SENATE EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS COMMITTEE

Inquiry into the Provisions of the Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009

DEPARTMENT OF EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS SUBMISSION

9 April 2009

A smooth transition to the new workplace relations system

Introduction

1. The Department of Education, Employment and Workplace Relations welcomes the opportunity to make a written submission to the Senate Committee Inquiry into the Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009 (T&C Bill).

2. When enacted, the T&C Bill will operate together with the *Fair Work Act 2009* (FW Act) to set out the arrangements for a smooth transition to the new workplace relations system. It will ensure the transition from the old workplace relations system to the new system operates as seamlessly, fairly and simply as possible.

3. The T&C Bill repeals the current *Workplace Relations Act 1996* (WR Act) with the exception of Schedule 1 (which deals with registered organisations) and Schedule 10 (which deals with transitionally registered associations).

4. The T&C Bill also includes sensible and practical arrangements for movement into the new system, and covers issues including:

   - the continued operation of existing WR Act industrial instruments and setting out how these interact with the new system, including the National Employment Standards (NES) and modern awards;
   - arrangements to allow bargaining under the new system to commence in an orderly way;
   - arrangements for the transfer of assets, functions and proceedings from the institutions under the WR Act to Fair Work Australia (FWA) and the Fair Work Ombudsman; and
   - consequential amendments to other Commonwealth legislation considered essential to the operation of the FW Act (e.g. the creation of the Fair Work Divisions of the Federal Court of Australia and the Federal Magistrates Court of Australia).

5. A second transitional and consequential Bill, to be introduced in May 2009, will make consequential amendments to all other Commonwealth legislation (which is likely to involve amendments to over 70 Commonwealth Acts). This second Bill will also deal with amendments that arise from any state referrals of power that have been completed by that time.

Consultation

6. The Government has undertaken significant consultation on the T&C Bill. The policy approach to transitional arrangements was first considered by the Committee on Industrial Legislation (expanded to include representatives of several other employer organisations) and officials from State and Territory governments in October 2008. Draft provisions were then considered at a further meeting of these stakeholders on 26-27 February 2009.

7. There was also targeted consultation in respect of certain provisions of the legislation, including extensive consultation over the form of the new provisions for the making of union representation orders.

8. Stakeholder feedback from these consultations ensured that the final provisions contained in the T&C Bill balance the need for fairness and simplicity with the need to preserve existing rights and obligations for an appropriate period.

Outline of this submission

9. This submission describes the key elements of the T&C Bill including arrangements for:

   - universal application of the safety net;
   - transitional instruments and enterprise awards;
   - bargaining, agreement making and industrial action;
   - transfer of business;
   - registered organisations and representation rights; and
   - institutions.

Universal application of the safety net

10. Consistent with the Government's election policy commitments, the new safety net of the 10 NES and modern awards will commence from 1 January 2010. All other substantive provisions of the new workplace relations legislative framework will commence from 1 July 2009.

11. The Australian Industrial Relations Commission is currently undertaking the award modernisation process. Modern awards will include minimum wage provisions, including minimum wages for junior employees, employees to whom training arrangements apply and employees with a disability.

12. Between 1 July 2009 and 1 January 2010 (the bridging period), entitlements under the Australian Fair Pay and Conditions Standard and other minimum statutory entitlements (e.g. notice of termination) will be retained. This arrangement will ensure employees retain existing minimum entitlements during the transition to the operation of the new, fairer safety net through modern awards and the NES.

13. The T&C Bill provides that the NES will apply to all national system employees, including employees who are covered by a transitional instrument[1]. This will ensure the Government's new safety net will benefit employees who would otherwise have conditions that are inferior to the conditions included in the NES . This means, for example, employees who are subject to Australian Workplace Agreements that were made prior to the Fairness Test or No

[1] For further information on what constitutes a transitional instrument refer to the section in this submission titled 'Transitional Instruments and Enterprise Awards' on page 7.

Disadvantage Test and who may not have the benefit of NES entitlements such as community service leave, will be entitled to the NES from 1 January 2010.

14. Similarly, from 1 January 2010, where an agreement-based transitional instrument applies to an employee and there is a modern award that covers the employee, the T&C Bill provides that the base rate of pay under the agreement-based transitional instrument must not be less than the rate that would be payable under the modern award. If it is less, then the employee will be entitled to receive a rate equal to the rate in the modern award. The Bill provides similar protections for employees covered by agreement-based transitional instruments, where the employee is not covered by a modern award, but would otherwise be entitled to a higher base rate under a national minimum wage order if the employee were award/agreement free.

15. These are important protections for employees and ensure that all employees will be entitled to fair minimum wages and to the NES from commencement of the new system.

16. The T&C Bill provides for FWA to vary a transitional instrument where the interaction between the transitional instrument and the NES creates uncertainty or difficulty.

Arrangements for minimum wages

17. The T&C Bill includes special provisions for minimum wages to ensure that employees are appropriately protected in the bridging period between commencement of the FW Act on 1 July 2009 and the commencement of modern awards and the NES from 1 January 2010. These provisions will ensure the transition to the new workplace relations system is smooth for both employees and employers.

Transitional minimum wage instruments

18. The T&C Bill provides for the continuation of minimum wage provisions in Australian Pay and Classification Scales (Pay Scales). They will continue in effect as 'transitional minimum wage instruments' until they are replaced by a modern award from 1 January 2010. This ensures all employees will remain covered by a relevant safety net of minimum wages.

19. Current provisions relating to the federal minimum wage, the two special federal minimum wages for employees with a disability and the default casual loading will also be maintained as transitional minimum wage instruments during the bridging period. The T&C Bill provides that from 1 January 2010, FWA will be deemed to have made a 'transitional national minimum wage order' which includes these important employee protections.

20. To ensure an appropriate safety net of minimum wages is maintained for employees covered by transitional minimum wage instruments, these instruments will be able to be:

    - varied by the Australian Fair Pay Commission as part of its final wage review currently being conducted under the WR Act;
    - varied by FWA as part of an annual wage review; and

- varied or terminated as a result of the award modernisation process or enterprise instrument modernisation process.

FWA's first annual minimum wage review

21. The T&C Bill also includes provisions to ensure a smooth transition in relation to the first annual minimum wage review. The Bill provides that FWA's first annual wage review must be completed by 30 June 2010.

22. To enable this, the T&C Bill allows FWA to commence gathering information, inviting written submissions and undertaking or commissioning research to assist with the review. These provisions will ensure that FWA has sufficient time to make an informed decision in its first annual minimum wage review and that interested parties have sufficient time to make submissions and provide comments on any research undertaken by FWA. This will ensure a fair and transparent process.

23. The FW Act requires FWA to make a national minimum wage order for employees not covered by a modern award or agreement in each annual minimum wage review. The national minimum wage order is to include:

    - a national minimum wage;
    - special national minimum wages for junior employees, employees to whom training arrangements apply and employees with a disability; and
    - a casual loading.

24. Under the FW Act, FWA will be required to set special national minimum wages for junior employees or employees to whom training arrangements apply. The T&C Bill provides this will not be required in FWA's first review in 2010. This recognises that special federal minimum wages for these classes of employees have not previously been set by the Australian Fair Pay Commission and that it represents a very substantial task requiring further research and consultation.

25. There are currently a diverse range of minimum wages applying to junior employees and employees to whom training arrangements apply. While the award modernisation process will address this in respect of particular industries and occupations, the outcome of the process may impact on the level at which a special national minimum wage may be set for these classes of employees.

26. However, in recognition of the importance of establishing a fair safety net for these employees, the Bill provides that if FWA does not set special minimum wages for juniors or employees to whom training arrangements apply in its first annual wage review, the President of FWA must establish a process that will ensure such wages are set in the second annual minimum wage review.

Scope for 'phasing in' minimum wages in exceptional circumstances

27. Although the minimum safety net will apply to all employees from 1 January 2010 the Government recognises that there may be instances where it is appropriate to phase in the effect of pay increases that may take effect in relation to agreement-based transitional instrument. The T&C Bill enables FWA

to make a determination phasing in such rates where it is satisfied that the determination is necessary to ensure the ongoing viability of the employer's enterprise.

Recognition of accrued leave and service in relation to the NES

28. The T&C Bill provides for leave and service accrued by an employee prior to 1 January 2010 to be recognised for the purposes of the NES.

29. This means that service related entitlements, such as notice of termination and parental leave, will be calculated based on an employee's full period of service, including service prior to the commencement of the NES.

30. Where an employee does not have an entitlement to redundancy pay on commencement, only service from 1 January 2010 will count for the purposes of calculating this entitlement.

31. Annual or personal/carer's leave accrued before 1 January 2010 will be taken to have been accrued under the NES.

32. This approach will ensure that employees' service is appropriately recognised in the new system.

Award modernisation

33. As previously mentioned, the award modernisation process is currently being undertaken by the Australian Industrial Relations Commission. The T&C Bill provides that the Australian Industrial Relations Commission is to operate until it has completed this important task.

Take-home pay orders

34. The T&C Bill makes it clear that the award modernisation process is not intended to result in a reduction in the take-home pay of employees and provides a mechanism for obtaining remedial orders in limited circumstances (take-home pay orders) when there is such a reduction. The provisions are not intended to allow FWA to review entitlements in modern awards generally.

35. The Bill allows FWA to make orders to address cases where there is an actual reduction in take-home pay and where award modernisation is the immediate reason for the reduction. For example, where employees are performing the same (or comparable) job and operating under the same working arrangements (for example, a particular span of hours).

36. FWA must not make a take-home pay order if the reduction in take-home pay is minor or insignificant, or FWA is satisfied the employee has been adequately compensated in other ways for the reduction. The Bill also makes it clear that FWA can only make orders requiring payment of an amount of money. FWA cannot make orders requiring certain work patterns to be maintained.

37. Take-home pay orders will operate separately to modern awards and any increases awarded as a result of an annual minimum wage review will not flow into the order. The take-home pay order will continue to have effect as long as the modern award continues to cover the employee, even if the modern award

stops applying because an enterprise agreement starts to apply to the employee. This ensures the employee is not disadvantaged.

38. Outworkers and employees covered by enterprise instruments which have undergone a modernisation process are covered by take-home pay order provisions in a similar manner.

39. The take-home pay order provisions are consistent with the objectives set out in the award modernisation request. The request includes in its objectives that the award modernisation process is not intended to disadvantage employees or increase costs for employers. In terms of the latter, Paragraph 12 of the request also enables the Australian Industrial Relations Commission to include transitional arrangements in modern awards to ensure that the objectives of award modernisation are met.

40. Transitional provisions will allow the phasing in, or phasing out, of entitlements over a five year period, including state and territory based entitlements.

41. On 3 April 2009, the Australian Industrial Relations Commission handed down a decision in relation to award modernisation. In its decision, the Commission emphasised that disadvantage to employees and increased costs for employers from the award modernisation process had been treated as having central importance in formulating the terms of the modern awards themselves. It further noted that these issues will also be addressed in considering transitional provisions.[2]

42. The Australian Industrial Relations Commission's decision also outlined a program to address transitional arrangements in the priority and Stage 2 modern awards, with initial submissions being due to the Commissioner by 29 May 2009.[3] A process for Stage 3 and 4 modern awards will be announced later in 2009.

Employer/sector concerns

43. Some stakeholders have raised concerns about the take-home pay order provisions, claiming that the provisions treat employees more favourably than employers. This is not correct.

44. Modern awards will reduce the number and complexity of existing awards and will be easy to find, read and apply.

45. Any differences between current state award conditions and the new federal modern award standard can be phased in over five years. These phasing in arrangements will ensure that employers have an appropriate adjustment period.

46. Some stakeholders have also expressed concern that the AIRC may judge that an employee has had a reduction in their take-home pay because of changed work patterns. Again this is not correct.

[2] AIRC Decision, Award Modernisation, [2009] AIRCFB 345, 3 April 2009, paragraph 39.
[3] Ibid, paragraphs 19-25.

47. The Bill clearly sets out when an employee will be considered to have suffered a reduction in take-home pay. This can only occur if:

- a modern award applies to an existing employee when the award comes into operation, and
- the employee is employed in the same (or comparable) position as he or she was employed in immediately before the modern award came into operation, and
- the amount of the employee's take-home pay for working particular hours or for a particular quantity of work after the modern award comes into operation, is less than the take-home pay for those hours or that quantity of work immediately before the award came into operation, and
- that the reduction in the employee's take-home pay is attributable to the award modernisation process.

Transitional instruments and enterprise awards

48. The T&C Bill reflects the Government's policy commitment that individual and collective agreements made prior to the new bargaining framework commencing on 1 July 2009 will continue to operate unless terminated or replaced by a new enterprise agreement. This ensures that agreements lawfully made at the time they were entered into are honoured, while also providing a fair and efficient process for parties to move into the new system.

49. Agreements made under the WR Act will continue to operate until terminated or replaced. The relevant content and interaction rules that applied to those instruments under the WR Act will generally continue.

Existing agreements under the new framework

50. Under the T&C Bill, instruments made under the WR Act will generally become 'transitional instruments', and will continue to apply as if the WR Act had not been repealed and will be able to be terminated in accordance with the rules that currently apply. For the purposes of the T&C Bill, the following WR Act instruments will become 'transitional instruments' from commencement:

- unmodernised awards;
- Australian workplace agreements (AWA);
- pre-reform AWAs;
- individual and collective preserved State agreements;
- collective agreements;
- old IR agreements;
- pre-reform certified agreements;
- workplace determinations;
- section 170MX awards; and
- individual transitional employment agreements (ITEAs).

51. The continuation of these instruments and associated interaction rules confirms the rights and entitlements for employees, employers and organisations in the transition to the new system.

52. The arrangements for transitional instruments will ensure a smooth transition into the new system for employers and employees by confirming their ongoing application, subject to appropriate minimum standards.

53. Entry into the new, simpler workplace relations system is encouraged by:

    - limiting the ability of FWA to vary transitional instruments to clearly defined circumstances;
    - providing for the sunsetting of instruments that apply to non-national system employers and notional agreements preserving state awards (NAPSAs);
    - facilitating the termination of transitional agreements; and
    - allowing for the conditional termination of individual agreement-based transitional instruments so that employees may become fully involved in collective bargaining.

Content and interaction rules for transitional instruments

54. Transitional instruments will continue to apply to employers, employees and organisations (where relevant) as if the WR Act had not been repealed. For all types of collective agreements and unmodernised awards, these instruments will also apply to new employees of an employer.

55. In order to achieve a smooth transition, allowable content of transitional instruments will be generally determined by the relevant rules that applied prior to the commencement of the FW Act. For example, the prohibited content rules in the WR Act will continue to apply to workplace agreements made between 27 March 2006 and 30 June 2009.

General termination rules

56. Under the Bill, transitional agreements can be terminated at any time by agreement of the parties whether or not the agreement has passed its nominal expiry date. Any such termination needs to be approved by FWA.

57. Once transitional agreements have passed their nominal expiry date, one of the parties may also seek to terminate agreements in accordance with the rules that currently apply to the relevant type of instrument.

58. This means that any party covered by a collective agreement-based transitional instrument may apply to FWA to terminate the agreement after the nominal expiry date. FWA must then terminate the agreement if satisfied it is not contrary to the public interest and it is appropriate taking into account all the circumstances, including the views of all the parties and the likely effect the termination will have on each of them.

59. Similarly, as provided by the current rules, either the employee or employer can apply to FWA to terminate an individual agreement-based transitional

instrument, such as an AWA or ITEA, after the agreement's nominal expiry date has passed. FWA must then satisfy itself that certain procedural requirements have been met before approving the termination (e.g. notice is provided at least 90 days before lodgement of the declaration to terminate).

Conditional termination of individual agreement-based transitional instruments

60. The T&C Bill also provides for conditional termination of individual agreement-based transitional instruments. The provision for conditional termination will allow employees on individual agreements to participate in and benefit from collective bargaining at the workplace and will also assist in ensuring a smooth transition to enterprise agreements made under the new system.

61. An employee covered by an individual statutory agreement that has not passed its nominal expiry date can agree with their employer to terminate that agreement on a conditional basis while negotiations are underway for a new enterprise agreement. This allows the employee to fully participate in the bargaining process, including voting on the new agreement, without losing their existing terms and conditions.

62. If a new enterprise agreement is then approved and commences operation, the individual agreement will terminate and the employee will be covered by the enterprise agreement. If the enterprise agreement is not voted up by employees or not approved by FWA, the employee can continue to be covered by their individual agreement.

63. Individual agreements that have passed their nominal expiry date can be conditionally terminated by either the employer or the employee. This ensures these employees will be able to participate fully in bargaining for a new enterprise agreement while retaining their existing entitlements in their individual agreement.

Variation

64. FWA will be able to vary transitional instruments in the following limited circumstances:

- to remove ambiguity or uncertainty;
- to resolve a difficulty relating to the interaction between the instrument and a modern award;
- to remove terms that are inconsistent with the general protections framework; and
- to remove certain discriminatory terms following a referral by the Human Rights and Equal Opportunity Commission.

65. Consistent with the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008*, parties to pre-reform certified agreements and preserved collective State agreements will be able to vary the terms or extend the nominal expiry date (NED) of those instruments until 31 December 2009.

Sunsetting rules

66. The T&C Bill provides sunsetting rules for certain types of instruments currently in operation.

67. Certain instruments that apply to non-national system employers (i.e. old IR agreements and pre-reform certified agreements made under the conciliation and arbitration power and some section 170MX awards) will terminate on 27 March 2011 unless the employer becomes a national system employer before then.

68. The Bill provides that NAPSAs will sunset on 31 December 2013, or a later date if prescribed by the regulations. There are special provisions for NAPSAs derived from a state enterprise award or those applying to franchises.

Approval of collective agreements

69. The T&C Bill provides that for collective agreements made before 1 July 2009 and lodged within the appropriate timeframes, the relevant WR Act provisions will generally continue to apply. The T&C Bill does however impose time limits on making variations to a collective agreement that operates from approval, and making further modifications to ITEA that have already been varied, for the purpose of passing the no-disadvantage test. The Workplace Authority will continue to administer the processing of these agreements.

Arrangements for making ITEAs

70. To ensure stability and certainty for employers and employees during the transition period, ITEAs can continue to be made until 31 December 2009 under the provisions of the WR Act retained by the T&C Bill. This includes the requirement that ITEAs made during the bridging period:

- will continue to be subject to the no-disadvantage test;
- do not have a nominal expiry date later than 31 December 2009; and
- are subject to time limitations and restrictions in relation to variations.

Enterprise awards and NAPSAs

71. Enterprise awards and NAPSAs derived from state enterprise awards are excluded from the scope of the Australian Industrial Relations Commission's current award modernisation process. The T&C Bill provides for the integration of those awards and certain preserved state collective agreements derived from an enterprise award (defined as an enterprise instrument) into the new workplace relations system. The process provided by the Bill is called the enterprise instrument modernisation process.

72. This process will ensure enterprise instruments can continue to operate through a replacement modern enterprise award. In undertaking the enterprise instrument modernisation process, FWA will be required to take into account a range of factors. These factors include:

- the circumstances that led to the making of the enterprise instrument, the content of a modern award (other than the miscellaneous modern award) that would otherwise apply; and
- the extent to which the enterprise instrument provides enterprise-specific terms and conditions of employment and the views of the persons covered by the enterprise instrument.

73. FWA must also apply the modern awards objective, the minimum wages objective and the modern enterprise awards objective.

74. A person covered by an enterprise instrument will be able to make an application to FWA make a modern enterprise award or terminate an enterprise instrument until 31 December 2013.

Bargaining, industrial action and agreement making

75. Bargaining processes initiated prior to the commencement of the Act on 1 July 2009 will not carry over when the new system commences.

76. Parties involved in bargaining for a collective agreement under the WR Act will either need to conclude their bargain prior to commencement of the new system, or start a new bargaining process for an enterprise agreement under the FW Act.

77. This approach provides for a simple, clean transition to the new system that facilitates immediate access to the new bargaining and agreement provisions of the FW Act, including good faith bargaining.

Previous bargaining conduct of the parties

78. The T&C Bill allows FWA to take into account the history of bargaining that occurred for a collective agreement under the WR Act when considering certain bargaining-related matters under the FW Act.

Arrangements for protected industrial action

79. The transitional arrangements for industrial action in the new workplace relations system are simple, clear and easy to understand. As bargaining will not carry over to the new system, all protected action ballot orders, authorisations for industrial action, and notifications of intention to take protected industrial action will lapse on 1 July 2009. Any protected industrial action commencing before repeal of the WR Act will cease to be protected if it is still occurring on the WR Act repeal day.

80. Where a bargaining representative that is bargaining for an agreement wishes to continue to pursue protected industrial action, an application must be made to FWA for a protected action ballot order under the provisions of the FW Act.

81. Under the FW Act, the Australian Electoral Commission (AEC) will conduct all protected action ballots unless FWA authorises the use of an alternative ballot agent. The cost of ballots conducted by the AEC will be funded in full by the Commonwealth. The Government has already announced funding for protected action ballots in its 2008-09 Budget. Bargaining representatives who

choose an approved alternative ballot agent to conduct the ballot will be required to meet the full cost of the conduct of the ballot.

82. The provisions of the FW Act will regulate strike pay in relation to periods of industrial action that commences on or after the WR Act repeal day. For industrial action that commences before the WR Act repeal day, the strike pay provisions of the WR Act will continue to apply. The strike pay provisions of the FW Act will apply to employees covered by transitional instruments in the same way that they apply to employees covered by modern awards and enterprise agreements.

Operation of the NDT prior to commencement of the NES/modern awards

83. The no-disadvantage test will continue until the commencement of the NES and modern awards, i.e. during the bridging period from 1 July 2009 until 31 December 2009.

84. Enterprise agreements will be assessed by FWA against the current no-disadvantage test using an appropriate reference instrument (e.g. an unmodernised award that covers the employer in respect of its employees). In addition, a term relating to wages, hours of work, annual leave, personal leave and parental leave in any enterprise agreement made during the bridging period will be of no effect to the extent that it provides a less favourable outcome for an employee in comparison to the Australian Fair Pay and Conditions Standard of the WR Act.

85. From 1 January 2010, enterprise agreements made during the bridging period will be subject to the NES. The no detriment rule will be applied to ensure that a term of an enterprise agreement has no effect to the extent that it is detrimental to an employee, when compared to an entitlement under the NES. As enterprise agreements made in this period are likely to operate beyond 1 January 2010, they must also include a term about settling disputes in relation to the NES. FWA must also be satisfied that, if a relevant award that includes outworker terms is in operation, the enterprise agreement includes terms of that kind and the terms of the agreement are not detrimental to the employee in any respect when compared to the outworker terms of the award.

Transfer of business

86. The T&C Bill sets out the effect of transfers of business during the bridging period and provides certainty for any employers considering a transfer of business before the FW Act commences.

87. Schedule 11 of the T&C Bill provides for the continued application of the WR Act where transmissions of business occur before the WR Act repeal day and the application of the transfer of business provisions in the FW Act to transfers of business that apply on or after the WR Act repeal day. Schedule 11 also provides for transfer of entitlements under the Australian Fair Pay and Conditions Standard and preserved redundancy provisions during the bridging period.

Transfers of business occurring before the WR Act repeal day

88. Where a transmission of business occurs before the WR Act repeal day the transmission of business rules under the WR Act will continue to apply with some modification.

    - A transmission of business occurs where a new employer becomes the successor, transmittee or assignee of the whole or a part of a business of the old employer and the time of transmission (as defined in the WR Act) is before the WR Act repeal day.

89. While employees of the old employer may not yet have been engaged by the new employer, if there has been a transmission of business, the rules governing the transmission under the WR Act continue to apply.

90. In addition to preserving some of the transmission of business rules in the WR Act, the Bill also contains rules for dealing with the period for which certain transmitted instruments and other entitlements cover or apply to new employers. For example, transmitting instruments may continue to apply for a maximum of 12 months. Maintaining the 12 month period for transmitting instruments will also encourage employers and employees to make new enterprise agreements once these instruments cease to apply. The good faith bargaining framework in the FW Act will assist parties to negotiate new agreements.

Transfers of business occurring on or after the WR Act repeal day

91. Where a transfer of business as defined in clause 311(1) of the FW Act occurs on or after the commencement of the FW Act, the new transfer of business rules will apply. This will be the case regardless of whether a transferring employee's employment was terminated by the old employer before, on or after the WR Act repeal day, or the transferring employee was employed by the new employer before, on, or after repeal day. This could occur where, for example, a transferring employee's employment is terminated and the employee becomes employed by the new employer before the WR Act repeal day, but the "connection" between the old employer and the new employer (as per the FW Act) occurs on or after the WR Act repeal day.

92. The transfer of business provisions have been extended to cover employers and employees covered by transitional (i.e. non FW Act) instruments. This means transitional instruments can 'transfer' to cover a new employer in the same way as instruments made under the FW Act, with some modifications. This ensures that FWA's powers are consistent for instruments made under the FW Act and transitional instruments.

93. The transitional arrangements will also allow for the transfer of entitlements under the Australian Fair Pay and Conditions Standard and agreement-based preserved redundancy provisions during the bridging period.

Registered organisations and representation rights

State union participation in the new national system

94. Schedule 22 of the T&C Bill amends Schedules 1 and 10 of the WR Act to create a stand alone Act, the *Fair Work (Registered Organisations) Act 2009* which will contain the provisions dealing with registered organisations and State-registered associations. This new Act will be closely linked to the FW Act, under which registered organisations and certain State-registered associations will have certain rights.

95. Existing federal and state registration arrangements have resulted in a complex duplication of regulations where bodies need to be registered both federally and at a state level to represent members in the different systems. The new provisions will make it simpler and easier for organisations to operate across multiple jurisdictions.

96. The T&C Bill extends the existing transitional registration provisions for state unions for five years until 2014. This will allow all state unions to continue to represent members who become covered by the federal system. This transitional period is also intended to allow organisations to take advantage of new provisions which will enable state and federal unions to rationalise their organisational arrangements in a relevant and timely manner.

97. To facilitate rationalisation, new provisions will enable federal unions to amend their rules to include the broader coverage of their state-registered counterpart. In addition, new provisions will allow federal union rules to provide state branches of the union (operating within state systems) with a level of autonomy to manage their own financial and operational affairs.

98. The T&C Bill also includes new provisions that will allow for the reciprocal recognition of state and federal unions. State unions will be recognised in the federal system where the state union does not have a federally registered counterpart, and the relevant state's registration and accountability of organisations (RAO) legislation has been prescribed by the regulations. The Commonwealth will continue to work with state governments to harmonise RAO legislation between jurisdictions and developing mutually acceptable minimum standards for registration.

Scope for FWA to make representation orders

99. The T&C Bill will also create new types of representation orders. These new orders will be in addition to those already able to be obtained under Schedule 1 to the WR Act. The orders are intended to address any potential demarcation disputes that may arise as a result of the removal of the requirement that a union be bound to an award or agreement to exercise right of entry or changes to the bargaining framework contained in the FW Act. Under the FW Act right of entry is based on a union's eligibility to represent the industrial interests of employees in the workplace. These new orders will be available where there is a dispute about such eligibility.

100. The new orders will be able to be obtained where there is disagreement about a union's entitlement to represent employees at a workplace. It will not be

necessary to show that the dispute is harming the business of an employer as a pre-condition for obtaining the order. The disagreement need not be manifested by particular negative consequences on the employer's business. This is different to the existing representation order regime in the WR Act.

101. FWA must consider certain criteria when making a representation order. These include:

- the history of award coverage and agreement making in relation to the employees in the workplace group;
- the wishes of the members of the workplace group;
- the extent to which particular employee organisations represent the employees in the workplace group, and the nature of that representation;
- any agreement or understanding of which FWA becomes aware that deals with the right of an organisation of employees to represent under this Act or the FW Act the industrial interests of a particular class or group of employees; and
- the consequences of not making the order for any employer, employees or organisation concerned.

102. Peak councils will be entitled to make submissions to FWA in relation to the proposed making of the new representation orders.

103. The new provisions are not intended to displace existing union coverage boundaries or to open up settled demarcations. New orders can only be made if they are consistent with existing representation orders. Further, the new orders cannot confer a representation right on a union which it did not already have. The provisions will form part of Schedule 1 (Registration and Accountability or Organisations) of the existing Act, which will be renamed.

104. Some stakeholders have expressed concern that representation orders will not operate quickly enough to prevent demarcation disputes. To address this, FWA will be able to make an interim order unless it is unfair to another party or parties to do so. The approach provides a balanced mechanism to deal with demarcation disputes while also preserving the right of employees to join and be represented by a union of their choice.

Transitional arrangements for right of entry permits

105. The T&C Bill also sets out transitional arrangements for right of entry which effectively deem existing permits and other right of entry instruments issued under the WR Act to be instruments issued under the FW Act.

Institutions

106. The T&C Bill contains provisions to ensure an orderly transition from the WR Act institutions to FWA.

107. The T&C Bill also makes amendments to the *Federal Court of Australia Act 1976* and the *Federal Magistrates Act 1999* to establish new Fair Work Divisions within those Courts. The new Divisions will operate from 1 July 2009 in relation

to matters arising under the T&C Bill, the provisions of the WR Act as continued by the T&C Bill, *the Fair Work (Registered Organisations) Act 2009*, and the FW Act.

Agencies to be abolished

108. From 1 July 2009 the functions of the Workplace Ombudsman (WO) will be taken over by the Fair Work Ombudsman and the WO will be abolished. The Fair Work Ombudsman will also take on the general information and advisory function currently performed by Workplace Authority (WA) from this date.

109. The T&C Bill includes a provision which sets out when each of the other existing agencies under the WR Act will cease to exist, subject to change by Ministerial declaration.

110. The Australian Industrial Relations Commission (AIRC) and the Australian Industrial Registry will cease on 31 December 2009. Until this date the AIRC will complete matters and processes commenced under the WR Act, including award modernisation and existing unfair dismissal applications.

111. The WA will continue to operate until 31 January 2010 in order to finish assessing collective agreements made before 1 July 2009 against the current no-disadvantage test and to process ITEAs which can be made until 31 December 2009 under saved provisions of the WR Act.

112. The Australian Fair Pay Commission (AFPC) and its Secretariat will cease to exist on 31 July 2009. This will allow the AFPC to complete its final wage review. The functions of the AFPC will then be assumed by a specialist minimum wages panel within FWA.

Appointments to FWA

113. The T&C Bill also replicates provisions contained in Schedule 1 of the FW Act providing for the initial appointment of all full time AIRC Members to FWA and the preservation of their terms and conditions under the WR Act. Schedule 1 of the FW Act will be repealed upon commencement of the T&C Bill.

114. AIRC Members appointed to FWA will hold dual appointments until such time as the AIRC is abolished.

115. The current President of the AIRC will be appointed as the President of FWA from commencement of Part 5-1 FW Act, which establishes FWA. All other Presidential Members and Commissioners of the AIRC will be taken to be appointed as Deputy Presidents and Commissioners of FWA, respectively, by subsequent proclamation.

116. Early commencement of FWA and the Office of the Fair Work Ombudsman (OFWO) will allow the General Manager of FWA and the Fair Work Ombudsman to complete the necessary preparations for the institutions to be 'open for business' from day one of the new system.

117. The General Manager of FWA will be empowered to enter into arrangements with the Industrial Registrar, the WA Director and the Director of the AFPC Secretariat to provide assistance to those office holders in the period between

the WR Act repeal day and the respective cessation dates for each of these bodies. The President of FWA will be able to establish procedural rules to ensure FWA is able to operate from 1 July 2009.

Disputes

118. The T&C Bill empowers FWA to deal with disputes about matters arising under transitional instruments as well as the Australian Fair Pay and Conditions Standard (AFPCS) and minimum entitlements set out in Part 12 of the WR Act (e.g. notice of termination and public holidays) until the NES commences on 1 January 2010. FWA will exercise the same powers that the AIRC could have exercised under the WR Act in relation to the dispute.