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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**WORKPLACE RELATIONS AMENDMENT (TRANSITION TO  
FORWARD WITH FAIRNESS) BILL 2008**

EXPLANATORY MEMORANDUM

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

## **WORKPLACE RELATIONS AMENDMENT (TRANSITION TO FORWARD WITH FAIRNESS) BILL 2008**

### **OUTLINE**

The Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008 (the Bill) would amend the *Workplace Relations Act 1996* (the Act) to make a number of changes to the framework for workplace agreements and to enable the process of award modernisation to commence. The amendments would give effect to key Government election commitments and begin the transition to a new workplace relations system.

### **Workplace agreements**

The Bill would make the following key amendments to the Act.

Australian Workplace Agreements (AWAs) could not be made after the commencement date. AWAs made and lodged before the commencement date, or made before commencement and lodged within 14 days after that date, would continue to operate until terminated or replaced.

A new type of instrument would be created – the Individual Transitional Employment Agreement (ITEA). ITEAs could be made until 31 December 2009, between an employer that employed at least one employee on an individual employment agreement such as an AWA, a pre-reform AWA, an individual preserved State agreement or an individual Victorian employment agreement at 1 December 2007, and

- an existing employee employed under an AWA, a pre-reform AWA, an individual preserved State agreement or an individual Victorian employment agreement, or
- a new employee who has not previously been employed by that employer.

The Bill would clarify that employees on ITEAs (and existing AWAs) that have passed their nominal expiry dates would be able to make and approve proposed collective agreements and would be eligible to take part in ballots for protected industrial action.

The “fairness test” would be replaced by a no-disadvantage test for both ITEAs and collective agreements. Under the no-disadvantage test, the Workplace Authority Director would have to be satisfied that a workplace agreement would not reduce employees’ overall terms and conditions of employment when compared with a reference instrument, such as an otherwise applicable collective agreement (if the workplace agreement is an ITEA), an award, or if there is no such instrument, an appropriate designated award.

The Bill would introduce a number of changes relating to the circumstances in which workplace agreements commence operation.

- ITEAs for existing employees, and employer and union collective agreements, could only commence operation after the Workplace Authority Director has approved them, on the basis that they pass the no-disadvantage test.

- ITEAs for new employees, and employer and union greenfields agreements, would commence operation when lodged with the Workplace Authority Director, but would cease to operate if they later fail the no-disadvantage test. In such circumstances compensation may be payable to employees and the parties would revert to the instrument that applied before the agreement was lodged.
- Only workplace agreements, agreement variations and terminations that meet fundamental requirements (such as employee approval) would come into operation. Employers would be required to lodge copies of signed workplace agreements and variations. If a document does not come into operation because these requirements are not met, a Court could order that the document is to have effect as if it were a workplace agreement, variation or termination, but only if this would not result in a reduction in an employee's overall terms and conditions of employment.
- Penalties and remedies for non-compliance with statutory requirements that apply in relation to workplace agreements, variations and terminations would also apply in relation to documents that are represented to be workplace agreements, variations and terminations.

The Bill would remove the concept of 'protected award conditions' by repealing section 354 of the Act. This concept is no longer required because the whole award could be used as the basis for the no-disadvantage test and the whole award could apply to the parties when a workplace agreement is terminated (see below).

The Bill would repeal section 355, which restricts the incorporation of terms from other instruments in workplace agreements, and section 399, which prevents an award or previous workplace agreement from applying to an employee once the employee's current workplace agreement is terminated.

Unilateral termination of collective agreements would no longer be permitted. Instead, the Australian Industrial Relations Commission (the Commission) could terminate a collective agreement on application, if the Commission was satisfied that the termination would not be contrary to the public interest.

Transitional arrangements would provide for AWAs and collective agreements made before the commencement date to continue in operation under most current rules.

The Bill would make amendments to the Act (and other legislation) that are consequential on the amendments set out above, including in relation to enforcement and transmission of business.

Division 3A of Part 5 of the Act would be repealed. That Division currently requires the Workplace Authority Director to issue a document called the Workplace Relations Fact Sheet and requires employers to provide a copy of that document to their employees.

The Bill would permit pre-reform certified agreements to be extended and varied on application to the Commission. The Commission could extend or vary the agreement if satisfied that the parties genuinely agree, and that the parties have not organised or engaged in industrial action or applied for a protected action ballot in relation to proposed

industrial action, after the day the Bill is introduced. Variations of pre-reform certified agreements would have to pass a no-disadvantage test.

The Bill would enable old IR agreements to continue in operation and to be terminated by the Commission where the parties agree.

## **Awards**

### *Award modernisation*

The Bill would introduce a new Part 10A dealing with award modernisation. The new Part would set out the award modernisation function of the Australian Industrial Relations Commission (the Commission) and specify the objectives of award modernisation and requirements for modern awards. The Bill also proposes the repeal of existing Division 4 of Part 10, which deals with award rationalisation and simplification. These processes would be overtaken by the new award modernisation process.

Modern awards would be able to contain terms about 10 allowable modern award matters, or terms about certain other matters specified in an award modernisation request. The Commission would undertake award modernisation in accordance with the terms of an 'award modernisation request' made by the Minister to the President. The proposed award modernisation request is set out at pages 76 – 81 of this explanatory memorandum.

Among other matters, the proposed award modernisation request:

- specifies the award modernisation process that is to be carried out and the timing for completion of that process;
- specifies matters that can be included in awards and direct the Commission as to the types of terms that must be included in awards; and
- requires the Commission to prepare progress reports and make them available.

The proposed award modernisation request also specifies the extent to which modern awards may include terms about the proposed National Employment Standards. Broadly, the National Employment Standards are:

- hours of work;
- parental leave;
- flexible work for parents;
- annual leave;
- personal, carers and compassionate leave;
- community service leave;
- public holidays;
- information in the workplace;
- notice of termination and redundancy; and
- long service leave.

The Bill would include only those matters that are necessary in order for the Commission to undertake award modernisation. Other matters will be left to the discretion of the Commission or contained in the award modernisation request.

**FINANCIAL IMPACT STATEMENT**

The measures proposed in this Bill are budget-neutral.

## REGULATION IMPACT STATEMENT

This Regulation Impact Statement relates to the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008 (the Bill). It deals first with issues relating to the overall context for the proposed legislation and then addresses the major elements of the Bill in further detail.

### BACKGROUND

#### Forward with Fairness

A major election commitment of the Australian Government (the Government) was to implement a fairer and more productive workplace relations system proposed to come into effect in 2010. The Government's election commitments for the workplace relations system are spelt out in *Forward with Fairness – Labor's plan for fairer and more productive Australian workplaces* released in April 2007.

In summary, the election commitments involve putting in place a new system built on:

- (i) a strong safety net of ten legislated National Employment Standards (NES) for all employees;
- (ii) a modern, simple award system that appropriately protects award-covered employees while allowing greater flexibility for high-income employees;
- (iii) arrangements tailored to individual workplaces through collective bargaining and common law contracts;
- (iv) no provision for individual statutory agreements; and
- (v) a modernised and flexible award system; and
- (vi) a new independent agency, Fair Work Australia, to act as a convenient 'one-stop-shop' for workplace relations services, advice and compliance.

In addition, the Government is working with state and territory governments to create a uniform national workplace relations system for the private sector.

#### Transition to Forward with Fairness

The Government's election commitments for the transition to the new workplace relations system are spelt out in *Forward with Fairness - Policy Implementation Plan* (the Policy Implementation Plan) released in August 2007. The proposed legislation is framed to give effect to the transition arrangements set out at pages 4 to 8 of the Policy Implementation Plan.

A key issue underpinning the development of the transition to the new workplace relations system is to ensure that existing workplace agreements continue to operate until they are either replaced or terminated. A further consideration is the importance of providing

employers and employees with time to work through their transition to the new system without major disruption or confusion.

The key provisions in the Bill will:

- (i) prevent the making of new Australian Workplace Agreements (AWAs);
- (ii) create new Individual Transitional Employment Agreements (ITEAs) to be available only for limited use during the transitional period;
- (iii) put in place a new no-disadvantage test for future workplace agreements to provide better protection for employees; and
- (iv) enable the Australian Industrial Relations Commission to undertake the process of modernising industrial awards.

## **MAIN ISSUES TO BE ADDRESSED**

### **Workplace agreements**

#### *Objectives of government action*

The Government's election commitment is that there will be no place in the new workplace relations system for AWAs or any other form of statutory individual employment agreement. AWAs have been used to undermine the award safety net and are the least used industrial instrument in Australian workplaces. The Government's estimate is that fewer than 10 per cent of Australian employees have an AWA.

The proposed legislation therefore prevents the making of new AWAs. However, AWAs made prior to the implementation date of the proposed legislation will remain in force and continue to be terminated in accordance with the current rules.

A special transitional instrument - an ITEA – will be available for limited use by users of AWAs as at 1 December 2007 during the transition to the new workplace relations system. ITEAs will have a nominal expiry date of no later than 31 December 2009 and must not disadvantage an employee against an applicable collective agreement, or where there is no collective agreement, the applicable award and the Australian Fair Pay and Conditions Standard (the current Standard).

The proposed legislation introduces a new no-disadvantage test for future agreements. In order to pass the new no-disadvantage test collective agreements must not disadvantage employees in comparison with an applicable award and the current Standard. The "fairness test" will therefore not apply to future workplace agreements.

Currently workplace agreements take effect from the date that they are lodged with the Workplace Authority. This will continue to be the case for greenfields agreements and ITEAs covering new employees. This maintains the status quo in the transition period by enabling employers to commence newly recruited employees on these instruments with immediate effect.

The proposed amendments establish new operational arrangements for collective agreements and ITEAs covering existing employees. The changes mean that these agreements will take effect after they are approved by the Workplace Authority as passing the no-disadvantage test.

*Impact analysis*

The abovementioned arrangements for the transition period recognise that Australian employers and employees need certainty and that it would create concern and confusion if AWAs were suddenly terminated.

Enabling AWAs made prior to the implementation date of the proposed legislation to remain in force recognises that businesses have factored their labour costs on this basis and it would not be appropriate to interfere with accrued rights entered into under these agreements.

Importantly for employees, minimum wages paid under AWAs and ITEAs must reflect any adjustments to minimum wages made by the Australian Fair Pay Commission during the transition to the new workplace relations system.

When the previous government introduced the “fairness test” it also imposed a requirement on employers to issue employees with a Workplace Relations Fact Sheet. This requirement on employers is being removed along with the “fairness test”.

The “fairness test” only applies to some agreements and has not provided adequate protection for employment conditions. It has also resulted in red tape and uncertainty for employers and employees alike. The new no-disadvantage test provides a stronger safety net for employees. The changes also reduce the current uncertainty and red tape involved where agreements do not pass the test and there is a requirement to amend the agreement or pay compensation for the period any sub-standard agreement was in operation.

**Award modernisation**

*Objectives of government action*

The Government is committed to modernising and simplifying Australia’s award system as a matter of priority. The award modernisation process will be undertaken by the Australian Industrial Relations Commission (AIRC). The proposed legislation will provide for award modernisation to proceed in accordance with a written request from the Minister for Employment and Workplace Relations to the President of the AIRC.

Modernised awards will contain ten matters and provide industry relevant detail about a new safety net of ten National Employment Standards (the NES). The Government is releasing for public comment an exposure draft of proposed NES which will replace the current Standard when the new workplace relations system comes into future effect. Along with the NES (which will apply to all employees), a modernised award system (which will not apply to high-income employees) will form an integral part of the safety net. The simpler safety net will allow for flexible common law contracts and operate as the benchmark for collective bargaining.



The proposed legislation also limits the role of the Australian Fair Pay Commission (the Fair Pay Commission) during the transition to the new workplace relations system to conducting annual minimum wage reviews.

### *Impact analysis*

The award modernisation process needs to commence as soon as possible to ensure that the new modern awards are ready to commence at the same time as the more substantial reforms in 2010. Releasing an exposure draft of the NES provides an opportunity for businesses and other stakeholders to fully consider the content of the NES. This will ultimately make it easier for business to apply and comply with them.

As part of the award modernisation process all awards will contain a flexibility clause enabling arrangements to meet the genuine individual needs of employers and employees. In addition, employees earning above \$100,000 per annum will be free to agree their own pay and conditions without reference to awards. This will provide greater flexibility for common law agreements which have previously been required to comply with all award provisions, no matter how highly paid the employee. These measures respond to the views of employers and employees about who needs the protection of the award system.

Limiting the role of the Fair Pay Commission to conducting annual wage reviews will mean that other reviews such as those underway into pay and classification scales and junior rates will be discontinued. These issues will be more effectively dealt with if included as part of the award modernisation process thereby avoiding duplication and confusion for employers and employees.

## **CONSULTATION**

Extensive consultations with businesses, employer groups, the union movement and the wider community have indicated the need for sensible transition arrangements, particularly for those businesses that are currently using Australian Workplace Agreements. Consultations with key stakeholders and with state and territory governments have occurred through meetings of the National Workplace Relations Consultative Council, the Committee on Industrial Legislation and the Workplace Relations Ministers' Council.

## **IMPLEMENTATION AND REVIEW**

The proposed changes are to be effected by amendments to existing legislation. Their impact will be monitored and analysed by the Department of Education, Employment and Workplace Relations against the Government's objectives as outlined in the Policy Implementation Plan.

## NOTES ON CLAUSES

### Clause 1 – Short title

1. This clause would specify the short title of the enacted Bill. Once enacted, the Bill would be known as the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008*.

### Clause 2 – Commencement

2. This clause would specify when various provisions of the Act are proposed to commence. The timing and commencement of particular provisions would be set out in a table in subclause 2(1).

3. Item 1 of the table would provide that the short title, commencement provision and effect of Schedules would commence on Royal Assent.

4. Item 2 of the table would provide that Schedules 1 to 7 would commence on a single day to be fixed by Proclamation. However, if these provisions are not proclaimed to commence within six months of the Act receiving Royal Assent, they would commence on the day following that period of six months.

### Clause 3 – Schedule(s)

5. Subclause 3(1) would provide that each Act that is specified in a Schedule is amended or repealed as set out in that Schedule, and any other item in a Schedule to this Act has effect according to its terms.

## **Schedule 1 – Workplace agreements and the no-disadvantage test**

### **Part 1 – Main amendments**

#### *Workplace Relations Act 1996*

#### **Item 1 - Section 326**

1. This item would repeal and replace current section 326, which provides for the making of AWAs. From commencement, it would no longer be possible to make an AWA and it would only be possible to vary an AWA in limited circumstances. Part 2 deals with existing AWAs under proposed Schedule 7A.

2. New section 326 would introduce a new form of individual workplace agreement to be known as an Individual Transitional Employment Agreement (ITEA). ITEAs would be subject to the no-disadvantage test under new Part 5A.

3. Subsections 326(1) and (2) would enable an ITEA to be made between an employer that employed at least one employee on an individual statutory agreement such as an AWA or ‘pre-reform AWA’ as at 1 December 2007, and:

- an existing employee employed under an ITEA, an AWA, a ‘pre-reform AWA’, an individual preserved State agreement or an employment agreement within the meaning of section 887, or
- a new employee who has not previously been employed by that employer.

4. Subsection 326(5) would make clear that an ITEA can be made with a new employee before the employee commences employment. Where the new employee has commenced employment, subparagraph 326(2)(b)(i) would require that the ITEA be made no more than 14 days from the commencement of the employment.

5. Subsection 326(4) would make clear that, for the purposes of subparagraph 326(2)(b)(ii), a casual employee can be in an employment relationship with an employer, notwithstanding the end of a shift or other period of work.

#### **Item 2 - Division 5A of Part 8**

##### **New Division 5A – The no-disadvantage test**

6. Item 2 would repeal existing Division 5A of Part 8 (the fairness test) and replace it with a new Division 5A (the no-disadvantage test).

##### **New Subdivision A – Preliminary**

###### *New section 346B – Definitions*

7. Proposed subsection 346B(1) would define a number of terms to be used in this Division. Key definitions are explained below.

- *Designated award* would mean an award determined by the Workplace Authority Director under either of proposed sections 346G and 346H in relation to an employee or employees.
- *Industrial instrument* would mean a pre-reform AWA, a pre-reform certified agreement, a workplace determination, a section 170MX award and an old IR agreement. The terms ‘pre-reform certified agreement’, ‘section 170MX award’ and ‘old IR agreement’ are defined in Schedule 7 to the Act.
- *Reference instrument, relevant collective instrument* and *relevant general instrument* would have the meanings set out in proposed subsections 346E(1), (2) and (4).

8. Proposed subsection 346B(2) would make clear that Division 5 applies to a workplace agreement as varied under Division 8 in the same way that it applies to a workplace agreement, subject to other provisions that deal specifically with agreement variations.

#### *New section 346C – Application of Division to workplace agreements*

9. Proposed subsections 346C(1) and (2) would ensure the application of the no-disadvantage test to workplace agreements irrespective of whether they:

- are yet to operate (in the case of ITEAs for existing employees, employee collective agreements or union collective agreements, which commence after they have been approved by the Workplace Authority Director); or
- are in operation (in the case of ITEAs for new employees, employer greenfields agreements or union greenfields agreements, which commence when they are lodged with the Workplace Authority Director); or
- have ceased operation (for example, because they have been terminated under Division 9 of Part 8).

10. An agreement that has ceased to operate must still be tested. This is important because compensation may still be payable to employees in respect of the period that an agreement was in operation, if the agreement does not pass the no-disadvantage test.

11. Proposed subsection 346C(3) would ensure that a reference to an employee is taken to include a reference to a future employee.

#### **New Subdivision B – The no-disadvantage test**

##### *New section 346D – When does an agreement pass the no-disadvantage test?*

12. Proposed subsection 346D(1) would require the Workplace Authority Director to be satisfied that an ITEA would not result, on balance, in a reduction in the employee’s overall terms and conditions of employment under any reference instrument relating to the employee. *Reference instrument* would have the meaning set out in proposed section 346E.

13. Proposed subsection 346D(2) would require the Workplace Authority Director to be satisfied that a collective agreement would not result, on balance, in a reduction in the employees’ overall terms and conditions of employment under any reference instruments relating to the employees.

14. Under proposed subsection 346D(3), an employee collective agreement or union collective agreement would be taken to pass the no-disadvantage test where it would otherwise

fail if the Workplace Authority Director is satisfied that due to exceptional circumstances, approval of the agreement would not be contrary to the public interest.

15. Proposed subsection 346D(4) would provide that an example of where approval of the agreement would not be contrary to the public interest would be where making the agreement was part of a reasonable strategy to deal with a short-term crisis in, and to assist in the revival of, the employer's business.

16. Proposed subsection 346D(5) would provide that where the Workplace Authority Director decides that a workplace agreement passes the no-disadvantage test because of exceptional circumstances under subsection 346D(3), it must publish its reasons for decision on the Workplace Authority's website.

17. Proposed subsections 346D(6) and (7) would provide that:

- an ITEA would be taken to pass the no-disadvantage test if there is no reference instrument relating to an employee; and
- a collective agreement would be taken to pass the no-disadvantage test if there is no reference instrument relating to any employees.

18. In the case of a collective agreement, this means that if there is a reference instrument in relation to some but not all employees whose employment will be subject to the agreement, the agreement must be tested. If the agreement passes the no-disadvantage test, it would operate in relation to all employees. If the agreement fails and is not varied, it would not come into operation.

*New section 346E – Reference instruments etc.*

19. Proposed subsection 346E(1) would set out the meaning of *reference instrument*, which will differ depending on whether the agreement to be tested is an ITEA or a collective agreement.

20. In the case of an ITEA, a reference instrument would be:

- a relevant collective instrument, or instruments if they are capable of operating together (for example, two pre-reform certified agreement operating concurrently); or
- a relevant collective instrument and a relevant general instrument, if they are capable of operating together (for example, a pre-reform certified agreement operating concurrently with an award); or
- if there is no relevant collective instrument, a relevant general instrument; or
- if there is no relevant collective instrument or relevant general instrument above, an appropriate federal award designated by the Workplace Authority Director.

21. In the case of a collective agreement, a reference instrument would be:

- a relevant general instrument; or
- if there is no relevant general instrument, an appropriate federal award designated by the Workplace Authority Director.

22. Under proposed subsections 346E(2) and (3), a *relevant collective instrument* would be

any of the following instruments that would regulate the employment relationship (because it is binding on the employer and employee immediately before the day on which a workplace agreement is lodged), or would do so but for an earlier ITEA, AWA or pre-reform AWA having come into operation:

- a collective agreement;
- a pre-reform certified agreement;
- a preserved collective State agreement;
- a workplace determination;
- a section 170MX award; or
- an old IR agreement.

23. The effect of these provisions is that the relevant collective instrument would form the basis for the no-disadvantage test for the ITEA, even though it may not actually bind the parties as a result of ‘displacement’ by an earlier ITEA, AWA or pre-reform AWA. However, the relevant collective instrument must be one that regulates terms and conditions of employment of persons engaged in the same kind of work as that performed or to be performed by the employee under the workplace agreement that is to be tested against the no-disadvantage test.

24. Under proposed subsections 346E(4) and (5), a *relevant general instrument* would be any of the following instruments that would regulate the employment relationship (because it is binding on the employer and employees immediately before the day on which a workplace agreement is lodged), or would do so but for an industrial instrument having come into operation:

- a federal award (i.e. a pre-reform award);
- a common rule in operation under Schedule 6 to the Act;
- a transitional Victorian reference award;
- a transitional award other than a transitional Victorian reference award, to the extent it applies to excluded employers in respect of employees employed in Victoria; or
- a NAPSA.

25. A relevant general instrument would form the basis for the no-disadvantage test, even though it may not actually bind the parties because it has been displaced by an earlier agreement. However, the relevant general instrument would have to be one that regulates terms and conditions of employment of persons engaged in the same kind of work as that performed by the employee under the workplace agreement.

*New section 346F – Agreements to be tested as at lodgment date*

26. Proposed subsections 346F(1) and (2) would provide that in deciding whether a workplace agreement, or an agreement as varied, passes or does not pass the no-disadvantage test, the Workplace Authority Director must consider the agreement, or a workplace agreement as varied, as it exists or operates immediately after lodgment.

27. Where a variation to a workplace agreement is lodged before the Authority Director has decided whether the original workplace agreement passes the no-disadvantage test, the Workplace Authority Director must consider both the workplace agreement and the agreement as varied as part of the same process of assessment.

28. A separate decision would be required to be issued in respect of the workplace agreement and the agreement as varied. This is because, in the case where the agreement is of a type that commences on lodgment, the variation may affect the extent to which an employee may be entitled to compensation under proposed section 346ZG. This is necessary as different entitlements to compensation may flow from each decision.

29. Proposed subsection 346F(4) would make clear that it would be assumed, for the purposes of the no-disadvantage test, that an employment relationship between the parties to the agreement was in existence immediately before the day on which the workplace agreement was lodged.

*New section 346G – Designated awards – before a workplace agreement or variation is lodged*

30. Proposed section 346G(1) would enable the Workplace Authority Director to designate one or more awards in relation to an employee or employees upon application by the employer. Before designating an award, the Workplace Authority Director must be satisfied that:

- employees of the employer are (or may be) employed in an industry or occupation where the type of work is usually regulated by an award, or where the work performed by the employees would be regulated by an award, but for a workplace agreement or other industrial instrument having come into operation;
- unless there was a designated award, there would be no reference instrument; and
- the award meets the requirements set out in proposed subsection 346G(4).

31. Proposed subsection 346G(3) would also set out the circumstances in which the Workplace Authority Director could designate a federal award, and the type of awards that are appropriate to be designated. Under proposed subsection 346G(4), an award designated by the Workplace Authority Director must:

- be an award or awards that regulate work of the same kind as that performed by employees (or would regulate that work, but for an industrial instrument having come into operation);
- be appropriate for the purposes of assessment of a workplace agreement between the parties against the no-disadvantage test; and
- not be an award that applies to a single business (an enterprise award).

32. Enterprise awards are excluded because they bind a specific employer and are typically tailored to the circumstances of that employer. Such an award is not an appropriate basis for assessing a workplace agreement made by another employer.

33. Proposed subsection 346G(5) would provide that once an award is designated by the Workplace Authority Director under section 346G, it would be taken to be the designated award if the employer later lodges a workplace agreement or agreement variation in relation to those employees.

34. However, if at a later time the Workplace Authority Director becomes aware of information that would have resulted in a different award being designated, proposed subsection 346G(6) would enable the Workplace Authority Director to determine that the other award is the designated award.

35. Proposed subsections 346G(1) and (7) would make clear that different awards could be

designated for different employees, or for classes of employees.

36. Proposed subsection 346G(8) would make clear that a reference to an employee includes a future employee. This is necessary to ensure that an award may be designated for a new venture where there are not yet any employees at the time the application for designation of an award is made.

37. Proposed subsection 346G(9) makes clear that a designated award is not a legislative instrument. This provision is included to assist readers, as a determination under this section is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

*New section 346H – Designated awards – after a workplace agreement or variation is lodged*

38. Proposed section 346H would set out the circumstances in which the Workplace Authority Director is required to determine that an award is a designated award in relation to a workplace agreement (or variation) that has been lodged. Proposed section 346H limits the type of award that may be designated to one that regulates or would regulate the same kind of work performed by the employee(s), is appropriate in the Workplace Authority Director's opinion, and is not an enterprise award.

39. Proposed subsection 346H(5) makes clear that an award may be designated in respect of a class of employees.

40. Proposed subsection 346H(6) makes clear that a designated award is not a legislative instrument. This provision is included to assist readers, as a determination under this section is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

*New section 346J – Matters taken into account when testing agreement etc.*

41. Proposed subsection 346J(1) would provide that in determining whether an agreement passes the no-disadvantage test, the Workplace Authority Director:

- would be required to have regard to the work obligations of the employees under the agreement (for example, the rostering arrangements or shift patterns of the employee or employees); and
- could inform himself or herself in any way considered appropriate including by contacting the employer, employee, their bargaining agent or an organisation of employees (in the case of a union collective or greenfields agreement) directly.

42. Under proposed section 346J(2), in determining whether to designate an award under proposed section 346H, the Workplace Authority Director could inform himself or herself in any way considered appropriate, including by contacting the employer, employee, their bargaining agent or an organisation of employees (in the case of a union collective or greenfields agreement) directly.



## **New Subdivision C – Agreements that operate from approval, and variations of agreements**

### *New section 346K – Application of this Subdivision*

43. Proposed section 346K provides for the application of the no-disadvantage test to workplace agreements (and variations to them under Division 8) that operate after they are approved by the Workplace Authority Director, that is:

- an ITEA with an existing employee;
- an employee collective agreement;
- a union collective agreement; and
- a multiple business agreement that would also be an employee collective agreement or a union collective agreement.

44. Proposed subsection 346K(2) would provide that Subdivision C would also apply to workplace agreement variations under Division 8 in the same way as it applies to workplace agreements under Division 5.

45. This Subdivision is necessary because for these types of agreements and variations to them, the consequences of no-disadvantage test failure are different to those for agreements (and variations to those agreements under proposed section 346Y) that commence operation on lodgment with the Workplace Authority Director. Because these agreements (and variations) cannot commence operation until approved, existing industrial arrangements continue in effect until that time, and no issue about ‘revival’ of such instruments, or compensation, arises if the agreement fails the no-disadvantage test.

### *New section 346L – Applying the no-disadvantage test*

46. New section 346L would require the Workplace Authority Director to decide whether workplace agreements and agreement variations under Division 8 of Part 8 (which would not commence operation until approved) pass the no-disadvantage test. The no-disadvantage test is set out in proposed section 346C.

### *New section 346M - Workplace Authority Director must notify of decision*

47. New section 346M would set out requirements for the notification of parties where an agreement passes or fails to pass the no-disadvantage test, including the content of the notice:

- in the case of an ITEA for an existing employee, the Workplace Authority Director would notify the employer and employee;
- in the case of a union collective agreement (including an agreement that was also a multiple business agreement), the Workplace Authority Director would notify the employer and any organisations bound by the agreement;
- in all other cases, the Workplace Authority Director would notify the employer. The employer would be required to notify employees of the decision (see proposed section 346ZH).

48. The table in the description of new section 346Q at paragraph 57 below compares the notification requirements under that provision with those in new section 346M.

49. Proposed subparagraph 346M(2)(b) relates to the content of the notice issued by the Workplace Authority Director. If the Workplace Authority Director decides that an agreement does not pass the no-disadvantage test, the notice issued to the parties would be required to include advice as to how the agreement could be varied to pass the no-disadvantage test.

50. Proposed subsection 346M(3) relates to the circumstance where the Workplace Authority Director would be required to consider and separately decide whether a workplace agreement and agreement variation pass the no-disadvantage test under subsection 346F(3). In this circumstance, the notice issued by the Workplace Authority Director under proposed section 346M would be required to deal with both agreements.

*New section 346N – Agreement does not pass no-disadvantage test*

51. New section 346N would provide that where an agreement does not pass the no-disadvantage test, the employer may lodge a variation of the agreement in an attempt to pass the no-disadvantage test. The agreement as varied would then be tested (under new section 346Q) to determine if it passes.

*New section 346P – Lodging of variation documents with the Workplace Authority Director*

52. New section 346P would set out lodging requirements for variations – these include lodging a declaration form and a copy of the variation.

53. Form requirements would be published by the Workplace Authority Director by notice in the *Gazette*. A declaration must actually be received by the Workplace Authority Director for it to operate. As with the fairness test, these variations will not require all the formalities of normal variations under the Act (for example, the requirements to give an information statement will not apply or seven days' notice of the variation will not apply).

*New section 346Q - Workplace Authority Director must test varied agreement*

54. Proposed section 346Q would require the Workplace Authority Director to decide whether a workplace agreement as varied passes the no-disadvantage test. It would require specified information to be notified to agreement parties relating to this decision (see table below).

55. New section 346Q sets out the requirements for the notification of parties to a workplace agreement of decisions made by the Workplace Authority Director relating to whether an agreement as varied passes the no-disadvantage test:

- in the case of an ITEA for an existing employee, the Workplace Authority Director would notify the employer and employee;
- in the case of a union collective agreement (including an agreement that was also a multiple business agreement), the Workplace Authority Director would notify the employer and any organisations bound by the agreement;
- in all other cases, the Workplace Authority Director would notify the employer. The employer would be required to notify employees of the decision (see proposed section 346ZH).

56. Proposed subsection 346Q(3) relates to the content of the notice issued by the Workplace

Authority Director. If the Workplace Authority Director decides that an agreement as varied does not pass the no-disadvantage test, the notice issued to the parties must specify that the agreement has not come into operation.

57. The content of notices required to be issued under sections 346M and 346Q is summarised in the following table.

**Content of notices issued by Workplace Authority Director relating to no-disadvantage test – workplace agreements and variations that commence operation when approved**

Content of Notice	Workplace agreement (or workplace agreement as varied) passes the no-disadvantage test	Workplace agreement (or workplace agreement as varied) does not pass the no-disadvantage test
<b>Workplace Agreement</b>	<ul style="list-style-type: none"> <li>• Date of issue of notice</li> <li>• Agreement comes into operation 7 days after date of issue of notice</li> </ul>	<ul style="list-style-type: none"> <li>• Date of issue of notice</li> <li>• Advice as to how the agreement could be varied to pass the no-disadvantage test</li> </ul>
<b>Workplace agreement as varied</b>	<ul style="list-style-type: none"> <li>• Date of issue of notice</li> <li>• Agreement as varied will come into operation 7 days from date of issue of notice</li> <li>• Agreement was varied by way of variation</li> </ul>	<ul style="list-style-type: none"> <li>• Date of issue of notice</li> <li>• Agreement has not come into operation</li> </ul>

*New section 346R – Operation of section 346N variations*

58. New section 346R would provide that where an employer lodges an agreement variation under new section 346N, with the result that the agreement passes the no-disadvantage test, the agreement as varied would come into operation 7 days after the date specified in the notice issued under new section 346Q by the Workplace Authority Director.

**New Subdivision D – Agreements that operate from lodgment**

*New section 346S – Application of this Subdivision*

59. Proposed section 346S would set out the operation of the no-disadvantage test in relation to workplace agreements that commence operation when lodged with the Workplace Authority Director, that is:

- an ITEA with a new employee;
- an employer greenfields agreement;
- a union greenfields agreement; and
- a multiple business agreement that would also be an employer greenfields agreement or a union greenfields agreement.

60. This Subdivision is necessary because for these types of agreements, and agreements as varied under section 346W (as distinct from variations under Division 8), the consequences of

no-disadvantage test failure are different from those for agreements that commence operation after they are approved by the Workplace Authority Director.

61. Because these types of agreements (and variations) commence operation on lodgment, they can displace other instruments. Subdivision D therefore contains provisions setting out rules about ‘revival’ of other instruments, and relating to compensation under Subdivision E, in circumstances where an agreement fails the no-disadvantage test.

*New section 346T – Applying the no-disadvantage test*

62. New section 346T would require the Workplace Authority Director to decide whether a workplace agreement to which Subdivision D applies passes the no-disadvantage test.

*New section 346U – Workplace Authority Director must notify of decision*

63. New section 346U would set out requirements for the notification of parties to the agreement of decisions made by the Workplace Authority Director relating to whether workplace agreements pass the no-disadvantage test:

- in the case of an ITEA for a new employee, the Workplace Authority Director would notify the employer and employee.
- in the case of a union greenfields agreement (including an agreement that was also a multiple business agreement), the Workplace Authority Director would notify the employer and any organisations bound by the agreement.
- in all other cases, the Workplace Authority Director would notify the employer. The employer would be responsible for notifying employees of the decision (see proposed section 346ZH).

64. New subparagraph 346U(2)(b) relates to the content of the notice issued by the Workplace Authority Director. If the Workplace Authority decides that an agreement does not pass the no-disadvantage test, the notice issued to the parties would be required to include advice as to how the agreement could be varied to pass the no-disadvantage test. For an employer greenfields agreement, this could include variation by way of an undertaking (see new paragraph 346W(2)(b)). The table in the description of new section 346Z (at paragraph 81 below) compares the notification requirements under that provision with those in new section 346U.

65. New subsection 346U(3) relates to the circumstance where the Workplace Authority Director would be required to consider and separately decide whether a workplace agreement and the agreement as varied pass the no-disadvantage test under subsection 346F(3). In this circumstance, the notice issued by the Workplace Authority Director under proposed section 346U would be required to deal with both agreements.

*New section 346V – Agreement does not pass no-disadvantage test – agreement not in operation*

66. New section 346V would provide that if the Workplace Authority Director decides that a workplace agreement does not pass the no-disadvantage test and the agreement is not in operation in relation to any employee immediately before the decision is made, employee(s) who were subject to the agreement at any time are entitled to any compensation payable under section 346ZG on and from 7 days after the issue of the no-disadvantage test failure notice by the Workplace Authority Director.

67. This provision is necessary to cater for the situation where an agreement that comes into operation on lodgment is subsequently terminated by the parties before the agreement is tested.

*New section 346W – Agreement does not pass no-disadvantage test – agreement in operation*

68. New section 346W relates to workplace agreements that are in operation and are subsequently determined not to pass the no-disadvantage test.

69. Under new subsection 346W(2), the employer would be able to lodge a variation of the agreement with the Workplace Authority Director. In the case of an employer greenfields agreement, an employer would be able to lodge a written undertaking with the Workplace Authority Director instead of a variation.

70. A period of 30 days would be available to the employer to lodge a variation or an undertaking (in the case of an employer greenfields agreement), beginning from 7 days after the issue of notice under proposed section 346U. New subsection 346U(3) provides that if the employer does not lodge a variation or written undertaking (as applicable) within the 30 day period, the agreement ceases to operate and employees whose employment was subject to the agreement would be entitled to compensation under section 346ZG.

71. The lodgment period available to employers for variation of workplace agreements would be able to be extended by the Workplace Authority in circumstances as prescribed in the regulations, or by the regulations directly (new subsection 346W(7)). No such regulations are proposed.

72. New subsection 346W(4) would provide for the circumstance where a workplace agreement as lodged fails the no-disadvantage test, and an agreement variation was subsequently lodged with the result that the agreement passes the no-disadvantage test. In this circumstance, the agreement as varied would continue to operate and any employees whose employment was subject to the agreement would be entitled to any compensation under section 346ZG in respect of the period of employment ending on the day the variation was lodged with the Workplace Authority Director.

73. The effect of new subsection 346W(5) would be that not all of the procedural requirements of Division 8 of Part 8 apply to variations under proposed subsection 346W(2). This enables the parties to streamline the process so that the variation can be lodged within the 30 day period. However, the variation must be properly approved by employees, including meeting the appropriate signature requirements.

*New section 346X – Lodging of variation documents with the Workplace Authority Director*

74. New section 346X would set out the procedural requirements for lodging a variation or giving an undertaking as permitted by section 346W.

75. A variation or an undertaking must be annexed to a declaration that meets the form requirements Gazetted by the Workplace Authority. A declaration must be received by the Workplace Authority before it can come into operation.

*New section 346Y – Operation of section 346W variations*

76. New section 346Y would set out rules about when variations made under new subsection 346R(2) come into operation.

77. New subsection 346Y(1) would provide that a variation of an agreement under subsection 346W(2)(a) comes into operation when it is lodged with the Workplace Authority Director. A variation is lodged when it and the accompanying declaration are received by the Workplace Authority Director.

78. Under new subsection 346Y(2), a variation of an employer greenfields agreement by way of an undertaking comes into operation when it is given to the Workplace Authority Director. An undertaking is given when the undertaking and accompanying declaration are received by the Workplace Authority.

79. New subsection 346Y(3) would provide that an undertaking is taken to be a variation of a employer greenfields agreement lodged by the employer under section 346W.

*New section 346Z – Workplace Authority Director must test varied agreement*

80. New section 346Z would provide for the notification of agreement parties of decisions made by the Workplace Authority Director relating to whether the agreement as varied passes the no-disadvantage test:

- In the case of an ITEA for a new employee, the Workplace Authority Director would notify the employer and employee.
- In the case of a union greenfields agreement or variation (including an agreement that was also a multiple business agreement), the Workplace Authority Director would notify the employer and any organisations bound by the agreement.
- In all other cases, the Workplace Authority Director would notify the employer. The employer would be responsible for notifying employees of the decision (see proposed section 346ZH).

81. The content of notices required to be issued under new section 346Z (and new section 346U) is summarised in the following table.

**Content of notices issued by Workplace Authority Director relating to no-disadvantage test - agreements and variations that operate from lodgment**

<b>Content of Notices</b>	<b>Agreement passes the no-disadvantage test</b>	<b>Agreement does not pass the no-disadvantage test</b>
<b>Workplace Agreement</b>	<ul style="list-style-type: none"> <li>• Date of issue of notice</li> <li>• Agreement passes the no-disadvantage test</li> </ul>	<ul style="list-style-type: none"> <li>• Date of issue of notice</li> <li>• Advice as to how the agreement could be varied to pass the no-disadvantage test</li> <li>• Employer greenfields agreements: variation could be made by way of an undertaking</li> </ul>
<b>Workplace</b>	<ul style="list-style-type: none"> <li>• Date of issue of notice</li> </ul>	<ul style="list-style-type: none"> <li>• Date of issue of notice</li> </ul>

<p><b>agreement as varied</b></p>	<ul style="list-style-type: none"> <li>• Agreement as varied continues to operate</li> <li>• Agreement was varied by way of variation</li> <li>• Employee(s) subject to the agreement are entitled to any compensation payable under proposed section 346ZG on and from 7<sup>th</sup> day after date of issue of notice</li> </ul>	<ul style="list-style-type: none"> <li>• If agreement as varied was in operation, it ceases to operate 7 days from the date of issue of notice</li> <li>• Employee(s) subject to the agreement are entitled to any compensation payable under proposed section 346ZG on and from 7<sup>th</sup> day after date of issue of notice</li> </ul>
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*New section 346ZA – Effect of decision on no-disadvantage test*

82. New section 346ZA would specify the effect of the decision of the Workplace Authority Director relating to the no-disadvantage test on a workplace agreement as varied that was in operation in relation to any employee immediately before the decision of the Workplace Authority Director. If the agreement as varied:

- passes the no-disadvantage test, it continues to operate; and
- does not pass the no-disadvantage test, it ceases to operate on and from 7 days after the issue of notice by the Workplace Authority Director, and compensation may be payable to employees subject to the agreement from that time (see section 346ZG).

*New section 346ZB - Employment arrangements that apply if a workplace agreement ceases to operate because it does not pass no-disadvantage test*

83. New section 346ZB would provide for the employment arrangements that will apply if a workplace agreement ceases to operate because it does not pass the no-disadvantage test.

84. From the day that a workplace agreement ceases to operate because it fails the no-disadvantage test (*the cessation day*), the employer and employees would be bound by the industrial instrument(s) that would have applied if the agreement had not come into operation. If there is no such instrument, a designated award would apply. *Instrument* would be defined in new subsection 346ZB(5) to include:

- a workplace agreement (including a workplace agreement in force immediately before it was varied under Division 8);
- an award;
- a workplace determination;
- an employment agreement (within the meaning of section 887);
- a pre-reform certified agreement (within the meaning of Schedule 7);
- a pre-reform AWA;
- a common rule (in operation under Schedule 6);
- a transitional Victorian reference award;
- a transitional award other than a Victorian reference award relating to excluded employers in Victoria;
- a section 170MX award (within the meaning of Schedule 7);
- an old IR agreement (within the meaning of Schedule 7);
- an AWA (within the meaning of Schedule 7A);

- a preserved State agreement (within the meaning of Schedule 8); and
- a notional agreement preserving State awards (within the meaning of Schedule 8).

85. The instruments in the list above would be able to operate again in relation to an employee or employees and an employer if they ceased to operate because a workplace agreement came into operation but that workplace agreement subsequently ceased to operate because it failed the no-disadvantage test.

*New section 346ZC - Effect of section 346ZB in relation to instruments*

86. New section 346ZC would ensure that instruments that had ceased operating in relation to an employer and employee(s) can operate or have effect again in relation to the employer and employees under proposed section 346ZB, despite any provision in the Act to the contrary.

87. A reference to an instrument means the instruments listed in new subsection 346ZB(5).

*New section 346ZD - Redundancy provisions and section 394 undertakings*

88. New section 346ZD would clarify that the preservation of redundancy entitlements under section 399A, clauses 6A and 20A of Schedule 7, and clauses 21A and 21D of Schedule 8 as in force immediately before lodgment of a workplace agreement would continue to apply from the date the workplace agreement ceases to operate because it does not pass the no-disadvantage test. Undertakings given by an employer under section 394 of the Act would also continue to have effect from the date the workplace agreement ceases to operate.

*New section 346ZE - Operation of workplace agreements*

89. New section 346ZE would provide that a workplace agreement that fails the no-disadvantage test and ceases to operate as a result can never operate again.

*New section 346ZF - Regulations may make provision for operation of provisions of revived instruments*

90. New section 346ZF would enable regulations to be made to provide for and in relation to the operation of instruments that are revived by operation of section 346ZB.

**New Subdivision E – Entitlement to compensation**

*New section 346ZG - Employee is entitled to compensation in respect of no-disadvantage test period*

91. New section 346ZG would provide for the payment of compensation in certain circumstances to employees, in relation to workplace agreements that commence operation when lodged with the Workplace Authority Director but subsequently do not pass the no-disadvantage test.

92. Compensation would be calculated as the shortfall between:

- the total value of entitlements under the workplace agreement and any other applicable law, agreement or arrangement operating in conjunction with the workplace agreement



during the *no-disadvantage test period*; and

- the total value of entitlements that would have been available, in respect of the same period, had the workplace agreement not come into operation.

93. The key assumptions underlying this calculation are set out below:

- during the relevant period of employment, the employee's employment was subject to an instrument that would have bound the employer but for the workplace agreement. *Instrument* would have the same meaning as in section 346ZB;
- if there was no relevant instrument, the employment would have been subject to a designated award;
- the employer may have been subject to a preserved redundancy provisions under section 399A and/or clauses 6A and 20A of Schedule 7 and clauses 21A and 21D of Schedule 8, or an undertaking under section 394 that, but for the workplace agreement, would have applied to the employee; and
- the employee's employment was subject to any other applicable law, agreement or arrangement that would have operated in conjunction with the instrument(s) referred to above or a designated award, as the case requires.

94. *No-disadvantage test period* would be defined in new subsection 346ZG(5) to mean the period beginning on the day a workplace agreement was lodged and ending on the day on which the workplace agreement ceased to operate. If the workplace agreement continued to operate because an agreement variation was lodged under subsection 346W(4) or section 346ZA, the *no-disadvantage test period* would be defined to mean the period beginning on the day the workplace agreement was lodged, and ending on the day the variation was lodged under section 346W or, if the workplace agreement had been varied before that day to pass the no-disadvantage test, that earlier day.

Employers would be required to pay to employees the amount of any shortfall calculated above within a specified period, as follows:

- 14 days from the seventh day after the date of issue of a notice under section 346V; or
- 14 days from the end of the relevant period (within the meaning of section 346W); or
- 14 days from the seventh day after the date of issue of a notice under section 346ZA;

whichever is applicable.

95. The requirement to pay compensation within a specified period is a civil remedy provision. Proposed section 346ZG would be an *applicable provision* under section 717.

### **New Subdivision F – Civil remedy provisions**

96. Subdivision F would specify additional civil remedy provisions relating to workplace agreements.

#### *New section 346ZH – Employer must notify employees*

97. New subsection 346ZH(1) would require an employer that has received a notice under section 346M, 346U or 346Z in relation to a collective agreement to take reasonable steps to give all employees subject to the agreement a copy of the notice.

98. New subsection 346ZH(2) would provide that failure to comply with the requirements of proposed subsection 346ZH(1) may result in civil penalties being imposed on the employer. Breach of subsection 346ZH(1) would attract a maximum pecuniary penalty of 30 penalty units. The legislative note would remind readers that the enforcement provisions are located in Division 11 of Part 8 of the Act.

*New section 346ZJ – Employer not to dismiss etc. employee because agreement does not pass the no-disadvantage test*

99. New section 346ZJ would prohibit an employer dismissing or threatening to dismiss, an employee for the sole or dominant reason that a workplace agreement does not, or may not, pass the no-disadvantage test.

100. The statutory presumption would be that the prohibited reason was the sole or dominant reason for the dismissal, and the onus would be on the employer to disprove that presumption (new subsection 346ZJ(3)).

*New section 346ZK – Other remedies for the contravention of section 346ZJ*

101. New section 346ZK would empower the Court to make orders in relation to an employer that contravenes proposed section 346ZJ. The orders available would be:

- orders for compensation payable by the employer for damage suffered by the employee
- injunctions
- any other orders considered appropriate or necessary to stop the conduct or remedy its effects.

Other orders that the Court may make could include reinstatement or injunctions.

102. An *eligible person* may apply to the Court seeking such relief. Under proposed subsection 346ZK(3), an eligible person means:

- a workplace inspector;
- an employee affected by the contravention; or
- a person prescribed by the regulations.

103. An organisation of employees may also apply on behalf of the employee concerned, provided that it has been requested to do so in writing by the employee concerned, and is entitled to represent the industrial interests of the employee under its eligibility rules.

### **Item 3 – Subsection 347(1)**

104. Item 3 would repeal subsection 347(1) which currently provides that a workplace agreement comes into operation on the day that it is lodged.

105. Proposed subsection 347(1) would replace this rule with new provisions creating different rules for workplace agreements that operate from lodgment and workplace agreements that operate from approval. The commencement of operation of agreements is set out in the table below.

Type of workplace agreement	Commencement of operation
ITEA with a new employee	The day the agreement is lodged
Union greenfields agreement	
Employer greenfields agreement	
Multiple business agreement that would also be a greenfields agreement	
ITEA with an existing employee	The seventh day after date of issue of notice by Workplace Authority Director under subsections 346M(2) or 346Q(2) (where the agreement as varied passes the no-disadvantage test).
Employee collective agreement	
Union collective agreement	
Multiple business agreement that would also be a collective agreement.	

**Item 4 – After section 347**

106. Item 4 would insert a new section 347A which will set out when non-compliance with the procedural requirements of the Act affects the operation of a workplace agreement. It would have the effect that a workplace agreement does not come into operation unless it is made and approved in accordance with Division 2 and section 340.

107. However, a workplace agreement could come into operation despite non-compliance with the requirements of Division 3, Division 4 (except section 340) and section 342. Penalties may apply in relation to non-compliance with these requirements.

**Item 5 – Before paragraph 352(1)(a)**

108. Item 5 would specify the nominal expiry date for certain types of agreements. The nominal expiry dates would be as follows:

- for ITEAs, 31 December 2009 or an earlier date specified in the agreement;
- for collective agreements taken to pass the no-disadvantage test due to exceptional circumstances (subsection 346D(3)), the date specified in the agreement or 2 years from the seventh day after the issue of a notice under subsection 346M(1) by the Workplace Authority Director, whichever comes first.

**Item 6 – At the end of subsection 352(1)**

109. Item 6 would insert a legislative note at the end of subsection 352(1), referring to subsection 346D(3) which deals with workplace agreements that are taken to pass the no-disadvantage test because of exceptional circumstances.

**Item 7 – Before paragraph 352(2)(a)**

110. Item 7 would specify the nominal expiry date for an agreement as varied. The new

nominal expiry dates would be as follows:

- for ITEAs, 31 December 2009 or an earlier date specified in the agreement;
- for collective agreements taken to pass the no-disadvantage test due to exceptional circumstances (subsection 346D(3)), the date specified in the agreement or 2 years from the seventh day after the issue of a notice under section 346L by the Workplace Authority Director.

### **Item 8 – Sections 354 and 355**

111. Item 8 would repeal sections 354 and 355.

112. Section 354 relates to protected award conditions. Protected award conditions are no longer a necessary concept due to the introduction of the new no-disadvantage test which ensures that workplace agreements and agreement variations are assessed on an overall basis against any otherwise applicable award or other instrument. Awards would also be able to operate again in their entirety in relation to employees where a workplace agreement ceased to operate. As such, there would be no need to retain protected award conditions as the award would remain relevant in its entirety (as would any other relevant instruments relating to the workplace agreement).

113. Section 355 currently restricts the incorporation of terms from other instruments or documents in workplace agreements. The repeal of this provision would allow parties to an agreement to choose whether they want to draft parts of an agreement by reference to terms contained in other instruments.

### **Item 9 – Subsections 380(1) and (2)**

114. Item 9 would repeal subsections 380(1) and (2) and replace them with a provision specifying that workplace agreement variations come into operation on the seventh day after the date of issue of a notice by the Workplace Authority Director under subsection 346M(1).

### **Item 10 – At the end of Subdivision D of Division 8**

*New section 380A – Whether certain non-compliance affects the operation of a variation*

115. Item 10 would insert new section 380A relating to whether non-compliance with the procedural requirements of the Act affects the operation of a workplace agreement. It would have the effect that a workplace agreement variation does not come into operation unless it is made and approved in accordance with Subdivision A and section 373.

116. A workplace agreement variation could come into operation, despite non-compliance with the requirements of Division 3, Subdivision B of Division 8 (except section 373) and section 375. Penalties may apply in relation to non-compliance with these requirements.

### **Item 11 – Section 393**

*New section 393 – Unilateral termination of ITEA with 90 days written notice*

117. Item 11 would repeal existing section 393 and replace it with a new provision that would permit the unilateral termination of ITEAs only. Collective agreements could not be unilaterally

terminated after the nominal expiry date by providing 90 days' notice.

118. An ITEA would be able to be terminated by either party after its nominal expiry date, with 90 days written notice. The notice would have to contain specified information (see proposed subsection 393(5)). A party seeking to terminate an ITEA under this provision would be required to take reasonable steps to give written notice of the termination to the other party (or a bargaining agent of the party, if applicable). Civil penalties may be available for failure to meet the notice requirements in subsections 393(4) and (5).

## **Item 12 – At the end of Subdivision D of Division 9 of Part 8**

### **New Subdivision DA – Termination by the Commission**

#### *New section 397A – Termination by the Commission*

119. Item 12 would insert a new Subdivision DA relating to termination of collective agreements by the Australian Industrial Relations Commission (the Commission).

120. Proposed section 397A would enable parties to a collective agreement to apply to the Commission to have the agreement terminated after its nominal expiry date. Parties with standing to apply to the Commission under this provision would include the employer, a majority of employees and a union bound by the agreement.

121. The Commission would have the power to terminate a collective agreement if it is satisfied that it is not contrary to the public interest to terminate the agreement. In making its decision under this provision, the Commission would be required to have regard to all the circumstances of the case, including:

- the views of each party bound by the agreement (including the employees subject to it) about whether it should be terminated; and
- the circumstances of each party bound by the agreement, including the likely effect on each party of the termination of the agreement.

## **Item 13 – Section 398**

#### *New section 398 – Whether a termination takes effect if certain non-compliance occurs*

122. Item 13 would repeal existing section 398 which deals with when a workplace agreement termination takes effect. The section would be replaced with a new section 398, setting out the effect of non-compliance with procedural requirements relating to termination of workplace agreements:

- Non-compliance with Division 3 (relating to bargaining agents) would not prevent a termination from taking effect.
- Non-compliance with Subdivision B (relating to termination of workplace agreements by approval) and / or section 388 (relating to lodgment of terminations) would not prevent a termination by approval from taking effect.
- However, to take effect, a termination by approval must be properly approved under sections 382 and 386.
- Non-compliance with subsections 392(4) and (5) and subsections 393(4) and (5) (relating

to notice of unilateral termination of workplace agreements) would not prevent unilateral termination of a workplace agreement from taking effect.

#### **Item 14 – Section 399**

123. This item would repeal section 399 of the Act, which currently prevents an award or collective agreement from operating in relation to an employee when the employee's AWA is terminated, and an award from operating when a collective agreement is terminated. It does this by expressly providing that when a workplace agreement is terminated and not replaced by another agreement, an employee is covered by the Australian Fair Pay and Conditions Standard and any applicable award, to the extent that it contains protected award conditions. This provision interferes with the normal operation of certified agreements or awards that would, but for section 399, apply on their terms to an employee in this situation.

124. The repeal of this provision would restore the operation of these instruments, ensuring that employees on a workplace agreement that is subsequently terminated would become covered by the instrument (or instruments) that would have operated in relation to the employee's employment if the workplace agreement did not exist. Existing priority rules in the Act would determine which instrument would have bound the parties, but for the original agreement. For example, a collective agreement would exclude an award (section 349).

#### **Part 2 – Transitional matters**

##### ***Workplace Relations Act 1996***

#### **Item 15 – After Schedule 7**

##### **New Schedule 7A —Transitional arrangements for existing AWAs**

125. Item 15 would insert a new Schedule 7A after Schedule 7. The new Schedule would provide for transitional arrangements applicable to existing AWAs.

126. Clause 1 would define the 'pre-transition Act' to mean the Act as in force just before the commencement of Schedule 7A. 'AWA' would mean an AWA within the meaning of sections 4 and 326 of the pre-transition Act, but would not include an agreement made after the commencement of Schedule 7A, or a pre-reform AWA within the meaning of existing Schedule 7.

127. The definition of 'AWA' in clause 1 combined with the repeal of the provisions enabling the making of AWAs from Part 8 means that an AWA could not be made after the commencement of Schedule 7A (subclause 2(4) also makes this clear, for avoidance of any doubt).

128. Clause 2 would provide for the continuation of existing AWAs, under most of the provisions of the pre-transition Act. AWAs made before commencement and lodged up to 14 days afterwards (see clause 4) would continue to operate under most current rules, including the fairness test provisions.

129. Existing rules for the termination of AWAs would continue. AWAs made before

commencement and terminated unilaterally under section 393 of the pre-transition Act would be subject to the preservation of redundancy provisions for up to 24 months under section 399A of the pre-transition Act.

130. However, the effect of subclause 2(2)(c) is that when an AWA is terminated, an employee could be covered by an applicable collective agreement or award.

131. Clause 3 provides transitional arrangements in relation to the appointment of bargaining agents in relation to AWAs.

132. It would not be possible to vary an AWA after the commencement of proposed Schedule 7A. However, an AWA would be able to be varied if the variation is made before commencement and lodged within 14 days of commencement (subclause 5(2)). AWAs would continue to be able to be varied under the pre-transition Act to deal with matters arising under the fairness test, the rules relating to prohibited content, removal of discriminatory provisions or by order of the Court (subclause 5(3)).

133. Clause 6 would provide that an AWA would be able to be replaced by an ITEA provided the parties met the criteria for making an ITEA described above. An AWA would not be able to be replaced by another AWA.

134. Under clause 7, the Workplace Authority Director would be required to notify parties to an AWA lodged other than in accordance with section 342 (or an AWA variation lodged other than in accordance with section 375) that the AWA (or AWA variation) was ineffective and not in operation.

135. The effect of clause 8 is that an employee on an AWA that has passed its nominal expiry date:

- could make and approve a collective agreement, or a variation of a collective agreement, (without the AWA having to be terminated first), as well as other employees whose employment will be subject to the agreement;
- could take part in a secret ballot for protected industrial action (but could not do so if the AWA had not passed its nominal expiry date).

### **New Schedule 7B —Transitional arrangements for existing collective agreements**

136. Item 15 would also insert a new Schedule 7B to the Act dealing with transitional arrangements for existing collective agreements (called *pre-transition collective agreements*) – that is, collective agreements made before the commencement of the Schedule that were lodged within 14 days of that commencement.

137. Clause 2 would provide that the fairness test provisions (and certain other provisions) would continue to apply to collective agreements as defined in proposed Schedule 7B. However, the provisions given transitional operation by Schedule 7B would not apply to variations to collective agreements unless the variation was lodged before commencement or made before commencement and lodged within 14 days of commencement (clause 3). Variations to collective agreements made after commencement would be subject to the new no-disadvantage test.

### **Part 3—Other amendments of the *Workplace Relations Act 1996***

138. Part 3 would make various amendments consequential on the main amendments and transitional amendments in Parts 1 and 2.

#### **Item 16 – Subsection 4(1) (definition of *Australian workplace agreement* or AWA)**

#### **Item 17 – Subsection 4(1) (definition of AWA)**

139. These items would repeal the definitions of *Australian workplace agreement* or AWA and AWA to reflect the fact that references in the Act to ‘AWA’ have been replaced with ‘ITEA’, and that AWA would now have the definition set out in new Schedule 7A.

#### **Item 18 – Subsection 4(1) (paragraph (a) of the definition of *bargaining agent*)**

140. This item would replace references to ‘AWA’ in the definition of bargaining agent to ‘ITEA’.

#### **Item 19 – Subsection 4(1)**

141. This item would insert definitions of *individual transitional employment agreement* or ITEA and ITEA.

#### **Item 20– Subsection 4(1) (definition of *workplace agreement*)**

142. This item would amend the definition of *workplace agreement* to include an ITEA in the place of an AWA and extend the definition, consequential on item 27, to a purported workplace agreement that a Court has ordered under proposed section 412A is to have effect as a workplace agreement.

#### **Item 21 – Section 8**

143. This item would repeal and replace section 8 with an amended provision, consequential upon the proposed creation of new Schedules 7A and 7B to the Act by item 15 of this Schedule.

#### **Item 22 – Paragraph 150B(1)(f)**

144. This item would replace the reference to the ‘fairness test’ with ‘no-disadvantage test’.

#### **Item 23 – Subsection 164A(7)**

145. This item is a minor amendment consequential on the amendments made by Item 2 of Part 1, relating to the no-disadvantage test, which would require the Workplace Authority Director to assess all workplace agreements lodged after the commencement date. It would prohibit a workplace agreement official disclosing to the Minister information relating to whether the Workplace Authority Director is required to decide whether a particular workplace agreement passes the no-disadvantage test.

#### **Item 24 – Paragraph 165(1)(c)**

#### **Item 29 – Paragraph 333(a)**

#### **Item 30 – Subsection 334(1)**



- Item 31 – Paragraph 336(a)**
- Item 33 – Paragraph 337(4)(b)**
- Item 36 – Subsection 340(1)**
- Item 38 – Subsection 342(1)**
- Item 40 – Paragraph 345(2)(b)**
- Item 41 – Subsection 346A(1)**
- Item 45 – Subsection 348(2)**
- Item 46 – Paragraphs 360(2)(b) and 367(1)(a)**
- Item 49 – Paragraph 368(a)**
- Item 51 – Paragraph 369(a)**
- Item 53 – Paragraph 370(4)(b)**
- Item 55 – Subsection 373(1)**
- Item 58 – Paragraph 378(2)(b)**
- Item 64 – Paragraphs 382(a), 383(a) and 384(3)(b)**
- Item 65 – Subsection 386(1)**
- Item 67 – Paragraphs 390(2)(b), 392(2)(ba) and (c) and 393(2)(ba) and (c)**
- Item 78 – Paragraph 396(2)(c)**
- Item 84 – Subsections 400(3), (5) and (6)**
- Item 85 – Paragraphs 400(6A)(b) and (d) and 405(1)(e)**
- Item 93 – Subsections 415(1) and (2)**
- Item 100 – Paragraph 418(d)**
- Item 102 – Section 450 (definition of *relevant employee*)**
- Item 104 – Subsection 467(2)**
- Item 105 – Paragraph 485(1)(d)**
- Item 106 – Subsections 495(1) and (2)**
- Item 111 – Paragraph 578(2)(a)**
- Item 112 – Section 579 (paragraph (a) of the definition of *instrument*)**
- Item 133 – Paragraph 659(2)(g)**
- Item 135 – Section 717 (subparagraph (a)(i) of the definition of *applicable provision*)**
- Item 137 – Subsection 718(1) (table item 1)**
- Item 140 – Subsection 718(5)**
- Item 142 – Subsections 719(5), (6) and (7)**
- Item 143 – Section 720**
- Item 144 – Subsection 721(1)**
- Item 145 – Paragraph 747(1)(b)**
- Item 146 – Subsection 747(2)**
- Item 147 – Subsection 748(12) (subparagraph (b)(iii) of the definition of *record relevant to the suspected breach*)**
- Item 148 – Subsection 757(4) (paragraph (b) of the definition of *employment record*)**
- Item 149 – Paragraph 885(1)(f)**
- Item 151 – Subsection 890(2)**
- Item 153 – Paragraph 893(d)**
- Item 191 – Clause 20 of Schedule 7**

146. These items would replace references to an ‘AWA’ with an ‘ITEA’. AWAs, which would not be able to be made or varied from the commencement date, are dealt with in Schedule 7A.

147. The effect of items 145 to 148 is that right of entry arrangements in relation to ITEAs would be the same as those that exist in relation to AWAs. New Schedule 7A (Item 15) would

preserve the operation of these arrangements for AWAs.

**Item 25 – Subsection 185(3) (cell at table item 1, column headed “In this situation ...”)**

**Item 26 – Subsection 185(3) (cell at table item 2, column headed “In this situation ...”)**

148. These items are minor technical amendments consequential on item 14, which would repeal section 399.

149. The applicable casual loading under section 185 of the Act currently depends on the operation of section 399. Under this provision, an existing award or collective agreement cannot operate in relation to an employee when an AWA is terminated, and an award cannot operate when a collective agreement is terminated.

150. The effect of the references to subsection 399(1) in section 185 is to provide different casual loading guarantees for:

- employees who have never been covered by a workplace agreement, who are entitled to the loading set out in an Australian Pay and Classification Scale (pay scale), and
- employees who were covered by a workplace agreement that was subsequently terminated, who are entitled to the higher of the pay scale loading, or the legislated 20 per cent default loading.

151. Although not referring to section 399, this item would preserve the operation of section 185 to ensure that there is no change to the existing casual loadings guarantee.

#### **Item 27 – After section 324**

##### *New section 324A – Documents taken to be workplace agreements etc*

152. This item would insert new section 324A, to provide that a document that is represented to be a workplace agreement but that could not come into operation under the Act (for example because it was not properly approved) is taken to be a workplace agreement for the purposes of certain provisions in Part 8.

153. New section 347A (item 4) would ensure that only workplace agreements that comply with the requirements of Division 2 of Part 8 (including the requirements for the types of agreements that can be made), and that are properly approved in accordance with section 340, would come into operation.

154. This means that, for example, an agreement could not come into operation if the agreement:

- is not with employees whose employment would be subject to the agreement, or
- did not meet the relevant signature requirements.

155. Item 27 would ensure that civil remedy provisions apply where an employer has lodged a document purporting to be a workplace agreement that is not capable of coming into operation because it does not satisfy section 347A.

156. So, for example, an employer would contravene the civil remedy provisions of Part 8 if

the employer lodges such a document without having provided employees with ready access to the agreement or an information statement, or without having obtained employee approval (Division 4), or engages in prohibited conduct (Division 10) in relation to the ‘purported agreement’.

157. This addresses situations like those in the case of *Inspector Wade Connolly v AC and MS Services* [2007] FMCA 139. That case concerned a lodged employee collective agreement that was intended to cover certain cleaning staff. The document had not been approved by the cleaning staff (who were yet to be employed), but by the company’s office staff, whose employment was not subject to the agreement.

158. Raphael FM held that there was no collective agreement within the meaning of section 327 of the Act, as such an agreement could only be made with employees whose employment will be subject to the agreement. As the current penalties assume the existence of a ‘workplace agreement’, and there was no workplace agreement in this case, Raphael FM decided that the penalties sought could not be imposed.

#### **Item 28 – Section 327**

159. This item would amend section 327 to ensure that an employer may make a collective agreement with employees on an ITEA that has passed its nominal expiry date (without the ITEA having to be terminated first), as well as other employees whose employment will be subject to the agreement.

#### **Item 32 – Paragraph 336(b)**

160. This item would amend paragraph 336(b) to provide that employees whose employment is subject to an ITEA that has passed its nominal expiry date (and other employees whose employment will be subject to the agreement as varied) are ‘eligible employees’ in relation to a collective agreement.

161. This means that the employer must satisfy pre-lodgment procedures for collective agreements in respect of these employees. For example, the employer must provide these employees with ready access to the agreement in writing during the period beginning 7 days before the agreement is approved and ending when it is approved.

#### **Item 34 – Paragraph 337(4)(ca)**

162. This item would repeal paragraph 337(4)(ca). This amendment is consequential on the amendments made by item 2 of Part 1, relating to the no-disadvantage test, which would require the Workplace Authority Director to assess all workplace agreements lodged after the commencement date. Under the existing fairness test, which does not apply to all agreements, the Workplace Authority Director is required to decide whether a particular agreement is subject to the test.

#### **Item 35 – Subsection 337(6)**

163. This item would amend subsection 337(6), consequential on item 8, which would repeal section 355.

**Item 37 – Paragraph 340(2)(a)**

164. This item would amend paragraph 340(2)(a) to ensure that an employee who is subject to an ITEA that has passed its nominal expiry date will be eligible to approve a collective agreement (without having to first terminate the ITEA).

**Item 39 – Paragraph 344(1)(b)**

165. This item would amend subsection 344(1) to provide that a copy of a workplace agreement (annexed to the required declaration) that is lodged with the Workplace Authority Director must meet specified signature requirements in order for lodgment to be effective. In the case of an ITEA, the signature requirements of subsection 340(1) would need to be satisfied. Collective agreements must meet the requirements of regulations made for the purposes of paragraph 418(e).

**Item 42 – Subsections 347(2) and (2A)**

166. This item would repeal subsection 347(2), consequential on amendments proposed under item 4 which would ensure that certain requirements must be satisfied for an agreement to come into operation, and subsection 347(2A). Subsection 347(2A) would not be necessary in the context of a system in which all workplace agreements are assessed under the no-disadvantage test and would need to meet certain signature requirements.

**Item 43 – Paragraphs 347(4)(b), (ba) and (bb)**

167. This item would replace references to an ‘AWA’ with ‘ITEA’ and references to the fairness test with the no-disadvantage test. It also makes minor amendments consequential on amendments in item 2 of Part 1 relating to the no-disadvantage test, which provide that only ITEAs for new employees and union and employer greenfields agreements commence operation on lodgment.

**Item 44 – Subsections 347(7A), (8A) and (9A)**

168. This item would repeal subsections 347(7A), (8A) and (9A). These amendments are consequential on amendments made by item 2 of Part 1, relating to the no-disadvantage test, which would provide that ‘replacement’ workplace agreements – namely ITEAs for existing employees, and employee and union collective agreements – would not commence operation until approved.

**Item 47 – Paragraph 367(1)(b)**

169. This item would amend paragraph 367(1)(b) to provide that an employee whose employment is subject to an ITEA that has passed its nominal expiry date (and other employees whose employment will be subject to the agreement as varied) can make a variation to a collective agreement with the employer.

**Item 48 – Paragraph 367(2)(aa)**

170. This item would replace references to the fairness test to the no-disadvantage test.

**Item 50 – At the end of Subdivision A of Division 8 of Part 8**

*New section 368A – Documents taken to be variations of workplace agreements etc*

171. This item would insert new section 368A to achieve the same result as in item 27 but with respect to variations of workplace agreements (rather than workplace agreements). It would provide that a document that is represented to be a variation of a workplace agreement but that could not come into operation under the Act as a variation of a workplace agreement (for example because it was not properly approved) is taken to be a variation of a workplace agreement for the purpose of ensuring that civil remedy provisions will apply.

**Item 52 – Subparagraph 369(b)(ii)**

172. This item would amend subparagraph 369(b)(ii) to provide that an employee whose employment is subject to an ITEA that has passed its nominal expiry date (and other employees whose employment will be subject to the agreement as varied) is an ‘eligible employee’ in relation to the variation of a workplace agreement.

173. This would ensure that the employer would have to satisfy pre-lodgment procedures for variations in respect of these employees. For example, the employer would be required to provide these employees with ready access to the variation in writing during the period beginning 7 days before the variation is approved and ending when the variation is approved.

**Item 54 – Subsection 370(6)**

174. Item 54 would amend subsection 370(6), consequential on item 8, which would repeal section 355.

**Item 56 – Subparagraph 373(2)(a)(ii)**

175. This item would amend paragraph 373(2)(a)(ii) to provide that employees whose employment is subject to an ITEA that has passed its nominal expiry date (and other employees whose employment will be subject to the agreement as varied) can approve a variation to a collective agreement.

**Item 57 – Paragraph 377(1)(b)**

176. This item would require lodgment of copies of workplace agreement variations that have been signed in accordance with subsection 373(1), in the case of ITEAs, or in accordance with regulations to the Act (under proposed amendments to section 418) that would set out the signature requirements for variations of collective agreements.

**Item 59 – At the end of section 380**

177. This item would insert a note under section 380, which specifies when a variation under Division 8 of Part 8 comes into operation, to refer to new section 346R setting out when

variations of workplace agreements under proposed Division 5A of Part 8 (no-disadvantage test) come into operation.

**Item 60 – At the end of subsection 381(1)**

178. This item would insert a new paragraph 381(1)(c) providing that a workplace agreement may be terminated by the Commission under proposed new Subdivision DA (item 12).

**Item 61 – Paragraph 381(2)(c)**

179. This item is consequential on amendments proposed by item 11, which would prevent collective agreements from being terminated unilaterally with 90 days' notice.

**Item 62 – At the end of subsection 381(2)**

180. This item would insert new paragraph 381(2)(d) to reflect that a collective agreement would be able to be terminated by an order of the Commission under proposed new section 397A (item 12).

**Item 63 – At the end of Subdivision A of Division 9 of Part 8**

*New section 381A – Documents taken to be terminations of workplace agreements etc*

181. This item would insert new section 381A to provide that a document that is represented to be a termination of a workplace agreement but that could not come into operation under the Act (for example because it was not properly approved) is taken to be a termination for the purposes of certain provisions in Part 8.

**Item 66 – Paragraph 389(1)(b)**

182. This item would require, in the case of ITEAs, lodgment of copies of termination agreements that have been signed in accordance with subsection 386(1).

**Item 68 – Subsection 394(1)**

**Item 69 – Subsections 394(1) and 394(2)**

**Item 70 – Subsections 394(4) and (5)**

183. These items are consequential on amendments in item 11, which would prevent collective agreements from being terminated unilaterally with 90 days notice under section 393.

**Item 71 – Subsection 394(8)**

184. This item would repeal subsection 394(8) to reflect that, pursuant to amendments proposed to be made by item 2 of Part 1 relating to the no-disadvantage test, ITEAs for existing employees and union and employee collective agreements would not commence operation until approved.

**Item 72 – Subsection 395(1)**

**Item 73 – Subsection 395(2)**

**Item 74 – Subsection 395(3)**

- Item 75 – Subsection 395(4)**
- Item 76 – Subsection 396(1A)**
- Item 77 – Paragraph 396(1A)(a)**
- Item 79 – Subsection 399A(1)**
- Item 80 – Subsection 399A(1)**
- Item 81 – Subsection 399A(2)**
- Item 82 – Subsection 399A(2A)**
- Item 83 – Paragraph 399A(3)(a)**

185. These items are consequential on amendments in item 11, which would prevent collective agreements being able to be unilaterally terminated with 90 days notice under section 393.

- Item 86 – At the end of section 406**
- Item 88 – Paragraph 407(2)(jba)**
- Item 91 – At the end of subsection 407(2)**

186. These items are consequential on amendments proposed under item 128, relating to the application of the no-disadvantage test in the context of a transmission of business.

- Item 87 – Paragraph 407(2)(jb)**
- Item 89 – Paragraph 407(2)(jc)**
- Item 94 – Paragraph 416(1)(a)**
- Item 95 – Paragraph 416(1)(d)**
- Item 96 – Paragraph 416(1)(g)**
- Item 97 – Paragraph 417(1)(a)**
- Item 98 – Paragraph 417(1)(g)**
- Item 99 – Paragraph 417(1)(k)**

187. These items are consequential on amendments in item 2 of Part 1 relating to the no-disadvantage test.

- Item 90 – Paragraph 407(2)(jd)**

188. This item is consequential on the amendment in item 8 that would repeal section 354, which relates to protected award conditions. The concept of protected award conditions is not required as, pursuant to the amendments relating to the no-disadvantage test in item 2 of Part 1, workplace agreements will be tested against the whole award (or other applicable instrument, as the case may be).

- Item 92 – After section 412**

*New section 412A – Court may give effect to purported workplace agreements etc.*

189. This item would insert new section 412A to allow the Court to order that a ‘purported’ workplace agreement, variation or approval-based termination (that is, a document that is represented to be one of these but that is not capable of coming into operation under the Act because of proposed new sections 347A, 380A and amended section 398) has effect for the purposes of the Act where it is satisfied that making such an order would not reduce any employee’s overall terms and conditions of employment.

190. When making an order, subsection (3) would require the Court to take into account any reference instrument (i.e. a collective agreement or award that would have applied but for the purported workplace agreement, variation or termination) to determine whether an order would disadvantage the employee.

**Item 101 – After paragraph 418(e)**

191. This item would insert a new paragraph 418(ea) which would allow for the regulations to make provision for the signing of variations of workplace agreements by persons bound by those agreements, or representatives of those persons.

**Item 103 – Subparagraphs 467(1)(a)(iii) and (b)(ii)**

192. This item would allow an employee on an ITEA that has passed its nominal expiry date to be included on the roll of voters for secret ballots on proposed industrial action in relation to a collective agreement.

**Item 107 – Subsection 506(4)**

193. This item makes a minor typographical amendment.

**Item 108 – Subsection 506(4)**

194. This item is consequential on amendments made by item 2 of Part 1, relating to the no-disadvantage test, which would provide that collective agreements do not commence operation until approved.

**Item 109 – Subsection 506(5)**

195. This item would repeal subsection 506(5), reflecting amendments made by item 2 of Part 1 relating to the no-disadvantage test that would provide that collective agreements do not commence operation until approved.

**Item 110 – Subsection 513(1) (note 3)**

196. This item would repeal Note 3 relating to protected award conditions. This amendment is consequential on the amendment in item 8 that would repeal section 354.

**Item 113 - Division 3 of Part 11 (heading)**

**Item 114 – Paragraph 583(1)(a)**

**Item 115 – Paragraph 583(1)(b)**

**Item 116 – Subsection 583(1)**

197. These items are consequential on item 1 which would provide for the making of an ITEA.

198. These items would amend section 583 to provide that where, immediately before the time of transmission, the old employer and an employee were bound by an ITEA that was in operation, and the employee is a transferring employee in relation to the ITEA, the new employer becomes bound by the ITEA.



199. This means that a new employer that is a successor, transmittee or assignee to a business or part of a business, would be bound by the ITEA that was binding on the old employer.

200. It is not possible for a workplace agreement that is not in operation to transfer to a new employer under Part 11 of the Act.

**Item 117 – After subsection 583(1)**

201. This item would insert new subsection 583(1A) to provide that for the purposes of proposed section 326 a transferring employee is not to be treated as a new employee of the new employer. This means that a transferring employee may only make an ITEA with a new employer that commences operation on approval (not on lodgment).

**Item 118 – Subsection 583(2)**

202. This item would amend subsection 583(2) to establish the period that a new employer is bound by the transmitted ITEA. It would also specify when the new employer would no longer be bound by the transmitted ITEA. The ITEA would cease to operate in the following circumstances:

- if it is terminated in accordance with Division 9 of Part 8 of the Act;
- it is replaced by another ITEA made between the new employer and the transferring employee;
- the transferring employee ceases to be a transferring employee in relation to the ITEA. For example, the transferring employee ceases to be employed by the new employer, or moves to another job while still working for the new employer that is not capable of being covered by the ITEA;
- the transmission period ends. This means that a new employer would only be bound by the ITEA for a maximum period of 12 months.

**Item 119 – Section 584**

*New section 584 – Termination of transmitted ITEA*

203. This item would repeal existing section 584 and replace it with a new provision, with the effect that an ITEA cannot be unilaterally terminated during the transmission period, even if the ITEA has passed its nominal expiry date.

**Item 120 – Paragraph 585(1)(a)**

204. For the avoidance of doubt, this item would amend section 585(1)(a) to make it clear that a collective instrument must be in operation to transfer to a new employer under Part 11 of the Act.

**Item 121 – Paragraph 585(3)(a)**

**Item 122 – Subsection 587(2)**

205. These items are technical amendments consequential on proposed clauses 1 and 2 of item 15 which would prevent the making of new AWAs.

**Item 123 – Subsection 588(2)**

206. This item is a technical amendment consequential on item 11. Item 11 would amend section 393 so that the provision no longer deals with collective agreements.

**Item 124 – Subsection 588(3)**

207. This item is consequential on item 14 which repeals section 399.

**Item 125 – Paragraph 595(3)(a)**

**Item 126 – Subsection 596(2) (note 2)**

**Item 127 – Subsection 597(2)**

208. These items are technical amendments consequential on proposed clauses 1 and 2 of new Schedule 7A (item 15) which would prevent the making of new AWAs.

**Item 128 - After Division 7 of Part 11**

**New Division 7A – Application of no-disadvantage test**

209. This item would insert new Division 7A to deal with the situation where a workplace agreement becomes binding on a new employer and a transferring employee before the Workplace Authority has applied the no-disadvantage test to the agreement.

210. Division 7A would only apply to a workplace agreement that operates from lodgment. Similar provisions are not necessary for workplace agreements that operate from approval. This is because in order for this type of workplace agreement to be approved and be in operation, it must have already passed the no-disadvantage test. In addition, it is not possible for a workplace agreement that is not in operation to transfer to a new employer under Part 11 of the Act.

*New section 601A – No decision under section 346D at time of transmission*

211. New section 601A(1) would state that the section applies where the Workplace Authority is required to apply the no-disadvantage test to a workplace agreement under proposed section 346D, but before doing so, the workplace agreement becomes binding on a new employer because of the operation of either section 583 (for an ITEA) or under section 585 (for a collective agreement).

212. New subsection 601A(2) makes clear that, for the purpose of applying the no-disadvantage test, references to an employer in proposed sections 346D and 346J are taken to be references to the old employer. In addition, the definitions in proposed section 346F of *relevant collective instrument* and the *relevant general instrument* mean the collective instrument or general instrument that was binding on the old employer in respect of a transferring employee.

213. New subsection 601A(3) would apply when the Workplace Authority has been notified that a workplace agreement is binding on the new employer and a transferring employee. This subsection would require the Workplace Authority to issue the following notices to both the old employer and the new employer:

- notice that the workplace agreement passes, or does not pass the no-disadvantage test (proposed subsections 346M and 346U);
- notice as to whether a workplace agreement as varied passes, or does not pass the no-disadvantage test (proposed subsection 346Z).

214. New subsection 601A(4) would provide that where a workplace agreement does not pass the no-disadvantage test, it is the new employer who has the opportunity to vary the workplace agreement so that it passes the test.

215. Where the new employer lodges a variation to the workplace agreement, proposed paragraph 601A(4)(b) would make clear that it is the old employer's circumstances that are to be taken into account by the Workplace Authority for the purposes of assessing whether the agreement as varied passes the no-disadvantage test.

216. Note 1 at the end of new subsection 601A(4) would direct the reader to new section 601D, which sets out the employment arrangements that would have effect in relation to the new employer and transferring employees should the workplace agreement cease operating as a consequence of not having passed the no-disadvantage test.

217. Note 2 would direct the reader to new sections 346ZG(2),(3) and 601G(1) which make clear that compensation is payable by both the old employer and the new employer in respect of the period during which the employee was employed by the relevant employer, and sets out how that compensation is to be calculated.

*New section 601B - No decision on a varied agreement under section 346Z at time of transmission*

218. New section 601B would deal with the situation where a workplace agreement as varied becomes binding on a new employer and transferring employees before the Workplace Authority has decided whether the agreement, as varied passes the no-disadvantage test.

219. New subsection 601B(1) would state that the section applies where the Workplace Authority is required to apply the no-disadvantage test to the workplace agreement as varied under proposed section 346Z, but before doing so, the workplace agreement becomes binding on a new employer because of the operation of either section 583 (for an ITEA) or under section 585 (for a collective agreement) of the Act.

220. New subsection 601B(2) makes clear that, for the purpose of applying the no-disadvantage test, it is the circumstances of the old employer that are to be taken into account.

221. New subsection 601B(3) would apply when the Workplace Authority has been notified that a workplace agreement is binding on the new employer and a transferring employee or transferring employees. This subsection would require the Workplace Authority to issue notices as to whether a workplace agreement as varied passes, or does not pass, the no-disadvantage test (proposed section 346Z) to both the old employer and the new employer.

*New section 601C – Employees still employed by old employer*

222. New section 601C is an avoidance of doubt provision, dealing with the case where a workplace agreement continues to bind the old employer after the time of transmission. This

situation would arise in the case where the old employer transfers part of its business to the new employer, but continues to operate the rest of the business after the time of transmission. In these circumstances the workplace agreement will continue to bind the old employer in respect of employees who continue to be employed in the part of the business that has not been transferred.

223. Where an agreement continues to bind the old employer in relation to employees that are not transferring employees, the no-disadvantage test applies to an old employer in respect of employees who have not transferred as if the old employer were an employer in the usual sense for the purpose of Division 5A of Part 8.

*New section 601D – Employment arrangements if a workplace agreement ceases to operate because it does not pass no-disadvantage test*

224. New section 601D would specify the employment arrangements that apply to a new employer and a transferring employee whose employment was subject to a workplace agreement in circumstances where a transferred workplace agreement ceases to operate because it has not passed the no-disadvantage test.

225. Proposed subsection 601D(1) would provide that the section applies if:

- a workplace agreement has ceased to operate because it does not pass the no-disadvantage test; and
- the new employer and transferring employee are bound by the workplace agreement because of section 583 (for an ITEA) or section 585 (for a collective agreement); and
- the day on which the workplace agreement ceased to operate falls within the transmission period (of 12 months).

226. For the purposes of proposed section 601D:

- the day on which a workplace agreement that is binding on a new employer and a transferring employee ceases to operate is referred to as the ‘cessation day’; and
- the transferred workplace agreement that has ceased to operate because it did not pass the no-disadvantage test is referred to as the ‘original agreement’.

227. The legislative note at the end of proposed subsection 601D(1) would provide clarification that where the cessation day occurs after the transmission period ends, Division 7A would not apply to determine the employment arrangements for the new employer and transferring employee. Rather, the usual rules under the Act (for example in the remaining part of Part 11) would apply.

228. New subsection 601D(2) would provide that, on and from the cessation day, the parties would be bound by the instrument that would have applied, but for the original agreement having come into operation. However, the instrument would only bind the parties if it:

- would have bound the old employer and the transferring employee immediately before the time of transmission; and
- is an instrument capable of binding the new employee under Part 11 of, or Schedules 6 or 9 to, the Act (which deal with transmission of business); and

- would not, had the instrument bound the new employer because of Part 11 of, or Schedules 6 or 9 to, the Act, have ceased to operate because of the end of the transmission period.

229. This means that if the period of 12 months has passed from the time of transmission, proposed section 601D would not apply to determine the employment arrangements between a new employer and a transferring employee. Rather, the new employer and the transferring employee would be bound by whatever instrument would apply to them under Part 11 of the Act because the transmission period has ended.

230. The definition of *instrument* is limited in new subsection 601D(5) to those instruments that could transfer to bind a new employer under the Act. Other instruments, such as old IR agreements and 170MX awards, are not instruments for the purposes of proposed section 601D, because these are not instruments that can transfer to bind a new employer under the Act.

231. If under proposed subsection 601D(1) the original agreement is a workplace agreement as varied under Division 8 of Part 8, then the workplace agreement in force before the variation was lodged is capable of being an instrument that binds the old employer and a transferring employee immediately before the time of transmission (new subsection 601D(4)). However, to avoid doubt, a workplace agreement that has ceased operating because it has not passed the no-disadvantage test can never be an ‘instrument’ for the purposes of section 601D.

232. Where there is no instrument of the kind referred to in proposed subsection 601D(5), on and from the cessation day, the parties will be bound by a designated award (new paragraph 601D(2)(b)).

233. New section 601D would not affect the way in which the Australian Fair Pay and Conditions Standard (including an Australian Pay and Classification Scale (an APCS)) operates in relation to the instruments, or to a new employer and transferring employee. For example, an APCS that transferred to bind a new employer and a transferring employee on transmission of business under Division 6 of Part 11 would continue to bind the employer regardless of the operation of the no-disadvantage test. That is, if on transmission of business a new employer is bound by an APCS in relation to a transferring employee, the APCS will continue to bind the new employer; section 601D would not displace the operation of the APCS.

234. New subsection 601D(3) provides that a new employer would also be bound by any preserved redundancy provisions that bound the old employer and a transferring employee immediately before the time of transmission, if a workplace agreement ceases to operate as a result of not passing the no-disadvantage test. The preserved redundancy provisions would apply to the new employer and the transferring employee on the cessation day until the earliest of the following:

- the end of the period of 24 months beginning on the first day on which the old employer became bound by the preserved redundancy provision;
- the time when the transferring employee ceases to be employed by the new employer;
- the time when another workplace agreement comes into operation in relation to the new employer and the transferring employee.

*New section 601E – Effect of section 601D in relation to instruments*

235. New section 601E would provide that if a new employer and a transferring employee are bound by an instrument under section 601D, then that instrument is taken to bind the employer and employee from the cessation day until the end of the transmission period. Such an instrument operates in relation to the new employer and the transferring employee as if the employer and employee had become bound by the instrument under Part 11 of, or Schedules 6 and 9 to, the Act (which also deal with transmission of business).

*New section 601F – Regulations may make provision for operation of revived instruments*

236. New section 601F would enable regulations to be made in relation to the operation of instruments that are revived by operation of new section 601D.

*New section 601G – Compensation in respect of no-disadvantage test period*

237. New section 601G would provide that a transferring employee may receive compensation in relation to a workplace agreement that does not pass the no-disadvantage test where the employee was employed by both a new and old employer during the no-disadvantage test period. Section 601G would also set out how compensation is to be calculated in respect of employment with each employer.

238. New subsection 601G(1) would provide that a transferring employee is entitled to receive compensation from the:

- old employer for periods of employment during the no-disadvantage test period that the employee was bound by the workplace agreement and employed by the old employer calculated in accordance with subsection 346ZG(3); and
- new employer for periods of employment after the time of transmission, during the no-disadvantage test period that the employee was bound by the workplace agreement and employed by the new employer.

239. It is important to note that proposed section 346ZG would determine the instrument that is relevant for the purposes of calculating the compensation payable by the old employer.

240. For the purposes of calculating compensation in respect of the new employer, proposed subsection 346ZG would apply with the following modifications:

- the instrument that binds (or would have bound, but for the transmission period ending) the new employer under proposed section 601D is the relevant instrument for the purposes of calculating the compensation payable by the new employer; and
- the redundancy provisions referred to in proposed section 346ZG are taken to mean the redundancy provisions that would have bound the new employer, but for the workplace agreement.

241. Because of the operation of the transmission of business rules in the Act, this means that the instrument that is relevant for the calculation of compensation in respect of the old employer may not be the same instrument as relevant to the new employer under section 601D.

242. It is intended that a transferring employee cannot receive compensation in respect of the

same period of employment from both the old and new employer.

*New section 601H – Notice requirements in relation to transmission of business*

243. New section 601H would create a requirement that an old employer must take reasonable steps to notify the Workplace Authority that a workplace agreement (or a variation) that has not been assessed is now binding on a new employer because of the transmission of business provisions of the Act.

244. An old employer would be required to provide a notice to the Workplace Authority where the workplace agreement has become binding on a new employer because of section 583 (for an ITEA) or section 585 (for a collective agreement) of the Act; and at the time of transmission, the Workplace Authority has not decided whether the workplace agreement passes the no-disadvantage test.

245. New subsection 601H(2) would provide that where an old employer is required to give a notice to the Workplace Authority, the notice must:

- identify the transmitted workplace agreement;
- state whether the old employer remains bound by the workplace agreement;
- specify the date of the end of the transmission period; and
- identify the new employer.

246. New subsection 601H(3) would provide that subsection 601H(2) is a civil remedy provision. The note would alert the reader to Division 11 of Part 8 of the Act which deals with enforcement.

**Item 129 – Subparagraph 602(1)(a)(i)**

**Item 130 – Subsection 602(6)**

**Item 131 – Paragraphs 603(1)(a) and 603B(2)(a)**

**Item 132 – Subsection 605(5) (table item 1)**

247. These items are consequential on item 1 which would allow for the making of an ITEA and items 113 to 127 which would provide for the transmission of an ITEA.

248. These items would ensure that the notice requirements and enforcement provisions in Division 8 of Part 11 would apply to a new employer that becomes bound by an ITEA under section 583.

**Item 134 – Subsection 691A(6) (at the end of the definition of *industrial instrument*)**

249. This item would insert new paragraph 691A(6)(l) to include an AWA (within the meaning of Schedule 7A) in the definition of *industrial instrument* for the purpose of that section relating to stand down. This is required because of the amendments proposed to be made by item 20 to the definition of *workplace agreement*.

**Item 136 – Section 717 (paragraph (aa) of the definition of *applicable provision*)**

**Item 138 – Subsection 718(1) (table item 5A)**

**Item 141 – Paragraph 718(6)(ba)**

250. These items would replace references to the fairness test with the no-disadvantage test.

**Item 139 – Subsection 718(1) (note 2)**

251. This item would repeal Note 2 relating to protected award conditions. This amendment is consequential on the amendment in item 8 that would repeal section 354.

**Item 150 – Paragraph 885(1)(g)**

252. This item would repeal paragraph 885(1)(g), which is not necessary because of paragraph 885(1)(f).

**Item 152 – Subsection 890(3)**

253. This item would repeal subsection 890(3). This amendment is consequential on amendments made by item 2 of Part 1, relating to the no-disadvantage test, which would provide that ITEAs for existing employees and collective agreements do not commence operation until approved.

**Item 154 – Clause 6 of Schedule 1 (definition of AWA)**

254. This item would repeal the definition of AWA in Schedule 1. The definition is not necessary as the term does not appear again in that Schedule.

**Item 155 – Subclause 2(1) of Schedule 6**

255. This item would insert a definition of *fairness test*. The fairness test would continue to be relevant in Schedule 6 to the extent it relates to AWAs and collective agreements made and lodged before the commencement date (or made before the commencement date and lodged within 14 days of that date).

**Item 156 – Subclause 2(1) of Schedule 6**

256. This item would insert a definition of *pre-transition Act*, consistent with the definition in new Schedule 7A.

**Item 157 – Subclause 2(1) of Schedule 6**

257. This item would include an AWA made and lodged before commencement date (or made before the commencement date and lodged within 14 days of that date) in the definition of *workplace agreement* for the purposes of Schedule 6. This would ensure that references to workplace agreements in Schedule 6 will apply to AWAs as well as ITEAs and collective agreements.



**Item 158 – Paragraph 89(1)(a) of Schedule 6**

**Item 159 – At the end of subclause 89(1) of Schedule 6**

**Item 164 – Paragraph 95(1)(a) of Schedule 6**

**Item 165 – At the end of subclause 95(1) of Schedule 6**

**Item 170 – Paragraph 102(1)(a) of Schedule 6**

**Item 171 – At the end of subclause 102(1) of Schedule 6**

258. These items are consequential on amendments in items 8 and 14 that would repeal sections 354 and 399 of the Act.

**Item 160 – Paragraph 89(3)(a) of Schedule 6**

**Item 161 – Paragraph 89(3)(b) of Schedule 6**

**Item 162 – Subclause 89(3) of Schedule 6**

**Item 163 – Paragraph 89(3)(d) of Schedule 6**

**Item 166 – Paragraph 95(2)(a) of Schedule 6**

**Item 167 – Paragraph 95(2)(b) of Schedule 6**

**Item 168 – Subclause 95(2) of Schedule 6**

**Item 169 – Paragraph 95(2)(d) of Schedule 6**

**Item 172 – Paragraph 102(2)(a) of Schedule 6**

**Item 173 – Paragraph 102(2)(b) of Schedule 6**

**Item 174 – Subclause 102(2) of Schedule 6**

**Item 175 – Paragraph 102(2)(d) of Schedule 6**

259. These items would amend subsection 89(3) of Schedule 6 to the Act to reflect that only AWAs and collective agreements made before the commencement date (or made before the commencement date and lodged within 14 days of that date) would be subject to the fairness test, pursuant to item 15. Item 2 of Part 1 would introduce a new no-disadvantage test for ITEAs and collective agreements made from the commencement date.

**Item 176 – Clause 1 of Schedule 7**

260. This item would include a definition of AWA, which will have the same meaning as in proposed new Schedule 7A (Item 15).

**Item 177 – Clause 1 of Schedule 7**

261. This item would insert a definition of *fairness test*. The fairness test would continue to be relevant in Schedule 7 to the extent it relates to AWAs and collective agreements made and lodged before the commencement date (or made before the commencement date and lodged within 14 days of that date).

**Item 178 – Clause 1 of Schedule 7**

262. This item would insert a definition of *pre-transition Act*, consistent with the definition in new Schedule 7A.

**Item 179 – Clause 1 of Schedule 7**

263. This item would insert a definition of *pre-transition collective agreement* which would refer to its meaning in new Schedule 7B, proposed to be inserted by item 15.

**Item 180 – Clause 1 of Schedule 7**

264. This item would insert a definition of *pre-transition workplace agreement*, to include an AWA within the meaning of proposed new Schedule 7A or a collective agreement within the meaning of proposed new Schedule 7B.

**Item 181 – Clause 1 of Schedule 7**

265. This item would insert a definition of *workplace agreement* to include an AWA. This would ensure that references to workplace agreements in Schedule 7 would refer to AWAs as well as ITEAs and collective agreements.

**Item 182 – Subclause 3(2) of Schedule 7**

266. This item would amend subclause 3(2) to extend its operation in relation to both AWAs and ITEAs. It would provide that a pre-reform certified agreement has no effect in relation to an employee while an AWA or ITEA operates in relation to the employee.

**Item 183 – Paragraph 3(5A)(a) of Schedule 7**

**Item 184 – Subclause 3(5A) (note) of Schedule 7**

267. These items would amend paragraph 3(5A)(a) and the note to reflect that collective agreements made after the commencement date would not commence operation until approved by the Workplace Authority Director (and would be subject to the no-disadvantage test rather than the fairness test). The amendments therefore restrict the operation of the paragraph to pre-transition collective agreements.

**Item 185 – Clause 7 of Schedule 7**

268. This item would repeal clause 7 of Schedule 7, which currently provides that a pre-reform certified agreement cannot come back into operation in relation to an employee when an AWA operated in relation to the employee and was subsequently terminated. This amendment would ensure that a pre-reform certified agreement could be capable of again operating in relation to an employee in these circumstances.

269. This amendment is consistent with the proposed repeal of section 399 by item 14.

**Item 186 – Clause 9 of Schedule 7**

**Item 187 – Clause 9 of Schedule 7**

**Item 188 – Clause 9 of Schedule 7**

270. These items would amend clause 9, consequential on the proposed repeal of section 355 by item 8, to restrict its operation to pre-transition workplace agreements as defined.

**Item 189 – Subclause 18(1) of Schedule 7**

271. This item would amend subclause 18(1) to extend its operation in relation to ITEAs as well as AWAs, so that a pre-reform AWA would cease to be in operation in relation to an employee if an ITEA or an AWA has come into operation in relation to the employee.

**Item 190 – Subclause 18(5) (note) of Schedule 7**

272. This item would amend the note under subclause 18(5) to reflect that the fairness test would be contained in the pre-transition Act.

**Item 192 – Clause 21 of Schedule 7**

**Item 193 – Clause 21 of Schedule 7**

**Item 194 – Clause 21 of Schedule 7**

273. These items would amend clause 21, consequential on the proposed repeal of section 355 by item 8, to restrict its operation to pre-transition workplace agreements as defined.

**Item 195 – Subclause 25(1) of Schedule 7**

274. This item would amend subclause 25(1) to extend its operation in relation to both AWAs and ITEAs. It would provide that a section 170MX award has no effect in relation to an employee while an AWA or ITEA operates in relation to the employee.

**Item 196 – Paragraph 25(4)(a) of Schedule 7**

**Item 197 – Subclause 25(4) of Schedule 7 (note 1)**

275. These items would amend paragraph 25(4)(a) and the legislative note to reflect that collective agreements made after the commencement date would not commence operation until approved by the Workplace Authority Director (and would not be subject to the fairness test). The amendments therefore restrict the operation of the paragraph to pre-transition collective agreements.

**Item 198 – Subclause 25(4) of Schedule 7 (note 2)**

276. This item would amend Note 2 under subclause 25(4) to reflect the proposed amendment to subclause 25(1) (item 195).

**Item 199 – Clause 26 of Schedule 7**

277. This item would repeal clause 26 of Schedule 7, which currently provides that a section 170MX award cannot come back into operation in relation to an employee when an AWA operated in relation to the employee and was subsequently terminated. This amendment would ensure that a section 170MX award could be capable of again operating in relation to an employee in these circumstances.

278. This amendment is consistent with the proposed repeal of section 399 by Item 14.

**Item 200 – Paragraph 27(2)(a) of Schedule 7**

**Item 201 – Subclause 27(2) of Schedule 7 (note)**

**Item 202 – Paragraph 28(5)(a) of Schedule 7**

**Item 203 – Subclause 28(5) of Schedule 7 (note)**

279. These items would amend paragraphs 27(2)(a) and 28(5)(a) and the legislative notes to reflect that replacement workplace agreements made after the commencement date (that is, collective agreements other than greenfields agreements and ITEAs for existing employees)

would not commence operation until approved by the Workplace Authority Director (and would be subject to the no-disadvantage test rather than the fairness test). These items would therefore restrict the operation of the paragraphs to pre-transition workplace agreements.

**Item 204 – At the end of clause 28 of Schedule 7**

280. This item would, consistent with the proposed repeal of section 399 by item 14, insert new subclause 28(6) to provide that an old IR agreement that ceased to operate because it was replaced by an AWA or ITEA can operate again once the AWA or ITEA ceases to operate.

**Item 205 – Subclause 32(1) of Schedule 7**

**Item 206 – Subclause 32(2) of Schedule 7**

281. These items would clarify that clause 32 applies only in relation to pre-reform AWAs.

**Item 207 – Subclause 1(1) of Schedule 8**

**Item 208 – Subclause 1(1) of Schedule 8**

**Item 209 – Subclause 1(1) of Schedule 8**

**Item 210 – Subclause 1(1) of Schedule 8**

282. These items would insert new definitions of *fairness test*, *pre-transition Act*, *pre-transition workplace agreement* and *workplace agreement* in Schedule 8 for the purpose of the amendments made by items 219 to 228 and 230 to 237.

283. The proposed amendments are consequential on the replacement of the fairness test with the new no-disadvantage test. The fairness test set out in section 346M of the pre-transition Act would continue to apply to employers and employees bound by a preserved State agreement or notional agreement preserving State awards (NAPSA) who made an AWA within the meaning of new Schedule 7A or a collective agreement within the meaning of new Schedule 7B.

**Item 211 – Paragraph 15G(4)(a) of Schedule 8**

284. This item would replace the reference to *workplace agreement* with a *pre-transition workplace agreement* in paragraph 15G(4)(a). This is a minor technical amendment, consequential on the amendments contained in new Schedules 7A and 7B.

**Item 212 – Subclause 15G(4) of Schedule 8 (note)**

285. Item 212 would amend the legislative note under subclause 15G(4) to make clear that the section references to the fairness test provisions set out in the note are references to the pre-transition Act. This amendment is consequential on the amendments contained in new Schedules 7A and 7B.

**Item 213 – At the end of clause 15G of Schedule 8**

286. This item would insert a new paragraph at the end of clause 15G to enable a preserved collective State agreement that has ceased operating to operate again if the preserved collective State agreement stopped operating because it was replaced by an AWA or an ITEA (and the AWA or ITEA ceased to operate after the commencement of the new Schedule 7A).

287. This amendment is necessary to ensure that a preserved collective State agreement can revive if a workplace agreement (or other instrument) is terminated or ceases to operate for other reasons.

288. The proposed amendment will not apply to preserved individual State agreements. A preserved individual State agreement that has ceased operating because it was replaced by another workplace agreement cannot operate again.

**Item 214 – Subclause 20(3) of Schedule 8**

**Item 216 – Subclause 20(4) of Schedule 8**

289. These items would replace the references to ‘AWA’ with ‘ITEA’ in subclauses 20(3) and 20(4). These are minor technical amendments consequential on the amendments contained in new Schedules 7A and 7B.

290. The effect of the amendments would be that:

- a preserved individual State agreement may be enforced as if it were an ITEA; and
- a workplace inspector has the same functions and powers in relation to a preserved individual State agreement as he or she has in relation to an ITEA.

**Item 215 – After subclause 20(3) of Schedule 8**

291. Item 215 would insert new subclause 20(3A) to provide that the pre-transition Act continues to apply to any enforcement process begun before the commencement of the subclause in relation to a preserved individual State agreement.

**Item 217 – At the end of clause 20 of Schedule 8**

292. This item would insert new subclause 20(5) to provide that the pre-transition Act continues to apply to any actions taken by a workplace inspector that were begun before the commencement of that subclause in the performance of functions or exercise of powers in relation to a preserved individual State agreement.

**Item 218 – Subclause 21(3) of Schedule 8**

293. This item would replace references to ‘AWA’ with ‘pre-reform AWA’.

**Item 219 – Paragraph 25A(1)(b) of Schedule 8**

**Item 220 – Subclauses 25(A)(2) and (3) of Schedule 8**

**Item 221 – Paragraph 25B(1)(a) of Schedule 8**

**Item 222 – Paragraphs 25B(1)(b) and (c) of Schedule 8**

**Item 223 – Subclause 25B(1) of Schedule 8**

**Item 224 – Paragraph 25B(1)(f) of Schedule 8**

**Item 225 – Subclause 25B(2) of Schedule 8**

**Item 226 – Subclause 25B(2) of Schedule 8**

**Item 227 – Paragraph 25B(2)(a) of Schedule 8**

**Item 228 – Paragraph 25B(2)(b) of Schedule 8**

294. These items would make amendments consequential on the amendments contained in

new Division 5A of Part 8 (which would replace the fairness test with the new no-disadvantage test) and new Schedules 7A and 7B (which would provide for the operation of *pre-transition workplace agreements*).

295. The fairness test set out in section 346M of the pre-transition Act would continue to apply to employers and employees bound by a preserved State agreement who have made an AWA within the meaning of Schedule 7A or a pre-transition collective agreement within the meaning of Schedule 7B. All workplace agreements made after commencement would be required to pass the no-disadvantage test. Under proposed new Division 5A (item 2 of Schedule 1), notional agreements preserving State awards and preserved State agreements could be reference instruments for the purpose of the no-disadvantage test.

296. In addition, these items would make the necessary amendments consequential on removing the concept of ‘protected notional conditions’ where employment was subject to a preserved State agreement.

**Item 229 – Paragraph 28(b) of Schedule 8**

297. This item makes a technical amendment that would replace the reference to ‘AWA’ with a reference to an ‘ITEA’ in paragraph 28(b). This item is consequential on the amendments contained in new Schedule 7A.

**Item 230 – Subclause 38A(2) of Schedule 8**

**Item 231 – Subclause 38A(5) of Schedule 8**

**Item 232 – Subclause 38A(5) of Schedule 8 (note)**

**Item 233 – At the end of clause 38A of Schedule 8**

298. These items would make minor technical amendments to clause 38A consequential on the amendments contained in new Schedules 7A and 7B.

299. Item 233 would insert new subclause 38A(6) at the end of clause 38A to enable a NAPSA that has ceased operating to operate again if the NAPSA stopped operating because it was replaced by a pre-transition workplace agreement or a workplace agreement (as the case may be) and the pre-transition workplace agreement or workplace agreement ceased to operate after the commencement of the new subclause).

300. The proposed amendment will not apply in circumstances where a NAPSA has ceased operating because a federal award has come into operation. A NAPSA that has ceased operating because it was replaced by a federal award cannot operate again.

**Item 234 – Paragraph 52(1)(a) of Schedule 8**

**Item 235 – Subclauses 52(2) and (2A) of Schedule 8**

**Item 236 – Paragraph 52AAA(1)(a), (b) and (c) of Schedule 8**

**Item 237 – Subclause 52AAA(1) of Schedule 8**

301. These items would have the same effect in relation to NAPSA as items 219 to 228 in relation to preserved State agreements.

302. The proposed amendments would allow for the continued application of the fairness test to agreements lodged prior to the commencement of new Schedules 7A and 7B where a person

was bound by a NAPSA.

**Item 238 – Subclause 2(2) of Schedule 9**

**Item 239 – Before paragraph 2(2)(a) of Schedule 9**

**Item 241 – Clause 3 of Schedule 9**

**Item 242 – Clause 3 of Schedule 9**

**Item 244 – Clause 3 of Schedule 9 (definition of *transitional instrument*)**

**Item 245 – Clause 3 of Schedule 9**

303. These items are technical amendments consequential on item 246. Proposed item 246 would insert new Part 2A in Schedule 9 dealing with the transmission of AWAs.

**Item 240 – Subclauses 2(5) and (6) of Schedule 9**

304. This item would repeal subclauses 2(5) and (6) consequential on the proposed repeal of Part 8 of Schedule 9 (item 258).

**Item 243 – Clause 3 of Schedule 9 (definition of *transitional industrial instrument*)**

305. This item is a technical amendment consequential on items 237, 249 and 250.

**Item 246 – After Part 2 of Schedule 9**

**New Part 2A - Transmission of AWAs**

306. This item is consequential on proposed clauses 1 and 2 of new Schedule 7A (to be inserted by item 15) which would prevent the making of new AWAs. Item 246 would insert new Part 2A in Schedule 9 to deal with the transfer of an AWA to a new employer on transmission of business. To the extent possible, it is intended that Part 2A provides for the transmission of AWAs consistent with the transmission of AWAs under Division 3 of Part 11 of the pre-transition Act.

*New clause 6B –Transmission of AWA*

307. Proposed clause 6B would provide that where, immediately before the time of transmission, the old employer and an employee were bound by an AWA, and the employee is a transferring employee in relation to the AWA, the new employer becomes bound by the AWA.

308. This means that a new employer that is a successor, transmittee or assignee to a business or part of a business, would be bound by the AWA that was binding on the old employer.

309. The legislative note would alert the reader that the employee must notify the transferring employee about the operation of transferred instruments and what instruments apply in a transmission of business situation. A copy of the notice must be lodged with the Workplace Authority.

310. New subclause 6B(2) would establish how long the new employer is bound to the AWA. It would also specify when the new employer would no longer be bound by the transmitted AWA. The AWA would cease to operate in the following circumstances:

- if it is terminated by agreement in accordance with Division 9 of Part 8 of the pre-transition Act;
- it is replaced by an ITEA between the new employer and the transferring employee;
- the transferring employee ceases to be a transferring employee in relation to the AWA. For example, the transferring employee ceases to be employed by the new employer, or moves to another job while still working for the new employer that is not capable of being covered by the AWA;
- the transmission period ends. This means that a new employer would only be bound by the AWA for a maximum period of 12 months.

311. New subclause 6B(3) makes it clear that the rights and obligations of the old employer that arose before the time of transmission in respect of transferring employees are not affected.

*New clause 6C – Termination of transmitted AWA*

312. New clause 6C would prevent an AWA from being unilaterally terminated during the transmission period, even if the AWA has passed its nominal expiry date.

*New clause 6D – Transferring employee considered an existing employee for the purposes of eligibility to make an ITEA*

313. New clause 6D would provide that for the purposes of proposed section 326 a transferring employee is not to be treated as a new employee of the new employer. This means that a transferring employee may only make an ITEA with a new employer that commences operation on approval (not on lodgment).

**Item 247 – Paragraph 7(2)(b) of Schedule 9**

314. This item is consequential on item 1 which would allow for the making of ITEAs. This item would ensure that a transmitted pre-reform AWA would cease to operate if the transferring employee makes an ITEA with the new employer.

**Item 248 – Clause 8 of Schedule 9**

315. This item is consequential on item 14 which would repeal section 399. This item would repeal clause 8 of Schedule 9, with the effect that a transferring employee may become bound by a transitional instrument that binds the new employer, in cases where the transmitted pre-reform AWA no longer applies to the employee.

**Item 249 - Paragraph 10(6)(a) of Schedule 9**

316. This item would repeal paragraph 10(6)(a), consistent with the fact that AWAs could not be made after the commencement date. This amendment is also consistent with the removal of equivalent provisions (subsections 585(3)(a) and 595(3)(a) of Part 11) - see items 121 and 125.

**Item 250 - Subclauses 11(5) and (6) of Schedule 9**

317. This item is consequential on item 14 which would repeal section 399. This item would repeal subclauses 11(5) and 11(6) of Schedule 9, with the effect that a transferring employee may become bound by a transitional instrument that binds the new employer, in cases where the



transmitted pre-reform certified agreement no longer applies to the employee.

**Item 251 – Subclauses 20(4) and (5) of Schedule 9**

318. This item is consequential on item 14 which would repeal section 399. This item would repeal subclauses 20(4) and 20(5) of Schedule 9, with the effect that a transferring employee may become bound by a transitional instrument that binds the new employer, in cases where the transmitted State transitional instrument no longer applies to the employee.

**Item 252 – Before subparagraph 28(1)(a)(i) of Schedule 9**

**Item 253 – Paragraph 28(4)(a) of Schedule 9**

**Item 255 – Paragraph 28(4)(b) of Schedule 9**

**Item 257 – Paragraph 29(1)(a) of Schedule 9**

**Item 258 – Subclause 31(4) of Schedule 9 (before item 1 of the table)**

319. These items are consequential on item 246 which would provide for the transmission of an AWA in Schedule 9.

320. These items would ensure that the notice requirements and enforcement provisions in Schedule 9 would apply to a new employer that becomes bound by an AWA under new clause 6B.

**Item 254 – Paragraph 28(4)(a) of Schedule 9**

**Item 256 – Paragraph 28(4)(b) of Schedule 9**

321. These items are consequential on item 1 which would allow for the making of ITEAs. These items would ensure that a new employer would not be required to give notice to a transferring employee where the new employer has become bound by an ITEA within 14 days of the time of transmission.

**Item 259 – Parts 8 and 9 of Schedule 9**

322. This item would repeal Parts 8 and 9 of Schedule 9, consistent with item 14 which would repeal section 399. The repeal of Part 8 would have the effect that a transferring employee may become bound by a transitional instrument that binds the new employer, in cases where a transmitted collective agreement or award no longer applied to the employee. The repeal of the regulation-making power in Part 9 is also consistent with the repeal of section 399.

#### Part 4 – Amendments of other Acts

323. Part 4 of the Bill would amend 16 Acts, consequential on amendments proposed to be introduced by the Bill, in particular by:

- Item 20 which would amend the definition of **workplace agreement** to mean an ITEA or collective agreement (replacing its current definition as an AWA or collective agreement)
- Item 19 which would insert a definition of **individual transitional employment agreement** or **ITEA** in subsection 4(1) of the Act
- Items 16 and 17 which would repeal the definitions of **Australian workplace agreement** or **AWA** and **AWA** in subsection 4(1) of the Act, and
- Item 15 which would insert a new definition of **AWA** in proposed new Schedule 7A, which would deal with transitional arrangements for AWAs.

324. The consequential amendments would fall into the following categories:

- amendments to insert references to AWAs as a result of their proposed exclusion from the definition of **workplace agreement** in section 4 of the Act (except where the provision relates to the making or varying of AWAs, which could not be done from the commencement date).
- amendments to include references to ITEAs in lists of industrial instruments (which include AWAs separately), where appropriate.
- amendments to preserve the operation of provisions in relation to AWAs and collective agreements only, where they have no potential to apply in relation to ITEAs.
- amendments to refer to the new definition of **AWA** in proposed new Schedule 7A.
- amendments to remove provisions which favour the making of AWAs (or other individual agreements) over other industrial instruments (*Skilling Australia's Workforce Act 2005*).

#### Acts being amended

*Airports (Transitional) Act 1996*

*APEC Public Holiday Act 2007*

*Australian Federal Police Act 1979*

*Building and Construction Industry Improvement Act 2005*

*Coal Mining Industry (Long Service Leave Funding) Act 1992*

*Commonwealth Serum Laboratories Act 1961*

*Health Insurance Commission (Reform and Separation of Function) Act 1997*

*Income Tax Assessment Act 1997*

*Income Tax (Transitional Provisions) Act 1997*

*Long Service Leave (Commonwealth Employees) Act 1976*

*Parliamentary Service Act 1999*  
*Public Service Act 1999*  
*Skilling Australia's Workforce Act 2005*  
*Superannuation Guarantee (Administration) Act 1992*  
*Telstra Corporation Act 1991*  
*Tradesmen's Rights Regulation Act 1946*

**Detail of amendments**

*Airports (Transitional) Act 1996*

**Item 259 – Paragraph 59(4)(d)**

325. This item would amend the definition of *industrial instrument* in subsection 59(4) to omit the reference to an Australian Workplace Agreement and substitute references to an individual transitional employment agreement (as defined by section 4 of the Act) or an AWA (as defined by clause 1 of Schedule 7A to the Act).

*APEC Public Holiday Act 2007*

**Item 260 – Section 4 (paragraph (b) of the definition of *industrial instrument*)**

**Item 261 – Section 4 (after paragraph (b) of the definition of *industrial instrument*)**

326. These items would omit the reference to workplace agreement and substitute references to a collective agreement and AWA within the meaning of Schedule 7A of the Act, to reflect that the Act has no ongoing application except to the extent it applies to past conduct and therefore has no potential to apply in relation to ITEAs.

*Australian Federal Police Act 1979*

**Item 262 – Subsection 27(4) (at the end of the definition of *industrial instrument*)**

327. This item would include an AWA within the definition of *industrial instrument* in subsection 27(4).

*Building and Construction Industry Improvement Act 2005*

**Item 263 – subsection 4(1) (definition of AWA)**

328. This item would amend the definition of AWA to refer to its definition in proposed Schedule 7A.

**Item 264 – subsection 4(1) (at the end of the definition of *workplace agreement*)**

329. This item would include an AWA within the meaning of Schedule 7A in the definition of *workplace agreement* in subsection 4(1).

*Coal Mining Industry (Long Service Leave Funding) Act 1992*

**Item 265 – Subsection 4(1) (after subparagraph (d)(i) of the definition of *relevant industrial instrument*)**

330. This item would insert an AWA within the meaning of Schedule 7A of the Act in the definition of *relevant industrial instrument* in subsection 4(1).

*Commonwealth Serum Laboratories Act 1961*

**Item 266 – Subsection 27(5) (at the end of the definition of *industrial instrument*)**

**Item 267 – Subsection 29(3) (at the end of the definition of *industrial instrument*)**

331. These items would include references to an AWA in the definitions of *industrial instrument* in subsections 27(5) and 29(3).

*Health Insurance Commission (Reform and Separation of Functions) Act 1997*

**Item 268 – Subsection 26(2) (at the end of the definition of *industrial instrument*)**

**Item 269 – Subsection 33(2) (at the end of the definition of *industrial instrument*)**

332. These items would include references to an AWA in the definitions of *industrial instrument* in subsections 26(2) and 33(2).

*Income Tax Assessment Act 1997*

**Item 270 – Subsection 290-80(2) (note)**

333. This item would amend the note under subsection 290-80(2) to include references to an individual transitional employment agreement and an AWA within the meaning of Schedule 7A. It would remove the reference to Australian Workplace Agreement to reflect the proposed repeal of the definition of *Australian Workplace Agreement* or AWA in the Act (Item 16).

*Income Tax (Transitional Provisions) Act 1997*

**Item 271 – Paragraph 82-10(1)(a)**

334. This item would omit a reference to workplace agreement in paragraph 82-10(1)(a) and substitute references to a collective agreement within the meaning of the Act or an AWA within the meaning of Schedule 7A of the Act. This would exclude the application of the provision to ITEAs to reflect that it relates to entitlements under agreements as in force just before 10 May 2006.

*Long Service Leave (Commonwealth Employees) Act 1976*

**Item 272 – At the end of subsection 15(1)**

335. This item would insert new paragraph (d) at the end of subsection 15(1) to ensure that the subsection applies in relation to AWAs as well as ITEAs and collective agreements to the extent it relates to the operation and not the making of agreements.

*Parliamentary Service Act 1999*

**Item 273 – Section 7**

**Item 274 – Subsections 23(5) and 24(1)**

336. These items would insert references to AWAs in subsections 23(5) and 24(1) to reflect their proposed exclusion from the definition of *workplace agreement* in the Act, and provide a definition of *AWA*.

*Public Service Act 1999*

**Item 275 – Section 7**

**Item 276 – Subsections 23(5) and 24(1)**

**Item 277 – Paragraph 72(3)(a)**

**Item 278 – Subparagraph 72(4)(a)(iii)**

337. These items would insert references to AWAs in subsections 23(5) and 24(1), paragraph 72(3)(a) and subparagraph 72(4)(a)(iii) to reflect their proposed exclusion from the definition of *workplace agreement* in the Act, and provide a definition of *AWA*.

*Skilling Australia's Workforce Act 2005*

**Item 279 – Subsection 3(1) (definition of *Australian workplace agreement*)**

338. This item would amend the definition of *AWA* to refer to its definition in proposed Schedule 7A.

**Item 280 – Paragraph 12(1)(b)**

339. This item would amend paragraph 12(1)(b) to remove the requirement of State and Territory governments to ensure that TAFE institutions introduce more flexible employment arrangements by offering Australian workplace agreements to staff, or where the Act does not apply, other individual agreements. The amended requirement would be to introduce more flexible employment arrangements, without specifying any particular type of industrial instrument.

**Item 281 – Paragraph 12(1)(g)**

**Item 282 – Subsection 12(3)**

340. These items would insert references to an *AWA* in paragraph 12(1)(g), dealing with freedom of association, to reflect the proposed exclusion of AWAs from the definition of *workplace agreement* in the Act.

*Superannuation Guarantee (Administration) Act 1992*

**Item 283 – Section 12A (definition of *AWA*)**

341. This item would amend the definition of *AWA* to refer to its definition in proposed Schedule 7A.

**Item 284 – Section 12A**

**Item 285 – At the end of subsection 32C(6)**

342. These items would insert a reference to ITEA in proposed new paragraph 32C(6)(f) and a definition of *ITEA* in section 12A.

*Telstra Corporation Act 1991*

**Item 286 – Subsection 9A(2) (after paragraph (d) of the definition of *industrial instrument*)**

343. This item would insert new paragraph 9A(2)(da) to include an AWA in the definition of *industrial instrument*.

*Tradesmen’s Rights Regulation Act 1946*

**Item 287 – Section 6 (definition of *industrial agreement*)**

344. This item would insert a reference to an AWA in the definition of *industrial agreement* in section 6 to reflect the proposed exclusion of AWAs from the definition of *workplace agreement* in the Act.

## **Schedule 2—Awards**

### **Part 1—Award modernisation**

#### **Item 1 - After paragraph 3(g)**

1. Item 1 would amend the Principal object of the Act to include the establishing of a process for making modern awards as a means of giving effect to the Principal object of the Act (new paragraph 3(ga)).

#### **Item 2 - Subsection 4(1)**

2. Item 2 would define an ‘award modernisation process’ as a process of award modernisation carried out by the Commission in accordance with an award modernisation request.

#### **Item 3 - Subsection 4(1)**

3. Item 3 would define an ‘award modernisation request’. An award modernisation request would have the meaning given by subsection 576C(1).

#### **Item 4 - Subsection 4(1)**

4. Item 4 would define ‘modern award’. Modern award would mean an award made by the Commission under section 576G.

#### **Item 5 - Subsection 4(1) (definition of *proceeding*)**

5. Item 5 would make clear that an award modernisation process is a ‘proceeding’ for the purposes of the Act.

#### **Item 6 - Subsection 527(5)**

6. Item 6 would repeal subsection 527(5). Subsection 527(5) of the Act currently provides that a preserved award term about superannuation ceases to have effect at the end of 30 June 2008. The proposed repeal of this subsection would allow a preserved award term about superannuation to continue beyond 30 June 2008.

7. Similar amendments are made in respect of preserved transitional award terms and preserved notional terms about superannuation under items 10-12.

#### **Item 7 - Subsection 529(3) (note 1)**

8. Item 7 would repeal note 1 in subsection 529(3) and would be consequential to the proposed repeal of subsection 527(5) (item 6).

#### **Item 8 - Subsection 529(3) (note 2)**

9. Item 8 would renumber the remaining note in subsection 529(3) as a consequence of the repeal of note 1.

## **Item 9 – After Part 10**

### **New Part 10A—Award modernisation**

10. Proposed Part 10A would set out the Australian Industrial Relations Commission’s award modernisation function and specify certain requirements for modern awards.

#### **Division 1—Preliminary**

##### *New section 576A - Object of Part*

11. New section 576A would set out the objects of proposed Part 10A. The objects make clear that modern awards, in conjunction with the proposed National Employment Standards (which will be legislated as part of the Government’s substantive workplace relations reforms), are to provide a fair minimum safety net for employees.

#### **Division 2—Award modernisation process**

12. Proposed Division 2 would set out the manner in which the Commission is to carry out an award modernisation process.

##### *New section 576B - Commission’s award modernisation function*

13. New subsection 576B(1) would provide that it is a function of the Commission to carry out one or more award modernisation processes.

14. New subsection 576B(2) would set out the matters to which the Commission must have regard when performing its award modernisation function.

15. New subsection 576B(3) would provide definitions of ‘transitional award’ and ‘transitionally registered association’.

##### *New section 576C - Award modernisation request*

16. New section 576C would set out the nature and content of the award modernisation request.

17. New subsection 576C(1) would provide that an award modernisation process is to be carried out in accordance with a written request (an *award modernisation request*) made by the Minister to the President. The proposed award modernisation request is set out at pages 76 – 81 of this explanatory memorandum.

18. New subsection 576C(2) would provide that an award modernisation request must specify the following:

- the award modernisation process to be undertaken (paragraph 576C(2)(a));
- the time by which the award modernisation process must be completed (which must be no later than 2 years after the request is made) (paragraph 576C(2)(b)); and
- any other matter relating to the award modernisation process that the Minister considers appropriate (paragraph 576C(2)(c)).



19. New subsection 576C(3) would provide guidance by identifying specific matters that the Minister could include in an award modernisation request under paragraph 576C(2). These matters would include:

- requiring the Commission to prepare progress reports on specified matters relating to the award modernisation process and make them available as required by the request (576C(3)(a));
- specifying matters (other than those referred to in subsection 576J(1), 576K and 576M) about which terms may be included in modern awards (576C(3)(b));
- requiring the Commission to include in modern awards terms about particular matters (being matters about which terms may be included in a modern award) (576C(3)(c));
- giving directions about how, or whether, the Commission is to deal with particular matters (being matters about which terms may be included in a modern award) (576C(3)(d)).

20. An award modernisation request may be varied or revoked by the Minister (576C(4)).

21. Despite subsection 576C(2)(b), an instrument varying an award modernisation request may also allow a later time for the Commission to complete an award modernisation process (which must be no later than 2 years after the variation) (576C(5)).

22. Proposed subsection 576C(6) exempts an award modernisation request, and an instrument varying or revoking a request, from being legislative instruments for the purposes of the *Legislative Instruments Act 2003*. The exemption is consistent with the existing exemption for instruments that deal with persons' terms and conditions of employment. The request, and any variation or revocation, is the first step in the process of a modern award being made as a result of the award modernisation process.

*New section 576D - Award modernisation request to be published*

23. New section 576D would provide that an award modernisation request (or an instrument varying or revoking a request) must be published, as soon as practicable after it has been received by the President, in a manner prescribed in the regulations, or if no manner is prescribed, in a manner a Registrar thinks appropriate.

*New section 576E - Procedure for carrying out award modernisation process*

24. New subsection 576E(1) would provide that once an award modernisation request is received, the President must establish one or more Full Benches to undertake the award modernisation process. Due to the breadth of the award modernisation process, the President may wish to establish more than one Full Bench to undertake the process. Proposed subsection 576E(1) would allow more than one Full Bench to be established.

25. New subsection 576E(2) would give the President certain powers to direct and manage an award modernisation process. The President would be able to:

- give directions to a Full Bench about how it should carry out an award modernisation process; and
- allocate specific tasks to individual Commissioners and direct those members about how they should undertake such tasks.

26. New subsection 576E(3) would provide that, subject to any directions from the President under subsection 576E(2), a Full Bench would have absolute discretion as to how it carries out an award modernisation process.

27. New subsection 576E(4) would provide that for the purposes of carrying out an award modernisation process a Full Bench may inform itself in any way it thinks appropriate, including by:

- undertaking or commissioning research; or
- consulting with any other person, body or organisation in any manner it considers appropriate.

28. New subsection 576E(5) would make clear that the acts listed in subsection 576E(4) do not limit the powers of a Full Bench under other provisions of the Act. For example, it would not limit the Commission’s powers under Division 4 or Part 3 of the Act.

*New section 576F - Completion of award modernisation process*

29. New section 576F would require the Commission to complete an award modernisation process within the time allowed in the award modernisation request.

30. Under new paragraph 576C(2)(b), the time specified in an award modernisation request must be no later than 2 years after the request is made.

31. However, if an award modernisation request is varied, the Minister may specify a later time (new subsection 576C(5)). That later time must be no longer than 2 years after the variation.

*New section 576G - Full Bench must make modern awards*

32. New subsection 576G(1) would require a Full Bench to make one or more modern awards to give effect to the outcome of an award modernisation process.

33. The first legislative note would make clear that a modern award must comply with the requirements for modern awards in proposed Divisions 3, 4 and 5. The second legislative note would refer the reader to proposed section 576Y, which sets out rules for when a modern award would commence.

34. A modern award made by a Full Bench under subsection (1) must be consistent with any directions in the award modernisation request to which the modern award relates (new subsection 576G(2)).

35. New subsection 576G(3) would provide that the Commission must not make a modern award other than to give effect to the outcome of an award modernisation process.

36. New subsection 576G(4) would exempt a modern award from being a legislative instrument for the purposes of the *Legislative Instruments Act 2003*. The exemption is consistent with the existing exemption for instruments that deal with persons’ terms and conditions of employment.

*New section 576H - Commission may vary modern awards*

37. New section 576H would provide that the Commission may vary a modern award if the variation is consistent with the terms of the award modernisation request to which the modern award relates.

**Division 3—Terms of modern awards**

38. This Division would provide for what terms may and may not be included in modern awards. The Division would set out what matters are allowable modern award matters, and provide for an award modernisation request to specify other matters about which terms may be included in awards (Subdivision A).

39. The Division would also specify certain matters that must not be included in modern awards (Subdivision B).

**Subdivision A—Terms that may be included in modern awards**

40. This Subdivision would establish what matters may be dealt with in awards. It would set out what matters are allowable modern award matters, and provide for an award modernisation request to specify other matters about which terms may be included in awards.

41. The Commission’s power to include terms about particular matters in modern awards would be affected by new paragraph 576C(3)(d), which provides for an award modernisation request to give directions as to how, and whether, particular matters may be dealt with in modern awards.

*New section 576J - Matters that may be dealt with by modern awards*

42. New subsection 576J(1) would set out the list of allowable modern award matters. Each of the allowable modern award matters would have its ordinary workplace relations meaning. The scope of the matters would be affected by any direction in an award modernisation request about how, or whether, a particular matter may be dealt with in a modern award.

Minimum wages

43. New paragraph 576J(1)(a) would make minimum wages an allowable modern award matter. This would allow modern awards to include terms about minimum wages, including wage rates for junior employees, employees to whom training arrangements apply, and employees with a disability. It would also allow modern awards to include terms about skill-based classifications and career structures, incentive-based payments, piece rates and bonuses.

Type of employment

44. New paragraph 576J(1)(b) would make type of employment, such as full-time employment, casual employment, regular part-time employment and shift work, an allowable modern award matter. This would also allow modern awards to include terms about the facilitation of flexible working arrangements, particularly for employees with family responsibilities.

### Arrangements for when work is performed

45. New paragraph 576J(1)(c) would make arrangements for when work is performed an allowable modern award matter. This would allow modern awards to include terms about hours of work, rostering, notice periods, rest breaks and variations to working hours.

#### *Arrangements for when work is performed*

46. This aspect of the allowable modern award matter would encompass modern award terms about, for example, the span of ordinary time hours of work or the days of the week on which work is to be performed.

#### *Hours of work*

47. The reference to ‘hours of work’ would mean that modern awards could include, for example, terms about weekly hours of work or the averaging of hours of work over a specified period.

#### *Notice periods*

48. The reference to ‘notice periods’ would mean, for example, that modern award terms that, for example, regulate the amount of notice required to a change to a roster of working hours would be allowable.

#### *Rest breaks*

49. The reference to ‘rest breaks’ would mean that modern award terms that, for example, provide for rest breaks, including meal breaks, crib breaks and breaks between shifts, are allowable modern award matters.

#### *Variations to working hours*

50. The reference to ‘variations to working hours’ would mean that modern award terms that, for example, regulate variations to working hour rosters and make up time arrangements would be allowable.

### Overtime rates

51. New paragraph 576J(1)(d) would make overtime rates an allowable modern award matter.

### Penalty rates

52. New paragraph 576J(1)(e) would make allowable in awards penalty rates, including for:

- employees working unsocial, irregular or unpredictable hours; or
- employees working on weekends or public holidays; or
- shift workers;

### Annualised wage or salary arrangements

53. New paragraph 576J(1)(f) would make allowable in awards annualised wage or salary arrangements that:

- have regard to the pattern of work in an occupation;
- provide an alternative to the separate payment of wages or salaries, and other monetary entitlements; and
- include appropriate safeguards to ensure that individual employees are not disadvantaged.

54. Annualised wage or salary arrangements (annualised wage arrangements) would involve an employer paying an employee an overall amount averaged over the course of a year that is inclusive of the employee's wages (or salary) and other award-based monetary entitlements eg penalty rates. An employer could use this method of paying an employee instead of paying the employee's wages (or salary), and other monetary entitlements separately throughout the year.

55. The scope of this allowable modern award matter would be limited by new subparagraph 576J(1)(f)(iii) which would ensure that a modern award term providing for an annualised wage arrangement must include appropriate safeguards to ensure that individual employees are not disadvantaged when compared with what they would have received, had they been paid the entitlements separately throughout the year.

### Allowances

56. New paragraph 576J(1)(g) would allow modern awards to include terms dealing with allowances, including allowances for:

- expenses incurred in the course of employment;
- responsibilities or skills that are not taken into account in rates of pay;
- disabilities associated with the performance of particular tasks or work in particular conditions or locations;

### Leave, leave loadings and arrangements for taking leave

57. New paragraph 576J(1)(h) would make leave, leave loadings and arrangements for taking leave allowable modern award matters.

### Superannuation

58. New paragraph 576J(1)(i) would make superannuation an allowable modern award matter.

### Procedures for consultation, representation and dispute settlement

59. New paragraph 576J(1)(j) would make procedures for consultation, representation and dispute settlement an allowable modern award matter.

60. New subsection 576J(2) would provide for an award modernisation request to specify other matters about which terms may be included in awards. The scope of these matters would

be affected by any direction in an award modernisation request about how, or whether, a particular matter may be dealt with in a modern award.

61. The proposed award modernisation request will specify that modern awards may include terms about the proposed National Employment Standards. Broadly, the National Employment Standards are:

- hours of work
- parental leave
- flexible work for parents
- annual leave
- personal, carers and compassionate leave
- community service leave
- public holidays
- information in the workplace
- notice of termination and redundancy
- long service leave

62. The proposed request will also include the rules as to how (and whether) modern awards may deal with matters that form part of the National Employment Standards. For example, the proposed award modernisation request includes a direction that that modern awards must not include terms about long service leave.

63. New subsection 576J(3) would define ‘employee with a disability’ as an employee who is or would be qualified for a disability support pensions under section 94 or 95 of the *Social Security Act 1991*, but for paragraph 94(1)(e) or 95(1)(c) of that Act (which deal with the residential status of the employee). This definition relates to paragraph 576J(1)(a).

64. New subsection 576J(3) would also define a junior employee as meaning an employee who is under the age of 21.

65. The legislative note would make it clear that this definition includes employees under the Supported Wage System endorsed by the Commission in the Full Bench decision dated 10 October 1994 (print L5723).

*New section 576K - Terms providing for outworkers*

66. New subsection 576K(1) would provide that modern awards may include terms providing for pay and conditions for outworkers.

67. New subsection 576K(2) would define ‘outworker’ as an employee who, for the purposes of the business of the employer, performs work at private residential premises or at other premises that are not business or commercial premises of the employer.

*New section 576L - Terms may only provide a fair minimum safety net*

68. New section 576L would ensure that the terms about an allowable modern award matter, a matter specified in an award modernisation request under 576J(2), or pay and conditions for outworkers, may only be included in a modern award to the extent that they provide a fair minimum safety net.

*New section 576M - Incidental and machinery terms*

69. New subsection 576M(1) would permit a modern award to include terms that are both:

- incidental to a term that is required or permitted to be in the modern award; and
- essential for the purpose of making a particular term operate in a practical way.

70. New subsection 576M(2) would permit a modern award to include ‘machinery provisions’ that deal with commencement, definitions, titles, arrangement, employers, employees and organisations, the duration of the modern award, and other like matters.

*New section 576N - Terms must be in accordance with award modernisation request*

71. New subsection 576N(1) would provide that a modern award must include a term that is required to be included under an award modernisation request to which the modern award relates. New paragraph 576C(3)(c) makes clear that an award modernisation request may require the Commission to include a term about a particular matter in a modern award.

72. New subsection 576N(2) would make clear that terms included in a modern award must be consistent with any directions in the award modernisation request to which the modern award relates. New paragraph 576C(3)(d) makes clear that an award modernisation request may give directions about how, or whether, the Commission is to deal with particular matters that may be included in a modern award.

**Subdivision B—Terms that must not be included in modern awards**

73. New Subdivision B would provide for certain matters that must not be included in modern awards.

*New section 576P - Terms not permitted by Subdivision A*

74. New section 576P would make clear that a modern award must not include terms other than terms that are permitted to be included in modern awards under Subdivision A.

*New section 576Q - Terms that breach freedom of association provisions*

75. New section 576Q would provide that a modern award must not include a term that requires or permits, or has the effect of requiring or permitting, any conduct that would contravene Part 16 of the Act (Freedom of Association).

*New section 576R - Terms about right of entry*

76. New section 576R would provide that a modern award must not include a term that requires or authorises an officer or employee of an organisation to enter premises for the purposes listed in the section – which include inspecting or viewing work performed on premises of an employer bound by the award, or interviewing an employee.

*New section 576S - Terms that are discriminatory*

77. New subsection 576S(1) would provide that a modern award must not include terms that discriminate against an employee for reasons that include race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

78. New subsection 576S(2) would qualify subsection 576S(1) by setting out the circumstances when a modern award would not discriminate against an employee. These are where a modern award:

- discriminates in respect of particular employment, on the basis of the inherent requirements of that employment (paragraph 576S(2)(a) – an example of such genuine occupational requirements would be the employment of persons of a particular age, sex or race in relation to dramatic or an artistic performance); or
- discriminates in respect of employment with an institution conducted in accordance with the teachings or beliefs of a particular religion or creed, on the basis of those teachings and in good faith (paragraph 576S(2)(b)).

79. New subsection 576S(3) would make clear that a modern award does not discriminate against an employee merely because it includes terms for minimum wages for junior employees, employees with a disability or employees to whom training arrangements apply.

80. New subsection 576S(4) would make clear that, in this section, the terms ‘employee with a disability’ and ‘junior employee’ have the same meaning as in section 576J.

*New section 576T - Terms that contain State-based differences*

81. New subsection 576T(1) would provide that, as a general rule, modern awards must not contain terms and conditions of employment that are determined by reference to State or Territory boundaries and that do not have effect in each State and Territory.

82. However, new subsection 576T(2) would permit modern awards to include such terms for a transition period of up to 5 years from the date the modern award commences. This would allow employers and employees time to adjust to the terms of a modern award.

83. New subsection 576T(3) would provide that if, by the end of the transition period, a modern award includes terms and conditions of employment that are determined by reference to State or Territory boundaries or that do not have effect in each State and Territory those terms will cease to have effect at the end of the transition period.

84. This direction to the Commission reflects the move to a national workplace relations system. Ensuring there are no State-based differences in modern awards is an essential element of this.



#### **Division 4—Who is bound by modern awards**

##### *New section 576U - Definitions*

85. New section 576U would provide some key definitions for the purposes of Division 4, such as ‘eligible entity’, ‘enterprise award’ and ‘outworker term’.

##### *New section 576V - Who is bound by a modern award*

86. New section 576V would set out the parties that may be bound by a modern award. It would provide that a modern award binds the employers, employees, organisations and eligible entities that it is expressed to bind (paragraph 576V(1)).

87. Under this proposed section, a modern award must be expressed to bind:

- specified employers (paragraph 576V(2)(a)) – who may be specified either by name or by inclusion in a specified class or classes (paragraph 576V(7)(a));
- specified employees of employers bound by the modern award in respect of work that is regulated by the modern award (paragraph 576V(2)(b)) – specified by inclusion in a specified class or classes (paragraph 576V(7)(b)).

88. Further, the award may be expressed to bind one or more specified organisations (that is, unions or employer associations registered under the Registration and Accountability of Organisation Schedule of the Act). An organisation may be bound in respect of:

- all employers and employees who are bound by the modern award; or
- specified employers and employees who are bound by the modern award (subsection 576V(4)).

89. In respect of outworker terms, an award may be expressed to bind an eligible entity or an employer that operates in an industry to which the modern award relates or to which the outworker terms are applicable (subsection 576V(5)).

90. A class or classes of employers or employees may be described by reference to a particular industry or particular kinds of work (subsection 576V(8)).

91. Organisations must be specified by name (paragraph 576V(7)(c)).

92. New subsection 576V(6) would make clear that the Commission’s powers under subsections (2), (3), (4) and (5) must be exercised in accordance the award modernisation request to which the modern award relates.

93. New subsection 576V(3) would provide that a modern award must be expressed not to bind employers bound by enterprise awards in respect of the employees to whom the enterprise award applies.

## **Division 5—Technical matters**

### *New section 576W - Formal requirements of modern awards and variation orders*

94. New section 576W would set out specific formal requirements for the making of modern awards and orders varying modern awards.

95. New subsection 576W(1) would provide that both a modern award and an order varying a modern award must:

- be in writing (paragraph 576W(1)(a));
- be signed by the President, if the President is a member of the Full Bench making the modern award, or if the President is not a member of the Full Bench making the modern award, by the member of the Full Bench who has seniority under section 65 of the Act (paragraph 576W(1)(b)); and
- state the day on which it is signed (paragraph 576W(1)(c)).

96. New subsection 576W(2) would provide that a modern award must:

- have a unique title; and
- have a table of contents; and
- be expressed in plain English and be easy to understand in structure and content; and
- not include terms that are obsolete.

### *New section 576X - When is a modern award or variation order made*

97. New section 576X would provide that the date of a modern award or order is the date upon which it is signed in the manner set out in proposed section 576W.

### *New section 576Y - Commencement of modern awards and variation orders*

98. New section 576Y would set out rules for the commencement of modern awards and orders varying modern awards.

99. A modern award or an order varying a modern award must be expressed to commence on the start-up day, if the modern award is made before the start-up day, or in any other case on a day that is not earlier than the day on which the modern award is made.

100. A modern award or an order varying a modern award that has not yet commenced must include a statement to this effect.

101. New subsection 576Y(3) would define the meaning of start-up day for the purposes of the section. Unless a later date is prescribed by the regulations, the start-up day would be 1 January 2010. If a later day is prescribed by the regulations, the start-up day would be that later date.

*New section 576Z - Modern awards and variation orders must be published*

102. New section 576Z would provide for the publication of modern awards and variation orders. It would provide that, as soon as the modern award or variation order is signed, the Commission must (under subsection 576Z(1)) give to a Registrar:

- a copy of the modern award or order (paragraph 576Z(1)(a));
- written reasons for the modern award or order (paragraph 576Z(1)(b)); and
- a statement specifying the employers, employees, organisations and eligible entities bound by the modern award or order (paragraph 576Z(1)(c)).

103. The intention is that written reasons must accompany every decision of the Commission that results in a modern award or variation order being made.

104. New subsection 576Z(2) would provide that, as soon the Registrar receives a copy of a modern award or variation order from the Commission, the Registrar must:

- give notice to the employers, employees, organisations and eligible entities specified in the statement given to the Registrar of the making of the modern award or order varying a modern award (paragraph 576Z(2)(a));
- ensure that a copy of the modern award, order and written reasons are made available for inspection at each registry (paragraph 576Z(2)(b)); and
- ensure that a copy of the modern award, order and written reasons are published (paragraph 576Z(2)(c)).

105. Under new clause 576Z, ‘eligible entity’ would have the same meaning as provided by proposed 576U (576Z(3)).

*New section 576ZA - Modern awards and variation orders are final*

106. New subsection 576ZA(1) would protect the validity of modern awards and orders varying modern awards. It would provide that a modern award or an order varying a modern award made by the Commission:

- is final and conclusive; and
- must not be challenged, appealed against, reviewed, quashed or called in question in any court; and
- is not subject to prohibition, mandamus or injunction in any court on any account.

107. New subsection 576ZA(2) would make clear that a modern award or an order varying a modern award is not invalid because it was made by the Commission constituted otherwise than as provided by the Act.

*New section 576ZB - Expressions used in modern awards and variation orders*

108. New section 576ZB would provide that, unless the contrary intention appears in a modern award or order varying a modern award, an expression used in these documents has the same meaning as it would have in an Act because of either the *Acts Interpretation Act 1901* or this Act.

**Item 10 – Subclause 22(6) of Schedule 6**

109. Item 10 would repeal subclause 22(6) of Schedule 6. Subclause 22(6) of Schedule 6 currently provides that a preserved transitional award term about superannuation ceases to have effect at the end of 30 June 2008. The proposed repeal of this subclause would allow a preserved transitional award term about superannuation to continue beyond 30 June 2008.

**Item 11 – Subclause 45(3) of Schedule 8**

110. Item 11 would repeal subclause 45(3) of Schedule 8. Subclause 45(3) of Schedule 8 currently provides that a preserved notional term about superannuation ceases to have effect at the end of 30 June 2008. The proposed repeal of this subclause would allow a preserved notional term about superannuation to continue beyond 30 June 2008.

**Item 12 – Subclause 46(3) of Schedule 8 (note)**

111. Item 12 would repeal the note in subclause 46(3) of Schedule 8. The note states that a preserved notional term about superannuation ceases to have effect at the end of 30 June 2008. The repeal of this note would be consequential to the repeal of subclause 45(3) of Schedule 8.

**Part 2—Repeal of award rationalisation and award simplification provisions**

112. This Part would repeal Division 4 of Part 10 of the Act which provides for the processes of award rationalisation and award simplification (item 26). The Part also makes a number of minor technical amendments and repeals that are consequential to the repeal of Division 4 (items 13 – 25 and items 27 – 40).

## Award modernisation request

### Commission to undertake award modernisation

Pursuant to section 576C of the Workplace Relations Act 1996 (the Act), I, Julia Gillard, Minister for Employment and Workplace Relations, request that the Australian Industrial Relations Commission (the Commission) undertake the task of creating modern awards in accordance with the following request.

This award modernisation request is to be read in conjunction with Part 10A of the Act.

### Objects

1. The aim of the award modernisation process is to create a comprehensive set of modern awards. As set out in section 576A of the Act, modern awards:
  - (a) must be simple to understand and easy to apply, and must reduce the regulatory burden on business; and
  - (b) together with any legislated employment standards, must provide a fair minimum safety net of enforceable terms and conditions of employment for employees; and
  - (c) must be economically sustainable and promote flexible modern work practices and the efficient and productive performance of work; and
  - (d) must be in a form that is appropriate for a fair and productive workplace relations system that promotes collective enterprise bargaining but does not provide for statutory individual employment agreements; and
  - (e) must result in a certain, stable and sustainable modern award system for Australia.
2. The creation of modern awards is not intended to:
  - (a) extend award coverage beyond those classes of employees, such as managerial employees, who, because of the nature or seniority of their role, have traditionally been award free. This does not preclude the extension of modern award coverage to new industries or new occupations where the work performed by employees in those industries or occupations is of a similar nature to work that has historically been regulated by awards (including State awards) in Australia;
  - (b) result in high-income employees being covered by modern awards;
  - (c) disadvantage employees;
  - (d) increase costs for employers;
  - (e) result in the modification of enterprise awards. This does not preclude the creation of a modern award for an industry or occupation in which enterprise awards operate. However section 576V of the Act provides that a modern award is to be expressed not to

bind an employer who is bound by an enterprise award in respect of an employee to whom the enterprise award applies.

### **Performance of functions by the Commission**

3. In accordance with section 576B of the Act, the Commission must have regard to the following factors when performing its functions under Part 10A of the Act and this award modernisation request:
  - (a) the creation of jobs and the promotion of high levels of productivity, low inflation, high levels of employment and labour force participation, national and international competitiveness, the development of skills and a fair labour market;
  - (b) protecting the position in the labour market of young people, employees to whom training arrangements apply and employees with a disability;
  - (c) the needs of the low paid;
  - (d) the desirability of reducing the number of awards operating in the workplace relations system;
  - (e) the need to help prevent and eliminate discrimination on the grounds of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin and to promote the principle of equal remuneration for work of equal value;
  - (f) the need to assist employees to balance their work and family responsibilities effectively and to improve retention and participation of employees in the workforce;
  - (g) the safety, health and welfare of employees;
  - (h) relevant rates of pay in Australian Pay & Classification Scales and transitional awards;
  - (i) minimum wage decisions of the Australian Fair Pay Commission; and
  - (j) the representation rights, under the Act or the Registration and Accountability of Organisations Schedule, of organisations and transitionally registered associations.

### **Award modernisation process**

4. When modernising awards, the Commission is to create modern awards primarily along industry lines, but may also create modern awards along operational lines as it considers appropriate. In creating modern awards, and as indicated at paragraph 3(d) above, the Commission must have regard to the desirability of reducing the number of awards operating in the workplace relations system.
5. Division 3 of Part 10A of the Act deals with the terms of modern awards, including the provisions that may be included and must not be included in modern awards. Subject to paragraphs 29-35 below, modern awards may also include provisions relating to the proposed National Employment Standards (proposed NES).

6. As soon as practicable after receiving this award modernisation request, the President will consult with the major employer and employee representative bodies on the best process to be followed by the Commission when creating modern awards. The President will then release a clear program and timetable for completing the award modernisation process.
7. Individual Commission members may be directed by the President in the award modernisation process.
8. The Commission will identify the type of work, industry and/or occupations covered by a modern award and the application of each award.
9. The Commission is to have regard to the desirability of avoiding the overlap of awards and minimising the number of awards that may apply to a particular employee or employer. Where there is any overlap or potential overlap in the coverage of modern awards, the Commission will as far as possible include clear rules that identify which award applies.
10. The Commission will prepare a model flexibility clause to enable an employer and an individual employee to agree on arrangements to meet the genuine individual needs of the employer and the employee. The Commission must ensure that the flexibility clause cannot be used to disadvantage the individual employee.
11. Each modern award will include the model flexibility clause with such adaptation as is required for the modern award in which it is included.
12. The Commission may include transitional arrangements in modern awards to ensure the Commission complies with the objects and principles of award modernisation set out in this award modernisation request.

### **Consultation**

13. The President will consult with the Australian Fair Pay Commission and State industrial tribunals as appropriate.
14. The Commission will prepare an exposure draft of each modernised award. The Commission will, as appropriate, hold a conference or conferences with major employer and employee representative bodies for the purpose of informing the preparation of each exposure draft.
15. The Commission is to publish exposure drafts of each modernised award for the purpose of further consultation and to ensure that all stakeholders and interested parties have a reasonable opportunity to comment upon the exposure drafts. In so far as practicable, the exposure drafts will be electronically published for comment.
16. Consultation on exposure drafts of modern awards will be open and transparent.

### **Creating modern awards**

17. Upon completion of the consultation processes in relation to an exposure draft, the Commission will prepare the modern award.

18. The President may establish one or more Full Benches for the purpose of creating modern awards. Each modern award is to be created by a Full Bench.

### **Timing**

19. The Commission is to complete the award modernisation process by 31 December 2009.

20. To that end, the Commission should endeavour by 30 June 2008 to have identified a list of priority industries or occupations for award modernisation, developed a timetable for completing the award modernisation process and developed a proposed model award flexibility clause. In developing its priority list, the Commission will have regard to those industries and occupations with high numbers of Australian Workplace Agreements and Notional Agreements Preserving State Awards (NAPSAs).

21. In identifying a list of priority industries or occupations for award modernisation, developing a timetable for completing the award modernisation process and developing a proposed model award flexibility clause, the Commission is to consult with major workplace relations stakeholders and other interested parties. It is acknowledged that the Commission will require the full support and cooperation of major workplace relations stakeholders and other interested parties in order to conduct that consultation.

22. In developing a timeframe for completing the award modernisation process, the Commission should endeavour to have created by the end of December 2008 modern awards for each of the priority industries or occupations it has identified following the consultations with key workplace relations stakeholders.

### **Reporting on the progress of award modernisation**

23. The President is to publish a quarterly report outlining:

- (a) those industries or occupations undergoing or about to commence award modernisation, including the Commission member responsible, under the auspices of the Full Bench, for those industries and/or occupations;
- (b) the progress of award modernisation, including any significant developments during the quarter, key issues or developments scheduled for the next quarter and any adjustments made to the timetable determined by the President for the award modernisation process; and
- (c) any other matters which the President considers appropriate.

24. The first quarterly report should relate to the June quarter 2008.

### **Interaction with the proposed National Employment Standards**

25. The proposed NES consist of 10 legislated minimum conditions of employment for all employees covered by the federal system. The proposed NES will establish a simple legislative framework of minimum entitlements with straightforward application or machinery rules that are essential to the operation of each entitlement. The proposed NES



will operate in conjunction with a relevant modern award to provide a fair safety net of minimum entitlements for award covered employees.

26. The proposed NES will be finalised prior to 30 June 2008 and provided to the Commission for the purpose of conducting the award modernisation process.
27. A modern award may cross reference a provision of the proposed NES. A modern award may replicate a provision of the proposed NES only where the Commission considers this essential for the effective operation of the particular modern award provision. Where a modern award replicates a provision of the proposed NES, NES entitlements will be enforceable only as NES entitlements and not as provisions of the modern award.
28. A modern award cannot exclude a term of the proposed NES or operate inconsistently with a term of the proposed NES.
29. Subject to paragraph 32 below, a modern award may include industry-specific detail about matters in the proposed NES.
30. Subject to paragraph 32 below, a modern award may build on entitlements in the proposed NES where the Commission considers it necessary to do so to ensure the maintenance of a fair minimum safety net for employees covered by the modern award, having regard to existing award entitlements for those employees.
31. In creating a modern award, the Commission is to assess whether additional machinery rules in relation to NES entitlements are necessary for the applicable industry or occupation. An example of a machinery provision could be rules about taking double the period of annual leave on half pay.
32. In relation to long service leave, the Australian Government will, in co-operation with state governments, develop a national long service leave entitlement under the NES. In doing so, the Australian Government will also consult with major employer and employee representative bodies. Until then, long service leave entitlements derived from various sources will be protected. So as to not pre-empt the development of a nationally consistent approach, the Commission must not include a provision of any kind in a modern award that deals with long service leave.
33. Other than expressly authorised under this request (see paragraphs 29-31), the Commission must not include a term in a modern award on the basis that it would be an allowable modern award matter where the substance of the matter is dealt with under the proposed NES.

*Shift workers and piece workers*

34. The proposed NES apply to shift workers and provide that a shift worker is entitled to an additional week of annual leave – that is, five weeks of annual leave for each year of completed service.
35. The proposed NES rely on a modern award to define, where required, a shift worker as appropriate for the particular industry covered by the award.

36. In modernising awards, the Commission must have regard to whether it is appropriate to include a definition of shift worker in a modern award that applies to these types of employees for the purposes of the proposed NES annual leave entitlements.
37. The proposed NES apply to a piece worker.
38. The proposed NES rely on modern awards to define a piece worker and set out rules relating to the payment of NES entitlements (based on ordinary hours of work) for a piece worker.
39. In modernising awards, the Commission must have regard to whether it is appropriate to include:
- (a) a definition of piece worker in a modern award that applies to these types of employees (if an employee is employed on the basis of hours worked, it is not expected that such employees would be defined as piece workers); or
  - (b) a provision that would provide a calculation of payment, a payment rate, or a payment rule in relation to a piece worker employee with respect to paid leave or paid absence under the proposed NES. For example, a method for making payment to a piece worker employee when that employee is absent on annual leave.

*Ordinary hours of work*

40. Many entitlements in the proposed NES rely on modern awards to set out ordinary hours of work on a weekly or daily basis for an employee covered by the modern award. The Commission is to ensure that it specifies in each modern award the ordinary hours of work for each classification of employee covered by the modern award for the purpose of calculating entitlements in the proposed NES.

*Minimum wages*

41. In accordance with section 576J of the Act, minimum wages are a matter that may be dealt with in modern awards. In dealing with minimum wages in modern awards, the Commission is to have regard to the desire for modern awards to provide a comprehensive range of fair minimum wages for all employees including, where appropriate, junior employees, employees to whom training arrangements apply and employees with a disability in order to assist in the promotion of employment opportunities for those employees.

## **Schedule 3—Functions of the Australian Fair Pay Commission**

### *Workplace Relations Act 1996*

1. Under the Act, the AFPC is responsible for setting and adjusting minimum wages for employees. The functions of the AFPC are limited to those conferred on it by legislation. The current functions of the AFPC are set out in Division 2 of Part 2 and Division 2 of Part 7 of the Act and include:

- Determining and adjusting minimum classification rates of pay in APCs, including piece rates and casual loadings (sections 187, 214 and 216);
- Adjusting the standard FMW (section 196);
- Determining and adjusting special FMWs for junior employees, employees with a disability or employees to whom training arrangements apply (sections 197 and 200);
- Determining and adjusting special APCs for employees with a disability or employees to whom training arrangements apply (sections 220 and 221).

2. The Act also requires the AFPC to have regard to the recommendations of the Award Review Taskforce in exercising its powers (section 177). The recommendations of the Award Review Taskforce primarily concern the desirability of rationalising APCs.

3. Under the Government's proposed substantive workplace relations reforms, minimum wages will be contained in awards from 1 January 2010, and will be the responsibility of a new statutory body, Fair Work Australia.

4. In anticipation of these changes, it is proposed that, during the transitional period leading up to 2010, the functions of the AFPC be confined to those functions that are necessary to ensure the maintenance of minimum wages.

5. It is intended that the AFPC will continue to undertake annual minimum wage reviews during this period. As part of its minimum wage reviews, the AFPC will continue to adjust wage rates in existing APCs. The AFPC will not, however, have the power to make new APCs.

6. The AFPC will retain the power to adjust the standard FMW or a special FMW. The AFPC will not, however, have the power to determine a new special FMW.

7. The AFPC will not be able to conduct reviews other than for the purpose of the annual minimum wage reviews. Any existing reviews outside these functions that have not been completed when the legislation commences will be required to cease.

8. The amendments proposed by this Schedule would amend Parts 2 and 7 of the Act to confine the functions of the AFPC to:

- undertaking annual minimum wage reviews;
- adjusting wage rates in existing APCs as a result of those reviews; and
- adjusting the standard FMW or a special FMW.

9. The Schedule would also repeal all other provisions of the Act that have the effect of conferring a function on the AFPC, or refer to a function of the AFPC, that is outside these functions.

**Item 1 - Subsection 4(1) (definition of *new APCS*)**

10. This item would amend the definition of ‘new APCS’ in subsection 4(1) of the Act to refer to section 178, instead of subsection 214(1). Section 178 would provide the substantive definition of new APCS.

11. This item is consequential upon items 6 and 33. Proposed item 6 would amend the definition of new APCS in section 178 to provide that a new APCS is an APCS that was determined under subsection 214(1) of the Act before the repeal of that subsection by the Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008.

12. Currently, section 178 provides a definition of new APCS which refers to subsection 214(1) of the Act. However, subsection 214(1) would be repealed by item 33.

**Item 2 - Subsection 22(1) (paragraphs (b), (c) and (d) of the note)**

13. This item would repeal and substitute paragraphs (b), (c) and (d) of the legislative note to subsection 22(1). The note provides examples of the AFPC’s wage-setting powers under Division 2 of Part 7 of the Act.

14. As part of the amendments proposed by this Schedule, the scope of the AFPC’s wage-setting powers would be confined to:

- undertaking annual minimum wage reviews;
- adjusting wage rates in existing APCSs as a result of those reviews; and
- adjusting the standard FMW or a special FMW.

15. This item would amend the examples in the note to subsection 22(1) to reflect the proposed amended wage-setting powers of the AFPC.

**Item 3 - Section 176 (notes 1 and 2)**

16. This item would repeal and substitute the legislative notes to section 176 to make clear that additional considerations and limitations on the exercise of the AFPC’s powers are set out in the various sections of Division 2 of Part 7 (including section 222). The substituted note would reflect the proposed repeal of section 177 and section 206 by item 4 and item 31 respectively.

**Item 4 - Section 177**

17. This item would repeal section 177, which requires the AFPC to have regard to any relevant recommendations of the Award Review Taskforce. The recommendations of the Award Review Taskforce largely related to the objective of rationalising APCSs and how the AFPC should exercise its powers to determine and revoke APCSs, in order to achieve that objective.

18. However, as part of the amendments proposed under this Schedule, the AFPC would no longer have the power to determine or revoke APCSs and, consequently, has no ability to rationalise APCSs.

**Item 5 - Section 178 (definition of *default casual loading percentage*)**

19. This item would amend the definition of ‘default casual loading percentage’ in section 178 by deleting the reference to subsection 186(1) and substituting a reference simply to section 186.

20. This item is consequential upon item 9, which would repeal subsection 186(2).

**Item 6 - Section 178 (definition of *new APCS*)**

21. This item would repeal and substitute the definition of ‘new APCS’ in section 178.

22. Currently, ‘new APCS’ is defined by reference to subsection 214(1). However, as part of the amendments proposed under this Schedule, section 214 would be repealed.

23. This item would define a ‘new APCS’ as an APCS determined under subsection 214(1) of this Act before the repeal of that subsection by the Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008.

24. The AFPC has determined two APCSs under subsection 214(1). Those APCSs are ‘special APCSs’ covering:

- employees with a disability who are unable to perform the range of duties to the competence level required because of the effects of a disability on their productive capacity, and who are covered by an APCS which does not include Supported Wage System provisions; and
- employees with a disability who are unable to perform the range of duties to the competence level required because of the effects of a disability on their productive capacity, and who are employed in business services which are not covered by an APCS.

**Item 7 - Section 178 (definition of *special FMW*)**

25. This item would repeal and substitute the definition of ‘special FMW’ in section 178.

26. Currently, ‘special FMW’ is defined by reference to section 197. However, as part of the amendments proposed under this Schedule, section 197 would be repealed.

27. This item would define ‘special FMW’ as a special FMW determined under section 197 of this Act before the repeal of that section by the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008*.

28. The AFPC has determined two special FMWs under section 197. Those special FMWs relate to employees with a disability who are not junior employees or employees to whom training arrangements apply, and who are not covered by an APCS.

**Item 8 - Paragraphs 182(4)(b) and (c)**

29. This item would repeal paragraphs 182(4)(b) and (c) and substitute a new paragraph 182(4)(b) .

30. Subsection 182(4) guarantees a basic periodic rate of pay of at least a special FMW for an employee:

- who is not covered by an APCS (182(4)(a));
- who is a junior employee, an employee with a disability, or an employee to whom a training arrangement applies (182(4)(b)); and
- in respect of whom a special FMW has been determined (182(4)(c)),

31. As part of the amendments proposed under this Schedule, the AFPC would no longer have the power to determine a special FMW. The effect of this would be to freeze special FMW coverage, meaning no further employees could become covered by a special FMW.

32. Subsection 182(4)(b) sets out the categories of employees that may be bound by a special FMW. As special FMW coverage would be frozen, subsection 182(4)(b) would no longer be required.

33. This item is consequential upon item 23, which would have the effect that the AFPC would no longer have the power to determine a special FMW.

#### **Item 9 - Section 186**

##### *New section 186 – Default casual loading percentage*

34. This item would repeal section 186 and substitute a new section. Proposed new section 186 would provide that the default casual loading is 20%.

35. This item is consequential upon item 10, which would repeal the AFPC's power to adjust the default casual loading percentage.

#### **Item 10 - Sections 187 and 188**

36. This item would repeal sections 187 and 188, with the effect that the AFPC would no longer have the power to adjust the default casual loading percentage.

#### **Item 11 - Subparagraphs 190(1)(a)(iii) and (iv)**

37. This item would repeal subparagraphs 190(1)(a)(iii) and (iv) to remove the reference to determining a new APCS and revoking an APCS.

38. Section 190 guarantees that the employee cannot be paid less than the basic periodic rate of pay that would have been payable to an employee in the same circumstances as that employee immediately after reform commencement (27 March 2006). This guarantee constrains the exercise of the AFPC's wage-setting powers to adjust the standard FMW, to adjust an APCS, to determine a new APCS or to revoke an APCS.

39. This item is consequential upon items 33 and 37, which would repeal the AFPC's powers to determine and revoke APCSs.

**Item 12 - Subsection 190(4)**

40. This item would repeal and substitute subsection 190(4). Proposed new subsection 190(4) would make clear that the operation of section 190 does not limit the AFPC's power to adjust an APCS made under sections 220 (special APCSs in relation to employees with a disability) before the repeal of that section by the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008*.

41. This item is consequential upon item 33, which would repeal the AFPC's power to determine an APCS, including under these sections.

**Item 13 - Subparagraphs 191(1)(a)(iii) and (iv)**

42. This item would repeal subparagraphs 191(1)(a)(iii) and (iv) to remove the reference to determining a new APCS and revoking an APCS.

43. Section 190 guarantees that the employee cannot be paid less than the basic piece rate of pay that would have been payable to an employee in the same circumstances as that employee immediately after reform commencement (27 March 2006). This guarantee constrains the exercise of the AFPC's wage-setting powers to adjust the standard FMW, to adjust an APCS, to determine a new APCS or to revoke an APCS.

44. This item is consequential upon items 33 and 37, which would repeal the AFPC's powers to determine and revoke APCSs.

**Item 14 - Subsection 191(4)**

45. This item would repeal and substitute subsection 191(4). Proposed new subsection 191(4) would make clear that the operation of section 191 does not limit the AFPC's power to adjust an APCS made under section 220 (special APCSs in relation to employees with a disability) before the repeal of that section by the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008*.

46. This item is consequential upon item 33, which would repeal the AFPC's power to determine an APCS, including under these sections.

**Item 15 - Paragraphs 192(1)(b), (c) and (d)**

47. This item would repeal subparagraphs 192(1)(b), (c) and (d) to remove the reference to determining a new APCS, revoking an APCS and adjusting the default casual loading percentage.

48. Section 192 provides a guarantee to a casual employee that the casual loading percentage that applies to the employee's basic periodic rate cannot be less than the casual loading percentage that would have been payable to that employee had he or she been in their current circumstances of employment immediately after reform commencement (27 March 2006). This guarantee constrains the exercise of the AFPC's wage-setting powers to adjust an APCS, to determine a new APCS, to revoke an APCS or to adjust the default casual loading percentage.

49. This item is consequential upon items 33, 37 and 10, which would repeal the AFPC's powers to determine APCSs, revoke APCSs and adjust the default casual loading percentage.

**Item 16 - Subsection 193(1)**

50. This item would amend subsection 193(1) by deleting the references to subsection 193(3) and the AFPC's power to make an APCS.

51. This item is consequential upon items 17 and 33, which repeals subsection 193(3) and the AFPC's power to determine an APCS.

**Item 17 - Subsection 193(1) (note 1)**

52. This item would amend the legislative note to subsection 193(1) by deleting the reference to 'any new APCS that replaces the preserved APCS'.

53. This item is consequential upon item 33, which repeals the AFPC's power to determine an APCS.

**Item 18 - Subsection 193(3)**

54. This item would repeal subsection 193(3), which provides that the guarantee that an employee cannot be paid less than an applicable special FMW under subsection 193(1) does not apply unless:

- the AFPC determined that the special FMW in question would operate as a minimum standard for one or more APCSs (section 198); and
- the exercise of wage-setting powers by the AFPC affects one of the APCSs covered by that special FMW.

55. This subsection would no longer have any application as the AFPC's power to determine a special FMW would be repealed by proposed item 23.

**Item 19 - Subsection 194(2)**

**Item 20 - Subsection 194(4)**

56. These items would repeal subsections 194(2) and (4), which set out when there is a special FMW for junior employees and employees to whom training arrangements apply.

57. These subsections would no longer be required as no special FMW has yet been determined for those categories of employees, and the AFPC's power to determine a special FMW for them (and anyone else) would be repealed under proposed item 23.

**Item 21 - Subsection 195(1)**

58. This item would amend subsection 195(1) by deleting the reference '12.75' and replacing it with '13.74', to reflect the current level of the standard FMW.



**Item 22 - Paragraph 196(2)(a)**

59. This item would amend paragraph 196(2)(a) by deleting the reference to section 177. This item is consequential upon item 4, which would repeal section 177.

**Item 23 - Section 197 and 198**

60. This item would repeal sections 197 and 198.

61. Currently, section 197 empowers the AFPC to determine a special FMW for any of the following groups:

- all junior employees, or a class of junior employees (paragraph 197(a));
- all employees with a disability, or a class of employees with a disability (paragraph 197(b)); or
- all employees to whom training agreements apply, or a class of employees to whom training agreements apply (paragraph 197(c)).

62. This item would repeal section 197, with the effect that the AFPC would no longer have the power to determine a special FMW.

63. Currently, section 198 empowers the AFPC to determine whether a special FMW should operate as a minimum standard. The AFPC may determine that a special FMW should operate as a minimum standard for all APCSs, for a class of APCSs or for a single APCS.

64. The AFPC has determined two special FMWs for employees with a disability. However, those special FMWs have not been prescribed as a minimum standard for an APCS.

65. This item would repeal the AFPC's power to determine that a special FMW should operate as a minimum standard for an APCS. This would have the effect of confining the scope of the two special FMWs that have been determined under section 197, to only employees who are not covered by an APCS.

66. During the transition period leading up to 2010, the Commission will undertake the award modernisation process. An integral part of this process is the return of minimum wages, including for juniors, employees to whom training arrangements apply and employees with a disability to awards.

67. The continued exercise of specific powers by the AFPC in relation to the determination of special FMWs and new Pay Scales for these groups of employees would directly duplicate the award modernisation process and lead to confusion, cost and uncertainty for employees, employers, unions and employer organisations.

**Item 24 - Paragraph 200(2)(a)**

68. This item would amend paragraph 200(2)(a) by deleting the reference to section 177. This item is consequential upon item 4, which would repeal section 177.

**Item 25 - Subsection 200(3)**

69. This item would repeal subsection 200(3). Subsection 200(3) empowers the AFPC to adjust a statement that a special FMW is a minimum standard for an APCS under section 198. This subsection is no longer required, as no such statements are in existence, and the power to include such a statement in the future would be repealed by proposed item 23.

**Item 26 - Subsection 201(1)**

**Item 27 - Subsection 201(2)**

70. These items would amend section 201 by repealing subsection 201(2). Subsection 201(2) makes clear that an APCS includes both a preserved APCS (an APCS that is derived from a pre-reform wage instrument under section 208) or a new APCS (an APCS that is determined by the AFPC under section 214). This subsection would be repealed as it is not necessary. The meaning of ‘APCS’, and the fact that it includes both a preserved APCS or a new APCS, is already clear from the definition in section 178.

**Item 28 - Subsection 202(4)**

**Item 29 - Subsection 203(4)**

71. These items would amend subsections 202(4) and 203(4) to remove the reference to including provisions in new APCSs (ie APCSs that would be determined by the AFPC in the future). It would confine the AFPC’s obligations under subsection 202(4) and 203(4) to adjusting APCSs (that are already in existence). These items are consequential upon item 33, which would repeal the AFPC’s power to determine new APCSs.

**Item 30 - Paragraph 205(2)(b)**

72. This item would amend paragraph 205(2)(b) to take into account the proposed repeal of Subdivision M. It would ensure the priority rules that determine when one APCS prevails over another APCS would continue to apply to APCSs that were determined under Subdivision M, before the Subdivision was repealed.

73. This item is consequential upon items 33 and 38. Item 33 would repeal the AFPC’s power to determine new APCSs (including APCSs made in accordance with Subdivision M). Item 38 would repeal and replace Subdivision M.

**Item 31 - Section 206**

74. This item would repeal section 206, removing the requirement that the AFPC ensure that, by three years after reform commencement (ie 27 March 2009), the coverage provisions in an APCS must not be determined by reference to State or Territory boundaries. It was intended that the AFPC would fulfil this obligation by exercising its powers to adjust, revoke or determine new APCSs.

75. However, as part of the amendments proposed under this Schedule, the AFPC would no longer have the power to determine or revoke APCSs, and would only adjust APCSs to maintain minimum wage levels. Consequently, the AFPC would not have sufficient powers to enable it to meet the obligation under section 206.

76. The task of eliminating provisions based on State and Territory boundaries will instead be performed through the award modernisation process.

**Item 32 - Subsection 207(3)**

77. This item would repeal subsection 207(3). Subsection 207(3) limits the application of section 207 in respect of a special FMW or particular APCS, unless the instrument determining the special FMW includes a statement under section 198. This subsection would no longer be required, as no such statements are in existence, and the power to include such a statement in the future would be repealed by proposed item 23.

**Item 33 - Subdivision J of Division 2 of Part 7**

78. This item would repeal Subdivision J, with the effect that the AFPC would no longer have the power to determine an APCS.

79. It is proposed that, during the transitional period leading up to 2010, the functions of the AFPC would be confined to those functions that are necessary to ensure the maintenance of minimum wages.

80. While it is intended that the AFPC would continue to adjust wage rates in existing APCSs, it would not have the power to make further APCSs.

**Item 34 - Subdivision K of Division 2 of Part 7 (heading)**

81. This item would repeal and replace the heading to Subdivision K by deleting the reference to revocation of APCSs.

82. This item is consequential upon item 37, which would repeal the AFPC's power to revoke APCSs.

**Item 35 - Section 215**

83. This item would amend section 215 to remove the reference to revocation.

84. This item is consequential upon item 37, which would repeal the AFPC's power to revoke APCSs.

**Item 36 - Paragraph 216(2)(a)**

85. This item would amend paragraph 216(2)(a) by deleting the reference to section 177.

86. This item is consequential upon item 4, which would repeal section 177.

**Item 37 - Section 217**

87. This item would repeal section 217 with the effect that the AFPC would no longer have the power to revoke an APCS.

88. This would ensure that minimum wage rates for employees under existing APCSs are maintained in the transition period leading up to 2010.

**Item 38 - Subdivision M of Division 2 of Part 7**

89. This item would repeal and replace Subdivision M of Division 2 of Part 7. Subdivision M currently allows for the AFPC to determine APCSs to cover the employment of employees with a disability (section 220) and employees to whom training arrangements apply (section 221).

90. The AFPC has already determined two APCSs in accordance with section 220 which cover:

- employees with a disability who are unable to perform the range of duties to the competence level required because of the effects of a disability on their productive capacity, and who are covered by an APCS which does not include Supported Wage System provisions; and
- employees with a disability who are unable to perform the range of duties to the competence level required because of the effects of a disability on their productive capacity, and who are employed in business services which are not covered by an APCS.

*New section 219A – Coverage of special APCSs for employees with a disability*

91. Proposed new section 219A would set out when APCSs made in accordance with section 220 (before its repeal) apply. It would provide that those APCSs operate in relation to a particular employee with a disability only where:

- another APCS does not cover that employee; or
- another APCS covers the employee but it does not determine a basic periodic rate of pay that specifically applies to a class of employees with a disability covered by the special APCS to which the employee belongs.

92. In other words, where another APCS covers an employee with a disability and that APCS specifically determines basic rates of pay for the class of employees with a disability covered by the special APCS, that APCS will prevail over the special APCS.

93. The AFPC has made no APCSs in accordance with section 221.

94. Proposed new subsection 219A(3) would make clear that, in addition to its general power to adjust APCSs, the AFPC has the power to adjust a special APCS.

**Item 39 - Subsection 222(1)**

95. This item would amend paragraph 222(1) by deleting the reference to section 177.

96. This item is consequential upon item 4, which would repeal section 177.

**Item 40 - Subsection 222(2)**

97. This item would repeal and substitute subsection 222(2) to remove references to:

- determining an APCS;
- determining a special FMW; and
- adjusting a special FMW for junior employees and employees to whom training arrangements apply.

98. This item is consequential upon items 33 and 23. Item 33 would repeal the AFPC's power to determine new APCSs. Item 23 would repeal the AFPC's power to determine a special FMW.

**Item 41 - After paragraph 861(1)(c)**

99. This item would include new paragraph 861(1)(ca) to provide that Division 2 of Part 7 has effect in relation to the employment of any employee in Victoria as if the definition of APCS in section 178 did not contain a reference to 'a new APCS'.

100. This paragraph has been included to avoid confusion, as the only new APCSs that have been made by the AFPC would apply to these employees, and the AFPC's power to make further new APCSs would be repealed by item 33.

**Item 42 - Subparagraph 861(1)(d)(i)**

101. This item would amend subparagraph 861(1)(d)(i) by deleting the reference to Subdivision J of Division 2 of Part 7.

102. This item is consequential upon item 33, which would repeal that Subdivision.

**Item 43 - Subparagraph 861(1)(d)(ii)**

103. This item would amend subparagraph 861(1)(d)(ii) by deleting references to sections 206 and 217.

104. This item is consequential upon items 32 and 37, which would repeal sections 206 and 217.

**Item 44 - At the end of subparagraph 861(1)(d)(iv)**

**Item 45 - Subparagraph 861(1)(d)(v)**

105. These items would repeal subparagraph 861(1)(d)(v), which refers to paragraph 201(2)(b).

106. They are consequential upon item 27, which would repeal subsection 201(2).

**Item 46 - Paragraph 864(1)(b)**

107. This item would repeal and replace paragraph 864(1)(b) with the effect that the AFPC would no longer have the power to adjust an APCS relating to the employment of one or more

employees in Victoria if the adjustment relates to a casual loading provision or a frequency of payment provision.

**Item 47 - Paragraph 864(2)(a)**

108. This item would amend paragraph 864(2)(a) by deleting the reference to section 177.

109. This item is consequential upon item 4, which would repeal section 177.

**Item 48 - Subsection 864(4)**

110. This item would repeal subsection 864(4), which provides ‘sign post’ definitions of casual loading provision, frequency of payment provision and rate provision.

111. This item is consequential upon item 46, which would repeal the AFPC’s power to adjust an APCS relating to the employment of one or more employees in Victoria if the adjustment relates to a casual loading provision or a frequency of payment provision.

**Item 49 - Subsection 865(1)**

**Item 50 - Paragraphs 865(1)(a) and (b)**

**Item 51 - Subsection 865(2)**

**Item 52 - Paragraphs 865(2)(a) and (b)**

112. These items would amend section 865 by deleting references to the AFPC setting a minimum wage for employees in Victoria. The effect of this amendment would be that the AFPC would no longer have the power to set a minimum wage for these employees, but would retain the power to adjust an existing minimum wage.

**Item 53 - Wage reviews in progress before commencement time—previous wage-setting powers of the AFPC**

113. This item would require the AFPC to cease conducting any wage review that it is conducting at the time the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* commences, if that wage review relates to the exercise of a power that:

- was a wage-setting power of the AFPC immediately before that Act commenced; and
- would not be a wage-setting power of the AFPC after that Act commenced.

## **Schedule 4—Repeal of provisions of Workplace Relations Fact Sheet**

### ***Workplace Relations Act 1996***

#### **Item 1 – Division 3A of Part 5**

1. This item would repeal Division 3A of Part 5 of the Act. Existing section 154A currently requires the Workplace Authority Director to issue by notice in the *Gazette*, a document called the Workplace Relations Fact Sheet.
2. Existing section 154B requires an employer to provide a copy of the Workplace Relations Fact Sheet to a new employee within 7 days of the employee first commencing employment with the employer. Existing 154C required employers to provide a copy of the Workplace Relations Fact Sheet to their existing employees within three months of its publication in the *Gazette*.
3. These provisions are civil penalty provisions, attracting a maximum penalty of one penalty unit (section 154D).
4. Regulation 5.4 of Chapter 2, Part 5 of the *Workplace Relations Regulations 2006* sets out the manner for providing the Workplace Relations Fact Sheet. This regulation will cease to operate when Division 3A is repealed.
5. Regulation 21.4 extends the Workplace Relations Fact Sheet obligations to excluded employers in Victoria. A regulation will be made to repeal regulation 21.4 with effect from the proclamation of this Schedule.

## **Schedule 5—Transitional arrangements for existing pre-reform Federal agreements, etc.**

### **Item 1 – After clause 2 of Schedule 7**

#### *New clause 2A – Commission may extend or vary pre-reform certified agreements*

1. Item 1 would insert new clause 2A to enable the Commission to make the following orders in relation to pre-reform certified agreements (within the meaning of clause 1 of Schedule 7):

- extend the nominal expiry date of a pre-reform certified agreement, but not longer than 3 years after the date on which the order is made, and
- vary the terms of a pre-reform certified agreement.

2. However, before making an order to extend or vary a pre-reform certified agreement, the Commission would have to be satisfied that:

- all parties bound by the agreement genuinely agree to the extension or variation (agreement by a valid majority of employees would be required for agreements with organisations of employees and agreements with employees, as was the case under the pre-reform Act), and
- none of the parties have, from the day after the day the Bill was introduced into the House of Representatives, organised or engaged in, or threatened to organise or engage in, industrial action, or applied for a protected action ballot in relation to proposed industrial action.

3. In the case of a variation of the terms of a pre-reform certified agreement, the Commission would be required to apply a no-disadvantage test.

4. The Commission would need to be satisfied that a pre-reform certified agreement as varied would not result, on balance, in a reduction in the employees' overall terms and conditions of employment compared to:

- any transitional award that would regulate the employees' terms or conditions of employment, if the employer had been an excluded employer immediately before the commencement of Schedule 1 to the *Workplace Relations Amendment (Work Choices) Act 2005* – that is, 27 March 2006 ('reform commencement'); and
- any law of the Commonwealth, or of a State or Territory, that the Commission considers relevant.

5. Transitional awards are federal awards that were in force immediately before reform commencement and continued in operation under Schedule 6 to the Act. Transitional awards bind 'excluded employers' (that is, those employers outside the meaning of 'employer' in subsection 6(1) of the Act), their employees, organisations and certain other parties. These instruments are different from awards in force immediately before reform commencement that bound employers within the meaning of subsection 6(1) of the Act. Those instruments were replaced by 'pre-reform awards' that operate under Part 10 of the Act.

- Unlike pre-reform awards, transitional awards contain the full range of 'pre-Work Choices' allowable award matters (including rates of pay and classifications) against



which pre-reform certified agreements would have been tested under the pre-reform no-disadvantage test. Transitional awards have been published and updated by the Commission.

- These instruments are therefore an appropriate basis for the no-disadvantage test for pre-reform certified agreement variations. For this limited purpose, it would be assumed that the employer was an excluded employer immediately before reform commencement.

6. The Commission would also have regard to any law of the Commonwealth, or of a State or Territory, that the Commission considers relevant. This would be the case notwithstanding sections 16 and 17 of the Act, which exclude the operation of certain State laws.

#### **Item 2 – After subclause 4(1) of Schedule 7**

7. This item would insert new subclause 4(1A) to extend the prohibition against coercion in relation to the termination of pre-reform certified agreements to variations and extensions of such agreements.

#### **Item 3 – Subclause 4(2) of Schedule 7**

#### **Item 4 – Subclause 4(3) of Schedule 7**

8. These items would make minor amendments to reflect the proposed inclusion of new subclause 4(1A) of Schedule 7.

#### **Item 5 – Subclause 28(1) of Schedule 7**

9. Item 5 would repeal subclause 28(1) of Schedule 7 so that an old IR agreement would no longer automatically cease operation 3 years after the reform commencement. A new subclause 28(1) would be substituted, providing for old IR agreements to cease operation if they are terminated under proposed new clause 29A (see item 6 below).

#### **Item 6 – At the end of Part 6 of Schedule 7**

##### *New clause 29A – Termination of old IR agreements*

10. This item would insert new clause 29A to allow a party to an old IR agreement to apply to the Commission for the agreement to be terminated. The Commission may terminate the agreement by order if it is satisfied that all of the parties to the termination agree.

## **Schedule 6—Notional agreements preserving State awards**

### *Workplace Relations Act 1996*

#### **Item 1 – Subclause 38A(1) of Schedule 8**

1. This item would repeal and substitute subclause 38A(1) of Schedule 8 of the Act to provide that a notional agreement preserving State awards ceases to be in operation at the end of 31 December 2009 or any later date prescribed by the regulations.
2. Subclause 38A(1) currently provides that a notional agreement preserving State awards cease to be in operation at the end of a period of 3 years beginning on reform commencement (ie 27 March 2009).

#### **Item 2 – Paragraph 19(2)(b) of Schedule 9**

3. This item would amend paragraph 19(2)(b) by deleting a reference to a notional agreement preserving State awards ceasing to be in operation “at the end of the period of 3 years beginning on the reform commencement (see subclause 38A(1) of Schedule 8)”.
4. This item is consequential upon item 1, which would repeal and replace subclause 38A(1) of Schedule 8.

## **Schedule 7—Transitionally registered associations**

### *Workplace Relations Act 1996*

#### **Item 1 - Paragraph 6(c) of Schedule 10**

1. This item would repeal and substitute paragraph 6(c) of Schedule 10 of the Act.
2. Clause 6 of Schedule 10 sets out the circumstances in which the registration of a transitionally registered association ends. Clause 6 currently provides that the registration of a transitionally registered association ends:
  - when it is cancelled under clause 5 (paragraph 6(a)); or
  - when the association becomes an organisation (paragraph 6(a)); or
  - in any other case – on the third anniversary of the commencement of this Schedule (ie 27 March 2009) (paragraph 6(a)).
3. This item would repeal and replace paragraph 6(c) to provide that, in any other case, the registration of a transitionally registered association will end at the end of:
  - 31 December 2009; or
  - any later date prescribed by the regulations.
4. This item is consequential upon item 1 of Schedule 2, which would repeal and replace subclause 38A(1) of Schedule 8.