(1)(a) of the FW Act, FWA cannot make an order under paragraph 319(1)(c) of the FW Act.

75 At the end of Schedule 12

Add:

4 Application in relation to Division 2B State instruments

Part 3-1 of the FW Act has effect as if:

- (a) a reference in that Part to an enterprise agreement included a reference to a Division 2B State employment agreement; and
- (b) a reference in that Part to a modern award included a reference to a Division 2B State award.

Note: References in Part 3-1 of the FW Act:

- (a) to an enterprise agreement are found in paragraphs 341(2)(e) and (g), paragraph 344(b), subsection 353(3) and subparagraphs 354(1)(a)(iii) and (b)(ii) of that Act; and
- (b) to a modern award are found in paragraphs 341(2)(g) and 344(b) of that Act.

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

Insert:

- (ba) to the extent that a Division 2B State instrument applied to the person, and the person was not a casual employee—the person’s ordinary hours of work under item 48 of Schedule 3A; or

77 Item 2 of Schedule 13 (heading)

Repeal the heading, substitute:

2 Employee covered by individual agreement-based transitional instrument or individual Division 2B State employment agreement is taken not to be an employee who will be, or who is, covered by enterprise agreement in certain circumstances

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

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

78 Subitem 2(1) of Schedule 13

After “transitional instrument”, insert “or an individual Division 2B State employment agreement”.

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

After “individual agreement-based transitional instrument”, insert “or the individual Division 2B State employment agreement”.

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

Add “or subitem 25(2) of Schedule 3A”.

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

After “individual agreement-based transitional instrument”, insert “or an individual Division 2B State employment agreement”.

82 Subitem 2(2) of Schedule 13 (note)

After “Schedule 3”, insert “or subitem 25(2) of Schedule 3A”.

83 Paragraphs 2(3)(a) and (b) of Schedule 13

After “individual agreement-based transitional instrument”, insert “or the individual Division 2B State employment agreement”.

84 At the end of paragraph 2(3)(b) of Schedule 13

Add “or subitem 25(2) of Schedule 3A”.

85 Item 3 of Schedule 13 (heading)

After “instruments”, insert “or collective Division 2B State employment agreements”.

86 Item 3 of Schedule 13

Omit “transitional” (first occurring).

87 Paragraphs 3(a) to (e) of Schedule 13

Repeal the paragraphs, substitute:

- (a) any of the following transitional instruments:
 - (i) a collective agreement;
 - (ii) a workplace determination;
 - (iii) a preserved collective State agreement;
-

- (iv) a pre-reform certified agreement;
- (v) a section 170MX award;
- (b) a collective Division 2B State employment agreement;

88 Paragraph 3(f) of Schedule 13

Omit “transitional” (wherever occurring).

89 Item 4 of Schedule 13 (heading)

Omit “**transitional instrument**”, substitute “**agreement-based transitional instrument or Division 2B State employment agreement**”.

90 Subitem 4(1) of Schedule 13

After “agreement-based transitional instrument”, insert “or a Division 2B State employment agreement”.

91 Subitem 4(2) of Schedule 13

After “individual agreement-based transitional instrument”, insert “or an individual Division 2B State employment agreement”.

92 Subitem 4(2) of Schedule 13

After “instrument” (second and third occurring), insert “or agreement”.

93 At the end of subitem 4(2) of Schedule 13

Add “or subitem 25(2) of Schedule 3A”.

94 Subitem 4(2) of Schedule 13 (note)

Repeal the note, substitute:

Note: The effect of this provision is that an employee who is covered by an agreement-based transitional instrument or a Division 2B State employment agreement may not organise or engage in industrial action until after the nominal expiry date of the instrument or agreement has passed. However, this does not apply to an individual agreement-based transitional instrument, or an individual Division 2B State employment agreement, in relation to which a conditional termination has been made.

95 Subitem 4(3) of Schedule 13

After “agreement-based transitional instrument”, insert “or the Division 2B State employment agreement”.

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

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

96 Subitem 4(3) of Schedule 13

After “such an instrument”, insert “or agreement”.

97 At the end of item 6 of Schedule 13

Add:

Note: For the continuation of orders or injunctions to prevent or stop industrial action that were made by State industrial bodies or courts of Division 2B referring States, see item 61 of Schedule 3A.

98 Item 17 of Schedule 13 (heading)

After “agreement-based transitional instruments”, insert “and collective Division 2B State employment agreements that”.

99 Subitem 17(1) of Schedule 13

Omit “transitional”.

100 Paragraphs 17(1)(a) to (e) of Schedule 13

Repeal the paragraphs, substitute:

- (a) any of the following transitional instruments:
 - (i) a collective agreement;
 - (ii) a workplace determination;
 - (iii) a preserved collective State agreement;
 - (iv) a pre-reform certified agreement;
 - (v) a section 170MX award;
- (b) a collective Division 2B State employment agreement.

101 Subitem 17(2) of Schedule 13

Omit “transitional” (wherever occurring).

102 Part 5 of Schedule 13 (heading)

Repeal the heading, substitute:

Part 5—Effect of conduct engaged in while bargaining for WR Act collective agreement or collective State employment agreement

103 Item 18 of Schedule 13 (heading)

Omit “WR Act”.

104 After subitem 18(1) of Schedule 13

Insert:

(1A) This item applies if:

- (a) before the Division 2B referral commencement, a bargaining representative for a proposed enterprise agreement engaged in conduct in relation to a proposed collective State employment agreement; and
- (b) immediately before that day, the collective State employment agreement had not been made, or had been made but had not been lodged (however described) under a State industrial law of a Division 2B referring State; and
- (c) the employment of the employees who would be covered by the proposed enterprise agreement would have been subject to the proposed collective State employment agreement, had it come into operation; and
- (d) the employers who would be covered by the proposed enterprise agreement would have been bound by the proposed collective State employment agreement, had it come into operation.

105 Subitem 18(2) of Schedule 13

Omit “FWA may take into account that conduct”, substitute “If this item applies because of subitem (1) or (1A), FWA may take into account the conduct referred to in that subitem”.

106 Paragraph 20(a) of Schedule 13

After “award-based transitional instrument”, insert “and a Division 2B State award”.

107 Paragraph 20(b) of Schedule 13

After “agreement-based transitional instrument”, insert “and a Division 2B State agreement”.

108 At the end of item 3 of Schedule 14

Add:

; (d) a Division 2B State instrument.

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

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

109 At the end of Schedule 15

Add:

4 Application of FW Act—stand down under Division 2B State instruments

Subsection 524(2) of the FW Act (which deals with circumstances allowing stand down) applies in relation to a Division 2B State instrument as if a reference to an enterprise agreement included a reference to a Division 2B State instrument.

110 After item 4 of Schedule 16

Insert:

4A Compliance with Division 2B State instruments

Division 2B State awards

- (1) A person must not contravene a term of a Division 2B State award that applies to the person.

Note 1: This subitem is a civil remedy provision (see item 16, and Part 4-1 of the FW Act).

Note 2: An injunction may not be granted in relation to a contravention of a Division 2B State award (see item 17).

Division 2B State employment agreements

- (2) A person must not contravene a term of a Division 2B State employment agreement that applies to the person.

Note 1: This subitem is a civil remedy provision (see item 16, and Part 4-1 of the FW Act).

Note 2: An injunction may not be granted in relation to a contravention of a Division 2B State employment agreement instrument (see item 17).

4B Compliance with obligations relating to conditional terminations of individual Division 2B State employment agreements

- (1) An employer must not contravene subitem 25(6) of Schedule 3A.

Note: This subitem is a civil remedy provision (see item 16, and Part 4-1 of the FW Act).

- (2) A bargaining representative who applies to FWA for approval of an enterprise agreement must not contravene subitem 25(7) of Schedule 3A.
-

Note: This subitem is a civil remedy provision (see item 16, and Part 4-1 of the FW Act).

110A After item 7 of Schedule 16

Insert:

7A Compliance with transitional pay equity orders and orders to continue effect of terms relating to long service leave

- (1) A person must not contravene a term of a transitional pay equity order that applies to the person.

Note: This subitem is a civil remedy provision (see item 16, and Part 4-1 of the FW Act).

- (2) A person must not contravene an order under item 30 of Schedule 3A that continues the effect of terms of a Division 2B State award relating to long service leave.

Note: This subitem is a civil remedy provision (see item 16, and Part 4-1 of the FW Act).

111 At the end of subitem 12(1) of Schedule 16

Add “or an individual Division 2B State employment agreement”.

112 At the end of subparagraph 13(1)(b)(iv) of Schedule 16

Add “or an individual Division 2B State employment agreement”.

113 Paragraph 16(1)(c) of Schedule 16

After “transitional instrument,”, insert “a Division 2B State instrument,”.

114 Paragraph 16(1)(d) of Schedule 16

Omit “item 40”, substitute “items 40 and 44C”.

115 Paragraph 16(1)(da) of Schedule 16

Repeal the paragraph, substitute:

- (da) the reference in subsections 540(3) and (4) to a term in an enterprise agreement that would be an outworker term if it were included in a modern award included:
- (i) a reference to a term in a collective agreement-based transitional instrument that would be an outworker term if it were included in an award-based transitional instrument; and

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

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

-
- (ii) a reference to a term in a collective Division 2B State employment agreement that would be an outworker term if it were included in a Division 2B State award; and

116 Subitem 16(1) of Schedule 16 (after table item 44)

Insert:

44A	4A(1) (other than in relation to a contravention or proposed contravention of an outworker term)	(a) an employee; (b) an employer; (c) an employee organisation; (d) an employer organisation; (e) an inspector	(a) the Federal Court; (b) the Federal Magistrates Court; (c) an eligible State or Territory court	60 penalty units
44B	4A(1) (in relation to a contravention or proposed contravention of an outworker term)	(a) an outworker; (b) an employer; (c) an outworker entity; (d) an employee organisation; (e) an employer organisation; (f) an inspector	(a) the Federal Court; (b) the Federal Magistrates Court; (c) an eligible State or Territory court	60 penalty units

Transitional matters related to State referrals under Division 2B of Part 1-3 of the Fair
 Work Act 2009 **Schedule 2**
 Amendment of the Fair Work (Transitional Provisions and Consequential Amendments)
 Act 2009 **Part 1**

44C	4A(2) (in relation to a contravention or proposed contravention of a collective Division 2B State employment agreement other than a contravention or proposed contravention of a term that would be an outworker term if it were included in a Division 2B State award)	(a) an employee; (b) an employer; (c) an employee organisation to which the collective Division 2B State employment agreement concerned applies; (d) an inspector	(a) the Federal Court; (b) the Federal Magistrates Court; (c) an eligible State or Territory court	60 penalty units
44D	4A(2) (in relation to a contravention or proposed contravention of a term in a collective Division 2B State employment agreement that would be an outworker term if it were included in a Division 2B State award)	(a) an employee; (b) an employer; (c) an employee organisation; (d) an inspector	(a) the Federal Court; (b) the Federal Magistrates Court; (c) an eligible State or Territory court	60 penalty units
44E	4A(2) (in relation to a	(a) an employee;	(a) the Federal Court;	60 penalty units

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

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

	contravention of an individual Division 2B State employment agreement)	(b) an employer; (c) an employee organisation; (d) an inspector	(b) the Federal Magistrates Court; (c) an eligible State or Territory court	
44F	4B(1)	(a) an employee who the proposed enterprise agreement will cover; (b) a bargaining representative for the proposed enterprise agreement; (c) an inspector	(a) the Federal Court; (b) the Federal Magistrates Court; (c) an eligible State or Territory court	30 penalty units
44G	4B(2)	(a) an employee who the proposed enterprise agreement will cover; (b) a bargaining representative for the proposed enterprise agreement; (c) an inspector	(a) the Federal Court; (b) the Federal Magistrates Court; (c) an eligible State or Territory court	30 penalty units

116A Subitem 16(1) of Schedule 16 (after table item 48)

Insert:

48A	7A(1)	(a) an employee; (b) an employee organisation; (c) an inspector	(a) the Federal Court; (b) the Federal Magistrates Court; (c) an eligible State or Territory court	60 penalty units
48B	7A(2)	(a) an employee; (b) an employer; (c) an employee	(a) the Federal Court; (b) the Federal Magistrates	60 penalty units

- | | |
|----------------------------------|---------------------------------------------|
| organisation; | Court; |
| (d) an employer
organisation; | (c) an eligible State
or Territory court |
| (e) an inspector | |

117 Subitem 16(2) of Schedule 16

After “40A”, insert “, 44A, 44B, 44C, 44D,”.

118 Subparagraph 16(2)(b)(i) of Schedule 16

Repeal the subparagraph, substitute:

- (i) references in the section to a modern award were references to an award-based transitional instrument, a Division 2B State award or a continuing Schedule 6 instrument; and

119 After paragraph 17(a) of Schedule 16

Insert:

- (aa) a Division 2B State instrument; or

120 After item 14 of Schedule 18

Insert:

**14A Conduct after Division 2B referral commencement—
application of Part 5-2 of FW Act**

- (1) Part 5-2 of the FW Act applies in relation to conduct that occurs on or after the Division 2B referral commencement as if:
 - (a) a reference in that Part to a fair work instrument were a reference to a Division 2B State instrument; and
 - (b) paragraphs 706(2)(a) to (f) included a reference to a term of a Division 2B State instrument.
- (2) This item has effect in addition to item 14.

121 After item 623 of Schedule 22

Insert:

**623A Division 2B State awards and Division 2B State
employment agreements**

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

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

The *Fair Work (Registered Organisations) Act 2009* applies as if:

- (a) references in that Act to a modern award included a reference to a Division 2B State award; and
- (b) references in that Act to an enterprise agreement included a reference to a Division 2B State employment agreement.

Part 2—Amendment of other Acts

Age Discrimination Act 2004

122 Subparagraph 39(8)(b)(ii)

After “transitional instrument”, insert “or Division 2B State instrument”.

Australian Human Rights Commission Act 1986

123 Subsection 46PW(7) (paragraph (b) of the definition of *industrial instrument*)

After “transitional instrument”, insert “, or a Division 2B State instrument,”.

Disability Discrimination Act 1992

124 Subparagraph 47(1)(c)(ii)

After “transitional instrument”, insert “or Division 2B State instrument”.

Fair Work Act 2009

125 Paragraph 113(3)(a)

After “award”, insert “, or a State reference transitional award,”.

126 Subparagraph 113(3)(a)(i)

Omit “immediately before the commencement of this Part”, substitute “at the test time (see subsection (3A))”.

127 Paragraph 113(3)(b)

After “award”, insert “, or the State reference transitional award,”.

128 After subsection 113(3)

Insert:

(3A) For the purpose of subparagraph (3)(a)(i), the test time is:

- (a) immediately before the commencement of this Part; or
- (b) if the employee is a Division 2B State reference employee (as defined in Schedule 2 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*)—immediately before the Division 2B referral commencement (as defined in that Schedule).

129 Paragraph 168E(3)(a)

After “section 30C”, insert “or 30M”.

130 Paragraph 168E(3)(b)

After “section 30A”, insert “or 30K”.

131 Paragraph 168E(4)(a)

After “section 30D”, insert “or 30N”.

132 Paragraph 168E(4)(b)

After “section 30A”, insert “or 30K”.

Legislative Instruments Act 2003

133 Subsection 7(1) (table item 18A)

After “Transitional instruments”, insert “and Division 2B State instruments”.

Sex Discrimination Act 1984

134 Subparagraph 40(1)(g)(ii)

After “transitional instrument”, insert “or Division 2B State instrument”.

Superannuation Guarantee (Administration) Act 1992

135 At the end of subsection 12A(1)

Add:

- ; (i) *Division 2B State instrument*.

136 After subsection 32C(6B)

Insert:

Contributions under Division 2B State instruments

- (7) A contribution to a fund by an employer for the benefit of an employee is also made in compliance with the choice of fund requirements if the contribution, or a part of the contribution, is made under, or in accordance with, a Division 2B State instrument.

Note: The expression *Division 2B State instrument* is defined in section 12A by reference to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

137 Regulations may make consequential amendments of Acts

- (1) The Governor-General may make regulations amending Acts (other than the *Fair Work Act 2009*) being amendments that are consequential on, or that otherwise relate to, the enactment of this Act.
- (2) For the purposes of the *Amendments Incorporation Act 1905*, amendments made by regulations for the purposes of this item are to be treated as if they had been made by an Act.

Note: This subitem ensures that the amendments can be incorporated into a reprint of the Act.

138 Regulations may take effect from date before registration

- (1) Despite subsection 12(2) of the *Legislative Instruments Act 2003* and subject to subitem (2), regulations made under item 137 may be expressed to take effect from a date before the regulations are registered under that Act.
- (2) If:
- (a) regulations made under item 137 are expressed to take effect from a date (the *registration date*) before the regulations are registered under the *Legislative Instruments Act 2003*; and
 - (b) a person engaged in conduct before the registration date; and
 - (c) but for the retrospective effect of the regulations, the conduct would not have contravened a provision of an Act;

then a court must not convict the person of an offence, or order the person to pay a pecuniary penalty, in relation to the conduct on the grounds that it contravened a provision of that Act.

Schedule 3—Other amendments

Part 1—Main amendments

Fair Work Act 2009

1A Section 12 (after paragraph (c) of the definition of *eligible State or Territory court*)

Insert:

- (ca) the Industrial Court of New South Wales;

1 Section 14

Before “A *national system employer*”, insert “(1)”.

2 At the end of section 14 (after the notes)

Add:

Particular employers declared not to be national system employers

- (2) Despite subsection (1) and sections 30D and 30N, a particular employer is not a national system employer if:
 - (a) that employer:
 - (i) is a body established for a public purpose by or under a law of a State or Territory, by the Governor of a State, by the Administrator of a Territory or by a Minister of a State or Territory; or
 - (ii) is a body established for a local government purpose by or under a law of a State or Territory; or
 - (iii) is a wholly-owned subsidiary (within the meaning of the *Corporations Act 2001*) of, or is wholly controlled by, an employer to which subparagraph (ii) applies; and
 - (b) that employer is specifically declared, by or under a law of the State or Territory, not to be a national system employer for the purposes of this Act; and
 - (c) an endorsement by the Minister under paragraph (4)(a) is in force in relation to the employer.

- (3) Paragraph (2)(b) does not apply to an employer that is covered by a declaration by or under such a law only because it is included in a specified class or kind of employer.

Endorsement of declarations

- (4) The Minister may, in writing:
- (a) endorse, in relation to an employer, a declaration referred to in paragraph (2)(b); or
 - (b) revoke or amend such an endorsement.
- (5) An endorsement, revocation or amendment under subsection (4) is a legislative instrument, but neither section 42 (disallowance) nor Part 6 (sunsetting) of the *Legislative Instruments Act 2003* applies to the endorsement, revocation or amendment.

Employers that cannot be declared

- (6) Subsection (2) does not apply to an employer that:
- (a) generates, supplies or distributes electricity; or
 - (b) supplies or distributes gas; or
 - (c) provides services for the supply, distribution or release of water; or
 - (d) operates a rail service or a port;
- unless the employer is a body established for a local government purpose by or under a law of a State or Territory, or is a wholly-owned subsidiary (within the meaning of the *Corporations Act 2001*) of, or is wholly controlled by, such a body.
- (7) Subsection (2) does not apply to an employer if the employer is an Australian university (within the meaning of the *Higher Education Support Act 2003*) that is established by or under a law of a State or Territory.

3 After section 14

Insert:

14A Transitional matters relating to employers etc. becoming, or ceasing to be, national system employers etc.

- (1) The regulations may make provisions of a transitional, application or saving nature in relation to any of the following:
-

- (a) an employer ceasing to be a national system employer because subsection 14(2) applies to the employer;
 - (b) an individual ceasing to be a national system employee because an employer ceases to be a national system employer for the reason referred to in paragraph (a);
 - (c) an employer becoming a national system employer because subsection 14(2) ceases to apply to the employer;
 - (d) an individual becoming a national system employee because an employer becomes a national system employer for the reason referred to in paragraph (c).
- (2) Without limiting subsection (1), regulations made for the purpose of that subsection may:
- (a) modify provisions of this Act or the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*; or
 - (b) provide for the application (with or without modifications) of provisions of this Act, or the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, to matters to which they would otherwise not apply.

4 After subparagraph 423(7)(b)(ii)

Insert:

- (ia) if the industrial action is being engaged in in a State that is a referring State as defined in section 30B or 30L—the Minister of the State who has responsibility for workplace relations matters in the State;
- (ib) if the industrial action is being engaged in in a Territory—the Minister of the Territory who has responsibility for workplace relations matters in the Territory;

5 After subparagraph 424(2)(b)(ii)

Insert:

- (ia) if the industrial action is being engaged in, or is threatened, impending or probable, in a State that is a referring State as defined in section 30B or 30L—the Minister of the State who has responsibility for workplace relations matters in the State;
- (ib) if the industrial action is being engaged in, or is threatened, impending or probable, in a Territory—the

Minister of the Territory who has responsibility for workplace relations matters in the Territory;

6 After paragraph 426(6)(b)

Insert:

- (ba) if the industrial action is being engaged in in a State that is a referring State as defined in section 30B or 30L—the Minister of the State who has responsibility for workplace relations matters in the State; or
- (bb) if the industrial action is being engaged in in a Territory—the Minister of the Territory who has responsibility for workplace relations matters in the Territory; or

7 After subsection 565(1)

Insert:

- (1A) No appeal lies from a decision of an eligible State or Territory court exercising jurisdiction under this Act, except:
 - (a) if the court was exercising summary jurisdiction—an appeal, to that court or another eligible State or Territory court of the same State or Territory, as provided for by a law of that State or Territory; or
 - (b) in any case—an appeal as provided for by subsection (1).

Appeals from appellate decisions of eligible State or Territory courts

- (1B) An appeal lies to the Federal Court from a decision of an eligible State or Territory court made on appeal from a decision that:
 - (a) was a decision of that court or another eligible State or Territory court of the same State or Territory; and
 - (b) was made in the exercise of jurisdiction under this Act.
- (1C) No appeal lies from a decision to which subsection (1B) applies, except an appeal as provided for by that subsection.

Note: The following heading to subsection 565(1) is inserted “*Appeals from original decisions of eligible State or Territory courts*”.

8 At the end of subsection 565(2)

Add “or (1B)”.

Note: The following heading to subsection 565(2) is inserted “*Leave to appeal not required*”.

9 Subsection 565(3)

Repeal the subsection.

10 After section 569

Insert:

569A State or Territory Minister's entitlement to intervene

- (1) The Minister of a State or Territory who has responsibility for workplace relations matters may intervene on behalf of the State or Territory in proceedings before a court (including a court of a State or Territory) in relation to a matter arising under this Act if he or she believes it is in the public interest of the State or Territory to do so.
- (2) If the Minister of a State or Territory who has responsibility for workplace relations matters intervenes, he or she is taken to be a party to the proceedings for the purposes of instituting an appeal from a judgment given in the proceedings.
- (3) Despite section 570, a court may make an order as to costs against a State or Territory if:
 - (a) the Minister of a State or Territory who has responsibility for workplace relations matters intervenes under subsection (1);
or
 - (b) he or she institutes an appeal from a judgment as referred to in subsection (2).

11 At the end of subsection 570(1) (before the note)

Add "or 569A".

12 Subsection 570(1) (at the end of the note)

Add "A State or Territory might be ordered to pay costs under section 569A.".

13 At the end of Subdivision C of Division 3 of Part 5-1

Add:

597A State or Territory Minister’s entitlement to make submissions

- (1) The Minister of a State or Territory who has responsibility for workplace relations matters is entitled to make a submission for consideration in relation to a matter before FWA if:
 - (a) the matter is before a Full Bench; and
 - (b) it is in the public interest of the State or Territory for the Minister of the State or Territory to make a submission.
- (2) Subsection (1) applies whether or not FWA holds a hearing in relation to the matter.

14 Subsection 604(1)

Repeal the subsection, substitute:

- (1) A person who is aggrieved by a decision:
 - (a) made by FWA (other than a decision of a Full Bench or the Minimum Wage Panel); or
 - (b) made by the General Manager (including a delegate of the General Manager) under the *Fair Work (Registered Organisations) Act 2009*;may appeal the decision, with the permission of FWA.

15 Subsection 607(1)

After “decision of FWA”, insert “or the General Manager”.

16 Paragraph 613(2)(a)

Repeal the paragraph, substitute:

- (a) decide under section 604 whether to grant permission to appeal:
 - (i) a decision of a delegate under subsection 625(2); or
 - (ii) a decision of the General Manager (including a delegate of the General Manager) under the *Fair Work (Registered Organisations) Act 2009*; and

17 Subsection 649(1)

After “facilitates”, insert “and encourages”.

Fair Work (Transitional Provisions and Consequential Amendments) Act 2009

17A After subitem 2(3) of Schedule 5

Insert:

- (3A) Part 10A of the WR Act applies as if:
- (a) a reference to an employee were a reference to a national system employee; and
 - (b) a reference to an employer were a reference to a national system employer; and
 - (c) all the words after “eligible entity” in paragraph 576K(2)(b) were omitted and the words “may arrange for work to be performed for the entity (either directly or indirectly), if the work is of a kind that is often performed by outworkers” were substituted; and
 - (d) the definition of *eligible entity* in section 576U were omitted; and
 - (e) subsection 576Z(4) were omitted; and
 - (f) a reference to an eligible entity were a reference to an outworker entity within the meaning of the FW Act; and
 - (g) subsection 576K(1) were omitted; and
 - (h) a reference to an outworker in subsection 576K(2) were a reference to an outworker within the meaning of the FW Act; and
 - (i) the definition of *outworker term* in section 576U were omitted; and
 - (j) a reference to an outworker term in section 576V were a reference to an outworker term within the meaning of the FW Act.

17B Subitems 5(1) and (3) of Schedule 6A

After “FWA” (wherever occurring), insert “or the Commission”.

17C Subitem 5(3) of Schedule 6A

Omit all the words after “miscellaneous modern award”, substitute “that, at the time of the termination, is or is likely to be in operation and that is appropriate for them”.

17D Subitems 5(4) and (5) of Schedule 6A

After “FWA”, insert “or the Commission”.

17E At the end of item 5 of Schedule 6A

Add:

- (6) If the Commission terminates the current award, the termination is taken, after the Commission has ceased to exist, to have been made by FWA.

Note: Schedule 18 provides for when the Commission ceases to exist.

Part 2—Minor technical amendments

Fair Work (Transitional Provisions and Consequential Amendments) Act 2009

18 Paragraph 12(1)(d) of Schedule 2

Omit “*Human Rights and Equal Opportunity Commission Act 1986*”, substitute “*Australian Human Rights Commission Act 1986*”.

19 Item 11 of Schedule 3 (heading)

Omit “HREOC”, substitute “AHRC”.

20 Subitem 11(1) of Schedule 3

Omit “*Human Rights and Equal Opportunity Commission Act 1986*”, substitute “*Australian Human Rights Commission Act 1986*”.

21 Paragraph 38(3)(a) of Schedule 3

Omit “subitem 20(2)”, substitute “subitems 20(2) and (3)”.

22 Subitem 8(5) of Schedule 11

Omit “collective agreement-based transitional agreement”, substitute “collective agreement-based transitional instrument”.

23 Subitem 4(3) of Schedule 13

Omit “WR Act”, substitute “FW Act”.

*[Minister's second reading speech made in—
House of Representatives on 21 October 2009
Senate on 23 November 2009]*

(208/09)

Fair Work Amendment (State Referrals and Other Measures) Act 2009 *No. 124, 2009*

117