Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008

(Government)

(1) Schedule 1, item 1, page 3 (after line 19), after subparagraph 326(2)(b)(i), insert:

(a) did not commence that employment more than 14 days before the day on which the ITEA was made, and had previously been employed by the employer (not being employment that had ceased for the reason that, or for reasons that included the reason that, the employer would re-employ the person under an ITEA); or

[ITEAs for previous employees]

(2) Schedule 1, item 2, page 5 (line 24), after “workplace agreement is”, insert “; so far as the context permits,”.

[future employees]

(3) Schedule 1, item 2, page 5 (lines 31 and 32), omit “employee’s overall terms and conditions of employment”, substitute “overall terms and conditions of employment of the employee whose employment is subject to the agreement”.

[future employees]

(4) Schedule 1, item 2, page 6 (line 4), after “employment of the employees”, insert “whose employment is subject to the agreement”.

[future employees]

(5) Schedule 1, item 2, page 6 (after line 6), after subsection 346D(2), insert:

(2A) For the purposes of subsection (1) or (2):

(a) a law of a State or Territory that:

(i) relates to long service leave; and
(ii) immediately before the agreement was lodged, applied to an employee referred to in that subsection, or would have applied to such an employee if he or she had been employed by the employer at that time;

is taken, to the extent that it provides for long service leave, to be a reference instrument relating to the employee; and

(b) if, apart from this subsection, the only reference instrument relating to the employee is a designated award for the employee—the designated award is to be disregarded to the extent (if any) that it provides for long service leave.

[long service leave]

(6) Schedule 1, item 2, page 6 (after line 27), at the end of section 346D, add:

(8) To avoid doubt, if there is a reference instrument in relation to one or more, but not all, of the employees whose employment is subject to a collective agreement:

(a) in a case where the agreement passes the no-disadvantage test under subsection (2)—it passes the test in relation to all employees whose employment is subject to the agreement; or

(b) in a case where the agreement does not pass the no-disadvantage test under subsection (2)—it does not pass the test in relation to any employees whose employment is subject to the agreement.

[employees for whom there are no reference instruments]

(7) Schedule 1, item 2, page 10 (lines 6 to 25), omit subsection 346G(3).

[designated awards]

(8) Schedule 1, item 2, page 11 (lines 1 to 3), omit paragraph 346G(4)(c), substitute:

(c) must not be an award that regulates the terms and conditions of employment in a single business only (being the single business specified in the award).

[enterprise awards]

(9) Schedule 1, item 2, page 12 (lines 14 to 18), omit subsection 346H(2), substitute:

(2) The Workplace Authority Director must determine that an award is a designated award for the employee or employees referred to in subsection (1), if the Workplace Authority Director is satisfied that:

(a) on the date of lodgment of the agreement or variation (as the case requires), the employee or employees are or would be employed in an industry or occupation in which the terms and conditions of the kind of work performed or to be performed by the employee or employees:

(i) are usually regulated by an award; or

(ii) would, but for a workplace agreement or another industrial instrument having come into operation, usually be regulated by an award; and

(b) there is an award that satisfies the requirements specified in subsection (3).

[designated awards]

(10) Schedule 1, item 2, page 12 (lines 31 to 33), omit paragraph 346H(3)(c), substitute:

(c) must not be an award that regulates the terms and conditions of employment in a single business only (being the single business specified in the award).

[enterprise awards]

(11) Schedule 1, item 2, page 12 (after line 37), after section 346H, insert:
346HA  Effect of State awards etc.

For the purposes of paragraphs 346G(2)(a) and 346H(2)(a), an industry or occupation in which the terms and conditions of the kind of work performed or to be performed by an employee are usually regulated by an award is taken to include an industry or occupation in which the terms and conditions of the kind of work performed or to be performed by the employee:

(a) were, immediately before the reform commencement, usually regulated by a State award, or would, but for an industrial instrument or a State employment agreement having come into operation, usually have been so regulated immediately before the reform commencement; or

(b) are usually regulated by any of the following instruments:
   (i) a transitional Victorian reference award (within the meaning of Part 7 of Schedule 6);
   (ii) a common rule in operation under Schedule 6;
   (iii) a transitional award (within the meaning of Schedule 6) other than a Victorian reference award (within the meaning of that Schedule), to the extent that the award regulates excluded employers in respect of the employment of employees in Victoria;
   or would, but for a workplace agreement or an industrial instrument having come into operation, usually be so regulated.

[designated awards]

(12) Schedule 1, item 2, page 15 (lines 31 to 34), omit subsection 346N(2), substitute:

(2) For the purposes of subsection (1), Division 8 does not apply to the variation of an agreement, except for sections 367, 368, 368A, 372, 373 and 374, paragraph 377(1)(b) and section 380A.

[variation of agreements]

(13) Schedule 1, item 2, page 20 (lines 27 to 30), omit subsection 346W(5), substitute:

(5) For the purposes of paragraph (2)(a), Division 8 does not apply to the variation of an agreement, except for sections 367, 368, 368A, 372, 373 and 374, paragraph 377(1)(b) and section 380A.

[variation of agreements]

(14) Schedule 1, item 2, page 30 (line 23), after “section 346M,”, insert “346Q,”.

[notification of decisions]

(15) Schedule 1, page 33 (after line 8), after item 4, insert:

4A  Section 349

Before “An award”, insert “(1)”.

4B  At the end of section 349

Add:

(2) Despite subsection (1), if:
   (a) a person’s employment is subject to a workplace agreement; and
   (b) but for the workplace agreement, an award would have effect in relation to the person’s employment;
the terms of the award have effect to the extent that they are about outworker conditions, despite any terms of the workplace agreement that provide, in a particular respect, a less favourable outcome for that person.

(3) In this section:

_**outworker**_ means 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.

_**outworker conditions**_ means conditions (other than pay) for outworkers, but only to the extent necessary to ensure that their overall conditions of employment are fair and reasonable in comparison with the conditions of employment specified in a relevant award or awards for employees who perform the same kind of work at an employer’s business or commercial premises.

[**outworker conditions**]

(16) Schedule 1, item 15, page 39 (line 10), omit paragraph 2(2)(b).

[**continuing operation of AWAs**]

(17) Schedule 1, item 15, page 40 (after line 3), after subclause 3(1), insert:

(1A) However, paragraph 405(1)(e) of the pre-transition Act continues to apply in relation to a person whose appointment has ceased to have effect under subclause (1), as if the person continues to be a bargaining agent.

[**bargaining agents**]

(18) Schedule 1, item 15, page 41 (line 24), omit “the 14 day period referred to in section 342”, substitute “a period of 14 days after the commencement of this Schedule”.

[**notification of ineffective AWAs and variations**]

(19) Schedule 1, item 15, page 41 (lines 33 and 34), omit “the 14 day period referred to in section 375”, substitute “a period of 14 days after the commencement of this Schedule”.

[**notification of ineffective AWAs and variations**]

(20) Schedule 1, item 15, page 42 (after line 13), after paragraph 8(1)(a), insert:

(aa) paragraph 336(b);

[**eligible employees**]

(21) Schedule 1, item 15, page 43 (after line 20), after paragraph 2(1)(c), insert:

(ca) subsections 347(1) and (2);

[**continuing operation of fairness test**]

(22) Schedule 1, Part 2, page 44 (after line 15), at the end of the Part, add:

**15A Effect of repeal of section 399**

(1) To avoid doubt, if, immediately before the commencement of this item, an industrial instrument had no effect because of the operation of section 399 of the pre-transition Act, the repeal of that section by this Act:

(a) does not cause the instrument to have effect after that commencement; and

(b) does not cause any protected award condition to cease to have effect.

(2) In this item:
industrial instrument means an instrument mentioned in subsection 399(3) of the pre-transition Act, and includes any of the following (except to the extent that they contain protected award conditions):

(a) a common rule within the meaning of clause 89 of Schedule 6;
(b) a transitional Victorian reference award within the meaning of Part 7 of that Schedule;
(c) a transitional award within the meaning of that Schedule, to the extent that subclause 102(1) of that Schedule applies to it.

pre-transition Act means the Workplace Relations Act 1996 as in force immediately before the commencement of this item.

protected award condition has the meaning it had for the purposes of section 354 of the pre-transition Act.

[effect of repeal of section 399]

(23) Schedule 1, item 48, page 50 (line 22), omit “section 346W (which deals”, substitute “section 346N or 346W (which deal”.

[variation of agreements]

(24) Schedule 1, item 67, page 53 (line 33) to page 54 (line 1), omit the item, substitute:

67 Paragraphs 390(2)(b) and 392(2)(ba) and (c)
Omit “AWA”, substitute “ITEA”.

[technical correction]

(25) Schedule 1, item 159, page 71 (lines 1 to 3), omit the item, substitute:

159 At the end of subclause 89(1) of Schedule 6
Add:
; and (c) section 349 of the pre-transition Act as it applies because of clause 2 of Schedule 7A; and
(d) section 345 of the pre-transition Act as it applies because of clause 2 of Schedule 7A and clause 2 of Schedule 7B.

[common rules]

(26) Schedule 1, item 165, page 71 (lines 19 to 21), omit the item, substitute:

165 At the end of subclause 95(1) of Schedule 6
Add:
; and (c) section 349 of the pre-transition Act as it applies because of clause 2 of Schedule 7A; and
(d) section 345 of the pre-transition Act as it applies because of clause 2 of Schedule 7A and clause 2 of Schedule 7B.

[transitional Victorian reference awards]

(27) Schedule 1, item 171, page 72 (lines 9 to 11), omit the item, substitute:

171 At the end of subclause 102(1) of Schedule 6
Add:
; and (c) section 349 of the pre-transition Act as it applies because of clause 2 of Schedule 7A; and
(d) section 354 of the pre-transition Act as it applies because of clause 2 of Schedule 7A and clause 2 of Schedule 7B.

[transitional awards]

(28) Schedule 1, page 74 (after line 15), after item 191, insert:

**191A After paragraph 20(a) of Schedule 7**

Insert:

(aa) section 327;
(ab) paragraph 336(b);
(ac) paragraph 340(2)(a);
(ad) paragraph 367(1)(b);
(ae) subparagraph 369(b)(ii);
.af) subparagraph 373(2)(a)(ii);
(ag) subparagraph 467(1)(a)(iii);
(ah) subparagraph 467(1)(b)(ii);

[continuing operation of pre-reform AWAs]

(29) Schedule 1, page 76 (after line 21), after item 210, insert:

**210A After subclause 15G(1) of Schedule 8**

Insert:

(1A) If, after the commencement of this subclause, a preserved individual State agreement ceases to operate in relation to an employee because of subclause (1):
(a) any preserved collective State agreement binding the employer; or
(b) if there is no such preserved collective State agreement—any notional agreement preserving State awards that would have been taken to come into operation in relation to the employer and employee on the reform commencement but for the preserved individual State agreement;
has effect in relation to the employer and employee.

(1B) If, after the commencement of this subclause, a preserved collective State agreement ceases to operate in relation to an employee because of subclause (1), any notional agreement preserving State awards that would have been taken to come into operation in relation to the employer and employee on the reform commencement but for the preserved collective State agreement has effect in relation to the employer and employee.

(1C) However, subsection (1A) or (1B) ceases to apply if an award or a workplace agreement comes into operation in relation to the employer and employee.

[preserved State agreements]

(30) Schedule 1, page 78 (after line 23), after item 228, insert:

**228A Subclause 26(1) of Schedule 8**

Omit “workplace agreement” (first occurring), substitute “pre-transition workplace agreement”.

**228B Subclause 26(1) of Schedule 8**

After “section 355”, insert “of the pre-transition Act”.

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228C **At the end of subclause 26(1) of Schedule 8**
Add “for the purposes of that Act”.

228D **Subclause 26(2) of Schedule 8**
After “subsection 355(6)”, insert “of the pre-transition Act”.

228E **Subclause 26(2) of Schedule 8**
Omit “workplace agreement”, substitute “pre-transition workplace agreement”.

**[incorporation of terms from preserved State agreements]**

(31) Schedule 1, page 79 (after line 28), after item 237, insert:

237A **Subclause 52A(1) of Schedule 8**
Omit “workplace agreement” (first occurring), substitute “pre-transition workplace agreement”.

237B **Subclause 52A(1) of Schedule 8**
After “section 355”, insert “of the pre-transition Act”.

237C **At the end of subclause 52A(1) of Schedule 8**
Add “for the purposes of that Act”.

237D **Subclause 52A(2) of Schedule 8**
After “subsection 355(6)”, insert “of the pre-transition Act”.

237E **Subclause 52A(2) of Schedule 8**
Omit “workplace agreement”, substitute “pre-transition workplace agreement”.

**[incorporation of terms from notional agreements preserving State awards]**

(32) Schedule 2, item 9, page 96 (lines 23 to 30), omit section 576K, substitute:

576K **Terms providing for outworkers**

(1) In this section:

*outworker* means:

(a) 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; or

(b) an individual who is a party to a contract for services, and who, for the purposes of the contract, performs work:

(i) in the textile, clothing or footwear industry; and

(ii) at private residential premises or at other premises that are not business or commercial premises of the other party to the contract or (if there are 2 or more other parties to the contract) of any of the other parties to the contract.

(2) A modern award may include either or both of the following:

(a) terms relating to the conditions under which an employer may employ employees who are outworkers (including terms relating to the pay or conditions of the outworkers);
(b) terms relating to the conditions under which an eligible entity (within the meaning of Division 4) may arrange for work to be carried out for the entity (either directly or indirectly) by outworkers (including terms relating to the pay or conditions of the outworkers).

Note: In paragraph (2)(a), employee and employer have the meanings given by subsections 5(1) and 6(1).

[8]  

(33) Schedule 2, item 9, page 100 (lines 17 to 19), omit the definition of enterprise award in section 576U, substitute:

enterprise award means an award that regulates the terms and conditions of employment in a single business only (being the single business specified in the award).

[meaning of enterprise award]

(34) Schedule 2, item 9, page 100 (line 21), omit “the matter”, substitute “a matter”.

[8]

(35) Schedule 2, page 104 (after line 22), after item 9, insert:

9A After paragraph 2(2)(s) of Schedule 2
Insert:
(sa) subsection 576K(1), definition of outworker;

9B At the end of subclause 3(2) of Schedule 2
Add:
; (j) subsection 576K(1), definition of outworker.

[8]

(36) Schedule 5, item 6, page 119 (line 18), omit “termination”, substitute “agreement”.

[technical correction]

(37) Page 119 (after line 19), after Schedule 5, insert:

Schedule 5A—Transitional treatment of State employment agreements

Workplace Relations Act 1996

1 After clause 16 of Schedule 8
Insert:

16A Commission may extend or vary preserved collective State agreements

(1) The Commission may, on application by any person bound by a preserved collective State agreement, by order:
(a) extend the nominal expiry date of the agreement; or
(b) vary the terms of the agreement.

(2) However, before making the order, the Commission must be satisfied that:
(a) all parties bound by the agreement genuinely agree to the extension or variation; and

(b) none of the parties have, after the introduction day:
   (i) organised or engaged in, or threatened to organise or engage in, industrial action in relation to another party to the agreement; or
   (ii) applied for a protected action ballot under section 451 in relation to proposed industrial action; and

(c) in the case of a variation—the agreement as varied would not result, on balance, in a reduction in the overall terms and conditions of employment of the employees bound by the agreement under:
   (i) any relevant State award in relation to the employees; and
   (ii) any law of the Commonwealth, or of a State or Territory, that the Commission considers relevant.

(3) If the Commission extends the nominal expiry date of the agreement, the extended date cannot be more than 3 years after the date on which the order is made.

(4) The employees bound by the agreement are taken, for the purposes of paragraph (2)(a), genuinely to agree to the extension or variation if:
   (a) the employer gives all of the employees bound by the agreement at the time of making the extension or variation a reasonable opportunity genuinely to decide whether they agree to the extension or variation; and
   (b) either:
      (i) if the decision is made by a vote—a majority of those employees who cast a valid vote; or
      (ii) otherwise—a majority of those employees; genuinely decide that they agree to the extension or variation.

(5) To avoid doubt, the terms and conditions of employment under a relevant State award may, for the purposes of paragraph (2)(c), include terms and conditions that did not apply on the reform commencement, or that have been varied since the reform commencement.

(6) In this clause:

   introduction day means the day on which the Bill that became the Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008 was introduced into the House of Representatives.

   relevant State award, in relation to an employee, means:
   (a) if, immediately before the reform commencement, the employee was bound by, or a party to, the original collective agreement to which the preserved collective State agreement referred to in subsection (1) relates, under the terms of that agreement or a State or Territory industrial law as in force at that time—the State award that would have bound the employee at that time but for that agreement; or
   (b) otherwise—the State award that would have bound, or but for the application of a State employment agreement would have bound, the employee at that time if the employee had been employed by the employer at that time.

2 After clause 21E of Schedule 8

   Insert:
Division 5A—Coercion

3 After subclause 22(1) of Schedule 8

Insert:

(1A) A person must not:

(a) take or threaten to take any industrial action or other action; or
(b) refrain or threaten to refrain from taking any action;

with intent to coerce another person to agree, or not to agree, to the extension of the nominal expiry date of, or the variation of, a preserved collective State agreement under clause 16A.

Note: The heading to clause 22 of Schedule 8 is altered by adding at the end “etc.”.

4 Subclause 22(2) of Schedule 8

Omit “Subclause (1)”, substitute “This clause”.

5 Subclause 22(3) of Schedule 8

Omit “subclause (1)”, substitute “this clause”.

[transitional treatment of State employment agreements]