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

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Date introduced: 13 February 2008

House: House of Representatives

Portfolio: Employment and Workplace Relations

Commencement: The substantive provisions commence on Proclamation or six months after Royal Assent, whichever is the sooner.

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

The Bill would amend the principal Act, the [Workplace Relations Act 1996](#) (WR Act) in order to:

- terminate the making of new Australian Workplace Agreements (AWAs)
- provide transitional arrangements by the creation of Individual Transitional Employment Agreements (ITEAs) to run to 31 December 2009
- replace the ‘fairness test’ with a no disadvantage test to be used to approve both ITEAs and collective agreements, and
- allow the ‘modernisation’ of federal and former state industrial awards.

Background

The Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008 constitutes the first substantive piece of legislation of the Rudd Labor Government following its success at the federal election on 24 November 2007. In the election campaign, and throughout 2007, Labor had campaigned on a platform of repealing ‘Work Choices’¹. The Bill is directed at only one aspect of Work Choices – the abolition of AWAs – although it also deals with the award modernisation process and seeks to replace the existing fairness test with a no disadvantage test.

The Bill is only step one in the ALP Government’s proposed changes – with consultation over the main changes beginning later in the year, with a view to the new workplace

1. The *Workplace Relations Amendment (Work Choices) Act 2005* significantly amended the WR Act and came into effect on 27 March 2006. ‘Work Choices’ is often used to refer to the amended WR Act.

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relations system fully commencing by 1 January 2010 under forthcoming principal legislation.

Basis of policy commitment

The Bill derives from workplace relations policies released in 2007 prior to the federal election of 24 November. These being *Forward with Fairness*² followed by *Forward with Fairness – Policy Implementation Plan*³.

In her Second Reading Speech, the Minister for Employment and Workplace Relations, the Honourable Julia Gillard stated:

In April last year, we published our workplace relations policy, *Forward with Fairness*, and confirmed that, if elected, we would abolish Australian workplace agreements.

In August we released our Forward with Fairness policy implementation plan, which reiterated Labor's commitment to abolish Australian workplace agreements while setting out the sensible transitional arrangements a Rudd Labor government would adopt for implementing this key commitment. This policy made it clear that, when Labor's workplace relations system was fully operational, there would be no AWAs and no other statutory individual employment agreements.⁴

Minister Gillard also stated that during the government's first three months it had consulted on the Bill with the key employer and employee representative organisations through the National Workplace Relations Consultative Council and its subcommittee, the Committee on Industrial Legislation. She said that as a result of these consultations, the Government has also decided to adopt the following recommendations arising from the parties at these meetings:

- removal of the restriction on referencing other industrial instruments in agreements, which will simplify the drafting of agreements
- requiring workplace agreements be lodged with signatures attached to protect employees and ensure the correct agreements are lodged for review and approval by the Workplace Authority

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2. K. Rudd and J. Gillard [*Forward with Fairness*](#), April, 2007.
 3. K. Rudd and J. Gillard [*Forward with Fairness: Policy Implementation Plan*](#), August 2007.
 4. The Hon Julia Gillard, Minister for Employment and Workplace Relations, 'Second reading speech: Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008', House of Representatives, 13 February 2008, p. 8.

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- ensuring that most agreements will take effect from seven days from the date of the notice from the Workplace Authority Director advising an employer that the agreement has passed the no disadvantage test
- preventing the making of unilateral undertakings when agreements fail the no disadvantage test. If agreements are to be genuine agreements, any variation should have the agreement of both parties. The government has included streamlined approval rules for variations to agreements in these circumstances
- requiring the Workplace Authority Director to publish reasons where the Workplace Authority Director allows an agreement to pass the no disadvantage test where satisfied that, due to exceptional circumstances, it is not contrary to the public interest to do so (for example to deal with a temporary business crisis)
- requiring the Workplace Authority to consult more widely when designating awards for the purposes of the no disadvantage test and
- ensuring that the transition period for a number of matters, including the automatic expiry of notional agreements preserving state awards—the so-called NAPSAs—old IR agreements, removal of superannuation as an allowable award matter and the transitional registration of organisations arrangements is extended to the end of the government's transition period, 31 December 2009, to provide continuity and certainty during the transition period.⁵

These aims are reflected in the Bill's main provisions described below at p. 8.

Employer commentary on the Bill

The following is a selection of commentary by key employer organisation representatives. The common theme of these responses and views is that the Bill tends to be a fair reflection of the ALP's 2007 election policies and should not constitute significant concerns.

Australian Chamber of Commerce and Industry (ACCI)

Acting Chief Executive, Peter Anderson:

I think the Government recognises that unless award modernisation works effectively then the removal of statutory individual bargaining is going to create some problems for industry.

I think the Government is perfectly entitled to stick to its position, but it has to push award modernisation very hard to demand it produces flexibility in employment regulation.

5. *ibid.*

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The “jury is still out from the business point of view” on whether award modernisation can deliver what the individual statutory agreement system did, [...]

The transitional bill was “a measured piece of legislation”, and “reasonably true to industry’s understanding” of Labor’s plan for the transition to Forward with Fairness.⁶

Australian Metals and Minerals Association (AMMA)

General Manager Workplace Policy, Chris Platt:

The level of consultation with employer organisations that WR Minister Julia Gillard undertook in the lead-up to this week’s tabling of the transitional bill marks a ‘new high point in consultation in IR terms’.

(Minister) Gillard had used the National Workplace Relations Consultative Council (NWRCC) and the Committee on Industrial Legislation (COIL) ‘exceptionally well’ and had developed a ‘better bill as a result’.

From our perspective, the Government has done what it said it was going to do; no more, no less ... We accept that they’ve got a mandate to remove AWAs and they’ve done so.⁷

Australian Industry Group (AiGroup)

AiGroup chief executive Heather Ridout

claimed the transitional bill to be ‘balanced and workable’, saying it was ‘shaped by a very constructive consultative process’. In a statement, Ridout said employers would have preferred the option of AWAs, but in the absence of that ‘the Government has been prepared to take on board AiGroup’s concerns and to address the major transitional issues in a practical way’. The legislation was ‘complex’ and would need to be studied, and any concerns raised in submissions to the Senate inquiry, she said. Ridout also hoped award modernisation would be ‘the breakthrough needed to succeed where so many previous attempts have failed’.⁸

Committee consideration

The Bill has been referred to the Senate Employment Workplace Relations and Education Committee for inquiry and report by 17 March 2008. Details of the inquiry are at http://www.aph.gov.au/Senate/committee/eet_ctte/wr_tff08/index.htm.

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6. ‘Can award modernisation deliver, asks ACCI’, *Workforce*, Issue 1621, 15 February 2008.
 7. *ibid.*
 8. ‘New high in IR consultation under Labor’, *Workforce*, Issue 1621, 15 February 2008.

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Generally, submissions and evidence given in Committee hearings, would indicate there is broad support for the Bill, despite calls for further amendment and refinement. Some of these matters are set out below. The reader is referred to the submissions ([here](#)) for further detail.

AWAs and ITEAs

Some employer groups have called for ITEAs to be made available more broadly. For example, the ACCI have asked that ITEAs be made available to all employees; that their term should be extended to five years; and that all employers should be allowed to offer ITEAs to former employees.⁹

No disadvantage test

There have been calls for refinement of the provisions relating to the no disadvantage test. For example, the Shop, Distributive & Allied Employees' Association submission states employers should be required to give affected employees copies of designated awards they submit to the Workplace Authority for examination against the no disadvantage test so workers can make an informed choice before approving an agreement. The submission states:

It would appear fundamental that an employee can only make an informed choice in relation to entering into an ITEA or a Collective Agreement if they know how the Agreement is going to be tested and against which instrument it is to be tested.¹⁰

Award modernisation

Evidence to the Committee suggests there is doubt about the feasibility of the December 2009 deadline for modernising awards. It is reported that AiG national IR director Steve Smith, warned against imposing 'too rigid' a deadline on the process via the Bill and the Minister's award modernisation request to the AIRC. He noted that the 1998 'deadline' for award simplification was not met then either and ran at least 18 months over the deadline. Smith also pointed to the enormity of the task and the drain on resources and said he would like to see the terms of the modernisation proposal amended to require the Commission to complete the task to 'the extent practicable'.¹¹

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9. 'Make 5 year ITEAS available to all employees, says ACCI' *Workplace Express*, 5 March 2008.
 10. Shop, Distributive & Allied Employees' Association, Submission No. 20, Senate Inquiry into the Workplace Relations Amendment (Transition to Forward with Fairness Bill 2008, paragraph 99.
 11. 'Unions, employers say award modernisation timeline too tight', *Workplace.express*, 7 March 2008.

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Transitional arrangements and drafting

There is criticism relating to the Bill's complexity and drafting style. Professor Andrew Stewart, while noting that the drafting style is largely dictated by and consistent with, what is already in the WR Act, he states that 'many of the new provisions remain unduly complicated and difficult to understand, even for the experts'. In relation to the transitional arrangements, Professor Stewart states:

the difficulty of complying with rules that have to be pieced together from amending statutes and multiple versions of the same Act should not be underestimated.¹²

Main Provisions

Schedule 1—Workplace agreements and the no-disadvantage test

Part 1—Main amendments

Individual Transitional Employment Agreements

Item 1 repeals and replaces section 326 with **proposed section 326: Individual Transitional Employment Agreements (ITEAs)**.

The repeal of current section 326 would halt the making of Australian Workplace Agreements (AWAs) after commencement. Transitional arrangements for existing AWAs are set out in **proposed Schedule 7A** (for further discussion see page 12). AWAs made and lodged before the commencement date of the legislation, or made before commencement and lodged within 14 days after that date, would continue to operate until terminated or replaced.

Under **proposed section 326**, ITEAs will only be available to employers that on December 1 2007 employed a worker under an individual statutory agreement, including an AWA, a pre-reform AWA, an individual preserved state agreement, or an individual Victorian employment agreement.

This restriction would prevent current non-AWA employers from signing new workers up to AWAs in the expectation of having access to the full transitional package contained in the Bill.

12. Andrew Stewart, Submission No. 9, Senate Inquiry into the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008, p. 2.

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An ITEA can be made with an employee prior to commencing employment. Where the employee has commenced employment, the ITEA must be made no longer than 14 days after commencement.

ITEAs will have an expiry date of no later than December 31, 2009 (**item 5** inserting **proposed subparagraph 352(1)(a)**).

The Bill would clarify that employees on ITEAs (and existing AWAs) that have passed their nominal expiry dates would be able to make and approve proposed collective agreements and would be eligible to take part in ballots for protected industrial action (**proposed Schedule 7A, clause 8**, see below at p. 12).

The no disadvantage test —Division 5A of Part 8

Item 2 would repeal existing Division 5A of Part 8 (the current fairness test of the WR Act), and replace it with a **new Division 5A** (the no disadvantage test (NDT)). The new test would apply to both ITEAs and collective agreements.

The fairness test was introduced into the WR Act by the *Workplace Relations Amendment (Stronger Safety Net) Act 2007*. It was precipitated in part by reports at Senate Estimates and in the media suggesting workplace agreements were being lodged and taking effect with disregard for the ‘protected’ award conditions and even the Australian Fair Pay and Conditions Standard (AFPC Standard). For a fuller account the reader is referred to the [Bills Digest](#).¹³ In essence, from 7 May 2007, the fairness test has required the Workplace Authority Director to assess the agreement to ensure that if award conditions were traded off, fair compensation was provided.

However the key to any application of the fairness test is that the employees’ work conditions *are usually regulated by an award*. Manifestly, the test was not designed to apply to ‘repeat bargainers’, that is, those who had moved off awards via earlier certified agreements. Central to the Work Choices framework was that, sooner or later, workplace agreements would meet only the AFPC Standard of minimum conditions. These being only: a minimum wage, personal leave, annual leave, a standard 38 hour week and parental leave.

The pre Work Choices no disadvantage test on the other hand, was based on the simplified award standard of 20 allowable matters and did apply to both AWAs and to certified (collective) agreements.

13. Steve O’Neill and Mary Anne Neilsen, ‘Workplace Relations Amendment (A Stronger Safety Net) Bill 2007, Bills Digest, no. 181, Parliamentary Library, Canberra, 2006-07.

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The provisions in Item 2, essentially, seek to reinstate the pre Work Choices NDT arrangements.

Proposed section 346B defines *designated award, industrial instrument* and *reference instrument* which may be used in assessing an agreement under the NDT.

Proposed section 346C allows the NDT to apply to workplace agreements that are yet to operate, are in operation or have ceased to operate.

Proposed section 346D stipulates that an ITEA would pass the NDT if the Workplace Authority Director (WAD) is satisfied that the ITEA would not result, on balance, in a reduction in the employee's overall terms and conditions under any reference instrument.

Reference instruments are defined in **proposed section 346E** and differ depending on whether the agreement to be tested is an ITEA or a collective agreement.

ITEAs must not disadvantage an employee against an applicable collective agreement or, where there is no such collective agreement, an applicable/designated award and the AFPC Standard (**proposed subsections 346D(1)** and **346E(3)**).

Collective agreements must not disadvantage employees in comparison with an applicable/designated award and the AFPC Standard (**proposed subsections 346D(2)**, **346E(4)** **346E(5)**), except where the WAD approves an agreement as part of a reasonable strategy to deal with an 'exceptional circumstance' (such as short term business crisis) (**proposed subsection 346D(3)**).

If there is no reference instrument, ITEAs and collective agreements are taken to have passed the NDT (**proposed subsections 346D(6)** and **(7)**), providing they comply with current section 172, that is by meeting the AFPC Standard. Given the WAD has the power to designate an award (**proposed section 346G**) or replace a designated award with a more appropriate one (**proposed subsection 346G(6)**) and may designate an award after a workplace agreement is lodged where there are no other relevant instruments (**proposed section 346H**), it must be assumed approving agreements without reference to *any* award or reference instrument will be rare.

New commencement dates for agreements

The Bill would introduce a number of changes relating to the circumstances in which workplace agreements commence operation.

Collective union and non-union agreements and ITEAs for *existing* employees would only take effect after they pass the NDT and the WAD approves them (**item 3, Schedule 1, proposed section 346L, and proposed paragraph 347(1)(b)**).

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ITEAs for *new* employees and employer and union greenfields agreements would apply from the date of lodgement with the WAD, but would cease to operate if they later failed the NDT (in the same way as the provisions apply under the fairness test) (**item 3, Schedule 1, proposed sections 346S and 346V, proposed paragraph 347(1)(a)**).

Where the agreement fails the NDT, compensation may be payable to employees (**proposed section 346ZG**) and the parties would revert to the instrument that applied before the agreement was lodged (**proposed section 346ZB**).

Only workplace agreements, agreement variations and terminations that meet fundamental requirements (such as employee approval) would come into operation (**item 4, proposed section 347A**). Employers would be required to lodge copies of signed workplace agreements and variations. If a document does not come into operation because these requirements are not met, a Court could order that the document is to have effect as if it were a workplace agreement, variation or termination, but only if this would not result in a reduction in an employee's overall terms and conditions of employment (**item 92, Schedule 1, proposed section 412**).

Penalties and remedies for non-compliance with statutory requirements that apply in relation to workplace agreements, variations and terminations would also apply in relation to documents that are represented to be workplace agreements, variations and terminations (as in Part 8 of the WR Act).

All agreements will cease to operate or never operate if they fail the NDT (**proposed section 346V**).

Termination of agreements

Collective agreements

The Bill provides that employers would no longer have the power to unilaterally terminate a collective agreement that has passed its nominal expiry date, and return employees to a limited number of minimum standards.

Under the Bill, a collective agreement will only be able to be terminated where the parties agree (**item 11, Schedule 1 deletes section 393**), or by the Australian Industrial Relations Commission (AIRC) in circumstances where termination would not be contrary to the public interest (**item 12, Schedule 1, proposed section 397A**).

When an agreement is terminated, employees will be entitled to whatever award or workplace agreement would have applied to them but for the terminated agreement.

AWAs

AWAs can be terminated by either party on 90 days' notice and the employee would then revert to the agreement or award that applied in the workplace. **Item 14, Schedule 1**

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would repeal current section 399 which prevents an award or collective agreement from operating in relation to an employee when the employee's AWA is terminated, and an award from operating when a collective agreement is terminated.

ITEAs

Termination of ITEAs is set out in **proposed section 393**. ITEAs can be terminated by either party on 90 days' notice and the employee would then revert to the agreement or award that applied in the workplace (**item 11, Schedule 1** repeals and replaces **section 393**).

Part 2 — Transitional Matters

Transitional arrangements for existing AWAs—Proposed Schedule 7A

The transitional arrangements for existing AWAs are set out in **proposed Schedule 7A (item 15)**. They would allow the fairness test and existing termination provisions to apply to AWAs made and lodged before commencement of this Bill, or to AWAs lodged within 14 days of commencement of the Bill.

Proposed clause 1 provides definitions of *pre-transition Act* (the WR Act in force before the commencement of Schedule 7A) and AWA. AWAs are defined to mean AWAs operative before the commencement of Schedule 7A but not including pre-reform AWAs (made prior to 27 March 2006).

Proposed clause 2 allows pre-transition Act terms to continue to apply to AWAs as defined. However provisions under **subclause 2(2)** negate the application of certain pre-transition Act terms. The effect of **paragraph 2(2)(c)** for example is to allow AWA employees to be included in a roll for the purposes of conducting a secret ballot prior to industrial action in support of a collective agreement. The effect of **paragraph 2(2)(d)** is that when an AWA is terminated, an employee could be covered by an applicable collective agreement or award.¹⁴

Proposed clause 3 negates the appointment of AWA bargaining agents 14 days after the commencement of the Schedule.

Proposed clauses 4 and 5 limit the ability to vary AWAs. However, an AWA would be able to be varied if the variation is made before commencement and lodged within 14 days of commencement (**subclause 5(2)**). AWAs would continue to be able to be varied under the pre-transition Act to deal with matters arising under the fairness test, the rules relating

14. The Bill's *Explanatory Memorandum* incorrectly cites this subclause 2(2)(c): par. 130, p. 30.

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to prohibited content, removal of discriminatory provisions or by order of the Federal Court (**subclause 5(3)**).

Proposed clause 6 allows an AWA to be replaced by an ITEA but not another AWA.

Proposed clause 7 requires the Workplace Authority Director to determine that an AWA or AWA variation was ineffective, or otherwise not compliant.

Proposed clause 8 according to the Bill's *Explanatory Memorandum*, allows an AWA employee (and other employees) to make and approve a collective agreement without having to terminate the AWA. Also they could take part in secret ballot processes to seek protected industrial action providing the AWA had not expired.

Transitional arrangements for existing collective agreements—Proposed Schedule 7B

The transitional arrangements for existing collective agreements are set out in **proposed Schedule 7B (item 15)**.

Proposed clause 1 defines the *fairness test*, the *pre-transition Act* and *pre-transition collective agreements*.

Proposed clause 2 provides that the fairness test and a number of other provisions apply to pre-transition collective agreements. Variations to collective agreements made after commencement of the schedule would be subject to the new NDT.

Part 3 — Other amendments of the *Workplace Relations Act 1996*

Part 3 of Schedule 1 would make amendments consequential on the main amendments and transitional amendments in Parts 1 and 2.

Several items would repeal the definitions of 'Australian workplace agreement' or 'AWA'. These are consequential on the proposed abolition of AWAs. Numerous items propose to remove the term 'AWA' and replace it with the term 'ITEA'. **Items 19** and **20** add new definitions of an 'ITEA' and a 'workplace agreement' to section 4 of the Act. A workplace agreement means an ITEA, or a collective agreement, and also includes a document that a Court has ordered under section 412A to have effect as a workplace agreement.

Part 3 also proposes amendments consequential on the replacement of the 'fairness test' with 'no-disadvantage test'.

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Transmission of business rules

Many of the proposed amendments in Part 3 relate to the transmission of industrial instruments that apply to employers and employees following the sale or restructure of the business.

The Work Choices amendments of 2005 enacted new transmission of business rules in a new Part 11, the stated object of the Part being ‘to provide for the transfer of employer obligations under certain instruments when the whole, or a part, of a person’s business is transmitted to another person’. The Work Choices reforms maintain some protection for employees following a sale or restructure for the business they work in, but arguably with significant limitations, compared with the old provisions.¹⁵ First, only employees who were engaged by the former business owners benefit from a continuation of award or workplace agreement conditions, and only if they continue to be engaged in the same kind of employment with the new employer. Most importantly, the new owner will not be bound by the transmitted award or agreement in respect of any newly appointed employees. Second, the award or agreement binds the new employer for a maximum period of only 12 months.¹⁶

The Bill does not alter these essential rules relating to transmission of business but amends the provisions to the extent necessary to comply with the new arrangements relating to the abolition of AWAs and introduction of ITEAs, and the replacement of the fairness test with the NDT.

For example, **items 113 to 116** propose amendments to section 583 so that where immediately before the time of transmission, the old employer and employee were bound by an ITEA, and the employee is a transferring employee, the new employer becomes bound by the ITEA.

Item 117 provides that a transferring employee is to be treated as an existing employee for the purposes of eligibility to make an ITEA with the new employer. The purpose and effect is that a transferring employee may only make an ITEA with a new employer that commences operation on approval (not on lodgement).

Item 118 proposes to amend subsection 583(2) to replace ‘AWA’ with ‘ITEA’. The effect is to establish the period that a new employer is bound by a transmitted ITEA. Essentially the same rules would apply to ITEAs as apply to existing AWAs.

15. J. Riley and K. Peterson, *Work Choices: A guide to the 2005 changes*, Thomson, 2006, p. 627.

16. *ibid.*

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Item 119 would repeal and replace section 584 with the effect that an ITEA cannot be unilaterally terminated during the transmission period, even if the ITEA has passed its nominal expiry date.

Item 128 would insert into Part 11 a **proposed Division 7A** – Application of no-disadvantage test. Its **proposed sections 601A to 601H** deal with the situation where a workplace agreement (ie usually an ITEA or a collective agreement) becomes binding on a new employer and a transferring employee before the Workplace Authority has applied the no-disadvantage test to the agreement. The Division applies only to a workplace agreement that operates from lodgement. **Proposed section 601D** sets out the employment arrangements that would apply should a workplace agreement cease to operate because it does not pass the no-disadvantage test.

Amendments to Schedules of the WR Act

The WR Act includes a number of Schedules relating to transitional arrangements for various industrial instruments following the 2005 Work Choices amendments. Part 3 of Schedule 1 of the Bill proposes amendments to several of these Schedules consequential to the amendments proposed in Parts 1 and 2.

For example **items 238–259** propose amendments to Schedule 9. This is the Schedule containing the rules for the transmission of pre-Work Choices industrial instruments of all types. **Item 244** amends the definition of a ‘transitional instrument’ in clause 3 to add an AWA. Similarly, **item 245** amends the definition of ‘workplace agreement’ to add an AWA.¹⁷ **Item 246** is one of the more significant amendments. It proposes a **new Part 2A** to deal with the transfer of an AWA to a new employer on transmission of business. It is consequential on the amendments which would prevent the making of new AWAs and proposes similar rules to the transmission of business rules in Part 11 of the Act. Where immediately before the time of transmission, the old employer and an employee were bound by an AWA, and the employee is a transferring employee in relation to the AWA, the new employer becomes bound by the AWA (**proposed clause 6B**). **Proposed subclause 6B(2)** would specify how long the new employer is bound to the AWA and the circumstances when the AWA would cease to operate.

Item 248 would repeal clause 8 of Schedule 9. The effect is that a transferring employee may become bound by a transitional instrument that binds the new employer, in cases where the AWA no longer applies to the employee.

17. Note that these provisions are complex. The provisions in Schedule 9 already deal with pre-reform AWAs. The Bill would add a new set of AWAs to the transmission rules: ie AWAs made since the 2005 amendments and prior to the enactment of the 2008 Bill.

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Item 259 repeals Parts 8 and 9 of Schedule 9. The repeal of Part 8 would have the effect that a transferring employee may become bound by a transitional instrument that binds the new employer, in cases where a transmitted collective agreement or award no longer applied to the employee. Part 9 is a regulation making power and its repeal is consistent with the repeal of Part 8.

Schedule 2—Awards

Part 1—Award Modernisation

The Work Choices amendments have had a massive impact on Australia's state and federal award system. Where state award employers fall under the definition of a 'federal' employer as stipulated in the amended WR Act at section 6, the state award transfers to the federal jurisdiction. In practical terms, what used to be about 2,000 awards (called 'pre-reform' awards) in the federal jurisdiction has doubled to about 4,300, following the inclusion of state awards, although these 'state' awards are scheduled to terminate on 27 March 2009. Also, there are approximately 1500 'transitional' awards which were to have a life of 5 years.

The Award modernisation program in the Bill would replace the Work Choices 'Award Simplification and Rationalisation' program, but both programs aim to rationalise the award structure.

Items 2 to 4 insert into Subsection 4(1) the definitions of: *award modernisation process*, *award modernisation request* and *modern award*.

Item 6 repeals the 30 June 2008 limit on award superannuation for those award employees who have an entitlement to award superannuation.

Item 9 is the key provision. It inserts **proposed Part 10A**—Award Modernisation into the WR Act. **Part 10A** sets out the Australian Industrial Relations Commission's (AIRC) award modernisation function and specifies certain requirements for modern awards.

Proposed section 576A sets out the objects of Part 10A which include the requirements that awards must be simple and easy to understand and must reduce the regulatory burden on business; must provide a fair minimum safety net of enforceable terms (together with legislated standards); must be economically sustainable and promote flexible work practices; must be in a form which promotes collective enterprise bargaining and must result in a stable and sustainable modern award system for Australia.

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Award modernisation process

AIRC functions

Proposed section 576B sets out the award modernisation functions of the AIRC. The AIRC is to give regard to:

- promoting the creation of jobs
- high levels of productivity
- low inflation
- high levels of employment and labour force participation
- national and international competitiveness
- the development of skills and a fair labour market
- protecting the position in the labour market of young people
- employees with a disability and employees to whom training arrangements apply
- the needs of the low-paid
- the desirability of reducing the number of awards operating in the workplace relations system
- the need to help prevent and eliminate discrimination on the grounds of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin, and to promote the principle of equal remuneration for work of equal value
- the need to assist employees to balance their work and family responsibilities effectively, and to improve retention and participation of employees in the workforce
- the safety, health and welfare of employees
- relevant rates of pay in Australian Pay and Classification Scales and transitional awards
- minimum wage decisions of the Australian Fair Pay Commission, and
- the representation rights of organisations and transitionally registered associations.

Award modernisation request

Proposed section 576C stipulates that the award modernisation process must be carried out in accordance with a written request (an *award modernisation request*) made to the AIRC President by the Minister. An award modernisation request must specify the award modernisation process that is to be carried out; the time by which the award modernisation process must be completed, which must not be later than two years after the making of the request; and any other matter relating to the award modernisation process that the Minister considers appropriate. The request can also be revoked or varied.

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Proposed subsection 576C(3) in essence gives the Workplace Relations Minister control over award modernisation. It allows an award modernisation request to require the Commission to prepare progress reports on specified matters relating to the award modernisation process and allows two years to undertake award modernisation; specify additional matters about which terms may be included in modern awards; require the Commission to include in a modern award terms about particular matters; and give directions about how, or whether, the Commission is to deal with particular matters about which terms may be included in a modern award.

It is these provisions which could be used to exclude an employee above a certain salary from the award when s/he makes an employment agreement. The Bill's [Explanatory Memorandum](#) mentions this proposed exclusion in the following terms:

As part of the award modernisation process all awards will contain a flexibility section enabling arrangements to meet the genuine individual needs of employers and employees. In addition, employees earning above \$100,000 per annum will be free to agree their own pay and conditions without reference to awards. This will provide greater flexibility for common law agreements which have previously been required to comply with all award provisions, no matter how highly paid the employee. These measures respond to the views of employers and employees about who needs the protection of the award system. (p. 8)

It appears that proposed section 576C will facilitate the above policy but it requires this Bill to be passed and operational to effect any such exclusion.

Proposed Section 576D requires that an award modernisation request be published by the Australian Industrial Registrar.

Procedure for carrying out award modernisation process

Proposed section 576E requires the AIRC President to establish a full bench of the AIRC to carry out the request and authorises the President to give directions and allocate tasks. Subject to these directions the full bench shall have discretion in carrying out award modernisation and may consult with persons and organisations.

Proposed section 576G directs a full bench of the AIRC to make one or more modern awards consistent with the Minister's request and not make an award other than in accordance with the award modernisation process. It stipulates that a modern award is not a legislative instrument.

Terms of modern awards

Matters that may be dealt with by modern awards

Proposed section 576J sets out the new 'allowable' matters to be contained in awards. These are itemised under **subsection 576J(1)**. They are:

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- a) **minimum wages** (including wage rates for junior employees, employees with a disability and employees to whom training arrangements apply), and skill-based classifications and career structures and incentive-based payments, piece rates and bonuses
- b) **type of employment**, such as full-time employment, casual employment, regular part-time employment and shift work and the facilitation of flexible working arrangements particularly for employees with family responsibilities
- c) **arrangements for when work is performed**, including hours of work, rostering, notice periods, rest breaks and variations to working hours
- d) **overtime rates**
- e) **penalty rates**, including for employees working unsocial, irregular or unpredictable hours; employees working on weekends or public holidays and shift workers
- f) **annualised wage or salary arrangements** that have regard to the patterns of work in an occupation, industry or enterprise and provide an alternative to the separate payment of wages or salaries, and other monetary entitlements and include appropriate safeguards to ensure that individual employees are not disadvantaged
- g) **allowances**, including expenses incurred in the course of employment, responsibilities or skills that are not taken into account in rates of pay and disabilities associated with the performance of particular tasks or work in particular conditions or locations
- h) **leave**, leave loadings and arrangements for taking leave
- i) **superannuation**, and
- j) **consultation, representation and dispute settlement** procedures.

A modern award may include terms about any other matter specified in an award modernisation request.

Proposed section 576K allows an award to include terms about outworkers' conditions of employment.

Proposed section 576L limits award terms to providing a fair safety net.

Proposed section 576M allows awards to include terms incidental to a permitted term if they are essential to making a term work in a practical way and to include machinery terms about commencement, definitions, employers, employees and organisations and so on.

Proposed section 576N emphasises that awards must include terms prescribed by the Minister's request and otherwise be consistent with that request.

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Terms that must not be included in modern awards

Proposed section 576P stipulates that awards must not contain terms other than those permitted under Subdivision A (proposed sections 576J – 576N).

Proposed section 576Q would provide that award must not contain terms that would contravene the Freedom of Association provisions (Part 16) of the Act.

Proposed section 576R prevents award terms to do with right of entry to the workplace. Awards must not contain terms that would allow union and employer organisation officers to enter workplaces covered by the award so as to conduct inspections, inspect work and documents and interview employees.

Proposed section 576S prevents awards from containing discriminatory terms other than where these provisions are required for inherent requirements of the job or to accord with religious creeds for their teaching staff. Certain wage rate for specified classes of employee (eg juniors) are not to be taken as discriminatory.

Proposed section 576T prevents awards from containing provisions determined by reference to State or Territory boundaries after five years from the commencement of the award. Thereafter those terms cease to have effect.

Who is bound by modern awards

Proposed section 576V states that a modern award binds those employers, employees, organisation and eligible entities it expresses to bind in accordance with its terms. These exclude employers who are bound by enterprise awards. **Subsection 576V(5)** allows a modern award to bind entities and employers which employ outworkers.

Technical matters

Proposed section 576W would set out specific formal requirements for the making of modern awards and orders varying modern awards such as being signed by the President of the AIRC, along with other requirements. There are also provisions setting out rules of commencement of the award. Inter alia these require that when the AIRC makes an award or order, the Registrar is to make public that award or order (**Proposed section 576Z**).

Part 2—Repeal of award rationalisation and award simplification provisions

Award rationalisation and simplification is currently provided under Part 10—Division 4 of the WR Act (sections 534-551). **Item 26** of the Bill's Schedule 2 repeals these provisions in their entirety. Other amendments are also made pursuant to the repeal of Part 10—Division 4.

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A model award modernisation request, incorporated into the *Explanatory Memorandum*, is attached to this digest as an appendix. The model award modernisation request suggests that scope may be given to the AIRC to mould the proposed national employment standards to industry circumstances via award modernisation. The proposed National Employment Standards (NES) in effect expand on, but are different to, the current Australian Fair Pay and Conditions Standard. The NES will comprise:

- hours of work
- parental leave
- flexible work for parents
- annual leave
- personal, carers and compassionate leave
- community service leave
- public holidays
- information in the workplace
- notice of termination and redundancy; and
- long service leave.

The NES have been released for public consultation along with the tabling of this Bill. Refer to the NES [discussion paper](#).

It might be noted that under the current WR Act, the Minister was accorded the function of triggering an award rationalisation request (subsection 534(2)) however such a request was not made by the previous Coalition Government. However, the previous government did commission an award review by a taskforce chaired by the AIRC's Deputy President O'Callaghan.¹⁸ One concern raised by the Taskforce has been answered in the model award modernisation request. The Taskforce's concern went to the scope of award coverage. The Coalition Government's response to the Taskforce indicated that it preferred award-free employees to remain so.¹⁹ However Minister Gillard's model award modernisation request mentions, inter alia, that:

The creation of modern awards is not intended to ... extend award coverage beyond those classes of employees, such as managerial employees, who, because of the nature or seniority of their role, have traditionally been award free. This does not preclude the extension of modern award coverage to new industries or new occupations where

18. M. O'Callaghan, [Award Review Taskforce Report on Award Rationalisation](#), July 2006.

19. Kevin Andrews MP, [Australian Government response to the award review taskforce report on award rationalisation](#), 3 November 2006, p. 2.

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the work performed by employees in those industries or occupations is of a similar nature to work that has historically been regulated by awards (including State awards) in Australia.²⁰

Schedule 3—Functions of the Australian Fair Pay Commission (AFPC)

The amendments proposed by this Schedule would amend Parts 2 and 7 of the WR Act to confine the functions of the AFPC to:

- undertaking annual minimum wage reviews
- adjusting wage rates in existing Australian Pay and Classification Scales as a result of those reviews, and
- adjusting the APCS Federal Minimum Wage (FMW) or a special FMW.

Other functions performed by the AFPC such as setting special FMW for junior employees and trainees, are repealed. The Schedule retains key provisions enabling the AFPC to carry out its new prescribed functions, such as the current section 196 allowing the AFPC to adjust the FMW.

Schedule 4—Repeal of provisions for Workplace Relations Fact Sheet

Item 1 of this Schedule would repeal Division 3A of Part 5 of the WR Act which obliges employers to provide their employees with a Fact Sheet outlining certain aspects of their employment conditions.

Schedule 5—Transitional arrangements for existing pre-reform Federal agreements etc

Item 1 inserts **proposed section 2A** into Schedule 7. Schedule 7 of the WR Act currently prescribes transitional arrangements for existing pre-reform federal agreements. **Proposed section 2A** will allow the AIRC to extend pre-reform certified agreements beyond their nominal expiry date and/or vary their terms of agreement, on application by any person bound by the agreement. Any variation will be conditional on all parties consenting to the variation and no industrial action has been entered into or contemplated. In addition, the variation must not disadvantage the employees in their overall terms of employment under any relevant transitional award or any relevant law. The AIRC cannot extend the agreement for more than three years.

20. Refer to full text of the request in the Appendix to this digest.

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Schedule 6—Notional agreements preserving State awards

Item 1 extends the cessation date of notional agreements preserving State awards (NAPSAs) from 27 March 2009 to 31 December 2009 or a later date as prescribed in regulations.

Schedule 7—Transitionally registered associations

Item 1 extends the registration of transitionally registered organisations from 27 March 2009 to 31 December 2009 or a later date as prescribed by regulations.

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Appendix

Model Award Modernisation Request

Commission to undertake award modernisation

Pursuant to section 576C of the Workplace Relations Act 1996 (the Act), I, Julia Gillard, Minister for Employment and Workplace Relations, request that the Australian Industrial Relations Commission (the Commission) undertake the task of creating modern awards in accordance with the following request.

This award modernisation request is to be read in conjunction with Part 10A of the Act.

Objects

1. The aim of the award modernisation process is to create a comprehensive set of modern awards. As set out in section 576A of the Act, modern awards:

- (a) must be simple to understand and easy to apply, and must reduce the regulatory burden on business; and
- (b) together with any legislated employment standards, must provide a fair minimum safety net of enforceable terms and conditions of employment for employees; and
- (c) must be economically sustainable and promote flexible modern work practices and the efficient and productive performance of work; and
- (d) must be in a form that is appropriate for a fair and productive workplace relations system that promotes collective enterprise bargaining but does not provide for statutory individual employment agreements; and
- (e) must result in a certain, stable and sustainable modern award system for Australia.

2. The creation of modern awards is not intended to:

- (a) extend award coverage beyond those classes of employees, such as managerial employees, who, because of the nature or seniority of their role, have traditionally been award free. This does not preclude the extension of modern award coverage to new industries or new occupations where the work performed by employees in those industries or occupations is of a similar nature to work that has historically been regulated by awards (including State awards) in Australia;
- (b) result in high-income employees being covered by modern awards;

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- (c) disadvantage employees;
- (d) increase costs for employers;
- (e) result in the modification of enterprise awards. This does not preclude the creation of a modern award for an industry or occupation in which enterprise awards operate.

However section 576V of the Act provides that a modern award is to be expressed not to bind an employer who is bound by an enterprise award in respect of an employee to whom the enterprise award applies.

Performance of functions by the Commission

3. In accordance with section 576B of the Act, the Commission must have regard to the following factors when performing its functions under Part 10A of the Act and this award modernisation request:

- (a) the creation of jobs and the promotion of high levels of productivity, low inflation, high levels of employment and labour force participation, national and international competitiveness, the development of skills and a fair labour market;
- (b) protecting the position in the labour market of young people, employees to whom training arrangements apply and employees with a disability;
- (c) the needs of the low paid;
- (d) the desirability of reducing the number of awards operating in the workplace relations system;
- (e) the need to help prevent and eliminate discrimination on the grounds of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin and to promote the principle of equal remuneration for work of equal value;
- (f) the need to assist employees to balance their work and family responsibilities effectively and to improve retention and participation of employees in the workforce;
- (g) the safety, health and welfare of employees;
- (h) relevant rates of pay in Australian Pay & Classification Scales and transitional awards;
- (i) minimum wage decisions of the Australian Fair Pay Commission; and
- (j) the representation rights, under the Act or the Registration and Accountability of Organisations Schedule, of organisations and transitionally registered associations.

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Award modernisation process

4. When modernising awards, the Commission is to create modern awards primarily along industry lines, but may also create modern awards along operational lines as it considers appropriate. In creating modern awards, and as indicated at paragraph 3(d) above, the Commission must have regard to the desirability of reducing the number of awards operating in the workplace relations system.

5. Division 3 of Part 10A of the Act deals with the terms of modern awards, including the provisions that may be included and must not be included in modern awards. Subject to paragraphs 29-35 below, modern awards may also include provisions relating to the proposed National Employment Standards (proposed NES).

6. As soon as practicable after receiving this award modernisation request, the President will consult with the major employer and employee representative bodies on the best process to be followed by the Commission when creating modern awards. The President will then release a clear program and timetable for completing the award modernisation process.

7. Individual Commission members may be directed by the President in the award modernisation process.

8. The Commission will identify the type of work, industry and/or occupations covered by a modern award and the application of each award.

9. The Commission is to have regard to the desirability of avoiding the overlap of awards and minimising the number of awards that may apply to a particular employee or employer. Where there is any overlap or potential overlap in the coverage of modern awards, the Commission will as far as possible include clear rules that identify which award applies.

10. The Commission will prepare a model flexibility clause to enable an employer and an individual employee to agree on arrangements to meet the genuine individual needs of the employer and the employee. The Commission must ensure that the flexibility clause cannot be used to disadvantage the individual employee.

11. Each modern award will include the model flexibility clause with such adaptation as is required for the modern award in which it is included.

12. The Commission may include transitional arrangements in modern awards to ensure the Commission complies with the objects and principles of award modernisation set out in this award modernisation request.

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Consultation

13. The President will consult with the Australian Fair Pay Commission and State industrial tribunals as appropriate.

14. The Commission will prepare an exposure draft of each modernised award. The Commission will, as appropriate, hold a conference or conferences with major employer and employee representative bodies for the purpose of informing the preparation of each exposure draft.

15. The Commission is to publish exposure drafts of each modernised award for the purpose of further consultation and to ensure that all stakeholders and interested parties have a reasonable opportunity to comment upon the exposure drafts. In so far as practicable, the exposure drafts will be electronically published for comment.

16. Consultation on exposure drafts of modern awards will be open and transparent.

Creating modern awards

17. Upon completion of the consultation processes in relation to an exposure draft, the Commission will prepare the modern award.

18. The President may establish one or more Full Benches for the purpose of creating modern awards. Each modern award is to be created by a Full Bench.

Timing

19. The Commission is to complete the award modernisation process by 31 December 2009.

20. To that end, the Commission should endeavour by 30 June 2008 to have identified a list of priority industries or occupations for award modernisation, developed a timetable for completing the award modernisation process and developed a proposed model award flexibility clause. In developing its priority list, the Commission will have regard to those industries and occupations with high numbers of Australian Workplace Agreements and Notional Agreements Preserving State Awards (NAPSAs).

21. In identifying a list of priority industries or occupations for award modernisation, developing a timetable for completing the award modernisation process and developing a proposed model award flexibility clause, the Commission is to consult with major workplace relations stakeholders and other interested parties. It is acknowledged that the Commission will require the full support and cooperation of major workplace relations stakeholders and other interested parties in order to conduct that consultation.

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22. In developing a timeframe for completing the award modernisation process, the Commission should endeavour to have created by the end of December 2008 modern awards for each of the priority industries or occupations it has identified following the consultations with key workplace relations stakeholders.

Reporting on the progress of award modernisation

23. The President is to publish a quarterly report outlining:

- (a) those industries or occupations undergoing or about to commence award modernisation, including the Commission member responsible, under the auspices of the Full Bench, for those industries and/or occupations;
- (b) the progress of award modernisation, including any significant developments during the quarter, key issues or developments scheduled for the next quarter and any adjustments made to the timetable determined by the President for the award modernisation process; and
- (c) any other matters which the President considers appropriate.

24. The first quarterly report should relate to the June quarter 2008.

Interaction with the proposed National Employment Standards

25. The proposed NES consist of 10 legislated minimum conditions of employment for all employees covered by the federal system. The proposed NES will establish a simple legislative framework of minimum entitlements with straightforward application or machinery rules that are essential to the operation of each entitlement. The proposed NES will operate in conjunction with a relevant modern award to provide a fair safety net of minimum entitlements for award covered employees.

26. The proposed NES will be finalised prior to 30 June 2008 and provided to the Commission for the purpose of conducting the award modernisation process.

27. A modern award may cross reference a provision of the proposed NES. A modern award may replicate a provision of the proposed NES only where the Commission considers this essential for the effective operation of the particular modern award provision. Where a modern award replicates a provision of the proposed NES, NES entitlements will be enforceable only as NES entitlements and not as provisions of the modern award.

28. A modern award cannot exclude a term of the proposed NES or operate inconsistently with a term of the proposed NES.

29. Subject to paragraph 32 below, a modern award may include industry-specific detail about matters in the proposed NES.

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30. Subject to paragraph 32 below, a modern award may build on entitlements in the proposed NES where the Commission considers it necessary to do so to ensure the maintenance of a fair minimum safety net for employees covered by the modern award, having regard to existing award entitlements for those employees.

31. In creating a modern award, the Commission is to assess whether additional machinery rules in relation to NES entitlements are necessary for the applicable industry or occupation. An example of a machinery provision could be rules about taking double the period of annual leave on half pay.

32. In relation to long service leave, the Australian Government will, in co-operation with state governments, develop a national long service leave entitlement under the NES. In doing so, the Australian Government will also consult with major employer and employee representative bodies. Until then, long service leave entitlements derived from various sources will be protected. So as to not pre-empt the development of a nationally consistent approach, the Commission must not include a provision of any kind in a modern award that deals with long service leave.

33. Other than expressly authorised under this request (see paragraphs 29-31), the Commission must not include a term in a modern award on the basis that it would be an allowable modern award matter where the substance of the matter is dealt with under the proposed NES.

Shift workers and piece workers

34. The proposed NES apply to shift workers and provide that a shift worker is entitled to an additional week of annual leave – that is, five weeks of annual leave for each year of completed service.

35. The proposed NES rely on a modern award to define, where required, a shift worker as appropriate for the particular industry covered by the award.

36. In modernising awards, the Commission must have regard to whether it is appropriate to include a definition of shift worker in a modern award that applies to these types of employees for the purposes of the proposed NES annual leave entitlements.

37. The proposed NES apply to a piece worker.

38. The proposed NES rely on modern awards to define a piece worker and set out rules relating to the payment of NES entitlements (based on ordinary hours of work) for a piece worker.

39. In modernising awards, the Commission must have regard to whether it is appropriate to include:

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(a) a definition of piece worker in a modern award that applies to these types of employees (if an employee is employed on the basis of hours worked, it is not expected that such employees would be defined as piece workers); or

(b) a provision that would provide a calculation of payment, a payment rate, or a payment rule in relation to a piece worker employee with respect to paid leave or paid absence under the proposed NES. For example, a method for making payment to a piece worker employee when that employee is absent on annual leave.

Ordinary hours of work

40. Many entitlements in the proposed NES rely on modern awards to set out ordinary hours of work on a weekly or daily basis for an employee covered by the modern award. The Commission is to ensure that it specifies in each modern award the ordinary hours of work for each classification of employee covered by the modern award for the purpose of calculating entitlements in the proposed NES.

Minimum wages

41. In accordance with section 576J of the Act, minimum wages are a matter that may be dealt with in modern awards. In dealing with minimum wages in modern awards, the Commission is to have regard to the desire for modern awards to provide a comprehensive range of fair minimum wages for all employees including, where appropriate, junior employees, employees to whom training arrangements apply and employees with a disability in order to assist in the promotion of employment opportunities for those employees.

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