THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

WORKPLACE RELATIONS AMENDMENT (WORK CHOICES) BILL 2005

SUPPLEMENTARY EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Employment and Workplace Relations, the Honourable Kevin Andrews MP)
NOTES ON CLAUSES

Clause 2 – Commencement

Item 1 – Clause 2, page 2 (after table item 2)

1. This item would insert table item 2A into the commencement table to provide that Schedule 1A will commence on the day on which the Act receives the Royal Assent.

Item 2 – Clause 2, page 2 (cell at table item 4)

2. This item would provide that Schedule 3 of the Bill commences on Royal Assent.

Item 3 – Clause 2, page 2 (after table item 4)

3. This item would amend clause 1 of the Bill to provide that Schedule 3A (redundancy pay by small business employers) commences on royal assent

Item 4 – Clause 3, page 3 (lines 4 to 8)

4. This item would omit and substitute proposed new clause 3, which would provide that each Act and each regulation specified in a Schedule is amended or repealed as set out in that Schedule. Other items operate according to their terms. The amendment of any regulation does not prevent the regulation, as so amended, from being amended or repealed by the Governor-General.

Item 5 – Schedule 1, item 1, page 4 (lines 20 and 21)

5. This item would amend proposed section 3 which would set out the principal object of the Act. Specifically, it amends subsection 3(d), by omitting the reference to ‘key minimum standards for agreement making’. This reinforces the primacy of agreement making. This amendment more closely mirrors existing subsection 3(b) which relates to the agreement making process. The amendment also inserts the words ‘as far as possible’ into the subparagraph. This language reflects words contained in existing subparagraph 3(d)(i).

Item 6 – Schedule 1, item 2, page 7 (line 24)

6. This item would make a minor amendment to the definition of ‘Australian employer’ in proposed section 4.

Item 7 - Schedule 1, item 2, page 18 (line 18)

7. This item would amend proposed subsection 4(2).

8. Subsection 4(2) provides that references to an independent contractor in the freedom of association provisions is not confined to a natural person.
9. This amendment would provide that references to ‘independent contractor’ are not confined to a natural person in the awards provisions (Part VI) and in regulations made under section 101D (prohibited content in workplace agreements).

10. The effect of this amendment would be that:

- the prohibition on award terms that restrict the engagement of independent contractors in section 116B would extend to terms restricting the engagement of corporate contractors;

- prohibitions specified in the regulations against agreements containing terms which restrict the engagement of independent contractors would apply to both individual independent contractors and corporate contractors.

**Item 8 – Schedule 1, item 6, page 22 (after line 10)**

**New section 7AAA – Exclusion of persons insufficiently connected with Australia**

11. Proposed section 7AAA would authorise the making of regulations to exempt persons or entities from any provision of the WR Act (including the Registration and Accountability of Organisations Schedule and regulations made under it) on the basis that the person or entity is insufficiently connected with Australia. Before the Governor-General could make such regulations, the Minister would need to be satisfied that the provision in question should not apply to the person or entity because there was not a sufficient connection between that person or entity and Australia.

**Item 9 Schedule 1, item 6, page 22 (after table item 4), insert**

12. This item would insert a proposed item 4A in the table set out in proposed section 7AA. The amendment would add to the table a reference to proposed section 170AM. The table would set out certain provisions in the amended WR Act which relate to extraterritorial application.

**Item 10 – Schedule 1, item 6, page 23 (after line 8)**

13. This item would add a further Note after Note 2 after proposed subsection 7AA(1), explaining that Part VC (Industrial action) may extend in relation to Australia’s exclusive economic zone and continental shelf in the way prescribed by regulations made under section 106C. Item 117 would insert proposed section 106C, which would authorise regulations to be made to modify the way that Part VC (Industrial action) and the rest of the WR Act (including the Registration and Accountability of Organisations Schedule and regulations made under it) so far as it relates to Part VC, apply in relation to Australia’s exclusive economic zone and Australia’s continental shelf.

**Item 11 – Schedule 1, item 8, page 24 (line 7)**

**Item 12 – Schedule 1, item 8, page 24 (after line 7)**

**Item 13 – Schedule 1, item 8, page 24 (line 10)**
14. These items would amend proposed subsection 7B(2), and the Note following it, to include proposed section 106C as one of the sections to which Part 2.7 of the Criminal Code would be subject in its application to offences against the WR Act. Part 2.7 of the Criminal Code is about geographical jurisdiction in connection with offences, and would have effect subject to section 106C (among other sections) because section 106C would deal with extraterritorial operation of the WR Act.

**Item 14 – Schedule 1, item 9, page 24 (lines 29 and 30)**

15. This item would amend proposed paragraph 7C(1)(c) so that State or Territory laws entitling trade union representatives to enter premises would be included in the list of laws intended to be excluded by the WR Act. However, item 15 would amend paragraph 7C(3)(c) so that entry of a representative of a trade union to premises for a purpose connected with occupational health and safety would be a non-excluded matter. Item 16 would also have the effect of adding entry of a representative of a trade union to premises for a purpose connected with outworkers to the list of non-excluded matters in subsection 7C(3).

16. The effect of items 14 and 15, and also item 16, would be that State or Territory laws entitling trade union representatives to enter premises would be intended to be excluded by the WR Act, except where they dealt with entry for a purpose connected with occupational health and safety or a purpose connected with outworkers.

**Item 16 – Schedule 1, item 9, page 25 (after line 11)**

17. This item would add matters relating to outworkers to the list of non-excluded matters listed in subsection 7C(3), so that State or Territory laws relating to outworkers would not be excluded by the WR Act. This would include State or Territory laws dealing with entry of a trade union representative to premises for a purpose connected with outworkers, and this is discussed above in relation to Items 14 and 15.

**Item 17 – Schedule 1, item 9, page 25 (lines 19 and 20)**

18. This item would omit proposed paragraph 7C(3)(j) so that matters relating to training or apprenticeships would be removed from the list of non-excluded matters. State or Territory laws relating to training and apprenticeships would be unlikely to apply to employment generally and so would not fall within paragraph (b) of the definition of ‘State or Territory industrial law’ in proposed section 4, and therefore would not be covered by paragraph 7C(1)(a). The Government does not intend that such laws be excluded by subsection 7C(1).

**Item 18 – Schedule 1, item 9, page 25 (line 32)**

19. This item would amend the Note following proposed section 7C, to make a minor technical correction.

**Item 19 – Schedule 1, item 9, page 26 (after line 4)**
20. The item would insert a new subsection 7C(4A) to make it clear that regulations made for
the purposes of subsection 7C(4) could prescribe certain laws even though those laws dealt with
one or more of the non-excluded matters listed in subsection 7C(3), or were otherwise covered
by subsection 7C(2). Where subsection 7C(2) applied to a law, subsection 7C(1) would be
disapplied with the result that the law would not be intended to be excluded by the WR Act by
virtue of subsection 7C(1). However, in this situation the law could nevertheless be intended to
be excluded by the WR Act because of regulations made under subsection 7C(4).

Item 20 – Schedule 1, item 9, page 26 (line 16)

21. This item would amend proposed subsection 7D(2) to allow regulations to be able to be
made prescribing certain State or Territory laws about matters listed in subsection 7D(2). Where
a State or Territory law dealing with a matter was prescribed by regulations for the purposes of
subsection 7D(2), a term of an award or workplace agreement dealing with that matter would not
be subject to that State or Territory law.

Item 21 – Schedule 1, item 9, page 26 (line 19)

22. This item would amend proposed paragraph 7D(2)(c) so that a term of an award or
workplace agreement dealing with training arrangements would be subject to a State or Territory
law about training arrangements. ‘Training arrangements’ would include both apprenticeships
and traineeships.

Item 22 – Schedule 1, item 10, page 27 (line 6) to page 41 (line 28)

23. This item would omit item 10 from Schedule 1. New item 319 would insert Part IA into a
separate schedule (new Schedule 1A) with a separate commencement date.

Item 23 – Schedule 1, item 20, page 45 (line 5)

24. This item would amend proposed section 44B, by deleting from paragraph 44B(a) the words
‘without discrimination based on sex’. This amendment is being made to ensure that the
obligation upon the AIRC under paragraph 44B(a) to apply the principle of equal pay for work
of equal value is expressed in the same terms as the obligation upon the Australian Fair Pay
Commission under paragraph 90ZR(1)(a).

Items 24 - 26 – Schedule 1, item 43, page 57 (line 17, after “small business”)}

25. The Bill as introduced provides, at proposed section 83BB, for new functions for the
Employment Advocate consistent with the new system for the making of workplace agreements.

26. Proposed paragraphs 83BB(1)(a), (c) and (f) refer to the functions of the Employment
Advocate in relation to the provision of assistance, advice, education and information to
employees and employers in relation to workplace agreements, awards and the Australian Fair
Pay and Conditions Standard.

27. This amendment would provide that the Employment Advocate is to also have the function
of providing assistance, advice, education and information to organisations (within the meaning
of the Act).
Item 27 – Schedule 1, item 43, page 58 (lines 22 and 23)

28. This item would make a minor technical correction to proposed paragraph 83BB(3)(b) in relation to the Employment Advocate having regard to the need to prevent and eliminate discrimination.

Item 28

29. This item amends item 71 of Schedule 1 to repeal Part VIAAA – which is inserted by Schedule 3A – on reform commencement.

Item 29 – Schedule 1, item 71, page 65 (after line 23)

Item 30 – Schedule 1, item 71, page 65 (line 26)

30. Items 29 and 30 would amend proposed section 89A to provide a process for resolving disputes that concern the application of both the Australian Fair Pay and Conditions Standard (the Standard) and a workplace agreement.

31. Proposed section 89E in Part VA provides that the model dispute resolution process applies with respect to a dispute about the non-wage guarantees in the Standard. Proposed section 101A in Part VIB provides that a workplace agreement must include a dispute resolution process, which may be the model dispute resolution process or another process as agreed.

32. Item 29 would insert a new subsection (2A) in section 89A. The proposed subsection would provide that the dispute resolution process in a workplace agreement applies to a dispute about whether or what ‘more favourable outcome’ is provided by the Standard for an employee who is subject to a workplace agreement.

33. The intention is that wherever a workplace agreement operates its dispute resolution process would apply instead of the process that would otherwise apply to a dispute about the operation of the Standard (section 89E refers).

34. Item 2 would make a consequential amendment to subsection 89A(3) to allow regulations to be made for the purposes of proposed subsection (2A). If necessary for the purposes of dispute resolution, the regulations may prescribe how the Standard is to be compared to a workplace agreement ‘in a particular respect’ and when the Standard provides a more favourable outcome.

Item 31 – Schedule 1, item 71, page 66 (lines 14 to 30)

35. This item would omit proposed section 89C, which would have allowed employees to be exempted by regulations from the operation of Part VA (The Australian Fair Pay and Conditions Standard) on the basis of an insufficient connection between the employee’s employment and Australia. Due to the new section 7AAA to be inserted by item 8, section 89C would be redundant.

Item 32 – Schedule 1, item 71, page 70 (after line 29)
36. The amendment to proposed section 90B would insert a definition of *frequency of payment provisions* into the general definitions section of Division 2 of Part VA (proposed section 90B). *Frequency of payment provisions* would be defined to mean provisions that determine the frequency with which an employee must be paid. For a pre-reform wage instrument, they include provisions of that instrument or of another instrument or law that are incorporated by reference. The legislative note would make it clear that for a preserved APCS, the frequency of payment provisions will (at least initially) be the same as those (if any) for the pre-reform wage instrument from which the APCS is derived.

**Item 33 – Schedule 1, item 71, page 75 (line 16)**

**Item 34 – Schedule 1, item 71, page 75 (lines 20 and 21)**

**Item 35 – Schedule 1, item 71, page 76 (line 5)**

**Item 36 – Schedule 1, item 71, page 76 (lines 8 and 9)**

**Item 37 – Schedule 1, item 71, page 76 (line 19)**

**Item 38 – Schedule 1, item 71, page 76 (lines 22 and 23)**

These amendments are consequential upon the proposed amendment to proposed section 90G.

**Item 39 – Schedule 1, item 71, page 76 (line 24) to page 77 (line 26)**

37. The proposed amendment would omit proposed section 90G and substitute it with a new section 90G to define an employee’s *guaranteed hours* for the guarantee of basic periodic rates of pay in Section 90F(1), (3) and (4).

38. New section 90G would define *guaranteed hours* for employees employed to work a specified number of hours (eg full-time and part-time employees). That definition would not apply to categories such as casual or APCS piece rate employees, who by definition are not employed to work a specified number of hours per week.

39. Subsection 90G(1) would set out the process for determining the guaranteed hours for employees employed for work a specified number of hours per week. Subject to subsection 90G(4), those specified weekly hours form the starting point under paragraph 90G(1)(a) for determining an employee’s guaranteed hours.

40. Paragraph 90G(1)(b) would set out the hours that must be deducted from an employee’s specified weekly hours to ensure that the employee is not paid for hours not worked because:

- the employee is absent from work on *deductible authorised leave*, as defined in subsection 90G(6) (subparagraph 90G(1)(b)(i));
- the employer is prohibited by section 114 from paying ‘strike pay’ to the employee (subparagraph 90G(1)(b)(ii)); or
41. Paragraph 90G(1)(c) would require an adjustment to add any additional hours that an employee is required or requested to work that are not counted (under the terms and conditions of employment) towards the specified number of hours. For example, hours required or requested to be worked in addition to an employee’s specified weekly hours, but not subject to an averaging arrangement, would count as additional hours for purposes of the paragraph.

42. The term ‘required’ is intended to capture situations where an employee has not been expressly directed or requested to work additional hours, but must do so in order to meet his or her employer’s requirements. For example, an employer may set a project deadline that requires employees to work additional hours to meet that deadline, although the requirement is not expressly stated. Those additional hours would be caught by the additional hours provision.

43. The legislative note paragraph 90G(1)(c) make it clear that the specified number of hours worked may vary form week to week. For example, an averaging arrangement may enable hours worked to be averaged over a period of time or work cycle (eg 152 hours per four weeks). At the end of a work cycle (eg four weeks using the example above), the averaging arrangement may enable any additional hours (ie any hours worked over 152 hours during the work cycle) to be ‘rolled over’ as credits towards hours worked in the next work cycle. Such hours would not count towards the employee’s guaranteed hours. If no such provision is made, then any additional hours at the end of a work cycle would be included as part of the employee’s guaranteed hours (for which payment would be due).

44. Subsection 90G(2) would, for the purposes of subsection 90G(1), deem employees engaged on a full-time basis to be employed for 38 hours per week where their terms and conditions of employment failed to specify their hours or work. This provision would ensure that full-time employees were guaranteed hours under the section, even if their specified hours were not explicitly stated.
Illustrative Example

Lana is engaged as a full-time nursing assistant to work 152 hours averaged over a four-week period (a non-week period) on an ongoing basis.

Under her flexible hours arrangement, Lana works a total of 162 hours over a four-week period broken down as follows:

- Week 1: 38 hours
- Week 2: 50 hours
- Week 3: 36 hours
- Week 4: 38 hours

Lana is taken to be employed to work 38 hours per week (152 hours x 7 / 28 days) under the formula in proposed subsection 90G(3). Accordingly, she takes home a weekly wage based on a 38-hour week.

At the end of the work cycle, Lana has worked 162 hours over four weeks, which is 10 hours above her specified number of hours for that cycle. Under Lana’s terms and conditions of employment, however, these hours count towards the specified number of hours worked for the next work cycle, so no further payment is due for those hours at that time.

Lana decides to end her employment as a nursing assistant to start her own business. Her last day will be three days into a seven-day period. For that ‘broken’ period of service, Lana is only employed to work three days out of her usual five, or 22.8 (38 x 3 / 5) hours per week. That will be the starting point for determining her guaranteed hours that week.

Upon termination, Lana has a flexible hours ‘credit’ of 18 hours. These are hours which she has been required or requested to work, but for which she has not been paid. Because these hours cannot count towards her specified number of hours during the next work cycle, she is entitled to payment for those additional hours upon termination. (Had Lana been in flexible hours ‘debit’, then her terms and conditions of employment would determine the treatment of those hours upon termination.)

45. Subsection 90G(3) would provide a formula to determine the average number of hours per week an employee is engaged for, where their actual fixed period is not a week. For example an employee engaged to work 152 hours over a four-week cycle is taken (for the purpose of subsection 90G(1)) to be engaged for 38 hours per week, averaged over a four-week period.

46. Subsection 90G(4) would ensure that where APCS requires an employee to whom a training arrangement applies to be paid his or her basic periodic rate of pay for any hours attending off-the-job training that those hours (paid training hours) are included as part of the employee’s specified hours of work. Where an employee’s paid training hours are not included as part their actual specified hours, then those specified hours are taken to be increased to include the paid training hours.
47. Subsection 90G(6) would define the terms *deductible authorised leave*, *hour*, and *public holiday* for purposes of the section.

48. Paragraphs (a) – (c) of the definition of *deductible authorised leave* would define the term to mean any leave or an absence, whether paid or unpaid that is authorised by the employer (eg annual or personal leave), by or under a term or condition of the employee’s employment (eg stand-down or ‘inclement weather’ provisions), or by or under a law, or instrument in force under a law, of the Commonwealth, a State or a Territory (eg jury service). Hours of paid leave are deducted from the guaranteed hours, because a separate entitlement to be paid would exist.

49. Paragraphs (d) and (e) would make it clear that authorised public holidays and *paid training hours* are not forms of *deductible authorised leave*.

50. A *public holiday* would be defined to mean a day declared as such by or under State or Territory law, excluding union picnic days and any other day, or kind of day, specified by the regulations. The definition would enable another day to be substituted for a *public holiday*, providing that substitution occurred under or in accordance with a state or Territory law, an award or workplace agreement.

51. An *hour* would be defined to include part of an hour, so that an employee’s guaranteed hours may be a number of hours and part of an hour.

Item 40 – Schedule 1, item 71, page 77 (after line 26)

52. The amendment would insert proposed section 90GA at the end of Subdivision B.

53. Proposed section 90GA would provide persons with disabilities (as defined in proposed section 90B) with access to the Supported Wage System (SWS) through workplace agreements made under the WR Act. The legislative note to the section would define the SWS by reference to the decision of the AIRC which established the test case provision for the SWS in 1994 (Print L5723).

54. Under the SWS, an employee would be entitled to be paid the applicable percentage of the minimum rate of pay prescribed in their APCS for the class of work the employee was performing.

55. The section would only apply to those persons eligible for the Supported Wage System, whose APCS did not include rate provisions specific to employees with disabilities that included that employee. While those conditions were met, subsection 90GA(2) would deem an SWS-compliant rate in a workplace agreement (ie a rate not less than the rate set in accordance with the SWS) to be the guaranteed basic periodic rate of pay for the employee under subsection 90F(1).

Item 41 – Schedule 1, item 71, page 78 (lines 4 and 5)

56. The proposed amendment to paragraph 90H(1)(c) would make a minor technical amendment to omit the phrase ‘collective agreement or an AWA’ and substitute the term ‘workplace agreement’. 
Item 42 – Schedule 1, item 71, page 78 (lines 12 to 27)

57. The proposed amendment would omit subsection 90H(3) and substitute an amended version of the omitted subsection. The provision would set out the guaranteed casual loadings for casual employees guaranteed a basic periodic rate of pay.

58. The proposed amendment would vary the guaranteed casual loading for certain employees guaranteed a basic periodic rate of pay under proposed section 90F, whose employment is not covered by a workplace agreement. Under the omitted section, these employees would have been guaranteed the casual loading under their APCS.

59. Item 2 of new subsection 90H(3) would ensure that employees who employment is affected by subsection 103R(1) (Consequence of termination of agreement—application of other industrial instruments) are guaranteed the casual loading in their APCS, or the default casual loading, whichever is higher.

60. Item 4 of the table would make it clear that that employees covered by the standard FMW or a special FMW that are employed on a casual basis are guaranteed the default casual loading percentage.

Item 43 – Schedule 1, item 71, page 79 (after line 10)

61. The proposed amendment would insert a new Subdivision CA—Guarantee of frequency of payment after Subdivision C to establish a guarantee of frequency of payment under the Division. It also sets out priority rules to determine which frequency of payment provisions prevail for purposes of the guarantee, and establishes a default entitlement in the absence of such provisions.

62. Proposed subsection 90KA(1) would guarantee an employee frequency of payments in accordance with their APCS.

63. Where an applicable APCS is silent on the required frequency of payment, then subsection 90KA(2) guarantees frequency of payment in accordance with the employee’s workplace agreement or, if inapplicable, any frequency of payment provisions in their contract of employment (which must be in writing for the provision to apply). In the absence of any relevant frequency of payment provisions, the employee would be guaranteed fortnightly payments in arrears.

64. Where the employee is not covered by an APCS, subsection 90KA(3) guarantees payment in accordance with the frequency of payment provisions in the employee’s workplace agreement or, if inapplicable, their contract of employment. In the absence of any relevant frequency of payment provisions, the employee would be guaranteed fortnightly payments, in arrears.

Item 44 – Schedule 1, item 71, page 82 (lines 6 and 7)

65. The proposed amendment to paragraph 90N(4)(b) would be consequential upon the omission and substitution of proposed subsection 90H(3).

Item 45 – Schedule 1, item 71, page 86 (line 32)
66. The proposed amendment to paragraph 90X(2)(c) would make a minor technical amendment by omitting the words ‘count as’ and substituting the word ‘are’.

**Item 46 – Schedule 1, item 71, page 86 (after line 33)**

67. The proposed amendment to subsection 90X(2) would add ‘frequency of payment provisions’ to the list of the kinds of provisions that an APCS may contain. This would make it clear that an APCS may contain frequency of payment provisions (as defined in section 90B).

**Item 47 – Schedule 1, item 71, page 87 (line 1)**

68. The proposed amendment to subsection 90X(3) would be consequential upon the proposed amendment to insert new subsection 90ZD(3A). This would enable an exception to be made to the operation of proposed section 90X(3).

**Item 48 – Schedule 1, item 71, page 91 (after line 15)**

69. The proposed amendment to subsection 90ZD(1) would enable frequency of payment provisions for a pre-reform instrument (whether of that instrument or of another instrument or law) to be included as part of the corresponding preserved APCS as part of the derivation process under proposed section 90ZD.

**Item 49 – Schedule 1, item 71, page 91 (line 19)**

70. The proposed amendment to subsection 90ZD(3) would be consequential upon the insertion of new subsection 90ZD(3A).

**Item 50 – Schedule 1, item 71, page 91 (after line 25), after subsection 90ZD(3), insert:**

71. The proposed amendment would insert new subsection 90ZD(3A) to create an exception to the operation of section 90X(3), which prohibits ‘self-executing’ rate or casual loading increases. Subsection 90ZD(3A) would ensure that preserved APCSs are taken to include any pre-reform wage increases determined by the AIRC, or a State industrial authority, wholly or partly on the ground of work value change or pay equity. The subsection would only apply to allow the phasing-in of pay increases on those grounds scheduled to occur after the reform commencement.

**Item 51 – Schedule 1, item 71, page 97 (line 3)**

72. This amendment would be required to accommodate the proposed amendments to include pre-reform work value and pay equity increases as part of the rate provisions of preserved APCSs (proposed subsection 90ZD(3A)). Because such rate provisions may already factor in future Safety Net Reviews (SNRs) of the AIRC, the proposed amendment to subsection 90ZN(2) would provide that in adjusting APCSs to accommodate the 2005 Safety Net Review wage increase (under section 90ZN), the AFPC would not be required to adjust a particular APCS where the terms of a work value increase has already factored in the 2005 SNR increase.

**Item 52 – Schedule 1, item 71, page 100 (line 4)**
73. This item would make a minor technical correction to proposed paragraph 90ZR(1)(e) in relation to the AFPC ensuring that its decisions do not contain discriminatory provisions.

Item 53 – Schedule 1, item 71, page 100 (line 18)

74. This amendment would insert the words “or requested” after the word “required” in proposed subsection 91C(1). The amendment will ensure that the hours guarantee will apply to both hours which an employee is required and requested by an employer to work.

Item 54 – Schedule 1, item 71, page 101 (lines 20 and 21)

75. This amendment would provide that an employer cannot require or request an employee to work more than 38 hours per week, or 38 hours per week averaged over a period of up to 12 months (the employee’s averaging period) as agreed between the employer and employee, and reasonable additional hours. A week is to be given its ordinary meaning, being a calendar week. The manner in which an employer and employee may agree to an averaging period for the purpose of proposed subparagraph 91C(1)(a)(ii) will be a matter for them. For example, an employer and employee could agree that the averaging period will be each calendar year, or a ‘rolling period’ of any period up to 12 months during the employment period.

76. In the absence of an averaging period as agreed between the employer and employee, hours in excess of 38 hours per week will be regarded as additional hours and an employer would need to demonstrate that those hours were “reasonable additional hours” having regard to the factors set out in s.91C(5) such as the operating requirements of the business.

Item 55 – Schedule 1, item 71, page 101 (line 23)

77. This amendment is a minor technical amendment to the note, consequent on the proposed amendment to proposed subsection 91C(1).

Item 56 – Schedule 1, item 71, page 101 (line 25)

Item 57 – Schedule 1, item 71, page 101 (line 26)

78. These amendments would make minor technical changes.

Item 58 – Schedule 1, item 71, page 101 (line 29) to page 102 line 23

79. This amendment would omit subsections 91C(2) to (4) and insert new proposed subsection 91C(2) and new proposed subsection 91C(3). Subsection 91C(2) is a technical amendment consequent on the amendment to proposed subsection 91C(1). Subsection 91C(3) would provide that an averaging period that applies to the employee is taken not to include the period before the employee started to work for the employer. For example, if an employee commenced on 1 July, under a collective agreement which provided for an averaging period of each calendar year, the employee’s averaging period would be the remaining 6 months of that year: from 1 July until 31 December. Afterwards, the employee’s averaging period would be each complete calendar year.

Item 59 – Schedule 1, item 71, page 102 (line 26)
Item 60 – Schedule 1, item 71, page 102 (line 36)

Item 61 – Schedule 1, item 71, page 103 (line 1)

80. These amendments are consequential on the amendment to proposed subsection 91C(1).

Item 62 – Schedule 1, item 71, page 103 (line 4)

81. This amendment is a minor drafting amendment.

Item 63 – Schedule 1, item 71, page 103 (after line 4)

82. This amendment would add two factors to the inclusive list of factors in proposed subsection 91C(5). The factor in proposed paragraph 91C(5)(f) takes account of other amendments to the Standard, in relation to public holidays. The factor in proposed paragraph 91C(5)(g) provides that the employee’s hours of work over a prior 4 week prior period may be taken into account in determining whether particular additional hours are reasonable.

Item 64 – Schedule 1, item 71, page 103 (before line 5)

83. This amendment would insert a definition of public holiday for the purpose of this section.

Item 65 – Schedule 1, item 71, page 103 (line 29) to page 104 (line 22)

84. This item would omit the definition of nominal hours worked, including the notes, in proposed section 92A and substitute a new definition which would provide that nominal hours worked has the meaning given by section 92AA (to be inserted by proposed item 68). The definition is relevant for annual leave accrual.

Item 66 – Schedule 1, item 71, page 104 (lines 25 to 32)

85. This item would repeal and replace the definition of public holiday in proposed section 92A. The effect of the amendment is to add a new paragraph (b) to the definition – to account for substitution of public holidays.

86. As a result of this amendment, a public holiday would be defined as:

- a day declared by or under a law of a State or Territory as days to be observed generally with that State or Territory, or a region of that State or Territory, as a public holiday by employees who work in that State, Territory or region. The definition would exclude union picnic days or days excluded by the regulations (this paragraph reflects the definition in the Bill);

- a day substituted for such a day under a law of a State or Territory, or under an award or workplace agreement.

Item 67 – Schedule 1, item 71, page 104 (line 39)
87. This item would amend the definition of *shift worker* to delete the words ‘a Sunday or public holiday’ and substitute ‘Sundays and public holidays’.

88. The effect of this would be to reflect the existing award standard.

**Item 68 – Schedule 1, item 71, page 105 (after line 2)**

89. This item would insert a new section 92AA which would explain the meaning of *nominal hours worked*.

90. Subsection 92AA(1) would set out a method for calculating *nominal hours worked* for employees who are employed for a specified number of hours each week. This method would ensure that an employee who is engaged for a specified number of hours per week is guaranteed to accrue leave entitlements based on that specified number of hours, irrespective of the actual number of hours actually worked during a settlement period. The effect of this is that an employee who is employed for a specified number of hours (eg, full-time for 38 hours per week) is guaranteed to accrue annual leave on this basis, even if the employee occasionally works less than the full number of hours (eg, because of a short period of reduced work demand).

91. If an employee is employed to work a specified number of hours in an employment period, the *nominal hours worked* for the employee would be calculated by deducting periods:

   - of leave which do not count as service, such as unpaid authorised leave or unauthorised absences (subparagraph 92AA(1)(b)(i)); and
   - for which an employer may not pay the employee because they were engaged in industrial action (subparagraph 92AA(2)(b)(ii)),

from the specified number of hours set out under an award, workplace agreement or contract of employment.

92. This amendment would not:

   - prevent changes to working hours by agreement, or otherwise in accordance with the terms of an award or agreement (providing it did not increase above 38 per week); or
   - otherwise change the relevant guarantee where an employee is not engaged for a specified number of hours (that is, hours may fluctuate) to ensure that employment arrangements can operate flexibly.

93. Subsection 92AA(2) would ensure that if there is not a relevant award, workplace agreement or contract of employment which sets out the number of hours that constitute ‘full-time’ employment of an employee, an employee who is a full-time employee is taken to be employed under his or her contract of employment to work 38 hours per week for the purpose of subsection 92AA(1).
94. Subsection 92AA(3) would set out a method for calculating nominal hours worked per week where the specified number of hours for which an employee is employed is expressed in relation to a period that is greater than a week (eg, if the employment is for a specified number of hours per fortnight).

95. Subsection 92AA(4) would set out a method for calculating the nominal hours worked for an employee to which subsection 92AA(1) does not apply – that is, the employee is not employed to work a specified number of hours.

96. If an employee is employed to work variable hours, subsection 92AA(4) provides a formula for working out the employee’s nominal hours worked.

97. Subsection 92AA(5) would deem a reference to an hour to include a reference to a part of an hour.

**Item 69 – Schedule 1, item 71, page 106 (after line 30)**

98. This item would insert a note under subsection 92E(1) to make clear that any period of annual leave foregone under proposed section 92E is deducted from the employee’s accrued annual leave balance.

**Item 70 – Schedule 1 item 71, page 107 (after line 4)**

99. This item would insert a new subsection in proposed section 92E.

100. Section 92E allows employees to forego (or ‘cash out’) a period of annual leave. The new provision would require an employer to give the employee the amount of pay the employee is entitled to receive in lieu of the amount of annual leave foregone within a reasonable time frame.

**Item 71 – Schedule 1, item 71, page 109 (after line 9)**

101. This item would ensure that that Commonwealth, or State or Territory, legislation relating to workers’ compensation would continue to apply despite Division 4 of Part VA to the extent of any inconsistency in relation to:

- the taking of annual leave while an employee is receiving workers’ compensation; or

- the accrual of annual leave while an employee is receiving compensation.

102. The effect of this amendment would be that such limits in a Commonwealth or State or Territory law would continue to apply.

**Item 72 – Schedule 1, item 71, page 110 (lines 27 and 28)**

**Item 73 – Schedule 1, item 71, page 110 (lines 29 to 31)**

**Item 75 – Schedule 1, item 71, page 111 (after line 27)**
103. These items would specify who may issue a certificate under the personal/carer’s leave scheme in Division 5 of Part VA.

104. Item 72 would be a minor technical amendment to omit the term medical practitioner from the definition of medical certificate.

105. Item 73 would amend proposed section 93A to omit the definition of medical practitioner.

106. Item 75 would amend proposed section 93A to provide a new definition of registered health practitioner. A registered health practitioner would mean a health practitioner registered or licensed under a law of a State or Territory that provides for the registration or licensing of health practitioners. This would include physical and mental health professionals, such as a chiropractor, dentist, medical practitioner, nurse or physiotherapist.

**Item 74 – Schedule 1, item 71, page 110 (line 32) to page 111 (line 22)**

107. This item would omit the definition of nominal hours worked, including the notes, in proposed section 93A and substitute a new definition which would provide that nominal hours worked has the meaning given by section 93AA. The definition is relevant for personal/carer’s leave accrual.

**Item 76 – Schedule 1, item 71, page 111 (line 32)**

108. This item would insert a new section 93AA which would explain the meaning of nominal hours worked.

109. The definition reflects that proposed in relation to annual leave accrual (item 68).

**Item 77 – Schedule 1, item 71, page 113 (line 35)**

**Item 78 – Schedule 1, item 71, page 114 (lines 15 and 16)**

110. This item would change the heading of proposed section 93H to reflect the changes proposed by items 79 and 80.

**Item 79 – Schedule 1, item 71, page 114 (after line 21)**

**Item 80 – Schedule 1, item 71, page 114 (after line 21)**

111. Item 80 would ensure that that Commonwealth, or State or Territory, legislation relating to workers’ compensation would continue to apply despite Division 5 of Part VA to the extent of any inconsistency in relation to:

- the taking of personal/carer’s leave while an employee is receiving workers’ compensation; or

- the accrual of personal/carer’s leave while an employee is receiving compensation.
112. The effect of this amendment would be that such limits in a Commonwealth or State or Territory law would continue to apply.

113. Item 24 would make an amendment consequential upon this change.

**Item 81 – Schedule 1, item 71, page 115 (line 8)**

114. These items would make a minor technical amendment to the examples under proposed subsections 93F(2) and 93I(2). The amendments replace a reference to ‘2 weeks’ with a reference to ’10 days’. This is consistent with other provisions in the personal/carer’s leave provisions (Division 5 of Part VA).

**Item 82 – Schedule 1, item 71, page 117 (line 8)**

115. Section 93N sets out the documentary requirements for a period of sick leave taken by an employee.

116. This item would repeal and replace proposed section 93N to provide that if it is not reasonably practicable for an employee to obtain a medical certificate, then a statutory declaration may be provided to the employer. For example, a statutory declaration could be used in circumstances where an employee is unable to make an appointment with their medical practitioner on a particular day.

117. This item would not change the ability of an employer to require a declaration of the reason for the absence where they consider this appropriate.

**Item 83 – Schedule 1, item 71, page 118 (line 10) to page 119 (line 11)**

118. Section 93P sets out the documentary requirements for a period of carer’s leave taken by an employee.

119. This item would repeal and replace proposed section 93P to provide that an employee may provide a medical certificate or statutory declaration in the case of injury or illness of a family member requiring care and support. This would cover the situation where medical treatment is not necessary (eg a child with asthma), and is consistent with the conciliated position in the recent Family Provisions Case.

**Item 84 – Schedule 1, item 71, page 119 (lines 23 to 33)**

120. Item 84 would replace the compassionate leave provisions in 93Q(2). This item would clarify the scope of the compassionate leave provisions to make clear that an employee may only take one period of compassionate leave for each permissible occasion when a member of his or her immediate family or household is suffering from a serious personal injury or illness.
121. Subsection 93Q(3) would provide that an employee is entitled to compassionate leave the employee gives the employer reasonable evidence or the illness, injury or death, if required.

122. Items 76 and 86 would make minor technical amendments to proposed section 93R, consequential upon the change proposed by item 84, to clarify that for each particular permissible occasion, two days of compassionate leave may be taken in a manner as specified.

123. Item 87 would insert a new subsection at the end of proposed section 93R.

124. Subsection 93R(2) would provide that an employee entitled to a period of compassionate leave may take the leave at any time while the illness or injury persists.

Item 88 – Schedule 1, item 71, page 129 (line 8)

Item 89 – Schedule 1, item 71, page 129 (line 25)

125. These items would be minor technical amendments to the documentary evidence provisions for special maternity leave to delete the reference to ‘(or was)’ and substitute ‘was or will be’. These changes are consistent with the references to medical certificates in sections 93N and 93P of the personal/carer’s leave provisions.

Item 90 – Schedule 1, item 71, page 160 (after line 3)

126. This item would insert a new Division 7 to Part VA to provide civil remedies for contraventions of the Australian Fair Pay and Conditions Standard in proposed Part VA. The Bill currently allows financial penalties to be imposed on an employer for a breach of the Standard. It also enables recovery of wages.

127. The changes mean the new Division would enable a court to prevent further breaches, or to rectify the consequences of a breach, of one of the conditions guarantees.

New Section 94ZZC ~ Definition

128. Proposed new section 94ZZC would define Court to mean the Federal Court of Australia or the Federal Magistrates Court.

New Section 94ZZD ~ Civil Remedies

129. Proposed new section 94ZZD would provide that an employer must not contravene a term of Divisions 3, 4, 5 or 6 of the Standard.

130. Subsection 94ZZD(2) would deem subsection 94ZZC(1) to be a civil remedy provision.

131. Subsection 94ZZD(3) would provide that this Division applies in relation to the extended application of Division 6, as set out in section 170KB.

New Section 94ZZE ~ Standing for civil remedies
132. Proposed new section 94ZZE would set out the parties who may apply to the Court for an order under proposed new Division 7. The parties that may bring an order would be:

- the employee affected by the contravention;
- an organisation of employees, subject to subsection 94ZZE(2);
- a workplace inspector.

133. Subsection 94ZZE(2) would provide that a member of an organisation may apply on behalf of an employee for a remedy under proposed new Division 7 if:

- a member of the organisation is employed by the respondent employer; and
- the contravention relates to or affects the member or the member’s work for the employer.

New Section 94ZZF ~ Court orders

134. Proposed new section 94ZZF would set out the orders that the Court may make. Subsection 94ZZF(1) would provide that the Court may make orders for:

- compensation; or
- any other orders necessary to stop the contravention or rectify its effects to place the employee concerned in the position the employee would be if the contravention had not occurred.

135. For example, if an employee concerned has been dismissed in breach of the return to work guarantee in the parental leave provisions (proposed section 94R), it would be open to a Court to make an order to reinstate the employee to the position that the employee occupied immediately before the dismissal.

Item 91 – Schedule 1, item 71, page 160 (after line 12)

136. Proposed section 95 of the Bill would provide definitions of certain terms for the purposes of Part VB. Proposed amendment would insert a definition of verified copy into proposed section 95 of the Bill. For the purposes of Part VB, verified copy would, in relation to a document, mean a copy that is certified as being a true copy of the document.

137. This amendment would be consequential to item 115. Relevantly, item 115 would provide for the inclusion of proposed section 105M, which would allow the Employment Advocate to issue verified copies of documents relating to workplace agreements.

Item 92 – Schedule 1, item 71, page 161 (lines 21 to 30)

138. Proposed section 95C of the Bill would provide special arrangements for AWAs relating to Commonwealth employees. This amendment would omit section 95C. This would be
consequential to item 115 which would provide for proposed section 95C to be relocated to proposed section 105L in Division 12 of Part VB.

**Item 93 – Schedule 1, item 71, page 165 (lines 28 and 29)**

139. Proposed section 97 of the Bill would set out the requirements needed for a person to be a bargaining agent in relation to an employee collective agreement or AWA. Item 93 would omit subsection 97(2) which provides that a bargaining agent must meet any requirement specified in the regulations. This amendment would be consequential to item 115. Item 115 would provide for the inclusion of proposed section 105O, which would allow the regulations to make provision for a range of matters relating to workplace agreements, including the qualifications and appointment of bargaining agents.

**Item 94 – Schedule 1, item 71, page 173 (line 27)**

140. Proposed section 100 of the Bill sets out the circumstances in which a workplace agreement is in operation. Proposed subsection 100(2) would provide that a workplace agreement comes into operation even if certain requirements under the Bill are not met. Proposed item 94 would insert the words “and section 99” into subsection 100(2). The effect of proposed item 94 would be that a workplace agreement will come into operation even if it lodged outside the 14 day deadline in proposed section 99.

**Item 95 – Schedule 1, item 71, page 176 (line 20)**

141. Proposed section 101 of the Bill would provide the maximum nominal expiry dates for workplace agreements. If an agreement does not specify such a date or specified a date beyond the maximum provided in the Bill, the Bill would prevail. Item 95 would substitute the words “a greenfields agreement” in paragraph 101(1)(a) with “an employer greenfields agreement.” This would have the effect that employer greenfields agreements may have a nominal expiry date of up to one year from the date of lodgment, while all other workplace agreements (including union greenfields agreements) would be able to have a maximum nominal expiry date of five years from the date of lodgment.

**Item 96 – Schedule 1, item 71, page 177 (line 3)**

142. Proposed subsection 101(2) of the Bill would provide that where a workplace agreement is varied to extend its nominal expiry date, the maximum nominal expiry date must be no more than that specified in the Bill. Item 96 would substitute the words “a greenfields agreement” in paragraph 101(2)(a) with “an employer greenfields agreement.” The effect of this is that where an employer greenfields agreement is varied to extend its NED, it can be extended to no more than one year from the date the agreement was lodged. All other agreements (including union greenfields agreements) would be able to be varied to extend their nominal expiry date up to five years from the date the agreement was lodged.

**Item 97 – Schedule 1, item 71, page 178 (after line 3)**

143. Proposed section 101B of the Bill would provide a mechanism by which certain protected award conditions are automatically read into a workplace agreement unless expressly excluded or modified. Proposed item 97 would insert subsection 101B(2A) into proposed section 101B.
Subsection 101B(2A) would provide that despite paragraph 101B(2)(c), which allows workplace agreement to expressly exclude or modify protected award conditions, those protected award conditions that are about outworkers conditions have effect, despite any terms of a workplace agreement that provide, in a particular respect, a less favourable outcome for the outworker.

144. Subsection 101B(3) would define outworker conditions to mean conditions for outworkers, other than pay, 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 awards or awards for employees who perform the same kind of work at an employer’s business or commercial premises. The definition of outworker conditions in subsection 101B(3) is similar to the provisions of paragraph 116(1)(b), which relates to allowable award matters.

145. The effect of item 97 would be that a workplace agreement could only exclude or modify outworker conditions, as defined in subsection 101B(3), if the agreement provided a more favourable outcome for the outworker than the outworker conditions in the award.

**Item 98 – Schedule 1, item 71, page 178 (after line 24)**

146. Proposed subsection 101B(3) of the Bill would provide definitions for the purposes of subsections 101B(1), 101B(2) and 101B(2A), which would deal with protected award conditions. Relevantly, the definition of protected allowable award matters would include paragraph 101B(3)(d) that provides for the observance of days declared by or under a law of a State or Territory to be observed as public holidays and entitlements to payment in respect of those days. Proposed amendment Agt41 would insert paragraph 101B(3)(da) into the definition of protected allowable award conditions in subsection 101B(3). New paragraph 101B(3)(da) would provide an equivalent to item 129 to include in the list of protected allowable award matters a term of an award that provides for days to be substituted, or a procedure for substituting, public holidays.

147. In addition, paragraph 101B(3)(da) would have the effect of making the following protected allowable award matters:

- a term that enables a public holiday declared in a metropolitan area to be substituted for a public holiday in a country or regional area; and

- a procedure for agreement between an employer and an individual employee with respect to taking an alternate day as the public holiday in lieu of a day that would otherwise be the designated public holiday because of paragraph 101B(3)(d).

**Item 99 – Schedule 1, item 71, page 179 (line 3)**

148. Proposed subsection 101B(3) of the Bill would provide a definition of protected award conditions that would apply for the purposes of proposed section 101B which allows such conditions to be read into a workplace agreement unless expressly excluded or modified.

149. Proposed item 99 would make the definition of protected awards conditions consistent with the operation of proposed section 116I of the Bill by substituting paragraph 101B(3)(a).
substituted paragraph 101B(3)(a) would provide that protected award conditions includes terms of an award that are:

- about protected allowable award matters (subparagraph 101B(3)(a)(i));
- incidental to protected allowable award matters that may be included in an award because of proposed section 116I (subparagraph 101B(3)(a)(ii)); or
- machinery provisions that relate to protected allowable award matters and that may be included in an award because of proposed section 116I (subparagraph 101B(3)(a)(iii)).

150. Proposed item 99 would ensure that protected award conditions fully incorporate the relevant terms and conditions from awards (including terms that are incidental and essential to the practical operation of protected allowable award matters and machinery terms) and ensure that they operate in a practical way.

Item 100 – Schedule 1, item 71, page 179 (line 5)

151. Proposed subparagraph 101B(b)(i) of the Bill would exclude from the definition of protected award conditions terms of an award that are not matters “mentioned in” section 116B. Proposed amendment Agt44 would reword subparagraph 101B(3)(i) to say “matters that are not about allowable award matters because of section 116B.” This is a technical amendment so that the language of subparagraph 101B(b)(i) is more precise.

Item 101 – Schedule 1, item 71, page 179 (lines 25 to 30)

152. Proposed section 101C of the Bill would set out the circumstances in which a new workplace agreement could ‘call up’ the terms of an award or other workplace agreement.

153. As introduced, paragraph 101C(3)(b) would limit the calling up of a workplace agreement to circumstances where, just before the new agreement is made, the workplace agreement regulates the employment of at least one person whose employment will be subject to the new workplace agreement (paragraph 101C(3)(b)). Because paragraph 101C(3)(b) as introduced would require at least one employee whose employment will be subject to the new agreement to already be subject to the agreement being called up, it would prevent an employer from being able to call up terms and conditions from a workplace agreement that already applies in the workplace, when engaging a new employee. In order to overcome this, proposed amendment Agt45 would omit paragraph 101C(3)(b) and replace it with a new paragraph 101C(3)(b). Paragraph 101C(3)(b) would provide that a new workplace agreement may call up another workplace agreement if, just before the new agreement is made, the other workplace agreement is binding on the employer.

154. The effect of item 101 would be to allow an employer to offer an AWA that calls up a workplace agreement that is already operative in the employer’s workplace, when engaging a new employee on an AWA.

Item 102 – Schedule 1, item 71, page 185 (lines 23 and 24)
Proposed section 102A of the Bill would provide the time at which a variation to a workplace agreement is made. As introduced paragraph 102A(e) would provide that a variation to an employer greenfields agreement is made when it is lodged. Proposed amendment Agt50 would substitute paragraph 102A(e) to provide that a variation to an employer greenfields agreements would be made when it is approved in accordance with section 102F. Proposed amendment 102 would bring the time at which a variation to an employer greenfields agreement is made into line with the time at which variations to other collective agreements are made.

**Item 103 – Schedule 1, item 71, page 188 (line 11)**

155. The title to proposed section 102E of the Bill currently refers to a prohibition from withdrawal from a union collective agreement. However, the provisions of section 102E apply to both union collective agreements and union greenfields agreements.

156. Item 103 would insert the words “or union greenfields agreement” into the heading of proposed section 102E. This is a technical amendment so that the heading of proposed section 102E matches the provisions of proposed section 102E.

**Item 104 – Schedule 1, item 71, page 191 (line 27)**

157. Proposed section 102M of the Bill sets out the circumstances in which a variation to a workplace agreement comes into operation. Proposed subsection 102M(2) would provide that a variation to a workplace agreement comes into operation even if certain requirements under the Bill are not met. Proposed amendment 104 would insert the words “and section 102H” into subsection 102M(2). The effect of proposed amendment 104 would be that a variation to a workplace agreement will come into operation even if it is lodged outside the 14 day deadline in proposed section 102H.

**Item 105 – Schedule 1, item 71, page 191 (after line 28)**

158. Proposed section 96F allows the Employment Advocate to authorise employers to make multiple-business agreements. To ensure that this authorisation process is complied with, subsection 100(3) prevents a multiple-business agreement from coming into operation unless it has been authorised by the Employment Advocate. However, there is no equivalent provision in the Bill preventing a variation to a multiple-business agreement coming into operation unless authorised by the Employment Advocate.

159. Proposed amendment 105 would insert an equivalent of subsection 100(3) to apply to variations of multiple-business agreements. Subsection 102M(3) would provide that a variation to a multiple-business agreement comes into operation only if the variation has been authorised by the Employment Advocate under proposed section 96F.

**Item 106 – Schedule 1, item 71, page 194 (lines 1 and 2)**

160. The title to proposed section 103D of the Bill refers to a prohibition on withdrawal from a variation to a union collective agreement. However, the provisions of section 103D apply to terminations of both union collective agreements and union greenfields agreements.

161. Proposed amendment 106 would substitute the words “variation to union collective agreement” in the heading of proposed section 103D with the words “termination of union
collective agreement or union greenfields agreement.” This is a technical amendment so that the heading of proposed section 103D matches the provisions of proposed section 103D.

Item 107 – Schedule 1, item 71, page 197 (line 23)

162. Proposed section 103K would provide for a workplace agreement to be terminated in accordance with its own terms after the agreement has passed its nominal expiry date. As part of this process, subsection 103K(4) would require the person terminating the agreement to give at least 14 days written notice of the termination. As introduced, proposed section 103K does not specify whether the notice must be given before or after the agreement’s nominal expiry date has passed.

163. Proposed amendment 107 would insert the words “and after the nominal expiry date of the agreement has passed” into subsection 103K(4). The effect of the amendment would be to prohibit a person giving notice to unilaterally terminate a workplace agreement in accordance with its terms until after the agreement’s nominal expiry date has passed.

Item 108 – Schedule 1, item 71, page 198 (line 28)

164. Proposed section 103L of the Bill would provide for workplace agreements to be terminated on 90 days written notice after the agreement has passed its nominal expiry date. As introduced, proposed section 103L does not specify whether the notice must be given before or after the agreement’s nominal expiry date has passed.

165. Proposed amendment 108 would insert the words “and after the nominal expiry date of the agreement has passed” into subsection 103L(4). The effect of the amendment would be that a person cannot give notice to unilaterally terminate a workplace agreement on 90 days written notice until after the agreement’s nominal expiry date has passed.

Item 109 – Schedule 1, item 71, page 202 (line 7)

166. Proposed section 103Q of the Bill would set out when a termination of a workplace agreement takes effect.

167. Proposed amendment 109 would substitute the reference in paragraph 103Q(b) to paragraph 103(2)(a) with a reference to paragraph 103(1)(a). This is a technical amendment to clarify that paragraph 103Q(b) refers to a termination of a workplace agreement rather than a declaration to terminate a workplace agreement.

Item 110 – Schedule 1, item 71, page 202 (line 7)

168. Proposed section 103Q of the Bill sets out the circumstances in which a termination of a workplace agreement takes effect. Proposed section 103Q would provide that a termination takes effect even if certain requirements under the Bill are not met. Proposed amendment 110 would insert the words “and section 103G” into paragraph 103Q(a). The effect of proposed amendment 110 would be that a termination of a workplace agreement by approval will take effect even if it lodged outside the 14 day deadline in proposed section 103G.

Item 111 – Schedule 1, item 71, page 202 (lines 9 and 10)
169. Proposed section 103Q of the Bill would set out when a termination of an agreement takes effect.

170. Proposed amendment 111 would substitute the reference in paragraph 103Q(c) to paragraph 103(2)(b) with a reference to paragraph 103(1)(b). This is a technical amendment to clarify that paragraph 103Q(c) refers to a termination of a workplace agreement rather than a declaration to terminate a workplace agreement.

**Item 112 – Schedule 1, item 71, page 203 (line 30)**

171. Proposed section 103R of the Bill as introduced would provide that, following the termination of a workplace agreement, certain industrial instruments have no effect in relation to an employee whose employment was subject to the workplace agreement that was terminated. Subsection 103R(3) specifies the industrial instruments as a workplace agreement (paragraph 103R(3)(a)) or an award (paragraph 103R(3)(b)). The effect of proposed section 103R would be that, following an agreement being terminated, an employee’s terms and conditions would be sourced from the FPCS.

172. Proposed amendment 112 would substitute paragraph 103R(3)(b) so that it refers to “an award, except to the extent to which it contains protected award conditions as defined in section 101B (disregarding any exclusion of modification of those conditions made by the agreement).” The effect of proposed amendment 112 would be that, following termination of a workplace agreement, an employee’s terms and conditions would be sourced from the FPCS and the protected award conditions.

**Item 113 – Schedule 1, item 71, page 203 (line 11)**

173. Proposed section 104 of the Bill would provide remedies against coercion and duress in relation to workplace agreements and bargaining agents.

174. Proposed amendment 113 would insert the word “section” into subsection 104(2). This is a technical amendment to repair a typographical error in the Bill as originally drafted.

**Item 114 – Schedule 1, item 71, page 203 (lines 25 to 28)**

175. Subsection 104(6) of the Bill would provide an exception to what constitutes duress in connection with an AWA.

176. Proposed amendment 114 would substitute subsection 104(6) to provide that a person does not apply duress to another person in connection with an AWA merely because the person requires another person to make an AWA as a condition of engagement.

177. The effect of proposed amendment 114, would be to reinforce that the intended effect of subsection 104(6) is to implement, rather than change, the current judicial interpretation of duress as explained by Justice Moore in *Schanka v Employment National (Administration) Pty Ltd* [1999] FCA 1344. At paragraph 43 Justice Moore held that for conduct to constitute duress:

> “The conduct of the contravening party must involve illegitimate pressure. I doubt that the mere fact that an employer offers employment on the basis that an AWA in certain
terms must be made is illegitimate pressure. It would do no more than place the potential employee in the position of either declining or accepting the employment on those terms and regulated that way, that is by an AWA. Something more is probably necessary and whether pressure is illegitimate will ultimately depend on the factual context in which the allegation of duress arises.”

**Item 115 – Schedule 1, item 71, page 209 (after line 15)**

178. Proposed amendment 115 would insert a proposed Division 12 – Miscellaneous into Part VB of the Bill. Part VB would deal with workplace agreements.

179. Proposed amendment 115 would insert proposed sections 105L, 105M, 105N and 105O into the Bill.

**New section 105L – AWAs with Commonwealth employees**

180. Proposed section 95C of the Bill would allow an agency head, or a Secretary of a Commonwealth department, to act on behalf of the Commonwealth in relation to AWAs with persons in the agency who are engaged under the *Public Service Act 1999* or the *Parliamentary Service Act 1999*.

181. Relevantly, proposed amendment 115 would provide a new section 105L which would replicate proposed section 95C of the Bill. This amendment is consequential to proposed item 92. Proposed item 92 would omit proposed section 95C from the Bill. The effect of these two amendments is to shift the provision from Division 1 of Part VB (which sets out preliminary matters relating to workplace agreements) to Division 12 of Part VB (which sets out miscellaneous matters relating to workplace agreements).

**New section 105M – Evidence – verified copies**

182. Proposed subsection 105M would allow the Employment Advocate to issue verified copies of documents relating to workplace agreements, for example, a declaration lodging a workplace agreement under proposed section 99B(2). Such documents would be used for evidence in proceedings brought under the Act as amended, for example, in proceedings alleging a breach of a workplace agreement.

183. The note below proposed section 105M refers the reader to the definition of verified copy provided in proposed section 95.

184. Proposed subsection 105M(2) would limit the persons to whom a verified copy can be issued. Those are persons who are, or were, bound by the workplace agreement to which the verified copy relates.

185. Proposed subsection 105M(3) would allow verified copies issued by the Employment Advocate to be used as evidence of the document in proceedings before a Court.

186. Proposed subsection 105M(4) would provide that documents issued by the Employment Advocate are to be treated as verified copies unless evidence to the contrary is adduced.
New section 105N – certificates

187. Proposed subsection 105N would allow the Employment Advocate to issue a certificate stating certain matters in relation to a workplace agreement. Those certificates would be taken to be prima facie evidence of the matters stated in the certificate in proceedings before a Court (proposed section 105N(3)).

188. Proposed subsection 105N(2) would limit the persons to whom a certificate can be issued. A certificate may only be issued to a person who is, or was, bound by the workplace agreement to which the certificate relates.

189. Proposed subsection 105N(4) would allow documents purporting to be certificates issued by the Employment Advocate to be taken as such certificates, unless evidence to the contrary is adduced.

New section 105O – Regulations relating to workplace agreements

190. Proposed section 105O would allow regulations to be made in relation to the following matters:

- requiring an employer who is bound by a workplace agreement to supply copies of prescribed documents to the employee or employees bound by the workplace agreement (subsection 105O(a));
- the qualifications and appointment of bargaining agents (subsection 105O(b));
- the required form of workplace agreements (including a requirement that documents be in the English language) (subsection 105O(c));
- the witnessing of signatures on AWAs (subsection 105O(d));
- the signing of workplace agreements by parties to those agreements (subsection 105O(e));
- the retention by employers of signed workplace agreements (including the manner and period of retention) (subsection 105O(f));
- prescribing fees for the issue by the Employment Advocate of certificates and verified copies (subsection 105O(g)).

191. Note 1 under proposed section 105L would refer the reader to section 359 which sets out the sanctions that the regulations may provide for a breach of the regulations.

192. Note 2 under proposed section 105L would refer the reader to proposed section 353A which would provide for the retention of records relating to employees.

193. The inclusion of proposed subsection 105O(b) is consequential to proposed amendment Agt03, which would omit proposed subsection 97(2) from the Bill. This would have the effect
of shifting the regulation making power in relation to the qualifications and appointment of bargaining agents from proposed section 97 of the Bill to proposed section 105O in Division 12 of Part VB (which deals with miscellaneous measures relating to workplace agreements).

Item 116 – Schedule 1, item 71, page 211 (line 25)

194. This amendment is to clarify that the definition of lockout set out in subsection 106A is not intended to extend the meaning of that term beyond its ordinary meaning.

Item 117 – Schedule 1, item 71, page 213 (after line 5)

New section 106C – Extraterritorial extension

195. Proposed section 106C would authorise regulations to be made to modify the way that Part VC (Industrial action) and the rest of the WR Act (including the Registration and Accountability of Organisations Schedule and regulations made under it) so far as it relates to Part VC, apply in relation to Australia’s exclusive economic zone and Australia’s continental shelf. The modifications could include additions, omissions and substitutions (subsection 106C(5)). The Note after subsection 106C(4) would explain that the regulations in relation to Australia’s continental shelf could prescribe different modifications relating to different parts of the continental shelf, in order to give effect to Australia’s international obligations.

Item 118 – Schedule 1, item 71, page 216 (line 27)

196. This item corrects a typographical error in the Bill.

Item 119 – Schedule 1, Item 71, page 218 (line 11)

197. Proposed section 107G of the Bill sets out a range of circumstances in which the AIRC must suspend or terminate a bargaining period. Subsection 107G(2) sets out the circumstances that that a negotiating party which is taking or organising industrial action

- did not genuinely try to reach agreement with the other negotiating parties before taking the action; or

- is not genuinely trying to reach agreement with the other negotiating parties; or

- has failed to comply with any orders of directions of the Commission made during the bargaining period about relating to the proposed collective agreement or the negotiations for the agreement or industrial action relating industrial action r.

198. This amendment ensures that a negotiating party could not itself fulfil one of the circumstances (either deliberately or otherwise) and then use its own conduct as the basis for an application to the AIRC for a suspension or termination of the bargaining period under subsection 107G(2).
Item 120 – Schedule 1, Item 71, page 232 (line 30)

199. Proposed subsection 110(1) provides that industrial action must not be organised or engaged in before the nominal expiry date of a collective agreement or workplace determination. Proposed section 108E provides that engaging in industrial action in contravention of section 110 (or 110A) is not protected action. This amendment ensures that section 108E is consistent with subsection 110(1) by adding a reference to ‘organising’ (in relation to industrial action).

Item 121 – Schedule 1, Item 71, page 249 (line 20)

200. The Bill provides for the AIRC to make an order for a protected action ballot and at proposed section 109N(1), sets out what the AIRC must include in such an order, including at subparagraph 109N(2)(d)(ii) the day on which the ballot is to close. This amendment adds to that requirement that the AIRC must also include in the order a voting closing time on the day on which the ballot is to close, for a postal ballot and for an attendance ballot.

Item 122 – Schedule 1, Item 71, page 250 (line 10)

201. A postal ballot is to be the default voting method and this amendment provides that the outer envelope which contains the declaration envelope, which in turn contains the ballot paper, must be received by the ballot agent before the voting closing time, on the day on which the ballot is to close.

Item 123 – Schedule 1, Item 71, page 250 (lines 11 to 13)

202. Proposed subsection 109N(4) provides that if a ballot order made by the AIRC provides for an attendance ballot as the voting method, it must specify that voting must take place during the voters; meal time or other breaks, or outside their hours of employment.

203. The amendment adds to this requirement that the AIRC must also specify that the votes must be cast before the voting closing time and that the AIRC may also specify other rules about when votes can be cast.

Item 124 – Schedule 1, Item 71, page 266 (line 33)

204. Proposed section 110 provides for a prohibition on engaging in or organising industrial action before the nominal expiry date of a collective agreement or workplace determination. Subsection 110(1) refers to an employee, organisation or officer engaging in or organising ‘industrial action affecting the employer’.

205. This amendment removes the reference to ‘affecting the employer’ – it is unnecessary as the policy intention is that any industrial action during the life of a collective agreement is prohibited.

Item 125 – Schedule 1, Item 71, page 268 (line 5)

Item 126 – Schedule 1, Item 71, page 268 (line 16)
206. These amendments would allow for a person who is affected by the industrial action referred to in subsection 110(1) (industrial action engaged in or organised by an employee, organisation or officer) or subsection 110(3) (industrial action by an employer against an employee) to commence action for breach of the prohibition.

Item 127 – Schedule 1, item 71, page 283 (line 27) to page 284 (line 7)

207. Item 127 would omit proposed section 115B, which would have allowed employees to be exempted by regulations from the operation of Part VI (Awards) on the basis of an insufficient connection between the employee’s employment and Australia. Due to the new section 7AAA to be inserted by item 8, section 115B would also be redundant.

Item 128 – Schedule 1, item 71, page 285 (after line 31)

208. This item would add a new allowable award matter. This amendment would enable an award to provide an entitlement for an employee to take leave for the purpose of seeking other employment where they have been given a notice of termination. A number of current awards include such a term.

Item 129 - Schedule 1, item 71, page 286 (after line 6)

209. This item would add paragraph 116(1)(ea) to make allowable a term of an award that provides for days to be substituted, or a procedure for substituting, public holidays that may be included in an award (under proposed paragraph 116(1)(e)). For example, where Christmas Day falls on a Saturday or a Sunday, the award may provide that 27 December shall be observed as a public holiday in lieu of 25 December.

210. In addition, paragraph 116(1)(ea) would make allowable an award term that enables a public holiday declared in a metropolitan area to be substituted for a public holiday in a country or regional area. Paragraph 116(1)(ea) would also allow an award term to provide a procedure for agreement between an employer and an individual employee with respect to taking an alternate day as the public holiday in lieu of a day that would otherwise be the designated public holiday because of paragraph 116(1)(e).

Item 130 – Schedule 1, item 71, page 287 (line 33)

Item 131 – Schedule 1, item 71, page 288 (after line 3)

211. These items would insert a new subsection into proposed section 116A.

212. Proposed section 116A would ensure that each award contains the model dispute resolution process contained in Part VIIA of the Bill.

213. This amendment would make clear that the model dispute resolution process in an award may only be used to resolve disputes about matters arising under the award and between persons bound by the award.

Item 132 – Schedule 1, item 71, page 288 (lines 13 to 14)
214. This item would delete proposed paragraph 116B(1)(b) from the Bill and substitute a new paragraph.

215. As introduced, the Bill made non-allowable terms in awards that prevent transfers from one form of employment to another. The intention of this paragraph was to make non-allowable ‘casual conversion’ clauses in awards. However, it would also have inadvertently made non-allowable terms in awards that provide for part-time return to work after a period of parental leave. This item would replace paragraph 116B(1)(b) in the Bill with a new paragraph that is confined on its face to terms in awards that provide for the conversion from casual employment to another type of employment. This means that a term of an award that permits, or provides a procedure for, a casual employee to convert to another type of employment (such as full-time or part-time employment) would not be an allowable award matter.

**Item 133 – Schedule 1, item 71, page 288 (line 31)**

216. This item would make clear that the prohibition on ‘tallies’ in proposed paragraph 116B(1)(j) relates to tallies in the meat industry.

**Item 134 – Schedule 1, item 71, page 288 (line 34)**

217. This item would repeal proposed paragraph 116B(1)(m), which provides for regulations to be made prescribing additional matters as non-allowable.

**Item 135 – Schedule 1, item 71, page 289 (after line 5)**

218. This item would make a technical amendment to ensure that existing award protections for outworkers are not inadvertently made non-allowable. This item is one of a series of amendments designed to ensure that the Bill does not diminish the protection that the federal workplace relations system provides for outworkers.

219. New subsection 116B(2A) would ensure that the prohibition on awards containing terms that restrict the engagement of independent contractors (paragraph 116B(1)(g)) does not operate to limit the scope available to include in an award terms that provide protection for outworkers under paragraph 116(1)(m).

**Item 136 – Schedule 1, item 71, page 289 (after line 18)**

220. This item would insert a legislative note to section 116B, consequential upon the amendment made by item 7. The note would remind readers that in Part VI references to independent contractors are not confined to natural persons.

**Item 137 – Schedule 1, item 71, page 291 (after line 13)**

221. This item would amend proposed section 116I, and is related to the amendment proposed by item 135. The amendment proposed by this item is one of a series of amendments designed to ensure that the Bill does not diminish the protection that the federal workplace relations system provides for outworkers.
222. Proposed new subsection 116I(2A) would make clear that the ability of the AIRC to include terms in awards that are incidental and essential to the allowable matter that permits an award to contain conditions for outworkers (paragraph 116(1)(m)) is not affected by the limitation in paragraph 116B(1)(g). The ability of the AIRC to include machinery provisions is also unaffected.

**Item 138 – Schedule 1, item 71, page 294 (line 3)**

**Item 139 – Schedule 1, item 71, page 294 (after line 24)**

223. These items would amend section 117 of the Bill as introduced to make clear that all the provisions in an award about the matters listed in subsection 117(2) are encompassed by the expression *preserved award term*.

**Item 140 – Schedule 1, item 71, page 295 (lines 3 and 4)**

**Item 141 – Schedule 1, item 71, page 295 (lines 11 to 13)**

224. This item would make an amendment to proposed section 117, which provides for the preservation of certain award terms.

225. Where a term of an award that deals with annual leave, personal/carer’s leave or parental leave is more generous than the equivalent entitlement under the Standard, the award term applies. Regulations can be made specifying in detail when a preserved award entitlement dealing with these forms of leave will be considered to be ‘more generous’.

226. Subsection 117(7) would enable regulations to be made to ensure that particular specified elements of the Standard will apply despite the terms of any award entitlement. This is designed to ensure that certain entitlements provided by the Standard are not lost even if an award term is ‘more generous’ than the Standard.

227. The effect of this amendment (and any regulations that were then made) would be that the entitlement to transfer to a safe job, or access paid leave, would apply independently of the ‘more generous’ assessment – meaning that it would not be lost even if an award term is ‘more generous’ than the Standard.

**Item 142 – Schedule 1, item 71, page 302 (line 5)**

228. Section 118I sets out who may be bound by an award made to give effect to an award rationalisation process under Division 4 of Part VI. The legislative note to subsection (1) reminds readers that Division 6 of Part VI provides a process by which additional employers, employees and organisations may become bound by an award.

229. This item would amend the legislative note to subsection 118I(1) to direct readers to Division 6A of Part VI (to be inserted by item 153), which would provide limited scope for additional *eligible entities* to become bound by outworker terms in awards.

**Item 143 – Schedule 1, item 71, page 303 (line 8)**
Item 144 – Schedule 1, item 71, page 304 (line 8)

230. This item would amend subsection 118N(1) of the Bill to ensure that the ability of the AIRC to establish principles for the review and simplification of awards under section 118M is exercisable only by a Full Bench.

Item 145 – Schedule 1, item 71, page 304 (line 11)

Item 146 – Schedule 1, item 71, page 304 (line 17)

231. These items would make technical amendments to section 118N to clarify that the principles referred to in subsections (2) and (3) that may be established by the AIRC are those mentioned in subsection (1).

Item 147 Schedule 1, item 71, page 304 (after line 25)

232. This item would add a new subsection to proposed section 118N to make clear that principles established under subsection 118N(1) must be consistent with, and cannot be such as to override, a provision of this Act that relates to the variation of awards.

Item 148 – Schedule 1, item 71, page 308 (line 14)

Item 149 – Schedule 1, item 71, page 308 (line 16)

Item 150 – Schedule 1, item 71, page 308 (line 18)

Item 151 – Schedule 1, item 71, page 308 (line 23)

233. Section 119B(5) enables an award to be varied to update the list of those bound to reflect name changes.

234. These items would amend subsection 119B(5) by removing references to ‘employee’, which are unnecessary as employees will not be bound to awards by name (rather they may be bound to an award by class).

Item 152 – Schedule 1, item 71, page 310 (after line 11)

235. These items would insert a legislative note under subsection 118J(4) and subsection 120(1) (respectively) to remind readers that an award may also be varied to bind eligible entities under Division 6A.

Item 153 – Schedule 1, item 71, page 313 (after line 11)

New Division 6A

236. This item would insert proposed Division 6A in Part VI to provide for the binding of eligible entities to outworker terms in awards. This will enable an entity that is not an employer of outworkers covered by the award to be bound by the outworker terms in the award. (Such an
entity may employ other employees who do different work, such as working in a retail store, that may be covered by other awards.)

**New section 120G – Definitions**

237. Proposed section 120G would set out definitions of *eligible entity* and *outworker term* to apply in Division 6A.

**New section 120H – Outworker terms may bind eligible entities**

238. Proposed section 120H would enable eligible entities to be bound to awards made (under section 118E) or varied (under section 118J) as part of an award rationalisation process.

239. Under subsection 120H(2), the AIRC would be able to bind an *eligible entity* to the outworker terms of an award that is made or varied as a result of the award rationalisation process in circumstances where the *eligible entity* does not employ any person that would do the work covered by the award, but operates in the industry as part of the production chain.

240. This provision would operate, for example, to enable the AIRC to bind to the outworker terms of any relevant rationalised award a wholesaler or retailer in the textile, clothing and footwear industry that outsources the manufacture of the apparel, footwear or other items it then sells. If so bound, the *eligible entity* would be obliged to comply with outworker terms that provide for, for example, the maintenance of work records, the preparation and filing of lists of those to whom work has been outsourced, the manner in which payments may be claimed, the terms of engagement of outworkers and registration requirements.

**New section 120I – Binding additional eligible entities**

241. Proposed section 120I would enable an organisation, employer or eligible entity to apply to the AIRC for an order varying an award to bind an employer or eligible entity, or class of new eligible entities, to the outworker terms of an award (subsection 120I(1)).

242. This provision would enable employers or entities operating in an industry in which outworkers are used (for example, the textile, clothing and footwear industry) to be bound to applicable outworker provisions in an award where the employer or entity is not otherwise bound by an award that contains applicable outworker terms.

243. Subsections 120I(2) to (4) set out the process for dealing with, and determining the application.

244. In determining an application, paragraph 120H(4)(c) requires the AIRC to be satisfied that binding the employer or eligible entity to the outworker terms of the award is consistent with the objective of protecting the overall conditions of employment of outworkers.

**Item 154 – Schedule 1, item 71, page 318 (after line 11), after the definition of Court in section 122B**

245. This amendment would insert a definition of ‘instrument’ for the purposes of proposed Part VIAA to ensure the Part is read as transmitting certain types of instruments only.
Item 155 – Schedule 1, item 71, page 331 (lines 6 to 13)

246. This amendment would delete proposed subsection 126A(2) and insert new proposed subsections 126A(2) and 126A(3).

247. The Bill provides that, at the time of transmission, where the old employer and any transferring employees were covered by an award, and the new employer is bound by a collective agreement that would be capable of applying on its terms to the transferring employees, then the transmitting award would be immediately overtaken upon transmission by the collective agreement so that it immediately applies to the employment of the transferring employees with the new employer.

248. Proposed subsection 126A(2) would provide instead that the transmitting award would apply to the employment of transferring employees even if the new employer’s collective agreement would be capable of applying on its terms. This would ensure that the previous instrument (i.e. the transmitting award) governs the transferring employee’s employment with the new employer for a maximum 12 month period, unless agreed otherwise. This is consistent with what applies where there are transmitting workplace agreements.

249. Proposed subsection 126A(3) would allow for a transferring employee to elect to be covered by the new employer’s existing collective agreement rather than a transmitting award. This is to enable a transferring employee to easily opt out of coverage by the transmitting award, and is required because there is no general mechanism for awards to be ‘terminated’ as per workplace agreements. The effect of subsection 126A(3) would be that once a transferring employee elects to be covered by the new employer’s existing collective agreement, then the transmitting award ceases to apply to that transferring employee, and would not revive if, for example, the collective agreement was terminated or otherwise ceased to apply.

Item 156 – Schedule 1, item 71, page 336 (lines 32 to 35)

250. Proposed paragraph 129(3)(f) provides that an employer must indicate in a section 129 notice to a transferring employee, amongst other things, what will dictate the terms and conditions contained in the transmitting instrument when that instrument no longer applies to that transferring employee. The provision refers to ‘the source’ for the new terms and conditions.

251. In order to clarify the intent of the provision, the amendment would identify what could be ‘the source’ for regulating those terms and conditions under the WR Act, being the Australian Fair Pay and Conditions Standard or another instrument.

Item 157 – Schedule 1, item 71, page 337 (after line 5)

252. This amendment would insert new proposed subsections 129(3A) and 129(3B).

253. Proposed subsection 129(3A) would create a new requirement that a new employer provide a transferring employee with a copy of any existing collective agreement or award that bound the new employer in respect of its existing workforce (i.e. the employees employed by the new employer prior to the transmission) with a section 129 notice.
254. Proposed subsection 129(3B) provides that the requirement to provide a copy of an award or agreement under proposed subsection 129(3A) does not apply where a transferring employee can easily access a copy, and the new employer indicate in a section 129 notice how a transferring employee can access it.

255. An example of how a new employer could fulfil the requirement in proposed subsection 129(3B) (mentioned in the legislative note) is by including a website address in a section 129 notice that was a link to a copy of an applicable award or agreement.

**Item 158 – Schedule 1, item 71, page 337 (lines 7 to 15)**

256. This amendment is consequential to item TB2, which would provide for an award to transmit for a maximum period of 12 months even if the new employer’s existing collective agreement is capable of applying to any transferring employees on its terms.

257. Proposed subparagraph 129(4)(a)(i) removes the requirement for the new employer to provide a section 129 notice to a transferring employee where the new employer’s existing collective agreement immediately over-rides a transmitting award. Given that item TB2 removes this possibility, subparagraph 129(4)(a)(i) is redundant. Proposed paragraph 129(4)(a) reflects the existing provision of the Bill with that subparagraph removed.

**Item 159 – Schedule 1, item 71, page 339 (line 12)**

258. This amendment is consequential to item TB4, which would insert a new requirement for the new employer to provide a copy of any existing award or collective agreement that binds the new employer and its employees prior to transmission.

259. New proposed paragraph 129C(1)(b) adds a reference to the new requirement (in proposed subsection 129(3A)) to indicate that breaching the requirement would attract a civil remedy.

**Item 160 – Schedule 1, item 72, page 343 (after line 4), after Division 1 of Part VIA, insert**

*New Division 1A of Part VIA – Entitlement to public holidays*

260. Proposed item 160 would insert a proposed Division 1A – Entitlement to public holidays, into Part VIA of the Bill.

*New section 170AE – Definition of public holiday*

261. Proposed section 170AE would insert a definition of public holiday. This definition would only apply to Division 1A of Part VIA. Paragraph 170AE(a) would set out certain public holidays which are common to all States and Territories. The definition would also include other public holidays declared under a State or Territory law to be observed as a public holiday, but not where the holiday is declared to be in substitution for one of the days specifically mentioned in paragraph 170AE(a).
Illustrative example

In a particular year, Christmas Day falls on Saturday, 25 December. Under the law of a State, the following Monday, 27 December, is declared as the ‘Christmas Day’ public holiday. The right to refuse, on reasonable grounds, to work on Christmas Day would relate to 25 December, and not to 27 December.

New section 170AF – Entitlement to public holidays

262. Proposed subsection 170AF(1) would establish a statutory guarantee to a day off on a public holiday, subject to proposed subsections 170AF(2) – (3). This guarantee would apply to all employees within the definition set out in proposed section 4AA(1).

263. Proposed subsection 170AF(2) would permit an employer to request an employee to work on a particular public holiday. It is proposed that such a request could be made verbally or in writing.

264. Proposed subsection 170AF(3) would provide that an employee may refuse a request by the employee’s employer to work on a particular public holiday (and take the day off) if the employee has reasonable grounds for refusing the request.

265. Proposed subsection 170AF(4) would provide that a term of a workplace agreement or award is of no effect to the extent that it is contrary to proposed subsections 170AF(1) – (3).

New section 170AG – Reasonableness of refusal

266. Proposed section 170AG would set out a number of matters to which regard must be had in determining whether an employee has reasonable grounds for refusing a request to work on a public holiday. They would be:

- the nature of the work performed by the employee;
- the type of employment (for example, whether full-time, part-time, casual or shift work);
- the nature of the employer’s workplace or enterprise (including its operational requirements);
- the employee’s reasons for refusing the request;
- the employee’s personal circumstances (including family responsibilities);
- whether the employee is entitled to additional remuneration or other benefits as a consequence of working on the public holiday;
- whether a workplace agreement, award, other industrial instrument, contract of employment or written guidelines or policy that regulate the employee’s
employment contemplate that the employer might require work on public holidays, or particular public holidays;

• whether the employee has acknowledged or could reasonably expect that the employer might require work on public holidays, or particular public holidays;

• the amount of notice in advance of the public holiday given by the employer when making the request;

• the amount of notice in advance of the public holiday given by the employee in refusing the request;

• whether an emergency or other unforeseen circumstances are involved; and

• any other relevant factors.

Illustrative example

This example sets out a situation where refusing a request to work a public holiday might be reasonable.

Rachel works part-time as a sales assistant in a chocolate shop. Rachel’s contract of employment requires her to work on Mondays, Wednesdays and Saturday morning, but not public holidays. She does occasional extra shifts, by agreement with her employer. Rachel’s partner, Ali, is a nurse. Ali works a shift roster. Rachel and Ali have 2 children.

3 days before the Queen’s birthday public holiday, Rachel’s employer tells her that she must work on the public holiday at normal pay rates. She refuses to do so. She tells her employer that the request is unreasonable because:

• she has never been required to work a public holiday before (as the shop has always closed on previous Queen’s birthday public holidays);

• she has to look after her children as her partner, Ali, is rostered to work on the public holiday;

• she has insufficient time to make alternative childcare arrangements.
Illustrative example
This example sets out a situation where refusing a request to work a public holiday might be unreasonable.

Catriona works as a baker at Netty’s Baked Treats. Under her workplace agreement, she is required to work in accordance with a roster that is published by the employer six weeks in advance. The workplace agreement provides for penalty rates for working a public holiday.

Catriona receives her roster for the Easter period in late February. It requires her to work on Good Friday. On 3 April, two days before Good Friday, she tells her employer that she will no longer work that day, as she is rostered off for the next two days and has decided to go away for the long weekend.

Illustrative example
This example sets out a situation where refusing a request to work a public holiday might be unreasonable.

Rosanne, Phil and Rob are specialist engineers who work for an electricity distribution company. On any given day, the company requires at least one specialist engineer to work. Under the terms of Rosanne’s workplace agreement, she is required to work a shift roster. The agreement states that she will be required to work weekends and public holidays, in accordance with the roster, in order to provide a constant electricity service to customers. Under the agreement, shift loadings and penalty rates for working weekends and public holidays are aggregated and included in Rosanne’s normal hourly rate. In mid-October, Rosanne receives her November/December roster. She is rostered to work on Boxing Day. Phil is rostered to work on Christmas Day. Rob is rostered to work on New Year’s Day. Two weeks prior to Boxing Day, Rosanne tells her supervisor, John, that she will not work on Boxing Day. Neither Rob nor Phil is prepared to work on Boxing Day instead.

New section 170AH – Model dispute resolution process

267. Proposed section 170AH would provide that the model dispute resolution process applies to any dispute arising under Division 1A of Part VIA.

New section 170AI – Employer not to prejudice employee for reasonable refusal

268. Proposed section 170AI would set out protection for employees by providing that an employer must not, because an employee has refused on reasonable grounds to work on a particular public holiday, do or threaten to do any of the following:

- dismiss an employee;
- injure an employee in her or her employment;
- alter the position of an employee to the employee’s prejudice.
New section 170AJ – Penalties etc. for contravention of section 170AI

269. Proposed section 170AJ would provide penalties and other remedies for a breach of the civil remedy provision set out in proposed section 170AI.

270. The Federal Court or Federal Magistrates Court would be able to make one of the following orders in relation to an employer who has contravened section 170AI:

- an order imposing a pecuniary penalty of up to 300 penalty units ($33,000) for a body corporate or 60 penalty units ($6,600) for any other person;
- an order requiring the employer to pay compensation to the employee;
- any other appropriate order, including injunctions and an order for reinstatement.

271. The following persons would be able to bring an application for contravention of section 170AI:

- a workplace inspector;
- an employee affected by the contravention;
- an organisation of employees that is requested to act by an employee, provided the organisation has a member employed by the employer and is entitled to represent the employee’s industrial interests; and
- a person set out in the regulations.

New section 170AK – Burden of proof in relation to reasonableness of refusal

272. Proposed section 170AK would provide that for the purposes of an application under proposed section 170AJ, the applicant bears the burden of proving that an employee’s refusal to work on a particular public holiday was on reasonable grounds.

New section 170AL – Proof not required of the reason for conduct

273. Proposed subsection 170AL(1) would provide that in an application under proposed section 170AJ, a reverse burden of proof would apply. Therefore, to avoid a finding that section 170AI has been breached, an employer would be required to demonstrate that its reasons for engaging in the impugned conduct did not include that the employee had refused on reasonable grounds to work on a particular public holiday. If the employer failed to discharge the burden of proof, then the employer’s conduct would be taken to be a breach of section 170AI.

274. A reverse burden of proof applies because an employer against whom an application is brought would be in a better position than the applicant to know, and to provide evidence of, its reasons for engaging in particular conduct.
275. Subsection 170AL(2) would provide that the reverse burden of proof would not apply in relation to an application for an interim injunction.

New section 170AM – Extraterritorial extension

276. Proposed subsection 170AM(1) would extend the application of the Division (and related provisions of the WR Act) to certain employees outside Australia and to their employers. The legislative note to subsection 170AM(1) would note that, for the purposes of section 170AM, Australia includes the Territory of Christmas Island, the Territory of Cocos (Keeling) Islands and the coastal sea.

277. In Australia’s exclusive economic zone, the Division would apply to employees of Australia employers (as defined in subsection 4(1)), unless regulations were made to dis-apply the Division to such an employee (proposed paragraph 170AM(2)(a)). Regulations could also extend the operation of provisions of the amended WR Act to other employees in the exclusive economic zone (proposed paragraph 170AM(2)(b)). In making regulations, account would be taken of Australia’s international law obligations in relation to foreign-flagged ships and foreign-registered aircraft.

278. In relation to employees in, on or over Australia’s continental shelf beyond the exclusive economic zone, the Standard would apply only if regulations prescribed the part of the continental shelf where the employee was located and the employee met the requirements prescribed by the regulations (proposed subsection 170AM(3)). In making regulations, account would be taken of Australia’s international law obligations in relation to foreign-flagged ships and foreign-registered aircraft and its obligations in relation to matters in, on or over the continental shelf (including under agreements with other countries in relation to particular areas of the continental shelf). The legislative note to subsection 170AM(3) would make clear that the regulations could prescribe different requirements for different parts of the continental shelf, including for reasons connected with Australia’s international obligations.

279. Subsection 170AM(4) would provide a specific definition of this Act for the purposes of section 170AM. This is because the definition of this Act in proposed subsection 4(1) (which would otherwise apply) does not include the Registration and Accountability of Organisations Schedule and regulations made under it. The specific definition would ensure that the extraterritorial extension under subsection 170AM(1) would apply to that Schedule and those regulations so far as they relate to Division 1A of Part VIA.

Item 161 - Schedule 1, item 74, page 344 (lines 25 and 26)

280. This item would amend the heading to proposed section 170BAC, so that it reads ‘Relationship of this Division to AFPC decisions and the Australian Fair Pay and Conditions Standard’, to more accurately describe the effect of section 170BAC.

Item 162 - Schedule 1, item 74, page 344 (lines 29) to page 345 (line 4)

281. This item would delete proposed subsections 170BAC(2) and (3) and replace them with proposed subsections 170BAC(2), (3), (4), (5), (6) and (7). It is intended that this amendment will better reflect the policy intent that decisions of the AFPC made on a national level should not be undermined by the AIRC, while ensuring that Division 2 of Part VIA gives effect or further effect to the:
• the Equal Remuneration Convention, 1951;
• the Convention on the Elimination of all Forms of Discrimination against Women;
• the Convention concerning Discrimination in respect of Employment and Occupation;
• Articles 3 and 7 of the International Covenant on Economic, Social and Cultural Rights;
• the Equal Remuneration Recommendation, 1951, which the General Conference of the International Labour Organisation adopted on 29 June 1951 and is also known as Recommendation No. 90; and
• the Discrimination (Employment and Occupation) Remuneration Recommendation, 1958, which the General Conference of the International Labour Organisation adopted on 25 June 1957 and is also known as Recommendation No 111 (see section 170BA, and definition of Anti-Discrimination Conventions in subsection 4(1)).

282. Proposed subsection 170BAC(2) would provide that the AIRC must not deal with an application under Division 2 of Part VIA (an application for an equal remuneration order), to the extent that the proposed equal remuneration order relates to a basic periodic rate of pay, a basic piece rate of pay or a casual loading if:

• the group of employees who would be covered by the proposed equal remuneration order; and

• the comparator group of employees;

are both entitled to a rate of pay that is equal to the applicable guaranteed rate of pay under the provisions of the Australian Fair Pay and Conditions Standard.

283. The terms basic periodic rate of pay, basic piece rate of pay and casual loading have the same meaning as in Division 2 of Part VA (see proposed subsection 170BAC(7)).

284. The effect of the words ‘to the extent to which the application is for an order relating to a basic period rate of pay, a basic piece rate of pay or casual loading’ is that an application for an equal remuneration order relating to some other form of remuneration (for example superannuation contributions or allowances) may be dealt with by the AIRC in relation to those other forms of remuneration.

285. Proposed subsection 170BAC(3) would provide that, to avoid doubt, the limitation upon the AIRC’s powers in subsection 170BAC(2) does not apply to the extent that either:

• the group of employees who would be covered by the proposed equal remuneration order; and
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- the comparator group of employees;

are entitled to a rate of pay higher than the applicable guaranteed rate of pay in the Australian Fair Pay and Conditions Standard.

286. Proposed subsection 170BAC(4) would provide that the AIRC must not deal with an application under Division 2 of Part VIA (an application for an equal remuneration order), to the extent that the proposed equal remuneration order relates to a basic periodic rate of pay, a basic piece rate of pay or a casual loading, if:

- the group of employees who would be covered by the proposed equal remuneration order is entitled to a rate of pay that is higher than the applicable guaranteed rate of pay under the provisions of the Australian Fair Pay and Conditions Standard; and

- the comparator group of employees is entitled to a rate of pay that is equal to the applicable guaranteed rate of pay under the provisions of the Australian Fair Pay and Conditions Standard.

287. The terms basic periodic rate of pay, basic piece rate of pay and casual loading have the same meaning as in Division 2 of Part VA (see proposed subsection 170BAC(7)).

288. Proposed subsection 170BAC(5) would provide that, to avoid doubt, the limitation upon the AIRC’s powers in subsection 170BAC(2) does not apply to the extent that the comparator group of employees is entitled to a rate of pay higher than the applicable guaranteed rate of pay in the Australian Fair Pay and Conditions Standard.

289. Proposed subsection 170BAC(6) would provide that the limitation upon the AIRC’s powers in subsections 170BAC(2) and (4) apply regardless of the source of the employee’s entitlement to be paid a particular rate of pay (eg a workplace agreement under the Act, or a contract of employment).

290. The term ‘rate of pay’ in proposed section 170BAC is intended to mean a basic periodic rate of pay, a basic piece rate of pay and/or a casual loading.

291. The term ‘guaranteed rate of pay’ is intended to mean whichever of the rates in Division 2 of Part VA applies. This will mean:

- where the employee is covered by an APCS, is not engaged as casual and is not an APCS piece rate employee – a basic periodic rate of pay equal to the guaranteed basic periodic rate of pay referred to in subsection 90F(1);

- where the employee is an APCS piece rate employee - a basic piece rate of pay equal to the guaranteed basic piece rate of pay referred to in subsection 90F(2);

- where the employee is not covered by an APCS and is not engaged as casual – a basic periodic rate of pay equal to the guaranteed basic periodic rate of pay referred to in subsection 90F(3) or 90F(4), as applicable;
• where the employee is covered by an APCS and is engaged as casual—a basic periodic rate of pay equal to the guaranteed basic periodic rate of pay referred to in subsection 90F(1), plus a casual loading equal to the guaranteed casual loading percentage of the employee’s actual basic periodic rate of pay, as referred to in section 90H; or

• where the employee is not covered by an APCS and is engaged as casual—a basic periodic rate of pay equal to the guaranteed basic periodic rate of pay referred to in subsection 90F(3) or 90F(4), as applicable, plus a casual loading equal to the guaranteed casual loading percentage of the employee’s actual basic periodic rate of pay, referred to in section 90H.

292. Proposed subsection 170BAC(7) would provide that for the purposes of section 170BAC the terms basic periodic rate of pay, basic piece rate of pay and casual loading have the same meaning as in Division 2 of Part VA.

293. Proposed subsection 170BAC(7) would also provide that for the purposes of section 170BAC the term comparator group of employees means employees whom the applicant for an equal remuneration order contends are performing work of equal value to the work performed by employees who would be covered by the proposed equal remuneration order.

Item 163 - Schedule 1, page 355 (after line 2), after line 105

294. This item would add a new subsection to section 170CD.

295. Proposed subsection 170CD(1C) would provide that, for the purposes of the termination of employment provisions, an employee’s resignation is taken to constitute a termination at the initiative of the employer only if the employee can prove, on the balance of probabilities, that he or she did not resign voluntarily, but that he or she was forced to resign because of the conduct (or a course of conduct) engaged in by the employer.

296. Subsection 170CD(1C) is intended to reflect the common law doctrine of ‘constructive dismissal’, reinforcing that the onus of proof in a case of alleged constructive dismissal rests upon the employee to demonstrate that there was a termination at the initiative of the employer.

Item 164 - Schedule 1, item 113, page 356 (after line 13), after subsection 170CE(5E)

297. This item would create a new subsection 170CE(5EA). Proposed section 170CE(5E) provides an exclusion from unfair dismissal laws for employees of employers with 100 employees or fewer.

298. The effect of proposed subsection 170CE(5EA) would be that, for the purposes of the ‘100 employees or fewer’ exclusion, the calculation of employees employed by an employer would be the aggregate of those employed by the employer and its related bodies corporate (subject to the provisions of proposed subsections 170CE(5E) and (5F)).

299. The term related bodies corporate is defined by section 50 of the Corporations Act 2001 to mean:
• a holding company of another body corporate; or
• a subsidiary of another body corporate; or
• a subsidiary of a holding company of another body corporate.

300. The terms body corporate, holding company and subsidiary are defined by other provisions of the Corporations Act 2001 (sections 9 and 46 of the Corporations Act 2001).

Item 165 - Schedule 1, item 114, page 357 (lines 4 to 5)

301. This amendment is a minor technical correction to ensure that the language of proposed section 170CEA is consistent with the language of proposed section 170CEB.

Item 166 - Schedule 1, item 114, page 357 (lines 6 to 7)

302. This amendment is a minor technical correction to ensure that the language of proposed section 170CEA is consistent with the language of proposed section 170CEB.

Item 167 - Schedule 1, item 114, page 357 (after line 8)

303. Proposed subsection 170CEA(5A) would provide that if a respondent has filed a motion to dismiss an unfair dismissal application, alleging that the AIRC does not have jurisdiction to hear and determine the application because of:

• one of the exclusions in section 170CBA;
• the qualifying period of employment exclusion in subsection 170CE(5A); or
• the ‘100 employees or fewer’ exclusion in subsection 170CE(5E):

and if the AIRC is not satisfied that the application should be dismissed on those grounds, the AIRC must refuse the motion for dismissal.

Item 168 - Schedule 1, item 114, page 357 (line 10)

304. This item is consequential upon item 167 and would amend proposed subsection 170CEA(6), to provide that the AIRC need not conduct a hearing in relation to the making of an order under proposed subsection 170CEA(5A).

Item 169 – Schedule 1, item 115, page 357 (line 20)

305. This item would amend proposed paragraph 170CEB(1)(b), by omitting the word ‘an’ and replacing it with ‘the’. This is a minor technical correction to clarify that the respondent’s motion to dismiss must relate to the application referred to in subsection 170CEB(1).

Item 170 - Schedule 1, item 115, page 357 (after line 31)
306. Proposed subsection 170CEB(1A) would provide that if:

- a respondent has filed a motion to dismiss an unfair dismissal application, alleging that the application is frivolous, vexatious or lacking in substance; and

- the AIRC is not satisfied that the application is frivolous, vexatious or lacking in substance:

the AIRC must refuse the motion for dismissal.

**Item 171 - Schedule 1, item 115, page 357 (line 33)**

307. This item is consequential upon item 170 and would amend proposed subsection 170CEB(2), to provide that the AIRC need not conduct a hearing in relation to the making of an order under proposed subsection 170CEB(1A).

**Item 172 - Schedule 1, item 115, page 358 (lines 19 to 20)**

308. This item is consequential upon items 167 and 170. It would amend proposed paragraph 170CED(1)(a) by omitting the words ‘or 170CEB(1)’ and replacing them with ‘or (5A) or 170CEB(1) or (1A)’. The effect of this amendment is that the provisions of section 170CED for dealing with papers ‘on the papers’ will apply to the making of orders either upholding or refusing a motion to dismiss an application on the ground referred to in subsections 170CEA(5) and 170CEB(1).

**Item 173 - Schedule 1, item 115, page 359 (lines 25 to 26)**

309. This item would provide that the AIRC may deal with certain matters ‘on the papers’ before conducting a hearing relating to the ‘genuine operational reasons’ exclusion.

310. This item would amend proposed subsection 170CEE(1), by providing that the AIRC must hold a hearing to deal with the ‘genuine operational reasons’ exclusion before taking any further action in relation to an unfair dismissal application, except for considering a motion to dismiss an application ‘on the papers’ under proposed section 170CEA, 170CEB, 170CEC or 170CED.

311. The effect of this amendment is that the AIRC may consider a motion to dismiss an unfair dismissal application ‘on the papers’ (if the motion to dismiss is on the grounds referred to in subsection 170CEA(5) or section 170CEB), or consider an application for extension of time ‘on the papers’ (section 170CEC) before dealing with the ‘genuine operational reasons’ exclusion, but it may not take any other action (such as conducting a conciliation or an arbitration) before dealing with the ‘genuine operational reasons’ by conducting a hearing and making an appropriate order under subsection 170CEE(2).

**Item 174 - Schedule 1, item 115, page 359 (lines 30 to 31)**

312. This amendment is a minor technical correction to ensure that the language of proposed section 170CEE is consistent with the language of proposed section 170CEB.

**Item 175 - Schedule 1, item 115, page 359 (lines 32 to 33)**
313. This amendment is a minor technical correction to ensure that the language of proposed section 170CEE is consistent with the language of proposed section 170CEB.

**Item 176 - Schedule 1, item 115, page 360 (after line 2)**

314. This item is consequential upon item 173. Proposed subsection 170CEE(3A) would provide that section 170CEE does not require the AIRC to hold a hearing, regarding the ‘genuine operational reasons’ exclusion, in relation to an unfair dismissal application that the AIRC has dismissed under subsection 170CEA(5) (various jurisdictional grounds) or 170CEB(1) (frivolous, vexatious or lacking in substance).

**Item 177 - Schedule 1, page 360 (after line 11)**

315. This item would replace proposed paragraph 170CFA(6)(b), adjusting the time limit for the filing of a notice to proceed to arbitration or to bring court proceedings, where the employee’s application alleges a breach of section 170CK.

316. Proposed paragraph 170CFA(6)(b) would provide that, where a termination of employment application to the AIRC includes an allegation of a breach of section 170CK, the employee will have 28 days to file a notice to proceed to arbitration or to bring court proceedings. This 28 day time limit will be subject to extension by the AIRC – see proposed subsection 170CFA(8A) (item 178). The 28 day time limit would apply to all elements of applications where:

- the application’s only ground is an alleged contravention of section 170CK;
- the application alleges a contravention of section 170CK and one or more other ‘unlawful termination’ provisions (contravention of section 170CL and/or 170CM);
- the application alleges a contravention of section 170CK and that the termination of employment was harsh, unjust or unreasonable (unfair dismissal); or
- the application alleges a contravention of section 170CK, and one or more other ‘unlawful termination’ provisions, and alleges that the termination of employment was harsh, unjust or unreasonable.

317. Where a termination of employment application does not include an allegation of a breach of section 170CK, the employee will have 7 days to file a notice to proceed to arbitration or to bring court proceedings. This 7 day time limit will not be subject to extension by the AIRC – see proposed subsection 170CFA(8) (item 178).

318. The intent of this amendment is to allow employees who have sought advice under the Government’s scheme for employee assistance relating to unlawful termination, and who are eligible to receive advice under that scheme, time to consider that advice before deciding whether to proceed to arbitration in the AIRC, bring court proceedings, or discontinue the application.

**Item 178 - Schedule 1, item 120, page 360 (lines 16 to 18)**
319. This item would insert two subsections into proposed section 170CFA.

320. Proposed subsection 170CFA(8) would provide that the AIRC must not, except as provided in subsection 170CFA(8A), extend the time limit for filing a notice to proceed to arbitration or to bring court proceedings. The effect of subsection 170CFA(8) is that the 7 day time limit for filing a notice to proceed to arbitration or to bring court proceedings, in relation to a termination of application that does not include an allegation of a breach of section 170CK, will not be subject to extension by the AIRC.

321. Proposed subsection 170CFA(8A) would provide that the AIRC may extend the time limit for filing a notice to proceed to arbitration or to bring court proceedings, if the termination of application includes an allegation of a breach of section 170CK, and if the AIRC considers that it would be unfair not to do so. The intent of this amendment is to allow employees who have sought advice under the Government’s scheme for employee assistance relating to unlawful termination, and who are eligible to receive advice under that scheme, time to consider that advice before deciding whether to proceed to arbitration in the AIRC, bring court proceedings, or discontinue the application.

Item 179 - Schedule 1, page 362 (after line 34)

322. Proposed subsection 170CK(4A) is intended to clarify one aspect of the effect of paragraph 170CK(2)(h), which provides that an employer must not terminate an employee’s employment for the reason of, or reasons including the reason of, the employee’s absence from work during maternity leave or other parental leave.

323. Subsection 170CK(4A) would provide that an employer will be taken to have contravened paragraph 170CK(2)(h) in circumstances where:

- the employer has terminated the employee’s employment;
- the reason, or a reason, for the termination is that the employee’s position no longer exists, or will no longer exist; and
- the reason, or a reason, that the employee’s position no longer exists (or will no longer exist) is the employee’s absence, or proposed or probable absence, during maternity leave or other parental leave.

324. The protection provided by proposed subsection 170CK(4A), together with paragraph 170CK(2)(h), is intended to supplement the civil remedy provisions in proposed Division 7 of Part VA (item 90) and to facilitate the effective operation of, but not to over-ride, the return to work guarantee provided by proposed section 94R.
Illustrative example – Employee whose position is abolished because she is absent on maternity leave

Kate is employed as Regional Sales Manager – Victoria/Tasmania, for Argentum Products Pty Ltd. Kate is one of three Regional Sales Managers employed by Argentum Products Pty Ltd – the other two are responsible for Western Australia/South Australia/Northern Territory and Queensland/New South Wales.

Kate becomes pregnant and takes maternity leave. While Kate is absent from work on maternity leave, Argentum Products Pty Ltd rationalises its operations and decides that it needs only needs two Regional Sales Managers.

In deciding which Regional Sales Manager position to abolish, Steve (the manager of Argentum Products Pty Ltd) takes into account that fact that Kate will not be at work for some months. Steve decides to abolish the Regional Sales Manager – Victoria/Tasmania position and to expand one of the other Regional Sales Manager’s role so that it covers Victoria, Tasmania, Queensland and New South Wales.

Four weeks before her period of maternity leave ends, Kate informs Argentum Products Pty Ltd that she intends to return to work in accordance with proposed subsection 94R(1). Steve informs Kate that her position no longer exists, that there are no other positions available which Kate is qualified for and able to work in, and that therefore Argentum Products Pty Ltd will terminate Kate’s employment.

Under proposed subsection 94R(3), Kate is not entitled to return to her original position, because it no longer exists. Nor is Kate entitled to return to any other position under subsection 94R(5), because she is not qualified for and able to work in any other position for her employer (Kate is not able to work in the other Regional Sales Manager positions due to geographic considerations).

However, Kate is entitled to bring an action against Argentum Products Pty Ltd alleging a contravention of paragraph 170CK(2)(h), relying upon proposed subsection 170CK(4A), arguing that the reason her position no longer exists (and therefore the reason why her employment was terminated) was because she was absent on parental leave. If the matter proceeds to Court, a reverse onus of proof applies: section 170CQ.

Item 180 - Schedule 1, item 152, page 367 (after line 11)

Item 181 - Schedule 1, item 153, page 368 (after line 26)

325. These items would insert two subsections into each of proposed sections 170HB and 170HC.

326. Proposed subsections 170HB(3A) and 170HC(4) would provide that, without limiting proposed subsection 170HB(3) or 170HC(3) respectively, an other termination proceeding includes an inquiry in respect of a complaint under the Human Rights and Equal Opportunity Commission Act 1986 that relates to the termination of employment of an employee (whether that complaint was contained in the original application or added by a subsequent amendment).
327. These amendments would ensure that ‘double-dipping’ cannot occur with discrimination proceedings relating to a termination of employment, such as in *Nott v Australian Postal Corporation* [PR964228]. In that case, the AIRC held that the lodging of a complaint with the Human Rights and Equal Opportunity Commission (HREOC) under the *Human Rights and Equal Opportunity Act 1986* is not a ‘proceeding … for a remedy’ within the meaning of section 170HB, because the HREOC has no power or jurisdiction to provide a remedy: paragraph [19] of *Nott v Australian Postal Corporation* [PR964228]. Proposed subsections 170HB(3A) and 170HC(4) would clarify that a complaint to the HREOC in respect of a termination of employment is an *other termination proceeding* for the purposes of proposed sections 170HB and 170HC.

328. Proposed subsections 170HB(3B) and 170HC(5) would provide that, for the purposes of proposed sections 170HB and 170HC respectively, an inquiry in respect of a complaint under the *Human Rights and Equal Opportunity Commission Act 1986* that relates to the termination of employment of an employee is commenced when:

- if the complaint originally filed with the HREOC relates to a termination of employment, when the employee makes the complaint to the HREOC;

- if the complaint to the HREOC is subsequently amended to relate to a termination of employment, when that amendment occurs.

329. In *Nott v Australian Postal Corporation*, the AIRC held that if a complaint (that does not complain about a termination of employment) is lodged with the HREOC before the applicant files an application with the AIRC in respect of a termination of employment, then the applicant subsequently amends the complaint to the HREOC to include a claim in relation to the termination of employment, the complaint to the HREOC is not a ‘prior’ proceeding within the meaning of section 170HB: paragraph [10] of *Nott v Australian Postal Corporation* [PR964228]. Proposed subsections 170HB(3B) and 170HC(5) would provide that the complaint to HREOC is an *other termination proceeding* from the time of its amendment.

**Item 182 – Schedule 1, item 168, page 372 (lines 1 to 3)**

330. This item would omit proposed section 172, and substitute a new proposed section 172. Proposed section 172 would confirm that none of the dispute resolution processes that are enabled by this Act affect any right that a party has to take court action in relation to the matter in dispute.

**Item 183 – Schedule 1, item 168, page 372 (lines 5 to 20)**

331. This item would omit proposed section 173, and substitute a new proposed section 173. Proposed section 173 would make clear that the model dispute resolution process set out in Division 2 of Part VIA only applies in relation to a dispute as specifically provided in other Parts of the Act. For example, proposed section 170AC provides that the model dispute resolution process applies to a dispute about the meal breaks entitlement contained in Division 1 of Part VIA.

332. The intended effect of this amendment is to confirm that the model dispute resolution process only applies to those disputes that are specified in the Act.
333. In addition, the legislative note is amended to include a reference to disputes about public holidays (proposed section 170AH refers).

Item 184 – Schedule 1, item 168, page 375 (lines 14 to 16)

334. These items would include an additional ground upon which the Commission must refuse to conduct dispute resolution under either the model dispute resolution process.

335. The Commission must refuse to conduct dispute resolution if the matter in dispute is currently the subject of proceedings, or has been settled in proceedings, under a Commonwealth, State or Territory law relating to the prevention of discrimination or equal opportunity.

336. This would mean that, for example, if a complaint about alleged discrimination in the workplace is settled in conciliation before the Human Rights and Equal Opportunity Commission, neither the employer nor employee concerned could seek an additional settlement by pursuing the same issue using the dispute resolution processes contained in this Part.

Item 185 – Schedule 1, item 168, page 381 (lines 21 and 22)

337. This item would omit and substitute paragraph 176L(2)(c). Proposed section 176L would set out a process for invoking the Commission’s jurisdiction with respect to a dispute resolution process in a workplace agreement. The new paragraph would only require an application to the Commission to be signed by the applicant, and not to be countersigned by the other party or parties to the dispute.

Item 186 – Schedule 1, item 168, page 385 (after line 15)

338. This item would insert a new section at the end of Division 6 of Part VIIA. The proposed amendment would be similar to items 5 and 6, except that this item addresses a dispute resolution process that is conducted by a person other than the Commission.

Item 187 – Schedule 1, item 170, page 385 (after line 31), after paragraph (b) of the definition of applicable provision in section 177A, insert

339. Proposed amendment RCPH3 would insert a proposed paragraph 177A(ba). It would provide that section 170AF is an applicable provision for the purpose of Part VIII–Compliance.

Item 188 - Schedule 1, item 171, page 387 (table item 3, third column), after paragraph (d) insert

340. This item is a technical amendment.

Item 189 – Schedule 1, item 171, page 388 (after table item 6)

341. Proposed item RCPH5 would insert a proposed item 6A into the table in subsection 177AA(1). The amendment would set out the persons having standing to bring proceedings for a breach of proposed section 170AF.

Item 190 – Schedule 1, item 171, page 388 (line 1)
Item 191 – Schedule 1, item 171, page 388 (after line 4)  

342. Both of these items insert a legislative note.

Item 192 – Schedule 1, item 171, page 388 (after line 4), after subsection 177AA(1)  

343. These amendments provide that for a person to have standing to enforce the relevant breaches of the applicable provisions described, that person must be affected by the breach.

344. Proposed subsection 177AA(1A) deals with employee standing in respect of the breach of an applicable provision of a term of the AFPCS, award, collective agreement, of section 170AA (meal breaks), section 170KB (entitlement to parental leave) and section 170AF (public holidays). Subsection 177AA(1B) deals with employer standing in respect of breach of a term of an award and collective agreement and subsection 177AA((1C) deals with the standing of a person bound by an order of the AIRC.

Item 193 – Schedule 1, item 171, page 388 (after line 21), after paragraph 177AA(3)(c), insert  

345. Proposed item RCPH8 would insert a proposed paragraph 177AA(3)(ca) which would provide that an organisation of employees must not apply for a penalty or other remedy under Division 2 of Part VIII–Compliance for a breach of proposed section 170AF unless a member of the organisation is employed by the respondent employer and the breach relates to, or affects, the member or worked carried on by the member for the employer.

Item 194 – Schedule 1, item 193, page 403 (line 32)  

Item 195 – Schedule 1, item 193, page 403 (after line 32)  

346. These items would amend section 208 of the Bill, which deals with right of entry for a permit holder to investigate a suspected breach of the Workplace Relations Act 1996 or an industrial instrument. These items would add paragraph 208(1)(ca) and, as a consequence of this addition, the word “or” at the end of paragraph 208(1)(c). Paragraph 208(1)(ca) would provide that a permit holder of an organisation would have a right of entry to investigate a breach of an employee collective agreement on behalf of a member of the organisation who is bound to the agreement.

Item 196 – Schedule 1, item 193, page 411 (line 12)  

347. This item would amend the definition of employment record in section 218 of the Bill. The amendment would provide that an employment record means a record that relates to certain listed matters. This amendment is intended to more tightly define the scope of employment record and to make it clear that the definition does not include records such as a licence to operate machinery or an employee’s qualifications.

Item 197 – Schedule 1, item 193, page 429 (line 20)  

Item 198 – Schedule 1, item 193, page 429 (lines 21 and 22)
Item 199 – Schedule 1, item 193, page 430 (line 10)

Item 200 – Schedule 1, item 193, page 430 (lines 11 and 12)

Item 201 – Schedule 1, item 193, page 431 (line 7)

Item 202 – Schedule 1, item 193, page 431 (lines 8 and 9)

348. These items would amend the references to ‘registered organisation’ in proposed section 249 to ‘organisation’, for consistency with other provisions of the WR Act.

Item 203 - Schedule 1, item 193, page 433 (after line 18), after subsection 252(3)

349. Proposed subsection 253(1) of the Work Choices Bill provides that an employer must not engage in certain conduct for any of the prohibited reasons set out in proposed section 254. One of those prohibited reasons is that an employee is entitled to the benefit of an industrial instrument, an order of an industrial body or the Australian Fair Pay and Conditions Standard (proposed paragraph 254(1)(i).

350. This amendment would provide that an employer does not contravene subsection 253(1) for the ground in paragraph 254(1)(i) unless that ground is the sole or dominant reason for the conduct.

Item 204 - Schedule 1, item 193, page 434 (after line 3), at the end of section 252

351. Proposed subsection 253(4) of the Work Choices Bill provides that a person must not engage in certain conduct against an independent contractor for any of the prohibited reasons set out in proposed section 254. One of those prohibited reasons is that the independent contractor is entitled to the benefit of an industrial instrument, an order of an industrial body or the Australian Fair Pay and Conditions Standard (proposed paragraph 254(1)(i).

352. This amendment would provide that a person does not contravene subsection 253(4) for the ground in paragraph 254(1)(i) unless that ground is the sole or dominant reason for the conduct.

Item 205 – Schedule 1, items 210 and 210A, page 454 (line 20 to 22)

353. Section 353A(1) of the WR Act allows regulations to make provision in relation to the keeping of employment records and the inspection of those records, for persons employed under an award, a certified agreement or an AWA. Subsection 353A(2) of the Act allows regulations to require employers of employees employed under an award, certified agreement or AWA to issue pays slips to those employees, containing such details as the regulations set out.

354. Item 210 of the Bill proposed to replace the words a certified agreement or an AWA with or a workplace agreement, to reflect the new forms of agreements provided for in the Bill.

355. That amendment however would not be sufficient to cover the employment of persons under the range of industrial instruments for which the Bill provides (for example, incoming State instruments). This amendment will therefore amend section 353A so that the regulations
will be able to make provision for records of employment of employees (employees being as defined in proposed section 4AA of the Bill) and the issuing of payslips to those employees.

**Item 206 – Schedule 1, item 221, page 457 (lines 5 and 6)**

356. This amendment provides for the expression of the maximum penalty for criminal offences in the regulations in penalty units (10 penalty units for a natural person – by the operation of subsection 4B(3) of the *Crimes Act 1914* the maximum penalty that could be imposed on a body corporate would be a pecuniary penalty not exceeding an amount equal to 5 times the amount of the maximum pecuniary penalty that could be imposed by the court on a natural person convicted of the same offence).

357. This amendment also allows for the regulations to provide for civil penalties with maximum pecuniary penalties of 5 penalty units for a natural person or 25 penalty units for body corporate.

**Item 207 - Schedule 1, item 240, page 461 (line 12)**

358. This item would amend proposed subsection 491(1), to correct an incorrect cross-reference.

**Item 208 – Schedule 1, item 240, page 462 (line 8)**

359. This proposed amendment would be consequential to the omission and substitution of proposed section 90H(3).

**Item 209 – Schedule 1, item 240, page 470, (line36)**

**Item 210 - Schedule 1, item 240, page 473 (after line 11)**

360. This item would insert Division 5A into Part XV, extending the application of proposed Division 1A of Part VIA (public holidays) [a new Division to be inserted by item 160] to cover the *employees* (within the meaning of section 489) and *employers* (within the meaning of section 489) in Victoria.

**New Division 5A – Public Holidays**

*New section 507A – Additional effect of Act-public holidays*

361. Proposed section 507A would provide *employees* (within the meaning of section 489) in Victoria the same public holiday entitlement as *employees* (within the meaning of subsection 4AA(1)) would be provided by proposed Division 1A of Part VIA.

362. The model dispute resolution process would apply to disputes about this entitlement.

*New section 507B – Additional effect of Act – enforcement of, and compliance with, section 170AF*
363. Proposed section 507B would extend the application of the compliance provisions in proposed Part VIII to the public holiday entitlement (as it applies because of section 507A) to an employee (within the meaning of section 489) in Victoria.

364. For the purposes of this extended application, each reference in Part VIII to an employee, an employer or employment (within the meaning of Part VIII) is to be read as a reference to an employee, an employer or employment (within the meaning of section 489) in Victoria. This means that an employee (within the meaning of section 489) in Victoria can enforce the public holiday entitlement (as it applies because of section 507A) in the same way as an employee within the meaning of subsection 4AA(1).

Item 211 - Schedule 1, item 240, page 475 (after line 18)

365. This item would insert a new Division 8A into Part XV, extending the application of proposed section 353A (employee records and payslips) to cover records and payslips relating to the employment (within the meaning of section 489) of employees (within the meaning of section 489) by employers (within the meaning of section 489) in Victoria.

New Division 8A – Employee records and payslips

New section 512A – Additional effect of Act-employee records and pay slips

366. Proposed section 512A would provide that section 353A also has effect in relation to records and payslips relating to employment of employees by employers in Victoria (as those terms are defined in section 489).

367. The terms employee, employer and employment within the meaning of section 489 will be applied to the extended operation of section 353A provided by section 512A in accordance with paragraph 23(b) of the Acts Interpretation Act 1901, which provides that ‘words in the singular number include the plural and words in the plural number include the singular’.

Item 212 - Schedule 1, item 240, page 481 (lines 11 to 24)

368. This item will delete proposed section 523.

369. Proposed section 523 would extend the application of section 353A to allow regulations to be made for the making and retention of employee records relating to persons employed under employment agreements (within the meaning of section 515).

370. However, due to amendments proposed to be made to section 353A by item 205, and the extended application of section 353A proposed by section 507A (item 211), section 523 would be redundant.

Item 213 - Schedule 1, item 240, page 482 (line 26) to page 483 (line 14)

371. This item would omit proposed 527 and replace it with a new proposed section 527, to more accurately reflect what Victorian laws will be excluded by the Act in relation to employees and employers (within the meaning of section 489). It is intended that the WR Act apply to the exclusion of certain laws of Victoria, to the extent that those laws relate to matters which are
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dealt with in proposed Part XV (or Parts in various Schedules, dealing with matters relating to Victoria), in relation to an employee or employer (within the meaning of section 489).

372. The laws of Victoria expressly excluded by proposed paragraph 527(1)(a) would be laws that apply to employment generally and which relate to one or more of the following matters:

- agreements about matters pertaining to the relationship between an employer or employers in Victoria and an employee or employees (within the meaning of section 489) in Victoria;
- minimum terms and conditions of employment (within the meaning of section 489), other than minimum wages, for employees (within the meaning of section 489) in Victoria;
- setting and adjusting minimum wages (within the meaning of subsection 4(7) of the Commonwealth Powers (Industrial Relations) Act 1996 (Vic)) for employees (within the meaning of section 489) in Victoria within a work classification (within the meaning of section 496);
- termination, or proposed termination, of the employment (within the meaning of section 489) of an employee (within the meaning of section 489) in Victoria; and
- freedom of association, within the meaning of subsection 4(7) of the Commonwealth Powers (Industrial Relations) Act 1996 (Vic).

373. The laws of Victoria excluded by section 527 would include statutes of the Parliament of Victoria and legislative instruments (such as regulations) made under such statutes.

374. The definition of the term applies to employment generally in proposed subsection 4(1) would apply to section 527.

375. Paragraph 527(1)(b) would allow regulations to be made prescribing additional laws of Victoria for the purposes of section 527.

376. Subsection 527(2)(a) would provide that subsection 527(1) does not apply to a law of Victoria so far as the law deals with the prevention of discrimination and is neither a State or Territory industrial law (see proposed subsection 4(1)) nor contained in a State or Territory industrial law.

377. Subsection 527(2)(b) would allow regulations to be made prescribing additional laws of Victoria that would not be excluded by section 527.

378. Subsection 527(3) would provide definitions for the purposes of section 527.

379. Proposed section 527 would not affect the operation of proposed clause 87 of Schedule 13 (item 359, page 575), which would provide that a common rule that applies under Schedule 13 to an industry in Victoria is not intended to exclude or limit the operation of a law of Victoria that is capable of operating concurrently with the common rule.
380. This item would amend proposed subsection 18A(3) to provide that an employer association will remain *federally registrable* if it has a member or members who were an employer when admitted to membership but who have since ceased to be an employer. This amendment would make the Bill consistent with existing provisions setting out the criteria for registration of an employer organisation under Schedule 1B.

381. These items would insert a number of new items into the Work Choices Bill in relation to withdrawal from amalgamations.

382. Division 2 of Part 3 of Chapter 3 of Schedule 1B deals with the process for applying for, approval, and conduct of ballots to approve the withdrawal from amalgamation of a constituent part of an amalgamated organisation. At present, the Federal Court and the Registrar of the Federal Court perform various functions, and have various powers, in relation to such ballots.

383. Amendments made by these items would replace references to the Federal Court in Division 2 with references to the Commission. These amendments would have the effect that the AIRC would assume the functions and powers currently exercised by the Federal Court. The Federal Court would retain its other powers and functions under Chapter 3 of Schedule 1B, such as dealing with post-ballot matters including the division of assets and liabilities between the withdrawing part and the amalgamated organisation.

384. Consequential to these amendments, item 4 would insert item 317M. This item would replace the reference to the Registrar of the Federal Court in section 99, which provides that the Registrar must notify the AEC of any application for a ballot, with a reference to the Industrial Registrar to reflect that the AIRC will now be the body to which applications for a ballot are made.

385. Item 217 would also insert item 313A into the Bill which would correct a typographical error in existing section subsection 93(1).

386. Item 220 would also insert item 317A, which would amend subsection 95(1), to require an applicant for a disamalgamation ballot to include in his or her written outline of disamalgamation particulars of any proposal in relation to the division of assets and liabilities.

387. Item 220 would also insert item 317C, which would insert new subsections 95(3A), 95(3B) and 95(3C) into the Work Choices Bill.
388. Proposed subsection 95(3A) would provide that an applicant for a disamalgamation ballot who has insufficient information to prepare the outline of disamalgamation that is required to be filed under section 95, may request the Industrial Registrar to:

- give to the applicant all information in the possession of the Industrial Registrar that may be relevant to the outline (see proposed paragraph 95(3A)(a)); or
- direct the amalgamated organisation to give to the applicant all such information (see proposed paragraph 95(3A)(b)).

389. Proposed subsection 95(3B) would provide that the Industrial Registrar may, if requested, provide the information or direct the amalgamated organisation to do so.

390. Proposed subsection 95(3C) would provide that the amalgamated organisation must, if directed to provide the information, comply with that direction.

391. Item 6 would insert item 341A into the Work Choices Bill which would insert a new paragraph 305(2)(ba) into the list of civil penalty provisions in section 305. The consequence of this amendment is that a person failing to comply with a direction by the Industrial Registrar made under subsection 95(3C) would be liable for a civil penalty.

392. Item 220 would further insert:

- item 317V, which would insert section 108A into the Work Choices Bill, to provide that any power or function of the AIRC under Division 2 must be exercised by the President of the AIRC or a Full Bench of the AIRC of which the President is a member; and
- items 317P, 317R and 317S, which would make consequential amendments to subparagraph 100(1)(b)(ii) and paragraphs 106(2)(a) and 107(1)(a).

**Item 219 – Schedule 1, page 503 (after line 23)**

393. This item would insert a number of new items into the Bill.

394. It would insert item 319A, which would amend subsection 109(2), to require the Federal Court, when dividing assets and liabilities following a disamalgamation, to have regard to the following matters in addition to the matters it is already required to have regard to under section 109:

- any proposal for the division of such assets and liabilities made by the withdrawn constituent part (proposed paragraph 109(2)(c)); and
- if the withdrawn part was a *separately identifiable constituent part*, the proportion of the members of the amalgamated organisation that were included in it (proposed paragraph 109(2)(d)).
395. Item 5 would also make various amendments section 111, which provides for choice of membership following the withdrawal of a constituent part of an organisation. Under the current provisions, a relevant member remains a member of the amalgamated organisation unless he or she specifically chooses to join the withdrawing part. The amalgamated organisation is required to provide an information statement to relevant members informing them of the withdrawal from amalgamation and setting out their right to elect to remain a member of the amalgamated organisation or join the withdrawing part and the consequences of not making an election (i.e., they would remain a member of the amalgamated organisation).

396. Item 5 would amend section 111 as follows:

- make a technical amendment to clarify that the section is concerned with persons who were constituent members of the withdrawn part (item 319C);

- amend subsection 111(2), to require a Registrar rather than the amalgamated organisation to provide the written information statement to relevant members informing them of the withdrawal from amalgamation and their right to elect to remain a member of the amalgamated organisation and the consequences of not making an election (i.e., they would be a member of the withdrawing part) (Item 319B);

- amend subsections 111(7) and 111(9), to provide that persons who were constituent members of the withdrawn part automatically become members of the withdrawn part unless they expressly elect to remain members of the amalgamated organisation within 28 days of receiving the information statement from the Registrar (items 319D and 319F);

- amend paragraph 111(6)(a), to clarify when a person ceases to be a member of the amalgamated organisation in the event he or she does not elect to remain a member (item 319B); and

- make a consequential amendment to subsection 111(9) (item 319E).

Item 221 – Schedule 1, page 512 (after line 21)

397. This item would insert item 346A, which would insert a new paragraph 324(2)(oa) into the authorisation of financial assistance provisions contained in section 324 of Schedule 1B.

398. The new paragraph would provide that a person who was a party to proceedings under Part 3 of Chapter 3 of Schedule 1B may apply for financial assistance. That assistance, if given, would be provided in respect of costs incurred by the person in the proceedings. It would only be granted where the Minister (who under the Administrative Arrangements Order is the Attorney-General for the purposes of this section) was satisfied that hardship is likely to be caused if the application for assistance is refused and that in all the circumstances it is reasonable that the application should be granted.

Item 222 – Schedule 1, page 515 (after line 18)
399. This item would insert item 348A, which would insert new paragraphs (aa) to (ae) into subsection 340(1). These new paragraphs would provide that a Full Court of the Federal Court (as opposed to a single member of the Court) is to carry out the functions bestowed on the Federal Court in Divisions 3 and 4 of Part 3 of Chapter 3 of Schedule 1B.

**Item 223 – Schedule 1, item 358, page 516 (line 29)**

400. This item would make a minor technical amendment.

**Item 224 – Schedule 1, item 359, page 521 (lines 6 to 10)**

401. This item would amend the definition of *industrial dispute* in proposed subclause 2(1) of Schedule 13 (which provides transitional arrangements for parties bound by federal awards who will not be covered by the new system).

402. The amendment removes the express limitation on disputes about matters pertaining to a transitional employer and a third party (such as an independent contractor), to ensure that disputes about outworker terms in a transitional award are able to be dealt with to the same extent as is currently possible.

**Item 225 - Schedule 1, item 359, page 522 (after line 32)**

403. This item would amend proposed clause 2 of Schedule 13 to ensure that references to an independent contractor in Schedule 13 are also not confined to a natural person. The effect of this amendment would be that the prohibition on award terms that restrict the engagement of independent contractors in clause 18 would extend to terms restricting the engagement of corporate contractors.

**Item 226 – Schedule 1, item 359, page 524 (line 36)**

404. Each of these amendments amends the definition of lockout in the relevant parts of the Bill to the same effect as indicat 10, that is to clarify that the definition of lockout is not intended to extend the meaning of that term beyond its ordinary meaning.

**Item 227 – Schedule 1, item 359, page 525 (lines 9 to 12)**

**Item 229 – Schedule 1, item 359, page 525 (after line 25)**

**Item 230 – Schedule 1, item 359, page 525 (line 27)**

**Item 231 – Schedule 1, item 359, page 525 (line 29)**

405. Proposed clause 4 provides for the continuing operation of awards in force before the reform commencement as transitional awards and also identifies those who are to be bound by the transitional awards. These items would amend proposed subclauses 4(2) and (3) to ensure that non-employing entities currently bound to a federal award continue to be bound to that award as a transitional award after the reform commencement. These amendments would ensure that these entities continue to be covered by the outworker terms in the transitional award after reform commencement.
Item 228 – Schedule 1, item 359, page 525 (lines 15 to 20)

406. This amendment is consequential to item 249.

407. This item would amend proposed subclause 4(2) by removing paragraph 4(2)(b) from the Bill and substituting a new paragraph that provides a cross reference to a new Part 6A of Schedule 13, which Part sets out the applicable transmission of business rules when the whole, or a part, of a transitional employer’s business is transmitted to another transitional employer.

Item 232 – Schedule 1, item 359, page 525 (line 35)

408. This item would make a technical amendment to proposed subclause 4(4) to remove a typographical error.

Item 233 – Schedule 1, item 359, page 525 (after line 36)

409. This item would amend proposed clause 4 by adding a definition of outworker term for the purposes of this clause.

Item 234 – Schedule 1, item 359, page 528 (line 20)

410. This item would make a minor technical correction to proposed Schedule 13, clause 9 in relation to the Commission ensuring that its decisions do not contain discriminatory provisions.

Item 235 – Schedule 1, item 359, page 531 (after line 18)

411. This item would add a new allowable transitional award matter. This amendment would enable an award to include a term that entitled an employee to leave for the purpose of seeking other employment after they had been given a notice of termination by their employer. A number of current awards include such a term.

Item 236 – Schedule 1, item 359, page 531 (after line 25)

412. This item would add a new paragraph 17(1)(ia) to make allowable a term of a transitional award that provides for days to be substituted, or a procedure for substituting, public holidays that may be included in a transitional award under proposed paragraph 17(1)(i).

413. For example, where Christmas Day falls on a Saturday or a Sunday, the transitional award may provide that 27 December shall be observed as a public holiday in lieu of 25 December. In addition, proposed paragraph 17(1)(ia) would make allowable a transitional award term that enables a public holiday declared in a metropolitan area to be substituted for a public holiday in a country or regional area. Proposed paragraph 17(1)(ia) would also allow a transitional award term to provide a procedure for agreement between an employer and an individual employee with respect to taking an alternate day as the public holiday in lieu of a day that would otherwise be the designated public holiday because of proposed paragraph 17(1)(i).

Item 237 – Schedule 1, item 359, page 533 (lines 14 and 15)
414. This item would delete proposed paragraph 18(1)(b) from the Bill and substitute a new paragraph.

415. As introduced, the Bill made non-allowable terms in transitional awards that prevent transfers from one form of employment to another. The intention of this paragraph was to make non-allowable ‘casual conversion’ clauses in transitional awards. However, it would also have inadvertently made non-allowable terms in transitional awards that provide for part-time return to work after a period of parental leave.

416. This item would therefore replace proposed paragraph 18(1)(b) in the Bill with a new paragraph that is confined on its face to terms in transitional awards that provide for the conversion from casual employment to another type of employment.

417. This means that a term of a transitional award that permits, or provides a procedure for, a casual employee to convert to another type of employment (such as full-time or part-time employment) would not be an allowable transitional award matter.

Item 238 – Schedule 1, item 359, page 533 (line 34)

418. This item would make clear that the prohibition on ‘tallies’ in proposed paragraph 18(1)(j) relates to tallies in the meat industry.

Item 239 – Schedule 1, item 359, page 533 (line 37)

419. This item would repeal proposed paragraph 18(1)(m), which provides for regulations to be made declaring additional matters to be not allowable transitional award matters.

Item 240 – Schedule 1, item 359, page 534 (after line 7)

420. This item would make a technical amendment to ensure that existing award protections for outworkers are not inadvertently made non-allowable. This item is one of a series of amendments designed to ensure that the Bill does not diminish the protection that the federal workplace relations system provides for outworkers.

421. New subclause 18(2A) would ensure that the prohibition on awards containing terms that restrict the engagement of independent contractors (paragraph 18(1)(g)) does not operate to limit the scope available to include in an award terms that provide protection for outworkers under paragraph 17(1)(q).

Item 241 – Schedule 1, item 359, page 534 (after line 20)

422. This item would insert a legislative note to proposed clause 18, consequential upon the amendment made by item 225. The note would remind readers that in Schedule 13, references to independent contractors are not confined to natural persons.

Item 242 – Schedule 1, item 359, page 535 (line 15)

Item 243 – Schedule 1, item 359, page 535 (after line 28)
423. These items would amend proposed clause 22 of the Bill as introduced to make it clear that all the provisions in a transitional award about the matters listed in proposed subclause 22(3) are encompassed by the expression *preserved award term*.

**Item 244 – Schedule 1, item 359, page 536 (after line 31)**

424. This item would amend proposed clause 24, and is related to the amendment proposed by item 240. The amendment proposed by this item is one of a series of amendments designed to ensure that the Bill does not diminish the protection that the federal workplace relations system provides for outworkers.

425. Proposed new subclause 24(2A) would make clear that the ability of the AIRC to include terms in awards that are incidental and essential to the allowable transitional award matter that permits a transitional award to contain conditions for outworkers (paragraph 17(1)(q)) is not affected by the limitation in paragraph 18(1)(g). The ability of the AIRC to include machinery provisions is also unaffected.

**Item 245 – Schedule 1, item 359, page 546 (lines 13 and 14)**

426. This item would make a technical amendment to proposed clause 40 to substitute the present heading for this clause in the Bill as introduced for a heading that reflects the provisions of the clause. This proposed clause provides that a Full Bench of the AIRC may establish principles about varying transitional awards in relation to each allowable transitional award matter listed in proposed subclause 29(2) (the matters that the AIRC may deal with for the purposes of varying a transitional award).

**Item 246 – Schedule 1, item 359, page 546 (line 18)**

427. This item amends proposed subclause 40(2) to clarify that the reference to principles in this subclause is a reference to the principles established by a Full Bench under proposed subclause 40(1).

**Item 247 – Schedule 1, item 359, page 546 (after line 31)**

428. This item would add a new subclause to proposed clause 40 to make it clear that principles established under subclause 40(1) must be consistent with, and cannot be such as to override, a provision of the Schedule that relates to the variation of transitional awards.

**Item 248 – Schedule 1, item 359, page 564 (lines 22 to 27)**

429. This amendment is consequential to item 249.

430. This item would amend proposed subclause 69(1) by removing paragraph 69(2)(d) from the Bill and substituting a new paragraph that provides a cross reference to a new Part 6A of Schedule 13, which Part sets out the applicable transmission of business rules when the whole, or a part, of a transitional employer’s business is transmitted to another transitional employer.

**Item 249 – Schedule 1, item 359, page 565 (after line 23)**
New Part 6A – Transmission of transitional awards

431. This item would insert a new Part 6A in Schedule 13, which Part sets out the applicable provisions about the transmission of transitional awards when the whole, or part, of a transitional employer’s business is transmitted to another transitional employer.

New Division 1 – Introductory

New clause 72A – Object

432. Proposed clause 72A would establish the object of the Part, which is to provide for the transmission of transitional awards when the whole, or a part, of a transitional employer’s business is transmitted to another transitional employer.

New clause 72B – Simplified outline

433. Proposed clause 72B would create a simplified outline detailing the way that Part 6A is structured.

434. Subclause 72B(1) would provide that proposed Division 2 would describe the transmission of business situation the Part is designed to deal with.

435. Subclause 72B(2) would provide that proposed Division 3 would deal with the transmission of transitional awards from one transitional employer to another upon a transmission of business.

436. Subclause 72B(3) would provide that proposed Division 4 would deal with notification requirements for a transitional employer that becomes a successor, transmittee or assignee to a business being transferred, as well as lodgment of notices and civil remedy provisions relevant to the notification requirements.

437. Subclause 72B(4) would provide that proposed Division 5 would allow regulations to be made to deal with additional transmission of business issues in relation to transitional awards.

New clause 72C – Definitions

438. Proposed clause 72C would set out the definitions of business being transferred, Court, new transitional employer, old transitional employer, operational reasons, time of transmission, transferring transitional employee and transmission period to apply in the Part.

New Division 2 – Application of Part

439. This Division would define when Part 6A would apply and provide definitions for key terms.

New clause 72D – Application of Part

440. Proposed clause 72D would outline the circumstances in which Part 6A applies.
441. Subclause 72D(1) would provide that the Part applies if a person becomes the successor, transmittee or assignee of the whole, or a part, of a business of another person.

442. In this context the person who initially owned the business or part being transferred is the old transitional employer and the person who becomes the successor, transmittee or assignee is the new transitional employer. The term ‘person’ is used in this definition so that Part 6A also captures transmissions where the old transitional employer ceases to be an employer (eg because it dismisses all of its employees) before, or at the time the business transfers.

443. Subclause 72D(2) would define, for the purposes of Part 6A, the business being transferred is the business, or part of the business, of which the new transitional employer is the successor, transmittee or assignee.

444. Subclause 72D(3) would define, for the purposes of Part 6A, the time of transmission as the time at which the new transitional employer becomes the successor, assignee or transmittee of the business being transferred.

445. Subclause 72D(4) would define the transmission period as the period of 12 months from the time of transmission. This is the maximum period of time that a new transitional employer may be bound by a transitional award by operation of Part 6A.

New clause 72E – Transferring transitional employees

446. Proposed clause 72E would create a definition of transferring transitional employee for the purposes of Part 6A.

447. Subclause 72E(1) would provide that a person is a transferring transitional employee if the person is employed by the old transitional employer immediately before the time of transmission and the person stops being employed by the old transitional employer and is employed by the new transitional employer in the business being transferred within 2 months of the time of transmission.

448. The proposed definition of transferring transitional employee seeks to ensure that the operation of Part 6A cannot be avoided by the new transitional employer delaying the employment of an employee of the old transitional employer until after the time of transmission, rather than at the time of transmission.

449. Subclause 72E(2) would provide that a person is also a transferring transitional employee for the purposes of Part 6A if the person:

(a) is employed by the old transitional employer at any time within the period of 1 month before the time of transmission; and

(b) the person’s employment with the old transitional employer is terminated because of, or for reasons that include, genuine ‘operational reasons’; and

(c) the person becomes employed by the new transitional employer in the business being transferred within 2 months of the time of transmission.
1. In light of the definition of this term set out in clause 72C, operational reasons is attributed with the same meaning as in proposed subsection 170CE(5D) of the Bill. Subsection 170CE(5D) would provide that the definition of operational reasons are reasons of an economic, technological, structural or similar nature relating to the employer’s undertaking, establishment, service or business, or to part of the employer’s undertaking, establishment, service or business.

2. This limb of the definition of transferring transitional employee is also an anti-avoidance provision which is intended to ensure that the effect of Part 6A could not be avoided by the old transitional employer terminating the employment of the transitional employee shortly before the time of transmission.

3. Accordingly, the transmission of business rules in proposed Part 6A would extend to a situation where the old transitional employer made transitional employees redundant in anticipation of a transmission of business, or part of a business, close to the time of transmission and the new transitional employer employs those employees.

4. Therefore, if a transitional employee’s position is genuinely redundant and the transitional employee’s employment is terminated by the old transitional employer within one month of the time of transmission, this break in employment would not preclude the transitional employee from being a transferring transitional employee for the purposes of Part 6A, if the transitional employee is employed by the new transitional employer within 2 months of the time of transmission.

5. Subclause 72E(3) would be a facilitative provision consequential upon the inclusion of subclause 72E(2). The subclause enables Part 6A to operate with respect to a transitional employee who is a transferring transitional employee, but whose employment was terminated by the old transitional employer within one month prior to the time of transmission without the need for an additional reference or extension of the term transferring transitional employee wherever it is used in the Part.

New clause 72F – Transferring transitional employees in relation to particular transitional award

6. Proposed clause 72F would describe how a transitional employee is a transferring transitional employee in relation to a particular transitional award.

7. Subclause 72F(1) would provide that in order for a particular transitional award to bind a new transitional employer there must be a transferring transitional employee who was, immediately before the time of transmission, bound or covered by a relevant transitional award. Additionally, the transferring transitional employee’s employment with the new transitional employer must be capable of being covered by the particular transitional award.

8. Subclause 72F(2) would provide that a transitional employee ceases to be a transferring transitional employee in relation to a transitional award where the transferring transitional employee ceases to be employed by the new transitional employer after the time of transmission or the transferring transitional employee’s employment with the new employer changes so that the transitional award is no longer capable of applying to that employment. Additionally, the transferring employee ceases to be a transferring transitional employee when the transmission period ends.
9. The term applying in these provisions is to encompass all the various ways in which a transitional award may regulate a transitional employee’s terms and conditions of employment. Accordingly, the term should not be read as a limitation on the scope of the provision.

New Division 3 – Transmission of transitional award

10. Proposed Division 3 would contain the transmission of business rules about the transfer of transitional awards from an old transitional employer to a new transitional employer.

New clause 72G – Transmission of transitional award

New transitional employer bound by transitional award

11. Proposed subclause 72G(1) would provide that where the old transitional employer was, immediately before the time of transmission, bound by a transitional award, and there is at least one transferring transitional employee in relation to the transitional award, and the new transitional employer would not otherwise be bound by the transitional award and the new transitional employer is a transitional employer at the time of transmission, this clause binds the new transitional employer to the transitional award.

12. This means that a new transitional employer who is a successor, transmitter or assignee to a business or part of a business, will be bound by the transitional award that was binding on the old transitional employer, in respect of a transitional employee if that employee is employed by the new transitional employer within 2 months of the time of transmission and the transitional award is capable of covering the transitional employee’s employment with the new transitional employer.

13. Proposed legislative note 1 would explain that proposed paragraph 72G(1)(c) (which requires that the new transitional employer is not otherwise bound by the transitional award) is necessary as there are circumstances where a transmitting award might already be binding on the new transitional employer in respect of its own transitional employees employed prior to the time of transmission. This is possible as a transitional award can bind multiple transitional employers.

14. Proposed legislative note 2 would mention that where the transitional award becomes binding on the new transitional employer by force of this clause, the new transitional employer may have obligations imposed by clauses 72J and 72K with respect to notification.

Period for which new transitional employer remains bound

15. Proposed subclause 72G(2) would establish the period of time the new employer will be bound by the transitional award. It would identify the five events, and if one were to occur (whichever occurs first), it would have the effect that the new transitional employer ceases to be bound by the transitional award in its entirety.

16. Firstly, the transitional award could be revoked (see proposed clause 31). The AIRC can revoke a transitional award in limited circumstances (i.e., where the transitional award is obsolete or is no longer operating), so that it is no longer binding on the new transitional employer.
17. Secondly, the transitional award would cease to bind the new transitional employer when there are no longer any transferring transitional employees in relation to the transitional award. An example of where this would apply is where all transferring transitional employees either cease to be employed by the new transitional employer or move to another position while working for the new transitional employer that is not capable of being covered by the transitional award.

18. Thirdly, the transitional award would cease to bind the new transitional employer if the new transitional employer ceases to be bound by the transitional award under Part 5 of the Schedule, that is by entering into a State employment agreement (see clause 57), by an order of the AIRC if it is satisfied that the new transitional employer has made genuine efforts to make a State employment agreement, but has been unable to do so (see clause 58) and by order of the AIRC if it is satisfied that it is not able to resolve a genuine industrial dispute under the Schedule (see clause 59).

19. Fourthly, the transitional award would not be binding on the new transitional employer once the transmission period ends. This means that a new transitional employer would only be bound by the transitional award by force of subclause 72G(1) for a maximum period of 12 months.

20. Finally, the transitional award would not be binding on the new transitional employer once the transitional period (that is, the 5 year period beginning on the reform commencement) ends. Therefore, if there is less than 12 months between the time of transmission and the end of the transitional period, the transmission period will not extend beyond the end of the transitional period on the basis that all transitional awards will cease to operate at the end of the transitional period (see clause 6).

New transitional employer bound only in relation to employment of transferring transitional employees

21. Proposed subclause 72G(3) would provide that a new transitional employer is bound by the transitional award in respect of transferring transitional employees only. Therefore, the transitional award cannot bind the new transitional employer, by force of subclause 72G(1), in relation to its employees who are not transferring transitional employees.

Commission order

22. Proposed subclause 72G(4) would provide that proposed subclauses 72G(1) and (2) have effect subject to any order of the AIRC.

23. Proposed subclause 72G(5) would ensure that the AIRC cannot make an order which would extend the transmission period for more than 12 months.

Old transitional employer's rights and obligations that arose before time of transmission not affected

24. Proposed subclause 72G(6) would provide that this clause does not affect the rights and obligations of the old transitional employer in respect of a transferring transitional employee that arose before the time of transmission. It is not intended that subclause 72G(1) operates to transfer liability for employee entitlements that accrued prior to the time of transmission from an old transitional employer to a new transitional employer.
New clause 72H – Interaction rules

Transmitted award

25. Proposed subclause 72H(1) would provide that this clause applies if subclause 72G(1) applies to a transitional award (to be referred to as a transmitted award).

Division 3 pre-reform certified agreement

26. Proposed subclause 72H(2) would provide that a transmitted award, to the extent that it relates to the transferring transitional employee’s employment with the new transitional employer, prevails over a Division 3 pre-reform certified agreement (within the meaning of Schedule 14) to the extent of any inconsistency with that certified agreement. This rule applies in circumstances where:

- the new transitional employer is bound by a Division 3 pre-reform certified agreement;
- a transferring transitional employee in relation to a transmitted award was not bound by that certified agreement immediately before the time of transmission; and
- the certified agreement would, but for this subclause, apply to the transferring employee’s employment with the new transitional employer and would prevail over the transmitted award to the extent of any inconsistency with the transmitted award.

27. Proposed subclause 72H(3) would provide that subclause 72H(2) would have effect despite section 170LY of the pre-reform Act that is applied by clause 2 of Schedule 14.

New Division 4 – Notice requirements and enforcement

New clause 72J – Informing transferring transitional employees about transmitted award

28. Proposed clause 72J would create notification obligations for a transitional employer with respect to a transferring transitional employee. The effect of the provisions would be to inform the transferring transitional employee about the operation of a transmitted award that may apply to the transferred transitional employee. The provisions are civil remedy provisions.

29. Subclause 72J(1) would confirm that the clause applies where a transmitted award binds a transitional employer in relation to a transferring transitional employee by force of clause 72G.

30. Subclause 72J(2) would provide that within 28 days after the transferring transitional employee commences employment with the transitional employer, the transitional employer must take reasonable steps to give the transferring transitional employee a notice that complies with subclause 72J(3). ‘Reasonable steps’ is included as there may be exceptional circumstances which prevent a transitional employer from complying with the notice requirements.

31. Subclause 72J(3) would provide that the notice must:
• identify the transmitted award;

• state that the transitional employer is bound by the transmitted award;

• specify the date on which the transmission period for the transmitted award ends; and

• state that the transitional employer will remain bound by the transmitted award until the end of the transmission period unless the transmitted award is revoked, or otherwise ceases to be in operation, before the end of that period.

**New clause 72K – Lodging copy of notice with Employment Advocate**

**Only one transferring transitional employee**

32. Proposed subclause 72K(1) would deal with the situation where there is only one transferring transitional employee with respect to the transitional award.

33. Where there is only one transferring transitional employee with respect to a transitional award, and the transitional employer gives notice under subclause 72J(2) to that transitional employee, the transitional employer must also lodge a copy of the notice with the Employment Advocate.

34. This notice must be lodged in accordance with subclause 72K(4) within 14 days of giving the notice to the transferring transitional employee.

35. Proposed legislative note 1 would indicate that subclause 72K(1) is a civil remedy provision with reference to clause 72M.

36. Proposed legislative note 2 would refer to obligations imposed by sections 137.1 and 137.2 of the *Criminal Code* in relation to the provision of information or documents.

**Multiple transferring transitional employees and notices all given on the one day**

37. Proposed subclause 72K(2) would deal with the situation where there are a number of transferring transitional employees with respect to a transitional award, who were all given notice under subclause 72J(2) on the same day.

38. Where the transitional employer gives a number of notices under subclause 72J(2) to transferring transitional employees in relation to a transitional award, and all the notices are given on the one day, the transitional employer must lodge a copy of one of those notices with the Employment Advocate.

39. This notice must be lodged in accordance with subclause 72K(4) within 14 days of giving the notice to the transferring transitional employee.

40. Proposed legislative note 1 would indicate that subclause 72K(2) is a civil remedy provision with reference to clause 72M.
41. Proposed legislative note 2 would refer to obligations imposed by sections 137.1 and 137.2 of the Criminal Code in relation to the provision of information or documents.

**Multiple transferring transitional employees and notices given on different days**

42. Proposed subclause 72K(3) would deal with the situation where there are a number of transferring transitional employees with respect to a transitional award, who were all given notice under subclause 72J(2) but on different days.

43. Where the transitional employer gives a number of notices under subclause 72J(2) to transferring transitional employees in relation to a transitional award, and all the notices are given on different days, the transitional employer must lodge a copy of the notice or one of those notices with the Employment Advocate.

44. This notice must be a copy of the notice or one of the notices given on the earliest of those days and lodged in accordance with subclause 72K(4) within 14 days after that notice is given.

Proposed legislative note 1 would indicate that subclause 72K(3) is a civil remedy provision with reference to clause 72M.

45. Proposed legislative note 2 would refer to obligations imposed by sections 137.1 and 137.2 of the Criminal Code in relation to the provision of information or documents.

**Lodgement with the Employment Advocate**

46. Proposed subclause 72K(4) would provide that a notice is lodged in accordance with this subclause only once it is actually received by the Employment Advocate.

47. The proposed legislative note would explain that subclause 72K(4) departs from section 29 of the Acts Interpretation Act 1901 (AI Act). Section 29 of the AI Act provides that service of a document is normally effected when it is ‘properly prepaid, addressed and posted’.

New clause 72L – Employment Advocate must issue receipt for lodgement

48. Proposed clause 72L would oblige the Employment Advocate to issue a receipt for a notice that it receives under clause 72K. The receipt must state that it was lodged in accordance with clause 72K and specify the date of lodgement.

49. The Employment Advocate would need to give a copy of the receipt to the person who lodged the notice under clause 72K.

New clause 72M– Civil remedies

50. Proposed clause 72M would deal with the civil remedy provisions of Part 6A.

51. Subclause 72M(1) would specify that subclauses 72J(2) and 72K(1), (2) and (3) are civil remedy provisions.

52. The proposed legislative note would indicate that proposed Division 4 of Part VIII also contains provisions that are relevant to the consideration of civil remedies under the WR Act.
53. Proposed subclauses 72M(2) and (3) would provide that the Federal Court or the Federal Magistrates Court may order a person who has contravened the civil remedy provisions to pay a pecuniary penalty of not more than 300 penalty units for a body corporate or 60 penalty units in other cases.

54. Subclause 72M(5) would establish who has standing (ie who is entitled) to make an application for an order under subclause 72M(2).

**New Division 5 – Miscellaneous**

**New clause 72N – Regulations**

55. Proposed clause 72N would enable regulations to be made with respect to the succession, transmission or assignment of a business or part of a business, and the obligations of transitional employers in these situations. The regulations might also deal with the terms and conditions of the employment of transitional employees whose employment is affected by a transmission, assignment or succession of a business, or part of a business.

56. This regulation making power is intended to be broad in scope, and should not be construed narrowly.

**Item 250 - Schedule 1, item 359, page 567 (lines 15 to 19)**

57. This item would omit the final paragraph of the definition of *industrial dispute* in proposed subclause 75(1) of Schedule 13. This amendment is similar to the amendment made to the definition of *industrial dispute* in subclause 2(1) of Schedule 13 (item 224). The amendment removes the express limitation on disputes about matters pertaining to a transitional employer and a third party (such as an independent contractor), to ensure that disputes about outworker terms in a transitional award are able to be dealt with to the same extent as is currently possible.

**Item 251 - Schedule 1, item 359, page 568 (after line 11)**

58. This item would insert subclauses 77(3) and (4) into Schedule 13. Proposed clause 77 of Schedule 13 relates to preserved transitional award terms in *transitional Victorian reference awards*.

59. Proposed subclauses 77(3) and (4) of Schedule 13 would provide regulation-making powers, to exclude certain matters from the ‘more generous’ comparison between preserved award terms and the Australian Fair Pay and Conditions Standard, in a similar way to proposed subsections 117(7) and (8) (item 71, page 295).

**Item 252 - Schedule 1, item 359, page 575 (line 29)**

60. This item would amend proposed paragraph 89(1)(a) of Schedule 13, by adding a reference to each of sections 101B (Protected award conditions) and 103R (Consequences of termination of agreement – application of other industrial instruments) to the list of sections which will apply to a common rule (which has effect under Subdivision E of Division 1 of Part 7 of Schedule 13) as if the common rule were an award.
61. The effect of this amendment is that the provisions of sections 101B and 103R, relating to protected award conditions and the consequences of termination of a workplace agreement respectively, to the extent that they apply in relation to employees and employers (within the meaning of section 489) in Victoria because of section 500, will have effect as if a reference to an award were a reference to a common rule.

**Item 253 - Schedule 1, item 359, page 576 (line 22) to page 577 (line 2)**

62. This item would omit proposed clause 94 of Schedule 13 and replace it with a new clause 94.

63. Clause 94 of Schedule 13 relates to the application of ‘transmission of business’ provisions to transitional Victorian reference award.

64. This amendment is consequential upon amendments made by item 228 (amendment of paragraph 4(2)(b) of Schedule 13), item 248 (amendment of paragraph 69(1)(d) of Schedule 13) and item 249 which would insert a new Part 6A of Schedule 13 (Transmission of transitional awards).

65. New Part 6A of Schedule 13 would apply on its own terms to a transitional Victorian reference award (within the meaning of clause 73 of Schedule 13), because transitional Victorian reference awards are a subset of transitional awards (within the meaning of subclause 2(1) of Schedule 13).

66. Clause 94 would provide that subclause 72J(3) (item 249) has effect, in relation to a transitional Victorian reference award (within the meaning of clause 73) as if paragraphs (e), (f) and (g) were added to subclause 72J(3).

67. These three additional paragraphs have the same effect as proposed paragraphs 129(3)(e), (f) and (g) of the WR Act (item 81, page 336 of the Bill). They are necessary because employees and employers (within the meaning of section 489) in Victoria are covered by Parts VA and VB of the WR Act as a result of the extended application of those Parts provided by Part XV, unlike excluded employees and excluded employers (within the meaning of subclause 2(1) of Schedule 13) in States other than Victoria.

**Item 254 - Schedule 1, item 359, page 577 (line 7)**

68. This item would amend proposed paragraph 95(a) of Schedule 13, by adding a reference to each of sections 101B (Protected award conditions) and 103R (Consequences of termination of agreement – application of other industrial instruments) to the list of sections which will apply to a transitional Victorian reference award (within the meaning of clause 73 of Schedule 13) as if the transitional Victorian reference award were an award.

69. The effect of this amendment is that the provisions of sections 101B and 103R, relating to protected award conditions and the consequences of termination of a workplace agreement respectively, to the extent that they apply in relation to employees and employers (within the meaning of section 489) in Victoria because of section 500, will have effect as if a reference to an award were a reference to a transitional Victorian reference award.
Item 255 - Schedule 1, item 359, page 577 (after line 8)

70. This item would add a Subdivision H to Division 1 of Part 7 of Schedule 13, consisting of proposed clause 95A (Ceasing to be bound by transitional Victorian reference award – inability to resolve industrial dispute under this Schedule).

71. Clause 95A of Schedule 13 would provide that clause 59 of Schedule 13 has effect, in relation to a transitional Victorian reference award (within the meaning of clause 73 of Schedule 13) as if the word ‘must’ were deleted from subclause 59(3) and replaced with the word ‘may’. Clause 59 of Schedule 13 provides that, in certain circumstances, the AIRC must issue an order stating that a transitional award no longer binds an excluded employer in respect of particular employees.

72. This amendment would provide the AIRC with discretion whether or not to make an order under clause 59 of Schedule 13 that a transitional employer cease to be bound by a transitional Victorian reference award. In States other than Victoria, the effect of an order made under clause 59 of Schedule 13 would be that the relevant employees’ terms and conditions would be regulated under the relevant State’s industrial laws. For employees (within the meaning of section 489) in Victoria, terms and conditions will be regulated by the Act rather than any State industrial laws. It is therefore appropriate that the AIRC have discretion whether to make an order under clause 59 of Schedule 13 applying to employees (within the meaning of section 489) in Victoria.

Item 256 - Schedule 1, item 359, page 577 (after line 28)

73. This item would insert subclauses 97(3), (4) and (5) into Schedule 13. Proposed clause 97 of Schedule 13 relates to preserved transitional award terms in transitional awards other than transitional Victorian reference awards.

74. Proposed subclause 97(3) would provide an explanation of the meaning of personal/carer’s leave for the purposes of clause 97, in a similar way to proposed subclause 77(2) of Schedule 13.

75. Proposed subclauses 97(4) and (5) of Schedule 13 would provide regulation-making powers, to exclude certain matters from the ‘more generous’ comparison between preserved award terms and the Australian Fair Pay and Conditions Standard, in a similar way to proposed subsections 117(7) and (8) (item 71, page 295).

Item 257 - Schedule 1, item 359, page 580 (after line 27)

76. This item would insert Subdivision BA into Division 2 of Part 7 of Schedule 13, consisting of section 101A (Transmission of business).

77. This amendment is consequential upon item 249 which would insert a new Part 6A of Schedule 13 (Transmission of transitional awards).

78. Clause 101A would provide that subclause 72J(3) (item 249) has effect, in relation to a transitional award (other than a transitional Victorian reference award within the meaning of clause 73) to the extent that the award regulates excluded employers (within the meaning of subclause 2(1) of Schedule 13) in respect of the employment (within the meaning of section 489)
of employees (within the meaning of section 489) as if paragraphs (e), (f) and (g) were added to subclause 72J(3).

79. These three additional paragraphs have the same effect as proposed paragraphs 129(3)(e), (f) and (g) (item 81, page 336 of the Bill). They are necessary because employees and employers (within the meaning of section 489) in Victoria are covered by Parts VA and VB of the WR Act as a result of the extended application of those Parts provided by Part XV, unlike excluded employees and excluded employers (within the meaning of subclause 2(1) of Schedule 13) in States other than Victoria.

Item 258 - Schedule 1, item 359, page 580 (line 34)

80. This item would amend proposed paragraph 102(a) of Schedule 13, by adding a reference to each of sections 101B (Protected award conditions) and 103R (Consequences of termination of agreement – application of other industrial instruments) to the list of sections which will apply to a transitional award other than a transitional Victorian reference award, to the extent that the award regulates excluded employers in respect of the employment of employees (within the meaning of section 489), as if the transitional award were, to that extent, an award.

81. The effect of this amendment is that the provisions of sections 101B and 103R, relating to protected award conditions and the consequences of termination of a workplace agreement respectively, to the extent that they apply in relation to employees and employers (within the meaning of section 489) in Victoria because of section 500, will have effect as if a reference to an award were a reference to a transitional award other than a transitional Victorian reference award, to the extent that the award regulates excluded employers in respect of the employment of employees (within the meaning of section 489).

Item 259 - Schedule 1, item 359, page 580 (after line 35)

82. This item would add a Subdivision D to Division 2 of Part 7 of Schedule 13, consisting of proposed clause 102A (Ceasing to be bound by transitional award – inability to resolve industrial dispute under this Schedule).

83. Clause 102A of Schedule 13 would provide that clause 59 of Schedule 13 has effect, in relation to a transitional award other than a transitional Victorian reference award, to the extent that the award regulates excluded employers in respect of the employment of employees (within the meaning of section 489), as if the word ‘must’ were deleted from subclause 59(3) and replaced with the word ‘may’. Clause 59 of Schedule 13 provides that, in certain circumstances, the A IRC must issue an order stating that a transitional award no longer binds an excluded employer in respect of particular employees.

84. This amendment would provide the A IRC with a discretion whether or not to make an order under clause 59 of Schedule 13 that a transitional employer cease to be bound by a transitional award other than a transitional Victorian reference award, to the extent that the award regulates excluded employers in respect of the employment of employees (within the meaning of section 489). In States other than Victoria, the effect of an order made under clause 59 of Schedule 13 would be that the relevant employees’ terms and conditions would be regulated under the relevant State’s industrial laws. For employees (within the meaning of section 489) in Victoria, terms and conditions will be regulated by the Act rather than any State industrial laws. It is
therefore appropriate that the AIRC have discretion whether to make an order under clause 59 of Schedule 13 applying to employees (within the meaning of section 489) in Victoria.

**Item 260 – Schedule 1, item 359, page 581 (before line 3)**

85. This item would amend proposed Part 8 of Schedule 13 by inserting a clause that provides for the application of proposed subsection 34(4) (reconstituted Commission) to the transitional award system.

**Item 261 – Schedule 1, item 359, page 581 (after line 8)**

86. These items would amend proposed clause 103 to limit the application of proposed section 44Q. Section 44Q would enable the AIRC to suspend or cancel an award or order in certain cases.

87. These amendments ensure that the AIRC is only able to suspend or cancel a transitional award in cases of misconduct by an organisation bound by the award or a substantial number of its members, and not for ‘any other reason’. Proposed clauses 57 to 59 deal with the full range of circumstances in which a transitional award ceases to apply.

**Item 262 – Schedule 1, item 359, page 582 (line 14)**

88. This item made a technical amendment to proposed paragraph 105(f) to correct a cross-referencing error.

**Item 263 – Schedule 1, item 359, page 582 (after line 30)**

89. Proposed clause 107 in the Bill provides for the application of Part VIII (compliance) to the transitional award system. This item would amend proposed clause 107 to give a person and an entity standing to apply for a penalty or other remedy for a breach of an outworker term in a transitional award.

**Item 264 – Schedule 1, item 359, page 582 (after line 31)**

90. This item would amend proposed Part 8 by inserting new provisions to provide for the application of certain terms of the WR Act to Schedule 13:

- proposed clause 107A would provide for the application of PartXA (freedom of association);
- proposed clause 107B would provide for the application of section 338 (contracts entered into by agents of employers);
- proposed clause 107C would provide for the application of section 353A (records relating to employees); and
- proposed clause 107D would provide for the application of section 413 (interpretation of awards).
Item 265 – Schedule 1, item 359, page 582 (line 33)

91. This item would make a minor amendment to proposed subclause 108(1) to enable the proper operation of the regulation making power set out in this clause.

Item 266 – Schedule 1, item 360, page 593 (lines 4 to 6)

92. Item 360 of the Bill would insert Proposed Schedule 14 into the WR Act, which deals with transitional arrangements for existing pre-reform Federal agreements etc. Proposed Part 4 of Schedule 14 would set out the transitional arrangements for dealing with awards made under subsection 170MX(3) of the WR Act prior to the commencement of the Bill.

93. Proposed clause 22 of Schedule 14 would provide that Part 4 applies specifically in relation to a 170MX award in force just before the reform commencement.

94. Proposed item 266 would amend proposed clause 22 so that Part 4 of Schedule 14 of the WR Act would apply to a 170MX award that was either:

- in force just before reform commencement; or
- made after reform commencement because of Part 8 of Schedule 14.

95. This amendment would be consequential to proposed amendment 268. Proposed amendment 268 would insert proposed clause 32A into Part 8 of Schedule 14, which set out the rules that will apply where the AIRC has started to exercise it arbitration powers in relation to an application for a 170MX award prior to reform commencement.

Item 267 – Schedule 1, item 360, page 595 (after line 29), after Part 7, insert

96. Proposed item RCPH15 would insert a proposed Part 7A–Relationships between pre-reform agreements etc. and public holiday entitlement, into Schedule 14.

New clause 30A – Relationship between pre-reform agreements etc. and public holiday entitlement

97. Proposed clause 30A would provide that Division 1A of Part VIA (public holidays) does not apply to an employee if the employee’s employment is subject to:

- a pre-reform certified agreement;
- a pre-reform AWA; or
- a section 170MX award.

Item 268 – Schedule 1, item 360, page 596 (after line 19)

98. Item 360 of the Bill would insert Proposed Schedule 14 into the WR Act, which deals with transitional arrangements for existing pre-reform Federal agreements etc. Proposed amendment
Agt150 would insert proposed clause 32A into Part 8 of Schedule 14. Part 8 of Schedule 14 sets out the rules that apply when an application for the certification of an agreement has occurred prior to the Bill’s commencement.

99. Subclause 32A(1) would provide that proposed clause 32A applies if, before the Bill’s commencement, the Commission has started to exercise arbitration powers under subsection 170MX(3) of the WR Act to make a 170MX award, the rules under the pre-reform WR Act will apply.

100. The effect of proposed amendment 268 would be that if, before the commencement of the Bill, the Commission terminated a bargaining period and started to exercise its arbitration powers with a view to making a 170MX award, the Commission could make a 170MX award even after the commencement of the Bill.

Item 269 - Schedule 1, item 360, page 597 (lines 13 to 15)

101. This item would amend clause 33 of Schedule 14 by inserting a replacement definition of Victorian reference section 170MX award.

102. This amendment is consequential upon clauses 32A (item 268) and 38A (item 270) of Schedule 14, which would allow a Victorian reference section 170MX award to be made after the reform commencement in certain circumstances.

Item 270 - Schedule 1, item 360, page 598 (after line 23)

103. This item would insert a new clause 38A of Schedule 14.

104. Clause 38A would provide that clause 32A of Schedule 14 (item 268) has effect, in relation to the making of a section 170MX award under the WR Act in its operation in accordance with repealed Division 2 of Part XV, as if the reference in subclause 32A(1) to subsection 170MX(3) of the pre-reform Act were read as a reference to that subsection as it had effect because of repealed Division 2 of Part XV.

105. This amendment is consequential upon item 268, to ensure that new clause 32A of Schedule 14 has effect in relation to matters arising under section 170MX of the pre-reform Act as it had effect because of repealed Division 2 of Part XV.

Item 271 - Schedule 1, item 360, page 599 (after line 17)

106. This item would insert new definitions of preserved collective State agreement and preserved individual State agreement. This amendment is consequential on amendments to Part 2–Preserved State Agreements, of Schedule 15–Transitional treatment of State employment agreements and State awards.

Item 272 - Schedule 1, item 360, page 599 (lines 21 and 22)

107. This item would insert a new definition of preserved State agreement. This amendment is consequential on amendments to Part 2–Preserved State Agreements, of Schedule 15–Transitional treatment of State employment agreements and State awards.
Item 273 - Schedule 1, item 360, page 599 (after line 22)

108. Item 273 would insert a new subclause 1(1). The amendment is consequential on amendments that apply in other provisions of the Act relating to prohibited content. The amendment is required because section 4(2) of the Bill provides that a reference to an independent contractor is confined to a natural person. The amendment would provide that the restriction on the meaning of independent contractor in section 4(2) would not apply for the purposes of regulations made under clause 9, subclause 19(1), clause 37 or subclause 42(1) of Schedule 15. These regulations relate to prohibited content in preserved State agreements and notional agreements preserving State awards.

Item 274 - Schedule 1, item 360, page 600 (lines 12) to page 604 (line 29)

109. Proposed item 274 would substitute a new Division 1–Preserved individual State agreements, a new Division 2–Preserved collective State agreements and a new Division 2A–Effect and operation of a preserved State agreement, in Part 2–Preserved State agreements, of Schedule 15–Transitional treatment of State employment agreements and State awards. The amendments effected by the substitution are technical, and intended to improve readability.

Division 1–Preserved individual State agreements

Subdivision A–What is a preserved individual State agreement?

Clause 3 – Preserved individual State agreements

110. Proposed clause 3 would provide that a preserved individual State agreement (PISA) would come into operation on reform commencement where, immediately before reform commencement, the terms or conditions of an employee’s employment were determined, in whole or part, by a State employment agreement applying to only one employee.

111. The State employment agreement is referred to as the original individual agreement in the provisions of this Schedule.

112. A PISA would come into operation irrespective of whether the original individual agreement regulates one term or condition of the relationship between the employer and the employee, or whether it comprehensively regulates the employment relationship. The actual terms and conditions of employment that would be preserved in a PISA would be determined by proposed clause 5 (below).

113. Subdivision B–Who is bound by or subject to a preserved individual State agreement?

Clause 4 – Who is bound by or subject to a preserved individual State agreement?

114. Under the WR Act a range of entitlements and obligations flow from being ‘bound by’ or from a person’s employment being ‘subject to’ an agreement. Proposed clause 4 would set out who is bound by, or whose employment is subject to, a PISA. This would be determined by reference to those who were bound by, or whose employment was subject to, the original individual agreement.
115. Proposed subclause 4(1) would address who would be bound by the PISA by reference to those who were bound by the original agreement. It would provide that an employer, an employee or an organisation would be bound by the PISA if, immediately before the reform commencement, that employer, employee or organisation was bound by or a party to the original individual agreement. It would not matter whether the employer, employee or organisation would have been bound under the terms of the original individual agreement or by operation of a State or Territory industrial law.

116. In this Schedule an organisation takes on the proposed definition in Schedule 17 which provides that an organisation includes a transitionally registered association.

117. Proposed subclause 4(2) would provide that a person’s employment would be subject to the PISA if the employment of a person was, immediately before the reform commencement, subject to the original individual agreement.

Subdivision C–Terms of a preserved individual State agreement

Clause 5 – Terms of a preserved individual State agreement

118. Clause 5 would provide for the terms of the PISA. It is intended that the terms of the PISA would comprise:

- the terms of the original individual agreement (subclause 5(1));
- the terms of any other State employment agreement that, immediately before the reform commencement, actually determined a term or condition of employment of the employee bound by or subject to the original individual agreement (subclause 5(2));
- the terms of any State award that, immediately before the reform commencement, actually determined a term or condition of employment of the employee bound by or subject to the original individual agreement (subclause 5(3)); and
- a provision of a State or Territory law that, immediately before the reform commencement, actually determined a preserved entitlement of the employee bound by or subject to the original individual agreement (subclause 5(4)).

119. This recognises that where an employee’s employment is regulated by a State employment agreement, that agreement is not necessarily comprehensive of all the employee’s terms and conditions of employment. There may be terms and conditions of employment that are determined by another State employment agreement, a State award or particular State or Territory laws. If one of these instruments, or a particular law, actually determined a term and condition of an employee’s employment on the day immediately before reform commencement, it is intended that the term of the instrument, or the provision of the law, would form a term of the PISA.

120. A term will only be included in the PISA to the extent that it actually applied to the person. If a term did not apply because, for example, it was included in an award which was excluded by
the operation of the original individual agreement, then it would not be included in the PISA. The phrase ‘as in force immediately before reform commencement’ makes it clear that the terms included in the original individual agreement, other State employment agreement or State awards would be preserved in the PISA as they exist at that time, and would not be adjusted or varied to reflect subsequent changes to the agreements or awards. Similarly, any provision of a State or Territory law that determines a preserved entitlement would be preserved in the PISA as it exists at that time, and would not be adjusted or varied to reflect subsequent legislative amendments. The terms and conditions of employment in a PISA may only be varied in accordance with this Schedule.

121. Proposed subclause 5(5) would set out a definition of preserved entitlement. This definition would apply, when read with subclause 5(4), so that the provisions of a State or Territory law would form a term of a PISA to the extent that they relate to a preserved entitlement and actually determined a term and condition of employment of the employee bound by (or subject to) the original individual agreement on the day immediately before reform commencement.

**Illustrative Example**

Tony is employed by Banco Bank Limited (Banco) in Brisbane under a State employment agreement. He is the only employee bound by the agreement. The agreement provides that Tony must work on Saturday mornings. The agreement does not contain any terms dealing with penalty rates for working on a Saturday or any terms dealing with annual leave.

The Banking – State – Award contains a term that employees will be entitled to be paid at 150% of their normal pay rate for hours worked on a Saturday. This term actually determines Tony’s terms and conditions of employment, and Banco pays Tony 150% of his normal pay rate for the hours he works on a Saturday morning.

There is an entitlement to annual leave under the Industrial Relations Act 1999 (Qld).

At the reform commencement, Banco and Tony (who are both bound by the State employment agreement) would become bound by a PISA.

The terms preserved in the PISA would be the terms of the State employment agreement as in force immediately before the reform commencement. The term of the State award setting penalty rates for working on a Saturday (as in force immediately before reform commencement) would also be preserved in the PISA. The provisions of the Industrial Relations Act 1999 (Qld) dealing with annual leave (as in force immediately before reform commencement) would also be preserved in the PISA.

**Clause 6 – Nominal expiry date of a preserved individual State agreement**

122. Proposed paragraph 6(a) would provide that the nominal expiry date of a PISA would be the same date on which the original individual agreement would have nominally expired under the relevant State or Territory industrial law. This would include a nominal expiry date provided for under the terms of the agreement itself, or under a State or Territory law directly, or a combined effect of the two.
123. Proposed paragraph 6(b) would provide an exception to paragraph 6(a). If the nominal expiry date of the original individual agreement would have fallen more than three years after the commencement of the original agreement, then the nominal expiry date in the PISA will instead be the last day of the three year period after the commencement of the original agreement. Note that a PISA would continue to operate after the nominal expiry date has passed until it is terminated or replaced.

**Clause 7 – Powers of State industrial authorities**

124. Proposed subclause 7(1) would provide that if a PISA confers a function or power on a State industrial authority, that function must not be performed and that power must not be exercised by the State industrial authority on or after the reform commencement. This subclause is intended to ensure that the terms and conditions of a PISA are only enforced under this Act, and not under the State or Territory laws or in the State system in which the original individual agreement was made. It would not be appropriate for State industrial authorities to exercise powers or perform functions with respect to PISAs as PISAs would be federal instruments.

125. Proposed subclause 7(2) would provide that the employer and the persons bound by the PISA may, by agreement, confer such a function or power on the AIRC. However this option would only apply in situations where the matter or issue does not relate to the resolution of a dispute about the application of the agreement. Proposed clause 8 provides that in such cases, the model dispute resolution process would apply (see Part VIIA of Schedule 1).

**Clause 8 – Dispute resolution processes**

126. Proposed subclause 8(1) would provide that a PISA is taken to include a term requiring disputes about the application of the agreement to be resolved in accordance with the proposed model dispute resolution process (Part VIIA of Schedule 1).

127. Proposed subclause 8(2) would provide that any term of the PISA that would otherwise deal with the resolution of those disputes is void to that extent. This subclause is intended to ensure that disputes in relation to the application of a PISA are resolved in a manner which is consistent with the model dispute settlement resolution process established under the WR Act, including that employers and employees be encouraged to resolve disputes at the workplace level.

**Clause 9 – Prohibited content**

128. Proposed clause 9 would provide that a term of a PISA is void to the extent that it contains prohibited content of a prescribed kind.

**Division 2–Preserved collective State agreements**

**Subdivision A–What is a preserved collective State agreement?**

**Clause 10 – Preserved collective State agreements**

129. Proposed clause 10 would provide that a preserved collective State agreement would come into operation on reform commencement where, immediately before reform commencement, the
terms or conditions of an employee’s employment were determined, in whole or part, by a State employment agreement applying to more than one employee.

130. The State employment agreement is referred to as the original collective agreement in the provisions of this Schedule.

131. A preserved collective State agreement (PCSA) would come into operation irrespective of whether the original collective agreement regulates one term or condition of the relationship between the employer and the employee, or whether it comprehensively regulates the employment relationship. The actual terms and conditions of employment that would be preserved in a PCSA would be determined by proposed clause 13 (below).

132. Subdivision B—Who is bound by or subject to a preserved collective State agreement?

Clause 11 – Who is bound by a preserved collective State agreement?

Clause 12 – Whose employment is subject to a preserved collective State agreement?

133. Under the WR Act a range of entitlements and obligations flow from being ‘bound by’ or from a person’s employment being ‘subject to’ an agreement. Proposed clauses 11 and 12 would set out who is bound by, and whose employment is subject to, a PCSA. This would be determined by reference to those who were bound by, or whose employment was subject to, the original collective agreement.

134. Proposed subclause 11(1) would address who would be bound by the PCSA by reference to those who were bound by the original agreement. It would provide that an employer, an employee or an organisation would be bound by the PCSA if, immediately before the reform commencement, that employer, employee or organisation was bound by or a party to the original collective agreement. It would not matter whether the employer, employee or organisation would have been bound under the terms of the original collective agreement or by operation of a State or Territory industrial law.

135. In this Schedule an organisation takes on the proposed definition in Schedule 17 which provides that an organisation includes a transitionally registered association.

136. Proposed subclause 11(2) would address who would be bound by a PCSA in the future. It would provide that if, after the reform commencement, a person is employed by an employer who is bound by a PCSA and that employee would have been bound by the original collective agreement (as in force immediately before reform commencement), then the employee is bound by the PCSA.

137. Proposed subclause 12(1) would provide that a person’s employment would be subject to the PCSA if the employment of that person was, immediately before the reform commencement, subject to the original collective agreement.

138. Proposed subclause 12(2) would address whose employment would be subject to a PCSA in the future. It would provide that if, after the reform commencement, a person is employed by an employer who is bound by a PCSA and that employee’s employment would have been
subject to the original collective agreement (as in force immediately before reform commencement), then the employee’s employment is subject to the PCSA.

139. Subdivision C–Terms of a preserved collective State agreement

Clause 13 – Terms of a preserved collective State agreement

140. Clause 13 would provide for the terms of the PCSA. It is intended that the terms of the PCSA would comprise:

- the terms of the original collective agreement (subclause 13(1));
- the terms of any State award that, immediately before the reform commencement, actually determined a term or condition of employment of an employee bound by or subject to the original collective agreement (subclause 13(2)); and
- a provision of a State or Territory law that, immediately before the reform commencement, actually determined a preserved entitlement of an employee bound by or subject to the original collective agreement (subclause 13(3)).

141. This recognises that where an employee’s employment is regulated by a State employment agreement, that agreement is not necessarily comprehensive of all the employee’s terms and conditions of employment. There may be terms and conditions of employment that are determined by a State award or particular State or Territory laws. If the award, or a particular law relating to a preserved entitlement, actually determined a term and condition of an employee’s employment on the day immediately before reform commencement, it is intended that the term of the award, or the provision of the law, would form a term of the PCSA.

142. A term will only be included in the PCSA to the extent that it actually applied to the person. If a term did not apply because, for example, it was included in an award which was excluded by the operation of the original collective agreement, then it would not be included in the PCSA. The phrase ‘as in force immediately before reform commencement’ makes it clear that the terms included in the original collective agreement or State awards would be preserved in the PCSA as they exist at that time, and would not be adjusted or varied to reflect subsequent changes to the agreement or awards. Similarly, any provision of a State or Territory law that determines a preserved entitlement would be preserved in the PCSA as it exists at that time, and would not be adjusted or varied to reflect subsequent legislative amendments. The terms and conditions of employment in a PCSA may only be varied in accordance with this Schedule.

143. Proposed subclause 13(4) would set out a definition of preserved entitlement. This definition would apply, when read with subclause 13(3), so that the provisions of a State or Territory law would form a term of a PCSA to the extent that they relate to a preserved entitlement and actually determined a term and condition of employment of the employee bound by (or subject to) the original individual agreement on the day immediately before reform commencement.
Illustrative Example

Sarah has been employed as a confectioner by Sweetsbury Pty Ltd (Sweetsbury) for 3 years. Sweetsbury and its employees, including Sarah, are bound by a certified agreement, made under the Queensland *Industrial Relations Act 1999* (the Act).

The certified agreement provides most of Sarah’s terms and conditions of employment. However it is silent on carer’s leave in relation to casual employees. Under the Act, long term casual employees are entitled to 5 days unpaid leave in each year to care and support members of their immediate family or members of their household when they are ill. Sarah comes within the definition of a long term casual employee under the Act as she has worked at Sweetsbury on a regular and systematic basis for at least one year, and is therefore entitled to five days unpaid carer’s leave each year.

At the reform commencement Sweetsbury and its employees that are bound by the certified agreement (which is a *State employment agreement* under subsection 4(1) of the WR Act) would become bound by a PCSA.

In this instance, the terms preserved in the PCSA under clause 13 would be the terms of the certified agreement as in force immediately before the reform commencement, and the provisions of the Act relating to carer’s leave for long term casuals as in force immediately before the reform commencement. Prior to reform commencement Sarah is entitled to carer’s leave and would therefore be entitled to it after the reform commencement under the terms of PCSA. On the other hand, Peter is not entitled to carer’s leave prior to the reform commencement because he is a casual employee who has only been employed by Sweetsbury for three months. Peter would be entitled to carer’s leave under the terms of the PCSA if he worked on a regular and systematic basis for at least one year.

*Clause 14 – Nominal expiry date of a preserved collective State agreement*

144. Proposed paragraph 14(a) would provide that the nominal expiry date of a PCSA would be the same date on which the original collective agreement would have nominally expired under the relevant State or Territory industrial law. This would include a nominal expiry date provided for under the terms of the agreement itself, or under a State or Territory law directly, or a combined effect of the two.

145. Proposed paragraph 14(b) would provide an exception to paragraph 14(a). If the nominal expiry date of the original individual agreement would have fallen more than three years after the commencement of the original agreement, then the nominal expiry date in the PCSA will instead be the last day of the three year period after the commencement of the original agreement. Note that a PCSA would continue to operate after the nominal expiry date has passed until it is terminated or replaced.

*Clause 15 – Powers of State industrial authorities*

146. Proposed subclause 15(1) would provide that if a PCSA confers a function or power on a State industrial authority, that function must not be performed and that power must not be exercised by the State industrial authority on or after the reform commencement. This subclause is intended to ensure that the terms and conditions of a PCSA are only enforced under this Act, and not under the State or Territory laws or in the State system in which the original individual...
agreement was made. It would not be appropriate for State industrial authorities to exercise powers or perform functions with respect to PCSAs as PCSAs would be federal instruments.

147. Proposed subclause 15(2) would provide that the employer and the persons bound by the PCSA may, by agreement, confer such a function or power on the AIRC. However this option would only apply in situations where the matter or issue does not relate to the resolution of a dispute about the application of the agreement. Proposed clause 15A provides that in such cases, the model dispute resolution process would apply (see Part VIIA of Schedule 1).

Clause 15A – Dispute resolution processes

148. Proposed subclause 15A(1) would provide that a PCSA is taken to include a term requiring disputes about the application of the agreement to be resolved in accordance with the proposed model dispute resolution process (Part VIIA of Schedule 1).

149. Proposed subclause 15A(2) would provide that any term of the PCSA that would otherwise deal with the resolution of those disputes is void to that extent. This subclause is intended to ensure that disputes in relation to the application of a PCSA are resolved in a manner which is consistent with the model dispute settlement resolution process established under the WR Act, including that employers and employees be encouraged to resolve disputes at the workplace level.

Clause 15B – Prohibited content

150. Proposed clause 15B would provide that a term of a PCSA is void to the extent that it contains prohibited content of a prescribed kind.

Division 2A–Effect and operation of a preserved State agreement

Proposed Division 2A would set out provisions regarding the effect and operation of a preserved State agreement. These provisions would apply to both PISAs and PCSAs, as they both fall within the definition of preserved State agreement (PSA) which would be set out in clause 1.

Clause 15C – Effect of preserved State agreement

151. Proposed subclause 15C(1) would provide that a PSA has effect according to its terms, except to the extent that its terms are varied or modified by this Part, or otherwise under this Act.

152. Proposed subclause 15C(2) would provide that this Part has effect despite the terms of the PSA itself, or any State award or law of a State.

153. Proposed subclause 15C(3) would clarify that none of the terms and conditions of a PSA are enforceable under the law of a State. The terms and conditions of employment included in a PSA would only be enforceable under the WR Act.

Clause 15D – Effect of awards while preserved State agreement in operation

154. Proposed clause 15D would provide that an award has no effect in relation to an employee while the terms of a PSA operate in relation to the employee. The WR Act currently provides
that a State employment agreement may generally regulate the wages and conditions of employment of an employee in spite of a federal award that would otherwise be binding on an employer in respect of the employee (subsection 152(3)). This is an exception to the approach in subsection 152(1) which provides that a federal award prevails over State laws to the extent of any inconsistency. This provision would preserve the effect of subsection 152(3) in relation to the terms and conditions contained in the PSA. This is necessary to allow the terms and conditions from the original agreement to continue to interact with a relevant award as they would do if the reform commencement did not occur.

**Illustrative Example**

Jenny works as a receptionist at Henry’s Strike ‘em Down Ten Pin Bowling Centre in Parramatta, NSW. Her employment is covered by an enterprise agreement made under the *Industrial Relations Act 1996* (NSW). Henry’s business is a respondent to the *AWU Ten Pin Bowling Award 2003*.

Prior to reform commencement, the agreement regulated Jenny and her colleagues’ terms and conditions of employment in spite of the federal award, because of the operation of section 152 of the WR Act. The terms of the agreement will be included in a preserved State agreement after reform commencement, and the terms will continue to prevail over the terms of the award.

*Clause 15E – Relationship between preserved State agreement and Australian Fair Pay and Conditions Standard*

155. Proposed clause 15E would provide that the Standard does not apply to an employee if the employee is bound by a PSA, or the person’s employment is subject to the PSA. This mirrors the situation for pre-reform federal agreements (see clause 22 of Schedule 14). The Standard does not apply to pre-reform federal agreements because those agreements were made under different circumstances prior to the Standard operating.

*Clause 15F – Relationship between preserved State agreement and public holiday entitlement*

156. Proposed clause 15F would provide that the public holiday entitlement set out in proposed Division 1A of Part VIA of the Bill does not apply to an employee if the employee is bound by a PSA, or the person’s employment is subject to the PSA. This mirrors the situation for pre-reform federal agreements (see proposed clause 30A of Schedule 14). This entitlement does not apply to pre-reform federal agreements because those agreements were made under different circumstances prior to the entitlement having effect.

*Clause 15G – When a preserved State agreement ceases to operate*

157. Proposed clause 15G would provide when a PSA ceases to operate.

158. Subclause 15G(1) would provide that a PSA ceases to be in operation if it is terminated under clause 21.

159. Subclause 15G(2) would provide that a PSA ceases to be in operation in relation to an employee, if a workplace agreement comes into operation in relation to the employee (paragraph...
15G(2)(a)), or if a workplace determination comes into operation in relation to the employee (paragraph 15G(2)(b)). This result would arise irrespective of whether the nominal expiry date of the PSA has passed. The nominal expiry date of a PISA is provided for in proposed clause 6. The nominal expiry date of a PCSA is provided for in proposed clause 14.

160. Subclause 15G(3) would provide that if a PSA has ceased to operate in relation to an employee because a workplace agreement or a workplace determination has come into operation in relation to an employee, then the PSA would never operate again in relation to that employee.

Item 275 - Schedule 1, item 360, page 610 (lines 8 to 16)

161. This item would substitute a new proposed subclause 23(1). The amendment is intended to align the wording of subclause 23(1) more closely with the wording of subsection 110(1). The amendment is not intended to effect any substantive change to the effect of subclause 23(1).

Item 276 - Schedule 1, item 360, page 611 (line 13)

162. This item would amend proposed subclause 23(7) by adding new paragraphs 23(7)(c) – (d). Paragraph 23(7)(c) would add a person affected by the industrial action to the list of persons able to apply for a remedy for a breach of the civil remedy provision in subclause 23(1). Paragraph 23(7)(d) is identical to the previous paragraph 23(7)(c) and would provide that any other person prescribed by the regulations can apply for a remedy for a breach of the civil remedy provision in subclause 23(1).

Item 277 - Schedule 1, item 360, page 611 (line 24)

163. This item would amend proposed subclause 23(8) by adding new paragraphs 23(7)(d) – (e). Paragraph 23(8)(d) would add a person affected by the industrial action to the list of persons able to apply for a remedy for a breach of the civil remedy provision in subclause 23(3). Paragraph 23(8)(e) is identical to the previous paragraph 23(8)(d) and would provide that any other person prescribed by the regulations can apply for a remedy for a breach of the civil remedy provision in subclause 23(3).

Item 278 - Schedule 1, item 360, page 611 (line 24)

164. Proposed item 278 would amend proposed clause 25 by adding the words ‘or organising’. The amendment is a technical amendment to ensure that both engaging in and also organising industrial action in contravention of proposed clauses 23 or 24 is not protected action for the purposes of the Act.

Item 279 - Schedule 1, item 360, page 613 (after line 17)

Clause 25A – Protected conditions where employment was subject to preserved State agreement

165. Proposed clause 25A would provide a mechanism by which certain protected conditions are automatically read into a workplace agreement unless expressly excluded or modified.
166. Subclause 25A(1) would set out the application of the clause. It would apply if a person’s employment was subject to a PSA and the agreement ceased to operate (under proposed clause 15G) because a workplace agreement came into operation.

167. Subclause 25A(2) would provide that protected preserved conditions are taken to be included in the workplace agreement and have effect in relation to the employment of the person, subject to any terms of the workplace agreement that expressly exclude or modify all or part of them.

168. Subclause 25A(3) would provide that despite paragraph 25A(2)(c), which allows workplace agreement to expressly exclude or modify protected preserved conditions, those protected preserved conditions that are about outworkers conditions have effect, despite any terms of a workplace agreement that provide, in a particular respect, a less favourable outcome for the outworker.

169. Subclause 25A(4) would define outworker conditions to mean conditions for outworkers, other than pay, 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 awards or awards for employees who perform the same kind of work at an employer’s business or commercial premises. The definition of outworker conditions in subclause 25A(4) is similar to the provisions of paragraph 116(1)(b) of the Bill, which relates to allowable award matters.

170. The effect of the provisions would be that a workplace agreement could only exclude or modify outworker conditions if the agreement provided a more favourable outcome for the outworker than the outworker conditions.

171. Subclause 25A(4) would also provide definitions for the purposes of subclauses 25A(1) – (3). The definition would provide that protected preserved conditions, in relation to the employment of a person, are the terms of a State award or a provision of a State or Territory industrial law (as in force immediately before the reform commencement) that would have determined a term or condition of that employment had not been subject to a State employment agreement to the extent that the term or provision:

- is about protected allowable award matters (the list of matters is defined in proposed subclause 25A(4)); or

- is incidental to a protected allowable award matter and may be included in an award as permitted by section 116I; or

- is a machinery provision that is in respect of a protected allowable award matter and may be included in an award as permitted by section 116I; and

- is not about matters that are not allowable award matters because of section 116B; or

- is not about any matters specified in the regulations.
172. The provision would ensure that an employee who is bound by or subject to a PSA, and who subsequently makes a workplace agreement, would be entitled to protected preserved conditions. They would, subject to the limitations above, be drawn from any State award or State or Territory law (as in force immediately before reform commencement) that would have determined an employee’s terms or conditions of employment. For the purpose of determining the protected preserved conditions, the effect of any State employment agreement would be ignored. This is because the State employment agreement may have traded off particular terms in an award or provisions under a State or Territory law. It is intended that these conditions would be protected for the purposes of bargaining for a workplace agreement under the WR Act. An employer and employee would, however, be able to trade them off in the manner provided for by subclauses 25(1) – (3).

Item 280 - Schedule 1, item 360, page 614 (line 27) to page 619 (line 26)

173. Proposed item 280 would substitute a new Division 1–What is a notional agreement preserving State awards, and a new Division 2–Effect and operation of a notional agreement preserving State awards, in Part 3–Notional agreements preserving State awards, of Schedule 15–Transitional treatment of State employment agreements and State awards. The amendments effected by the substitution are technical, and intended to improve readability.

Division 1–What is a notional agreement preserving State awards?

Subdivision A–What is a notional agreement preserving State awards?

Proposed clause 31 – Notional agreements preserving State awards

174. Proposed clause 31 would provide that a notional agreement preserving State awards (NAPSA) would come into operation on reform commencement where a term or condition of a person’s employment was regulated under a state award or a State or Territory industrial law. State award would be defined in subsection 4(1) to mean an award, order, decision or determination of a State industrial authority. In this Schedule, the relevant State award is referred to as the original State award. The relevant State or Territory law is referred to as the original State law.

175. The NAPSA is taken to come into operation in respect of an employer in a single business or part of a single business and relevant employees. These terms would be defined in subsection 4(1) by reference to the definition in proposed section 95A. Subsection 95A(2) and subparagraph 95A(2)(b)(i) would also apply to proposed clause 31, so that two or more employers would be deemed to be one employer for the purposes of clause 31 where certain conditions are met.

176. Proposed clause 31 is qualified by proposed paragraph 31(a) which would provide that a NAPSA would not come into operation if any term or condition of that employee’s employment with the employer is regulated by a State employment agreement at the reform commencement. The intention of proposed paragraph 31(a) is to ensure that, where any term or condition of employment between an employer and a employee is regulated by a State employment agreement, those terms and conditions are preserved as a PSA under Part 2 of this Schedule, and not as a NAPSA under Part 3. The actual terms and conditions of employment that would be preserved in a NAPSA would be determined by proposed clause 34 (see below).
Subdivision B—Who is bound by or subject to a notional agreement preserving State awards?

Clause 32 – Who is bound by the notional agreement preserving State awards?

Clause 33 – Who is subject to a notional agreement preserving State awards

177. Proposed clauses 32 and 33 would set out who is bound by, or whose employment is subject to, a NAPSA. This would be determined by reference to those who are bound by, or whose employment was subject to the original State award or the original State law.

178. Proposed subclause 32(1) would address who would be bound by the NAPSA by reference to those who were bound by the original State award or original State law. It would provide that an employer in the business (or part), an employee employed in the business (or part) or an organisation having at least one member who is such an employee would be bound by the NAPSA.

179. In this Schedule an organisation takes on the proposed definition in Schedule 17 which provides that an organisation includes a transitionally registered association.

180. Proposed subclause 32(2) would address who would be bound by a NAPSA in the future. It would provide that a person is bound by the NAPSA if:

- after the reform commencement, they are employed in the business (or part);
- they would have been bound by the original State award or original State law (as in force immediately before reform commencement); and
- they are not bound by a PSA.

181. Proposed subclause 33(1) would provide that a person’s employment would be subject to the NAPSA if the employment of that person was, immediately before the reform commencement, subject to the original State award or original State law.

182. Proposed subclause 33(2) would address whose employment would be subject to a NAPSA in the future. It would provide that a person is subject to the NAPSA if:

- after the reform commencement, the person is employed in the business (or part);
- the person would have been subject to the original State award or original State law (as in force immediately before reform commencement); and
- the person’s employment is not subject to
- a PSA.
Illustrative Example

Six months after the reform commencement Brooke is employed as an entry level process worker, by Milky Goodness Pty Ltd (Milky Goodness) a manufacturer of dairy products, based in Launceston, Tasmania. Prior to the reform commencement, the terms and conditions of employment of process workers at Milky Goodness were regulated by the Tasmanian Butter and Cheese Makers Award 2005. After the reform commencement the terms and conditions of employment that existed in the Butter and Cheese Makers Award 2005 immediately before reform commencement would be preserved in a notional agreement preserving state awards. At the reform commencement Milky Goodness, and its current employees become bound to, or subject to the notional agreement. When Brooke is employed by Milky Goodness, her employment would become subject to the NAPSA. Milky Goodness and Brooke would be able to enforce the NAPSA under the WR Act.

Clause 34 – Terms of notional agreement preserving State awards

183. Proposed clause 34 would provide for the terms of the NAPSA. It is intended that the terms of the NAPSA would comprise:

- the terms of the original State award that, immediately before the reform commencement, actually determined a term or condition of employment of a person in the business (or part) provided that person was not bound by, party to or subject to a State employment agreement (subclause 34(1)); and

- a provision of a State or Territory law that, immediately before the reform commencement, actually determined a preserved entitlement of a person in the business (or part) provided that person was not bound by, party to or subject to a State employment agreement (subclause 34(2)).

184. A term will only be included in the NAPSA to the extent that it actually applied to a person employed in the business (or part). The phrase ‘as in force immediately before reform commencement’ makes it clear that the terms included in the original State award or original State law would be preserved in the NAPSA as they exist at that time, and would not be adjusted or varied to reflect subsequent changes to the award or legislation. The terms and conditions of employment in a NAPSA may only be varied in accordance with this Schedule.

185. Proposed subclause 34(3) would set out a definition of preserved entitlement. This definition would apply, when read with subclause 34(2), so that the provisions of a State or Territory law would form a term of a NAPSA to the extent that they relate to a preserved entitlement and actually determined a term and condition of employment of the person employed in the business (or part) on the day immediately before reform commencement.
Illustrative Example

Julianne has been employed as a baker’s assistant at Crusty Loaves Pty Ltd (Crusty Loaves), in Perth, Western Australia, for 8 years. She is covered by the Bakers’ (Metropolitan) Award No.13 of 1987 (Bakers’ Award). Among other things, the award includes provisions dealing with redundancy and provides a scale of severance pay depending on the period of continuous service. The maximum that an employee is entitled to is eight weeks severance pay in respect of a period of continuous service of four or more years.

A 2005 General Order of the Western Australian Commission in relation to redundancy applies to all employees (as defined in the Industrial Relations Act 1979). It also provides a scale of severance pay. Under its terms, the maximum that an employee is entitled to is 16 weeks severance pay in respect of a period of continuous service of nine years and less than 10 years. This means that at the reform commencement, the terms of the notional agreement would include the terms of the Bakers’ Award as well as the terms from the General Order that provides an entitlement to redundancy more beneficial than the Bakers’ Award, and to the extent that those terms apply to Crusty Loaves and its employees (including Julianne).

Clause 35 – Powers of State industrial authorities

186. Proposed subclause 35(1) would provide that if a NAPSA confers a function or power on a State industrial authority, that function must not be performed and that power must not be exercised by the State industrial authority on or after the reform commencement. This subclause is intended to ensure that the terms and conditions of a NAPSA are only enforced under this Act, and not under the State or Territory laws or in the State system in which the original agreement was made. It would not be appropriate for State industrial authorities to exercise powers or perform functions with respect to federal instruments.

187. Proposed subclause 35(2) would provide that the employer and the persons bound by the NAPSA may, by agreement, confer such a function or power on the AIRC. However this option would only apply in situations where the matter or issue does not relate to the resolution of a dispute about the application of the agreement. Proposed clause 36 would provide that in such a case, the model dispute resolution process would apply (see Part VIIA of Schedule 1).

Clause 36 – Dispute resolution process

188. Proposed subclause 36(1) would provide that a NAPSA is taken to include a term requiring disputes about the application of the notional agreement to be resolved in accordance with the model dispute resolution process (see Part VIIA of Schedule 1).

189. Proposed subclause 36(2) would provide that any term of the NAPSA that would otherwise deal with the resolution of those disputes is void to that extent.

Clause 37 – Prohibited content

190. Proposed clause 38 would provide that a term of a NAPSA is void to the extent that it contains prohibited content of a prescribed kind.

191. Division 2–Effect and operation of a notional agreement preserving State awards
Clause 38 – Effect of notional agreement preserving State awards

192. Proposed subclause 38(1) would provide that a NAPSA has effect according to its terms, except where its terms are modified or varied under this Part or under the Act.

193. Subclause 38(2) would make it clear that this Part of the Act has effect despite terms and conditions of the original State award, the original law or any other law of a State.

194. Subclause 38(3) would provide that none of the terms and conditions of employment included in the NAPSA are enforceable under the law of a State.

Clause 38A – Operation of notional agreement preserving State awards

195. Proposed clause 38A would provide the circumstances whereby a NAPSA would cease to operate.

196. Subclause 38A(1) would provide that a NAPSA ceases to be in operation at the end of the period of three years beginning on reform commencement. During this period, the persons who are bound by, or whose employment is subject to, the NAPSA may become bound by an award (see proposed sections 120, 120A, and 120B). During this period, the AIRC would undertake award rationalisation. The Award Review Taskforce will report to Government with recommendations for the rationalisation of award wage and classification structures and federal awards. Under its terms of reference, the Taskforce will recommend an approach to rationalise awards on an industry sector basis, and to permit general coverage of employers and employees according to the relevant industry sector based awards.

197. Subclause 38A(2) would provide that a NAPSA ceases to be in operation in relation to an employee if a workplace agreement comes into operation in relation to the employee. The workplace agreement could be a collective agreement or an AWA.

198. This would mean that the NAPSA ceases to regulate the relationship between that employee and employer. The employer would still be bound to, or subject to the NAPSA to the extent that the notional agreement binds, or regulates terms and conditions of employment in relation to other employees bound to, or subject to the NAPSA.

199. It is noted at proposed clause 38A that a reference to a workplace agreement includes a reference to a workplace determination.

200. Subclause 38A(3) would provide that a notional agreement ceases to be in operation in relation to an employee if an award made under proposed section 118E comes into operation in relation to the employee. Proposed section 118E provides for the making of awards to give effect to award rationalisation.

201. Subclause 38A(4) would provide that if a notional agreement has ceased to operate in relation to an employee because of subclauses 33(2) or (3), the agreement can never operate again in relation to that employee.

Item 281 - Schedule 1, item 360, page 624 (line 9)
202. This item would make a technical amendment to proposed subclause 45(1) to address the situation where one than one term of a NAPSA is about one of the matters set out at paragraphs 45(1)(a) – (g).

**Item 282 - Schedule 1, item 360, page 624 (line 25)**

203. This item would make a technical amendment by inserting a proposed subclause 45(4) to address the situation where one than one term of a NAPSA is about one of the matters set out at paragraphs 45(1)(a) – (g). It would make clear that the terms taken together constitute the preserved notional term of the NAPSA about the particular matter.

**Item 283 - Schedule 1, item 360, page 624 (lines 30 and 31)**

204. Proposed item 283 would substitute a new proposed paragraph 45(5)(a). The amendment is consequential on an amendment to the definition of parental leave in paragraph 117(7)(a) of the Bill.

**Item 284 - Schedule 1, item 360, page 625 (lines 5 to 7)**

205. Proposed item 284 would substitute a new note to subclause 45(5). The amendment is consequential on an amendment to the subsection 117(7) of the Bill.

**Item 285 - Schedule 1, item 360, page 629 (after line 14)**

206. Proposed clause 52 of Schedule 15 would provide a mechanism by which certain protected notional conditions are automatically read into a workplace agreement unless expressly excluded or modified. Proposed item 285 would insert subclause 52(2A) into proposed clause 52. Subclause 52(2A) would provide that despite paragraph 52(2)(c), which allows a workplace agreement to expressly exclude or modify protected notional conditions, those protected notional conditions that are about outworkers conditions have effect, despite any terms of a workplace agreement that provide, in a particular respect, a less favourable outcome for the outworker.

207. Subclause 52(3) would define *outworker conditions* to mean conditions for outworkers, other than pay, 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 awards or awards for employees who perform the same kind of work at an employer’s business or commercial premises. The definition of outworker conditions in subclause 52(3) is similar to paragraph 116(1)(b) of the Bill, which relates to allowable award matters.

208. The effect of the proposed amendment would be that a workplace agreement could only exclude or modify outworker conditions if the agreement provided a more favourable outcome for the outworker than the outworker conditions.

**Item 286 - Schedule 1, item 360, page 629 (after line 35)**

209. Proposed subclause 52(3) of the Bill would provide definitions for the purposes of subclauses 52(1) – (2A), which would deal with protected notional conditions. Relevantly, the definition of protected allowable award matters would include paragraph (d) that provides for the
observance of days declared by or under a law of a State or Territory to be observed as public holidays and entitlements to payment in respect of those days. Proposed item 286 would insert a new paragraph (da) into the definition of protected allowable award conditions. It would include in the list of protected allowable award matters a term of an award that provides for days to be substituted, or a procedure for substituting, public holidays.

210. In addition, it would have the effect of making the following protected allowable award matters:

- a term that enables a public holiday declared in a metropolitan area to be substituted for a public holiday in a country or regional area; and
- a procedure for agreement between an employer and an individual employee with respect to taking an alternate day as the public holiday in lieu of a day that would otherwise be the designated public holiday because of paragraph (d) of the definition.

Item 287 - Schedule 1, item 360, page 630 (after line 15)

211. Proposed subclause 52(3) would provide a definition of protected notional conditions.

212. Proposed item 287 would make the definition of protected notional conditions consistent with the operation of proposed section 116I of the Bill. The substituted paragraph (a) of the definition would provide that protected notional conditions include terms of a NAPSA that are:

- about protected allowable award matters;
- incidental to protected allowable award matters that may be included in an award because of proposed section 116I; or
- machinery provisions that relate to protected allowable award matters and that may be included in an award because of proposed section 116I.

213. It would ensure that protected notional conditions fully incorporate the relevant terms and conditions from NAPSA (including terms that are incidental and essential to the practical operation of protected allowable award matters and machinery terms) and ensure that they operate in a practical way.

Item 288 - Schedule 1, item 360, page 630 (line 17)

214. Proposed item 288 would amend subparagraph (b)(i) of the definition of protected notional conditions in subclause 52(3) to say “matters that are not about allowable award matters because of section 116B.” This is a technical amendment so that the language of subparagraph (b)(i) is more precise.

Item 289 - Schedule 1, item 360, page 630 (after line 18)
215. Proposed item 289 would insert a new Division 6A—Industrial action during the life of an enterprise award.

Clause 52AA – Action taken during life of enterprise award not protected

216. Proposed subclause 52AA(1) would provide that engaging in or organising industrial action is not protected action if:

- the person engaging in or organising the industrial action is bound by, or subject to, a NAPSA that includes terms and conditions from an enterprise award;
- the enterprise award includes a term or condition relating to industrial action;
- engaging in or organising the industrial action would breach that term or condition; and
- the nominal expiry date for the enterprise award has not yet passed.

217. Proposed subclause 52AA(2) would set out a definition of enterprise award. It would be defined as a State award:

- that applies to a single business or part of a single business;
- that has a nominal expiry date; and
- that has a no extra claims clause.

218. The terms single business or part of a single business would be defined in subsection 4(1) by reference to the definition in proposed section 95A. Subsection 95A(2) and subparagraph 95A(2)(b)(i) would also apply to proposed subclause 52AA(2), so that two or more employers would be deemed to be one employer for the purposes of subclause 52AA(2) where certain conditions are met.

219. Proposed subclause 52AA(2) would set out a definition of nominal expiry date. It would be defined as the last day of the period during which the enterprise award is specified to have effect.

220. Some State awards are made at the enterprise level as a result of bargaining, and are more akin to an agreement. These ‘enterprise awards’ are frequently expressed to apply for a particular period, contain provisions stating that the party will make no extra claims during that period, and contain restrictions on industrial action. The amendment would make clear that where the parties have agreed to a restriction or limitation on taking industrial action for the nominal life of the award, any industrial action taken to support or advance claims for a collective agreement that is in breach of that restriction or limitation is not protected action. The amendment would not prevent the parties from taking protected action that falls outside the scope of the restriction or limitation, nor would it prevent the parties from taking protected industrial action in support of a new collective agreement after the nominal expiry date of the enterprise award has passed (even if the action breached the restriction or limitation).
Illustrative example

Hard-As Steel is a party to an enterprise award (within the meaning in subclause 52AA(2)). The enterprise award has a nominal expiry date of 30 September 2007. Because Hard-As Steel operates a 24 hour operation that cannot be shut down without significant damage being caused to plant and equipment, the enterprise award includes a term that if employees take industrial action, they will ensure that there are still sufficient employees working to ensure that the plant continues to operate at least at minimum levels.

At the reform commencement, a NAPSA would come into operation. It would include the term of the enterprise award relating to industrial action.

In January 2007, following the breakdown on negotiations for a new federal collective workplace agreement, employees apply for and hold a secret ballot on industrial action. The ballot favours industrial action, and the employees serve the relevant notices under the Act (see Part VC) for the action to be protected action. The action specified in the notices is a number of stoppages of work for one hour. On the instruction of their shop steward, Geoff, all of the employees take part in the stop work and no minimum coverage occurs. The plant does not continue to operate at minimum levels and Hard-As Steel incurs substantial costs.

The industrial action would not be protected action because it was taken in breach of the term of the enterprise award included in the NAPSA, and was taken before the nominal expiry date of the NAPSA.

Item 290 – Schedule 1, item 360, page 632 (line 10)

221. This amendment is consequential to item 302, which would broaden the scope of Part 4 of Schedule 16 of the Bill so that it applies to all pre-reform certified agreements.

Item 291 – Schedule 1, item 360, page 632 (line 31)

222. This amendment is consequential to item 302, which would broaden the scope of proposed Part 4 of Schedule 16 of the Bill so that it applies to all pre-reform certified agreements.

223. The Bill provides for the transfer of Division 2 pre-reform certified agreements, whether they were actually made under Division 2 of Part VIA of the WR Act, or whether they are Division 3 pre-reform certified agreements treated as Division 2 pre-reform certified agreements under the terms of Schedule 14. However, since all Division 3 pre-reform certified agreements are now included in new proposed Part 4 of Schedule 16 with its widened scope, the words further defining which Division 2 agreements are covered are redundant.

Item 292 – Schedule 1, item 360, page 632 (after line 33), after the definition of Division 2 pre-reform certified agreement in clause 3

224. This amendment is consequential to item 302, which would broaden the scope of proposed Part 4 of Schedule 16 of the Bill so that it applies to all pre-reform certified agreements.
225. New Part 4 of Schedule 16 provides for the transmission of both Division 2 and Division 3 pre-reform certified agreements. The amendment inserts a definition of ‘Division 3 pre-reform certified agreement’ accordingly.

**Item 293 – Schedule 1, item 360, page 633 (after line 10)**

226. This amendment is consequential to item 302, which would broaden the scope of proposed Part 4 of Schedule 16 of the Bill so that it applies to all pre-reform certified agreements.

227. New Part 4 of Schedule 16 provides for the transmission of both Division 2 and Division 3 pre-reform certified agreements. The amendment inserts a definition of ‘pre-reform certified agreement’ accordingly.

**Item 293 – Schedule 2, item 2, page 660 (line 5), after “clause 3”, insert “or 10”**

228. Proposed item 293 would amend the definition of preserved State agreement in proposed Schedule 17–Transitional arrangements for State organisations. The amendment is consequential on amendments made to Schedule 15–Transitional treatment of State employment agreements and State awards.

**Item 294 – Schedule 1, item 360, page 633, after the proposed definition of pre-reform certified agreement**

229. This amendment is consequential to item 271, which would insert new definitions of ‘preserved collective State agreement’ and ‘preserved individual State agreement’ into Schedule 15.

**Item 295 – Schedule 1, item 360, page 633 (line 21)**

230. This amendment is consequential to item 302, which would broaden the scope of proposed Part 4 of Schedule 16 of the Bill so that it applies to all pre-reform certified agreements.

**Item 296 – Schedule 1, item 360, page 633 (after line 25), after the definition of transitional industrial instrument in clause 3**

231. This amendment would insert a definition of ‘instrument’ for the purposes of proposed Schedule 16 to ensure the Schedule is read as transmitting certain types of instruments only.

**Item 297 – Schedule 1, item 360, page 634 (after line 24), at the end of subclause 5(1)**

232. This amendment is consequential to item 301, which would provide that where the transmitting instrument is a Division 3 pre-reform certified agreement that binds an employer who is not within the meaning of proposed subsection 4AB(1), references in Schedule 16 to ‘employees’ and ‘employment’ are to have their ordinary meaning.

**Item 298 – Schedule 1, item 360, page 635 (after line 3), at the end of subclause 5(2)**

233. This amendment is consequential to item 301, which would provide that where the transmitting instrument is a Division 3 pre-reform certified agreement that binds an employer
who is not within the meaning of proposed subsection 4AB(1), references in Schedule 16 to ‘employees’ and ‘employment’ are to have their ordinary meaning.

**Item 299 – Schedule 1, item 360, page 635 (after line 18), at the end of subclause 6(1)**

234. This amendment is consequential to item 301, which would provide that where the transmitting instrument is a Division 3 pre-reform certified agreement that binds an employer who is not within the meaning of proposed subsection 4AB(1), references in Schedule 16 to ‘employees’ and ‘employment’ are to have their ordinary meaning.

**Item 300 – Schedule 1, item 360, page 635 (after line 26), at the end of subclause 6(2)**

235. This amendment is consequential to item 301, which would provide that where the transmitting instrument is a Division 3 pre-reform certified agreement that binds an employer who is not within the meaning of proposed subsection 4AB(1), references in Schedule 16 to ‘employees’ and ‘employment’ are to have their ordinary meaning.

**Item 301 – Schedule 1, item 360, page 635 (after line 28), at the end of Part 2**

236. This amendment is consequential to item 302, which would broaden the scope of proposed Part 4 of Schedule 16 of the Bill so that it applies to all pre-reform certified agreements.

237. Certified agreements made under Division 3 of Part VIA of the pre-reform Act are in settlement of an industrial dispute. Therefore, Division 3 certified agreements can bind any type of employer regardless of whether they are a constitutional corporation or not, unlike Division 2 certified agreements.

238. After the reform commencement, Division 3 certified agreements binding employers who are not constitutional corporations and who do not otherwise fall within the federal system as defined by proposed section 4AB(1) will continue as per proposed Schedule 15. New Part 4 of Schedule 16 will provide for the transfer of those Division 3 certified agreements, both to employers within the scope of proposed subsection 4AB(1) and to employers not within proposed subsection 4AB(1) who are bound by a Division 3 pre-reform certified agreement. To ensure that all relevant transmissions are captured by new Part 4, it is necessary to include new section 6A, which would extend the meaning of ‘an employee’ and ‘employment’ so that they will have their ordinary meaning.

**Item 302 – Schedule 1, item 360, page 637 (after line 13) to page 643 (line 34)**

239. This amendment would omit and substitute Part 4 of Schedule 16 of the Bill.

**New Part 4 – Transmission of Division 2 pre-reform certified agreements**

240. Part 4 of Schedule 16 applies to the transmission of Division 2 pre-reform certified agreements. The amendment would broaden the scope of Part 4 so that it would contain the transmission of business provisions specific to the transfer of all pre-reform certified agreements from an old employer to a new employer.

**New Division 1**
241. This item would create a new Division within new Part 4 to deal with the general provisions relating to the transfer of pre-reform certified agreements.

*New clause 10 – Transmission of pre-reform certified agreement*

*New employer bound by Division 2 pre-reform certified agreement*

242. Proposed subclause 10(1) would provide that where the old employer and employees of the old employer were bound by a Division 2 pre-reform CA immediately before the time of transmission and there is at least one transferring employee in relation to the Division 2 pre-reform CA, the new employer will be bound by the Division 2 pre-reform CA.

243. This means that a new employer who is a successor, transmitter or assignee to a business or part of a business, will be bound by the Division 2 pre-reform CA that was binding on the old employer, in respect of an employee if that employee is employed by the new employer within 2 months and the Division 2 pre-reform CA is capable of covering the employee’s employment with the new employer.

244. Proposed Note 1 would mention that where the Division 2 pre-reform CA becomes binding on the new employer by force of this clause, the new employer may have obligations imposed by clauses 28 and clause 29 with respect to notification.

245. Proposed Note 2 would mention that the provision should be read in conjunction with, and subject to, proposed clause 11.

*New employer bound by Division 3 pre-reform certified agreement*

246. Proposed subclause 10(2) would provide that where the old employer is within the scope of proposed subsection 4AB(1), and the old employer and employees of the old employer were bound by a Division 3 pre-reform CA immediately before the time of transmission and there is at least one transferring employee in relation to the Division 3 pre-reform CA, the new employer will be bound by the Division 3 pre-reform CA.

247. This means that a new employer who is a successor, transmitter or assignee to a business or part of a business, will be bound by the Division 3 pre-reform CA that was binding on the old employer, in respect of an employee if that employee is employed by the new employer within 2 months and the Division 3 pre-reform CA is capable of covering the employee’s employment with the new employer.

248. Note that the new employer would need to come within the scope of proposed subsection 4AB(1) for proposed new subclause 10(2) to operate to transmit the Division 3 pre-reform CA as proposed new clause 6A does not apply.

249. Proposed Note 1 would mention that where the Division 3 pre-reform CA becomes binding on the new employer by force of this clause, the new employer may have obligations imposed by clauses 28 and clause 29 with respect to notification.

250. Proposed Note 2 would mention that the provision should be read in conjunction with, and subject to, proposed clause 11.
251. Proposed subclause 10(3) would provide that where the old employer is not within the scope of proposed subsection 4AB(1), and the old employer and employees of the old employer were bound by a Division 3 pre-reform CA immediately before the time of transmission and there is at least one transferring employee in relation to the Division 3 pre-reform CA, the new employer will be bound by the Division 3 pre-reform CA if the new employer is within the scope of proposed subsection 4AB(1) and/or is bound by another Division 3 pre-reform CA at the time of transmission.

252. This means that a new employer who is a successor, transnitee or assignee to a business or part of a business, will be bound by the Division 3 pre-reform CA that was binding on the old employer, in respect of an employee if that employee is employed by the new employer within 2 months and the Division 3 pre-reform CA is capable of covering the employee’s employment with the new employer.

253. Note that the new employer does not need to come within the scope of proposed subsection 4AB(1) for proposed new subclause 10(3) to operate to transmit the Division 3 pre-reform CA as proposed new clause 6A does applies (to which Proposed Note 1 refers).

254. Proposed Note 2 would mention that where the Division 3 pre-reform CA becomes binding on the new employer by force of this clause, the new employer may have obligations imposed by clauses 28 and clause 29 with respect to notification.

255. Proposed Note 3 would mention that the provision should be read in conjunction with, and subject to, proposed clause 11.

Period for which new employer remains bound

256. Proposed subclause 10(4) would establish for how long the new employer will be bound by the pre-reform CA. It would identify five events, providing that when any one relevant event occurs, whichever is first, the new employer will cease to be bound by the pre-reform CA, in its entirety.

257. Firstly, the pre-reform CA may be terminated in accordance with section 170MG of the pre-reform Act. This means that the pre-reform CA may be terminated by the AIRC where there is valid majority of employees who approve the termination. Note that proposed subclause 12(3) would provide that a pre-reform CA may not be terminated under section 170MH or 170MHA of the pre-reform Act, during the transmission period, even where the agreement has reached its nominal expiry date.

258. Secondly, the pre-reform CA would cease to bind the new employer when there are no longer any transferring employees in relation to the pre-reform CA. This is where all the transferring employees, for example, either cease to be employed by the new employer or move to another job while working for the new employer that is not capable of being covered by the pre-reform CA.

259. Thirdly, the new employer would cease to be bound by the pre-reform CA in respect of the transferring employees when the transferring employees replace the pre-reform CA with a collective agreement, or all of the transferring employees make AWAs with the new employer.
260. The proposed Note would mention that proposed subclause 10(6) should be considered to determine how the new employer ceases to be bound by a pre-reform CA in respect of each transferring employee in order to assess whether all transferring employees are no longer bound by the pre-reform CA.

261. Fourthly, the pre-reform CA would not be binding on the new employer once the transmission period ends. This means that a new employer would only be bound by the pre-reform CA by force of subclauses 10(1), 10(2) or 10(3) for a maximum period of 12 months.

262. Lastly, where the transmitting pre-reform CA is a Division 3 pre-reform CA and the new employer is not within the scope of proposed subsection 4AB(1), if the transitional period (which is five years from the reform commencement) ends within the 12 month period post-transmission, then the transmitted Division 3 pre-reform CA will cease to apply at the end of the transitional period.

263. Proposed subclause 10(5) would provide that proposed paragraph 10(4)(d) does not apply (so that the 12 month maximum period of application is removed) where the old employer is outside the scope of proposed section 4AB(1) and is bound by a Division 3 pre-reform CA and the new employer is an incorporated version of the old employer. In these situations, proposed subclause 10(1) of Schedule 14 would provide that the Division 3 pre-reform certified agreement is to be treated as a Division 2 pre-reform certified agreement.

**Illustrative Example**

Romulus is employed by Star Holdings to work as a farmhand on a large property in northern NSW. Allan owns Star Holdings. The employment relationship between Star Holdings and its employees, including Romulus, is governed by a Division 3 pre-reform certified agreement. Allan decides to incorporate Star Holdings, which then changes its name to Star Pty Ltd. Romulus continues to be employed by Star Pty Ltd after the transmission. The Division 3 pre-reform certified agreement will continue to operate in respect of Romulus’s employment with Star Pty Ltd, including more than 12 months after transmission occurred.

Remus is employed by Moon Holdings as a farmhand on the property adjacent to Allan’s. Robert owns Moon Holdings. The employment relationship between Moon Holdings and its employees, including Remus, is governed by a Division 3 pre-reform certified agreement. Robert decides to sell the farm to Star Pty Ltd. Remus continues to be employed by Star Pty Ltd after the transmission. The Division 3 pre-reform certified agreement will continue to operate in respect of Remus’s employment with Star Pty Ltd, but because Star Pty Ltd is unrelated to Remus’s original employer, Moon Holdings, that agreement will only operate for a maximum period of 12 months after transmission occurred.

**Period for which new employer remains bound in relation to a particular transferring employee**

264. Proposed subclause 10(6) would provide the circumstances where the new employer would no longer be bound by the pre-reform CA in relation to each transferring employee in contrast to proposed subclause 10(4) which would stipulate when the new employer ceases to be bound by the pre-reform CA in respect of all employees. Subclause 10(6) lists three ways in which this may occur.
265. Firstly, the pre-reform CA would cease to be in operation in relation to a transferring employee where the new employer makes an AWA with the transferring employee.

266. Secondly, the pre-reform CA would cease to be in operation in relation to the transferring employee where it is replaced by a collective agreement between the new employer and the (formerly) transferring employee. Note that proposed clause 3 of Schedule 14 would provide that a collective agreement can replace a pre-reform CA, even where the Division 2 pre-reform CA has not reached its nominal expiry date.

267. Finally, the pre-reform CA may cease to be binding on a particular transferring employee because an event in proposed subclause 10(4) has occurred.

*New employer bound only in relation to employment of transferring employees in business being transferred*

268. Proposed subclause 10(7) would provide that a new employer is bound by the pre-reform CA in respect of transferring employees only, in relation to the business being transferred. This provision is intended to limit the application of the pre-reform CA to transferring employees while they are employed in the business being transferred. Therefore, employees of the new employer who are not transferring employees cannot be bound by the pre-reform CA.

*New employer bound subject to Commission order*

269. Proposed subclause 10(8) would provide that a new employer is bound by the pre-reform CA by operation of proposed subclauses 10(1), 10(2) 10(3), 10(4) and 10(6) subject to an order of the AIRC under proposed clause 14.

*Old employer’s rights and obligations that arose before time of transmission not affected*

270. Proposed subclause 10(9) would provide that this clause does not affect the rights and obligations of the old employer in respect of a transferring employee that arose before the time of transmission. This means, for example, that subclauses 10(1), 10(2) or 10(3) do not intend to transfer liability for accrued employee entitlements to a new employer from an old employer.

*New clause 11 – Interaction rules*

271. Proposed clause 11 would provide interaction rules that are specific to pre-reform CAs and other instruments. Proposed clause 11 is to be read in conjunction with clause 10.

*Transmitted certified agreement*

272. Proposed subclause 11(1) would provide that this clause applies if subclauses 10(1), 10(2) or 10(3) apply to the pre-reform CA (ie to a transmitted pre-reform CA).

*Existing certified agreement*

273. Proposed subclause 11(2) would specify arrangements for where the new employer is bound by a collective agreement immediately before the time of transmission (the *existing collective agreement*) with respect to other employees who are not transferring employees, and
the existing collective agreement would be capable of applying on its terms to a transferring employee. The existing collective agreement would not apply to the transferring employee by force of this clause.

274. This would ensure that a transmitted pre-reform CA cannot automatically be ‘overridden’ by an existing collective agreement that binds the new employer.

275. However, subclause 11(2) does not intend to prevent an existing collective agreement from applying to transferring employees where the transmitted pre-reform CA is terminated during the transmission period.

276. Proposed subclause 11(3) would provide that subclause 11(2) does not apply at the end of the transmission period. Therefore, at the end of the 12 months after transmission, if the existing collective agreement if it is capable of applying on its terms, would not be precluded from applying to a former transferring employee by subclause 11(2).

277. Proposed subclause 11(3) would also provide that where the transmitting pre-reform CA is a Division 3 pre-reform CA and the new employer is not within the scope of proposed subsection 4AB(1), if the transitional period (which is five years from the reform commencement) ends within the 12 month period post-transmission, then the existing collective agreement if it is capable of applying on its terms, would not be precluded from applying to a former transferring employee once the transitional period ends.

278. Proposed subclause 11(4) would provide that proposed subclause 11(3) does not apply (so that the 12 month maximum period of application is removed) where the old employer is outside the scope of proposed section 4AB(1) and is bound by a Division 3 pre-reform CA and the new employer is an incorporated version of the old employer. In these situations, proposed subclause 10(1) of Schedule 14 would provide that the Division 3 pre-reform certified agreement is to be treated as a Division 2 pre-reform certified agreement.

Transitional industrial instruments not to apply

279. Proposed subclause 11(5) would provide that from the time of transmission a transitional industrial instrument cannot apply to a transferring employee’s employment, other than the transmitted pre-reform CA. This means that a new employer’s existing transitional industrial instruments are not capable on their terms of applying to transferring employees.

280. Proposed subclause 11(6) would provide that subclause 11(5) has effect despite section 170LY of the pre-reform Act.

New clause 12 – Termination of transmitted pre-reform certified agreement

Transmitted agreement

281. Proposed subclause 12(1) would provide that this clause applies if subclause 10(1) applies to the pre-reform CA (ie to a transmitted pre-reform CA).

AWA
282. Proposed subclause 12(2) would provide that despite subclause 3(2) of Schedule 14, the transmitted pre-reform CA ceases to be in operation in relation to a transferring employee if the new employer and the transferring employee make a new AWA. This means that the transmitted pre-reform CA cannot bind the new employer in respect of the transferring employee again, when an AWA has operated in respect of the employment, even if the AWA is terminated prior to the end of the transmission period.

283. The proposed Note would clarify that a pre-reform CA is normally only suspended in respect of a particular employee while an AWA is in operation, whereas the effect of proposed subclause 12(2) would be to permanently cancel the transmitted pre-reform CA’s operation.

*Modified operation of sections 170MH and 170MHA of the old Act*

284. Proposed subclause 12(3) would provide that a person may not apply to the AIRC to have the transmitted pre-reform CA terminated under sections 170MH or 170MHA of the pre-reform Act during the transmission period, even though the agreement has passed its nominal expiry date. This provision is intended to be an exception to the rule that a CA may be terminated by the AIRC once it has reached its nominal expiry date.

*New Division 2 – Commission’s powers*

285. This item would create a new Division 2 within new Part 4 to outline the AIRC’s power to make orders with respect to a transferring pre-reform CA.

*New clause 13 – Application and terminology*

286. Proposed subclause 13(1) would provide that the Division applies if a person is bound by a pre-reform CA and that person’s business or part of a business becomes, or is likely to become transmitted.

287. This definition is to enable the Division to capture the time before transmission as well as at, or after, transmission.

288. Proposed subclause 13(2) defines terms to be used in the Division, which again reflect that the Division is to apply before, at and after the time of transmission.

*New clause 14 – Commission may make order*

289. Proposed subclauses 14(1) and (2) would provide that the AIRC can make an order that an *incoming employer*:

- is not, or will not be, bound by a pre-reform CA that would otherwise bind the incoming employer under proposed subclause 10(1); or

- is, or will be, bound by the pre-reform CA that binds an incoming employer by operation of subclause 10(1), but only to the extent that the AIRC’s order specified, including for a specified period.
290. The AIRC’s order must specify the day from which the order takes effect, however this time cannot be before the transfer time.

291. Proposed subclause 14(3) would provide that the AIRC cannot make an order that would vary or extend the transmission period to provide that a transmitted pre-reform CA is binding on a new employer for a period longer than 12 months.

*New clause 15 – When an application for an order can be made*

292. Proposed clause 15 would provide that an application for an order under subclause 14(1) can be made before, at or after the transfer time.

*New clause 16 – Who may apply for order*

293. Proposed clause 16 would prescribe who may apply for an order from the AIRC under proposed clause 14 in respect of a pre-reform CA.

294. Subclause 16(1) would provide that before the transfer time, an application for an order can only be made by the outgoing employer. Therefore, before the transfer time the incoming employer could not apply for an order that would limit the effect of a pre-reform CA.

295. Subclause 16(2) would provide that at or after the transfer time, an application may be made by the:

- incoming employer;
- a transferring employee in relation to the pre-reform CA;
- an organisation of employees that is bound by the pre-reform CA; or
- an organisation of employees that is entitled to apply in accordance with proposed paragraph 16(2)(d).

296. The outgoing employer cannot apply for an order at or after the transfer time as it would no longer be bound by the pre-reform CA in respect of the transferring employee under this Division.

*New clause 17 – Applicant to give notice of application*

297. Proposed clause 17 would provide that an applicant for an order by the AIRC under proposed clause 14 must take reasonable steps to give written notice of the application to all persons who may make submissions in relation to the application (a person who can make a submission is specified under clause 18). This is not a civil remedy provision.

*New clause 18 – Submissions in relation to application*

298. Proposed clause 18 would establish who may make a submission to the AIRC in relation to an application for an order under proposed clause 14 with respect to the pre-reform CA.
299. Under subclauses 18(1) and 18(2), before the transfer time the following must be given an opportunity by the AIRC to make a submission:

- the applicant;
- an employee of the outgoing employer who is bound by the pre-reform CA and who is employed in the business concerned;
- the incoming employer;
- an organisation of employees that is bound by the pre-reform CA;
- an organisation of employees that is entitled to make a submission under proposed paragraph 18(2)(d).

300. Under proposed subclauses 18(1) and 18(3), at or after the transfer time the following must be given an opportunity by the AIRC to make a submission:

- the applicant;
- the incoming employer;
- a transferring employee in relation to the transmitted pre-reform CA;
- an organisation of employees that is bound by the transmitted pre-reform CA; and
- an organisation of employees that is entitled to make a submission under proposed paragraph 18(3)(d).

301. The requirements for organisations under proposed paragraphs 18(2)(d) and 18(3)(d) mirror the requirements for standing with respect to enforcement and compliance in proposed Part VIII.

Item 303 - Schedule 1, item 360, page 644 (line 29)

302. Proposed item 303 would make a consequential amendment to paragraph 19(2)(a) of Schedule 16–Transmission of business rules (transitional instruments). The amendment is consequential on amendments made to Schedule 15–Transitional treatment of State employment agreements and State awards.

Item 304 - Schedule 1, item 360, page 644 (line 33)

303. Proposed item 304 would make a consequential amendment to paragraph 19(2)(b) of Schedule 16–Transmission of business rules (transitional instruments). The amendment is consequential on amendments made to Schedule 15–Transitional treatment of State employment agreements and State awards.

Item 305 - Schedule 1, item 360, page 645 (line 17)
304. Proposed item 305 would make a consequential amendment to paragraph 19(3)(a) of Schedule 16–Transmission of business rules (transitional instruments). The amendment is consequential on amendments made to Schedule 15–Transitional treatment of State employment agreements and State awards.

**Item 306 - Schedule 1, item 360, page 645 (line 24)**

305. Proposed item 306 would make a consequential amendment to paragraph 19(3)(b) of Schedule 16–Transmission of business rules (transitional instruments). The amendment is consequential on amendments made to Schedule 15–Transitional treatment of State employment agreements and State awards.

**Item 307 - Schedule 1, item 360, page 645 (line 29), omit “subclause 33(3)”, substitute**

306. Proposed item 307 would make a consequential amendment to paragraph 19(3)(c) of Schedule 16–Transmission of business rules (transitional instruments). The amendment is consequential on amendments made to Schedule 15–Transitional treatment of State employment agreements and State awards.

**Item 308 – Schedule 1, item 360, page 651 (lines 10 and 11)**

307. This amendment is consequential to item 302, which would broaden the scope of proposed Part 4 of Schedule 16 of the Bill so that it applies to all pre-reform certified agreements.

308. Proposed new subparagraph 28(1)(a)(ii) would be extended to ensure that all types of pre-reform CAs that are transmitted under proposed Part 4 will be subject to the notice requirements in proposed Part 6.

**Item 309 – Schedule 1, item 360, page 651 (lines 34 and 35) to page 652 (lines 1 and 2)**

309. This amendment mirrors item 156, in respect of the notice requirements in proposed paragraph 129(3)(f).

310. Proposed paragraph 28(3)(f) provides that an employer must indicate in a clause 28 notice to a transferring employee, amongst other things, what will dictate the terms and conditions contained in the transmitting instrument when that instrument no longer applies to that transferring employee. The provision refers to ‘the source’ for the new terms and conditions.

311. In order to clarify the intent of the provision, the amendment would identify what could be ‘the source’ for regulating those terms and conditions under the WR Act, being the Australian Fair Pay and Conditions Standard or another instrument.

**Item 310 – Schedule 1, item 360, page 652 (after line 8), after subclause (3)**

312. This amendment would insert new proposed subclauses 28(3A) and 28(3B). This amendment mirrors item 157, in respect of the notice requirements in proposed section 129.

313. New subclause 28(3A) would create a new requirement that a new employer provide a transferring employee with a copy of any existing collective agreement or award that bound the
new employer in respect of its existing workforce (ie the employees employed by the new employer prior to the transmission) with a clause 28 notice.

314. New subclause 28(3B) provides that the requirement to provide a copy of an award or agreement under proposed subclause 28(3A) does not apply where a transferring employee can easily access a copy, and the new employer indicates in a clause 28 notice how a transferring employee can access it.

315. An example of how a new employer could fulfil the requirement in proposed subclause 28(3B) (mentioned in the legislative note) is by including a website address in a clause 28 notice that was a link to a copy of an applicable award or agreement.

Item 311 – Schedule 1, item 360, page 652 (line 23)

316. This amendment is consequential to item 308, which would ensure that all types of pre-reform CAs that are transmitted under new Part 4 will be subject to the notice requirements in proposed Part 6.

Item 312 – Schedule 1, item 360, page 653 (line 3)

317. This amendment is consequential to item 308, which would ensure that all types of pre-reform CAs that are transmitted under new Part 4 will be subject to the notice requirements in proposed Part 6.

Item 313 – Schedule 1, item 360, page 653 (line 17)

318. This amendment is consequential to item 308, which would ensure that all types of pre-reform CAs that are transmitted under new Part 4 will be subject to the notice requirements in proposed Part 6.

Item 314 – Schedule 1, item 360, page 654 (line 8)

319. This amendment is consequential to item 310, which would insert a new requirement for the new employer to provide a copy of any existing award or collective agreement that binds the new employer and its employees prior to transmission. This amendment mirrors item 159, in respect of the notice requirements in proposed section 129.

320. New proposed paragraph 31(1)(b) adds a reference to the new requirement (in proposed subsection 28(3A)) to indicate that breaching the requirement would attract a civil remedy.

Item 315 – Schedule 1, item 360, page 655 (table item 2)

321. This amendment is consequential to item 308, which would ensure that all types of pre-reform CAs that are transmitted under new Part 4 will be subject to the notice requirements in proposed Part 6.

Item 316 - Schedule 1, item 360, page 656 (after line 11)
322. This item would insert into clause 32 of Schedule 16 a definition of *Victorian reference Division 3 pre-reform certified agreement*, for the purposes of Part 7 of Schedule 16. The definition would be the same as in clause 33 of Schedule 14 (item 360, page 597).

**Item 317 - Schedule 1, item 360, page 657 (after line 23)**

323. This item would insert clause 33A into Part 7 of Schedule 16.

324. Proposed clause 33A would provide that a *Victorian reference Division 3 pre-reform certified agreement* within the meaning of clause 32 (item 316) (ie an agreement between an employer in Victoria and a union, in settlement of an intra-State Victorian industrial dispute) would, for the purposes of Schedule 16, be treated as if it were made under section 170LJ of the pre-reform WR Act as it has effect because of repealed Division 2 of Part XV. That is, for the purposes of Schedule 16, such an agreement would be treated as if it were made between an employer in Victoria and a union, under Division 2 of Part VIB of the pre-reform WR Act as it has effect because of repealed Division 2 of Part XV.

325. To give effect to that intent, subclause 33A(1) would provide that clause 6A, subclauses 10(2), (3) and (5), paragraph 11(3)(b) and subclause 11(4) of Schedule 16 do not apply to a *Victorian reference Division 3 pre-reform certified agreement*. Further, subclause 33A(2) would provide that Division 1 of Part 4 of Schedule 16 (item 302) would apply to a *Victorian reference Division 3 pre-reform certified agreement* as if it had been made under section 170LJ of the WR Act as in force before the reform commencement.

**Item 318 - Schedule 1, item 360, page 658 (line 13)**

326. Proposed item 318 would make a consequential amendment to paragraph (35)(3)(c) of Schedule 16–Transmission of business rules (transitional instruments). The amendment is consequential on amendments made to Schedule 15–Transitional treatment of State employment agreements and State awards.
Schedule 1A – Establishment of Australian Fair Pay Commission

Item 319 – Page 658 (after line 25), after Schedule 1

327. This item would insert a Schedule 1A – Establishment of Australian Fair Pay Commission, after Schedule 1.

Workplace Relations Act 1996

Item 1 – After Part 1

328. This item would insert a new Part 1A in the WR Act to make provision for the Australian Fair Pay Commission (AFPC).

Part 1A – Australian Fair Pay Commission

329. This Part would provide for the establishment of the AFPC. The AFPC will set and adjust:

- the standard Federal Minimum Wage;
- special Federal Minimum Wages for junior employees, employees with disabilities or employees under training arrangements;
- basic periodic rates of pay and basic piece rates of pay payable for APCS classification levels; and
- casual loadings.

Division 1 – Preliminary

Section 7F – Definitions

330. Proposed section 7F would provide various definitions for Part 1A. Only key definitions are explained here.

331. AFPC would mean the Australian Fair Pay Commission established by proposed section 7G.

332. Wage review would mean a review conducted by the AFPC to determine whether it should exercise any of its wage-setting powers.

333. Wage-setting decision would mean a decision made by the AFPC in the exercise of its wage-setting powers.

334. Wage-setting function would be defined by proposed subsection 7I(1).
335. Wage-setting powers would be defined to mean the powers of the AFPC under Division 2 of Part VA.

**Division 2 – Australian Fair Pay Commission**

336. This Division would establish the AFPC and set out its powers and functions, including its wage setting functions and parameters and provide for the arrangements for the appointment and entitlements of the AFPC Chair and AFPC Commissioners.

**Subdivision A – Establishment and functions**

*Section 7G – Establishment*

337. Proposed section 7G would establish the AFPC and provide that it consists of the AFPC Chair and four AFPC Commissioners.

*Section 7H – Functions of the AFPC*

338. Proposed section 7H would set out the functions of the AFPC. Broadly, these are to exercise its wage-setting function (defined in proposed subsection 7I(1)), any other functions conferred on the AFPC, and promoting understanding of matters related to these functions.

**Subdivision B – AFPC’s wage-setting function**

*Section 7I – AFPC’s wage-setting function*

339. Proposed subsection 7I(1) would set out the AFPC’s wage-setting function which is to conduct wage reviews, and exercise its wage-setting powers as necessary depending on the outcomes of these wage reviews.

340. The legislative note would explain that the wage-setting powers are set out in Division 2 of Part VA.

341. Proposed subsection 7I(2) would set out the role of the AFPC during the period from the commencement of this Part to the commencement of Division 2 of Part VA. During this interim period the AFPC has the function of gathering information for the purpose of assisting it to perform its wage-setting function after Division 2 of Part VA has commenced. It would also make clear that the AFPC, when performing its wage-setting function, may have regard to any information gathered during the interim period.

*Section 7J – AFPC’s wage-setting parameters*

342. Proposed section 7J would provide that the objective of the AFPC is to promote the economic prosperity of the people of Australia having regard to:

- the capacity of the unemployed and low paid to obtain and remain in employment;
- employment and competitiveness across the economy;
• providing a safety net for the low paid; and

• providing minimum wages for junior employees, and employees to whom training arrangements apply and employees with disabilities that ensure those employees are competitive in the labour market.

Section 7K – Wage reviews and wage-setting decisions

343. Proposed section 7K would outline the operation of the AFPC in relation to its wage-setting function. Subsection 7K(1) would provide that the AFPC may determine the timing, scope and frequency of wage reviews, the manner in which wage reviews are to be conducted and when wage-setting decisions are to come into effect. Subsection 7K(2) would provide that for the purposes of performing its wage-setting function the AFPC may inform itself in any way it thinks appropriate, including by:

• undertaking or commissioning research;

• consulting with any other body, person or organisation; or

• monitoring and evaluating the impact of its wage-setting decisions.

344. Subsection 7K(3) would provide that subsections 7K(1) – (2) would have effect subject to the WR Act and any regulations made under the Act. Subsection 7K(4) would require the AFPC’s wage-setting decisions to be expressed as decisions of the AFPC as a body, to be in writing and include reasons. It would also make clear that a wage-setting decision is not a legislative instrument.

Section 7L – Constitution of the AFPC for wage-setting powers

345. Proposed section 7L would provide that for the purposes of exercising its wage-setting powers the AFPC must be constituted by the AFPC Chair and four AFPC Commissioners.

346. However, subsection 7L(2) would provide that if the AFPC Chair considers it necessary due to the unavailability of an AFPC Commissioner, the AFPC may be constituted by the AFPC Chair and not less than two AFPC Commissioners.

347. Subdivision D (AFPC Chair) and Subdivision E (AFPC Commissioners) set out additional requirements concerning appointments to the AFPC.

Section 7M – Publishing wage-setting decisions etc.

348. Proposed section 7M would provide that the AFPC must publish its wage-setting decisions and may publish other information about wages or its wage-setting function. Subsection 7M(3) provides that the publication may be done in a way the AFPC considers appropriate.
Subdivision C – Operation of the AFPC

Section 7N – AFPC to determine its own procedures

349. Proposed section 7N would provide that the AFPC may determine the procedures it would use in performing its functions, subject to Subdivision B of this Division and any procedures prescribed by regulations.

Section 7O – Annual report

350. Proposed section 7O would require the AFPC to provide an annual report on the operation of the AFPC to the Minister for presentation to Parliament. The report would be prepared as soon as practicable after the end of each financial year.

351. It is envisaged that this report and the annual report by the AFPC Secretariat under section 7ZJ would be published and presented to Parliament concurrently.

Subdivision D – AFPC Chair

Section 7P – Appointment

352. Proposed section 7P would provide for the AFPC Chair to be appointed by the Governor-General by written instrument. Subsection 7P(2) would provide that the AFPC Chair can be appointed on either a full-time or part-time basis for the period (not exceeding 5 years) specified in the instrument of appointment.

353. Subsection 7P(3) would require that the AFPC Chair have high levels of skills and experience in business or economics. Section 33 of the Acts Interpretation Act 1901 provides that appointment includes re-appointment.

Section 7Q – Remuneration

354. Proposed section 7Q would provide for the Remuneration Tribunal to determine the remuneration of the AFPC Chair. In the absence of a determination, the AFPC Chair would be paid the remuneration and allowances that are prescribed.

355. Subsection 7Q(3) would provide that this section has effect subject to the Remuneration Tribunal Act 1973. This will ensure that general provisions of that Act are not displaced by this section.

Section 7R – Leave of absence

356. Proposed section 7R would provide that if the AFPC Chair is appointed on a full-time basis the Remuneration Tribunal is to determine his or her recreation leave entitlements.

357. The Minister may grant a full-time AFPC Chair leave of absence, other than recreation leave, on such terms and conditions as he or she determines.
358. Subsection 7R(2) would allow the Minister to grant a part-time AFPC Chair leave of absence, including recreation leave, on such terms and conditions as he or she determines.

Section 7S – Engaging in other paid employment

359. Proposed section 7S would require a full-time AFPC Chair to obtain approval from the Minister before engaging in other paid employment.

Section 7T – Disclosure of interests

360. Proposed section 7T would require the AFPC Chair to give the Minister notice in writing of all financial or other interests that could conflict with the proper performance of the AFPC Chair’s duties.

Section 7U – Resignation

361. Proposed section 7U would provide that the AFPC Chair may resign by written notice given to the Governor-General and sets out when the resignation takes effect.

Section 7V – Termination of appointment

362. Proposed subsection 7V(1) would allow the Governor-General to terminate the appointment of the AFPC Chair if the AFPC Chair:

- becomes bankrupt or takes specified steps related to insolvency; or
- contravenes, without reasonable excuse, the requirement to disclose to the Minister any interest that could conflict with his or her duties (proposed section 7T); or
- has or acquires interests (including by being an employer or employee) that the Minister considers could conflict unacceptably with the proper performance of his or her duties; or
- in the case of a full-time AFPC Chair, is absent from duty (except on authorised leave) for 14 consecutive days or for 28 days in any 12 month period, or engages in other paid employment without the Minister’s approval (proposed section 7S); or
- in the case of a part-time AFPC Chair, is absent from duty (except on authorised leave) to an extent that the Minister considers excessive.

363. Subsection 7V(2) would allow the Governor-General to terminate the AFPC Chair’s appointment for misbehaviour or on the ground of physical or mental incapacity. To avoid doubt, subsections 7V(3)–(5) would set out certain limitations on termination on the ground of physical or mental incapacity.
Section 7W – Other terms and conditions

364. Proposed section 7W would provide that the AFPC Chair holds office on the terms and conditions that are determined by the Minister in relation to matters not covered by the WR Act.

Section 7X – Acting AFPC Chair

365. Proposed section 7X would provide that the Minister may appoint a person who meets the requirements set out in subsection 7P(3) as an acting AFPC Chair when necessary, including on a recurring basis. Subsection 7X(2) would provide that any act done under such an appointment is not to be invalid only because of a defect or irregularity in connection with the appointment.

Subdivision E – AFPC Commissioners

Section 7Y – Appointment

366. Proposed section 7Y would provide for an AFPC Commissioner to be appointed by the Governor-General by written instrument. Subsection 7Y(2) would provide that an AFPC Commissioner is to be appointed on a part-time basis for the period (not exceeding four years) specified in the instrument of appointment. Subsection 7Y(3) would require that an AFPC Commissioner have experience in one or more of the areas of business, economics, community organisations or workplace relations. Section 33 of the Acts Interpretation Act 1901 provides that appointment includes re-appointment.

Section 7Z – Remuneration

367. Proposed section 7Z would provide for the Remuneration Tribunal to determine the remuneration of an AFPC Commissioner. In the absence of a determination, an AFPC Commissioner would be paid the remuneration and allowances that are prescribed. Subsection 7Z(3) would provide that this section has effect subject to the Remuneration Tribunal Act 1973. This will ensure that general provisions of that Act are not displaced by this section.

Section 7ZA – Leave of absence

368. Proposed section 7ZA would provide that the AFPC Chair may grant an AFPC Commissioner leave of absence on such terms and conditions as he or she determines.

Section 7ZB – Disclosure of interests

369. Proposed section 7ZB would require an AFPC Commissioner to give the Minister notice in writing of all financial or other interests that could conflict with the proper performance of his or her duties.

Section 7ZC – Resignation

370. Proposed section 7ZC would provide that an AFPC Commissioner may resign by written notice given to the Governor-General and sets out when the resignation takes effect.
Section 7ZD – Termination of appointment

371. Subsection 7ZD(1) would allow the Governor-General to terminate the appointment of an AFPC Commissioner if the AFPC Commissioner:

- becomes bankrupt or takes specified steps related to insolvency; or
- contravenes, without reasonable excuse, the requirement to disclose to the Minister any interest that could conflict with his or her duties (proposed section 7ZB);
- has or acquires interests (including by being an employer or employee) that the Minister considers could conflict unacceptably with the proper performance of his or her duties; or
- is absent from duty (except on authorised leave) to an extent that the Minister considers excessive.

372. Subsection 7ZD(2) would allow the Governor-General to terminate an AFPC Commissioner’s appointment for misbehaviour or on the ground of physical or mental incapacity. To avoid doubt, subsections 7ZD(3) – (5) would set out certain limitations on termination on the ground of physical or mental incapacity.

Section 7ZE – Other terms and conditions

373. Proposed section 7ZE would provide that an AFPC Commissioner would hold office on the terms and conditions that are determined by the Minister in relation to matters not covered by this Act.

Section 7ZF – Acting AFPC Commissioners

374. Proposed section 7ZF would provide that the Minister may appoint a person who meets the requirements set out in subsection 7Y(3) as an acting AFPC Commissioner when necessary, including on a recurring basis. Subsection 7ZF(2) would provide that any act done under such an appointment is not to be invalid only because of a defect or irregularity in connection with the appointment.

Division 3 – AFPC Secretariat

375. This Division would establish the AFPC Secretariat as a separate statutory agency to assist the AFPC and provide for appointment of the Director of the Secretariat and the engagement of staff and consultants.

Subdivision A – Establishment and function

Section 7ZG – Establishment

376. Proposed subsection 7ZG(1) would establish the AFPC Secretariat.
377. Subsection 7ZG(2) would provide that the AFPC Secretariat consists of the Director and the staff of the Secretariat.

Section 7ZH – Function

378. Proposed section 7ZH would provide that the function of the AFPC Secretariat is to assist the AFPC in the performance of its functions.

Subdivision B – Operation of the AFPC Secretariat

Section 7ZI – AFPC Chair may give directions

379. Proposed section 7ZI would allow the AFPC Chair to give directions to the Director of the Secretariat about the performance of the function of the AFPC Secretariat and require the Director to comply with such directions.

380. To avoid doubt, subsection 7ZI(3) would provide that the AFPC Chair cannot give directions in relation to the performance of functions or powers by the Director under the Financial Management and Accountability Act 1997 or the Public Service Act 1999.

Section 7ZJ – Annual report

381. Proposed section 7ZJ would require the Director of the Secretariat to provide an annual report on the operation of the AFPC Secretariat to the Minister for presentation to Parliament. The report must be prepared as soon as practicable after the end of each financial year.

382. It is envisaged that this report and the annual report by the AFPC under section 7O would be published and presented to Parliament concurrently.

Subdivision C – The Director of the Secretariat

Section 7ZK – Appointment

383. Proposed section 7ZK would provide for the Director of the Secretariat to be appointed by the Minister by written instrument.

384. Subsection 7ZK(2) would provide that the Director of the Secretariat is to be appointed on a full-time basis for the period (not exceeding five years) specified in the instrument of appointment.

Section 7ZL – Remuneration

385. Proposed section 7ZL would provide that the Remuneration Tribunal is to determine the remuneration of the Director of the Secretariat. In the absence of a determination, the Director of the Secretariat would be paid the remuneration and allowances that are prescribed.
386. Subsection 7ZL(3) would provide that this section has effect subject to the *Remuneration Tribunal Act 1973*. This would ensure that general provisions of that Act are not displaced by this section.

*Section 7ZM – Leave of absence*

387. Proposed section 7ZM would provide for the Remuneration Tribunal to determine the recreation leave entitlements of the Director of the Secretariat.

388. Subsection 7ZM(2) would allow the Minister to grant the Director of the Secretariat leave of absence, including recreation leave, on such terms and conditions as he or she determines.

*Section 7ZN – Engaging in other paid employment*

389. Proposed section 7ZN would require the Director of the Secretariat to obtain approval from the Minister before engaging in other paid employment.

*Section 7ZO – Disclosure of interests*

390. Proposed section 7ZO would require the Director of the Secretariat to give the Minister notice in writing of all financial or other interests that could conflict with the proper performance of his or her duties.

*Section 7ZP – Resignation*

391. Proposed section 7ZP would provide that the Director of the Secretariat may resign by written notice given to the Minister and sets out when the resignation takes effect.

*Section 7ZQ – Termination of appointment*

392. Proposed subsection 7ZQ(1) would allow the Minister to terminate the appointment of the Director of the Secretariat if the Director of the Secretariat:

- becomes bankrupt or takes specified steps related to insolvency; or
- contravenes, without reasonable excuse, the requirement to disclose to the Minister any interest that could conflict with his or her duties (proposed section 7ZO); or
- has or acquires interests (including by being an employer or employee) that the Minister considers could conflict unacceptably with the proper performance of his or her duties; or
- engages in other paid employment without the Minister’s approval (proposed section 7ZN); or
- is absent from duty (except on authorised leave) for 14 consecutive days or for 28 days in any 12 month period.
393. Subsection 7ZQ(2) would require the Minister to terminate the Director of the Secretariat’s appointment if the Minister is of the opinion that the Director’s performance has been unsatisfactory for a significant period of time.

394. Subsection 7ZQ(3) would allow the Minister to terminate the Director of the Secretariat’s appointment for misbehaviour or on the ground of physical or mental incapacity.

395. To avoid doubt, subsections 7ZQ(4) – (6) would set out certain limitations on termination on the ground of physical or mental incapacity.

Section 7ZR – Other terms and conditions

396. Proposed section 7ZR would provide that the Director of the Secretariat would hold office on the terms and conditions that are determined by the Minister in relation to matters not covered by the WR Act.

Section 7ZS – Acting Director of the Secretariat

397. Proposed section 7ZS would provide that the Minister may appoint an acting Director of the Secretariat when necessary, including on a recurring basis. Subsection 7ZS(2) would provide that any act done under such an appointment is not to be invalid only because of a defect or irregularity in connection with the appointment.

Subdivision D – Staff and consultants

Section 7ZT – Staff

398. Proposed section 7ZT would provide that the staff of the AFPC Secretariat are to be engaged under the Public Service Act 1999 (subsection 7ZT(1)).

399. Subsection 7ZT(2) would provide that for the purposes of the Public Service Act 1999 the Director of the Secretariat and staff of the AFPC Secretariat would constitute a Statutory Agency with the Director as the Head of that Statutory Agency.

Section 7ZU – Consultants

400. Proposed section 7ZU would provide that the Director of the Secretariat may, on behalf of the Commonwealth, engage consultants with suitable qualifications and experience for the AFPC or the AFPC Secretariat. The terms and conditions of engagement of consultants would be determined by the Director of the Secretariat and recorded in writing.

Financial Management and Accountability Regulations 1997

2 Part 1 of Schedule 1 (after table item 110)

401. This item would amend the Financial Management and Accountability Regulations 1997, to prescribe the Australian Fair Pay Commission Secretariat as a prescribed agency for the purposes of the Financial Management and Accountability Act 1997.
Schedule 2 – Transitional arrangements for State organisations

Item 320 – Schedule 2, item 1, page 660 (line 5)

402. This item would make a consequential amendment to subsection 1(1) (definition of ‘preserved State agreement’) as a result of amendments to proposed Schedule 15.

Item 321 – Schedule 2, item 2, page 661 (lines 11 to 13)

Item 322 – Schedule 2, item 2, page 661 (lines 16 and 17)

403. This item would omit proposed paragraph 2(1)(a) of Schedule 17. That paragraph provides that, in order to transitionally register under Schedule 17, a State-registered association must have been bound to a State award or State employment agreement immediately prior to the commencement of the Schedule.

404. Some State-registered association are not, or are unable to be, bound to State awards or employment agreements. This item would ensure that all State-registered associations will be able to continue to represent members who move into the federal system. There will remain a requirement that the association seeking transitional registration must have been entitled to represent the industrial interests of the member under the State system.

405. Item 322 would make a consequential amendment to proposed subparagraph 2(1)(b)(i) as a result of the amendment to paragraph 2(1)(a) proposed by item 2.
Schedule 3A – Redundancy pay by small business employers

406. The amendments would insert a new Schedule 3A which would, with effect from royal assent, amend the Workplace Relations Act 1996 (WR Act) to protect small business employers from redundancy payments that would otherwise adversely impact on the capacity of small businesses to provide employment. The amendments would also preserve, after reform commencement, a term of an award or order imposing a redundancy pay obligation on an employer of fewer than 15 employees made before 26 March 2004.

Item 323

407. This item would insert a new Schedule 3A dealing with redundancy pay by small business employers.

408. New Schedule 3A would, with effect from royal assent, amend the Workplace Relations Act 1996 (WR Act) to protect small business employers from redundancy payments that would otherwise adversely impact on the capacity of small businesses to provide employment.

409. On 26 March 2004, the Australian Industrial Relations Commission (the Commission) handed down a test case decision (PR032004) which determined that the exemption of businesses with fewer than 15 employees from redundancy pay obligations should be removed. The Commission decided that the redundancy pay scale determined in 1984 for larger businesses should now apply to small businesses. The scale ranges from four weeks' pay after one year of service to eight weeks' pay after four years of service. On 8 June 2004, the Commission handed down a supplementary decision (PR062004), in which it decided that the redundancy pay scale applicable to small business should not take into account service rendered prior to the operative date of any order giving effect to the 26 March decision. Prior service will be taken into account in the case of employees of employers having 15 or more employees.

410. The Australian Government opposes any attempt to impose redundancy pay obligations on employers who employ fewer than 15 employees.

Schedule 3A – Redundancy pay by small business employers

Workplace Relations Act 1996

Clause 1 – Paragraph 89A(2)(m)

411. This clause would amend the WR Act to replace existing paragraph 89A(2)(m).

412. Proposed paragraph 89A(2)(m) would make redundancy pay by an employer of 15 or more employees an allowable award matter.

413. This means that redundancy pay by an employer of fewer than 15 employees would not be an allowable award matter.

Clause 2 – Subsection 89A(7)

414. This clause would insert a cross-reference to new subsection 89A(7A), which is to be inserted by clause 3.
Clause 3 – After subsection 89A(7)

415. This clause would insert proposed subsection 89A(7A) into the WR Act.

416. Subsection 89A(7A) would have the effect that the Commission would not be able to make an exceptional matters order about redundancy pay by an employer of fewer than 15 employees.

Clause 4 – After subsection 89A(8)

417. This clause would insert proposed subsection 89A(8A) into the WR Act.

418. Subsection 89A(8A) is an interpretative provision for proposed paragraph 89A(2)(m) and subsection 89A(7A).

419. Paragraph 89A(8A)(a) sets out the time – the relevant time – at which it is to be worked out whether a particular employer employs 15 or more employees or fewer than 15 employees for the purposes of paragraph 89A(2)(m) and subsection 89A(7A).

420. The relevant time is either when notice of redundancy is given by the employer or by the employee who becomes redundant, or when the redundancy occurs, whichever happens first. The reference to notice of redundancy being given by the employee refers to the situation where an employee elects to take voluntary redundancy and advises the employer of that fact.

421. Paragraph 89A(8A)(b) would ensure that a reference to employees in either paragraph 89A(2)(m) or subsection 89A(7A) includes a reference to the employee who becomes redundant and any other employee who becomes redundant at the relevant time. A reference to employees also includes any casual employee who, at the relevant time, has been engaged by the employer on a regular and systematic basis for at least 12 months, but does not include any other casual employee.

Clause 5 – After Part VI

New Part VIAAA – State and Territory laws etc. about redundancy payments by small businesses

422. This clause would amend the WR Act to insert new a new Part dealing with redundancy payments by small businesses under State and Territory laws and instruments.

New section 167 – Certain small businesses not bound by requirement to pay redundancy pay

423. Proposed section 167 would provide that State laws, State awards, State authority orders and Territory laws will have no effect to the extent that they would require a relevant employer that employs fewer than 15 employees to pay redundancy pay.

- Subsection 167(4) defines relevant employer to mean:

  (a) in the case of a State law, a State award or a State authority order - a constitutional corporation;

  (b) in the case of a Territory law - any employer.
The definitions in subsection 167(4) also ensure that any terms of a State employment agreement that allow for redundancy pay are not affected by these amendments.

1. Subsection 167(1) would provide that the section applies to a State law, a State award, a State authority order or a Territory law, each of which is an eligible instrument.

2. Subsection 167(2) would provide that an eligible instrument that would otherwise have the effect of requiring a relevant employer that employs fewer than 15 employees to pay redundancy pay, does not have that effect.

3. Paragraph 167(3) would explain how it is determined whether a relevant employer employs fewer than 15 employees for the purposes of subsection 167(2).

4. Subsection 167(4) would define certain terms used in the section.

Clause 6 – At the end of section 170FA

5. This clause would amend section 170FA to include new subsections 170FA(3) and (4).

6. Subsection 170FA(3) would provide that the Commission must not make an order to give effect to Article 12 of the Termination of Employment Convention in relation to the matter of redundancy pay by an employer of fewer than 15 employees.

7. Paragraph 170FA(4) would explain how it is determined whether a relevant employer employs fewer than 15 employees purposes of subsection 170FA(3).

Clause 7 – Application

8. This clause would provide that the amendments contained in clauses 1 to 4 of this Schedule would apply where, after the Schedule commences, the Commission is:

bullet dealing with an industrial dispute by arbitration; and

bullet making an award or order about the prevention or settlement of an industrial dispute; and

bullet varying an award or order that would involve maintaining the settlement of an industrial dispute.

9. This clause would apply whether the industrial dispute arose before or after the commencement of the Schedule.

10. This clause would also provide that the amendment made by clause 5 of this Schedule applies to:
Schedule 3A ~ Redundancy pay by small business employers

- an eligible instrument, made after the commencement of this Schedule, that has the effect of requiring a relevant employer that employs fewer than 15 employees to pay redundancy pay; and

- an eligible instrument, made before or after the commencement of this Schedule, that is amended or varied after the commencement of this Schedule and has the effect of requiring a relevant employer that employs fewer than 15 employees to pay redundancy pay.

11. In addition, this clause would provide that the amendment to section 170FA made by clause 6 of this Schedule would apply where the Commission is making orders after commencement of this Schedule.

Clause 8 – Transitional – awards and orders of the Commission

12. This clause would provide that if, during the period from 26 March 2004 until this Schedule commences, the Commission made an award or order that had the effect of requiring an employer of fewer than 15 employees to pay redundancy pay, or the Commission varied an award or order that was made before or during that period to that effect, then from the commencement of this Schedule such an award or order ceases to have that effect.

Clause 9 – Transitional – Eligible instruments

Item applies to eligible instruments with small business redundancy pay requirements just before commencement

13. This clause would provide transitional arrangements where a small business redundancy pay obligation is contained in an ‘eligible instrument’ (that is, a State law, State award, State authority order or Territory law).

Eligible instruments that began to provide for small business redundancy pay between 26 March 2004 and commencement

14. Paragraph 9(2)(a) would deal with a situation where an eligible instrument was made before 26 March 2004 and before that date did not contain provisions requiring the affected employers to pay redundancy pay but was varied on or after 26 March 2004 to include a provision requiring the affected employers to pay redundancy pay. Paragraph 9(2)(a) would prevent that eligible instrument from having the effect of imposing redundancy pay obligations on the affected small business employers from the commencement of this Schedule.

15. Paragraph 9(2)(b) would prevent an eligible instrument made on or after 26 March 2004 having the effect of imposing redundancy pay obligations on relevant small business employers from the commencement of this Schedule.

Eligible instruments where Federal award suppressed a small business redundancy pay requirement that was present just before 26 March 2004

16. Subclause 9(3) would cover a situation where an eligible instrument was made before 26 March 2004 and contains a provision requiring relevant small business employers to pay redundancy pay but was suppressed by a federal award because of inconsistency. Subclause 9(3)
would ensure that the eligible instrument would be prevented from ‘springing up’ to impose redundancy pay obligations on relevant small business employers once the inconsistency is removed and the federal award no longer contains a provision dealing with small business redundancy pay.

*Eligible instruments where certified agreement or AWA suppressed a small business redundancy pay requirement that was present just before 26 March 2004, and a Federal award would also have had that effect*

17. Subclause 9(4) would deal with a situation where a certified agreement or AWA to which a relevant small business employer is party ceases to have effect after the commencement of the Schedule, but the small business employer remains bound by a federal award. Subclause 9(4) would ensure that when the agreement ceases to have effect, an eligible instrument that would otherwise have imposed a redundancy pay obligation will not impose that obligation.

*Eligible instruments where small business redundancy pay requirement was present just before 26 March 2004 and a future Federal award starts to apply*

18. Subclause 9(5) would cover a situation where, before 26 March 2004, a relevant small business employer was covered by an eligible instrument (e.g. a State common rule award) containing provisions requiring the employer to pay redundancy pay, and, after commencement of the Schedule, the employer becomes bound by a federal award which applies in relation to some or all of the employees to whom the requirement to pay redundancy pay relates. From the time at which the employer becomes bound by the federal award, the small business redundancy pay obligation in the eligible instrument will cease to have effect in relation to the relevant employees.

**Definitions**

19. Subclause 9(6) would define the terms eligible instrument, Federal award and relevant employer.

**Clause 10 – Protection of existing entitlements**

20. This clause would ensure that nothing in this Schedule or an amendment made by this Schedule would affect any entitlement to a redundancy payment that had arisen before the commencement of this Schedule.
Schedule 4 – Transitional and other provisions

Item 324 – Schedule 4, item 4, page 675 (after line 16)

Item 325 – Schedule 4, item 4, page 675 (after line 20)

21. This item would amend subitem 4(1) of Schedule 4 by adding applicable definitions for eligible entity and outworker term.

Item 326 – Schedule 4, item 4, pages 675 (lines 22 and 23)

Item 327 – Schedule 4, item 4, pages 675 Lines 27 and 28)

Item 328 – Schedule 4, item 4, pages 676 (line 2)

Item 329 – Schedule 4, item 4, pages 676 (after line 2)

Item 330 - Schedule 4, item 4, pages 676 (line 3)

Item 331 - Schedule 4, item 4, pages 676 (line 5)

Item 332 - Schedule 4, item 4, pages 676 (line 10)

Item 333 - Schedule 4, item 4, pages 676 (line 13)

22. These items would amend proposed subitems 4(2) to (5) to ensure non-employing eligible entities bound by an original award that contains outworker terms remain bound after reform commencement.

Item 334

23. This item would insert a new item 5A into Schedule 4 of the Bill. New item 5A would preserve, after reform commencement, a term of an award or order imposing a redundancy pay obligation on an employer of fewer than 15 employees made before 26 March 2004.

Item 335 – Schedule 4, item 18, page 681 (line 24)

24. Proposed Schedule 4 of the Bill would set out transitional and other provisions. Relevantly, proposed item 18 of Part 2 of Schedule 4 would provide that Division 5 of Part VIA of the amended Act does not apply to certain industrial instruments including 170MX awards. Division 5 of Part VIA of the amended Act would deal with parental leave.

25. Sub-item 18(3) provides definitions for a number of terms including 170MX awards. Proposed amendment Agt160 would replace paragraph 18(3)(b) in the Bill with a new paragraph 18(3)(b) that would include 170MX awards made after the commencement of the Bill under Part 8 of Schedule 14 of the amended Act, which would provide that where a 170MX award was in force or being arbitrated just before commencement of the Bill, it would be dealt with under the pre-reform WR Act.

26. This amendment would be consequential upon item 268.
Item 336 – Schedule 4, item 20, page 682 (after line 18)

27. Proposed Schedule 4 of the Bill would set out transitional and other provisions. Proposed item 20 of Part 2 of Schedule 4 would provide that the WR Act to continues to apply, after the Bill’s commencement, to proceedings commenced prior to reform commencement under Division 8 of Part VIB of the WR Act. Proposed amendment 336 would insert a proposed sub-item 20(1A), which would provide that item 20 of Part 2 of Schedule 4 applies subject to:

- Parts 4 and 8 of Schedule 14 to the amended Act (which would apply to 170MX awards and applications to certify pre-reform certified agreements); and
- Item 20A of Schedule 4 (which would relate to the continuation of certain 170MX award proceedings).

28. Proposed item 336 would apply to the situation where, prior to the Bill’s commencement, the AIRC terminated a bargaining period under subsection 170MW(3) of the WR Act. In that situation the AIRC could exercise the conciliation powers mentioned in section 170MY of the WR Act, post commencement, with a view to making an award under subsection 170MX(3).

Item 337 – Schedule 4, page 682 (after line 26)

29. Proposed Schedule 4 of the Bill would set out transitional and other provisions. Proposed amendment 337 would insert proposed item 20A into Division 4 of Part 2 of Schedule 4. Sub-item 20A(1) would provide that item 20A applies if:

- a bargaining period was terminated on the ground set out in subsection 170MW(3) of the WR Act before reform commencement;
- the AIRC had not started to exercise arbitration powers in accordance with section 170MX(3) of the WR Act after reform commencement; and
- but for the Bill, the AIRC would have been able to make a 170MX award in relation to the bargaining period.

30. Subclause 20A(2) would provide that Division 8 of Part VC (which allows the AIRC to make workplace determinations) applies as if:

- the termination of the bargaining period was made on the ground set out in subsection 107G; and
- that termination happened on reform commencement.

31. Subclause 20A(3) would provide that a reference in proposed item 20A to subsection 170MX(3) does not include a reference to that subsection as it had effect because of repealed Division 2 of Part XV of the WR Act (which dealt with Victoria).

32. The effect of proposed amendment 338 would be that if, pre-reform commencement, the AIRC terminated a bargaining period and did not start to exercise its arbitration powers with a
view to making a section 170MX award, the AIRC could make a workplace determination or a section 170MX award after reform commencement.