FAIR WORK AMENDMENT BILL 2013

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments to be Moved on Behalf of the Government

(Circulated by authority of the Minister for Employment and Workplace Relations, the Honourable William Shorten MP)
AMENDMENTS TO THE FAIR WORK AMENDMENT BILL 2013

OUTLINE

The Fair Work Act Review was carried out by a panel of three independent experts in response to the Government’s commitment to commence a post-implementation review of the Fair Work Act 2009 (FW Act) within 2 years of its full implementation.


The Fair Work Act 2012 was passed by the Parliament in December 2012 and implemented approximately one third of the recommendations of the Panel for which there was broad consensus between the Government and workplace relations stakeholders.

The Fair Work Amendment Bill 2013 (the Bill) was introduced into the House of Representatives on 21 March 2013. It will implement several more of the Panel’s recommendations and a number of reforms which reflect the Government’s policy priorities.

The Bill was immediately referred to the Senate Education, Employment and Workplace Relations Legislation Committee (the Senate Committee) and the House Standing Committee on Education and Employment (the House Committee). The Senate Committee’s report was tabled on 14 May 2013. The House Committee has indicated it intends to table its report on 5 June 2013.

The amendments to the Bill that the Government will move respond to additional Panel recommendations and reflect further Government policy priorities. The amendments:

- limit and qualify the operation of the workplace bullying provisions in Schedule 3 to the Bill in relation to the Defence Force, Australia’s security agencies and the Australian Federal Police.
- clarify the Fair Work Commission’s (FWC) ability to conciliate, mediate, express opinions and make recommendations when conducting conferences;
- enable the FWC to arbitrate general protections dismissal disputes and unlawful termination disputes, where the parties consent;
- deal with procedural matters relating to FWC’s new consent arbitration jurisdiction in relation to general protections dismissal disputes and unlawful termination disputes, including new measures to limit appeals and provide for costs orders in certain circumstances;
- align the time limit for making an unlawful termination application with the time limit of 21 days that applies for making general protections dismissal and unfair dismissal applications;
- allow FWC Members to be concurrently appointed to positions under Commonwealth or Territory laws by removing the requirement for such laws to provide for an office to be held by an FWC Member; and
amend the *Fair Work (Registered Organisations) Amendment Act 2012* (ROA Act) to specify the commencement of Part 2 of Schedule 1 of the ROA Act is 1 January 2014 (while ensuring that relevant disclosures for the original period between 1 July 2013 and 31 December 2013 are still required), provide greater clarity and ensure consistency with the ROA Act amendments in respect of disclosure of remuneration, and make related consequential amendments to the ROA Act.

The development of these amendments included consultation with the National Workplace Relations Consultative Council and their technical advisers through the Committee on Industrial Legislation, and State and Territory government officials.

**Financial Impact Statement**

Nil
STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Amendments to the Fair Work Amendment Bill 2013

These amendments to the Fair Work Amendment Bill 2013 (the Bill) are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Overview of amendments to the Fair Work Amendment Bill 2013

The object of the Fair Work Act 2009 (the FW Act) is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians.

The Bill will amend the FW Act to improve its operation in relation to family-friendly measures, protections for pregnant workers, the modern awards objective and right of entry and introduces an anti-bullying measure.

The amendments to the Bill will:

- limit and qualify the operation of the workplace bullying provisions in Schedule 3 to the Bill in relation to the Defence Force, Australia’s security agencies and the Australian Federal Police (AFP).
- clarify the Fair Work Commission’s (FWC) ability to conciliate, mediate, express opinions and make recommendations when conducting conferences;
- allow the FWC to arbitrate general protections dismissal disputes and unlawful termination disputes, where the parties consent. This will improve compliance by providing for a voluntary, low cost FWC arbitration option as an alternative to court action;
- increase flexibility to concurrently appoint FWC Members to positions under Commonwealth or Territory laws by removing the requirement for such laws to provide for an office to be held by an FWC Member; and
- amend the Fair Work (Registered Organisations) Amendment Act 2012 (ROA Act) to delay the commencement of Part 2 of Schedule 1 of the ROA Act (while ensuring that relevant disclosures for the original period are still required), provide greater clarity and ensure consistency with the policy intention underpinning those ROA Act amendments, and make related consequential amendments to the ROA Act.

Human Rights Implications

The Bill engages the following rights:

- the right to just and favourable conditions of work under Article 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), including the right to fair wages, the right to safe and healthy working conditions, and the right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction under Article 11(1) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);
the right to freedom of association, including the right to form and join trade unions and the right of trade unions to function freely in Article 22 of the *International Covenant on Civil and Political Rights* (ICCPR) and in the International Labour Organisation (ILO) Convention 87, and the right to strike under Article 8 of the ICESCR

- the right to equality and non-discrimination in employment under Articles 2(1) and 26 of the ICCPR, Article 2 of the ICESCR, Article 5(e)(i) and (ii) of the Convention on the *Elimination of All Forms of Racial Discrimination* (CERD), Article 11 of the CEDAW and Article 27 of the *Convention on the Rights of Persons with Disabilities* (CRPD);

- the right to an effective remedy under Article 2(3) of the ICCPR;

- the right to a fair hearing under Article 14 of the ICCPR; and

- the right to privacy and reputation under Articles 14 and 17 of the ICCPR.

**Right to just and favourable conditions of work**

Article 7 of the ICESCR requires that State Parties recognise the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular, remuneration that provides all workers with fair wages, a decent living and rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

**General protections dismissal and unlawful termination disputes**

The general protections in Part 3-1 of the FW Act are divided into protections relating to workplace rights (which can be broadly described as employment entitlements and the freedom to exercise and enforce those entitlements) and engaging in lawful industrial activities (which encompasses the freedom to be or not be a member or officer of an industrial association and to participate in lawful activities, including those of an industrial association).

The general protections also include a prohibition on an employer taking adverse action against an employee or prospective employee of the employer because of the person’s race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy, religion, political opinion, national extraction or social origin (section 351).

Under Division 2 of Part 6-4 of the FW Act, it is unlawful to terminate an employee’s employment on certain prohibited grounds such as:

- employment rights, including filing a complaint, or participating in proceedings, against an employer involving alleged violation of laws or regulations or recourse to competent administrative activities;

- trade union membership or activities; or

- race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

Provision of a low-cost alternative to court action for the resolution of these disputes advances the right to just and favourable conditions of work.
Anti-bullying measures

Article 7 of the ICESCR requires that State Parties to the Covenant recognise the right of everyone to the enjoyment of just and favourable working conditions, including the right to safe and healthy working conditions. Schedule 3 to the Bill inserts new Part 6-4B into the FW Act, which gives workers a remedy against workplace bullying. Schedule 3 to the Bill promotes the right to safe and healthy working conditions by providing a mechanism to help workers to resolve bullying matters quickly and inexpensively.

Under subsection 789FC(2) of Part 6-4B as currently drafted, ‘worker’ has the same meaning as in the Work Health and Safety Act 2011 (WHS Act). This includes employees of, or persons engaged to carry out work for, Australia’s security agencies, and members of the Defence Force and the AFP, who are deemed to be workers under section 7 of the WHS Act. Amendment (9) excludes members of the Defence Force from the definition of ‘worker’ in subsection 789FC(2), the effect of which is that those members cannot seek orders from the FWC. This recognises the unique nature of service in the Defence Force (which is a disciplined force that is called upon to undertake service in dangerous operating environments) and the need to maintain the integrity of its command structure.

Consistent with the WHS Act, amendments 8 and 9 provide:

- for the FWC to dismiss a workplace bullying application if it considers that the application might involve matters relating to Australia’s defence, national security, or existing or future covert or international operations of the AFP (new subsection 789FE(2));
- that nothing in Part 6-4B of the FW Act requires or permits a person to take, or to refrain from taking, any action if the taking of the action, or the refraining from taking the action, would be, or could reasonably be expected to be, prejudicial to Australia’s defence, national security, or existing or future covert or international operations of the AFP (new section 789FI);
- for the Chief of the Defence Force to declare by legislative instrument, if the Minister for Employment and Workplace Relations approves, that all or specified provisions of Part 6-4B of the Act do not apply in relation to specified activities (new section 789FJ); and
- for the Director-General of Security or the Director-General of the Australian Secret Intelligence Service (ASIS) to declare by legislative instrument, if the Minister for Employment and Workplace Relations approves, that all or specified provisions of Part 6-4B of the Act do not apply in relation to persons carrying out work for the Director-General of Security (new section 789FK) or the Director-General of ASIS (new section 789FL).

These amendments align with the existing framework for exemptions under the WHS Act, which reflects the sensitive nature of the work that is undertaken by Australia’s defence and security personnel. Declarations issued by the Chief of Defence Force, Director-General of Security and the Director-General of ASIS will be in the form of legislative instruments and will be subject to scrutiny by both Houses of Parliament. Such declarations can also only be made with the approval of the Minister for Employment and Workplace Relations. These safeguards will ensure that such declarations are subject to appropriate scrutiny.

To the extent that these amendments reduce access to FWC orders under Part 6-4B, they are necessary to ensure that the workplace bullying measures do not interfere with Australia’s defence, national security or covert international law enforcement activity, and achieve that legitimate objective in a proportionate and reasonable way.
Right to Freedom of Association

Article 22 of the ICCPR protects the right to freedom of association, including the right to form and join trade unions. Article 8(1) of the ICESCR protects:

- the right to form and join trade unions;
- the right of trade unions to function freely subject to necessary limitations in the interests of national security, public order or the protection of the rights and freedoms of others; and
- the right to strike, provided it is exercised in conformity with the laws of the particular country.

The ILO Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) protects the rights of employees and employers to establish and join organisations for furthering and defending their interests, and the right of those organisations to organise their activities and formulate their programmes.

General protections dismissal and unlawful termination disputes

As described above, the general protections and unlawful termination provisions protect employees against dismissal for reasons such as their trade union membership or activities. Provision of a low-cost alternative to court action for the resolution of these disputes therefore advances the right to freedom of association.

Amendments to the Fair Work (Registered Organisations) Amendment Act 2012 (ROA Act)

The amendments to the Bill that the Government will move engage the right to freedom of association and the rights of people to form organisations to represent their industrial interests. However, the amendments work within the existing framework of the ROA Act and do not substantially alter the requirements on registered organisations under that Act as currently drafted. For the reasons set out in the Statement of Compatibility with Human Rights to the Fair Work (Registered Organisations) Amendment Bill 2012, the amendments to the Bill which would amend the ROA Act are compatible with human rights because to the extent that they may limit human rights, those limitations are reasonable, necessary and proportionate.

Right to Equality and Non-Discrimination in Employment

Rights to equality and non-discrimination in employment are provided under Articles 2(1) and 26 of the ICCPR, Article 2 of the ICESCR, Article 5(e)(i) and (ii) of the CERD, Article 11 of the CEDAW and Article 27 of the CRPD.

General protections dismissal and unlawful termination disputes

As described above, the general protections and unlawful termination provisions protect employees against dismissal for reasons such as their race, colour, sex etc. Provision of a low-cost alternative to court action for the resolution of these disputes therefore advances the right to equality and non-discrimination in employment.
Right to an effective remedy

Article 2(3) of the ICCPR provides the right to an effective remedy, including the right to have that right determined by competent judicial, administrative or legislative authorities, or any other competent authority and matters such as the right to a presumption of innocence and the right to not be compelled to testify against himself or herself or to confess to guilt.

General protections dismissal and unlawful termination disputes

Provision of a low-cost alternative to court action for the resolution of general protections dismissal and unlawful termination disputes advances the right to an effective remedy.

The limitations on appeals will not prevent genuine appeals from being pursued, but will discourage speculative claims and are reasonable and proportionate to address the time and expense that an appeal may cause another party to incur.

The costs provisions will strike a balance between the need to protect workers from adverse action and to provide a deterrent against unreasonable conduct during proceedings. They will not prevent genuine claims from being pursued.

The amendments will shorten the time limit for making an unlawful termination application from 60 days to 21 days. The FWC will retain its existing ability to accept late applications in exceptional circumstances, taking into account factors such as the reason for the delay, fairness and the merits of the case.

The new time limit will align with the 21 day time limit for lodging general protections dismissal and unfair dismissal applications. This will provide greater clarity to applicants and respondents and require applicants to determine at the outset which claim they intend to pursue. Where an employee challenges a dismissal, it is in the interests of both the employee and the employer for the matter to be resolved quickly so that, in the event of a successful challenge, the employee can return to their original position with minimal impact on relationships and management of the business. The time limits for dismissal applications balance the need to provide sufficient time for employees to consider the most appropriate application, and the need to provide certainty for employers in relation to the types of claims they may be exposed.

Right to a fair hearing

Article 14 of the ICCPR provides the right to a fair hearing, including matters such as the right to a presumption of innocence and the right to not be compelled to testify against himself or herself or to confess to guilt.

General protections dismissal and unlawful termination disputes

The FWC is an independent tribunal, which exercises its powers in a fair and just manner, including by applying the principles of procedural fairness.

Any FWC arbitration of disputes will be only with the consent of the parties.
An individual cannot be subject to criminal or civil sanctions as a result of an application to the FWC under the general protections or unlawful termination provisions. The exception to this is if the individual identified by the applicant as engaging in the adverse action does not comply with the term of a FWC order, at which time the applicant may seek a civil remedy against them. In considering civil remedies, the relevant court would apply the presumptions, guarantees and rights recognised in Articles 14 and 15 of the ICCPR.

**Right to privacy and reputation**

Article 17 of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with their privacy. Privacy guarantees a right to secrecy from the public of personal information. For interference with privacy not to be arbitrary it must be in accordance with the provisions, aims and objectives of the ICCPR and should be reasonable in the particular circumstances. Reasonableness in this context incorporates notions of proportionality to the end sought and necessity in the circumstances.

**General protections dismissal and unlawful termination disputes**

The amendments will allow the FWC, upon receiving an application in relation to a general protections dismissal or in relation to an unlawful termination, to inform itself in such a manner as it considers appropriate. This can include requiring a person to provide documents to the FWC. In this context, this may involve the FWC requesting the applicant's employer to provide documents relating to their internal employment processes and information about any management action that has been taken that relates to the matter in question.

The ability of the FWC to collect this information is necessary to facilitate the effective administration of these amendments, noting that any FWC process under the amendments will be only by consent. Information will be handled in accordance with the *Privacy Act 1982* and consistent with section 655 of the FW Act, which deals with the disclosure of information by FWC.

**Conclusion**

The amendments are compatible with human rights because they advance the protection of human rights. To the extent that the amendments may limit human rights, those limitations are reasonable, necessary and proportionate.

*Minister for Employment and Workplace Relations, the Honourable William Shorten MP*
NOTES ON AMENDMENTS

In these notes on amendments, the following abbreviations are used:

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>FW Act</td>
<td>Fair Work Act 2009</td>
</tr>
<tr>
<td>FWC</td>
<td>Fair Work Commission</td>
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<tr>
<td>RO Act</td>
<td>Fair Work (Registered Organisations) Act 2009</td>
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<tr>
<td>ROA Act</td>
<td>Fair Work (Registered Organisations) Amendment Act 2012</td>
</tr>
<tr>
<td>the Bill</td>
<td>Fair Work Amendment Bill 2013</td>
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<tr>
<td>WHS Act</td>
<td>Work Health and Safety Act 2011</td>
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<tr>
<td>AFP</td>
<td>Australian Federal Police</td>
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<tr>
<td>ASIS</td>
<td>Australian Secret Intelligence Service</td>
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Amendment No.1 – Title, page 1 (lines 1 and 2)

1. This amendment omits the existing title to the Bill and substitutes it with a broader title that encompasses the proposed amendments to the ROA Act.

Amendment No.2 – Clause 2, page 2 (after table item 6)

Amendment No.3 – Clause 2, page 2 (after table item 7)

Amendment No.4 – Clause 2, page 2 (table item 10)

Amendment No.5 – Clause 2, page 3 (after table item 17)

2. The table in clause 2 of the Bill sets out when the Bill’s provisions commence. These amendments amend the table to include commencement provisions for the changes made by the Bill.

Amendment No.6 – Schedule 3, item 6, page 17 (line 17), after “2011”

Amendment No.7 – Schedule 3, item 6, page 18 (line 26), before “the FWC”

Amendment No.8 – Schedule 3, item 6, page 18 (after line 30), at the end of section 789FE

Amendment No.9 – Schedule 3, item 6, page 19 (after line 36), at the end of Part 6-4B

3. Schedule 3 to the Bill inserts new Part 6-4B into the FW Act, which gives workers a remedy against workplace bullying. These provisions enable a worker who is bullied at work (i.e. subjected to unreasonable behaviour that creates a risk to health and safety) to apply to the FWC for orders to stop the bullying. Unreasonable behaviour that creates a risk to health and safety will depend on the relevant workplace context and circumstances.

4. Under new subsection 789FC(2) of Part 6-4B, ‘worker’ has the same meaning as in the WHS Act. This includes employees of, or persons engaged to carry out work for, Australia’s security agencies, and members of the Defence Force and the AFP, who are deemed to be workers under section 7 of the WHS Act.

5. Under the WHS Act the Defence Force, the AFP and Australia’s security agencies have duties to ensure, so far as reasonably practicable, the health and safety of Defence Force, AFP and security personnel by managing risks posed by bullying (and other risks to health and safety). However, sections 12C, 12D and 12E of the WHS Act provide that nothing in that Act requires or permits a person to take any action, or to refrain from taking any action, that would be, or could reasonably be expected to be, prejudicial to Australia’s national security, defence or existing or future covert or international operations of the AFP (these terms are defined in section 12E of the WHS Act).
6. Further, sections 12C and 12D of the WHS Act enable the Director-General of Security, the Director-General of ASIS and the Chief of the Defence Force to declare by legislative instrument, with the approval of the Minister for Employment and Workplace Relations, that specified WHS Act provisions do not apply, or apply with modifications, in relation (respectively) to:

- persons who carry out work for the Director-General of Security or the Director-General of ASIS; or
- specified activities, specified members of the Defence Force, or Defence Force members included in a specified class.

7. These WHS Act provisions recognise the unique nature of the operating environments of Australia’s defence and security personnel. The considerations that underpin these provisions are also relevant to the way in which workplace bullying, as a risk to health and safety, will be addressed in the FW Act. Amendments 6, 7, 8 and 9 reflect these considerations by limiting and qualifying the operation of the workplace bullying provisions in Schedule 3 to the Bill in relation to the Defence Force, Australia’s security agencies and the AFP.

8. Amendment 6 excludes members of the Defence Force from the definition of ‘worker’ in subsection 789FC(2), the effect of which is that those members cannot seek orders from the FWC. This recognises the unique nature of service in the Defence Force (which is a disciplined force that is called upon to undertake service in dangerous operating environments) and the need to maintain the integrity of its command structure.

9. Amendment 7 is a numbering change that inserts new subsection (1) in section 789FE, consequential on amendment 8. Amendments 8 and 9 adapt the WHS Act exemptions and exceptions for defence, security and AFP operations to the workplace bullying framework established by Schedule 3 to the Bill. These amendments provide:

- for the FWC to dismiss a workplace bullying application if it considers that the application might involve matters relating to Australia’s defence, national security, or existing or future covert or international operations of the AFP (new subsection 789FE(2));
- that nothing in Part 6-4B of the FW Act requires or permits a person to take, or to refrain from taking, any action if the taking of the action, or the refraining from taking the action, would be, or could reasonably be expected to be, prejudicial to Australia’s defence, national security, or existing or future covert or international operations of the AFP (new section 789FI);
- for the Chief of the Defence Force to declare by legislative instrument, if the Minister for Employment and Workplace Relations approves, that all or specified provisions of Part 6-4B of the Act do not apply in relation to specified activities (new section 789FJ); and
- for the Director-General of Security or the Director-General of ASIS to declare by legislative instrument, if the Minister for Employment and Workplace Relations approves, that all or specified provisions of Part 6-4B of the Act do not apply in relation to persons carrying out work for the Director-General of Security (new section 789FK) or the Director-General of ASIS (new section 789FL).

10. These amendments are consistent with arrangements under the WHS Act, and achieve an appropriate balance between the need to provide a swift and effective remedy against bullying, and Australia’s security and defence interests.
Amendment No.10 – Page 19 (after line 36), after Schedule 3

Item 1 – At the end of section 592

Item 2 – Subsection 595(5)

11. This amendment inserts Schedule 3A into the Bill. Items 1 and 2 of Schedule 3A amend sections 592 and 595 of the FW Act (respectively) to clarify the FWC’s ability to conciliate, mediate, express opinions and make recommendations in circumstances other than when dealing with disputes under the Act.

12. The FW Act currently enables the FWC to inform itself as it considers appropriate (section 590), to require attendance at conferences for the purpose of exercising its powers and functions (section 592) and to decide how, when and where matters are dealt with (section 589). In this context conciliation and mediation etc. occur in a range of matters (e.g. in applications for orders for modern award variations, enterprise agreement approvals and unfair dismissal remedies) to enable quick resolution of issues wherever possible. This approach is also envisaged for workplace bullying applications.

13. The FWC can deal with disputes where expressly authorised to do so by another provision of the FW Act (subsection 595(1)). For instance, various provisions of the FW Act enable the FWC to deal with disputes (e.g. about bargaining, right of entry, stand down, alleged contraventions of the general protections, and disputes arising under modern awards or enterprise agreements). Subsection 595(2) provides for the FWC to conciliate, mediate, express opinions and make recommendations when dealing with a dispute. In limited circumstances the FWC can arbitrate disputes (e.g. under subsection 240(4) by consent of the parties). Subsection 595(5) provides that the FWC cannot conciliate, mediate, express opinions, make recommendations or arbitrate in matters before it except as authorised by section 595.

14. Item 1 of Schedule 3A amends section 592 to clarify some of the common functions that the FWC can perform. The functions referred to in the provision include to conciliate, mediate, express opinions or make recommendations at a conference, without limiting what the FWC may do at a conference (such as informing itself or making decisions), in the range of matters that come before it. This amendment clarifies the FWC’s powers and would not confer any additional determinative powers or functions on the FWC, such as arbitration.

15. Item 2 of Schedule 3A is consequential on the amendment made by item 1 and reflects the FWC’s ability under that amendment to conciliate, mediate, express opinions or make recommendations at a conference. As amended by item 2, subsection 595(5) means that the FWC can only deal with a dispute by arbitration (in accordance with subsection 595(3)) where it is expressly authorised to do so under another provision of the Act, and cannot arbitrate in other matters.

Application of amendment

16. Item 1 of Schedule 7 to the Bill inserts new Schedule 4 into the FW Act, which sets out application and transitional provisions.

17. Amendment 16 inserts new Part 4A and item 8A into new Schedule 4 to the FW Act. New item 8A provides that the amendments made by new Schedule 3A to the Bill apply in relation to matters arising before or after the commencement of that Schedule, whether or not a conference starts to be conducted in relation to the matter before or after that commencement.
Amendment No.11 – Page 28 (after line 29), after Schedule 4

18. This amendment inserts new Schedule 4A into the Bill, which amends the FW Act to allow the FWC to arbitrate general protections dismissal disputes under Division 8 of Part 3-1 of the FW Act and unlawful termination disputes under Division 2 of Part 6-4 of the FW Act, where the parties consent.

19. Consent arbitration is intended to provide a faster, less expensive and less formal alternative to court proceedings.

20. The FWC will continue to initially deal with disputes other than by arbitration (which may include conciliation, mediation, expressing an opinion or making a recommendation) and will still be required to issue a certificate if all reasonable attempts to resolve the dispute by these means have been, or are likely to be, unsuccessful.

21. The amendments provide that once the FWC has issued a certificate, within 14 days, a dismissed employee can:
   - make a general protections or unlawful termination court application (whichever is appropriate) in relation to the dismissal; or
   - elect not to proceed further with the dispute; or
   - with the consent of their former employer, agree that the FWC conduct consent arbitration to resolve the dispute.

22. The FWC will be able to exercise its general powers when arbitrating and inform itself as it sees fit. Consistent with its general powers, and the powers available to a court when determining a general protections or unlawful termination court application, the FWC will also be able to make any order it considers appropriate.

23. The amendments also deal with procedural matters, including new measures to limit appeals and provide for costs orders in certain circumstances.

24. The amendments ensure that a dismissed employee will continue to be prevented from pursuing multiple remedies in relation to the dismissal.

25. The amendments will also align the time limit for making an unlawful termination application with the time limit of 21 days that applies for making general protections dismissal and unfair dismissal applications.

Part 1 – General Protections

Item 1 – Section 12 (definition of general protections court application)

26. This item amends the signpost definition of general protections court application in the dictionary in section 12 and refers to its definition in new subsection 368(4).

Item 2 – Subsection 361(1)

27. This item amends existing subsection 361(1) to make it clear that the existing reverse onus of proof for general protections court proceedings also applies to consent arbitration proceedings conducted by the FWC.

Item 3 – Section 365 (heading)

28. This item is a technical amendment to the heading of section 365.
Item 4 – Sections 368, 369, 370 and 371

29. The item repeals and replaces existing sections 368 to 371 and sets out the new compliance framework for contraventions of Part 3-1 involving dismissal to take account of the new consent arbitration jurisdiction exercisable by the FWC.

New Section 368 – Dealing with a dismissal dispute (other than by arbitration)

30. New subsection 368(1) provides that if an application is made under section 365, the FWC must deal with the dispute. The FWC’s powers under this section do not include arbitration.

31. A legislative note to new subsection 368(1) alerts the reader to section 595, which sets out the FWC’s powers when dealing with a dispute. The effect of this provision (and in particular subsection 595(2)) is that the FWC can deal with the dispute by mediation, conciliation, making a recommendation or expressing an opinion. The note also makes it clear that where the FWC forms the view that the dispute is in fact more properly characterised as an unfair dismissal claim, the FWC can recommend that the dismissed employee make an application under Part 3-2, which deals with unfair dismissal.

32. New subsection 368(2) provides that any conference held under this section must be conducted in private. A legislative note to new subsection 368(2) alerts the reader to section 592 which contains procedural rules relating to the conduct of conferences by FWC.

33. New subsection 368(3) provides that if the FWC is satisfied that all reasonable attempts to resolve the dispute other than by arbitration have been, or are likely to be unsuccessful, then the FWC must issue a certificate to that effect. This new subsection also provides that if the FWC considers, taking into account all of the materials before it, that consent arbitration under new section 369 or a general protections court application, would not have a reasonable prospect of success, the FWC must advise the parties accordingly.

34. Once a certificate has been issued by the FWC under new subsection 368(3), within 14 days (unless an extension of time is granted), a dismissed employee can:

- commence a general protections court application in relation to the dismissal (see new section 370); or
- elect not to proceed further with the dispute; or
- with the consent of their former employer, agree that the FWC conduct consent arbitration to resolve the dispute (see new section 369).

35. New subsection 368(4) defines a general protections court application as an application to a relevant court under Division 2 of Part 4-1 of the FW Act for orders in relation to a contravention of Part 3-1.
New Section 369 – Dealing with a dismissal dispute by arbitration

36. New subsection 369(1) enables the FWC to deal with a general protections dismissal dispute by consent arbitration if the following requirements are met:

- the FWC issues a certificate under new paragraph 368(3)(a) in relation to the dispute (paragraph 369(1)(a));
- the parties notify the FWC that they agree to the FWC arbitrating the dispute (paragraph 369(1)(b));
- the notification is given within 14 days of the certificate being issued, unless the FWC allows otherwise, and complies with any requirements prescribed by the procedural rules (paragraph 369(1)(c)); and
- sections 726, 728, 729, 730, 731 and 732 do not apply (paragraph 369(1)(d)).

37. Where sections 726, 728, 729, 730, 731 or 732 apply, a person is prevented from making an application or complaint of a kind referred to in any one of those sections in relation to the dismissal. The effect of new paragraph 369(1)(d) is that, in such circumstances, the person is also prevented from proceeding to consent arbitration.

38. A note to new subsection 369(1) informs the reader of the combined effect of Subdivision B of Division 3 of Part 6-1 and new paragraph 369(1)(d). Particular note is made of section 727, which sets out the circumstances in which a dismissed employee is prevented from seeking an alternative remedy in relation to their dismissal when they have elected to have the dispute dealt with by the FWC.

39. Subsection 595(3) provides that the FWC may only deal with a dispute by arbitration when it is expressly authorised to do so under another provision of the Act and may make any orders it considers appropriate. For the purposes of subsection 595(3), new subsection 369(2) provides that the FWC may deal with a dispute by arbitration, including by making or more of the orders listed in paragraphs (a) to (e).

40. In dealing with a dispute, the FWC is able to exercise its general powers, including its powers under section 590 to inform itself as it sees fit.

41. The parties are not generally able to be represented by a lawyer or paid agent unless the FWC grants permission under subsection 596(2) or if permitted under the procedural rules (see section 596).

42. New subsection 369(3) provides that a person who is subject to an order of the FWC made under new subsection 369(2) must comply with the terms of the order.

43. New subsection 369(3) is a civil remedy provision under Part 4-1.

New Section 370 – Taking a dismissal dispute to court

44. New section 370 sets out the two circumstances in which a dismissed employee can make a general protections court application in relation to a dismissal. They are:

- if the FWC has issued a certificate under new paragraph 368(3)(a) in relation to the dispute and the court application is made within 14 days of the certificate being issued unless the court allows otherwise (paragraph 370(a)); or
- the court application includes an application for an interim injunction (paragraph 370(b)). This recognises that applicants may decide not to involve the FWC where urgent relief is sought and the allegations are particularly serious, the facts in dispute are particularly complex, or the employer is unlikely to agree to consent arbitration.
45. A legislative note alerts the reader to sections 727 and 728, which provide that, if the parties notify the FWC under new subsection 369(1) that they wish the FWC to arbitrate the dispute by consent, a general protections court application cannot generally be made in relation to the dispute unless the FWC application is withdrawn or failed for want of jurisdiction.

46. A further legislative note refers the reader to *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298, in which the Industrial Relations Court of Australia set down principles relating to the exercise of its discretion under a similarly worded provision to that in new subparagraph 370(a)(ii).

**Item 5 – Section 372 (heading)**

47. This item is a technical amendment to the heading of section 372.

**Item 6 - Subdivision C of Division 8 of Part 3-1**

48. This item repeals and replaces Subdivision C of Division 8 of Part 3-1.

**New Section 375A – Appeal rights**

49. New section 375A provides limited rights to appeal arbitrated decisions made by the FWC in relation to general protections dismissal disputes that are similar to the appeal rights that apply for unfair dismissal decisions (see section 400).

50. The primary provisions dealing with the appeal of decisions are in the FWC provisions in Part 5-1 of the FW Act. The effect of new section 375A is to make the process for permitting appeals from decisions under this Division different from the general grounds in section 604 in two respects. Firstly, the general appeal provisions do not require public interest as a prerequisite for permitting appeals, whereas new section 375A provides that only appeals in the public interest can be permitted for general protections matters.

51. Secondly, new subsection 375A(2) limits appeals based on an error of fact to only allow an appeal where that error is a significant error of fact. This subsection is intended to limit the FWC’s discretion to permit an appeal under subsection 604(1).

52. Sections relevant to appeals from, and reviews of, general protections decisions are also contained in other provisions of Part 5-1.

53. Section 605 has the effect of empowering the Minister to apply to the FWC for a review of general protections decisions (other than those made by a Full Bench) if, in the Minister’s opinion, the decisions are contrary to the public interest.

54. Section 606 has the effect of allowing the FWC to stay the operation of the whole or part of a decision made in relation to a matter arising under Part 3-1 on any terms that FWC considers are appropriate.

55. Section 607 contains details of the processes for appealing or reviewing decisions, including those made in relation to a matter arising under Part 3-1.

**New Section 375B – Costs orders against parties**

56. New section 375B allows the FWC to order costs against a party to a general protections dismissal dispute (the first party) if it is satisfied that the first party caused the other party to the dispute to incur costs by an unreasonable act or omission in connection with the conduct or continuation of the dispute. New section 375B is similar to the costs orders that are available against parties in relation to unfair dismissal matters (see section 400A).

57. This power to award costs is in relation to the dispute before the FWC and does not include costs associated with a general protections court application.
58. The power to award costs under new section 375B is not intended to prevent a party from robustly pursuing or defending a general protections dispute before the FWC. Rather, the power is intended to address the small proportion of litigants who pursue or defend disputes in an unreasonable manner. The power is only intended to apply where there is clear evidence of unreasonable conduct by the first party.

59. The FWC’s power to award costs under subsection 375B(1) is discretionary and is only exercisable where the first party (whether the applicant or respondent) causes the other party to incur costs because of an unreasonable act or omission.

60. However, the power to award costs is only available if the FWC is satisfied that the act or omission by the first party was unreasonable. What is an unreasonable act or omission will depend on the particular circumstances but it is intended that the power only be exercised where there is clear evidence of unreasonable conduct by the first party.

61. New subsection 375B(2) provides that the power to award costs against one party in these circumstances is only exercisable if the other party to the dispute makes an application in accordance with section 377. New subsection 375B(3) makes it clear that the new power to award costs under subsection 375B(1) operates in addition to subsection 611(2), which enables the FWC to make costs orders against a person in certain circumstances, such as where an application is made vexatiously or without reasonable cause.

New Section 376 – Costs orders against lawyers and paid agents

62. Current section 376 enables the FWC to award costs against a lawyer or paid agent in certain circumstances where the FWC has granted permission under section 596 for them to represent a party in a general protections dispute. Under new section 376, this power will no longer depend on the FWC having granted permission under section 596. New section 376 is also similar to the costs orders that are available against lawyers and paid agents in relation to unfair dismissal matters (see section 401).

63. New section 376 will provide a strong deterrent for lawyers and paid agents from encouraging parties to bring or continue speculative general protections disputes they know have no reasonable prospect of success. The provision will also deter lawyers or paid agents from unreasonably encouraging a party to defend a general protections dispute with no reasonable prospect of success. It will act as a stronger deterrent than the current provision as it will make lawyers and paid agents subject to the possibility of adverse costs orders even if they are not granted, or do not seek, permission to represent the party in the dispute before the FWC.

64. New subsection 376(1) provides that the section applies if:

- a general protections application to deal with a dispute has been made under section 365 or 372;
- a lawyer or paid agent (the representative) has been engaged by a party to represent them in the dispute; and
- the party is required to seek the FWC’s permission under section 596 to be represented by the representative.
65. New subsection 376(2) sets out the grounds on which an order for costs is available against a representative. Costs are available where the FWC is satisfied that the representative caused costs to be incurred because:

- the representative encouraged the person to start, continue or respond to the dispute and it should have been reasonably apparent that the person had no reasonable prospect of success in the dispute (subsection 376(2)(a)); or

- of an unreasonable act or omission of the representative in connection with the conduct or continuation of the dispute (subsection 376(2)(b)).

66. This power to award costs is in relation to the dispute before the FWC and does not include costs associated with a general protections court application.

67. An example of where the FWC may award costs against a representative under new subsection 376(2) is where the representative knows that his or her client’s general protection application is dishonest or without foundation but still actively encourages them to proceed with the application to try and extract a remedy such as a financial settlement from the employer.

New Section 377 – Applications for costs orders

68. New section 377 replicates existing section 377 and provides that an application for costs under section 365 or 372 must be made within 14 days after the FWC has finished dealing with the dispute.

New Section 377A – Schedule of costs

69. New subsection 377A(1) allows for the prescription of a schedule of costs. The term costs is intended to have its ordinary meaning, namely legal and professional costs, disbursements and expenses of witnesses (see Cachia v Hanes (1994) 179 CLR 403; Re JDT; Ex parte Victoria Legal Aid (1998) 195 CLR 184). The purpose of this subsection is to ensure the FWC’s capacity to award legal and professional costs and disbursements includes expenses arising from the representation of a party by a person or organisation other than on a legal professional basis.

70. New subsection 377A(2) provides that, if a schedule of costs is prescribed, the FWC is not restricted in its award of costs to the items of expenditure listed in the schedule. However, if an item of expenditure appears in the schedule, the FWC cannot make an award of costs above the rate or amount specified.

New Section 378 – Contravening costs orders

71. New section 378 provides that, where an order made by the FWC under new sections 375B or 376 applies to a person, that person must not contravene a term of the order.

72. New section 378 is a civil remedy provision under Part 4-1.

Item 7 – Subsection 539(2) (at the end of the cell at table item 11, column 1)

73. This item amends the table in subsection 539(2) to include new subsection 369(3) in the list of civil remedy provisions at item 11 of the table.

Item 8 – Section 544 (note 1)

Item 9 – Paragraph 601(5)(a)

74. These items are technical amendments consequential to the amendments made by item 4.
Item 10 – After paragraph 609(2)(e)

75. This item inserts new paragraph 609(2)(ea) to allow the President to make procedural rules about the requirements of making a notification to the FWC. Such notifications would include notifications of parties’ agreement to arbitration by the FWC provided for under new paragraphs 369(1)(c) and 777(1)(c).

Item 11 – Subparagraph 727(1)(b)(iii)

76. This item is a technical amendment to subparagraph 727(1)(b)(iii) consequential to the amendments made by item 4.

Item 12 – After subsection 727(1)

77. This item inserts new subsection 727(1A) into current section 727 to prevent a person from making an application for another remedy in relation to their dismissal if they have made a general protections application to the FWC and:

- the application has not been withdrawn or failed for want of jurisdiction;
- a certificate under new paragraph 368(3)(a) has been issued in relation to the dispute; and
- a notification referred to in new paragraphs 369(1)(b) and (c) notifying the FWC that the parties agree to the FWC arbitrating the dispute has been made.

78. Section 727 is located in Subdivision B of Division 3 of Part 6-1, which deals with cases where there may be more than one remedy available for the same conduct or circumstances.

79. Section 725 sets out a general rule that if a person has made an application that falls within any of sections 726 to 732, they may not bring an application that falls within any of the other sections.

Part 2 – Unlawful termination

80. The following amendments are to take account of the new FWC consent arbitration jurisdiction that is available for unlawful termination disputes.

Item 13 – Section 12 (definition of unlawful termination court application)

81. This item amends the signpost definition of unlawful termination court application in the dictionary in section 12 and refers to its definition in new subsection 776(4).

Item 14 – Subsection 539(2) (at the end of the cell at table item 35, column 1)

82. This item amends the table in subsection 539(2) to include new subsection 777(3) in the list of civil remedy provisions at item 35 of the table.

Item 15 – Section 544 (note 1)

83. This item is a technical amendment consequential to the amendments made by item 19.

Item 16 – Subparagraph 730(1)(b)(iii)

84. This item is a technical amendment to subparagraph 730(1)(b)(iii) consequential to the amendments made by item 19.
**Item 17 – After subsection 730(1)**

85. This item inserts new subsection 730(1A) into current section 730 to prevent a person from making an application for another remedy in relation to their dismissal if they have made an unlawful termination application to the FWC and:

- the application has not been withdrawn or failed for want of jurisdiction;
- a certificate under new paragraph 776(3)(a) has been issued in relation to the dispute; and
- a notification referred to in new paragraphs 777(1)(b) and (c) notifying the FWC that the parties agree to the FWC arbitrating the dispute has been made.

86. Section 730 is located in Subdivision B of Division 3 of Part 6-1 which deals with cases where there may be more than one remedy available for the same conduct or circumstances.

87. Section 725 sets out the general rule which is that if a person has made an application that falls within any of sections 726 to 732 then they may not bring an application that falls within any of the other sections.

**Item 18 – Paragraph 774(1)(a)**

88. This item amends the time limit for applications made under section 773 to the FWC to deal with a dispute. The current time limit of 60 days after a person’s employment is terminated is replaced by a time limit of 21 days. This is to align with the time limits that apply to applications:

- made involving dismissals in alleged contravention of the general protections (see section 366); and
- for an unfair dismissal remedy (see section 394).

**Item 19 – Sections 776, 777, 778, 779, 780 and 781**

89. The item repeals and replaces existing sections 776 to 781 and sets out the new compliance framework for contraventions of Division 2 of Part 6-4 involving termination of employment to take account of the new consent arbitration jurisdiction exercisable by the FWC.

*New Section 776 – Dealing with a dispute (other than by arbitration)*

90. New subsection 776(1) provides that if an application is made under section 773, the FWC must deal with the dispute. The FWC’s powers under this section do not include arbitration.

91. A legislative note to new subsection 776(1) alerts the reader to section 595, which sets out the FWC’s powers when dealing with a dispute. The effect of this provision (and in particular subsection 595(2)) is that the FWC can deal with the dispute by mediation, conciliation, making a recommendation or expressing an opinion.

92. New subsection 776(2) provides that any conference held under this section must be conducted in private. A legislative note to new subsection 776(2) alerts the reader to section 592 which contains procedural rules relating to the conduct of conferences by FWC.

93. New subsection 776(3) provides that if the FWC is satisfied that all reasonable attempts to resolve the dispute other than arbitration have been, or are likely to be unsuccessful, then the FWC must issue a certificate to that effect. This new subsection also provides that if the FWC considers, taking into account all of the materials before it, that consent arbitration under section 777 or an unlawful termination court application, would not have a reasonable prospect of success, the FWC must advise the parties accordingly.
94. Once a certificate has been issued by the FWC under new subsection 776(3), within 14 days (unless an extension of time is granted), a dismissed employee can:

- commence an unlawful termination court application in relation to the dismissal (see new section 778); or
- elect not to proceed further with the dispute; or
- with the consent of their former employer, agree that the FWC conduct consent arbitration to resolve the dispute (see new section 777).

95. New subsection 776(4) defines an unlawful termination court application as an application to a relevant court under Division 2 of Part 4-1 for orders in relation to a contravention of subsection 772(1).

New Section 777 – Dealing with a dispute by arbitration

96. New subsection 777(1) enables the FWC to deal with an unlawful termination dispute by consent arbitration if the following requirements are met:

- the FWC issues a certificate under new paragraph 776(3)(a) in relation to the dispute (paragraph 777(1)(a));
- the parties notify the FWC that they agree to the FWC arbitrating the dispute (paragraph 777(1)(b)) ;
- the notification is given within 14 days of the certificate being issued, unless the FWC allows otherwise, and complies with any requirements prescribed by the procedural rules (paragraph 777(1)(c)); and
- sections 726, 727, 728, 729, 731 and 732 do not apply (paragraph 777(1)(d)).

97. Where sections 726, 727, 728, 729, 731 or 732 apply, a person is prevented from making an application or complaint of a kind referred to in any one of those sections in relation to the dismissal. The effect of new paragraph 777(1)(d) is that, in such circumstances, the person is also prevented from proceeding to consent arbitration.

98. A note to new subsection 777(1) informs the reader of the combined effect of Subdivision B of Division 3 of Part 6-1 and new paragraph 777(1)(d). Particular note is made of section 730, which sets out the circumstances in which a dismissed employee is prevented from seeking an alternative remedy in relation to their dismissal when they have elected to have the dispute dealt with by the FWC.

99. Subsection 595(3) provides that the FWC may only deal with a dispute by arbitration when it is expressly authorised to do so under another provision of the Act and may make any orders it considers appropriate. For the purposes of subsection 595(3), new subsection 777(2) provides that the FWC may deal with a dispute by arbitration, including by making or more of the orders listed in paragraphs (a) to (e).

100. In dealing with a dispute, the FWC is able to exercise its general powers, including its powers under section 590 to inform itself as it sees fit.

101. The parties are not generally able to be represented by a lawyer or paid agent unless the FWC grants permission under subsection 596(3) or if permitted under the procedural rules (see section 596).

102. New subsection 777(3) provides that a person who is subject to an order of the FWC made under new subsection 777(2) must comply with the terms of the order.
103. New subsection 777(3) is a civil remedy provision under Part 4-1.

*New Section 778 – Taking a dispute to court*

104. New section 778 sets out the two circumstances in which a dismissed employee can make an unlawful termination court application in relation to a dismissal. These are:

- if the FWC has issued a certificate under new paragraph 776(3)(a) in relation to the dispute and the court application is made within 14 days of the certificate being issued unless the court allows otherwise (paragraph 778(a)); or
- the court application includes an application for an interim injunction (paragraph 778(b)).

105. A legislative note alerts the reader to sections 730 and 731, which provide that, if the parties notify the FWC under new subsection 777(1) that they wish the FWC to arbitrate the dispute by consent, an unlawful termination court application cannot be made in relation to the dispute unless the FWC application is withdrawn or failed for want of jurisdiction.

106. A further legislative note refers the reader to *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298, in which the Industrial Relations Court of Australia set down principles relating to the exercise of its discretion under a similarly worded provision to that in new subparagraph 778(a)(ii).

*New Section 779 – Appeal rights*

107. New section 779 provides limited rights to appeal arbitrated decisions made by the FWC in relation to unlawful termination disputes that are similar to the appeal rights that apply for unfair dismissal decisions (see section 400).

108. The primary provisions dealing with appeal of decisions are in the FWC provisions in Part 5-1. The effect of new section 779 is to make the process for permitting appeals from decisions under this Division different from the general grounds in section 604 in two respects. Firstly, the general appeal provisions do not require public interest as a prerequisite for permitting appeals, whereas new section 779 provides that only appeals in the public interest can be permitted for unlawful termination matters.

109. Secondly, new subsection 779(2) limits appeals based on an error of fact to only allow an appeal where that error is a significant error of fact. This subsection is intended to limit the FWC’s discretion to permit an appeal under section 604(1).

110. Sections relevant to appeals from, and reviews of, unlawful termination decisions are also contained in Part 5-1.

111. Section 605 has the effect of empowering the Minister to apply to the FWC for a review of unlawful termination decisions (other than those made by a Full Bench) if, in the Minister’s opinion, the decisions are contrary to the public interest.

112. Section 606 has the effect of allowing the FWC to stay the operation of the whole or part of a decision made in relation to a matter arising under Division 2 of Part 6-1 on any terms that FWC considers are appropriate.

113. Section 607 contains details of the processes for appealing or reviewing decisions, including those made in relation to a matter arising under Division 2 of Part 6-1.
New Section 779A – Costs orders against parties

114. New section 779A allows the FWC to order costs against a party to a dispute (the first party) if it is satisfied that the first party caused the other party to the dispute to incur costs by an unreasonable act or omission in connection with the conduct or continuation of the dispute. New section 779A is similar to the costs orders that are available against parties in relation to unfair dismissal matters (see section 400A).

115. This power to award costs in relation to the dispute before the FWC and does not include costs associated with an unlawful termination court application.

116. The power to award costs under new section 779A is not intended to prevent a party from robustly pursuing or defending a dispute before the FWC. Rather, the power is intended to address the small proportion of litigants who pursue or defend disputes in an unreasonable manner. The power is only intended to apply where there is clear evidence of unreasonable conduct by the first party.

117. The FWC’s power to award costs under subsection 779A(1) is discretionary and is only exercisable where the first party (whether the applicant or respondent) causes the other party to incur costs because of an unreasonable act or omission.

118. However, the power to award costs is only available if the FWC is satisfied that the act or omission by the first party was unreasonable. What is an unreasonable act or omission will depend on the particular circumstances but it is intended that the power only be exercised where there is clear evidence of unreasonable conduct by the first party.

119. Subsection 779A(2) provides that the power to award costs against one party in these circumstances is only exercisable if the other party to the dispute makes an application in accordance with section 781. Subsection 779A(3) makes clear that the new power to award costs under subsection 779A(1) operates in addition to subsection 611(2), which enables the FWC to make costs orders against a person in certain circumstances, such as where an application is made vexatiously or without reasonable cause.

New Section 780 – Costs orders against lawyers and paid agents

120. Current section 780 enables the FWC to award costs against a lawyer or paid agent in certain circumstances where the FWC has granted permission under section 596 for them to represent a party in a dispute. Under new section 780, this power will no longer depend on the FWC having granted permission under section 596. New section 780 is also similar to the costs orders that are available against lawyers and paid agents in relation to unfair dismissal matters (see section 401).

121. New section 780 will provide a strong deterrent for lawyers and paid agents from encouraging parties to bring or continue speculative disputes under section 773 they know have no reasonable prospect of success. The provision will also deter lawyers or paid agents from unreasonably encouraging a party to defend a dispute with no reasonable prospect of success. It will act as a stronger deterrent than the current provision as it will make lawyers and paid agents subject to the possibility of adverse costs orders even if they are not granted, or do not seek, permission to represent the party in the dispute before the FWC.
122. New subsection 780(1) provides that the section applies if:

- an application to deal with a dispute has been made under section 773;
- a lawyer or paid agent (the representative) has been engaged by a party to represent them in the dispute, and
- the party is required to seek the FWC’s permission under section 596 to be represented by the representative.

123. New subsection 780(2) sets out the grounds on which an order for costs is available against a representative. Costs are available where the FWC is satisfied that the representative caused costs to be incurred because:

- the representative encouraged the person to start, continue or respond to the dispute and it should have been reasonably apparent that the person had no reasonable prospect of success in the dispute (paragraph 780(2)(a)); or
- of an unreasonable act or omission of the representative in connection with the conduct or continuation of the dispute (paragraph 780(2)(b)).

124. This power to award costs in relation to the dispute does not include costs associated with an unlawful termination court application.

125. An example of where the FWC may award costs against a representative under new subsection 780(2) is where the representative knows that his or her client’s application under section 773 is dishonest or without foundation but still actively encourages them to proceed with the application to try and extract a remedy such as a financial settlement from the employer.

New Section 781 – Applications for costs orders

126. New section 781 replicates existing section 781 and provides that an application for costs in relation to an application under section 773 must be made within 14 days after the FWC has finished dealing with the dispute.

New Section 781A – Schedule of costs

127. New subsection 781A(1) allows for the prescription of a schedule of costs. The term costs is intended to have its ordinary meaning, namely legal and professional costs, disbursements and expenses of witnesses (see Cachia v Hanes (1994) 179 CLR 403; Re JJT; Ex parte Victoria Legal Aid (1998) 195 CLR 184). The purpose of this subsection is to ensure the FWC’s capacity to award legal and professional costs and disbursements includes expenses arising from the representation of a party by a person or organisation other than on a legal professional basis.

128. New subsection 781A(2) provides that, if a schedule of costs is prescribed, the FWC is not restricted in its award of costs to the items of expenditure listed in the schedule. However, if an item of expenditure appears in the schedule, the FWC cannot make an award of costs above the rate or amount specified.

Item 20 - Section 782

129. This item is a technical amendment to section 782 consequential to the amendments made by item 19.
Item 21 – Subsection 783(1)

130. This item amends existing subsection 783(1) to make it clear that the existing reverse onus of proof for unlawful termination court proceedings also applies to consent arbitration proceedings conducted by the FWC.

Application of amendment

131. Item 1 of Schedule 7 to the Bill inserts new Schedule 4 into the FW Act, which sets out application and transitional provisions.

132. Amendment 17 inserts new Part 6 and item 10 into new Schedule 4 to the FW Act. New item 10 provides that the amendments made by new Schedule 4A to the Bill apply in relation to dismissals that take effect after the commencement of that Schedule (for the amendments made by Part 1 of new Schedule 4A) and employment that is terminated after the commencement of that Schedule (for the amendments made by Part 2 of new Schedule 4A).

Amendment No. 12 – Schedule 5, page 29 (line 1)

Amendment No. 13 – Schedule 5, page 29 (after line 14), at the end of the Schedule

133. These amendments amend Schedule 5 to the Bill, which is about the FWC.

134. Section 632 of the FW Act provides that nothing in the FW Act prevents a Deputy President or Commissioner from holding a concurrent appointment (with the President’s approval) to an office:

(a) as a member of a Commonwealth or Territory tribunal prescribed by the regulations (other than a court), or

(b) under a Commonwealth or Territory law that provides for the office to be held by an FWC Member.

135. Amendment 13 inserts new item 4 into Schedule 5 to the Bill. This amendment removes from paragraph 632(b) of the FW Act all the words after ‘under a Commonwealth or Territory law’. This provides increased flexibility to concurrently appoint Deputy Presidents or Commissioners to offices under Commonwealth or Territory laws in which their expertise may be useful. From time to time Members of the FWC (and its predecessors) have undertaken roles outside the FWC which draw on their experience and expertise. The proposed amendment to paragraph 632(b) removes a potential impediment to FWC Members being considered for appointment to a wider range of such roles.

136. Amendment 12 is consequential on Amendment 13. It changes the title of Schedule 5 from ‘Functions of the FWC’ to ‘The FWC’.

Application of amendments

137. Item 1 of Schedule 7 to the Bill inserts new Schedule 4 into the FW Act, which sets out application and transitional provisions.

138. Amendment 18 inserts new Part 7 and item 11 into new Schedule 4 to the FW Act. New item 11 provides for the amendment in new item 4 of Schedule 5 to the Bill, to apply in relation to an appointment made after the commencement of Schedule 5.
Amendments to the Fair Work Act of 2013

Amendment No. 14 – Page 31 (after line 23), after Schedule 6

139. This amendment amends the Bill to insert Schedule 6A which will specify the commencement of Part 2 of Schedule 1 of the ROA Act as 1 January 2014 (while ensuring that relevant disclosures for the intervening period between 1 July 2013 and 31 December 2013 are still required), provide greater clarity and consistency with the ROA Act amendments in respect of disclosure of remuneration, and make related consequential amendments to the ROA Act.

Item 1 – Section 2 (table item 3)

140. Item 1 repeals table item 3 of the commencement information table of the ROA Act and substitutes it with new items 3 and 4.

141. New table item 3 provides that new Part 1A (as inserted by item 2) will commence on 1 July 2013.

142. New table item 4 provides that the commencement of Schedule 1, Part 2 will be 1 January 2014.

143. Under the ROA Act amendments, registered organisations must comply with the requirements of Schedule 1, Part 2 of the ROA Act by 29 June 2013. In order to do so, registered organisations must certify any required rule alterations with FWC before that date. In order to avoid registered organisations being non-compliant with the RO Act (as amended by the ROA Act) because their applications have not been finalised by 29 June 2013, the commencement of Part 2 has been extended to 1 January 2014 to allow time for the approval of these applications.

144. Amendments to item 58 of Schedule 1, Part 2 (see item 9 below) ensure that there is no reduction in the disclosure obligations on registered organisations as a result of the amendment to the commencement of Part 2 by item 1.

Item 2 – After Part 1 of Schedule 1

145. Item 2 amends the ROA Act to insert new Part 1A into Schedule 1.

146. The insertion of Part 1A by item 2 will allow the Minister to issue final model rules under new sections 142A and 148F prior to the commencement of the obligations in Schedule 1, Part 2.

147. The model rules are intended to provide organisations with guidance when making any necessary rule alterations. The substance of the Minister’s powers under existing new sections 142A and 148F are unaffected by the amendments in item 2.

Item 3 – Part 2 of Schedule 1 (heading)

148. Item 3 is a consequential amendment to the heading to Schedule 1, Part 2 upon the amendments in item 1.

Item 4 – Item 56 of Schedule 1

Item 5 – Item 57 of Schedule 1 (heading)

Item 6 – Item 57 of Schedule 1 (heading to new Division 3A)

149. Items 4, 5 and 6 are consequential amendments upon the insertion of new Part 1A by item 2.

Item 7 – Item 57 of Schedule 1 (after new subsection 148C(2))

150. Item 7 amends item 57 of Schedule 1 to clarify the Government’s policy intention regarding the disclosure of remuneration of officials to ensure that only the identity and relevant
information regarding the remuneration of the 5 highest ranked officers (for organisations) and 2 highest ranked officers (for branches) is disclosed to members (under new section 148A).

151. New subsection 148C(2A) will ensure that remuneration paid to officers will not have to be disclosed as a payment to a related party under that section. The subsection also clarifies that reimbursements for costs reasonably incurred by the officer in the course of performing his or her duties are not intended to be captured by the requirements to disclose payments to related parties. The amendment is intended to exclude the disclosure of small expenses such as cost of taxi fares, stationery or other incidentals.

152. A note to new subsection 148C(2A) makes clear that nothing in the amendment to section 148C diminishes the obligation to disclose remuneration under new section 148A.

**Item 8 – Item 57 of Schedule 1 (new section 148F)**

153. Item 8 is a consequential amendment upon the insertion of new Part 1A by item 2.

**Item 9 – Item 58 of Schedule 1**

154. Item 9 repeals item 58 of Schedule 1, which sets out transitional provisions, and substitutes it with a new item 58. New item 58 is a transitional provision for the 2013-14 financial year that will ensure that there is no reduction in the disclosure obligations on registered organisations and their officers because of the amendment to the commencement of Schedule 1, Part 2 of the ROA Act by item 1 of this Schedule.

155. On 1 January 2014 registered organisations will be required to have rules that meet the requirements of the RO Act as amended by Part 2 of the ROA Act. New item 58 will ensure that all disclosures that would have been required to be made by officers and registered organisations under rules made in accordance with sections 148A–148C of the RO Act (as amended by the ROA Act) will still be required.

156. New subitems 58(2) and (3) will deem the rules of organisations to require that officers of organisations or branches (as the case may be) must disclose to the organisation for the period 1 July – 31 December 2013:

- remuneration paid to the officer because the officer is a member of a board or by a related party of the organisation (s 148A(1) and (2)); and
- material personal interests of the officer (s 148B(1) and (2)).

157. The provision will require officers to disclose this information to the organisation as soon as practicable after the commencement of the provisions on 1 January 2014 but no later than 31 January 2014.

158. New subitem 58(4) will provide that registered organisations must disclose any information disclosed by officers under subitems 58(2) and (3), or under the rules of the organisation or branch that commence on 1 January 2014, by 31 December 2014. Registered organisations will also need to disclose all payments made to related parties for the 2013-2014 financial year by the same date. This is consistent with existing provisions, which require that all disclosures for the disclosure period (which as a result new subitem 58(4) is the period 1 July 2013 – 30 June 2014) are made within six months of the end of the disclosure period.

159. Item 58 does not affect the operation of rules that have been made under section 148C in accordance with an exemption granted by the General Manager of FWC under section 148D (or under the transitional provision in item 39 of the ROA Act). In relation to such rules, new subitem 58(4) only establishes the disclosure period for which payments to related parties have to be disclosed to the members of the organisation.
160. Item 58 will not affect the capacity of organisations to apply to the General Manager of FWC for an exemption under section 148D or through the transitional provision in item 39 of the ROA Act.

161. Subitems 58(6) and (7) make clear that relevant disclosures must still be made in the manner provided for in the relevant rules and that subitems 58(2)-(5) do not otherwise affect the rules of an organisation.

Amendment No.15 – Schedule 7, item 1, page 33 (line 13), after “commencement”

162. This is a technical correction to item 1 of schedule 7 of the Bill. Item 1 of Schedule 7 inserts new Schedule 4 into the FW Act, which sets out application and transitional provisions.