

**Australian Industry Group Supplementary
Submission to the Fair Work Commission**

13 November 2014

**4 Yearly Review of Modern Awards – Exposure Drafts – Group 1
Supersession Clause, Take Home Pay Orders Clause, NES Summaries, NTW Schedule**



4 Yearly Review of Modern Awards – Exposure Drafts – Group 1 Supersession Clause, Take Home Pay Orders Clause, NES Summaries, NTW Schedule

1. Introduction

1. The Australian Industry Group (**Ai Group**) makes this submission in relation to the Group 1 Exposure Drafts published by the Fair Work Commission.
2. Ai Group notes that the Commission intends to deal with the following issues arising from the Exposure Drafts during hearings listed on 17 – 19 November 2014:
 - The supersession clause;
 - The take-home pay order clause;
 - The inclusion of NES summaries; and
 - The National Training Wage Schedule (**NTW Schedule**).
3. These submissions address the above issues.

2. The supersession clause

4. The Exposure Drafts contain a supersession clause in the following terms:

“This award supersedes the XXXX Award 2010 but this does not affect any right, privilege, obligation or liability that a person acquired, accrued or incurred under the superseded award.”
5. The Commission has directed parties to consider the option of varying awards (to delete all clauses, schedules etc and replace them with new provisions), rather than creating new awards.

6. Ai Group notes that this was the approach adopted by the Australian Industrial Relations Commission (AIRC) during the award simplification process between 1996 and 1998,¹ although supersession clauses were inserted into many simplified awards. For example, the *Metal, Engineering and Associated Industries Award 1998* contained a supersession clause in the following terms:
- “This award wholly supersedes the Metal Industry Award 1984 - Part I but no right obligation or liability accrued or incurred under that award or variations to it shall be affected by such supersession.”
7. Ai Group supports the proposal to vary modern awards as a result of this Review rather than the making of new awards. This will avoid unnecessary complications.
8. Ai Group notes that:
- Under s.156(2)(b) of the *Fair Work Act 2009* (FW Act), the Commission has power to either vary, make or revoke a modern award in a 4 Yearly Review; and
 - The revocation of a previous instrument gives rise to special considerations under s.164, of which the Commission must be satisfied.
9. Under s.164 a modern award cannot be revoked unless the Commission is satisfied that the award is obsolete and no longer capable of operating. To avoid any legal doubt about the validity of revoking the current modern awards given that they are not obsolete, it is preferable to vary modern awards to reflect the outcome of the Review.
10. Ai Group does not oppose the inclusion of a supersession clause but we are of the view that such a clause is not necessary.
11. If a clause is to be inserted, we suggest the following:

¹ For instance the *Metal, Engineering and Associated Industries Award 1998* was implemented through a variation to the *Metal Industry Award 1984* (Print Q0444).

"The *(insert name) Award 2010* was varied to reflect the outcome of the 4 Yearly Review of Modern Awards on *(insert date) 2015* including changing the name of the award to *(insert name) Award 2015*. Such variation does not affect any right, privilege, obligation or liability that a person acquired, accrued or incurred under the award before it was varied."

3. Take home pay order clause

12. The Exposure Drafts propose to delete the following provision found in clause 2 of each modern award:

"Neither the making of this award nor the operation of any transitional arrangements is intended to result in a reduction in the take-home pay of employees covered by the award. On application by or on behalf of an employee who suffers a reduction in take-home pay as a result of the making of this award or the operation of any transitional arrangements, the Fair Work Commission may make any order it considers appropriate to remedy the situation."

13. The ACTU submits that the above clause should be retained. Ai Group submits that the clause should be deleted.
14. The take home pay order clause was inserted in all modern awards by the Australian Industrial Relations Commission (AIRC) during the award modernisation process. In its decision regarding transitional provisions to be included in Priority and Stage 2 awards,² the Full Bench made the intention behind the clause clear:

"[20] We deal next with the possibility of reductions in take-home pay. The provisions of Part 3 of Schedule 5 to the Transitional Act are concerned with the maintenance of take-home pay. They deal with what happens when an employee suffers a reduction in take-home pay as a result of a modern award coming into operation. It is to be implied that the provisions do not apply to employees who commence employment after the modern award has come into operation. So while the provisions are concerned with what happens when the modern award comes into operation, they do not deal with the potential for reductions in take-home pay resulting from the operation of the transitional provisions. As will be seen, the model provisions permit a phased reduction in pre-modern award conditions if they were more beneficial for employees than the modern award. For that reason we think it is important to provide protection for new employees from reductions in take-home pay which otherwise might result from the operation of the transitional provisions. The model provision specifies that neither the making of the award nor the operation of the transitional

² *Award Modernisation* [2009] AIRCFB 800

provisions is intended to result in a reduction in take-home pay. It also indicates that Fair Work Australia may make an order to remedy a reduction in take-home pay. This provision will complement the power to make take-home pay orders in item 9 of Schedule 5 to the Transitional Act. The model provision reads:

“Neither the making of this award nor the operation of any transitional provision is intended to result in a reduction in the take-home pay of employees covered by the award. On application by or on behalf of an employee who suffers a reduction in take-home pay as a result of the making of this award or the operation of any transitional provision, Fair Work Australia may make any order it considers appropriate to remedy the situation.”³

15. It is self-evident from the above passage that the Full Bench inserted the take-home pay clause into modern awards because the take home pay provisions in the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* did not apply to:
 - employees who commenced employment after modern awards came into operation on 1 January 2010;
 - reductions in take home pay resulting from the operation of the transitional provisions in modern awards.
16. On 31 December 2014 the clause will have no work to do because the transitional provisions in awards will have come to an end, and the clause will be obsolete.
17. It is consistent with the modern awards objective to delete obsolete clauses to ensure that awards are simple and easy to understand (s.134(1)(g)). The removal of obsolete clauses is necessary to achieve the modern awards objective (s.138).
18. Given that the take home pay order clause will have achieved the purpose for which it was drafted on 31 December 2014, it should be deleted from each award with effect from 1 January 2015.

³ *Award Modernisation* [2009] AIRCFB 800.

19. What the ACTU is seeking to achieve is to apply the clause for a purpose which is entirely inconsistent with the reasons why the Commission drafted the clause and inserted it into modern awards. The ACTU's claim should be seen for what it is – a claim for an entirely new and substantial right to be included in the modern award system.
20. Such a new right is not appropriate. Take home pay orders were designed to prevent an employee suffering a reduction in take-home pay as a result of a modern award coming into operation. In 2009, the AIRC decided to extend the concept that was in the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* to new employees and to cover transitional provisions. The extension was for a specific short-term purpose. That purpose expires on 31 December 2014.
21. The source of the Commission's power to insert an award provision providing for the making of a take home pay order is not in the FW Act. Significantly:
- The Commission's award-making powers concern the maintenance of a "minimum safety net of terms and conditions" (s.134(1)) and the effect of a take home pay order is typically to require the maintenance of payments which are above the safety net.
 - Award provisions giving the Commission the power to make a take home pay order are not matters that *may* be included in modern awards (see Subdivision B of Division 3 of Part 2-3);
 - Award provisions giving the Commission the power to make a take home pay order are not matters that *must* be included in a modern award (see Subdivision C of Division 3 of Part 2-3); and
 - Section 136 prohibits awards including terms unless they are terms that may be, or must be, included in modern awards.

22. The Commission's power to insert a provision into an award giving it the power to make take home pay orders is found in Regulation 3B.04 (**Attachment 1**) of the *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009*. This Regulation was made through the *Fair Work (Transitional Provisions and Consequential Amendments) Amendment Regulations 2010 (No. 1)* and amended through the *Fair Work (Transitional Provisions and Consequential Amendments) Amendment Regulations 2010 (No. 3)*.

23. It can be seen that this Regulation, in particular paragraph 13A(1), provides a discretionary power to the Commission to:

“...include terms that give FWA power to make an order (a **take-home pay order**) remedying a reduction in take-home pay suffered by an employee or outworker, or a class of employees or outworkers, as a result of the making of a modern award or the operation of any transitional arrangements in relation to the award (whether or not the reduction in take-home pay is a modernisation-related reduction in take-home pay).” (Regulation 3B.04 13A(1))

24. The Explanatory Statement for the *Fair Work (Transitional Provisions and Consequential Amendments) Amendment Regulations 2010 (No. 1)* (**Attachment B**) provides the following explanation about Regulation 3B.04:

“Regulation 3B.04 modifies Schedule 5 of the Act to ensure that modern awards can contain provisions which confer power on FWA to make take-home pay orders.

The AIRC, as part of the award modernisation process, included transitional provisions in modern awards allowing FWA to make take-home pay orders. The award take-home pay provisions allow FWA to make orders to remedy reductions in an employee's take-home pay caused by the making of the modern award or the operation of transitional arrangements in the award.

The Government is concerned to ensure that it is not open to argue that the take-home pay provisions in modern awards are invalid because, as a statutory body, FWA only has the powers conferred on it by statute (not by the terms of an award). The protection afforded by such provisions in modern awards assists in ensuring that the award modernisation process does not result in the take-home pay of employees being reduced. Consequently, the Government considers it desirable that there be no doubt about the validity of such provisions in modern awards. This regulation removes any such doubt.

New item 13A is intended to allow modern awards to include terms protecting the take-home pay of a broader class of employees than the take-home pay provisions in Part 3 of Schedule 5 to the Act. Modern awards include provisions allowing new employees (i.e. those employed after the commencement of the modern award) to obtain a take-home pay order with respect to reductions in take-home pay that occur as a result of the transitional arrangements in the award (a reference to the phasing in of differences between the pay rates in pre-modernised awards and modern awards). This is different to the take-home pay provisions in Part 3 of Schedule 5 which require the employee to be employed in the same position as the position he or she was employed in immediately before the modern award came into operation (see item 8(3)(b) of Schedule 5 to the Act). The validation of these provisions in modern awards furthers the commitment made by the Government that the award modernisation process not reduce the take-home pay of employees.”

25. It can be seen from the above that the then Minister made the Regulation for the purpose of validating a transitional provision that the AIRC had inserted into awards for a specific purpose and for a limited and defined period of time. The then Minister clearly did not make the Regulation to create sweeping new, ongoing rights for employees and unions under awards.
26. The Regulation was made under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, which highlights the intended transitional nature of the Commission’s powers and award provisions which result from the exercise of those powers.
27. In addition, the ACTU’s argument about the take home pay order clause having potential relevance to enterprise awards is clearly incorrect. The 4 Yearly Review of Awards is only dealing with the 122 industry and occupational awards. Such awards expressly exclude employers and employees covered by enterprise awards.
28. It is not appropriate, necessary or consistent with the modern awards objective to give take home pay orders an ongoing role in the award system. To do so would be inconsistent with Parliament’s intention. If Parliament had intended that take home pay orders have an ongoing role, take home pay order provisions would have been inserted in Part 2-3 of the FW Act.

29. Accordingly, the take home pay order clause should be deleted from modern awards with effect from 1 January 2015.

4. The inclusion of NES summaries

30. The Exposure Drafts contain a summary of NES entitlements relating to annual leave, personal/carer's leave, parental leave, community service leave, public holidays and redundancy.
31. The Commission has published a *Sample Award Incorporating Notes 2014*. The Sample Award makes the following amendments to the Exposure Drafts:
- A new clause 1.5 is inserted which clarifies the legal status of the Notes in the award by stating that they do not form part of the award and are not intended to give rise to an award obligation;
 - The proposed summaries of NES provisions are now marked as Notes; and
 - Pre-existing Notes have been reformatted and marked as Notes in the same form as the NES summaries.
32. Ai Group appreciates the Commission's willingness to endeavour to address the issues of concern which Ai Group has raised about the NES summaries in the Exposure Drafts.
33. However, Ai Group is not convinced that it is open to the Commission under the FW Act to insert Notes in an award which are not terms of the award. Ai Group is also not convinced that it is open to the Commission to vary the legal effect of Notes which it inserts into an award by deeming them not to be part of the award. Ai Group has not identified any sections of the FW Act which would support these propositions.

34. Also, there is another extremely important point which Ai Group is very concerned about. Some of the Notes in existing modern awards are vital and are intended to have legal effect. An example is the following Note in the coverage clause of the *Black Coal Mining Industry Award 2010* which is extremely important and is intended to have legal effect:

“NOTE: The coverage clause is intended to reflect the status quo which existed under key premodern awards in relation to the kinds of employers and employees to whom those awards applied and the extent to which the awards applied to such employers and employees.

An example of the types of issues and some of the case law to be considered when addressing coverage matters can be found in *Australian Collieries Staff Association and Queensland Coal Owners Association – No. 20 of 1980*, 22 February 1982 {Print CR2297} and in the Court decisions cited in this decision.”

35. The above Note has been important in determining the correct award for the purposes of the Better Off Overall Test for enterprise agreements. For example, see paragraph [31] of the decision of Deputy President Asbury in *Transfield Services (Australia) Pty Ltd* [2014] FWC 5368. In this decision, the Deputy President decided that the *Manufacturing and Associated Industries and Occupations Award 2010* was the correct award for the purposes of the BOOT for an enterprise agreement reached between Transfield Services and its employees, not the *Black Coal Mining Industry Award 2010*. On 24 October 2014, a Full Bench (Boulton J, Harrison SDP and McKenna C) dismissed a CFMEU appeal against the decision.
36. The above Note was varied by Justice Boulton to reflect a consent position reached between Ai Group, the Coal Mining Industry Employers’ Group, the CFMEU, the AMWU and CEPU during the Modern Awards Review 2012 in response to an application by Ai Group (*Modern Awards Review 2012, Black Coal Mining Industry Award 2010*, [2012] FWA 9606).

37. Similar issues arise with the Note referred to in paragraph 47 of this submission which appears in clause X.6.3 of the current NTW Schedule and clause A.6.3 of the NTW Schedule Exposure Draft. Just like the above Note in the *Black Coal Mining Industry Award 2010*, the Note in the NTW Schedule was carefully drafted and is intended to have legal effect.
38. Given the above, Ai Group strongly opposes clause 1.5 in the *Sample Award Incorporating Notes 2014* being applied to all existing Notes in modern awards. As is evident from the above, some are intended to have legal effect
39. Ai Group submits that nothing more than a link to NES provisions should be included in relevant clauses in awards, in line with the approach taken in existing modern awards, rather than the inclusion of summaries.
40. In Ai Group's view:
- Summaries are not necessary to achieve the modern awards objective and hence are not consistent with s.138 of the FW Act;
 - Summaries would entrench legislative provisions in modern awards, and would require variation each time relevant provisions of the FW Act are amended; and
 - Summaries could mislead employers and employees about their obligations and entitlements as they cannot accurately reflect the relevant legislative provisions, e.g. they cannot highlight all relevant exceptions and qualifications.

5. The NTW Schedule

41. Ai Group has reviewed the proposed NTW Schedule contained in the Exposure Drafts. The following issues have been identified.

Wage rates for full-time and part-time trainees

42. The proposed NTW Schedule combines wage rates for full-time and part-time trainees into one table at clauses X.5.1(a) – (e). In the current NTW Schedule, the wage rates for full-time trainees and part-time trainees appear in separate tables at different clauses.
43. The consolidated tables obscure the methodology behind calculating wages for full-time and part-time trainees. The tables may give rise to the misconception that the hourly rate for a full-time trainee is the rate prescribed for a part-time trainee alongside it.
44. The wage rates for full-time and part-time trainees should be contained in separate tables which clearly identify the application of those rates.

Clause X.5.2 – Calculating the actual minimum wage

45. Clause X.5.2(f)(i) of the current NTW Schedule sets out the methodology for calculating the hourly rate of pay for a part-time trainee where the full-time ordinary hours of work are not 38 or an average of 38 per week. The proposed NTW Schedule has varied this clause by inserting the words “*for a full-time traineeship*” at the start of clause X.5.2(a).
46. The current clause X.5.2(f)(i) is contained in that part of the NTW Schedule which specifically deals with part-time trainees only. To this extent, the proposed clause substantially varies the effect of the current NTW Schedule and should not be adopted.
47. The current clause X.5.2(f)(i) was the subject of a Full Bench decision in *Modern Awards Review 2012—Apprentices, Trainees and Juniors* [2013] FWCFB 9840. The Full Bench rectified an anomaly or uncertainty in the NTW Schedule created by the interaction of clause X.6.3 and X.5.2(f) by inserting the following note at the end of clause X.6.3:

“Note: The time to be included for the purpose of calculating the wages for part-time trainees whose approved training is fully off-the-job is determined by clause X.5.2(f)(ii) and not by this clause.”

48. In its decision, the Full Bench accepted the following interpretation of X.5.2(f)(i):

“[3] ... part-time trainees whose training is conducted entirely off-the-job receive the full rates set out for part-time trainees in clauses X.5.2(a)-(c), while all other part-time trainees’ wages are discounted by 20% (see clauses X.5.2(f)(ii)-(iii)). It was further said that the rates in the wage tables for part-time trainees are 25% higher than those for full-time trainees. Therefore part-time trainees whose training is conducted entirely off-the-job are already compensated for the hours they spend at training by an hourly rate 25% higher than that for a full-time trainee or other part-time trainees.”

49. For this reason it is important that the terms of the current clause X.5.2(f)(i) remains unchanged by removing the words “*for a full-time traineeship*” at the start of the replacement clause X.5.2(a).
50. Additionally, the references to X.5.1(a) – (e) in clauses X.5.2(b) and (c) of the proposed NTW Schedule may give rise to confusion.
51. The corresponding clauses to X.5.2(b) and (c) in the current NTW Schedule only relate to part-time trainees. The references contained in those clauses are to provisions that contain part-time trainee rates.
52. The clauses referred to in the proposed X.5.2(b) and (c) contain full-time and part-time wages. It is not clear on the terms of the proposed NTW Schedule that the reference is to the part-time rates only.
53. Ai Group submits that the proposed NTW Schedule should be restructured to reflect the format of the current NTW Schedule. No ambiguity or anomaly arising from the NTW Schedule has been identified by Ai Group. The variations proposed are not necessary to achieve the modern awards objective (s.138).

Regulation 3B.03

applied in relation to the outworker, a reduction in the outworker's take-home pay is taken to be attributable to the Part 10A award modernisation process.

3B.03 Modification of subitems 8(3) and (4) of Schedule 5 to the Act

For subitem 8(1) of Schedule 2 to the Act, Schedule 5 to the Act is modified by substituting the heading for Part 3 as follows:

**‘Part 3—Avoiding reductions in take-home pay
from Part 10A award modernisation
process’.**

**3B.04 Modern award or transitional arrangements resulting in
reduction in take-home pay**

- (1) For subitem 8(1) of Schedule 2 to the Act, item 2 of Schedule 2 to the Act is modified by:
 - (a) replacing ‘subitem 8(2)’ in the definition of *take-home pay* with ‘subitems 8(2) and 13A(2)’; and
 - (b) inserting in the definition of *take-home pay order*, after ‘subitems 9(1) and (2)’, the words ‘and 13B(1)’.
- (2) For subitem 8(1) of Schedule 2 to the Act, Schedule 5 to the Act is modified by inserting the following Part after Part 3.

**‘Part 3A—Avoiding reductions in take-home pay
from modern award or transitional
arrangements**

**13A Modern award terms giving FWA power to make take-home
pay orders**

- (1) A modern award may include terms that give FWA power to make an order (a *take-home pay order*) remedying a reduction in

Regulation 3B.04

take-home pay suffered by an employee or outworker, or a class of employees or outworkers, as a result of the making of a modern award or the operation of any transitional arrangements in relation to the award (whether or not the reduction in take-home pay is a modernisation-related reduction in take-home pay).

- (2) An employee's or outworker's **take-home pay** is the pay an employee or outworker actually receives:
- (a) including wages and incentive-based payments, and additional amounts such as allowances and overtime; but
 - (b) disregarding the effect of any deductions that are made as permitted by section 324 of the FW Act.

Note: Deductions permitted by section 324 of the FW Act may (for example) include deductions under salary sacrificing arrangements.

- (3) This Part applies to an employee or outworker, or a class of employees or outworkers, to whom a modern award applies if the employee, employees, outworker or outworkers are likely to suffer a reduction in take-home pay attributable to the making of a modern award or the operation of any transitional arrangements in relation to the award.

13B Orders remedying reductions in take-home pay

- (1) If FWA makes a take-home pay order under the terms of a modern award it must do so in accordance with this Part.
- (2) Without limiting the kind of take-home pay order that may be made under the terms of a modern award, one or more of the following orders may be made:
- (a) an order compensating a reduction in take-home pay that has already been suffered;
 - (b) an order requiring the payment of an amount of take-home pay;
 - (c) an order preventing a reduction in take-home pay from occurring.
- (3) FWA may make a take-home pay order only on application by:
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- (a) an employee or outworker who has suffered a reduction in take-home pay; or
 - (b) an organisation that is entitled to represent the industrial interests of such an employee or outworker; or
 - (c) a person acting on behalf of a class of such employees or outworkers.
- (4) If FWA is satisfied that an application for a take-home pay order has already been made in relation to an employee or outworker, or a class of employees or outworkers, FWA may dismiss any later application that is made in relation to the same employee, employees, outworker or outworkers.

13C Ensuring that take-home pay orders are confined to the circumstances for which they are needed

- (1) FWA must not make a take-home pay order in relation to an employee or outworker, or a class of employees or outworkers, if:
- (a) FWA considers that the reduction in take-home pay is minor or insignificant; or
 - (b) FWA is satisfied that the employee, employees, outworker or outworkers have been adequately compensated in other ways for the reduction.
- (2) FWA must ensure that a take-home pay order is expressed so that:
- (a) it does not apply to an employee or outworker unless the employee or outworker has actually suffered a reduction in take-home pay; and
 - (b) if the take-home pay payable to the employee or outworker under the modern award increases after the order is made, there is a corresponding reduction in any amount payable to the employee or outworker under the order.

Regulation 3B.04

13D Take-home pay order continues to have effect so long as modern award continues to cover employee, employees, outworker or outworkers

A take-home pay order made in relation to an employee or outworker, or a class of employees or outworkers, to whom a particular modern award applies continues to have effect in relation to the employee, employees, outworker or outworkers (subject to the terms of the order) for so long as the modern award continues to cover the employee, employees, outworker or outworkers, even if it stops applying to the employee, employees, outworker or outworkers because an enterprise agreement starts to apply.

13E Describing classes of employees or outworkers

- (1) Without limiting the way in which a class of employees or outworkers mentioned in items 13A to 13D may be described for the purposes of those items, the class may be described by reference to one or more of the following:
 - (a) a particular type of employment;
 - (b) a particular classification, job level or grade;
 - (c) a particular entitlement;
 - (d) a particular employer.
- (2) To avoid doubt, the description of a class is not required to include the names of the employees or outworkers, or the number of employees or outworkers, included in the class.

13F Inconsistency with modern awards and enterprise agreements

A term of a modern award or an enterprise agreement has no effect in relation to an employee or outworker to the extent that it is less beneficial to the employee or outworker than a term of a take-home pay order that applies to the employee or outworker.

13G Application of provisions of FW Act to take-home pay orders

The FW Act applies as if the following provisions of that Act included a reference to a take-home pay order:

- (a) subsection 675(2);
- (b) subsection 706(2).

Note: For compliance with take-home pay orders, see item 7 of Schedule 16.

3B.05 Modernisation-related reduction in take-home pay from variation of modern award

- (1) For subitem 8(1) of Schedule 2 to the Act, item 2 of Schedule 2 to the Act is modified by:
 - (a) inserting in the definition of *modernisation-related reduction in take-home pay*, after paragraph (a), the following paragraph:
 - ‘(aa) in relation to the process of varying modern awards—see subitems 8A(4) and (5) of Schedule 5; and’; and
 - (b) replacing ‘subitems 8(2) and 13A(2)’ in the definition of *take-home pay* with ‘subitems 8(2), 8A(3) and 13A(2)’.
- (2) For subitem 8(1) of Schedule 2 to the Act, Schedule 5 to the Act is modified by:
 - (a) omitting the words ‘if, and only’ in subitems 8(3) and (4); and
 - (b) inserting the following item after item 8:

‘8A Variation of modern award not intended to result in reduction in take-home pay

- (1) The process of varying a modern award was not intended to result in a reduction in the take-home pay of employees or outworkers.
- (2) In this item, *varying a modern award* means varying a modern award:
 - (a) under item 14; or

EXPLANATORY STATEMENT

Select Legislative Instrument 2010 No. 77

(Issued by the authority of the Minister for Employment and Workplace Relations)

Fair Work (Transitional Provisions and Consequential Amendments) Act 2009

Fair Work (Transitional Provisions and Consequential Amendments) Amendment Regulations 2010 (No. 1)

Subitem 7(1) of Schedule 2 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (the Act) allows regulations to be made of a transitional, application or saving nature in relation to the transition from the regime provided for by the former *Workplace Relations Act 1996* (WR Act) and the regime provided for by state industrial laws of Division 2B referring States to the regime provided for by the Act and the *Fair Work Act 2009* (FW Act).

Subitem 8(1) of Schedule 2 to the Act provides a regulation-making power to modify the transitional Schedules to the Act.

In 2008 and 2009 the Australian Industrial Relations Commission (AIRC) conducted the award modernisation process under Part 10A of the WR Act to develop modern awards for the workplace relations system established by the FW Act. This process considerably reduced the number of awards able to apply to employers, employees and their representatives, making it easier for those parties to understand their responsibilities and entitlements.

The award modernisation process conducted by the AIRC was not intended to result in a reduction in the take-home pay of employees or outworkers. However, as employees and outworkers move from being covered by thousands of state and federal awards and instruments to just 122 new modern awards, some terms and conditions will inevitably change. While many such changes will improve the terms and conditions of employees and outworkers, some may result in a reduction in wages, allowances and incentive based payments (i.e. the take-home pay of an employee or outworker).

Take-home pay orders provide a mechanism for obtaining remedial orders if there is such a reduction.

The Regulations amend the *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009* (Principal Regulations) to modify the provisions of the Act that allow for the making of take-home pay orders. The modifications expand the circumstances in which Fair Work Australia (FWA) may make orders to ensure that the award modernisation process does not result in the take-home pay of employees being reduced.

The Regulations allow take-home pay orders to be made where a reduction occurs because of certain variations to modern awards made by FWA. While take-home pay orders can be made with respect to reductions arising from the award modernisation process, FWA variations to modern awards to deal with residual issues are not recognised as part of that process, as defined by the legislation. Any reductions in take-home pay that result from this limited range of FWA variations to modern awards are not able to be remedied by take-home pay orders. The Regulations address this inconsistency.

In addition to the take-home pay order provisions in the Act, the AIRC (as part of the award modernisation process) included transitional provisions in modern awards (the modern award provisions) enabling FWA to make orders remedying reductions in take-home pay attributable to the award modernisation process or the transitional arrangements in modern awards. The Australian Government (the Government) is concerned to ensure that it is not open to argue that the modern award provisions are invalid because, as a statutory body, FWA only has the powers conferred on it by statute (not by the terms of an award). The Government considers that the protection provided by the modern award provisions is beneficial and furthers its intention that no employee be worse off as a result of the award modernisation process. The Regulations put beyond doubt any question about the ability of modern awards to contain provisions which confer a power on FWA to make take-home pay orders.

Finally, the Regulations make a number of minor and technical amendments to clarify the operation of the take-home pay order provisions of the Act and their interaction with certain provisions of the FW Act. The Regulations, for example, clarify the types of orders that FWA may make to remedy reductions in take-home pay and ensure FWA can include certain terms in modern awards when varying awards under item 14 of Schedule 5 to the Act.

Details of the Regulations are in the [Attachment](#).

The Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Referring State and Territory Governments, as well as a number of peak industry bodies, were consulted during the development of the Regulations.

The Regulations are made under subitems 7(1) and 8(1) of the Act and have variable commencement dates. Some provisions are taken to have commenced on 1 January 2010. This is necessary because such provisions validate certain orders made by FWA and clarify the scope and operation of the take-home pay provisions in relation to applications made since 1 January 2010. Other provisions commence on the day after the Regulations are registered on the Federal Register of Legislative Instruments.

Details of the *Fair Work (Transitional Provisions and Consequential Amendments) Amendment Regulations 2010 (No. 1)*

Regulation 1 – Name of Regulations

This regulation sets out the name of the Regulations. The Regulations are called the *Fair Work (Transitional Provisions and Consequential Amendments) Amendment Regulations 2010 (No. 1)*.

Regulation 2 – Commencement

This regulation provides that regulations 1 to 3 and Schedule 1 are taken to have commenced on 1 January 2010. Schedule 2 commences on the day after the Regulations are registered on the Federal Register of Legislative Instruments.

Regulation 3 – Amendment of *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009*

This regulation provides that Schedules 1 and 2 of these Regulations amend the *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009* (the Principal Regulations).

Schedule 1 – Amendments taken to have commenced on 1 January 2010

Item [1] – After Part 2, Division 3

This item inserts a new Division, including new regulations 2.07, 2.08 and 2.09, that clarifies certain matters with respect to take-home pay orders made under the Act.

The take-home pay provisions in the Act allow FWA to make orders to avoid reductions in the take-home pay of employees which are attributable to the:

- movement of employees onto modern awards following the termination of a Division 2B State award (Division 2 of Part 4 of Schedule 3A);
- commencement of modern awards (Part 3 of Schedule 5);
- enterprise instrument modernisation process (Division 3 of Part 2 of Schedule 6); and
- State reference public sector transitional award modernisation process (Division 3 of Part 2 of Schedule 6A).

New regulation 2.07 – Orders remedying reductions in take-home pay

New regulation 2.07 modifies each of the take-home pay order schemes in the Act (i.e. Division 2 of Part 4 of Schedule 3A; Part 3 of Schedule 5; Division 3 of Part 2 of Schedule 6; Division 3 of Part 2 of Schedule 6A) by inserting new subitems to clarify the types of take-home pay orders FWA may make to remedy a reduction in take-home pay.

The take-home pay provisions in the Act allow FWA to make any order requiring, or relating to, the payment of an amount to an employee or outworker (where applicable) that FWA considers appropriate to remedy the situation (e.g. subitems 9(1) and (2) of Schedule 5 to the Act). It is not intended that take-home pay orders be limited to requiring an employer to pay back-pay.

The new subitems provide examples of the types of take-home pay orders that may be made by FWA when remedying reductions in take-home pay. The examples include:

- an order compensating an employee for a reduction in take-home pay that has already been suffered;
- an order requiring the payment of an amount to an employee (this would include an order that an employee be paid a rate specified in a pre-modernised industrial instrument to which the employee was previously entitled);
- an order requiring an employer to refrain from reducing an amount payable to an employee (this would include an order for a specified period or an order without a time limit).

These examples are not intended to limit FWA's power to make orders under the existing provisions of the Act.

New regulation 2.08 – Avoiding likely reductions in take-home pay

This regulation modifies each of the take-home pay order schemes in the Act (i.e. Division 2 of Part 4 of Schedule 3A; Part 3 of Schedule 5; Division 3 of Part 2 of Schedule 6; Division 3 of Part 2 of Schedule 6A) by inserting new items to make clear that take-home pay orders can be sought and made by FWA before an employee has suffered a reduction in take-home pay.

The Act enables FWA to make a take-home pay order if an employee (or an outworker, where applicable) suffers a reduction as a result of moving from an old instrument (e.g. a notional agreement preserving State awards, a Division 2B State award or an enterprise award) to a modern award, a modern enterprise award or a State reference public sector modern award. A take-home pay order may require an employer to pay an amount to an employee that FWA considers appropriate to remedy the situation.

The new items inserted by subregulations 2.08(3), (4), (6) and (8) make clear that take-home pay orders can be sought from and made by FWA pre-emptively in circumstances where an employee or outworker (or a class of employees or outworkers) to whom a modern award, a modern enterprise award or a State reference public sector modern award applies is 'likely' to suffer a reduction in take-home pay. An employee or outworker would be likely to suffer a reduction in take-home pay where, for example, an employer indicates that it intends to reduce wages in line with the transitional arrangements in a modern award for the phasing-in of the modern award rate of pay.

It is not intended that FWA be able to make a pre-emptive take-home pay order in relation to a theoretical reduction if there is no real prospect of the employee's pay being reduced.

Reflecting the existing terms of the Act, the new items require a modern award, a modern enterprise award or a State reference public sector modern award to apply to employees or outworkers (where applicable) for a take-home pay order (including a pre-emptive order) to be made. However, in relation to employees currently employed on Division 2B State awards, enterprise instruments or State reference public sector transitional awards, reductions in the take-home pay of employees may be likely at the time those instruments terminate (this can occur at varying dates after 1 January 2010) and a modern award, a modern enterprise award or a State reference public sector modern award begins to apply. Subregulations 2.08(2), (5) and (7) modify the Act to enable pre-emptive orders to be sought in these circumstances. The items

provide that if a modern award, a modern enterprise award or a State reference public sector modern award does not currently apply to an employee or outworker (where applicable), but will apply once the Division 2B State award, enterprise instrument or State reference public sector transitional award terminates, the employee (or outworker) is taken to be a person to whom the relevant modernised instrument applies.

Illustrative example

A number of employees engaged as cooks and kitchen hands prior to 1 January 2010 were entitled to a casual loading of 25 per cent under a pre-modernised award. The employees continued working in the same positions after 1 January 2010, from which time a modern award began applying to their employment. The modern award provided a casual loading of 20 per cent, with the change from 25 per cent to 20 per cent to be phased in in instalments from 1 July 2010. Before 1 July 2010, the employees were informed by their employer that their casual loading would be reduced in line with the transitional arrangements in the modern award.

This regulation clarifies that employees are not required to suffer a loss in take-home pay before they can obtain a take-home pay order. An order would be available because it is likely that the employees will suffer a reduction in their take-home pay (because of a reduction in their casual loading). The employer's announcement to the employees that their casual loading will be reduced would be sufficient for FWA to find that it is likely that a reduction in take-home pay is to occur.

New regulation 2.09 – Describing classes of employees and outworkers

Regulation 2.09 modifies each of the take-home pay order schemes in the Act (i.e. Division 2 of Part 4 of Schedule 3A; Part 3 of Schedule 5; Division 3 of Part 2 of Schedule 6; Division 3 of Part 2 of Schedule 6A) by inserting new items to clarify how a 'class' of employees or outworkers (where applicable) may be described in applications for take-home pay orders and in the orders themselves.

The take-home pay order schemes in the Act allow applications for take-home pay orders to be made on behalf of a 'class' of employees or outworkers (where applicable). FWA may also make orders remedying reductions in take-home pay suffered by such a 'class'.

The new items inserted by regulation 2.09 provide that a 'class' of employees (or outworkers) in this context may be described by reference to one or more of the following:

- a particular type of employment;
- a particular classification, job level or grade;
- a particular entitlement (e.g. an entitlement to an allowance under a pre-modernised instrument);
- a particular employer.

The new items provide examples of how a class may be described and do not limit the ordinary meaning of the term 'class'. Although described in the singular, the descriptors include references to the plural by operation of paragraph 23(b) of the *Acts Interpretation Act 1901*. It is therefore possible for a take-home pay order to describe a 'class' by reference to, for example, employees performing carpentry work who are employed by company A, company B and company C.

The new items also clarify that in describing a ‘class’ of employees (or outworkers), whether in an application for a take-home pay order or in the order itself, it is not necessary to individually name or specify the number of members of the class. This protects the identity of employees who can be adequately described because of their membership of a broader group of employees.

Illustrative example

A number of employees engaged as cooks and kitchen hands prior to 1 January 2010 were entitled to a casual loading of 25 per cent under a pre-modernised award. The employees continued working in the same positions after 1 January 2010, from which time a modern award commenced to apply to their employment. The modern award provided for a casual loading of 20 per cent, with the change from 25 per cent to 20 per cent to be phased in in instalments from 1 July 2010. Before 1 July 2010 the employees were informed by their employer that their casual loading would be reduced in line with the transitional arrangements in the modern award.

One of the cooks spoke to an official at her union about her employer’s plan to reduce her casual loading. She said she was unwilling to have any legal proceedings seeking a take-home pay order brought on her behalf because she was concerned about the possibility of being singled out by her employer as a trouble-maker. In this situation, an application could be brought on behalf of a class that included the concerned cook. The class could be described as all cooks employed by a particular employer on a casual basis. In making the application it would not be necessary to name, or specify the number of, members of the class. FWA could also make a take-home pay order with respect to the class without needing to identify each individual by name. This would protect the identity of employees who raise concern about their pay.

The general protection provisions in the FW Act also prohibit an employer taking adverse action against an employee because they have a workplace right or propose to exercise a workplace right (this includes an ability to initiate or participate in an application for a take-home pay order).

It is not intended that an employee, who is included as part of a ‘class’ in a take-home pay order, be prevented by subitems 32(4) of Schedule 3A, 9(4) of Schedule 5, 12(3) of Schedule 6 or 14(3) of Schedule 6A from seeking a further individual take-home pay order if the employee’s individual circumstances are different to those of the class.

Item [2] – After regulation 3B.01

This item inserts new regulation 3B.01A into Part 3B of the Principal Regulations.

New regulation 3B.01A – Modification of FW Act – inclusion of variation of modern award in the award modernisation process

This regulation modifies the definition of ‘award modernisation process’ in section 12 of the FW Act to include variations to modern awards made by FWA under item 14 of Schedule 5 to the Act. That item provides a three month period (commencing on 1 January 2010) in which FWA could finalise unresolved applications to vary modern awards made to the AIRC before 1 January 2010. Item 14 was inserted into the Act by regulation 3B.01 of the Principal Regulations.

The FW Act provides that state-based difference terms and terms that establish industry-specific redundancy schemes, can be included in modern awards as part of the award modernisation process (see paragraphs 141(1)(a) and 154(2)(a) of the FW Act). Because ‘award modernisation process’ is defined in section 12 of the FW Act to include ‘the process of making awards under Part 10A of the WR Act’, such terms could not have been validly inserted in modern awards by FWA when exercising its power under item 14 of Schedule 5 to the Act.

This regulation modifies the definition of ‘award modernisation process’ in section 12 of the FW Act to ensure that when making variations to modern awards under item 14 of Schedule 5 to the Act, FWA was permitted to include state-based difference terms and industry-specific redundancy schemes in the circumstances set out in paragraphs 154(2)(a) and 141(1)(a) of the FW Act.

This regulation is taken to have commenced on 1 January 2010, the date on which FWA’s power to make orders varying modern awards under item 14 of Schedule 5 commenced.

Item [3] – After regulation 3B.02

This item inserts new regulations 3B.03 and 3B.04 into the Principal Regulations.

New regulation 3B.03 – Modification of subitems 8 (3) and (4) of Schedule 5

This regulation is consequential to the making of regulation 3B.04.

Regulation 3B.03 replaces the heading for Part 3 of Schedule 5 to the Act to distinguish Part 3 from Part 3A (as inserted by regulation 3B.04) which refers to the take-home pay provisions in modern awards.

New regulation 3B.04 – Modern award or transitional arrangements resulting in reduction in take-home pay

Regulation 3B.04 modifies Schedule 5 of the Act to ensure that modern awards can contain provisions which confer power on FWA to make take-home pay orders.

The AIRC, as part of the award modernisation process, included transitional provisions in modern awards allowing FWA to make take-home pay orders. The award take-home pay provisions allow FWA to make orders to remedy reductions in an employee’s take-home pay caused by the making of the modern award or the operation of transitional arrangements in the award.

The Government is concerned to ensure that it is not open to argue that the take-home pay provisions in modern awards are invalid because, as a statutory body, FWA only has the powers conferred on it by statute (not by the terms of an award). The protection afforded by such provisions in modern awards assists in ensuring that the award modernisation process does not result in the take-home pay of employees being reduced. Consequently, the Government considers it desirable that there be no doubt about the validity of such provisions in modern awards. This regulation removes any such doubt.

Regulation 3B.04 modifies Schedule 5 to the Act by inserting new Part 3A which validates provisions in modern awards that confer power on FWA to make take-home pay orders (this is achieved by new item 13A). New item 13A ensures that modern awards have always been able to confer power on FWA to make take-home pay orders remedying reductions in take-home pay suffered by an employee or class of employees because of the making of a modern award or the operation of transitional arrangements in the award. The new item allows award terms to confer power on FWA to remedy reductions in take-home pay even if those reductions are not a 'modernisation-related reduction in take-home pay' within the meaning of the Act.

New item 13A is intended to allow modern awards to include terms protecting the take-home pay of a broader class of employees than the take-home pay provisions in Part 3 of Schedule 5 to the Act. Modern awards include provisions allowing new employees (i.e. those employed after the commencement of the modern award) to obtain a take-home pay order with respect to reductions in take-home pay that occur as a result of the transitional arrangements in the award (a reference to the phasing in of differences between the pay rates in pre-modernised awards and modern awards). This is different to the take-home pay provisions in Part 3 of Schedule 5 which require the employee to be employed in the same position as the position he or she was employed in immediately before the modern award came into operation (see item 8(3)(b) of Schedule 5 to the Act). The validation of these provisions in modern awards furthers the commitment made by the Government that the award modernisation process not reduce the take-home pay of employees.

In exercising its power to make a take-home pay order under a term of a modern award, FWA is required to do so in accordance with the remaining provisions of the proposed Part (see new subitem 13B(1)). This promotes consistency between the circumstances in which take-home pay orders can be made under the Act and under the terms of a modern award.

New subitem 13A(2) defines an employee's take-home pay for the purpose of Part 3A. The definition is the same as that used in the other take-home pay provisions in the Act (see Division 2 of Part 4 of Schedule 3A; Part 3 of Schedule 5; Division 3 of Part 2 of Schedule 6; Division 3 of Part 2 of Schedule 6A).

Consistent with the other take-home pay provisions in the Act, new subitem 13A(3) ensures that take-home pay orders under Part 3A are capable of being sought and made by FWA pre-emptively in circumstances where it is likely that an employee or employees will suffer a reduction in take-home pay. It is not intended that take-home pay orders be available in relation to a theoretical reduction if there is no real prospect of the employee's pay being reduced.

New subitem 13B(2) provides examples of the types of take-home pay orders that FWA may make under the terms of a modern award. These may include one or more of the following, but are not limited to:

- an order compensating a reduction in take-home pay that has already been suffered;
- an order requiring the payment of an amount of take-home pay; or
- an order preventing a reduction in take-home pay from occurring.

New subitem 13B(3) sets out who may make an application for a take-home pay order under a term of a modern award. This reflects the arrangements for take-home pay orders under the other provisions in the Act.

Repeat applications for take-home pay orders should be avoided. New subitem 13B(4) provides that FWA may dismiss an application in whole or in part if it considers that the individual circumstances of an employee have already been considered as part of an earlier application. However, it is not intended that FWA would dismiss an application for a take-home pay order made by an employee who had previously been included in a 'class' order, but whose individual circumstances are different to that of the class.

Item 13C sets out circumstances in which FWA must not make a take-home pay order. It also requires FWA to ensure that orders are expressed in certain ways. This item imposes the same requirements on FWA as the other take-home pay provisions in the Act (see items 33 of Schedule 3A, 10 of Schedule 5, 13 of Schedule 6 and 15 of Schedule 6A to the Act).

Item 13D provides that a take-home pay order made under a modern award continues to have effect in relation to an employee or class of employees (subject to the terms of the order) while the modern award covers the employee or employees, even if it stops applying because an enterprise agreement starts to apply. This ensures that an employee does not lose the benefit of a take-home pay order when an enterprise agreement starts to apply.

Applications for take-home pay orders and orders made under a modern award may be made in respect of a 'class' of employees. New item 13E clarifies the meaning of 'class' in items 13A to 13D. Subitem 13E(1) provides that, without limiting the ordinary meaning of 'class', a 'class' of employees may be described by reference to one or more of the following:

- a particular type of employment;
- a particular classification, job level or grade;
- a particular entitlement (e.g. an entitlement to an allowance under a pre-modernised instrument);
- a particular employer.

This subitem provides examples of how a class may be described and is not intended to limit the ordinary meaning of 'class'. Although described in the singular, the descriptors include references to the plural by operation of paragraph 23(b) of the *Acts Interpretation Act 1901*. It would therefore be possible for a take-home pay order to describe a 'class' by reference to, for example, employees performing carpentry work who are employed by company A, company B and company C.

New subitem 13E(2) provides that in describing a class of employees, whether in an application or a take-home pay order made under a modern award, it is not necessary to individually name or specify the number of members of the class.

New item 13F provides that a term of a modern award or enterprise agreement has no effect to the extent that it is less beneficial than a term in a take-home pay order made under a modern award.

New item 13G ensures that take-home pay orders made under a modern award are treated in the same way as similar types of orders (such as equal remuneration orders or take-home pay orders made under Part 3 of Schedule 5 to the Act) for the purposes of subsections 675(2) and 706(2) of the FW Act.

Schedule 2 – Amendment commencing on the day after registration

Item [1] – After regulation 3B.04

This item inserts new regulation 3B.05 into the Principal Regulations.

New regulation 3B.05 – Modernisation-related reduction in take-home pay from variation of modern award

New regulation 3B.05 modifies the Act to ensure that take-home pay orders may be made by FWA with respect to reductions in the take-home pay of employees or outworkers that result from certain variations to modern awards. The regulation provides that some variations to modern awards that result in reductions to the take-home pay of employees are a ‘modernisation-related reduction in take-home pay’. Where a ‘modernisation-related reduction in take-home pay’ occurs, FWA may make a take-home pay order to remedy the situation under item 9 of Schedule 5 to the Act. The regulation also makes consequential amendments to Schedule 2 of the Act.

Paragraph 3B.05(2)(b) modifies Schedule 5 to the Act by inserting new item 8A. The new item describes new circumstances in which a ‘modernisation-related reduction in take-home pay’ is taken to have occurred. The item applies to variations of modern awards made by FWA under:

- item 14 of Schedule 5 to the Act; or
- section 157 of the FW Act, provided the variation was made before 1 July 2010.

Item 14 of Schedule 5 to the Act provides for a three month period (commencing on 1 January 2010) in which FWA could finalise unresolved applications to vary modern awards made to the AIRC before 1 January 2010. Item 14 was inserted into the Act by regulation 3B.01 of the Principal Regulations. It is unclear whether take-home pay orders are available to remedy reductions caused by variations to modern awards made by FWA, rather than the AIRC, when finalising the award modernisation process under item 14 of Schedule 5. This is because variations made by FWA under item 14 are not technically part of the award modernisation process provided for by Part 10A of the WR Act (as is required by the existing take-home pay provisions – see paragraph 8(3)(d) of Schedule 5 to the Act). The regulation ensures that take-home pay orders are available to remedy such reductions.

Section 157 of the FW Act allows FWA to vary modern awards if satisfied that the variation is necessary to achieve the modern awards objective in section 134 of that Act. In the period immediately following the commencement of modern awards (on 1 January 2010) some applications under section 157 have sought the inclusion of old state and federal award terms that applied to employees now employed under a modern award. Given this use of section 157 to address outstanding award modernisation matters, the Government considers it appropriate to extend take-home pay protections to employees who suffer reductions in pay as a result of this variation process.

Take-home pay orders can only be made (under item 9 of Schedule 5) in respect of a ‘modernisation-related reduction in take-home pay’. New item 8A provides that, in addition to the existing meanings of ‘modernisation-related reduction in take-home pay’, an employee also suffers such a reduction if:

- FWA makes an order varying a modern award;
- the modern award:

- starts to apply to the employee when the award comes into operation; or
- starts to apply to the employee when the order varying the award comes into operation; and
- the employee is employed in the same position (or a position that is comparable to) the position they were employed in immediately before the modern award came into operation. This makes clear that the provision is designed purely to ensure a fair transition from the old award to the new (it is not intended that this provision apply where employees change jobs, or where working arrangements change);
- the employee's take-home pay for working particular hours or for a particular quantity of work, after the order varying the modern award comes into operation, is less than it would have been immediately before the modern award came into operation; and
- the reduction is attributable to the variation of the modern award under item 14 of Schedule 5 to the Act or section 157 of the FW Act made before 1 July 2010.

Equivalent provision is made by new item 8A for non-employee outworkers.

It is not intended that an employee be entitled to a take-home pay order if the employee suffers a reduction between the amount the employee would have received under a modern award in its form on 1 January 2010 and what the employee receives after that modern award is varied by FWA. The relevant comparison is between the amount of take-home pay an employee received for performing particular work before the modern award came into operation on 1 January 2010 (i.e. the take-home pay an employee received under a former WR Act instrument, such as an Australian Pay and Classification Scale) and what the employee receives (or is likely to receive) for the same work under the modern award, taking into account any variations to the modern award made by FWA.

New regulation 3B.05 modifies the definition of 'modernisation-related reduction in take-home pay' in item 2 of Schedule 2 to the Act to include a reference to reductions attributable to modern award variations made by FWA under item 14 of Schedule 5 to the Act or under section 157 of the FW Act. These modifications are consequential to the insertion of new item 8A.

The regulation also modifies subitems 8(3) and (4) of Schedule 5 to the Act by omitting the words 'if, and only'. Those subitems provide that an employee or outworker suffers a modernisation-related reduction in take-home pay 'if, and only if' certain circumstances have arisen. This modification allows additional circumstances to be included so that modernisation-related reductions in take-home pay are taken to include reductions attributable to modern award variations made by FWA under item 14 of Schedule 5 to the Act and section 157 of the FW Act. These modifications are consequential to the insertion of new item 8A.

New regulation 3B.05 also modifies item 9A of Schedule 5 to the Act (item 9A was inserted by new subregulation 2.08(4) in item [1] of Schedule 1 to these Regulations) to make clear that take-home pay orders can be sought and made pre-emptively. This ability exists where an employee or outworker (or a class of employees or outworkers) to whom a modern award applies is 'likely' to suffer a reduction in take-home pay attributable to an order varying a modern award under item 14 of Schedule 5 to the Act or section 157 of the FW Act (if the variation was made before 1 July 2010).

It is not intended that FWA would be able to make a pre-emptive take-home pay order in relation to a theoretical reduction if there is no real prospect of the employee's pay being reduced.