



## Fair Work Amendment (State Referrals and Other Measures) Bill 2009

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### Contents

Purpose . . . . .	3
Background . . . . .	3
State referral . . . . .	4
Progress of State referral . . . . .	4
Committee consideration . . . . .	5
Coalition/Greens/Family First policy position/commitments . . . . .	5
Position of significant interest groups . . . . .	5
Financial implications . . . . .	6
Main Provisions . . . . .	6
Schedule 1—Referring States . . . . .	6
New Division 2B . . . . .	7
Meaning of ‘referring State’ . . . . .	7
Initial reference . . . . .	7
Reference covering amendments . . . . .	8
Referred subject matters . . . . .	8
Excluded subject matter . . . . .	9
Reference covering transitional matters . . . . .	10
Reference exclusions—public sector and local government employment . . . . .	10
Termination of referral . . . . .	10
Other amendments in Schedule 1—Division 2A and Victoria . . . . .	12
Schedule 2—Transitional matters relating to Division 2B State referrals . . . . .	12

Preliminary matters . . . . .	12
New Schedule 3A of the T&C Act—Treatment of Division 2B State instruments . . . . .	12
Part 3 of Schedule 3A — Variation and termination of Division 2B State instruments . . . . .	13
Part 4 of Schedule 3A — Transition of employees from Division 2B State awards to FW Act modern awards . . . . .	14
Division 1 — Fair Work Australia required to consider varying modern awards etc . . . . .	14
Division 2 — Avoiding reductions in take-home pay . . . . .	15
Part 5 of Schedule 3A — Division 2B State instruments and the FW Act . . . . .	15
Division 1 — Interaction between Division 2B State instruments and the National Employment Standards . . . . .	15
Division 2 — Interaction between Division 2B State instruments and FW Act modern awards, enterprise agreements and workplace determinations . . . . .	15
Division 3 — Other general provisions about how the FW Act applies in relation to Division 2B State instruments . . . . .	16
Part 6 of Schedule 3A — Ongoing operation of State laws for transitional purposes . . . . .	16
Amendments of other Schedules of the T&C Act . . . . .	17
Part 3 of Schedule 4 of the T&C Act . . . . .	17
Division 1 — Operation in relation to Division 2B State reference employees . . . . .	17
Part 4 of Schedule 7 of the T&C Act . . . . .	17
Part 4A — Transitional provisions to apply the better off overall test to enterprise agreements that cover Division 2B State award covered employees . . . . .	17
New Part 5 of Schedule 9 of the T&C Act . . . . .	18
Division 1 — Universal application of minimum wages to employees: Division 2B State reference employees . . . . .	18
Division 2 — Other matters . . . . .	18
Part 3 of Schedule 11 of the T&C Act . . . . .	18
Division 4 — Transfers of business: Division 2B State instruments . . . . .	18
Schedule 3—Other amendments . . . . .	18
State public sector and local government employers . . . . .	18
Other amendments . . . . .	20
Concluding comments . . . . .	20

## Fair Work Amendment (State Referrals and Other Measures) Bill 2009

**Date introduced:** 21 October 2009

**House:** House of Representatives

**Portfolio:** Education, Employment and Workplace Relations

**Commencement:** Various dates, although the majority of the provisions commence on Proclamation or six months after Royal Assent, whichever is the earlier. Complete commencement details are set out in the table in Clause 2 of the Bill.

**Links:** The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

### Purpose

Where a State refers all or part of its powers to make laws in relation to industrial matters to the Commonwealth, the Bill will extend the *Fair Work Act 2009* to cover the State's unincorporated employers and employees and outworker entities.

The Bill also:

- facilitates the referral of State instruments such as awards and agreements from those States to the Commonwealth in respect of private sector workplace relations, and
- allows all States and Territories the option to retain their public service and local government employees under their own workplace relations system.

### Background

This Bill is introduced consequent to the *Fair Work Act 2009* (the FW Act), the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (T&C Act) and the *Fair Work (State Referral and Consequential and Other Amendments) Act 2009* (first referral Act). The first referral Act commenced on 1 July 2009 and primarily dealt with the referral from Victoria.

The Parliamentary Library's Bills Digest reviewing the Fair Work Bill 2008 noted:

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The purpose of the [Fair Work] Bill is to ultimately replace the current *Workplace Relations Act 1996* (WR Act) with industrial legislation designed to promote collective bargaining and broader workplace rights for employees. At a later time, the Bill may facilitate the referral of powers from the States to the Commonwealth in respect of private sector workplace relations laying the basis for a national approach to workplace relations regulation.<sup>1</sup>

This Bill further progresses the national approach to workplace relations regulation by facilitating the transfer of state ‘enterprise’ awards and collective and individual agreements to the federal jurisdiction.

### **State referral**

Section 51 (xxxvii) of the Commonwealth Constitution provides that the Commonwealth Parliament ‘may make laws for the peace, order and good Government of the Commonwealth’ with respect to:

Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to the States by whose Parliaments the matters is referred, or which afterwards adopt the law.

This Bill provides for a text base referral<sup>2</sup> in workplace relations matters from States to the Commonwealth. The Bill also facilitates the referral of State instruments such as awards and agreements from those States to the Commonwealth in respect of private sector workplace relations laying the basis for a national approach to workplace relations regulation.

### **Progress of State referral**

The Bills Digest on the Fair Work (State Referrals and Consequential and Other Amendments) Bill 2009 provided background on the progress of the States agreeing to refer workplace powers to effect referral.<sup>3</sup> The main development since then is that

1. S O’Neill, M Goodwin and M Neilsen *Fair Work Bill 2008*, Bills digest No 81, 2008-09, Parliamentary Library, 2009, viewed 29 October 2009, <http://www.aph.gov.au/library/pubs/bd/2008-09/09bd081.pdf>.
2. A national system can be achieved by a full referral of powers, text-based referral, mirror legislation or harmonisation. Text-based referral involves the States referring actual legislative provisions. Text-based referral as opposed to full referral is seen as an option more likely to gain State agreement. For more information on the history and types of referrals the reader is referred the table compiled by Pamela Tate as part of her paper: [New Directions in Co-operative Federalism: Referrals of Legislative Power and Their Consequences](#)
3. S O’Neill and M Neilsen, *Fair Work (State Referrals and Consequential and Other Amendments) Bill 2009*, Bills digest no 168 2008-09, Parliamentary Library, 2009, viewed 29 October 2009, <http://www.aph.gov.au/library/pubs/bd/2008-09/09bd168.pdf>

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Tasmania, South Australia and Queensland have introduced referral legislation into their Parliaments. Further to that, on 25 September 2009, Ministers from Victoria, South Australia, Tasmania, the Northern Territory and the Australian Capital Territory endorsed and signed an *Inter-Governmental Agreement for a National Workplace Relations System for the Private Sector*. New South Wales is yet to make a decision about its participation in the national system, while Western Australia has not changed its initial position of deciding against a referral.<sup>4</sup>

If more States do introduce referral legislation it will be necessary for the Commonwealth to make further amendments to accommodate the specifics of those referrals.<sup>5</sup>

### **Committee consideration**

The Bill has been referred to the Senate Education Employment and Workplace Relations Committee for inquiry and report by 16 November 2009. Details of the inquiry are at: [http://www.aph.gov.au/Senate/committee/eet\\_ctte/fair\\_work\\_state/index.htm](http://www.aph.gov.au/Senate/committee/eet_ctte/fair_work_state/index.htm)

### **Coalition/Greens/Family First policy position/commitments**

It has been reported that the Coalition parties do not intend to oppose the passage of this Bill, subject to its inquiry and report in the Senate.<sup>6</sup>

### **Position of significant interest groups**

Submissions to the Senate inquiry generally support and welcome the Bill for progressing the delivery of a uniform national industrial relations system.

The ACTU states that it supports the Bill and ‘applauds the consultative approach adopted by the government in working with the referring States to determine the scope of their referrals and the transitional arrangements that will apply to employees and employers transferring from the State systems’.<sup>7</sup>

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4. Department of Education, Employment and Workplace Relations, Submission to the Senate Standing Committee on Education, Employment and Workplace Relations inquiry into the provisions of Fair Work Amendment (State Referrals and Other Measures) Bill, November 2009, pp. 7-12.
  5. Note that Northern Territory and Australian Capital Territory private sector employers are already fully covered by the FW Act and do not need referral legislation.
  6. ‘Coalition won't oppose referral bill, subject to inquiry’, *Workplace express*, 27 October 2009.
  7. ACTU, Submission to the Senate Standing Committee on Education, Employment and Workplace Relations inquiry into the provisions of Fair Work Amendment (State Referrals and Other Measures) Bill, November 2009, p. 2.

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Professor Andrew Stewart similarly expresses a supportive view stating:

If passed the State Referrals Bill will help to create a clear and consistent delineation between federal and State industrial laws. At least in referring States, all private sector employers will be subject to the federal system, including the great majority of non-profit organisations [...] The uncertainty over the status of incorporated local employers, and certain other incorporated government business enterprises, will also be resolved.<sup>8</sup>

However ACCI and Australian Industry Group (Ai Group), while supporting the referral of the State industrial relations powers to the Commonwealth, raise concerns regarding aspects of the referral provisions. Ai Group goes so far as to suggest the Bill should not proceed— their preference being a complete referral of power from the States to the Commonwealth.<sup>9</sup>

Some of the technical issues raised by interest groups such as Ai Group and ACCI are discussed under the Main Provisions section below.

## Financial implications

According to the Explanatory Memorandum, the provisions of the Bill will generate extra work for Fair Work Australia (FWA) and the Fair Work Ombudsman in South Australia and Tasmania and the cost of the extra work will be absorbed within ‘existing operational capacity’. The Explanatory Memorandum adds that the financial impact of the expansion into other States will be considered separately.<sup>10</sup>

## Main Provisions

### Schedule 1—Referring States

As noted above, Victoria was the first State to legislate for the referral of workplace relations matters to the Commonwealth.<sup>11</sup> The *Fair Work (State Referral and*

8. A. Stewart, Submission to the Senate Standing Committee on Education, Employment and Workplace Relations inquiry into the provisions of Fair Work Amendment (State Referrals and Other Measures) Bill, November 2009, p. 5. The submission contains a fuller discussion of the existing difficulties for non-profit organisations.
9. ‘IR referral Bill should not go ahead, says Ridout’, *WorkplaceInfo*, 12 November 2009.
10. Explanatory Memorandum, Fair Work (State Referrals and Other Measures) Bill 2009, p. ii (subsequently referred to as the Explanatory Memorandum).
11. The *Fair Work (Commonwealth Powers) Act 2009* (Vic) gave effect to Victoria’s referral. It was passed by the Victorian Parliament on 9 June 2009 and received Royal Assent on 23 June 2009.

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*Consequential and Other Amendments) Act 2009* (Cth) inserted Division 2A into Part 1-3 of the FW Act which gave effect to Victoria's referral. It enabled all the elements of the national system of industrial relations laws to apply to all employers and employees in Victoria with effect from 1 July 2009.

The main purpose of Schedule 1 in the Bill is to give effect to other State references that occur by 1 January 2010.

## **New Division 2B**

**Item 39** inserts **new Division 2B** into Part 1-3 of the FW Act. It would give effect to State references of workplace relations matters to the Commonwealth that take effect after 1 July 2009 but on or before 1 January 2010. To date, South Australia, Tasmania and Queensland have introduced referring legislation into their Parliaments.<sup>12</sup>

The **new Division 2B** is largely based on the framework used for the referral by Victoria as set out in Division 2A. It relies on a number of definitions, including the definitions of 'referring State', 'referred subject matters' and 'excluded subject matter', 'national system employee' and 'national system employer'. These definitions are discussed below.

## **Meaning of 'referring State'**

**Proposed section 30L** defines 'referring State' and is a key provision. A State is a referring State if its Parliament, after 1 July 2009 but on or before 1 January 2010 refers the matters set out in **proposed subsections 30L(3), 30L(4) and 30L(5)** to the Commonwealth Parliament, to the extent that these matters are not otherwise within Commonwealth legislative power and are within the State's legislative power. **Proposed subsections 30L(3), 30L(4) and 30L(5)** provide for three referrals of power, namely the 'initial reference', the 'amendment reference' and the 'transition reference'.

## **Initial reference**

**New subsection 30B(3)** gives effect to a reference of matters relating to the text of the 'referred provisions'<sup>13</sup> in Division 2B. Matters covered by this text will cover the regulation of unincorporated and public sector employers and their employees, outworker entities.<sup>14</sup> These are brought into the referral by virtue of the extended definitions of 'national system employee' and 'national system employer' (**proposed sections 30M** and

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12. Department of Education, Employment and Workplace Relations, Op cit., p. 3.

13. 'Referred provisions' are defined to mean the provisions of Division 2B of the FW Act to the extent to which they deal with matters that are included in the legislative powers of the Parliaments of the States (**proposed section 30K**).

14. Explanatory Memorandum, p. 5 and 7.

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**30N**<sup>15</sup>, and ‘outworker entity’ (**proposed section 30Q**)<sup>16</sup>. Certain types of adverse action are also brought into the referral through extending the operation of the FW Act’s general protections in Part 3-1 (**proposed section 30R**).<sup>17</sup>

### Reference covering amendments

**New subsection 30K(4)** gives effect to a referral of matters relating to ‘express amendments’<sup>18</sup> of the FW Act. This would allow the Commonwealth to amend the FW Act in relation to the referred subject matters.

### Referred subject matters

The ‘referred subject matters’ are defined in **proposed section 30K** and amongst other things include:

- terms and conditions of employment (such as in minimum standards or instruments, or in relation to bargaining or transfer of business), and
- rights and responsibilities of employees and employers and other persons (such as in relation to freedom of association, industrial action, unfair dismissal and right of entry).

These correspond with the matters regulated by the FW Act.

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15. The FW Act currently applies to national system employees (sections 13 and 30C) and national system employers (sections 14 and 30D), such as constitutional corporations and employers in the Territories and in Victoria. **Proposed sections 30M** and **30N** will extend the current national systems definitions to any employees and any employers in a referring State that would otherwise be outside the existing definitions.
  16. **Proposed section 30Q** extends the definition of outworker entity to include a person (other than a national system employer) who arranges for outwork to be performed and the arrangement is connected with a referring State.
  17. Part 3-1 of the FW Act sets out a range of workplace protections. **Proposed section 30R** gives the general protections in Part 3-1 additional reach in a referring State in the same way that the Part already extends to action in a Territory or in a Commonwealth place. For example, this would provide a remedy for a contractor whose contract was terminated in a referring State by an unincorporated principal because the contractor was a member of a State industrial association. Department of Education, Employment and Workplace Relations, *Op cit.*, p. 15.
  18. ‘Express amendment’ is defined to mean the direct amendment of the text of FW Act (whether by the insertion, omission, repeal, substitution or relocation of words or matter), but does not include the enactment by a Commonwealth Act of a provision that has, or will have, substantive effect otherwise than as part of the text of the FW Act.

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### Excluded subject matter

‘Excluded subject matter’ from the referral are also defined in **proposed section 30K** and include amongst other things:

- matters dealt with by the States various equal opportunity or anti-discrimination Acts which are preserved in their application to national system employees and employers by subsection 27(1A) of the FW Act
- superannuation, workers compensation, occupational health and safety, public holidays, long service leave, regulation of employee and employer associations, and workplace surveillance, business trading hours, enforcement of contracts of employment.

### Comment

Ai Group, in their Senate inquiry submission are critical of this definition, arguing that its lack of consistency with existing section 27 of the FW Act would create uncertainty and potentially an increased regulatory burden for employers. Ai Group state that the definition gives States powers in respect of training arrangements, long service leave, public holidays and claims for enforcement of contracts of employment. The submission continues:

It is not appropriate to give States increased powers in the proposed areas and, accordingly, to undermine the provisions of the Fair Work Act, modern awards and enterprise agreements relating to these matters.<sup>19</sup>

Ai Group’s preference is for the definition of ‘excluded subject matter’ currently used in section 30A<sup>20</sup> arguing it ensures consistency with section 27 ‘non-excluded matters’ in the FW Act.<sup>21</sup>

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19. Ai Group, Submission to the Senate Standing Committee on Education, Employment and Workplace Relations inquiry into the provisions of Fair Work Amendment (State Referrals and Other Measures) Bill, p. 8.

20. Note that the Bill would also amend the section 30A definition of ‘excluded subject matter’ to make it consistent with the section 30K definition (**item 15**). Section 30A relates to the Victorian referral ‘excluded subject matter’ and is currently defined as:

- a matter dealt with in a law referred to in subsection 27(1A)
- a non-excluded matter within the meaning of subsection 27(2) (other than paragraph 27(2)(p)), or
- rights or remedies incidental to these matters.

21. Ai Group, op cit., p. 8.

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### Reference covering transitional matters

**Proposed subsection 30L(5)** gives effect to a referral of matters relating to the transition to the national system. This would enable the Commonwealth to transition State employers and employees from regulation by State industrial relations frameworks to the system created by the FW Act. It would also enable the transition of unincorporated employers and employees currently covered by the WR Act (as it continues to apply because of the T&C Act) to the FW Act regime.

### Reference exclusions—public sector and local government employment

**Proposed subsection 30L(2)** clarifies that a State is still a referring State even if the State's referral law provides for the reference to terminate in certain circumstances, or if it excludes certain matters relating to State public sector employment or local government employment. The effect is that referring States can refer or exclude from references matters relating to State public sector employment and local government employment.<sup>22</sup>

The Explanatory Memorandum states that it is anticipated that none of the Division 2B referring States will refer matters relating to public sector employment. Victoria (a referring State under Division 2A) on the other hand, has referred matters relating to its public sector and local government (subject to certain exceptions set out in its referral Act).<sup>23</sup>

### Termination of referral

**Proposed subsection 30L(6)** provides that if a State terminates any or all of the initial, amendment, or transitional references it will cease to be a referring State unless subsections 30L(7) or (8) apply. **Proposed subsections 30L(7) and (8)** enable a referring State to remain a referring State if its amendment reference is terminated by the State Governor by proclamation in the following circumstances:

- with six months notice, if the amendment references of other referring States all terminate on the same day, or
- with three months notice, if the Governor considers that an amendment to the FW Act is inconsistent with the *fundamental workplace relations principles* as set out in **proposed subsection 30L(9)**<sup>24</sup>.

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22. The terms 'State public sector employee' 'State public employer' and 'local government employee' and 'local government employer' are defined in proposed section 30K.

23. Explanatory Memorandum, p. 12.

24. The 'fundamental workplace relations principles' include: a strong, simple and enforceable safety net of minimum employment standards; genuine rights and responsibilities to ensure fairness, choice and representation at work; collective bargaining at the enterprise level with

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The effect of **proposed subsections 30L(7) and (8)** is that if a State terminated its ‘amendment reference’ it would still be able to remain a referring State.

*Comment*

ACCI in its Senate inquiry submission argues that there is no reason why such a provision should be part of the referral process for a national system.

This may be used as a political tool to stymie further amendments to the Commonwealth laws and put pressure on the Commonwealth by threatening to withdraw from the federal system.

[...]

If the termination of an amendment reference is ever invoked by a State Government, this will cause confusion and unnecessary dislocation for referral employers, as non-referred employers continue to be bound by the fair work laws, but their referral counterparts do not. It also appears to indicate that State Governments are not fully committed to achieving a national system for the private sector.<sup>25</sup>

ACCI therefore recommends that these provisions (subsections 30L(7) and (8)) be removed from the Bill.

Ai Group also expressed concern about an effective State Government veto power over amendments to the FW Act and the possibility of State Governments being able to pressure the Commonwealth into amending or not amending the FW Act. Such a veto could also cause delays in necessary amendments to the FW Act and could also result in one or more State Governments terminating their amendment references, thereby creating different versions of the national workplace relations system for different groups of employers and employees.<sup>26</sup>

In response to these concerns, a senior spokesperson for the Department of Education, Employment and Workplace Relations told the Senate inquiry that these provisions were worked out in close consultation with the States. They are aimed at protecting States’ long-term interests in a cooperative workplace relations system and address States’

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no provision for individual statutory agreements; fair and effective remedies through an independent umpire; protection from unfair dismissal, and an independent tribunal system and an independent authority able to assist employers and employees within a national workplace relations system.

25. ACCI, Submission to the Senate Standing Committee on Education, Employment and Workplace Relations inquiry into the provisions of Fair Work Amendment (State Referrals and Other Measures) Bill p. 16.
26. Ai Group, op cit., pp. 5-6.

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concerns that unwelcome changes to workplace relations laws could be forced upon them without any consultation by a future Commonwealth government.<sup>27</sup>

### Other amendments in Schedule 1—Division 2A and Victoria

As stated above, Division 2A of the FW Act gave effect to Victoria's workplace relations reference to the Commonwealth. Many of the amendments in Schedule 1 of the Bill amend this existing Division 2A to ensure consistency with the proposed arrangements in **new Division 2B**. This includes provisions that enable Victoria (like Division 2B referring States) to terminate its amendment reference and remain in the national system (**items 14, 17, 18, 26 and 31**).

Also for consistency with new Division 2B, Schedule 1 inserts new definitions including 'excluded subject matter' (**item 15**), 'local government employee' and 'local government employer' (**items 20 and 21**) and 'State public sector employer' (**item 25**).

There are also a number of minor technical amendments to Division 2A, including amendments consequential on the creation of Division 2B (**item 11 and items 32-37**).

### Schedule 2—Transitional matters relating to Division 2B State referrals

#### Preliminary matters

**Items 1 to 36** insert new definitions into item 2 (the dictionary) of Schedule 2 to the T&C Act to cross-reference new definitions and application provisions relevant to new Schedule 3A.

**Item 38** amends the general regulation-making power in item 7 of Schedule 2 of the T&C Act. It provides a new regulation making power for the transitional purposes of referral.

**Items 43, 45 and 47** provide definitions for the purposes of categorising State reference employers and employees. They are either Division 2A State reference employers and employees (ie Victoria) or Division 2B State reference employers and employees (ie other States).

#### New Schedule 3A of the T&C Act—Treatment of Division 2B State instruments

**Item 54** inserts **new Schedule 3A** into the T&C Act. It deals with the treatment of State awards and State employment agreements of Division 2B referring States.

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27. J Kovacic, Senate Education, Employment and Workplace Relations Legislation Committee, *Committee Hansard*, [Proof copy], EEW 22.

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**Proposed items 2 to 6** of the new Schedule 3A define Division 2B State awards and Division 2B State employment agreements which are to be known collectively as Division 2B State instruments. At the referral commencement, State awards and State employment agreements in operation under a referring States industrial law become notional federal awards and agreements.

**Proposed items 4 and 6** have the effect of preserving Division 2B State instruments in relation to those employers, employees, outworker entities and other persons who were covered by the instrument immediately before the referral commencement as well as new employees engaged by those employers after that time.<sup>28</sup>

**Proposed items 7 to 17** deal with matters relating to the terms of State awards and agreements on referral commencement.

**Proposed item 7** provides that a term of a State award dealing with dispute resolution procedures would effectively be replaced in the Division 2B State award with a model dispute resolution clause, prescribed by regulation. In contrast, State employment agreements dispute resolution terms would be retained (**proposed item 8**). The effect is that where Division 2B State employment agreements confer power on State industrial bodies (or other third parties), the State industrial bodies or parties will not be prevented from exercising power.

Other State rules would be preserved at referral commencement. For example:

- State rules about instrument content would be preserved (**proposed item 10**)
- State rules about interaction between instruments would be preserved (**proposed item 11**)
- Awards would continue to be subject to the same outworker interaction rules (**proposed item 12**).

**Proposed items 14 to 16** deal with the transition of employee entitlements at referral commencement. Generally an employee's service with an employer before referral commencement counts as service for the purpose of determining entitlements under the relevant Division 2B State instrument (**proposed item 14**).

**Proposed item 17** clarifies that there is no loss of accrued rights or liabilities when a Division 2B State instrument terminates or ceases to apply.

### **Part 3 of Schedule 3A — Variation and termination of Division 2B State instruments**

**Proposed item 18** sets out the circumstances under which Division 2B instruments may be varied or terminated. Such instruments may be varied so as to remove ambiguities (**item 19**) or on referral from the Australian Human Rights Commission (**proposed item**

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28. Explanatory Memorandum, p. 28.

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20); otherwise they may be varied pursuant to items 8 and 40 of the proposed Schedule 3A of the T&C Act in relation to dispute resolution under State Employment Agreements and resolving difficulties between State instruments and the National Employment Standards); pursuant to Part 6 of proposed Schedule 3A dealing with the ongoing operation of State laws for transitional purposes and under its schedules dealing with enterprise instrument modernisation process, variation of State awards in annual wage reviews and transfer of business. Similarly Division 2B State instruments cannot be terminated other than under Part 6 of proposed Schedule 3A dealing with the ongoing operation of State laws for transitional purposes or arising from an enterprise instrument modernisation process, or from a transfer of business matter.

**Proposed item 21** stipulates that Division 2B State industry awards terminate 12 months after the Division 2B referral, notwithstanding any award provision providing for an earlier termination. **Proposed items 22 and 23** allow the termination of collective State employment agreements under Part 2–4 of the FW Act, either by agreement between the parties or by the FWA after the agreement’s nominal expiry date.

**Proposed items 24 to 26** deal with the termination of individual Division 2B State employment agreements by written agreement between the parties; or where the individual agreement is to be superseded by an enterprise agreement under the FW Act; or by a unilateral application to the FWA upon the Division 2B agreement reaching its nominal expiry date, subject to notice requirements. The agreement’s termination takes effect 90 days after the FWA’s approval.

**Proposed item 27** defines the *nominal expiry date* of a Division 2B State employment agreement to be either the day expressed in the agreement or 3 years from the Division 2B referral, if the agreement specifies a later nominal expiry date than this. **Proposed item 28** makes clear that when a Division 2B State employment agreement terminates it ceases to cover and can never again cover any employer or employees.

#### **Part 4 of Schedule 3A — Transition of employees from Division 2B State awards to FW Act modern awards**

Division 1 — Fair Work Australia required to consider varying modern awards etc

**Proposed item 29** obliges FWA to consider varying modern awards within the first 12 months of referral commencement, to include transitional arrangements for Division 2B State award employees (but not employees under State enterprise awards). Any State award term to be included in a modern award must comply with section 136 of the FW Act and apply to State award employees. Any such provision made by FWA takes effect after 12 months from the referral commencement and cease to have affect within 5 years or earlier, if stipulated.

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**Proposed item 30** obliges FWA to consider the making of orders to apply State award long service leave, in the 12 months following a State referral. Any such order would override inferior long service leave provisions of either an award or enterprise agreement.

#### Division 2 — Avoiding reductions in take-home pay

**Proposed item 31** provides that the termination of a Division 2B State award is not intended to result in a reduction of take-home pay for employees and outworkers. Where a reduction in take-home pay does occur because of a termination of a State award, the FWA may make remedial *take-home pay orders* under **proposed item 32** on application from an employee or outworker, an organisation entitled to represent the employee or outworker, or a person acting on their behalf. **Proposed item 33** ensures that any such order will remedy only the reduction in pay brought about by the termination of the State award. **Proposed item 34** provides that a take-home pay order continues to apply for so long as the relevant modern award replacing the State award, continues to apply to the employee.

### Part 5 of Schedule 3A — Division 2B State instruments and the FW Act

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

Where a provision of a State instrument (award or agreement) is detrimental to an employee when compared to an entitlement under the National Employment Standards (NES), the State instrument provision is of no effect as stipulated under **proposed item 37**.

Certain provisions of the NES have effect under **proposed item 38** in relation to modern award or enterprise agreement, as if reference to these instruments included reference to a Division 2B State instrument. These terms of the NES include: the averaging of hours, cashing out and taking annual leave, cashing out and taking personal leave including evidence requirements, the substitution of public holidays, employees giving termination notice, where redundancy pay does not apply and the provision paid loadings in lieu for school-based trainees and school-based apprentices. **Proposed item 39** provides that a Division 2B State instrument employee is entitled to the shiftworker annual leave entitlement under the NES.

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

**Proposed item 41** provides that where a Division 2B State employment agreement and a modern award both apply to an employee, or employer, or other person, the State employment agreement prevails. **Proposed item 42** ensures that modern award outworker terms will continue to apply despite the provisions of item 41. **Proposed item 43** provides that a Division 2B State award will apply to relevant employees until its termination under

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this Bill. Where a FW Act enterprise agreement or workplace determination commences to apply to an employee, employer or other person then an otherwise applicable collective Division 2B State agreement ceases to apply under **proposed item 44**; however an individual State employment agreement will continue to apply. Further, under **proposed item 45**, a Division 2B State award may re-apply to an employee, employer or other person at some point in time, if the FW Act instrument ceases to apply. Outworker terms under a State award will continue to apply despite the existence of an otherwise applicable enterprise agreement under **proposed item 46**.

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

**Proposed item 47** stipulates that an employee is not award/agreement free for the purposes of the FW Act, if a Division 2B State instrument applies to the employee. Where an employee's ordinary hours of work are determined by a Division 2B State instrument, the hours of work stipulated therein continue to apply, as provided for in **proposed item 48**. Where no hours are agreed and no State instrument applies, ordinary hours of work shall be 38 hours for full-time employees and the lesser of 38 hours and the employee's usual hours of work for other employees. **Proposed item 49** applies the FW Act's payment of wages provisions under Part 2-9 to referred State instruments and **proposed item 50** applies the FW Act's guarantee of earnings to employees under referred State awards under Part 2-9, and also the exclusions of high income employees from awards under a written guarantee of earnings. Employees under referred State awards or agreements will be protected from unfair dismissal under the FW Act's dismissal provisions by **proposed item 51**.

### Part 6 of Schedule 3A — Ongoing operation of State laws for transitional purposes

Section 26 of the FW Act puts as a general rule that the FW Act is intended to apply to the exclusion of all State and Territory industrial laws, while section 27 of the FW Act makes certain exclusions to section 26. Under this proposed Part 6, FW Act provisions excluding State (or Territory) laws to national system employees and employers under section 26 do not apply in respect of state laws which facilitate the commencement or completion of an award appeal before referral commencement under **proposed item 55**. Similarly section 26 of the FW Act does not apply to a state law facilitating the completion of an employment agreement proceeding which had commencement before referral commencement under **proposed item 56**, nor does section 26 apply in relation to an agreement appeal made before, on or after referral commencement. **Proposed item 58** ensures that any decisions made in relation to award appeals, agreement proceedings and agreement appeals are not subject to section 26 of the FW Act. **Proposed item 59** applies where a state agreement, or variation or termination has been approved by a state industrial body before referral but has not come into effect at the time of referral commencement; in such a case section 26 of the FW Act does not apply. State laws also continue to apply under **proposed item 60** where a state law relates to compliance with an entitlement or obligation occurring prior to referral commencement. **Proposed item 61**

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ensures the ongoing operation of tribunal or court orders or injunctions preventing industrial action before referral commencement.

## Amendments of other Schedules of the T&C Act

### Part 3 of Schedule 4 of the T&C Act

#### Item 56 inserts at the end of Part 3 of Schedule 4:

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

**Proposed item 16** stipulates as a general rule that an employee's service with an employer prior to referral commencement counts as service for the purposes of determining the employee's entitlements under the National Employment Standards, subject to the proviso that no double entitlement shall occur as a result of the referral.

Where an employee has accrued paid personal/carers' leave or paid annual leave, prior to referral commencement, the NES provisions concerning the taking, payment and cashing out will apply to the accrued leave under **proposed item 17**. **Proposed item 18** provides that leave being taken prior to referral commencement can continue to be taken after referral commencement under the relevant NES provisions for the taking of that leave.

Where an employee's service prior to referral did not generate an entitlement to redundancy pay, the NES redundancy schedule commences from referral commencement; however redundancy pay for service prior to referral is allowed where a state industrial body makes such orders (as is generally the case with redundancy pay in the Tasmanian industrial system). **Proposed item 20** however provides that where notice of redundancy was made prior to referral commencement, but the date of the termination occurs after referral, the NES redundancy pay liability still applies for the period of service. **Proposed item 19** provides that the NES notice of termination requirements apply only to terminations occurring on or after referral commencement. **Proposed item 21** requires the NES Fair Work Information Statement to be provided only to employees who commence work after the referral commencement.

### Part 4 of Schedule 7 of the T&C Act

#### Item 68 inserts at the end of Part 4 of Schedule 7:

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

Provisions under this Part apply to enterprise agreements, whether these be greenfields agreements or non- greenfields agreements, made or varied after referral commencement for employees who would otherwise be covered by a state award. **Proposed item 20A**

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relates to new agreements satisfying the FW Act's 'better off overall test', while **proposed item 20B** relates to the requirements for varying agreements.

### **New Part 5 of Schedule 9 of the T&C Act**

**Item 70 inserts at the end of Schedule 9 a new Part 5—Provisions relating to Division 2B State instruments.** It contains:

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

Provisions under this Part ensure that base rates of pay under a Division 2B state award or state agreement, after referral, are not less than the national minimum wage and the FWA may make orders to phase in any increases in base pay rates. However **proposed item 19** provides for award/agreement free employees, that where application of the national minimum wage would result in a fall in base rates, the state minimum amount (for example stipulated by law or order) will apply.

Division 2 — Other matters

**Proposed item 20** allows FWA to vary the wages terms of a referred state award under the FW Act's annual wage review.

### **Part 3 of Schedule 11 of the T&C Act**

**Item 74 inserts at the end of Part 3 of Schedule 11:**

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

**Proposed items 14 to 15** provide for the application of the FW Act's transfer of business provisions under Part 2–8 to transferring employees covered by a Division 2B state instrument. **Proposed item 16** determines that where a state instrument covered an 'old' employer and employee, that instrument continues to cover the employee and the 'new' employer.

### **Schedule 3—Other amendments**

#### **State public sector and local government employers**

As noted above, proposed subsection 30L(2) of the FW Act recognises that referring States can choose the extent to which matters relating to state public sector or local government employment are included or excluded from references. This Schedule of the Bill makes further amendments in relation to public sector and local government employment.

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**Items 1 to 3 amend section 14** ('national system employer') of the FW Act by adding provisions allowing certain employers, such as those established for a State/Territory public purpose as well as local government entities, to be declared under a State or Territory law not to be national system employers. The effect would be that all States and Territories would be able to exclude by declaration certain State public sector and local government employers over which the Commonwealth currently has jurisdiction (such as constitutional corporations) from the FW Act. Such declarations could not however be made in relation to universities, nor electricity, gas, water, rail or port utilities (**proposed subsection 14(6)**).

To be effective, a declaration would need to be endorsed by the Minister administering the FW Act (**proposed subsection 14(2)**). Such an endorsement (or alternatively a revocation or amendment) by the Minister would be a legislative instrument for the purposes of the *Legislative Instruments Act 2003* and required to be tabled in Parliament. The instrument would however not be subject to the disallowance or sunset provisions of that Act (**proposed subsection 14(5)**).

#### *Comment*

ACCI is critical of this amendment noting that it would effectively allow local governments that are currently subject to the federal laws to be carved out of the national system.<sup>29</sup> ACCI argues that this ability for States to opt-out of the system would have a destabilising effect on the national system, particularly for those employers that have been subject to the federal system for a considerable period of time. ACCI's strong preference is for a referral to encompass all employers and employees and therefore recommends that these amendments to section 14 of the FW Act be omitted.<sup>30</sup>

The ACTU, on the other hand supports the amendment stating:

This will allow the Commonwealth to retreat from covering any local government entity or state enterprise that is a trading corporation where the State has determined (in consultation with the employers and employees in the local government sector) that it will not refer them. This sensible approach draws a "bright line" around the sector and avoids the difficulties that otherwise arise in determining whether a particular council or enterprise is a trading corporation.<sup>31</sup>

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29. ACCI, Submission to the Senate Standing Committee on Education, Employment and Workplace Relations inquiry into the provisions of Fair Work Amendment (State Referrals and Other Measures) Bill, pp. 16-17.

30. Ibid.

31. ACTU, op cit., pp. 6-7.

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Professor Andrew Stewart also supports this amendment stating that it will resolve the uncertainty over the status of incorporated local government employers, and certain other incorporated government business enterprises.<sup>32</sup>

Submissions from Unions NSW and United Services Union, while supporting the ability of the States to retain local government and public sector employment within their industrial systems, question the rationale of excluding utilities and energy generation.<sup>33</sup>

## Other amendments

Other provisions in Schedule 3 of the Bill:

- amend the FW Act to allow State/Territory ministers to make applications for the suspension of industrial action in a relevant State or Territory (**items 4 to 6**), and
- allow State/Territory ministers to intervene in court matters pertaining to the FW Act as these affect a State or Territory (**proposed section 569A, item 10**).

## Concluding comments

Along with the *Fair Work (State Referral and Consequential and Other Amendments) Act 2009*, this Bill progresses a significant national reform that will bring Australia to the closest point in its history of having a single set of workplace relations laws for the private sector.<sup>34</sup> As the Parliamentary Library's Bills Digest reviewing the Fair Work (State Referral and Consequential and Other Amendments) Bill 2009 noted: 'A revolution is underway'. This comment reflected the move to a uniform national workplace relations system for the private sector reflected in the agreements by most States to refer industrial legislation to the Commonwealth.

While submissions to the Senate inquiry into the current Bill were generally in favour of progressing the delivery of a national system, there were genuine concerns raised about some of the Bill's referral provisions. Those concerns are indicative of the complexity of achieving a fully national system.

The Bill was introduced on 21 October 2009, the Senate Committee inquiry has had a three-week time frame in which to consider it, and the new system is expected to be

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32. A. Stewart, op. cit.

33. United Services Union, Submission to the Senate Standing Committee on Education, Employment and Workplace Relations inquiry into the provisions of Fair Work Amendment (State Referrals and Other Measures) Bill; Unions NSW, Submission to the Senate Standing Committee on Education, Employment and Workplace Relations inquiry into the provisions of Fair Work Amendment (State Referrals and Other Measures) Bill.

34. J Kovacic, op. cit., EEW 21.

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operational by 1 January 2010. Parliament may ask why it has such a short time frame in which to consider such a significant and complex reform.

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