



Workplace Relations Amendment (Work Choices) Act 2005

Act No. 153 of 2005 as amended

This compilation was prepared on 29 March 2007

[This Act was amended by Act No. 163 of 2006; No. 8 of 2007]

Amendments from Act No. 163 of 2006

[Schedule 6 (items 49 and 50) amended Schedule 4 (item 5A)
Schedule 6 (items 49 and 50) commenced on 12 December 2006]

For application provision *see* Act No. 163, 2006, Schedule 6 (item 62)

Amendments from Act No. 8 of 2007

[Schedule 2 (item 17) amended item 187 of Schedule 1
Schedule 2 (item 18) amended item 24 of Schedule 4
Schedule 2 (item 17) commenced immediately before 27 March 2006
Schedule 2 (item 18) commenced immediately after 27 March 2006]

Prepared by the Office of Legislative Drafting and Publishing,
Attorney-General's Department, Canberra

Contents

1	Short title	1
2	Commencement	1
3	Schedule(s)	2
Schedule 1—Main amendments		3
	<i>Workplace Relations Act 1996</i>	3
Schedule 1A—Establishment of Australian Fair Pay Commission		705
	<i>Workplace Relations Act 1996</i>	705
	<i>Financial Management and Accountability Regulations 1997</i>	720
Schedule 2—Transitional arrangements for State organisations		722
	<i>Workplace Relations Act 1996</i>	722
Schedule 3—School-based apprentices and trainees		729
	<i>Workplace Relations Act 1996</i>	729
Schedule 3A—Redundancy pay by small business employers		737
	<i>Workplace Relations Act 1996</i>	737
Schedule 4—Transitional and other provisions		744
	Part 1—Regulations for transitional etc. provisions and consequential amendments	744
	Part 2—Transitional, application and saving provisions	745
	Division 1—Definitions used in this Part	745
	Division 2—Awards	745
	Division 3—Termination of employment	747
	Division 4—Miscellaneous	750
Schedule 5—Renumbering the Workplace Relations Act 1996		756
	<i>Workplace Relations Act 1996</i>	756

An Act to amend the law relating to workplace relations, and for related purposes

[Assented to 14 December 2005]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Workplace Relations Amendment (Work Choices) Act 2005*.

2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day on which this Act receives the Royal Assent.	14 December 2005
2. Schedule 1	A single day to be fixed by Proclamation. However, if any of the provision(s) do not commence within the period of 6 months beginning on the day on which this Act receives the Royal Assent, they commence on the first day after the end of that period.	27 March 2006 (see F2006L00836)
2A. Schedule 1A	The day on which this Act receives the Royal Assent.	14 December 2005

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
3. Schedule 2	A single day to be fixed by Proclamation. However, if any of the provision(s) do not commence within the period of 6 months beginning on the day on which this Act receives the Royal Assent, they commence on the first day after the end of that period.	27 March 2006 (<i>see</i> F2006L00836)
4. Schedule 3	The day on which this Act receives the Royal Assent.	14 December 2005
4A. Schedule 3A	The day on which this Act receives the Royal Assent.	14 December 2005
5. Schedule 4, Part 1	The day on which this Act receives the Royal Assent.	14 December 2005
6. Schedule 4, Part 2	At the same time as the provision(s) covered by table item 2.	27 March 2006
7. Schedule 5	A single day to be fixed by Proclamation. However, if any of the provision(s) do not commence within the period of 6 months beginning on the day on which this Act receives the Royal Assent, they commence on the first day after the end of that period.	27 March 2006 (<i>see</i> F2006L00836)

Note: This table relates only to the provisions of this Act as originally passed by the Parliament and assented to. It will not be expanded to deal with provisions inserted in this Act after assent.

- (2) Column 3 of the table contains additional information that is not part of this Act. Information in this column may be added to or edited in any published version of this Act.

3 Schedule(s)

- (1) Each Act, and each set of regulations, that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.
- (2) The amendment of any regulation under subsection (1) does not prevent the regulation, as so amended, from being amended or repealed by the Governor-General.

Schedule 1—Main amendments

Workplace Relations Act 1996

1 Section 3

Repeal the section, substitute:

3 Principal object

The principal object of this Act is to provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia by:

- (a) encouraging the pursuit of high employment, improved living standards, low inflation and international competitiveness through higher productivity and a flexible and fair labour market; and
- (b) establishing and maintaining a simplified national system of workplace relations; and
- (c) providing an economically sustainable safety net of minimum wages and conditions for those whose employment is regulated by this Act; and
- (d) ensuring that, as far as possible, the primary responsibility for determining matters affecting the employment relationship rests with the employer and employees at the workplace or enterprise level; and
- (e) enabling employers and employees to choose the most appropriate form of agreement for their particular circumstances; and
- (f) ensuring compliance with minimum standards, industrial instruments and bargaining processes by providing effective means for the investigation and enforcement of:
 - (i) employee entitlements; and
 - (ii) the rights and obligations of employers and employees, and their organisations; and
- (g) ensuring that awards provide minimum safety net entitlements for award-reliant employees which are consistent with Australian Fair Pay Commission decisions

and which avoid creating disincentives to bargain at the workplace level; and

- (h) supporting harmonious and productive workplace relations by providing flexible mechanisms for the voluntary settlement of disputes; and
- (i) balancing the right to take industrial action for the purposes of collective bargaining at the workplace level with the need to protect the public interest and appropriately deal with illegitimate and unprotected industrial action; and
- (j) ensuring freedom of association, including the rights of employees and employers to join an organisation or association of their choice, or not to join an organisation or association; and
- (k) protecting the competitive position of young people in the labour market, promoting youth employment, youth skills and community standards and assisting in reducing youth unemployment; and
- (l) assisting employees to balance their work and family responsibilities effectively through the development of mutually beneficial work practices with employers; and
- (m) respecting and valuing the diversity of the work force by helping to prevent and eliminate discrimination on the basis 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
- (n) assisting in giving effect to Australia's international obligations in relation to labour standards.

2 Section 4

Repeal the section, substitute:

4 Definitions

- (1) In this Act, unless the contrary intention appears:

A.C.T. Consequential Provisions Act means the *A.C.T. Self-Government (Consequential Provisions) Act 1988*.

AFPC has the meaning given by section 7F.

allowable award matters means the matters referred to in subsection 116(1).

Note: The matters referred to in subsection 116(1) have a meaning that is affected by section 116B.

alternative dispute resolution process has the meaning given by section 176A.

Anti-Discrimination Conventions means:

- (a) the Equal Remuneration Convention; and
- (b) the Convention on the Elimination of all Forms of Discrimination against Women, a copy of the English text of which is set out in the Schedule to the *Sex Discrimination Act 1984*; and
- (c) the Convention concerning Discrimination in respect of Employment and Occupation, a copy of the English text of which is set out in Schedule 1 to the *Human Rights and Equal Opportunity Commission Act 1986*; and
- (d) Articles 3 and 7 of the International Covenant on Economic, Social and Cultural Rights.

APCS has the meaning given by section 90B.

applies to employment generally: a law of a State or Territory ***applies to employment generally*** if it applies (subject to constitutional limitations) to:

- (a) all employers and employees in the State or Territory; or
- (b) all employers and employees in the State or Territory except those identified (by reference to a class or otherwise) by a law of the State or Territory.

For this purpose, it does not matter whether or not the law also applies to other persons, or whether or not an exercise of a power under the law affects all the persons to whom the law applies.

arbitration powers means the powers of the Commission in relation to arbitration.

Australian-based employee means:

- (a) an employee whose primary place of work is in Australia, in Australia's exclusive economic zone or in, on, or over Australia's continental shelf; or

- (b) an employee who is employed by the Commonwealth or a Commonwealth authority, except an employee engaged outside Australia and the external Territories to perform duties outside Australia and the external Territories; or
- (c) an employee who is prescribed by the regulations for the purposes of this definition.

Note: Subsection 4AA(1) defines *employee*.

Australian Capital Territory Government Service means the service established by the *Public Sector Management Act 1994* of the Australian Capital Territory.

Australian employer means:

- (a) an employer that is a trading corporation formed within the limits of the Commonwealth (within the meaning of paragraph 51(xx) of the Constitution); or
- (b) an employer that is a financial corporation formed within the limits of the Commonwealth (within the meaning of paragraph 51(xx) of the Constitution); or
- (c) an employer that is the Commonwealth; or
- (d) an employer that is a Commonwealth authority; or
- (e) an employer that is a body corporate incorporated in a Territory; or
- (f) an employer that carries on in Australia, in Australia's exclusive economic zone or in, on, or over Australia's continental shelf an activity (whether of a commercial, governmental or other nature) whose central management and control is in Australia; or
- (g) an employer that is prescribed by the regulations for the purposes of this definition.

Note: Subsection 4AB(1) defines *employer*.

Australian Fair Pay and Conditions Standard has the meaning given by subsection 89(3).

Australian workplace agreement or ***AWA*** has the meaning given by section 96.

Australia's continental shelf means the continental shelf (as defined in the *Seas and Submerged Lands Act 1973*) of Australia.

Australia's exclusive economic zone means the exclusive economic zone (as defined in the *Seas and Submerged Lands Act 1973*) of Australia.

AWA: see *Australian workplace agreement*.

award means:

- (a) an award made by the Commission under section 118E; or
- (b) a pre-reform award.

award rationalisation process means a process of award rationalisation conducted as a result of an award rationalisation request.

award rationalisation request has the meaning given by section 118.

award-related order means an order varying, revoking or suspending an award.

award simplification process means a process of reviewing and simplifying awards under section 118M.

bargaining agent means:

- (a) in relation to an AWA—a person who has been duly appointed as a bargaining agent in relation to the AWA in accordance with section 97A; or
- (b) in relation to an employee collective agreement—a person who has been requested to be a bargaining agent in relation to the agreement in accordance with section 97B.

BCII Act means the *Building and Construction Industry Improvement Act 2005*.

breach includes non-observance.

Chief Justice means the Chief Justice of the Court.

civil remedy provision has the meaning given by section 188.

collective agreement means:

- (a) an employee collective agreement; or
- (b) a union collective agreement; or
- (c) an employer greenfields agreement; or

- (d) a union greenfields agreement; or
- (e) a multiple-business agreement.

Commission means the Australian Industrial Relations Commission.

Commissioner means a Commissioner of the Commission.

committee of management, in relation to an organisation, association or branch of an organisation or association, means the group or body of persons (however described) that manages the affairs of the organisation, association or branch.

Commonwealth authority means:

- (a) a body corporate established for a public purpose by or under a law of the Commonwealth; or
- (b) a body corporate:
 - (i) incorporated under a law of the Commonwealth or a State or Territory; and
 - (ii) in which the Commonwealth has a controlling interest.

conciliation powers means the powers of the Commission in relation to conciliation.

constitutional corporation means a corporation to which paragraph 51(xx) of the Constitution applies.

constitutional trade or commerce means trade or commerce:

- (a) between Australia and a place outside Australia; or
- (b) among the States; or
- (c) between a State and a Territory; or
- (d) between 2 Territories; or
- (e) within a Territory.

contingency fee agreement means an agreement between a legal practitioner and a person under which:

- (a) the legal practitioner agrees to provide legal services; and
- (b) the payment of all, or a substantial proportion, of the legal practitioner's costs is contingent on the outcome of the matter in which the practitioner provides the legal services for the person.

Court means the Federal Court of Australia.

Note: For the purposes of various provisions of this Act, *Court* means the Federal Court of Australia or the Federal Magistrates Court. This is indicated by definitions that apply for the purposes of those provisions.

demarcation dispute includes:

- (a) a dispute arising between 2 or more organisations, or within an organisation, as to the rights, status or functions of members of the organisations or organisation in relation to the employment of those members; or
- (b) a dispute arising between employers and employees, or between members of different organisations, as to the demarcation of functions of employees or classes of employees; or
- (c) a dispute about the representation under this Act, or the Registration and Accountability of Organisations Schedule, of the industrial interests of employees by an organisation of employees.

Deputy President means a Deputy President of the Commission.

employee has a meaning affected by section 4AA.

employee collective agreement has the meaning given by section 96A.

employer has a meaning affected by section 4AB.

employer greenfields agreement has the meaning given by section 96D.

employing authority, in relation to a class of employees, means the person or body, or each of the persons or bodies, prescribed as the employing authority in relation to the class of employees.

employment has a meaning affected by section 4AC.

Employment Advocate means the Employment Advocate referred to in Part IVA.

Equal Remuneration Convention means the Equal Remuneration Convention, 1951.

Family Responsibilities Convention means the Workers with Family Responsibilities Convention, 1981, a copy of the English text of which is set out in Schedule 12.

flight crew officer has the meaning given by clause 1 of Schedule 1.

Full Bench means a Full Bench of the Commission.

Full Court means a Full Court of the Court.

greenfields agreement means a union greenfields agreement or an employer greenfields agreement.

industrial action has the meaning given by section 106A.

Industrial Registrar means the Industrial Registrar appointed under section 67.

Industrial Registry means the Australian Industrial Registry.

industry includes:

- (a) any business, trade, manufacture, undertaking or calling of employers; and
- (b) any calling, service, employment, handicraft, industrial occupation or vocation of employees; and
- (c) a branch of an industry and a group of industries.

inspector means a workplace inspector.

Judge means:

- (a) in the case of a reference to the Court or a Judge—a Judge (including the Chief Justice) sitting in Chambers; or
- (b) otherwise—a Judge of the Court (including the Chief Justice).

judgment means a judgment, decree or order, whether final or interlocutory, or a sentence.

legal practitioner means a legal practitioner (however described) of the High Court or of a Supreme Court of a State or Territory.

magistrate's court means:

- (a) a court constituted by a police, stipendiary or special magistrate; or
- (b) a court constituted by an industrial magistrate who is also a police, stipendiary or special magistrate.

maritime employee has the meaning given by clause 1 of Schedule 1.

model dispute resolution process means the process set out in Division 2 of Part VIIA.

multiple-business agreement has the meaning given by section 96E.

new APCS has the meaning given by subsection 90ZJ(1).

nominal expiry date of a workplace agreement has the meaning given by section 101.

Northern Territory authority means:

- (a) a body corporate established for a public purpose by or under a law of the Northern Territory; or
- (b) a body corporate:
 - (i) incorporated under a law of the Northern Territory; and
 - (ii) in which the Northern Territory has a controlling interest;

other than a prescribed body.

notional agreement preserving State awards has the meaning given by clause 1 of Schedule 15.

occupier, in relation to premises, includes a person in charge of the premises.

office, in relation to an organisation or a branch of an organisation, has the same meaning as in the Registration and Accountability of Organisations Schedule.

officer, in relation to an organisation or a branch of an organisation, means a person who holds an office in the organisation or branch.

organisation means an organisation registered under the Registration and Accountability of Organisations Schedule.

Note: An organisation that was registered under the *Workplace Relations Act 1996* immediately before the commencement of item 1 of Schedule 2 to the *Workplace Relations Legislation Amendment (Registration and Accountability of Organisations) (Consequential Provisions) Act 2002* (the **Consequential Provisions Act**) is taken to

have been registered under the Registration and Accountability of Organisations Schedule (see item 15 of Schedule 1 to the Consequential Provisions Act).

panel means a panel to which an industry has been assigned under section 37.

peak council means a national or State council or federation that is effectively representative of a significant number of organisations representing employers or employees in a range of industries.

penalty unit has the meaning given by section 4AA of the *Crimes Act 1914*.

person includes an organisation.

pilot has the meaning given by clause 1 of Schedule 1.

premises includes any land, building, structure, mine, mine working, ship, aircraft, vessel, vehicle or place.

pre-reform AWA has the meaning given by clause 1 of Schedule 14.

pre-reform award means an instrument that has effect after the reform commencement under item 4 of Schedule 4 to the *Workplace Relations Amendment (Work Choices) Act 2005*.

prescribed includes prescribed by Rules of the Commission made under section 48.

preserved APCS has the meaning given by subsection 90ZD(1).

preserved award entitlement, in relation to an employee, has the meaning given by section 117B.

preserved award term has the meaning given by section 117.

preserved State agreement has the meaning given by clause 1 of Schedule 15.

President means the President of the Commission.

Presidential Member means the President, a Vice President, a Senior Deputy President or a Deputy President.

previous Act means the *Conciliation and Arbitration Act 1904*, and includes any other Act so far as the other Act affects the operation of that Act.

proceeding includes a proceeding relating to the following:

- (a) an award rationalisation process;
- (b) an award simplification process.

protected action has the meaning given by section 108.

protected action ballot means a ballot under Division 4 of Part VC.

public sector employment means employment of, or service by, a person in any capacity (whether permanently or temporarily and whether full-time or part-time):

- (a) under the *Public Service Act 1999* or the *Parliamentary Service Act 1999*; or
- (b) by or in the service of a Commonwealth authority; or
- (c) under a law of the Australian Capital Territory relating to employment by that Territory, including a law relating to the Australian Capital Territory Government Service; or
- (d) by or in the service of:
 - (i) an enactment authority as defined by section 3 of the *A.C.T. Consequential Provisions Act*; or
 - (ii) a body corporate incorporated under a law of the Australian Capital Territory and in which the Australian Capital Territory has a controlling interest;
other than a prescribed authority or body; or
- (e) under a law of the Northern Territory relating to the Public Service of the Northern Territory; or
- (f) by or in the service of a Northern Territory authority; or
- (g) by or in the service of a prescribed person or under a prescribed law;

but, other than in section 44N, does not include:

- (h) employment of, or service by, a person included in a prescribed class of persons; or
- (i) employment or service under a prescribed law.

reform commencement means the commencement of Schedule 1 to the *Workplace Relations Amendment (Work Choices) Act 2005*.

Registrar means the Industrial Registrar or a Deputy Industrial Registrar.

Registration and Accountability of Organisations Schedule means Schedule 1B.

registry means the Principal Registry or another registry established under section 64.

regular part-time employee means an employee who:

- (a) works less than full-time ordinary hours; and
- (b) has reasonably predictable hours of work; and
- (c) receives, on a pro-rata basis, equivalent pay and conditions to those specified in an award or awards for full-time employees who do the same kind of work.

secondary office, in relation to a person who holds an office of member of the Commission and an office of member of a prescribed State industrial authority, means the office to which the person was most recently appointed.

Senior Deputy President means a Senior Deputy President of the Commission.

ship has the meaning given by clause 1 of Schedule 1.

single business has the meaning given by section 95A.

special magistrate means a magistrate appointed as a special magistrate under a law of a State or Territory.

State award means an award, order, decision or determination of a State industrial authority.

State employment agreement means an agreement:

- (a) between an employer and one or more of the following:
 - (i) an employee of the employer;
 - (ii) a trade union; and
- (b) that regulates wages and conditions of employment of one or more of the employees; and
- (c) that is in force under a State or Territory industrial law; and
- (d) that prevails over an inconsistent State award.

State industrial authority means:

-
- (a) a board or court of conciliation or arbitration, or tribunal, body or persons, having authority under a State Act to exercise any power of conciliation or arbitration in relation to industrial disputes within the limits of the State; or
 - (b) a special board constituted under a State Act relating to factories; or
 - (c) any other State board, court, tribunal, body or official prescribed for the purposes of this definition.

State or Territory industrial law means:

- (a) any of the following State Acts:
 - (i) the *Industrial Relations Act 1996* of New South Wales;
 - (ii) the *Industrial Relations Act 1999* of Queensland;
 - (iii) the *Industrial Relations Act 1979* of Western Australia;
 - (iv) the *Fair Work Act 1994* of South Australia;
 - (v) the *Industrial Relations Act 1984* of Tasmania; or
- (b) an Act of a State or Territory that applies to employment generally and has one or more of the following as its main purpose or one or more of its main purposes:
 - (i) regulating workplace relations (including industrial matters, industrial disputes and industrial action, within the ordinary meaning of those expressions);
 - (ii) providing for the determination of terms and conditions of employment;
 - (iii) providing for the making and enforcement of agreements determining terms and conditions of employment;
 - (iv) providing for rights and remedies connected with the termination of employment;
 - (v) prohibiting conduct that relates to the fact that a person either is, or is not, a member of an industrial association (as defined in section 240); or
- (c) an instrument made under an Act described in paragraph (a) or (b), so far as the instrument is of a legislative character; or
- (d) a law that:
 - (i) is a law of a State or Territory; and
 - (ii) is prescribed by regulations for the purposes of this paragraph.

State or Territory training authority means a body authorised by a law or award of a State or Territory for the purpose of overseeing arrangements for the training of employees.

stevedoring operations has the meaning given by clause 1 of Schedule 1.

Termination of Employment Convention means the Termination of Employment Convention, 1982, a copy of the English text of which is set out in Schedule 10.

this Act includes the regulations but does not include Schedule 1B or regulations made under that Schedule.

trade union means:

- (a) an organisation of employees; or
- (b) an association of employees that is registered or recognised as a trade union (however described) under the law of a State or Territory; or
- (c) an association of employees a principal purpose of which is the protection and promotion of the employees' interests in matters concerning their employment.

training arrangement means a combination of work and training that is subject to a training agreement or a training contract between the employee and employer that is registered:

- (a) with the relevant State or Territory training authority; or
- (b) under a law of a State or Territory relating to the training of employees.

union collective agreement has the meaning given by section 96B.

union greenfields agreement has the meaning given by section 96C.

Vice President means a Vice President of the Commission.

vocational placement means a placement that is:

- (a) undertaken with an employer for which a person is not entitled to be paid any remuneration; and
- (b) undertaken as a requirement of an education or training course; and

(c) authorised under a law or an administrative arrangement of the Commonwealth, a State or a Territory.

waterside worker has the meaning given by clause 1 of Schedule 1.

wharf has the meaning given by clause 1 of Schedule 1.

working day means a day that is not a Saturday, a Sunday or a public holiday.

workplace agreement means:

- (a) an AWA; or
- (b) a collective agreement.

Note: Section 95D affects the meaning of **workplace agreement**.

workplace determination means a determination under Division 8 of Part VC.

workplace inspector means a person appointed as a workplace inspector under section 84.

- (2) To avoid doubt, it is declared that a reference in this Act (except in Parts VI and XA, and in regulations made for the purposes of section 101D) to an independent contractor is confined to a natural person.
 - (3) In this Act, a reference to:
 - (a) a person who is eligible to become a member of an organisation; or
 - (b) a person who is eligible for membership of an organisation; includes a reference to a person who is eligible merely because of an agreement made under rules of the organisation made under subsection 151(1) of the Registration and Accountability of Organisations Schedule.
 - (4) In this Act, a reference to a person making a statement that is to the person's knowledge false or misleading in a material particular includes a reference to a person making a statement where the person is reckless as to whether the statement is false or misleading in a material particular.
 - (5) In this Act, a reference to engaging in conduct includes a reference to being, whether directly or indirectly, a party to or concerned in the conduct.
-

- (6) A reference in this Act to a term of an award includes a reference to a provision of an award.

Note: Section 69B of the *Australian Federal Police Act 1979* provides that this Act does not apply to certain matters relating to AFP employees.

3 After section 4

Insert:

4AA Employee

Basic definition

- (1) In this Act, unless the contrary intention appears:

employee means an individual so far as he or she is employed, or usually employed, as described in the definition of **employer** in subsection 4AB(1), by an employer, except on a vocational placement.

Note: See also Part XV (employees and employers in Victoria).

References to employee with ordinary meaning

- (2) However, a reference to employee has its ordinary meaning (subject to subsections (3) and (4)) if the reference is listed in clause 2 of Schedule 1. This does not limit the circumstances in which a contrary intention may appear for the purposes of subsection (1).

Note: The regulations may amend clause 2 of Schedule 1. See clause 5 of Schedule 1.

- (3) In this Act, unless the contrary intention appears, a reference to employee with its ordinary meaning includes a reference to an individual who is usually an employee with that meaning.
- (4) In this Act, unless the contrary intention appears, a reference to employee with its ordinary meaning does not include a reference to an individual on a vocational placement.

4AB Employer

Basic definition

- (1) In this Act, unless the contrary intention appears:
-

employer means:

- (a) a constitutional corporation, so far as it employs, or usually employs, an individual; or
- (b) the Commonwealth, so far as it employs, or usually employs, an individual; or
- (c) a Commonwealth authority, so far as it employs, or usually employs, an individual; or
- (d) a person or entity (which may be an unincorporated club) so far as the person or entity, in connection with constitutional trade or commerce, employs, or usually employs, an individual as:
 - (i) a flight crew officer; or
 - (ii) a maritime employee; or
 - (iii) a waterside worker; or
- (e) a body corporate incorporated in a Territory, so far as the body employs, or usually employs, an individual; or
- (f) a person or entity (which may be an unincorporated club) that carries on an activity (whether of a commercial, governmental or other nature) in a Territory in Australia, so far as the person or entity employs, or usually employs, an individual in connection with the activity carried on in the Territory.

Note 1: In this context, ***Australia*** includes the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands. See paragraph 17(a) of the *Acts Interpretation Act 1901*.

Note 2: See also Part XV (employees and employers in Victoria).

References to employer with ordinary meaning

- (2) However, a reference to employer has its ordinary meaning (subject to subsection (3)) if the reference is listed in clause 3 of Schedule 1. This does not limit the circumstances in which a contrary intention may appear for the purposes of subsection (1).

Note: The regulations may amend clause 3 of Schedule 1. See clause 5 of Schedule 1.

- (3) In this Act, unless the contrary intention appears, a reference to employer with its ordinary meaning includes a reference to a person or entity that is usually an employer with that meaning.

4AC Employment

(1) In this Act, unless the contrary intention appears:

employment means the employment of an employee by an employer.

Note: Subsections 4AA(1) and 4AB(1) define **employee** and **employer**.

References to employment with ordinary meaning

(2) However, a reference to employment has its ordinary meaning if the reference is listed in clause 4 of Schedule 1. This does not limit the circumstances in which a contrary intention may appear for the purposes of subsection (1).

Note: The regulations may amend clause 4 of Schedule 1. See clause 5 of Schedule 1.

4 Section 4A

Repeal the section, substitute:

4A Schedules 1B, 13, 14, 15 and 16 have effect

Schedules 1B, 13, 14, 15 and 16 have effect.

Note 1: Schedule 1B is about registration and accountability of organisations.

Note 2: Schedule 13 is about transitional arrangements for parties bound by federal awards.

Note 3: Schedule 14 is about transitional arrangements for existing pre-reform certified agreements.

Note 4: Schedule 15 is about transitional treatment of State employment agreements and State awards.

Note 5: Schedule 16 is about transitional instruments and transmission of business.

5 Sections 5 and 5AA

Repeal the sections.

6 Section 7

Repeal the section, substitute:

7 Modifications for Christmas Island and Cocos (Keeling) Islands

- (1) If the regulations prescribe modifications of this Act for its application in relation to the Territory of Christmas Island, this Act has effect as modified in relation to the Territory.
- (2) If the regulations prescribe modifications of this Act for its application in relation to the Territory of Cocos (Keeling) Islands, this Act has effect as modified in relation to the Territory.
- (3) In this section:
modifications includes additions, omissions and substitutions.

7AAA Exclusion of persons insufficiently connected with Australia

- (1) A provision of this Act prescribed by the regulations does not apply to a person or entity in Australia prescribed by the regulations as a person to whom, or an entity to which, the provision does not apply.

Note 1: In this context, *Australia* includes the Territory of Christmas Island, the Territory of Cocos (Keeling) Islands and the coastal sea. See section 15B and paragraph 17(a) of the *Acts Interpretation Act 1901*.

Note 2: The regulations may prescribe the person or entity by reference to a class. See subsection 13(3) of the *Legislative Instruments Act 2003*.
- (2) Before the Governor-General makes regulations for the purposes of subsection (1) prescribing either or both of the following:
 - (a) a provision of this Act that is not to apply to a person or entity;
 - (b) a person to whom, or an entity to which, a provision of this Act is not to apply;the Minister must be satisfied that the provision should not apply to the person or entity in Australia because there is not a sufficient connection between the person or entity and Australia.
- (3) In this section:
this Act includes the Registration and Accountability of Organisations Schedule and regulations made under it.

7AA Extraterritorial application

- (1) Each Part or Division listed in the table, and the rest of this Act so far as it relates to the Part or Division, extends to persons, acts, omissions, matters and things outside Australia as described in the relevant section listed in the table.

Extraterritorial application			
Item	This Part or Division:	Which is about this topic:	Extends to persons, acts, omissions, matters and things outside Australia as described in this section:
1	Part VA	The Australian Fair Pay and Conditions Standard	Section 89D
2	Part VB	Workplace agreements	Section 95E
3	Part VI	Awards	Section 115C
4	Division 1 of Part VIA	Meal breaks	Section 170AD
4A	Division 1A of Part VIA	Public holidays	Section 170AM
5	Division 2 of Part VIA	Equal remuneration for work of equal value	Section 170BGD
6	Division 3 of Part VIA	Termination of employment	Section 170CCB
7	Part IX	Right of entry	Section 200
8	Part XA	Freedom of association	Section 249

Note 1: In this context, **Australia** includes the Territory of Christmas Island, the Territory of Cocos (Keeling) Islands and the coastal sea. See section 15B and paragraph 17(a) of the *Acts Interpretation Act 1901*.

Note 2: Provisions of section 86 giving inspectors power to enter certain premises and places and do certain things there also extend to some premises and places outside Australia, subject to Australia's international obligations relating to foreign-flagged ships and foreign-registered aircraft.

Note 3: Part VC (Industrial action) and related provisions of this Act may extend in relation to Australia's exclusive economic zone, and in relation to Australia's continental shelf, as prescribed by the regulations. See section 106C.

Modified application in Australia's exclusive economic zone

- (2) If the regulations prescribe modifications of this Act for its operation in relation to all or part of Australia's exclusive economic zone, then, so far as this Act extends to the zone or part apart from this subsection, it has effect as modified in relation to the zone or part.
- (3) For the purposes of subsection (2), the regulations may prescribe different modifications in relation to different parts of Australia's exclusive economic zone.

Modified application in relation to Australia's continental shelf

- (4) If the regulations prescribe modifications of this Act for its operation in relation to all or part of Australia's continental shelf, then, so far as this Act extends in relation to the continental shelf or part apart from this subsection, it has effect as modified in relation to the continental shelf or part.
- (5) For the purposes of subsection (4), the regulations may prescribe different modifications in relation to different parts of Australia's continental shelf.

Definitions

- (6) In this section:

modifications includes additions, omissions and substitutions.

this Act includes the Registration and Accountability of Organisations Schedule and regulations made under it.

7 Section 7B

Before "Chapter", insert "(1)".

8 At the end of section 7B

Add:

- (2) However, so far as Part 2.7 of the *Criminal Code* is relevant to this Act, it has effect subject to the following sections of this Act:
 - (a) section 7AA;
 - (b) the sections mentioned in section 7AA;

- (c) section 86;
- (d) section 106C.

Note: Part 2.7 of the *Criminal Code* is about geographical jurisdiction in connection with offences. Section 7AA, the sections mentioned there and sections 86 and 106C deal with extraterritorial operation of this Act.

9 At the end of Part I

Add:

7C Act excludes some State and Territory laws

- (1) This Act is intended to apply to the exclusion of all the following laws of a State or Territory so far as they would otherwise apply in relation to an employee or employer:
 - (a) a State or Territory industrial law;
 - (b) a law that applies to employment generally and deals with leave other than long service leave;
 - (c) a law providing for a court or tribunal constituted by a law of the State or Territory to make an order in relation to equal remuneration for work of equal value (as defined in section 170BB);
 - (d) a law providing for the variation or setting aside of rights and obligations arising under a contract of employment, or another arrangement for employment, that a court or tribunal finds is unfair;
 - (e) a law that entitles a representative of a trade union to enter premises.

Note: Subsection 4(1) defines *applies to employment generally*.

State and Territory laws that are not excluded

- (2) However, subsection (1) does not apply to a law of a State or Territory so far as:
 - (a) the law deals with the prevention of discrimination, the promotion of EEO or both, and is neither a State or Territory industrial law nor contained in such a law; or
 - (b) the law is prescribed by the regulations as a law to which subsection (1) does not apply; or
 - (c) the law deals with any of the matters (the *non-excluded matters*) described in subsection (3).

- (3) The non-excluded matters are as follows:
- (a) superannuation;
 - (b) workers compensation;
 - (c) occupational health and safety (including entry of a representative of a trade union to premises for a purpose connected with occupational health and safety);
 - (ca) matters relating to outworkers (including entry of a representative of a trade union to premises for a purpose connected with outworkers);
 - (d) child labour;
 - (e) long service leave;
 - (f) the observance of a public holiday, except the rate of payment of an employee for the public holiday;
 - (g) the method of payment of wages or salaries;
 - (h) the frequency of payment of wages or salaries;
 - (i) deductions from wages or salaries;
 - (k) industrial action (within the ordinary meaning of the expression) affecting essential services;
 - (l) attendance for service on a jury;
 - (m) regulation of any of the following:
 - (i) associations of employees;
 - (ii) associations of employers;
 - (iii) members of associations of employees or of associations of employers.

Note: Part IX (Right of entry) sets prerequisites for a trade union representative to enter certain premises under a right given by a prescribed law of a State or Territory. The prerequisites apply even though the law deals with such entry for a purpose connected with occupational health and safety and paragraph (2)(c) says this Act is not to apply to the exclusion of a law dealing with that.

This Act excludes prescribed State and Territory laws

- (4) This Act is intended to apply to the exclusion of a law of a State or Territory that is prescribed by the regulations for the purposes of this subsection.
- (4A) To avoid doubt, subsection (4) has effect even if the law is covered by subsection (2) (so that subsection (1) does not apply to the law). This subsection does not limit subsection (4).

Definition

(5) In this section:

this Act includes the Registration and Accountability of Organisations Schedule and regulations made under it.

7D Awards, agreements and Commission orders prevail over State and Territory law etc.

- (1) An award or workplace agreement prevails over a law of a State or Territory, a State award or a State employment agreement, to the extent of any inconsistency.
- (2) However, a term of an award or workplace agreement dealing with any of the following matters has effect subject to a law of a State or Territory dealing with the matter, except a law that is prescribed by the regulations as a law to which awards and workplace agreements are not subject:
 - (a) occupational health and safety;
 - (b) workers compensation;
 - (c) training arrangements;
 - (d) a matter prescribed by the regulations for the purposes of this paragraph.
- (3) An order of the Commission under Part VIA prevails over a law of a State or Territory, a State award or a State employment agreement, to the extent of any inconsistency.

Note: Part VIA is about minimum entitlements of employees.

7E Act may exclude State and Territory laws in other cases

- (1) Sections 7C and 7D are not a complete statement of the circumstances in which this Act and instruments made under it are intended to apply to the exclusion of, or prevail over, laws of the States and Territories or instruments made under those laws.

Note: Other provisions of this Act deal with its relationship with laws of the States and Territories. For example, see clause 87 of Schedule 13, which is about not excluding or limiting Victorian law that can operate concurrently with certain provisions of that Schedule.

(2) In this section:

this Act includes the Registration and Accountability of Organisations Schedule and regulations made under it.

11 Section 33

Repeal the section, substitute:

33 Exercise of Commission powers

- (1) The Commission may perform a function or exercise a power on its own initiative.
- (2) Despite subsection (1), the Commission must not perform a function or exercise a power under a provision of this Act on its own initiative if:
 - (a) the function is to be performed, or the power exercised, on application by a specified person or class of persons; and
 - (b) the function is not also expressed to be able to be performed, or the power exercised, on the Commission's own initiative.

12 Subsection 36(3)

Repeal the subsection.

13 Section 39

Repeal the section.

14 At the end of Division 2 of Part II

Add:

41A Co-operation with the States by President

The President may invite the heads of State industrial authorities to meet with the President to exchange information and discuss matters of mutual interest in relation to workplace relations.

41B Co-operation with the States by Registrar

The Industrial Registrar may invite the principal registrars of State industrial authorities to meet with the Industrial Registrar to exchange information and discuss matters of mutual interest in relation to workplace relations.

15 Subsection 42(3)

Repeal the subsection, substitute:

- (3) A party (including an employing authority) may be represented by counsel, solicitor or agent if:
 - (a) all parties have given express consent to that representation; and
 - (b) the Commission grants leave for the party to be so represented.
- (3A) A party (including an employing authority) may be represented by counsel, solicitor or agent if:
 - (a) the party applies to the Commission to be so represented; and
 - (b) the Commission grants leave for the party to be so represented.
- (3B) In deciding whether or not to grant leave under subsection (3), the Commission must have regard to the following matters:
 - (a) whether being represented by counsel, solicitor or agent would assist the party concerned to bring the best case possible;
 - (b) the capacity of the particular counsel, solicitor or agent to represent the party concerned;
 - (c) the capacity of the particular counsel, solicitor or agent to assist the Commission in performing the Commission's functions under this Act.
- (3C) In deciding whether or not to grant leave under subsection (3A), the Commission must have regard to the following matters:
 - (a) the matters referred to in paragraphs (3B)(a), (b) and (c);
 - (b) the complexity of the factual and legal issues relating to the proceeding;
 - (c) whether there are special circumstances that make it desirable that the party concerned be represented by counsel, solicitor or agent;
 - (d) if the party applies to be represented by an agent—whether the agent is a person or body, or an officer or employee of a person or body, that is able to represent the interests of the party under a State or Territory industrial relations law.

- (3D) An appeal to a Full Bench under section 45 may not be made in relation to a decision under subsection (3) or (3A) to grant leave or not to grant leave.

16 At the end of paragraphs 42(7)(a) and (b)

Add “or”.

17 At the end of subsection 42(7)

Add:

; or (e) a bargaining agent.

18 Subsection 43(1)

Omit “(1)”.

19 Subsection 43(2)

Repeal the subsection.

20 After Division 3 of Part II

Insert:

Division 3A—General matters relating to the powers and procedures of the Commission

Subdivision A—General matters Commission to take into account

44A Commission to take into account the public interest

- (1) In the performance of its functions, the Commission must take into account the public interest, and for that purpose must have regard to:
- (a) the objects of this Act; and
 - (b) the state of the national economy and the likely effects on the national economy of any order that the Commission is considering, or is proposing to make, with special reference to likely effects on the level of employment and on inflation.
- (2) To the extent that the Commission is performing its functions in relation to matters arising under the Registration and Accountability of Organisations Schedule, the Commission must

take into account the public interest, and for that purpose must have regard to:

- (a) Parliament's intention in enacting that Schedule; and
 - (b) the state of the national economy and the likely effects on the national economy of any order that the Commission is considering, or is proposing to make, with special reference to likely effects on the level of employment and on inflation.
- (3) This section does not apply to the performance of a function under Part VC or Part VI.

44B Commission to take into account discrimination issues

In the performance of its functions, the Commission must take into account the following:

- (a) the need to apply the principle of equal pay for work of equal value;
- (b) the need to prevent and eliminate discrimination because of, or for reasons including, race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

44C Commission to take account of Racial Discrimination Act, Sex Discrimination Act, Disability Discrimination Act and Age Discrimination Act

In the performance of its functions, the Commission must take account of the principles embodied in the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984*, the *Disability Discrimination Act 1992* and the *Age Discrimination Act 2004* relating to discrimination in relation to employment.

44D Commission to take account of Family Responsibilities Convention

- (1) In performing its functions, the Commission must take account of the principles embodied in the Family Responsibilities Convention, in particular those relating to:
 - (a) preventing discrimination against workers who have family responsibilities; and

- (b) helping workers to reconcile their employment and family responsibilities.
- (2) This section does not apply to the performance of a function under Part VC.

44E Safety, health and welfare of employees

- (1) In performing its functions, the Commission must take into account the provisions of any law of a State or Territory relating to the safety, health and welfare of employees in relation to their employment.
- (2) This section does not apply to the performance of a function under Division 2 of Part VIA.

44F Commission to act quickly

The Commission must perform its functions as quickly as practicable.

44G Commission to avoid technicalities and facilitate fair conduct of proceedings

The Commission must perform its functions in a way that avoids unnecessary technicalities and facilitates the fair and practical conduct of any proceedings under this Act or the Registration and Accountability of Organisations Schedule.

Subdivision B—Particular powers and procedures of the Commission

44H Procedure of Commission

- (1) In a proceeding under this Act or the Registration and Accountability of Organisations Schedule:
 - (a) the procedure of the Commission is, subject to this Act, the Registration and Accountability of Organisations Schedule and the Rules of the Commission, within the discretion of the Commission; and

- (b) the Commission is not bound to act in a formal manner and is not bound by any rules of evidence, but may inform itself on any matter in such manner as it considers just; and
 - (c) the Commission must act according to equity, good conscience and the substantial merits of the case, without regard to technicalities and legal forms.
- (2) The Commission may determine the periods that are reasonably necessary for the fair and adequate presentation of the respective cases of the parties to the proceeding and require that the cases be presented within the respective periods.
 - (3) The Commission may require evidence or argument to be presented in writing, and may decide the matters on which it will hear oral evidence or argument.

44I Particular powers of Commission

- (1) The Commission may do any of the following in relation to a proceeding under this Act or the Registration and Accountability of Organisations Schedule:
 - (a) inform itself in any manner that it thinks appropriate;
 - (b) take evidence on oath or affirmation;
 - (c) give directions orally or in writing in the course of, or for the purposes of, procedural matters relating to the proceeding;
 - (d) vary or revoke an order, direction or decision of the Commission;
 - (e) dismiss a matter or part of a matter on the ground:
 - (i) that the matter, or the part of the matter, is trivial; or
 - (ii) that further proceedings in relation to the matter are not necessary or desirable in the public interest;
 - (f) determine the proceeding in the absence of a person who has been summoned or served with a notice to appear;
 - (g) sit at any place;
 - (h) conduct the proceeding, or any part of the proceeding, in private;
 - (i) adjourn the proceeding to any time and place;
 - (j) refer any matter to an expert and accept the expert's report as evidence;

- (k) direct a member of the Commission to consider a particular matter that is before the Full Bench and prepare a report for the Full Bench on that matter;
 - (l) allow the amendment, on any terms that it thinks appropriate, of any application or other document relating to the proceeding;
 - (m) correct, amend or waive any error, defect or irregularity whether in substance or form;
 - (n) summon before it any persons whose presence the Commission considers would assist in relation to the proceeding;
 - (o) compel the production before it of documents and other things for the purpose of reference to such entries or matters as relate to the proceeding;
 - (p) make interim decisions;
 - (q) make a final decision in respect of the matter to which the proceeding relates.
- (2) The Commission may, in writing, authorise a person (including a member of the Commission) to take evidence on its behalf, with any limitations as the Commission directs, in relation to the proceeding, and the person has all the powers of the Commission to secure:
- (a) the attendance of witnesses; and
 - (b) the production of documents and things; and
 - (c) the taking of evidence on oath or affirmation.
- (3) The following provisions do not apply to the performance of a function under Part VC:
- (a) paragraph (1)(e);
 - (b) paragraph (1)(j);
 - (c) paragraph (1)(k).
- (4) The following provisions do not apply to the performance of a function under Division 2, 3 or 4 of Part VIA:
- (a) paragraph (1)(a);
 - (b) paragraph (1)(e);
 - (c) paragraph (1)(k);
 - (d) paragraph (1)(p);
 - (e) paragraph (1)(q);
-

- (f) subsection (2).
- (5) Paragraph (1)(j) does not apply to the performance of a function under Division 3 of Part VIA.
- (6) If a provision of this Act specifies a time or a period in respect of any matter or thing, the Commission must not extend the time or the period specified unless this Act expressly permits the Commission to do so.
- (7) If a provision of the Registration and Accountability of Organisations Schedule specifies a time or a period in respect of any matter or thing, the Commission must not extend the time or the period specified unless the Registration and Accountability of Organisations Schedule expressly permits the Commission to do so.
- (8) For the purposes of paragraph (1)(d), *order* does not include an award or an award-related order.

44J Reference of proceedings to Full Bench

- (1) If a proceeding is before a member of the Commission, a party to the proceeding or the Minister may apply to the member to have the proceeding dealt with by a Full Bench because the subject matter of the proceeding is of such importance that, in the public interest, the proceeding should be dealt with by a Full Bench.
- (2) If an application is made under subsection (1) to a member of the Commission other than the President:
 - (a) the member must refer the application to the President to be dealt with; and
 - (b) the President must confer with the member about whether the application should be granted.
- (3) If the President is of the opinion that the subject matter of the proceeding is of such importance that, in the public interest, the proceeding should be dealt with by a Full Bench, the President must grant the application.
- (4) If the President grants an application under subsection (1), the Full Bench must (subject to subsection (5)) hear and determine the proceeding to which the application relates.

- (5) If the President grants an application under subsection (1), the Full Bench may do either or both of the following:
 - (a) have regard to any evidence given, and any arguments adduced, in the proceeding before the Full Bench began to deal with it;
 - (b) refer a part of the proceeding to a member of the Commission to hear and determine.
- (6) The President may, before a Full Bench has been established for the purpose of dealing with a proceeding under this section, authorise a member of the Commission to take evidence for the purposes of the proceeding, and the Full Bench must have regard to the evidence.
- (7) The President or a Full Bench may, in relation to the exercise of powers under this section, direct a member of the Commission to provide a report in relation to a specified matter.
- (8) The member must, after making such investigation (if any) as is necessary, provide a report to the President or the Full Bench, as required.
- (9) In this section:

proceeding includes a part of a proceeding.

44K President may deal with certain proceedings

- (1) The President may, whether or not another member of the Commission has begun to deal with a particular proceeding, decide to deal with the proceeding.
 - (2) If the President decides to deal with the proceeding, the President must:
 - (a) hear and determine the proceeding; or
 - (b) refer the proceeding to a Full Bench.
 - (3) If the President refers an application to a Full Bench, the Full Bench must (subject to subsection (4)) hear and determine the proceeding.
 - (4) If the President refers the proceeding to a Full Bench, the Full Bench may refer a part of the proceeding to a member of the Commission to hear and determine.
-

- (5) The President or the Full Bench may, in dealing with the proceeding, have regard to any evidence given, and any arguments adduced, in the proceeding before the President or the Full Bench, as the case may be, began to deal with it.
- (6) The President or a Full Bench may, in relation to the exercise of powers under this section, direct a member of the Commission to provide a report in relation to a specified matter.
- (7) The member must, after making such investigation (if any) as is necessary, provide a report to the President or a Full Bench, as the case may be.
- (8) In this section:
proceeding includes a part of a proceeding.

44L Review on application by Minister

- (1) The Minister may apply to the President for a review by a Full Bench of an award or order, or a decision relating to the making of an award or order, made by a member of the Commission (whether under this Act, the Registration and Accountability of Organisations Schedule or otherwise) if it appears to the Minister that the award, order or decision is contrary to the public interest.
- (2) If an application is made to the President under subsection (1), the President must establish a Full Bench to hear and determine the application.
- (3) The Full Bench must, if in its opinion the matter is of such importance that, in the public interest, the award, order or decision should be reviewed, make such review of the award, order or decision as appears to it to be desirable having regard to the matters referred to in the application.
- (4) Subject to subsection (5) of this section, subsections 45(4) to (8) apply in relation to a review under this section in the same manner as they apply in relation to an appeal under section 45.
- (5) Subsections 45A(4) to (8) apply in relation to a review under this section in relation to a matter arising under the Registration and Accountability of Organisations Schedule in the same manner as they apply in relation to an appeal under section 45A.

- (6) In a review under this section:
 - (a) the Commission must take such steps as it thinks appropriate to ensure that each person and organisation bound by the award or otherwise with an interest in the review is made aware of the review; and
 - (b) the Minister may intervene in the proceeding.
- (7) Each provision of this Act relating to the performance of the Commission's functions in relation to awards extends to a review under this section.
- (8) Nothing in this section affects any right of appeal or any power of a Full Bench under section 45, and an appeal under that section and a review under this section may, if the Full Bench thinks appropriate, be dealt with together.
- (9) Nothing in this section affects any right of appeal or any power of a Full Bench under section 45A, and an appeal under that section and a review under this section may, if the Full Bench thinks appropriate, be dealt with together.

44M Compulsory conferences

- (1) For the purpose of the performance of a function, or the exercise of a power, of the Commission under this Act or the Registration and Accountability of Organisations Schedule, a member of the Commission may, on the initiative of the member or on application made by a party to, or intervener in, the proceeding, direct a person to attend, at a specified time and place, a conference to be presided over by a member of the Commission or another person nominated by the President.

Note: Contravening a direction may be an offence under section 300.

- (2) A direction may be given to anyone whose presence at the conference the member considers would help in the performance of a function under this Act or the Registration and Accountability of Organisations Schedule.
- (3) The conference must be held in private except to the extent that the person presiding over the conference directs that it be held in public.

- (4) This section does not apply to the performance of a function under Part VC.

44N Power to override certain laws affecting public sector employment

- (1) In so far as the performance of its functions under this Act or the Registration and Accountability of Organisations Schedule involves public sector employment, the Commission may, where it considers it proper to do so, make an award or order that is not, or in its opinion may not be, consistent with a relevant law of the Commonwealth or of an internal Territory.

- (2) In this section:

enactment means an ordinance made under the *Northern Territory (Administration) Act 1910* and continued in force by the *Northern Territory (Self-Government) Act 1978*.

relevant law means a law of the Commonwealth or an internal Territory relating to matters pertaining to the relationship between employers and employees in public sector employment, other than:

- (a) the *Safety, Rehabilitation and Compensation Act 1988*, the *Long Service Leave (Commonwealth Employees) Act 1976*, the *Superannuation Act 1976* or the *Superannuation Act 1990*; or
- (b) a prescribed Act or enactment, or prescribed provisions of an Act or enactment.
- (3) This section does not apply to the performance of a function under Part VIA.

44O State authorities may be restrained from dealing with matter that is before the Commission

- (1) If it appears to a Full Bench that a State industrial authority is dealing or is about to deal with a matter that is the subject of a proceeding before the Commission under this Act or the Registration and Accountability of Organisations Schedule, the Full Bench may make an order restraining the State industrial authority from dealing with the matter.

- (2) The State industrial authority must, in accordance with the order, cease dealing or not deal, as the case may be, with the matter.
- (3) An order, award, decision or determination of a State industrial authority made in contravention of the order of a Full Bench under this section is, to the extent of the contravention, void.

44P Joint sessions of Commission

If:

- (a) the President considers that a question is common to 2 or more proceedings before the Commission; and
- (b) the Commission is not constituted by the same person or persons for the purposes of each proceeding;

the President may direct that the Commission constituted by all the persons who constitute the Commission for the purposes of the proceedings may take evidence or hear argument, or take evidence and hear argument, as to the question for the purposes of both or all of the proceedings.

44Q Revocation and suspension of awards and orders

- (1) An organisation, a person interested or the Minister may apply to the President, and a member of the Commission or a Registrar may refer a matter to the President, for action by a Full Bench under this section.
- (2) If an application is made to the President under subsection (1), the President must establish a Full Bench to hear and determine the application.
- (3) If a matter is referred to the President under subsection (1), the President may establish a Full Bench to hear and determine the matter.
- (4) If it appears to the Full Bench:
 - (a) that an organisation has contravened this Act, the Registration and Accountability of Organisations Schedule or an award or order of the Commission; or
 - (b) that a substantial number of the members of an organisation refuse to accept employment either at all or in accordance with existing awards or orders; or

- (c) that for any other reason an award or order should be suspended or revoked in whole or part;
the Full Bench may, subject to such conditions as it thinks appropriate, make an order revoking, or suspending for such period as it thinks appropriate, the award or order or any of the terms of the award or an order.
- (5) The Full Bench may also make such other orders as it thinks appropriate in relation to the operation of:
 - (a) if the Full Bench revokes or suspends an award or order on a ground referred to in paragraph (4)(a) or (b)—any other award or order that binds the organisation; or
 - (b) in any other case—any other award or order that applies in relation to the employment of:
 - (i) members of an organisation that is bound by the revoked or suspended award or order; or
 - (ii) persons eligible to be members of such an organisation.
- (6) The revocation or suspension of all or any of the terms of an award or order may be expressed to apply only in relation to:
 - (a) a particular organisation or person bound by the award or order; or
 - (b) a particular branch of an organisation; or
 - (c) a particular class of members of an organisation; or
 - (d) a particular locality.

21 Paragraph 45(1)(a)

Repeal the paragraph.

22 Paragraph 45(1)(b)

Omit all the words from and including “Commission, ”, substitute “Commission; and”.

23 Paragraph 45(1)(d)

Omit “111(1)(g)”, substitute “44I(1)(e)”.

24 Paragraph 45(1)(da)

Repeal the paragraph.

25 Paragraphs 45(1)(e) and (eaa)

Repeal the paragraphs.

26 Paragraph 45(1)(eba)

Omit “or certified agreement under section 298Z”, substitute “under section 273”.

27 Paragraphs 45(1)(ea) and (eb)

Repeal the paragraphs.

28 Paragraph 45(1)(ed)

Omit “certified agreement”, substitute “workplace agreement”.

29 Paragraphs 45(3)(ab) and (ac)

Repeal the paragraphs, substitute:

- (ab) in the case of an appeal under paragraph (1)(b) against an order that was made under subsection 125E(1) or subclause 14(1) or 23(1) of Schedule 16—by the person who applied for the order or any person who made submissions to the Commission on whether the order should be made; and
- (ac) in the case of an appeal under paragraph (1)(c) against a decision not to make an order under subsection 125E(1) or subclause 14(1) or 23(1) of Schedule 16—by the person who applied for the order;

30 Paragraphs 45(3)(ad), (b) and (ba)

Repeal the paragraphs.

31 Subparagraphs 45(3)(baa)(i) and (ii)

Repeal the subparagraphs, substitute:

- (i) an employer, employee or organisation bound by the award; or

32 Paragraph 45(3)(bab)

Repeal the paragraph.

33 Paragraph 45(3)(bb)

Omit “under section 111A”, substitute “or workplace agreement”.

34 Subsection 45(3) (note)

Repeal the note.

35 Subsection 45(3A)

Repeal the subsection.

36 Subsection 45(3B)

Repeal the subsection.

37 Paragraph 45(7)(d)

Omit “111(1)(g)”, substitute “44I(1)(e)”.

38 Subsection 45(9)

Repeal the subsection.

39 Paragraph 45A(1)(b)

Omit all the words after “Commission”, substitute “in proceedings under that Schedule, other than an order made by consent of the parties to the proceeding; and”.

40 Paragraph 45A(1)(d)

Omit “111(1)(g)”, substitute “44I(1)(e)”.

41 Paragraph 45A(7)(d)

Omit “111(1)(g)”, substitute “44I(1)(e)”.

42 Subsections 48(1A) and (1B)

Repeal the subsections.

43 Sections 83BB and 83BC

Repeal the sections, substitute:

83BB Functions of the Employment Advocate

- (1) The functions of the Employment Advocate are:
- (a) to promote the making of workplace agreements; and
 - (b) to provide assistance and advice to employees and employers (especially employers in small business) and organisations in relation to workplace agreements; and

-
- (c) to provide education and information to employees, employers and organisations in relation to workplace agreements; and
 - (d) to promote better work and management practices through workplace agreements; and
 - (e) to accept lodgment of:
 - (i) workplace agreements; and
 - (ii) notices about transmission of instruments; and
 - (f) to provide advice to employees, employers and organisations about awards and the Australian Fair Pay and Conditions Standard; and
 - (g) to provide aggregated statistical information to the Minister; and
 - (h) to authorise multiple-business agreements in accordance with the regulations; and
 - (i) to give to the Minister, in accordance with the regulations, information and copies of documents; and
 - (j) to disclose information that relates to the functions of workplace inspectors to workplace inspectors in response to requests from workplace inspectors; and
 - (k) to disclose information to workplace inspectors that the Employment Advocate considers on reasonable grounds is likely to assist the inspectors in performing their functions; and
 - (l) to analyse workplace agreements; and
 - (m) to perform any other function conferred on the Employment Advocate by this Act, another Act, the regulations or the Registration and Accountability of Organisations Schedule.
- (2) In performing his or her functions relating to workplace agreements, the Employment Advocate must encourage parties to agreement-making to take account of the needs of workers in disadvantaged bargaining positions (for example: women, people from a non-English speaking background, young people, apprentices, trainees and outworkers).
- (3) In performing his or her functions, the Employment Advocate must have particular regard to:
- (a) assisting workers to balance work and family responsibilities; and

- (b) the need to prevent and eliminate discrimination because of, or for reasons including, race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.
- (4) Regulations made for the purposes of paragraph (1)(i) may require that documents given to the Minister are given with such deletions as are necessary to prevent the identification of individuals to whom the documents refer.

83BC Minister's directions to Employment Advocate

- (1) The Minister may, by legislative instrument, give directions specifying the manner in which the Employment Advocate must exercise or perform the powers or functions of the Employment Advocate.
- (2) The directions must not be about a particular workplace agreement.
- (3) The Employment Advocate must comply with the directions.

44 Subsection 83BE(2)

Omit "under Part VID relating to the approval of AWAs and ancillary documents", substitute "relating to the authorisation of multiple-business agreements".

45 Subsection 83BE(3)

Repeal the subsection.

46 Division 2 of Part IVA

Repeal the Division.

47 Section 83BS

Repeal the section, substitute:

83BS Identity of parties to AWAs not to be disclosed

- (1) A person commits an offence if:
 - (a) the person discloses information; and
 - (b) the information is protected information; and

- (c) the discloser has reasonable grounds to believe that the information will identify another person as being, or having been, a party to an AWA; and
- (d) the disclosure is not made by the discloser in the course of performing functions or duties as a workplace agreement official; and
- (e) the disclosure is not required or permitted by this Act, by another Act, by regulations made for the purposes of another provision of this Act or by regulations made for the purposes of another Act; and
- (f) the person whose identity is disclosed has not, in writing, authorised the disclosure.

Penalty: Imprisonment for 6 months.

- (2) In this section:

protected information, in relation to a person, means information that the person acquired:

- (a) in the course of performing functions or duties, or exercising powers, as a workplace agreement official; or
- (b) from a workplace agreement official who acquired the information as mentioned in paragraph (a).

workplace agreement official means:

- (a) the Employment Advocate; or
- (b) a delegate of the Employment Advocate; or
- (c) a member of the staff assisting the Employment Advocate under section 83BD.

48 Section 83BT

Omit “AWAs or ancillary documents”, substitute “workplace agreements”.

49 Part V (heading)

Repeal the heading, substitute:

Part V—Workplace inspectors

50 Subsection 84(1)

Before “inspectors”, insert “workplace”.

51 Subsection 84(2)

Repeal the subsection, substitute:

- (2) The Minister may, by instrument, appoint as a workplace inspector:
 - (a) a person who has been appointed, or who is employed, by the Commonwealth; or
 - (b) a person, other than a person mentioned in paragraph (a).

52 Subsection 84(3)

Repeal the subsection, substitute:

- (3) A person appointed under paragraph (2)(a) is appointed for the period specified in regulations made for the purposes of this subsection.
- (3A) A person appointed under paragraph (2)(b) is appointed for the period specified in the person’s instrument of appointment, which must not be longer than the period specified in regulations made for the purposes of this subsection.

53 Subsection 84(4)

Omit “an inspector has such powers and functions in relation to the observance of this Act, awards and certified agreements as are conferred by this Act”, substitute “a workplace inspector has the powers and functions conferred on a workplace inspector by this Act or by the regulations or by another Act”.

54 Subsection 84(4A)

Omit “an inspector has such powers and functions in relation to the observance of this Act, awards and certified agreements as are conferred on an inspector by this Act and”, substitute “a workplace inspector has only such of the powers and functions mentioned in subsection (4) as are”.

55 Subsection 84(5)

Omit “by notice published in the *Gazette*”, substitute “by legislative instrument”.

56 Subsection 84(6)

Omit “An inspector shall”, substitute “A workplace inspector must”.

57 Subsection 85(2)

Omit “shall”, substitute “must”.

58 At the end of section 85

Add:

- (3) A person commits an offence if:
- (a) the person ceases to be a workplace inspector; and
 - (b) the person does not return the person’s identity card to the Secretary of the Department within 14 days of so ceasing.

Penalty: 1 penalty unit.

- (4) Subsection (3) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

59 Subsection 86(1)

Repeal the subsection, substitute:

Purpose for which powers of inspectors can be exercised

- (1) The powers of a workplace inspector under this section may be exercised:
- (a) for the purpose of determining whether any of the following are being, or have been, observed:
 - (i) workplace agreements;
 - (ii) awards;
 - (iii) the Australian Fair Pay and Conditions Standard;
 - (iv) minimum entitlements and orders under Part VIA;
 - (v) the requirements of this Act (other than section 541) and the regulations; or
 - (b) for the purposes of a provision of the regulations that confers powers or functions on inspectors.

Note: Workplace determinations are treated for the purposes of the Act as if they were collective agreements (see section 113F). Undertakings are treated the same way (see section 103M). This means that inspectors also have powers in relation to those instruments.

60 Subparagraph 86(1A)(a)(i)

Omit “an award or certified agreement”, substitute “an instrument or entitlement mentioned in subparagraphs (1)(a)(i) to (iv)”.

61 Subparagraph 86(1A)(b)(iii)

Omit “any employee”, substitute “any person”.

62 At the end of paragraph 86(1A)(b)

Add:

- (vi) to require a person to tell the inspector who has custody of a document; and

63 Paragraph 86(1A)(c)

Omit “to the inspector a document relevant to the purpose set out in subsection (1)”, substitute “a document to the inspector”.

64 At the end of subsection 86(1A)

Add:

Note: Contravening a requirement under subparagraph (b)(iv) or paragraph (c) may be an offence under section 305.

65 Subsection 86(4B)

Omit “paragraph (1A)(c)”, substitute “this section”.

66 Subsection 86(4C)

Omit “paragraph (1A)(c)”, substitute “this section”.

67 Subsections 86(6) and (7)

Repeal the subsections, substitute:

In Australia’s exclusive economic zone

(6) Subsection (1A) extends to premises, and places of business, that:

- (a) are in Australia’s exclusive economic zone; and
- (b) are owned or occupied by an Australian employer.

This subsection has effect subject to Australia’s obligations under international law concerning jurisdiction over ships that fly the flag of a foreign country and aircraft registered under the law of a foreign country.

On Australia's continental shelf outside exclusive economic zone

- (7) Subsection (1A) also extends to premises, and places of business, that:
- (a) are outside the outer limits of Australia's exclusive economic zone, but in, on or over a part of Australia's continental shelf that is prescribed by the regulations for the purposes of this subsection; and
 - (b) are connected with the exploration of the continental shelf or the exploitation of its natural resources; and
 - (c) meet the requirements that are prescribed by the regulations for that part.

Note: The regulations may prescribe different requirements relating to different parts of Australia's continental shelf. The regulations may need to do so to give effect to Australia's international obligations.

68 After section 86

Insert:

86A Disclosure of information by inspectors

- (1) A workplace inspector may disclose information acquired by the inspector in the course of exercising powers, or performing functions, as a workplace inspector, if the inspector considers on reasonable grounds that it is necessary or appropriate to do so in the course of exercising his or her powers, or performing his or her functions, as an inspector.
- (2) A workplace inspector may disclose information to an officer of the Department administered by the Minister who administers the *Migration Act 1958* if the inspector considers on reasonable grounds that the disclosure of the information is likely to assist the officer in the administration of that Act.
- (3) The regulations may authorise workplace inspectors to disclose information of the prescribed kind, to officers of the Commonwealth of the prescribed kind, for prescribed purposes.
- (4) A workplace inspector may disclose information to an officer of a State who has powers, duties or functions that relate to the administration of a workplace relations or other system relating to terms and conditions, or incidents, of employment, if the inspector considers on reasonable grounds that the disclosure of the

information is likely to assist the officer in the administration of that system.

69 Section 87

Repeal the section.

70 Section 88

Repeal the section.

71 Parts VA, VI and VIAAA

Repeal the Parts, substitute:

Part VA—The Australian Fair Pay and Conditions Standard

Division 1—Preliminary

89 Purpose of Part

- (1) The purpose of this Part is to set out key minimum entitlements of employment.
- (2) The key minimum entitlements relate to the following matters:
 - (a) basic rates of pay and casual loadings (see Division 2);
 - (b) maximum ordinary hours of work (see Division 3);
 - (c) annual leave (see Division 4);
 - (d) personal leave (see Division 5);
 - (e) parental leave and related entitlements (see Division 6).
- (3) The provisions of Divisions 2 to 6 constitute the *Australian Fair Pay and Conditions Standard*.

89A Operation of the Australian Fair Pay and Conditions Standard

- (1) The Australian Fair Pay and Conditions Standard provides key minimum entitlements of employment for the employees to whom it applies.
 - (2) The Australian Fair Pay and Conditions Standard prevails over a workplace agreement or a contract of employment that operates in
-

relation to an employee to the extent to which, in a particular respect, the Australian Fair Pay and Conditions Standard provides a more favourable outcome for the employee.

(2A) A dispute about:

- (a) whether the Australian Fair Pay and Conditions Standard provides a more favourable outcome for an employee in a particular respect than a workplace agreement that operates in relation to that employee; or
- (b) what the outcome is for an employee in a particular respect under the Australian Fair Pay and Conditions Standard, where a workplace agreement operates in relation to that employee;

is to be resolved using the dispute settlement procedure included (or taken to be included) in the agreement.

(3) The regulations may prescribe:

- (a) what a particular respect is or is not for the purposes of subsection (2) or (2A); or
- (b) the circumstances in which the Australian Fair Pay and Conditions Standard provides or does not provide a more favourable outcome in a particular respect.

Example 1: The way in which particular amounts of annual leave are accrued could be prescribed as a particular respect under paragraph (3)(a).

Example 2: Both the Standard and a workplace agreement require an employee to attest to certain matters in a statutory declaration made for the purposes of maternity leave. The matters required by the agreement are different in some respects from those set out in the Standard. Regulations made for the purposes of paragraph (3)(b) could prescribe the matters to be attested in a statutory declaration as a circumstance in which the Standard is not taken to provide a more favourable outcome.

89B Australian Fair Pay and Conditions Standard cannot be excluded

A term of a workplace agreement or a contract has no effect to the extent to which it purports to exclude the Australian Fair Pay and Conditions Standard or any part of it.

89D Extraterritorial extension

- (1) This Part, and the rest of this Act so far as it relates to this Part, extend:
- (a) to an employee outside Australia who meets any of the conditions in this section; and
 - (b) to the employee's employer (whether the employer is in or outside Australia); and
 - (c) to acts, omissions, matters and things relating to the employee (whether they are in or outside Australia).

Note: In this context, *Australia* includes the Territory of Christmas Island, the Territory of Cocos (Keeling) Islands and the coastal sea. See section 15B and paragraph 17(a) of the *Acts Interpretation Act 1901*.

In Australia's exclusive economic zone

- (2) One condition is that the employee is in Australia's exclusive economic zone and either:
- (a) is an employee of an Australian employer and is not prescribed by the regulations as an employee to whom this subsection does not apply; or
 - (b) is an employee prescribed by the regulations as an employee to whom this subsection applies.

Note: The regulations may prescribe the employee by reference to a class. See subsection 13(3) of the *Legislative Instruments Act 2003*.

On Australia's continental shelf outside exclusive economic zone

- (3) Another condition is that the employee:
- (a) is outside the outer limits of Australia's exclusive economic zone, but is in, on or over a part of Australia's continental shelf that is prescribed by the regulations for the purposes of this subsection, in connection with the exploration of the continental shelf or the exploitation of its natural resources; and
 - (b) meets the requirements that are prescribed by the regulations for that part.

Note: The regulations may prescribe different requirements relating to different parts of Australia's continental shelf. The regulations may need to do so to give effect to Australia's international obligations.

Outside Australia's exclusive economic zone and continental shelf

- (4) Another condition is that the employee:
- (a) is neither in Australia's exclusive economic zone nor in, on or over a part of Australia's continental shelf described in paragraph (3)(a); and
 - (b) is an employee of an Australian employer; and
 - (c) is an Australian-based employee or bound by a workplace agreement that binds the employer too; and
 - (d) is not prescribed by the regulations as an employee to whom this subsection does not apply.
- (5) Another condition is that the employee:
- (a) is neither in Australia's exclusive economic zone nor in, on or over a part of Australia's continental shelf described in paragraph (3)(a); and
 - (b) is an Australian-based employee of an employer that is not an Australian employer; and
 - (c) is bound by a workplace agreement that binds the employer too; and
 - (d) is not prescribed by the regulations as an employee to whom this subsection does not apply.

Definition

- (6) In this section:

this Act includes the Registration and Accountability of Organisations Schedule and regulations made under it.

89E Model dispute resolution process

The model dispute resolution process applies to a dispute about entitlements under Divisions 3 to 6.

Note: The model dispute resolution process is set out in Part VIIA.

Division 2—Wages

Subdivision A—Preliminary

90 AFPC's wage-setting parameters etc.

In exercising any of its powers under this Division, the AFPC must act in accordance with section 7J (AFPC's wage-setting parameters).

Note 1: Any additional considerations or limitations on the exercise of the AFPC's powers are set out in the various sections of this Division (including sections 90A and 90ZR).

Note 2: The AFPC must ensure that APCSs do not (after 3 years) continue to contain coverage rules that are described by reference to State or Territory boundaries—see section 90ZB.

90A AFPC to have regard to recommendations of Award Review Taskforce

In exercising any of its powers under this Division, the AFPC is to have regard to any relevant recommendations made by the Award Review Taskforce.

90B Definitions

In this Division:

APCS means a preserved APCS or a new APCS.

Note: APCS is short for Australian Pay and Classification Scale.

APCS piece rate employee means an employee in relation to whom the following paragraphs are satisfied:

- (a) the employee's employment is covered by an APCS;
- (b) the rate provisions of the APCS determine one or more basic piece rates of pay that apply to the employment of the employee.

basic periodic rate of pay means a rate of pay for a period worked (however the rate is described) that does not include incentive-based payments and bonuses, loadings, monetary allowances, penalty rates or any other similar separately

identifiable entitlements. The meaning of **basic periodic rate of pay** is also affected by section 90ZF.

Note: Most of the kinds of entitlement excluded from this definition are allowable award matters (see section 116).

basic piece rate of pay means a piece rate of pay, other than a piece rate of pay that is payable, as an incentive-based payment or bonus, in addition to a basic periodic rate of pay.

Note: Incentive-based payments and bonuses are allowable award matters.

casual loading: the meaning of casual loading is affected by section 90ZF.

casual loading provisions has the meaning given by section 90C.

classification has the meaning given by section 90D.

coverage provisions means:

- (a) for a pre-reform wage instrument—all provisions (whether of that instrument or of another instrument or law), as in force on the reform comparison day, that would have affected the determination of whether the employment of any particular employee was covered by the instrument on that day; or
- (b) for an APCS—provisions of the APCS that determine whether the employment of a particular employee is covered by the APCS.

Note: For a preserved APCS, the coverage provisions will (at least initially) be the coverage provisions for the pre-reform wage instrument from which the APCS is derived (see paragraph 90ZD(1)(f)).

covered: for when the employment of a particular employee is covered by a particular APCS, see sections 90Z and 90ZA.

current circumstances of employment, in relation to an employee, includes any current circumstance of or relating to the employee's employment.

default casual loading percentage has the meaning given by subsection 90I(1).

derived from: for when a preserved APCS is derived from a particular pre-reform wage instrument, see subsection 90ZD(2).

employee with a disability means an employee who is qualified for a disability support pension as set out in section 94 or 95 of the *Social Security Act 1991*, or who would be so qualified but for paragraph 94(1)(e) or 95(1)(c) of that Act.

FMW for an employee: for when there is an FMW for an employee, see section 90P.

Note: FMW is short for Federal Minimum Wage.

frequency of payment provisions means:

- (a) for a pre-reform wage instrument—provisions (whether of that instrument or of another instrument or law), as in force on the reform comparison day, that would have determined the frequency with which an employee covered by the instrument had to be paid; or
- (b) for an APCS, a workplace agreement or a contract of employment—provisions of the APCS, workplace agreement or contract that determine the frequency with which an employee covered by the APCS, workplace agreement or contract must be paid.

Note: For a preserved APCS, the frequency of payment provisions will (at least initially) be the frequency of payment provisions (if any) for the pre-reform wage instrument from which the APCS is derived (see paragraph 90ZD(1)(ea)).

junior employee means an employee who is under the age of 21.

new APCS has the meaning given by subsection 90ZJ(1).

piece rate of pay means a rate of pay that is expressed as a rate for a quantifiable output or task (as opposed to being expressed as a rate for a period worked).

Note: The following are examples of piece rates of pay:

- (a) a rate of pay calculated by reference to number of articles produced;
- (b) a rate of pay calculated by reference to number of kilometres travelled;
- (c) a rate of pay calculated by reference to number of articles delivered;
- (d) a rate of pay calculated by reference to number of articles sold;
- (e) a rate of pay calculated by reference to number of tasks performed.

pre-reform federal wage instrument means:

- (a) an award (as defined in subsection 4(1) of this Act as in force immediately before the reform commencement) as in force immediately before the reform commencement, but not including:
 - (i) an order under section 120A of this Act as then in force; or
 - (ii) an award under section 170MX of this Act as then in force; or
- (b) sections 552 and 555 of this Act as in force immediately before the reform commencement; or
- (c) a law, or a provision of a law, of the Commonwealth, being a law or provision:
 - (i) as in force immediately before the reform commencement; and
 - (ii) that is specified, or is of a kind specified, in regulations made for the purposes of this paragraph; or
- (d) an instrument made under a law, or a provision of a law, of the Commonwealth, being an instrument:
 - (i) as in force immediately before the reform commencement; and
 - (ii) that is specified, or is of a kind specified, in regulations made for the purposes of this paragraph.

Note: For when regulations made for the purpose of paragraph (c) or (d) may be expressed to take effect, see section 90ZI.

pre-reform non-federal wage instrument means a pre-reform State wage instrument or a pre-reform Territory wage instrument.

pre-reform State wage instrument means:

- (a) a State award (as defined in subsection 4(1) of this Act as in force immediately before the reform commencement) as in force immediately before the reform commencement; or
- (b) a law, or a provision of a law, of a State, being a law or provision:
 - (i) as in force immediately before the reform commencement; and
 - (ii) that entitled employees, or a particular class of employees, to payment of a particular rate of pay; or

- (c) a law, or a provision of a law, of a State, being a law or provision:
 - (i) as in force immediately before the reform commencement; and
 - (ii) that is specified, or is of a kind specified, in regulations made for the purposes of this paragraph; or
- (d) an instrument made under a law, or a provision of a law, of a State, being an instrument:
 - (i) as in force immediately before the reform commencement; and
 - (ii) that is specified, or is of a kind specified, in regulations made for the purposes of this paragraph.

Note: For when regulations made for the purpose of paragraph (c) or (d) may be expressed to take effect, see section 90ZI.

pre-reform Territory wage instrument means:

- (a) a law, or a provision of a law, of a Territory, being a law or provision:
 - (i) as in force immediately before the reform commencement; and
 - (ii) that entitled employees, or a particular class of employees, to payment of a particular rate of pay; or
- (b) a law, or a provision of a law, of a Territory, being a law or provision:
 - (i) as in force immediately before the reform commencement; and
 - (ii) that is specified, or is of a kind specified, in regulations made for the purposes of this paragraph; or
- (c) an instrument made under a law, or a provision of a law, of a Territory, being an instrument:
 - (i) as in force immediately before the reform commencement; and
 - (ii) that is specified, or is of a kind specified, in regulations made for the purposes of this paragraph.

Note: For when regulations made for the purpose of paragraph (b) or (c) may be expressed to take effect, see section 90ZI.

pre-reform wage instrument means a pre-reform federal wage instrument or a pre-reform non-federal wage instrument.

preserved APCS has the meaning given by subsection 90ZD(1).

pro-rata disability pay method means a method for determining a rate of pay for employees with a disability, being a method that determines the rate by reference to the relative capacities of those employees.

rate provisions has the meaning given by section 90E.

reform comparison day means the day before the day on which the reform commencement occurs.

special FMW has the meaning given by section 90S.

standard FMW has the meaning given by section 90Q.

90C Meaning of *casual loading provisions*

- (1) For the purposes of this Division, ***casual loading provisions***, of a pre-reform wage instrument or an APCS, are provisions of the instrument or APCS that determine a casual loading payable to an employee, or an employee of a particular classification, in addition to a basic periodic rate of pay.
- (2) The means by which such provisions may determine a casual loading include the following, or any combination of any of the following:
 - (a) direct specification of the loading;
 - (b) identification of the loading by reference to other provisions (whether or not of the same instrument or APCS);
 - (c) direct specification, or identification by reference to other provisions (whether or not of the same instrument or APCS), of a method for calculating the loading.
- (3) Subject to the regulations, a method referred to in subsection (2) may provide for a person or body to determine a loading in a particular way. For the purposes of this Division, a loading determined by the person or body in that way is taken to be a loading determined by the provisions that specify or identify the method.

90D Meaning of *classification*

- (1) For the purposes of this Division, a *classification* of employees is a classification or category of employees, however described in the pre-reform wage instrument or APCS concerned.
- (2) A classification or category of employees may be described by reference to matters including (but not limited to) any of the following, or any combination of any of the following:
 - (a) the nature of work performed by employees;
 - (b) the skills or qualifications of employees;
 - (c) the level of responsibility or experience of employees;
 - (d) whether employees are junior employees, or a particular class of junior employees;
 - (e) whether employees are employees with a disability, or are a particular class of employees with a disability;
 - (f) whether employees are employees to whom training arrangements, or are a particular class of employees to whom training arrangements, apply.

90E Meaning of *rate provisions*

- (1) For the purposes of this Division, *rate provisions*, of a pre-reform wage instrument or an APCS, are provisions of the instrument or APCS that determine a basic periodic rate of pay, or basic piece rates of pay, payable to an employee, or an employee of a particular classification.
- (2) The means by which such provisions may determine a basic periodic rate of pay, or a basic piece rate of pay, include the following, or any combination of any of the following:
 - (a) direct specification of a rate;
 - (b) identification of a rate by reference to other provisions (whether or not of the same instrument or APCS);
 - (c) direct specification, or identification by reference to other provisions (whether or not of the same instrument or APCS), of a method for calculating a rate.
- (3) Subject to the regulations, a method referred to in subsection (2) may provide for a person or body to determine a rate in a particular way. For the purposes of this Division, a rate determined by the

person or body in that way is taken to be a rate determined by the provisions that specify or identify the method.

Subdivision B—Guarantee of basic rates of pay

90F The guarantee

Guarantee of APCS basic periodic rates of pay

- (1) If:
- (a) the employment of an employee is covered by an APCS; and
 - (b) the employee is not an APCS piece rate employee;
- the employee must be paid a basic periodic rate of pay for each of the employee's guaranteed hours (pro-rated for part hours) that is at least equal to the basic periodic rate of pay (the ***guaranteed basic periodic rate of pay***) that is payable to the employee under the APCS.

Note: For what are the employee's guaranteed hours, see section 90G.

Guarantee of APCS piece rates of pay

- (2) If:
- (a) the employment of an employee is covered by an APCS; and
 - (b) the employee is an APCS piece rate employee;
- the employee must be paid basic piece rates of pay for his or her work that are at least equal to the basic piece rates of pay (the ***guaranteed basic piece rates of pay***) that are payable to the employee under the APCS.

Guarantee of standard FMW

- (3) If:
- (a) the employment of an employee is not covered by an APCS; and
 - (b) the employee is not a junior employee, an employee with a disability, or an employee to whom a training arrangement applies;
- the employee must be paid a basic periodic rate of pay for each of the employee's guaranteed hours (pro-rated for part hours) that is at least equal to the standard FMW (the ***guaranteed basic periodic rate of pay***).

Note: For what are the employee's guaranteed hours, see section 90G.

Guarantee of special FMW

- (4) If:
- (a) the employment of an employee is not covered by an APCS; and
 - (b) the employee is a junior employee, an employee with a disability, or an employee to whom a training arrangement applies; and
 - (c) there is a special FMW for the employee;
- the employee must be paid a basic periodic rate of pay for each of the employee's guaranteed hours (pro-rated for part hours) that is at least equal to that special FMW (the ***guaranteed basic periodic rate of pay***).

Note: For what are the employee's guaranteed hours, see section 90G.

90G An employee's guaranteed hours for the purpose of section 90F

Employees employed to work a specified number of hours

- (1) For the purposes of section 90F, if an employee is employed to work a specified number of hours per week, the ***guaranteed hours*** for the employee, for each week, are to be worked out as follows:
- (a) start with that specified number of hours (subject to subsection (4));
 - (b) deduct all of the following:
 - (i) any hours in the week when the employee is absent from work on deductible authorised leave (as defined in subsection (6));
 - (ii) any hours in the week in relation to which the employer is prohibited by section 114 from making a payment to the employee;
 - (iii) any other hours of unauthorised absence from work by the employee in the week;
 - (c) if, during the week, the employee works, and is required or requested to work, additional hours that are, under the terms and conditions of the employee's employment, not counted towards the specified number of hours—add on those additional hours.

Note: The actual hours worked from week to week by an employee who is employed to work a specified number of hours per week may vary, due to averaging as mentioned in section 91C or to some other kind of flexible working hours scheme that applies to the employee's employment.

- (2) If an employee is employed on a full-time basis, but the terms and conditions of the employee's employment do not determine the number of hours in a period that is to constitute employment on a full-time basis for the employee, the employee is, for the purpose of subsection (1), taken to be employed to work 38 hours per week.
- (3) If an employee is employed to work a specified number (the ***number of non-week specified hours***) of hours per period (the ***non-week period***), but that period is not a week (for example, it is a fortnight), then, for the purpose of subsection (1), the employee is taken to be employed to work the number of hours per week determined, subject to the regulations (if any), in accordance with the formula:

$$\text{Number of non-week specified hours} \times \frac{7}{\text{Number of days in non-week period}}$$

- (4) If:
- (a) subsection (1) applies to the employment of an employee to whom a training arrangement applies; and
 - (b) an APCS includes provisions that determine, in relation to the employee's employment, that hours attending off-the-job training (including hours attending an educational institution) are hours for which a basic periodic rate of pay is payable; and
 - (c) the hours that would otherwise be the specified number of hours referred to in subsection (1) for the employee for a week do not include all the hours (the ***paid training hours***) in the week that the APCS so determines are hours for which a basic periodic rate of pay is payable;
- subsection (1) applies as if the specified number of hours were increased to such number of hours as includes all the paid training hours.

Employees not employed to work a specified number of hours

- (5) For the purpose of section 90F, if subsection (1) of this section does not apply to the employment of an employee, the **guaranteed hours** for the employee are the hours that the employee both is required or requested to work, and does work, for the employer, less any period in relation to which the employer is prohibited by section 114 from making a payment to the employee.

Definitions

- (6) In this section:

deductible authorised leave means leave, or an absence, whether paid or unpaid, that is authorised:

- (a) by an employee's employer; or
- (b) by or under a term or condition of an employee's employment; or
- (c) by or under a law, or an instrument in force under a law, of the Commonwealth, a State or a Territory;

but not including any leave or absence:

- (d) that is on a public holiday and that is so authorised because the day is a public holiday; or
- (e) any leave or absence that is authorised in order for the employee to attend paid training hours (within the meaning of paragraph (4)(c)) of off-the-job training.

hour includes a part of an hour.

Note: An employee's guaranteed hours may therefore be a number of hours and part of an hour.

public holiday means:

- (a) a day declared by or under a law of a State or Territory to be observed generally within the State or Territory, or a region of that State or Territory, as a public holiday by people who work in that State, Territory or region, other than:
 - (i) a union picnic day; or
 - (ii) a day, or kind of day, that is excluded by regulations made for the purposes of this paragraph from counting as a public holiday; or
- (b) a day that, under (or in accordance with a procedure under) a law of a State or Territory, or an award or workplace

agreement, is substituted for a day referred to in paragraph (a).

90GA Modified operation of section 90F to continue effect of Supported Wage System for certain employees with a disability

- (1) This section applies to the employment of an employee with a disability if:
 - (a) subsection 90F(1) applies (disregarding this section) to the employment of the employee; and
 - (b) the APCS that covers the employee's employment does not determine the basic periodic rate of pay for the employee as a rate that is specific to employees with disabilities; and
 - (c) the employee is eligible for the Supported Wage System; and
 - (d) the employee's employment is covered by a workplace agreement; and
 - (e) the workplace agreement provides for the payment of a basic periodic rate of pay to the employee at a rate that is not less than the rate (the *SWS-compliant rate of pay*) set in accordance with the Supported Wage System.

Note: The Supported Wage System was endorsed by the Commission in the Full Bench decision dated 10 October 1994 (print L5723).

- (2) If this section applies to the employment of the employee, subsection 90F(1) has effect as if the guaranteed basic periodic rate of pay under that subsection for the employment of the employee were instead a rate equal to the SWS-compliant rate of pay.

Subdivision C—Guarantee of casual loadings

90H The guarantee

- (1) This section applies to a casual employee for whom, under section 90F, there is a guaranteed basic periodic rate of pay, other than a casual employee in relation to whom the following paragraphs are satisfied:
 - (a) subsection 90F(1) applies to the employee;
 - (b) the APCS that covers the employment of the employee does not contain casual loading provisions under which a casual loading is payable to the employee;

(c) the employee's employment is not covered by a workplace agreement.

(2) The casual employee must be paid, in addition to his or her actual basic periodic rate of pay, a casual loading that is at least equal to the guaranteed casual loading percentage of that actual basic periodic rate of pay.

Note: The employee's actual basic periodic rate of pay should at least equal the guaranteed basic periodic rate of pay under section 90F.

(3) The *guaranteed casual loading percentage* is as set out in the following table:

Item	In this situation ...	the guaranteed casual loading percentage is ...
1	if: (a) subsection 90F(1) applies to the employment of the employee; and (b) the employee's employment is not covered by a workplace agreement; and (c) subsection 103R(1) is not operating in relation to the employee's employment;	the percentage that is the casual loading payable to the employee under casual loading provisions of the APCS referred to in subsection 90F(1).
2	if: (a) subsection 90F(1) applies to the employment of the employee; and (b) the employee's employment is not covered by a workplace agreement; and (c) subsection 103R(1) is operating in relation to the employee's employment;	the higher of: (a) the percentage that is the casual loading payable to the employee under casual loading provisions of the APCS referred to in subsection 90F(1); and (b) the default casual loading percentage.
3	if: (a) subsection 90F(1) applies to the employment of the employee; and (b) the employee's employment is covered by a workplace agreement;	the default casual loading percentage.

Item	In this situation ...	the guaranteed casual loading percentage is ...
4	if subsection 90F(3) or (4) applies to the employment of the employee	the default casual loading percentage.

90I Default casual loading percentage

- (1) The *default casual loading percentage* is 20%, subject to the power of the AFPC to adjust the percentage.
- (2) Any adjustment of the default casual loading percentage must be such that the adjusted rate is still expressed as a percentage.

90J Adjustment of default casual loading percentage

- (1) The AFPC may adjust the default casual loading percentage.
- (2) The power to adjust the default casual loading percentage is subject to:
 - (a) sections 90 and 90A; and
 - (b) subsection 90I(2); and
 - (c) section 90K; and
 - (d) section 90N; and
 - (e) section 90ZR.

90K Only one default casual loading percentage

The AFPC must ensure that there is only ever one default casual loading percentage at any one time.

Subdivision CA—Guarantee of frequency of payment

90KA The guarantee

APCS applies and contains frequency of payment provisions

- (1) If:
 - (a) the employment of an employee is covered by an APCS; and
 - (b) the APCS contains frequency of payment provisions that apply in relation to the employee's employment;

the employer must comply with those provisions in relation to the employee.

APCS applies but does not contain frequency of payment provisions

- (2) If:
- (a) the employment of an employee is covered by an APCS; but
 - (b) the APCS does not contain frequency of payment provisions that apply in relation to the employee's employment;
- then:
- (c) if a workplace agreement that covers the employment of the employee contains frequency of payment provisions that apply in relation to the employee's employment—the employer must comply with those provisions in relation to the employee; or
 - (d) if paragraph (c) does not apply, and the employee's contract of employment contains frequency of payment provisions that apply in relation to the employee's employment—the employer must comply with those provisions in relation to the employee; or
 - (e) if neither paragraph (c) nor (d) applies—the employer must pay the employee on the basis of fortnightly payments in arrears.

Other situations

- (3) If the employment of an employee is not covered by an APCS, then:
- (a) if a workplace agreement that covers the employment of the employee contains frequency of payment provisions that apply in relation to the employee's employment—the employer must comply with those provisions in relation to the employee; or
 - (b) if paragraph (a) does not apply, and the employee's contract of employment contains frequency of payment provisions that apply in relation to the employee's employment—the employer must comply with those provisions in relation to the employee; or

-
- (c) if neither paragraph (a) nor (b) applies—the employer must pay the employee on the basis of fortnightly payments in arrears.

Subdivision D—Guarantee against reductions below pre-reform commencement rates

90L The guarantee where only basic periodic rates of pay are involved

- (1) This section applies if:
- (a) the AFPC proposes to exercise any of the following powers (subject to subsection (4)):
 - (i) adjusting the standard FMW;
 - (ii) adjusting a preserved APCS;
 - (iii) determining or adjusting a new APCS;
 - (iv) revoking a preserved or new APCS; and
 - (b) immediately after the exercise of the power takes effect, there will, under section 90F, be a guaranteed basic periodic rate of pay (the *resulting guaranteed basic periodic rate*) for a particular employee affected by the exercise of the power; and
 - (c) immediately after the reform commencement (and after any relevant adjustments mentioned in sections 90ZE to 90ZH took effect), there would, under section 90F, have been a guaranteed basic periodic rate of pay (the *commencement guaranteed basic periodic rate*) for the employee if the employee had at that time been in his or her current circumstances of employment.
- (2) The AFPC must ensure that the result of the exercise of the power, so far as it affects the employee, is such that the resulting guaranteed basic periodic rate of pay for the employee will not be less than the commencement guaranteed basic periodic rate of pay for the employee.
- (3) In applying this section in relation to a particular exercise of a power by the AFPC, the effect of any other exercise of a power by the AFPC that takes effect at the same time must also be taken into account.

- (4) This section does not limit the AFPC's power to make APCSs for the purpose of section 90ZP or 90ZQ, or to adjust APCSs made for the purpose of either of those sections.

90M The guarantee where basic piece rates of pay are involved

- (1) This section applies if:
- (a) the AFPC proposes to exercise any of the following powers (subject to subsection (4)):
 - (i) adjusting the standard FMW;
 - (ii) adjusting a preserved APCS;
 - (iii) determining or adjusting a new APCS;
 - (iv) revoking a preserved or new APCS; and
 - (b) either or both of the following subparagraphs apply in relation to a particular employee who will be affected by the exercise of the power:
 - (i) immediately after the exercise of the power takes effect, there will, under section 90F, be guaranteed basic piece rates of pay for the employee;
 - (ii) immediately after the reform commencement (and after any relevant adjustments mentioned in sections 90ZE to 90ZH took effect), there would, under section 90F, have been guaranteed basic piece rates of pay for the employee if the employee had at that time been in his or her current circumstances of employment.
- (2) The AFPC must exercise the power in a way that it considers will not result in an employee of average capacity, after the exercise of the power takes effect, being entitled to less basic pay per week than he or she would have been entitled to because of this Division immediately after the reform commencement if the employee had at that time been in his or her current circumstances of employment.
- (3) In applying this section in relation to a particular exercise of a power by the AFPC, the effect of any other exercise of a power by the AFPC that takes effect at the same time must also be taken into account.
- (4) This section does not limit the AFPC's power to make APCSs for the purpose of section 90ZP or 90ZQ, or to adjust APCSs made for the purpose of either of those sections.
-

90N The guarantee for casual loadings that apply to basic periodic rates of pay

- (1) This section applies in relation to the exercise by the AFPC of any of the following powers:
 - (a) adjusting a preserved APCS;
 - (b) determining or adjusting a new APCS;
 - (c) revoking a preserved or new APCS;
 - (d) adjusting the default casual loading percentage.
- (2) The AFPC must ensure that the result of the exercise of the power, so far as it affects any particular employee to whom this Division applies (other than an employee who will, after the exercise of the power, be an APCS piece rate employee), is such that the resulting guaranteed casual loading percentage for the employee will not be less than the commencement guaranteed casual loading percentage for the employee.
- (3) For the purposes of subsection (2):
 - (a) the **resulting guaranteed casual loading percentage** for the employee is the guaranteed casual loading percentage referred to in section 90H for the employee, as it will be immediately after the exercise of the power takes effect; and
 - (b) subject to subsection (4), the **commencement guaranteed casual loading percentage** for the employee is the percentage that, immediately after the reform commencement (and after any relevant adjustments mentioned in sections 90ZE to 90ZH took effect), would have been the guaranteed casual loading percentage referred to in section 90H for the employee if the employee had, at that time, been in his or her current circumstances of employment.
- (4) If:
 - (a) the employee is a casual employee; and
 - (b) the resulting guaranteed casual loading percentage is the default casual loading percentage because of item 3 of the table in subsection 90H(3);
 the **commencement guaranteed casual loading percentage** for the employee is taken to be the default casual loading percentage, as it was immediately after the reform commencement.

- (5) In applying this section in relation to a particular exercise of a power by the AFPC, the effect of any other exercise of a power by the AFPC that takes effect at the same time must also be taken into account.

Subdivision E—The guarantee against reductions below Federal Minimum Wages (FMWs)

90O The guarantee

- (1) Subject to subsection (3), when exercising its power to make an APCS, or to adjust an APCS, the AFPC must ensure that the rate provisions in the APCS are such that the resulting APCS basic periodic rate of pay for each employee:
- (a) whose employment will be covered by the APCS immediately after the exercise of the power; and
 - (b) for whom there will be an FMW immediately after the exercise of the power; and
 - (c) who will not be an APCS piece rate employee immediately after the exercise of the power;

is not less than that FMW.

Note 1: This section does not apply to rates determined by rate provisions as initially included in a preserved APCS from a pre-reform wage instrument as mentioned paragraph 90ZD(1)(a). However, this section does apply to any subsequent adjustment of those rate provisions, or to any new APCS that replaces the preserved APCS.

Note 2: See also section 90ZC (deeming APCS rates to at least equal FMW rates after first exercise of powers under this Division by the AFPC).

- (2) For the purposes of subsection (1), the ***resulting APCS basic periodic rate of pay*** for an employee is the basic periodic rate of pay that will be payable to the employee under the APCS immediately after the exercise of the power by the AFPC takes effect.
- (3) The requirement in subsection (1) does not apply in relation to a special FMW unless the determination of the special FMW includes a statement to the effect that the special FMW is a minimum standard for all APCSs, for a class of APCSs that includes the APCS or for the particular APCS (see section 90T).
- (4) In applying this section in relation to a particular exercise of a power by the AFPC, the effect of any other exercise of a power by
-

the AFPC that takes effect at the same time must also be taken into account.

Subdivision F—Federal Minimum Wages (FMWs)

90P When is there an FMW for an employee?

- (1) There is an FMW for an employee if the employee is not:
 - (a) a junior employee; or
 - (b) an employee with a disability; or
 - (c) an employee to whom a training arrangement applies; or
 - (d) an APCS piece rate employee.The FMW for the employee is the standard FMW.
- (2) There is an FMW for a junior employee (other than an APCS piece rate employee) if the AFPC has determined a special FMW that applies to all junior employees, or to a class of junior employees that includes the employee. The FMW for the employee is that special FMW.
- (3) There is an FMW for an employee with a disability (other than an APCS piece rate employee) if the AFPC has determined a special FMW that applies to all employees with a disability, or to a class of employees with a disability that includes the employee. The FMW for the employee is that special FMW.
- (4) There is an FMW for an employee to whom a training arrangement applies (other than an APCS piece rate employee) if the AFPC has determined a special FMW that applies to all employees to whom training arrangements apply, or to a class of employees to whom training arrangements apply that includes the employee. The FMW for the employee is that special FMW.

90Q Standard FMW

- (1) The *standard FMW* is \$12.75 per hour, subject to the power of the AFPC to adjust the standard FMW.
- (2) Any adjustment of the standard FMW must be such that the adjusted rate is still expressed as a monetary amount per hour.

90R Adjustment of standard FMW

- (1) The AFPC may adjust the standard FMW.
- (2) The power to adjust the standard FMW is subject to:
 - (a) sections 90 and 90A; and
 - (b) section 90L; and
 - (c) section 90M; and
 - (d) subsection 90Q(2); and
 - (e) section 90ZR.

90S Determination of special FMWs

The AFPC may determine a *special FMW* for any of the following:

- (a) all junior employees, or a class of junior employees;
- (b) all employees with a disability, or a class of employees with a disability;
- (c) all employees to whom training arrangements apply, or a class of employees to whom training arrangements apply.

90T AFPC to state whether special FMW is a minimum standard for APCSs

- (1) When determining a special FMW, the AFPC must consider whether the FMW is to operate as a minimum standard for all, or one or more, APCSs.
- (2) If the AFPC considers that the special FMW should operate as a minimum standard for all APCSs, the AFPC must, in the instrument determining the special FMW, include a statement to that effect.
- (3) If the AFPC considers that the special FMW should operate as a minimum standard for one or more (but not all) APCSs, the AFPC must, in the instrument determining the special FMW, include a statement to that effect that identifies those APCSs, whether by description of a class or identification of the particular APCS or APCSs.
- (4) If the AFPC considers that the special FMW should not operate as a minimum standard for any APCS, the AFPC must, in the

instrument determining the special FMW, include a statement to that effect.

90U How a special FMW is to be expressed

- (1) A special FMW is to be expressed in a way that produces a monetary amount per hour.
- (2) The means by which a special FMW may be expressed to produce a monetary amount per hour include:
 - (a) specification of a monetary amount per hour; or
 - (b) specification of a method for calculating a monetary amount per hour.
- (3) Any adjustment of a special FMW must be such that the adjusted special FMW still complies with this section.

90V Adjustment of a special FMW

- (1) The AFPC may adjust a special FMW.
- (2) The power to adjust a special FMW is subject to:
 - (a) sections 90 and 90A; and
 - (b) section 90U; and
 - (c) section 90ZR.
- (3) The AFPC may adjust statements of a kind mentioned in section 90T that are included in the instrument determining the special FMW.

Subdivision G—Australian Pay and Classification Scales (APCSs): general provisions

90W What is an APCS?

- (1) An APCS is a set of provisions relating to pay and loadings for particular employees that complies with this Subdivision.
- (2) An APCS is either:
 - (a) a preserved APCS (see section 90ZD); or
 - (b) a new APCS (see section 90ZJ).

90X What must or may be in an APCS?

- (1) An APCS must contain:
 - (a) either or both of the following:
 - (i) rate provisions determining basic periodic rates of pay for employees whose employment is covered by the APCS;
 - (ii) rate provisions determining basic piece rates of pay for employees whose employment is covered by the APCS; and
 - (b) if the rate provisions determine different rates of pay for employees of different classifications—provisions describing those classifications; and
 - (c) coverage provisions.
- (2) An APCS may also contain:
 - (a) casual loading provisions determining casual loadings for employees whose employment is covered by the APCS and for whom there are not basic piece rates of pay; and
 - (b) if the casual loading provisions determine different casual loadings for employees of different classifications—provisions describing those classifications; and
 - (c) provisions that determine, in relation to employees to whom training arrangements apply, whether hours attending off-the-job training (including hours attending an educational institution) are hours for which a basic periodic rate of pay is payable; and
 - (ca) frequency of payment provisions; and
 - (d) other incidental provisions.
- (3) Subject to subsection 90ZD(3A), rate provisions or casual loading provisions in an APCS must not include provisions under which a rate or casual loading provided for by the APCS will or may be increased by operation of the provisions and without anyone having to take any other action.

Note: This does not prevent an APCS, or an adjustment of an APCS, from being expressed to take effect at a future date. However, it does prevent an APCS from containing provisions under which (for example):

- (a) there will be one or more specified increases of a rate or loading at a specified future time or times; or

- (b) rates of pay or loading are indexed periodically.
 - (4) The AFPC must not include in a new APCS, or adjust a preserved or new APCS so that it includes, provisions that:
 - (a) determine whether an employer who acquires a business (whether by transfer or in some other way) is covered by the APCS; or
 - (b) give a person or body a power to make a decision that affects whether a person is covered by the APCS; or
 - (c) give the Commission a direct or indirect role in determining a rate of pay or loading.
- Note: A preserved APCS may contain provisions referred to in subsection (4) that were contained in the pre-reform wage instrument from which the APCS is derived, but the effect of those provisions is limited by sections 90Z and 90ZE.
- (5) An APCS must not contain any provisions that purport to limit the duration of the APCS.
 - (6) Subject to the regulations, an APCS must not contain any other provisions.

90Y How pay rates and loadings are to be expressed in an APCS

- (1) Rate provisions in an APCS must be such that basic periodic rates of pay determined by the provisions are expressed as a monetary amount per hour.
- (2) Rate provisions in an APCS must be such that basic piece rates of pay determined by the provisions are expressed as a monetary amount.
- (3) Casual loading provisions in an APCS must be such that casual loadings determined by the provisions are expressed as percentages to be applied to basic periodic rates of pay.
- (4) The AFPC must ensure these rules are complied with in exercising its powers to adjust a preserved APCS or make or adjust a new APCS.

90Z When is employment covered by an APCS?

- (1) The question whether the employment of a particular employee is covered by a particular APCS is to be determined by reference to the coverage provisions of the APCS.
- (2) If coverage provisions of a preserved APCS include provisions that determine whether an employer who acquires a business (whether by transfer or in some other way) is covered by the APCS, those provisions only have effect, for the purpose of determining whether the employment of a particular employee is covered by the APCS, in relation to acquisitions of businesses that occurred before the reform commencement.
- (3) If coverage provisions of a preserved APCS include provisions that give a person or body a power to make a decision that affects whether a person is covered by the APCS, those provisions only have effect, for the purpose of determining whether the employment of a particular employee is covered by the APCS, in relation to decisions made by the person or body before the reform commencement.

90ZA What if 2 or more APCSs would otherwise cover an employee?

- (1) If, but for this section, 2 or more APCSs would cover the employment of the same employee, the employment of the employee is taken to be covered only by the APCS that prevails.
- (2) Apply the following rules to work out which APCS prevails:
 - (a) the preserved APCS derived from the pre-reform federal wage instrument referred to in paragraph (b) of the definition of *pre-reform federal wage instrument* in section 90B (as that preserved APCS is adjusted from time to time) prevails over any other APCS;
 - (b) subject to paragraph (a), an APCS made in accordance with Subdivision L (as that APCS is adjusted from time to time) prevails over any other APCS;
 - (c) subject to paragraphs (a) and (b):
 - (i) a new APCS prevails over a preserved APCS; and
 - (ii) a preserved APCS that is derived from a pre-reform federal wage instrument prevails over a preserved

APCS that is derived from a pre-reform non-federal wage instrument;

- (d) subject to paragraphs (a), (b) and (c):
 - (i) as between 2 or more APCSs that are made or adjusted on different days, the APCS that is made or adjusted on the more recent day prevails; and
 - (ii) as between 2 or more APCSs that are made or adjusted on the same day, the APCS that is more generous to the employee prevails.
- (3) For the purpose of this section, all preserved APCSs are taken to have been made on the day on which the reform commencement occurs.

90ZB AFPC to remove coverage rules described by reference to State or Territory boundaries

- (1) The AFPC must (through exercise of its powers to adjust, revoke and make APCSs) ensure that, by the end of the period of 3 years starting on the reform commencement, all APCSs comply with the following rules:
 - (a) the question whether the employment of a particular employee is covered by an APCS must not be determined by reference to State or Territory boundaries;
 - (b) the question whether a particular employee is entitled to a particular basic periodic rate of pay, basic piece rate of pay, or casual loading provided for by an APCS must not be determined by reference to State or Territory boundaries.
- (2) In complying with this obligation, the AFPC must do so in a way that also complies with the rest of this Division, including (in particular) sections 90L, 90M, 90N and 90O.

90ZC Deeming APCS rates to at least equal FMW rates after first exercise of AFPC's powers takes effect

- (1) This section applies at all times after the first exercise of powers by the AFPC under this Division takes effect. If the first exercise of powers involves the exercise of powers taking effect at different times, this section applies at all times after the earliest of those times.

- (2) Subject to subsection (3), if:
- (a) there is an FMW for an employee at a particular time when this section applies; and
 - (b) an APCS that covers the employment of the employee determines a basic periodic rate of pay for the employee at that time that is less than that FMW;
- the basic periodic rate of pay determined by the APCS for the employee at that time is taken to be equal to the rate that is the FMW for the employee at that time.

Note: This subsection ensures that the employee will, under subsection 90F(1), be guaranteed a rate that equals the FMW rate, rather than the lower APCS rate.

- (3) Subsection (2) does not apply in relation to a special FMW and a particular APCS unless the determination of the special FMW includes a statement to the effect that the special FMW is a minimum standard for all APCSs, for a class of APCSs that includes the APCS or for the particular APCS (see section 90T).

Subdivision H—Australian Pay and Classification Scales: preserved APCSs

90ZD Deriving preserved APCSs from pre-reform wage instruments

- (1) If a pre-reform wage instrument contains rate provisions determining one or more basic periodic rates of pay, or basic piece rates of pay, payable to employees, then, from the reform commencement, there is taken to be a *preserved APCS* that includes (subject to this Subdivision):
- (a) those rate provisions; and
 - (b) if those rate provisions determine different basic periodic rates of pay, or different basic piece rates of pay, for employees of different classifications—the provisions of the instrument that describe those classifications; and
 - (c) any casual loading provisions of the instrument that determine casual loadings payable to employees, other than employees for whom the instrument provides basic piece rates of pay; and
 - (d) if the casual loading provisions determine different casual loadings for employees of different classifications—the

provisions of the instrument that describe those classifications; and

- (e) any provisions of the instrument that determine, in relation to employees to whom training arrangements apply, whether hours attending off-the-job training (including hours attending an educational institution) count as hours for which a basic periodic rate of pay is payable; and
 - (ea) any frequency of payment provisions for the instrument; and
 - (f) the coverage provisions for the instrument.
- (2) The preserved APCS is *derived from* the pre-reform wage instrument.
- (3) Subject to subsection (3A) and the regulations, the preserved APCS is taken not to include any provision of the pre-reform wage instrument which, after the adjustments referred to in sections 90ZE to 90ZH take effect, will not comply with the requirements of sections 90X and 90Y.

Note: For when regulations made for the purpose of subsection (3) may be expressed to take effect, see section 90ZI.

(3A) If:

- (a) the rate provisions referred to in paragraph (1)(a) include pay increases for particular employees, determined before the reform commencement, that are expressed to take effect at a time or times after the reform commencement; and
- (b) those increases were determined by the Commission, or by a State industrial authority, wholly or partly on the ground of work value change or pay equity;

then (despite subsection 90X(3)), the preserved APCS is taken to include provisions under which those increases will take effect for those employees at that time or those times.

- (4) The adjustments referred to in sections 90ZE to 90ZH are, subject to the regulations, to be made in the following order:
- (a) adjustments referred to in section 90ZE;
 - (b) adjustments referred to in section 90ZF;
 - (c) adjustments referred to in section 90ZG;
 - (d) adjustments referred to in subsection 90ZH(1).

Note: For when regulations made for the purpose of subsection (4) may be expressed to take effect, see section 90ZI.

90ZE Notional adjustment: rates and loadings determined as for reform comparison day

Rate provisions

- (1) Subject to subsections (2) and (3), if rate provisions included in a preserved APCS as mentioned in section 90ZD would, apart from this subsection, determine a basic periodic rate of pay otherwise than by direct specification of the monetary amount of the rate, then the APCS is taken to be adjusted as necessary immediately after the reform commencement so that those rate provisions instead directly specify, as that rate of pay, the rate as determined by the provisions for the reform comparison day.
- (2) Subsection (1) does not apply to the rate provisions included in the preserved APCS derived from the pre-reform federal wage instrument referred to in paragraph (b) of the definition of *pre-reform federal wage instrument* in section 90B.
- (3) If the rate provisions included in a preserved APCS as mentioned in section 90ZD determine a basic periodic rate of pay by (or by referring to) a pro-rata disability pay method, subsection (1) applies to any other rate of pay that the method refers to, but does not otherwise apply to the method.
- (4) If the rate provisions included in a preserved APCS as mentioned in section 90ZD determine a basic piece rate of pay by (or by referring to) a method, subsection (1) does not apply to the rate provisions that determine that rate.
- (5) The regulations may provide for other situations in which subsection (1) is not to apply to rate provisions, or is to apply with specified modifications.

Note: For when regulations made for the purpose of subsection (5) may be expressed to take effect, see section 90ZI.

Casual loading provisions

- (6) If casual loading provisions included in a preserved APCS as mentioned in section 90ZD would, apart from this subsection, determine a loading otherwise than by direct specification of the loading, then the APCS is taken to be adjusted as necessary immediately after the reform commencement so that those loading

provisions instead directly specify, as that loading, the loading as determined by the provisions for the reform comparison day.

90ZF Notional adjustment: deducing basic periodic rate of pay and casual loading from composite rate

If:

- (a) a particular rate of pay determined by rate provisions included in a preserved APCS as mentioned in section 90ZD would, apart from this subsection, be a basic periodic rate of pay for a casual employee; and
- (b) the rate of pay is, by an amount (the *inbuilt casual loading amount*), higher than it would have been if the employee had not been a casual employee; and
- (c) apart from this subsection, the preserved APCS does not contain casual loading provisions that determine a casual loading for the employee;

the APCS is taken to be adjusted as necessary immediately after the reform commencement so that:

- (d) the rate provisions instead determine a basic periodic rate of pay for the employee that equals the rate referred to in paragraph (a), reduced by the inbuilt casual loading amount; and
- (e) the preserved APCS contains casual loading provisions that determine a casual loading for the employee that equals the inbuilt casual loading amount.

90ZG Notional adjustment: how basic periodic rates and loadings are expressed

- (1) If a particular basic periodic rate of pay determined by rate provisions included in a preserved APCS as mentioned in section 90ZD would, apart from this subsection, be expressed as a monetary amount for a period other than an hour (for example, it would be expressed as a rate for a week), the rate provisions are taken to be adjusted as necessary immediately after the reform commencement so that they produce the result that the rate is expressed as the equivalent monetary hourly rate.
- (2) If a particular casual loading determined by casual loading provisions included in a preserved APCS as mentioned in

section 90ZD would, apart from this subsection, be expressed as an amount of money that is to be added to a basic periodic rate of pay, the loading provisions are taken to be adjusted as necessary immediately after the reform commencement so that they produce the result that the loading is expressed as the equivalent percentage of the basic periodic rate of pay.

90ZH Regulations dealing with notional adjustments

- (1) The regulations may provide for other adjustments (including by determining methods for working out adjustments) that are to be taken to be made to a preserved APCS.
- (2) The regulations may determine methods for working out the adjustments mentioned in any of sections 90ZE to 90ZG, or may otherwise clarify the operation of any aspect of those sections. Those sections have effect accordingly.

Note: For when regulations made for the purpose of this section may be expressed to take effect, see section 90ZI.

90ZI Certain regulations relating to preserved APCSs may take effect before registration

- (1) This section applies to regulations made for the purpose of any of the following provisions:
 - (a) paragraph (c) or (d) of the definition of *pre-reform federal wage instrument* in section 90B;
 - (b) paragraph (c) or (d) of the definition of *pre-reform State wage instrument* in section 90B;
 - (c) paragraph (b) or (c) of the definition of *pre-reform Territory wage instrument* in section 90B;
 - (d) subsection 90ZD(3) or (4);
 - (e) subsection 90ZE(5);
 - (f) section 90ZH.
- (2) Despite subsection 12(2) of the *Legislative Instruments Act 2003*, regulations to which this section applies may be expressed to take effect from a date before the regulations are registered under that Act.
- (3) If regulations to which this section applies take effect before their registration under the *Legislative Instruments Act 2003*, those

regulations are not to be taken into account in determining the effect of sections 90F, 90H, 90L, 90M and 90N in relation to periods of employment before the registration of those regulations.

Subdivision I—Australian Pay and Classification Scales: new APCSs

90ZJ AFPC may determine new APCSs

- (1) The AFPC may determine an APCS (a *new APCS*).
- (2) The power to determine a new APCS is subject to:
 - (a) sections 90 and 90A; and
 - (b) section 90L; and
 - (c) section 90M; and
 - (d) section 90N; and
 - (e) section 90O; and
 - (f) section 90X; and
 - (g) section 90Y; and
 - (h) Subdivision L; and
 - (i) section 90ZR.

Subdivision J—Australian Pay and Classification Scales: duration, adjustment and revocation of APCSs (preserved or new)

90ZK Duration of APCSs

An APCS continues to have effect indefinitely (subject to revocation or adjustment by the AFPC under this Subdivision, and to the rules in section 90ZA about when one APCS prevails over another).

90ZL Adjustment of APCSs

- (1) The AFPC may adjust an APCS.
- (2) The power to adjust an APCS is subject to:
 - (a) sections 90 and 90A; and
 - (b) section 90L; and

- (c) section 90M; and
- (d) section 90N; and
- (e) section 90O; and
- (f) section 90X; and
- (g) section 90Y; and
- (h) Subdivision K; and
- (i) section 90ZR.

90ZM Revocation of APCSs

- (1) The AFPC may revoke an APCS.
- (2) The power to revoke an APCS is subject to:
 - (a) sections 90 and 90A; and
 - (b) section 90L; and
 - (c) section 90M; and
 - (d) section 90N; and
 - (e) section 90ZR.

Subdivision K—Adjustments to incorporate 2005 Safety Net Review etc.

90ZN Adjustments to incorporate 2005 Safety Net Review

- (1) This section applies in relation to a preserved APCS if:
 - (a) the APCS is derived from a pre-reform federal wage instrument referred to in paragraph (a) of the definition of *pre-reform federal wage instrument* in section 90B; and
 - (b) either:
 - (i) in accordance with the Commission's wage fixing principles that applied at that time, the Commission (before the reform commencement) adjusted the instrument in accordance with the Commission's 2004 Safety Net Review decision; or
 - (ii) the instrument took effect after the Commission's 2004 Safety Net Review decision; and
 - (c) the Commission did not, before the reform commencement, adjust the instrument in accordance with the Commission's 2005 Safety Net Review decision.

- (2) The AFPC must adjust the rate provisions of the preserved APCS to increase rates in accordance with the Commission's 2005 Safety Net Review decision (if applicable), except to the extent that the AFPC is satisfied it is not appropriate to do so because of the effect of subsection 90ZD(3A).
- (3) The adjustment must be made as part of the first exercise of the powers of the AFPC under this Division.
- (4) After the adjustment has been made, section 90L has effect in relation to an employee as if the adjustment had been made to the pre-reform federal wage instrument immediately before the reform commencement.

Note: This subsection ensures that the post-adjustment rate is the rate against which compliance with the guarantee in section 90L is measured.

90ZO Regulations may require adjustments to incorporate other decisions

- (1) The regulations may require the AFPC to adjust rate provisions in a class of preserved APCSs that are derived from non-federal pre-reform wage instruments to increase rates to take account of decisions that were made before the reform commencement but that were not given effect to in those instruments before the reform commencement.
- (2) Regulations made for the purposes of subsection (1) may also modify how section 90L applies in relation to any APCSs that are so adjusted.

Subdivision L—Special provisions relating to APCSs for employees with disabilities and employees to whom training arrangements apply

90ZP Employees with disabilities

- (1) If the AFPC considers that there should be an APCS that applies to all, or a class of, employees with a disability that determines basic periodic rates of pay for those employees, the AFPC must determine an APCS containing rate provisions that determine basic periodic rates of pay for those employees, and that so determines those rates as rates specific to employees with disabilities.

Note: The usual provisions relating to the content of an APCS apply (see Subdivision G).

- (2) The determination of the APCS must include a statement to the effect that it is determined for the purpose of this section.

Note: APCSs determined for the purpose of this section generally prevail over all other APCSs—see section 90ZA.

- (3) The APCS (the *special APCS*) is taken not to cover the employment of a particular employee if:
- (a) there is another APCS that covers the employment of the employee (disregarding the effect that paragraph 90ZA(2)(b) would otherwise have because of the special APCS); and
 - (b) that other APCS determines a basic periodic rate of pay specifically for a particular class of employees with disabilities; and
 - (c) the employee's employment is covered by that other APCS because the employee is a member of that class; and
 - (d) that class is the same as, or is a subclass of, the employees whose employment would otherwise be covered by the special APCS.
- (4) This section does not limit the powers of the AFPC to determine APCSs, or to revoke or adjust APCSs (including APCSs determined for the purpose of this section).

90ZQ Employees to whom training arrangements apply

- (1) If the AFPC considers that there should be an APCS that applies to all, or a class of, employees to whom training arrangements apply that determines basic periodic rates of pay that are payable to those employees, the AFPC must determine an APCS containing rate provisions that determine basic periodic rates of pay to be payable to those employees, and that so determines those rates as rates specific to employees to whom training arrangements apply.

Note: The usual provisions relating to the content of an APCS apply (see Subdivision G).

- (2) The determination of the APCS must include a statement to the effect that it is determined for the purpose of this section.

Note: APCSs determined for the purpose of this section generally prevail over all other APCSs—see section 90ZA.

-
- (3) The APCS (the *special APCS*) is taken not to cover the employment of a particular employee if:
 - (a) there is another APCS that covers the employment of the employee (disregarding the effect that paragraph 90ZA(2)(b) would otherwise have because of the special APCS); and
 - (b) that other APCS determines a basic periodic rate of pay specifically for a particular class of employees to whom training arrangements apply; and
 - (c) the employee's employment is covered by that other APCS because the employee is a member of that class; and
 - (d) that class is the same as, or is a subclass of, the employees whose employment would otherwise be covered by the special APCS.
 - (4) The AFPC must, as part of the first exercise of the powers of the AFPC under this Division, consider whether it should determine APCSs for the purpose of this section. This does not limit the AFPC's power to consider whether it should determine APCSs for the purpose of this section at other times.
 - (5) This section does not limit the powers of the AFPC to determine APCSs, or to revoke or adjust APCSs (including APCSs determined for the purpose of this section).

Subdivision M—Miscellaneous

90ZR Anti-discrimination considerations

- (1) Without limiting sections 90 and 90A, in exercising any of its powers under this Division, the AFPC is to:
 - (a) apply the principle that men and women should receive equal remuneration for work of equal value; and
 - (b) have regard to the need to provide pro-rata disability pay methods for employees with disabilities; and
 - (c) take account of the principles embodied in the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984*, the *Disability Discrimination Act 1992* and the *Age Discrimination Act 2004* relating to discrimination in relation to employment; and
 - (d) take account of the principles embodied in the Family Responsibilities Convention, in particular those relating to:

- (i) preventing discrimination against workers who have family responsibilities; or
 - (ii) helping workers to reconcile their employment and family responsibilities; and
 - (e) ensure that its decisions do not contain provisions that discriminate because of, or for reasons including, race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.
- (2) For the purposes of the Acts referred to in paragraph (1)(c), and of paragraph (1)(e), the AFPC does not discriminate against an employee or employees by (in accordance with this Division) determining or adjusting rate provisions in an APCS that determine a basic periodic rate of pay, or by (in accordance with this Division) determining or adjusting a special FMW, for:
- (a) all junior employees, or a class of junior employees; or
 - (b) all employees with a disability, or a class of employees with a disability; or
 - (c) all employees to whom training arrangements apply, or a class of employees to whom training arrangements apply.

Division 3—Maximum ordinary hours of work

Subdivision A—Preliminary

91 Employees to whom Division applies

This Division applies to all employees.

91A Definitions

In this Division:

authorised leave means leave, or an absence, whether paid or unpaid, that is authorised:

- (a) by an employee's employer; or
 - (b) by or under a term or condition of an employee's employment; or
 - (c) by or under a law, or an instrument in force under a law, of the Commonwealth, a State or a Territory.
-

employee means an employee to whom this Division applies under section 91.

91B Agreement between employees and employers

Via a workplace agreement

- (1) For the purposes of this Division, an employee and an employer are taken to agree about a particular matter in a particular way if a provision of a workplace agreement binding the employee and the employer specifies that the matter is to be dealt with in that way.

Via an award

- (2) For the purposes of this Division, an employee and an employer are taken to agree about a particular matter in a particular way if a term of an award that binds the employee and the employer specifies that the matter is to be dealt with in that way.

Via other means

- (3) To avoid doubt, nothing in this section prevents employees and employers agreeing about matters by other means.

Subdivision B—Guarantee of maximum ordinary hours of work

91C The guarantee

- (1) An employee must not be required or requested by an employer to work more than:
 - (a) either:
 - (i) 38 hours per week; or
 - (ii) subject to subsection (3), if the employee and the employer agree in writing that the employee's hours of work are to be averaged over a specified averaging period that is no longer than 12 months—an average of 38 hours per week over that averaging period; and
 - (b) reasonable additional hours.

Note 1: An employee and an employer may agree that the employee is to work less than 38 hours per week, or less than an average of 38 hours per week over the employee's averaging period.

Note 2: A requirement for an employee to work a particular number of hours may come, for example, from an award or a workplace agreement.

Calculating the number of hours worked

- (2) For the purposes of paragraph (1)(a), in calculating the number of hours that an employee has worked in a particular week, or the average number of hours that an employee has worked per week over an averaging period, the hours worked by the employee are taken to include any hours of authorised leave taken by the employee during the week, or during that period.

Start of averaging period

- (3) For the purpose of subparagraph (1)(a)(ii), if an employee starts to work for an employer after the start of a particular averaging period that applies to the employee, that averaging period is taken, in relation to the employee, not to include the period before the employee started to work for the employer.

Reasonable additional hours

- (5) For the purposes of paragraph (1)(b), in determining whether additional hours that an employee is required or requested by an employer to work are reasonable additional hours, all relevant factors must be taken into account. Those factors may include, but are not limited to, the following:
- (a) any risk to the employee's health and safety that might reasonably be expected to arise if the employee worked the additional hours;
 - (b) the employee's personal circumstances (including family responsibilities);
 - (c) the operational requirements of the workplace, or enterprise, in relation to which the employee is required or requested to work the additional hours;
 - (d) any notice given by the employer of the requirement or request that the employee work the additional hours;
 - (e) any notice given by the employee of the employee's intention to refuse to work the additional hours;
 - (f) whether any of the additional hours are on a public holiday;

- (g) the employee's hours of work over the 4 weeks ending immediately before the employee is required or requested to work the additional hours.

Note: An employee and an employer may agree that the employee may take breaks during any additional hours worked by the employee.

Definition

- (6) In this section:

public holiday means:

- (a) a day declared by or under a law of a State or Territory to be observed generally within the State or Territory, or a region of that State or Territory, as a public holiday by people who work in that State, Territory or region, other than:
 - (i) a union picnic day; or
 - (ii) a day, or kind of day, that is excluded by regulations made for the purposes of this paragraph from counting as a public holiday; or
- (b) a day that, under (or in accordance with a procedure under) a law of a State or Territory, or an award or workplace agreement, is substituted for a day referred to in paragraph (a).

Division 4—Annual leave

Subdivision A—Preliminary

92 Employees to whom Division applies

This Division applies to all employees other than casual employees.

92A Definitions

In this Division:

annual leave has the meaning given by subsection 92D(1).

authorised leave means leave, or an absence, whether paid or unpaid, that is authorised:

- (a) by an employee's employer; or

- (b) by or under a term or condition of an employee's employment; or
- (c) by or under a law, or an instrument in force under a law, of the Commonwealth, a State or a Territory.

basic periodic rate of pay has the meaning given by section 90B.

Note: See also section 92C.

continuous service, in relation to a period of an employee's service with an employer, means service with the employer as an employee (other than a casual employee) during the whole of the period, including (as a part of the period) any period of authorised leave.

employee means an employee to whom this Division applies under section 92.

nominal hours worked has the meaning given by section 92AA.

Note: See also section 92C.

piece rate employee means an employee who is paid a piece rate of pay within the meaning of section 90B.

public holiday means:

- (a) a day declared by or under a law of a State or Territory to be observed generally within the State or Territory, or a region of that State or Territory, as a public holiday by people who work in that State, Territory or region, other than:
 - (i) a union picnic day; or
 - (ii) a day, or kind of day, that is excluded by regulations made for the purposes of this paragraph from counting as a public holiday; or
- (b) a day that, under (or in accordance with a procedure under) a law of a State or Territory, or an award or workplace agreement, is substituted for a day referred to in paragraph (a).

shift worker means:

- (a) an employee who:
 - (i) is employed in a business in which shifts are continuously rostered 24 hours a day for 7 days a week; and

-
- (ii) is regularly rostered to work those shifts; and
 - (iii) regularly works on Sundays and public holidays; or
 - (b) an employee of a type that is prescribed by regulations made for the purposes of this paragraph.

92AA Meaning of *nominal hours worked*

Employees employed to work a specified number of hours

- (1) For the purposes of this Division, if an employee is employed by an employer to work a specified number of hours per week, the number of ***nominal hours worked***, by the employee for the employer during a week, is to be worked out as follows:
 - (a) start with that specified number of hours;
 - (b) deduct all of the following:
 - (i) the number of hours (if any) in the week when the employee is absent from his or her work for the employer on leave which does not count as service;
 - (ii) the number of hours (if any) in the week (other than hours mentioned in subparagraph (i)) in relation to which the employer is prohibited by section 114 from making a payment to the employee.
- Note: The actual hours worked from week to week by an employee who is employed to work a specified number of hours per week may vary, due to averaging as mentioned in section 91C or to some other kind of flexible working hours scheme that applies to the employee's employment.
- (2) If an employee is employed on a full-time basis, but the terms and conditions of the employee's employment do not determine the number of hours in a week that is to constitute employment on a full-time basis for the employee, the employee is, for the purpose of subsection (1), taken to be employed to work 38 hours per week.
 - (3) If an employee is employed to work a specified number (the ***number of non-week specified hours***) of hours over a period (the ***non-week period***) that is not a week (for example, a fortnight), then, for the purpose of subsection (1), the employee is taken to be employed to work the number of hours per week determined, subject to the regulations (if any), in accordance with the formula:

$$\text{Number of non-week specified hours} \times \frac{7}{\text{Number of days in non-week period}}$$

Employees not employed to work a specified number of hours

- (4) For the purposes of this Division, if subsection (1) does not apply to the employment of an employee by an employer, the number of **nominal hours worked**, by the employee for the employer during a week, is the lesser of the following:
- (a) the number worked out as follows:
 - (i) start with the number of hours (if any) in the week that the employee both works, and is required or requested to work, for the employer;
 - (ii) add the number of hours (if any) in the week when the employee is absent from his or her work for the employer on leave that counts as service;
 - (iii) deduct the number of hours (if any) in the week in relation to which the employer is prohibited by section 114 from making a payment to the employee;
 - (b) the number of nominal hours the employee would be taken to have worked for the employer under subsection (1) during the week if the employee were employed to work 38 hours per week.

Definition

- (5) In this section:

hour includes a part of an hour.

Note 1: The regulations may prescribe a different definition of **nominal hours worked** for piece rate employees (see section 92C).

Note 2: An employee's hours of work may be varied (by number or time) in accordance with a workplace agreement, award or contract of employment that binds the employee and his or her employer.

Note 3: For whether leave guaranteed under this Part counts as service, see subsections 92I(2) (annual leave), 93T(2) (paid personal leave), 93U(2) (unpaid carer's leave) and 94ZZB(2) (parental leave).

Note 4: Because of the definition of **hour** in subsection (5), an employee's nominal hours worked may be a number of hours and part of an hour.

92B Agreement between employees and employers

Via a workplace agreement

- (1) For the purposes of this Division, an employee and an employer are taken to agree about a particular matter in a particular way if a provision of a workplace agreement binding the employee and the employer specifies that the matter is to be dealt with in that way.

Via other means

- (2) To avoid doubt, nothing in this section prevents employees and employers agreeing about matters by other means.

92C Regulations may prescribe different definitions for piece rate employees

The regulations may prescribe:

- (a) a different definition of *basic periodic rate of pay* for the purpose of the application of this Division in relation to piece rate employees; and
- (b) a different definition of *nominal hours worked* for the purpose of the application of this Division in relation to piece rate employees.

Subdivision B—Guarantee of annual leave

92D The guarantee

- (1) For the purposes of this Division, *annual leave* means leave to which an employee is entitled under this Subdivision.

All employees to whom this Division applies

- (2) An employee is entitled to accrue an amount of paid annual leave, for each completed 4 week period of continuous service with an employer, of $\frac{1}{13}$ of the number of nominal hours worked by the employee for the employer during that 4 week period.

Example: An employee whose nominal hours worked for a 12 month period were 38 hours per week would be entitled under this subsection to 152 hours of annual leave (which would be the equivalent of 4 weeks of annual leave if his or her nominal hours worked remained unchanged).

Additional leave entitlement for shift workers

- (3) An employee is also entitled to accrue an amount of paid annual leave, for each completed 12 month period of continuous service with an employer, of $\frac{1}{52}$ of the number of nominal hours worked by the employee, for the employer, as a shift worker during that 12 month period.

Example: A shift worker whose nominal hours worked for a 12 month period were 38 hours per week, and who worked as a shift worker throughout that period, would be entitled under this subsection to an additional 38 hours of annual leave (which would be the equivalent of one week of annual leave if his or her nominal hours worked remained unchanged).

92E Entitlement to cash out annual leave

- (1) An employee is entitled to forgo an entitlement to take an amount of annual leave credited to the employee by an employer if:
- (a) a provision in a workplace agreement binding the employee and the employer entitles the employee to forgo the entitlement to the amount of annual leave; and
 - (b) the employee gives the employer a written election to forgo the amount of annual leave; and
 - (c) a provision in a workplace agreement binding the employee and the employer entitles the employee to receive pay in lieu of the amount of annual leave at a rate that is no less than the employee's basic periodic rate of pay at the time that the election is made; and
 - (d) the employer authorises the employee to forgo the amount of annual leave.

Note: If, under this section, an employee forgoes an entitlement to take an amount of annual leave, the employee's employer may deduct that amount from the amount of accrued annual leave credited to the employee.

- (2) However, during each 12 month period, an employee is not entitled to forgo an amount of annual leave credited to the employee by an employer that is equal to more than $\frac{1}{26}$ of the nominal hours worked by the employee for the employer during the period.
- (3) An employer must not:
- (a) require an employee to forgo an entitlement to take an amount of annual leave; or

- (b) exert undue influence or undue pressure on an employee in relation to the making of a decision by the employee whether or not to forgo an entitlement to take an amount of annual leave.
- (4) If, under this section, an employee forgoes an entitlement to take an amount of annual leave, the employer must, within a reasonable period, give the employee the amount of pay that the employee is entitled to receive in lieu of the amount of annual leave.

Subdivision C—Annual leave rules

92F Annual leave—accrual, crediting and accumulation rules

Accrual

- (1) Annual leave accrues on a pro-rata basis.

Crediting

- (2) Each month an employer must credit to an employee of the employer the amount (if any) of annual leave accrued by the employee under subsection 92D(2) since the employer last credited to the employee an amount of annual leave accrued under that subsection.
- (3) Each year an employer must credit to an employee of the employer the amount (if any) of annual leave accrued by the employee under subsection 92D(3) since the employer last credited to the employee an amount of annual leave accrued under that subsection.

Accumulation

- (4) Annual leave is cumulative.

92G Annual leave—payment rules

- (1) If an employee takes annual leave during a period, the annual leave must be paid at a rate that is no less than the employee's basic periodic rate of pay immediately before the period begins.
- (2) If the employment of an employee who has not taken an amount of accrued annual leave ends at a particular time, the employee's

untaken accrued annual leave must be paid at a rate that is no less than the employee's basic periodic rate of pay at that time.

92H Rules about taking annual leave

General rules

- (1) Subject to this section and section 92E, an employee is entitled to take an amount of annual leave during a particular period if:
 - (a) at least that amount of annual leave is credited to the employee; and
 - (b) the employee's employer has authorised the employee to take the annual leave during that period.
- (2) To avoid doubt, there is no maximum or minimum limit on the amount of annual leave that an employer may authorise an employee to take.
- (3) Any authorisation given by an employer enabling an employee to take annual leave during a particular period is subject to the operational requirements of the workplace or enterprise in respect of which the employee is employed.
- (4) An employer must not unreasonably:
 - (a) refuse to authorise an employee to take an amount of annual leave that is credited to the employee; or
 - (b) revoke an authorisation enabling an employee to take annual leave during a particular period.

Shut downs

- (5) An employee must take an amount of annual leave during a particular period if:
 - (a) the employee is directed to do so by the employee's employer because, during that period, the employer shuts down the business, or any part of the business, in which the employee works; and
 - (b) at least that amount of annual leave is credited to the employee.

Extensive accumulated annual leave

- (6) An employee must take an amount of annual leave during a particular period if:
- (a) the employee is directed to do so by his or her employer; and
 - (b) at the time that the direction is given, the employee has annual leave credited to him or her of more than $\frac{1}{13}$ of the number of nominal hours worked by the employee for the employer during the period of 104 weeks ending at the time that the direction is given; and
 - (c) the amount of annual leave that the employee is directed to take is less than, or equal to, $\frac{1}{4}$ of the amount of credited annual leave of the employee at the time that the direction is given.

92HA Annual leave and workers' compensation

This Division does not apply to the extent that it is inconsistent with a provision of a law of the Commonwealth, a State or a Territory relating to workers' compensation if the provision would (apart from this Division):

- (a) prevent an employee from taking or accruing annual leave during a period while the employee is receiving compensation under such a law; or
- (b) restrict the amount of annual leave an employee may take or accrue during such a period.

Subdivision D—Service: annual leave

92I Annual leave—service

- (1) A period of annual leave does not break an employee's continuity of service.
- (2) Annual leave counts as service for all purposes except as prescribed by the regulations.

Division 5—Personal leave

Subdivision A—Preliminary

93 Employees to whom Division applies

- (1) Subject to this section, this Division applies to all employees other than casual employees.
- (2) This Subdivision, Subdivision C and sections 93O and 93P apply to all employees.

93A Definitions

In this Division:

authorised leave means leave, or an absence, whether paid or unpaid, that is authorised:

- (a) by an employee's employer; or
- (b) by or under a term or condition of an employee's employment; or
- (c) by or under a law, or an instrument in force under a law, of the Commonwealth, a State or a Territory.

carer's leave has the meaning given by paragraph 93D(b).

child includes the following:

- (a) an adopted child;
- (b) a stepchild;
- (c) an exnuptial child;
- (d) an adult child.

compassionate leave has the meaning given by subsection 93Q(1).

continuous service, in relation to a period of an employee's service with an employer, means service with the employer as an employee (other than a casual employee) during the whole of the period, including (as a part of the period) any period of authorised leave.

de facto spouse, of an employee, means a person of the opposite sex to the employee who lives with the employee as the

employee's husband or wife on a genuine domestic basis although not legally married to the employee.

employee, when used in a provision of this Division, means an employee to whom the provision applies under section 93.

immediate family: the following are members of an employee's **immediate family**:

- (a) a spouse, child, parent, grandparent, grandchild or sibling of the employee;
- (b) a child, parent, grandparent, grandchild or sibling of a spouse of the employee.

medical certificate means a certificate signed by a registered health practitioner.

nominal hours worked has the meaning given by section 93AA.

Note: See also section 93C.

permissible occasion, for unpaid carer's leave, has the meaning given by subsection 93J(1).

personal/carer's leave has the meaning given by section 93D.

piece rate employee means an employee who is paid a piece rate of pay within the meaning of section 90B.

registered health practitioner means a health practitioner registered, or licensed, as a health practitioner (or as a health practitioner of a particular type) under a law of a State or Territory that provides for the registration or licensing of health practitioners (or health practitioners of that type).

sick leave has the meaning given by paragraph 93D(a).

spouse includes the following:

- (a) a former spouse;
- (b) a de facto spouse;
- (c) a former de facto spouse.

93AA Meaning of *nominal hours worked*

Employees employed to work a specified number of hours

- (1) For the purposes of this Division, if an employee is employed by an employer to work a specified number of hours per week, the number of ***nominal hours worked***, by the employee for the employer during a week, is to be worked out as follows:
- (a) start with that specified number of hours;
 - (b) deduct all of the following:
 - (i) the number of hours (if any) in the week when the employee is absent from his or her work for the employer on leave which does not count as service;
 - (ii) the number of hours (if any) in the week (other than hours mentioned in subparagraph (i)) in relation to which the employer is prohibited by section 114 from making a payment to the employee.

Note: The actual hours worked from week to week by an employee who is employed to work a specified number of hours per week may vary, due to averaging as mentioned in section 91C or to some other kind of flexible working hours scheme that applies to the employee's employment.

- (2) If an employee is employed on a full-time basis, but the terms and conditions of the employee's employment do not determine the number of hours in a week that is to constitute employment on a full-time basis for the employee, the employee is, for the purpose of subsection (1), taken to be employed to work 38 hours per week.
- (3) If an employee is employed to work a specified number (the ***number of non-week specified hours***) of hours over a period (the ***non-week period***) that is not a week (for example, a fortnight), then, for the purpose of subsection (1), the employee is taken to be employed to work the number of hours per week determined, subject to the regulations (if any), in accordance with the formula:

$$\text{Number of non-week specified hours} \times \frac{7}{\text{Number of days in non-week period}}$$

Employees not employed to work a specified number of hours

- (4) For the purposes of this Division, if subsection (1) does not apply to the employment of an employee by an employer, the number of
-

nominal hours worked, by the employee for the employer during a week, is the lesser of the following:

- (a) the number worked out as follows:
 - (i) start with the number of hours (if any) in the week that the employee both works, and is required or requested to work, for the employer;
 - (ii) add the number of hours (if any) in the week when the employee is absent from his or her work for the employer on leave that counts as service;
 - (iii) deduct the number of hours (if any) in the week in relation to which the employer is prohibited by section 114 from making a payment to the employee;
- (b) the number of nominal hours the employee would be taken to have worked for the employer under subsection (1) during the week if the employee were employed to work 38 hours per week.

Definition

- (5) In this section:

hour includes a part of an hour.

- Note 1: The regulations may prescribe a different definition of ***nominal hours worked*** for piece rate employees (see section 93C).
- Note 2: An employee's hours of work may be varied (by number or time) in accordance with a workplace agreement, award or contract of employment that binds the employee and his or her employer.
- Note 3: For whether leave guaranteed under this Part counts as service, see subsections 92I(2) (annual leave), 93T(2) (paid personal leave), 93U(2) (unpaid carer's leave) and 94ZZB(2) (parental leave).
- Note 4: Because of the definition of ***hour*** in subsection (5), an employee's nominal hours worked may be a number of hours and part of an hour.

93B Agreement between employees and employers

Via a workplace agreement

- (1) For the purposes of this Division, an employee and an employer are taken to agree about a particular matter in a particular way if a provision of a workplace agreement binding the employee and the employer specifies that the matter is to be dealt with in that way.

Via other means

- (2) To avoid doubt, nothing in this section prevents employees and employers agreeing about matters by other means.

93C Regulations may prescribe different definitions for piece rate employees

The regulations may prescribe a different definition of *nominal hours worked* for the purpose of the application of this Division in relation to piece rate employees.

93D Meaning of *personal/carer's leave*

For the purposes of this Division, *personal/carer's leave* is:

- (a) paid leave (*sick leave*) taken by an employee because of a personal illness, or injury, of the employee; or
- (b) paid or unpaid leave (*carer's leave*) taken by an employee to provide care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because of:
 - (i) a personal illness, or injury, of the member; or
 - (ii) an unexpected emergency affecting the member.

Subdivision B—Guarantee of paid *personal/carer's leave*

93E The guarantee

- (1) Subject to this Subdivision, an employee is entitled to paid *personal/carer's leave* if the employee complies with the notice and documentation requirements under Subdivision D, to the extent to which they apply to the employee.

Note: The entitlement is subject to the restrictions in sections 93F, 93H and 93I.

- (2) An employee is taken not to have been entitled to a period of paid *personal/carer's leave* at any time after the start of the period if:
- (a) Subdivision D:
 - (i) required the employee to give notice or a document (the *required notice or document*) to his or her employer; and

- (ii) allowed the employee to give the required notice or document to his or her employer after the start of the leave; and
- (b) when the employee started the leave, the employee had not given his or her employer the required notice or document; and
- (c) the employee did not later give the required notice or document to his or her employer within the period required under Subdivision D.

Note: Under Subdivision D, an employee may be required to give his or her employer notice, a medical certificate or a statutory declaration (depending on the circumstances).

93F Paid personal/carer's leave—accrual, crediting and accumulation rules

Entitlement to take credited leave

- (1) Subject to this Subdivision, an employee is entitled to take an amount of paid personal/carer's leave if, under this section, that amount of leave is credited to the employee.

Accrual

- (2) An employee is entitled to accrue an amount of paid personal/carer's leave, for each completed 4 week period of continuous service with an employer, of $\frac{1}{26}$ of the number of nominal hours worked by the employee for the employer during that 4 week period.

Example: An employee whose nominal hours worked for an employer each week over a 12 month period are 38 hours would be entitled to accrue 76 hours paid personal/carer's leave (which would amount to 10 days of paid personal/carer's leave for that employee) over the period.

- (3) Paid personal/carer's leave accrues on a pro-rata basis.

Crediting

- (4) Each month, an employer must credit to an employee of the employer the amount (if any) of paid personal/carer's leave accrued by the employee since the employer last credited to the employee an amount of paid personal/carer's leave accrued under this section.

Accumulation

- (5) Paid personal/carer's leave is cumulative.

93G Paid personal/carer's leave—payment rule

If an employee takes paid personal/carer's leave during a period, the employer must pay the employee for that period the amount the employee would reasonably have expected to be paid by the employer if the employee had worked during that period.

93H Paid personal/carer's leave—workers' compensation

- (1) An employee is not entitled to take paid sick leave for a period during which the employee is absent from work because of a personal illness, or injury, for which the employee is receiving compensation payable under a law of the Commonwealth, a State or a Territory relating to workers' compensation.
- (2) Subject to subsection (1), this Division does not apply to the extent that it is inconsistent with a provision of a law of the Commonwealth, a State or a Territory relating to workers' compensation if the provision would (apart from this Division):
- (a) prevent an employee from taking or accruing paid personal/carer's leave during a period while the employee is receiving compensation under such a law; or
 - (b) restrict the amount of paid personal/carer's leave an employee may take or accrue during such a period.

93I Paid carer's leave—annual limit

- (1) This section applies to an employee if, at a particular time, the employee:
- (a) is employed by an employer; and
 - (b) for a continuous period of at least 12 months immediately before the time, has been in continuous service with the employer.
- (2) The employee is not entitled to take paid carer's leave from his or her employment with the employer at the time if, during the period of 12 months ending at the time, the employee has already taken a total amount of paid carer's leave from that employment of $\frac{1}{26}$ of

the nominal hours worked by the employee for the employer during that period.

Example: An employee whose nominal hours worked for an employer each week were 38 hours during a 12 month period of continuous service with the employer would not be entitled to take any paid carer's leave from his or her employment with the employer if the employee had, during the period, already taken 76 hours paid carer's leave (which amounted to 10 days paid carer's leave for that employee) from that employment.

Subdivision C—Guarantee of unpaid carer's leave

93J The guarantee

- (1) Subject to this Subdivision, an employee is entitled to a period of up to 2 days unpaid carer's leave for each occasion (a *permissible occasion*) when a member of the employee's immediate family, or a member of the employee's household, requires care or support during such a period because of:
- (a) a personal illness, or injury, of the member; or
 - (b) an unexpected emergency affecting the member.

Note 1: This entitlement extends to casual employees (see section 93).

Note 2: The entitlement is subject to the restrictions in sections 93K and 93L.

- (2) An employee is entitled to unpaid carer's leave only if the employee complies with the notice and documentation requirements under Subdivision D, to the extent to which they apply to the employee.
- (3) An employee is taken not to have been entitled to a period of unpaid carer's leave at any time after the start of the period if:
- (a) Subdivision D:
 - (i) required the employee to give notice or a document (the *required notice or document*) to his or her employer; and
 - (ii) allowed the employee to give the required notice or document to his or her employer after the start of the leave; and
 - (b) when the employee started the leave, the employee had not given his or her employer the required notice or document; and

- (c) the employee did not later give the required notice or document to his or her employer within the period required under Subdivision D.

Note: Under Subdivision D, an employee may be required to give his or her employer notice, a medical certificate or a statutory declaration (depending on the circumstances).

93K Unpaid carer's leave—how taken

An employee who is entitled to a period of unpaid carer's leave under section 93J for a particular permissible occasion is entitled to take the unpaid carer's leave as:

- (a) a single, unbroken, period of up to 2 days; or
- (b) any separate periods to which the employee and his or her employer agree.

93L Unpaid carer's leave—paid personal leave exhausted

An employee is entitled to unpaid carer's leave for a particular permissible occasion during a particular period only if the employee cannot take an amount of any of the following types of paid leave during the period:

- (a) paid personal/carer's leave;
- (b) any other authorised leave of the same type as personal/carer's leave.

Subdivision D—Notice and evidence requirements: personal/carer's leave

93M Sick leave—notice

- (1) To be entitled to sick leave during a period, an employee must give his or her employer notice in accordance with this section that the employee is (or will be) absent from his or her employment during the period because of a personal illness, or injury, of the employee.
- (2) The notice must be given to the employer as soon as reasonably practicable (which may be at a time before or after the sick leave has started).

- (3) The notice must be to the effect that the employee requires (or required) leave during the period because of a personal illness, or injury, of the employee.
- (4) This section does not apply to an employee who could not comply with it because of circumstances beyond the employee's control.

Note: The use of personal information given to an employer under this section may be regulated under the *Privacy Act 1988*.

93N Sick leave—documentary evidence

- (1) This section applies if an employer requires an employee of the employer to give the employer documentary evidence in relation to a period of sick leave taken (or to be taken) by the employee.
- (2) To be entitled to sick leave during the period, the employee must, in accordance with this section, give the employer a document (the **required document**) of whichever of the following types applies:
 - (a) if it is reasonably practicable to do so—a medical certificate from a registered health practitioner;
 - (b) if it is not reasonably practicable for the employee to give the employer a medical certificate—a statutory declaration made by the employee.
- (3) The required document must be given to the employer as soon as reasonably practicable (which may be at a time before or after the sick leave has started).
- (4) The required document must include a statement to the effect that:
 - (a) if the required document is a medical certificate—in the registered health practitioner's opinion, the employee was, is, or will be unfit for work during the period because of a personal illness or injury; or
 - (b) if the required document is a statutory declaration—the employee was, is, or will be unfit for work during the period because of a personal illness or injury.
- (5) This section does not apply to an employee who could not comply with it because of circumstances beyond the employee's control.

Note: The use of personal information given to an employer under this section may be regulated under the *Privacy Act 1988*.

93O Carer's leave—notice

- (1) To be entitled to carer's leave during a period, an employee must give his or her employer notice in accordance with this section.
- (2) The notice must be given to the employer as soon as reasonably practicable (which may be at a time before or after the carer's leave has started).
- (3) The notice must be to the effect that the employee requires (or required) leave during the period to provide care or support to a member of the employee's immediate family, or a member of the employee's household, who requires (or required) care or support because of:
 - (a) a personal illness, or injury, of the member; or
 - (b) an unexpected emergency affecting the member.
- (4) This section does not apply to an employee who could not comply with it because of circumstances beyond the employee's control.

Note: The use of personal information given to an employer under this section may be regulated under the *Privacy Act 1988*.

93P Carer's leave—documentary evidence

- (1) This section applies if an employer requires an employee of the employer to give the employer documentary evidence in relation to a period of carer's leave taken (or to be taken) by the employee to provide care or support to a member of the employee's immediate family or a member of the employee's household.
- (2) To be entitled to carer's leave during the period, the employee must, in accordance with this section, give the employer a document (the *relevant document*) that is:
 - (a) if the care or support is required because of a personal illness, or injury, of the member—a medical certificate from a registered health practitioner, or a statutory declaration made by the employee; or
 - (b) if the care or support is required because of an unexpected emergency affecting the member—a statutory declaration made by the employee.

-
- (3) The relevant document must be given to the employer as soon as reasonably practicable (which may be at a time before or after the carer's leave has started).
 - (4) If the relevant document is a medical certificate, it must include a statement to the effect that, in the opinion of the registered health practitioner, the member had, has, or will have a personal illness or injury during the period.
 - (5) If the relevant document is a statutory declaration, it must include a statement to the effect that the employee requires (or required) leave during the period to provide care or support to the member because the member requires (or required) care or support during the period because of:
 - (a) a personal illness, or injury, of the member; or
 - (b) an unexpected emergency affecting the member.
 - (6) This section does not apply to an employee who could not comply with it because of circumstances beyond the employee's control.

Note: The use of personal information given to an employer under this section may be regulated under the *Privacy Act 1988*.

Subdivision E—Guarantee of compassionate leave

93Q The guarantee

- (1) For the purposes of this Division, *compassionate leave* is paid leave taken by an employee:
 - (a) for the purposes of spending time with a person who:
 - (i) is a member of the employee's immediate family or a member of the employee's household; and
 - (ii) has a personal illness, or injury, that poses a serious threat to his or her life; or
 - (b) after the death of a member of the employee's immediate family or a member of the employee's household.
- (2) Subject to this Subdivision, an employee is entitled to a period of 2 days of compassionate leave for each occasion (a *permissible occasion*) when a member of the employee's immediate family or a member of the employee's household:
 - (a) contracts or develops a personal illness that poses a serious threat to his or her life; or

- (b) sustains a personal injury that poses a serious threat to his or her life; or
 - (c) dies.
- (3) However, the employee is entitled to compassionate leave only if the employee gives his or her employer any evidence that the employer reasonably requires of the illness, injury or death.

Note: The use of personal information given to an employer under this section may be regulated under the *Privacy Act 1988*.

93R Taking compassionate leave

- (1) An employee who is entitled to a period of compassionate leave under section 93Q for a particular permissible occasion is entitled to take the compassionate leave as:
- (a) a single, unbroken period of 2 days; or
 - (b) 2 separate periods of 1 day each; or
 - (c) any separate periods to which the employee and his or her employer agree.
- (2) An employee who is entitled to a period of compassionate leave under section 93Q because a member of the employee's immediate family or a member of the employee's household has contracted or developed a personal illness, or sustained a personal injury, is entitled to start to take the compassionate leave at any time while the illness or injury persists.

93S Compassionate leave—payment rule

If an employee takes compassionate leave during a period, the employer must pay the employee for that period the amount the employee would reasonably have expected to be paid by the employer if the employee had worked during that period.

Subdivision F—Personal leave: service

93T Paid personal leave—service

- (1) A period of paid personal leave does not break an employee's continuity of service.

(2) Paid personal leave counts as service for all purposes except as prescribed by the regulations.

(3) In this section:

paid personal leave means paid personal/carer's leave or compassionate leave.

93U Unpaid carer's leave—service

(1) A period of unpaid carer's leave does not break an employee's continuity of service.

(2) However, a period of unpaid carer's leave does not otherwise count as service except:

(a) as expressly provided by or under:

(i) a term or condition of the employee's employment; or

(ii) a law, or an instrument in force under a law, of the Commonwealth, a State or a Territory; or

(b) as prescribed by the regulations.

Division 6—Parental leave

Subdivision A—Preliminary

94 Employees to whom Division applies

This Division applies to all employees, other than casual employees who are not eligible casual employees.

94A Definitions

In this Division:

adoption agency means an agency, office, court or other entity that is authorised under a law of the Commonwealth, a State, a Territory or a foreign country to perform functions in relation to adoption.

adoption leave has the meaning given by subsection 94ZL(1).

authorised leave means leave, or an absence, whether paid or unpaid, that is authorised:

- (a) by an employee's employer; or
- (b) by or under a term or condition of an employee's employment; or
- (c) by or under a law, or an instrument in force under a law, of the Commonwealth, a State or a Territory.

continuous service, in relation to a period of an employee's service with an employer, means service with the employer as an employee during the whole of the period, including (as a part of the period) any of the following periods:

- (a) a period of authorised leave;
- (b) a period (the ***casual period***) during which the employee was a casual employee, if:
 - (i) during the casual period, the employee was engaged on a regular and systematic basis by the employer; and
 - (ii) during the casual period, the employee had a reasonable expectation of continuing employment by the employer.

day of placement: the ***day of placement*** of a child with an employee for an adoption is:

- (a) subject to paragraph (b), the earlier of the following days:
 - (i) the day on which the employee first takes custody of the child for the adoption;
 - (ii) the day on which the employee starts any travel that is reasonably necessary to take custody of the child for the adoption; or
- (b) if the child's adoption by an employee is authorised by an adoption agency after the child has started living with the employee (unless the employee has travelled overseas to take custody of the child for an adoption intended to occur in Australia)—the day on which the adoption is authorised by the agency.

de facto spouse, of an employee, means a person of the opposite sex to the employee who lives with the employee as the employee's husband or wife on a genuine domestic basis although not legally married to the employee.

eligible casual employee has the meaning given by section 94B.

eligible child has the meaning given by section 94ZJ.

employee means an employee to whom this Division applies under section 94.

expected date of birth, of a child of an employee who is or was pregnant, means:

- (a) if, to comply with a requirement under Subdivision C, the employee has given her employer a medical certificate stating the expected date of birth of the child or a date that would be, or would have been, the expected date of birth of the child—the stated date; or
- (b) if the employee could not comply with a requirement mentioned in paragraph (a) because of circumstances beyond her control—the date of birth of the child that could reasonably be expected if the pregnancy were to go to full term.

long adoption leave has the meaning given by paragraph 94ZL(1)(b).

long paternity leave has the meaning given by paragraph 94T(1)(b).

maternity leave has the meaning given by subsection 94C(1).

medical certificate means a certificate signed by a medical practitioner.

medical practitioner means a person registered, or licensed, as a medical practitioner under a law of a State or Territory that provides for the registration or licensing of medical practitioners.

ordinary maternity leave has the meaning given by paragraph 94C(1)(b).

paternity leave has the meaning given by subsection 94T(1).

placement, of a child, means:

- (a) subject to paragraph (b)—the placement, by an adoption agency, of the child into the custody of an employee for adoption; or
- (b) if the child's adoption by an employee is authorised by an adoption agency after the child has started living with the employee—the authorisation of the adoption by the adoption agency.

Note: *Day of placement* is also defined in this section.

pre-adoption leave has the meaning given by subsection 94ZK(2).

pregnancy-related illness means an illness related to pregnancy.

primary care-giver, of a child, means a person who assumes the principal role of providing care and attention to the child.

short adoption leave has the meaning given by paragraph 94ZL(1)(a).

short paternity leave has the meaning given by paragraph 94T(1)(a).

special maternity leave has the meaning given by paragraph 94C(1)(a).

spouse includes the following:

- (a) a former spouse;
- (b) a de facto spouse;
- (c) a former de facto spouse.

94B Meaning of *eligible casual employee*

- (1) For the purposes of this Division, an *eligible casual employee* is a casual employee:
 - (a) who has been engaged by a particular employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months; and
 - (b) who, but for an expected birth or an expected placement of a child, would have a reasonable expectation of continuing engagement by the employer on a regular and systematic basis.
- (2) Without limiting subsection (1), for the purposes of this Division, a casual employee is also an *eligible casual employee* if:
 - (a) the employee was engaged by a particular employer on a regular and systematic basis for a sequence of periods during a period (the *first period of employment*) of less than 12 months; and

-
- (b) at the end of the first period of employment, the employee ceased, on the employer's initiative, to be so engaged by the employer; and
 - (c) the employer later again engaged the employee on a regular and systematic basis for a further sequence of periods during a period (the *second period of employment*) that started not more than 3 months after the end of the first period of employment; and
 - (d) the combined length of the first period of employment and the second period of employment is at least 12 months; and
 - (e) the employee, but for an expected birth or an expected placement of a child, would have a reasonable expectation of continuing engagement by the employer on a regular and systematic basis.

Subdivision B—Guarantee of maternity leave

94C The guarantee

- (1) For the purposes of this Division, *maternity leave* is:
 - (a) unpaid leave (*special maternity leave*) taken by an employee because:
 - (i) she is pregnant, and has a pregnancy-related illness; or
 - (ii) she has been pregnant, and the pregnancy has ended within 28 weeks before the expected date of birth of the child otherwise than by the birth of a living child; or
 - (b) a single, unbroken period of unpaid leave (*ordinary maternity leave*) taken in respect of the birth, or the expected birth, of a child of an employee (other than leave taken as special maternity leave).
- (2) Subject to this Subdivision and Subdivision D, an employee is entitled to maternity leave if:
 - (a) she complies with the documentation requirements under Subdivision C, to the extent to which they apply to her; and
 - (b) immediately before the expected date of birth of the child:
 - (i) she has, or will have, completed at least 12 months continuous service with her employer; or
 - (ii) she is, or will be, an eligible casual employee.

Note: Entitlement to maternity leave is subject to the restrictions in sections 94D and 94E and Subdivision D.

- (3) An employee is taken not to have been entitled to a period of maternity leave at any time after the start of the period if:
- (a) Subdivision C:
 - (i) required the employee to give a document (the *required document*) to her employer; and
 - (ii) allowed the employee to give the required document to her employer after the start of the leave; and
 - (b) when the employee started the leave, the employee had not given her employer the required document; and
 - (c) the employee did not later give the required document to her employer within the period required under Subdivision C.
- Note: Under Subdivision C, an employee may be required to give her employer a medical certificate, an application or a statutory declaration (depending on the circumstances).
- (4) Subject to this Division, an employee may take special maternity leave, ordinary maternity leave, or both.

94D Period of maternity leave

- (1) In this section:
- related authorised leave*, in relation to maternity leave taken (or to be taken) by an employee, means any of the following types of authorised leave other than the maternity leave:
- (a) authorised leave (other than paid leave under subparagraph 94F(2)(b)(i) or (ii)) taken by the employee because of any of the following:
 - (i) her pregnancy;
 - (ii) the birth of the child;
 - (iii) the end of her pregnancy otherwise than by the birth of a living child;
 - (iv) the death of the child;
 - (b) paternity leave, or any other authorised leave of the same type as paternity leave, taken by the employee's spouse because of the birth of the child.
- (2) An employee may take a period of maternity leave as part of a continuous period including any other authorised leave.
- (3) The maximum total amount of maternity leave (including special maternity leave and ordinary maternity leave) to which an
-

employee is entitled in relation to the birth of a child is 52 weeks, less an amount equal to the total amount of related authorised leave taken:

- (a) by the employee before or after the maternity leave; and
- (b) by the employee's spouse before, during or after the maternity leave.

Example: Rosa is a pregnant employee entitled to maternity leave. She has taken 2 weeks of special maternity leave, but no other authorised leave. Rosa intends to take authorised leave because of the birth consisting of 4 weeks of annual leave and 12 weeks of long service leave, and a period of ordinary maternity leave.

Rosa's spouse Jim intends to take 1 week of short paternity leave.

The maximum amount of ordinary maternity leave to which Rosa is entitled is 33 weeks, worked out as follows:

- (a) the maximum entitlement of any employee to maternity leave is 52 weeks;
- (b) the maximum amount of ordinary maternity leave available to Rosa must be reduced by 2 weeks for her special maternity leave;
- (c) the maximum amount must also be reduced by 16 weeks for Rosa's annual leave and long service leave;
- (d) the maximum amount must be further reduced by 1 week for Jim's short paternity leave.

94E Period of special maternity leave

- (1) An employee is not entitled to a period of special maternity leave longer than the period stated in a medical certificate given to the employer for the purposes of section 94G.

Note: Section 94G requires an employee to give her employer a medical certificate (and other documents) in order to be entitled to special maternity leave. However, the section does not apply to an employee who could not comply with the section because of circumstances beyond her control (see subsection 94G(5)).

- (2) In addition, a period of special maternity leave must end before the employee starts any continuous period of leave including (or constituted by) ordinary maternity leave.

94F Transfer to a safe job

- (1) This section applies to an employee if:
 - (a) she is entitled to ordinary maternity leave; and

- (b) she has already complied with the documentation requirements under sections 94H and 94I; and
 - (c) the employee gives her employer a medical certificate from a medical practitioner containing a statement to the effect that, in the medical practitioner's opinion, the employee is fit to work, but that it is inadvisable for her to continue in her present position for a stated period because of:
 - (i) illness, or risks, arising out of her pregnancy; or
 - (ii) hazards connected with that position.
- (2) If this section applies to an employee:
- (a) if the employee's employer thinks it to be reasonably practicable to transfer the employee to a safe job—the employer must transfer the employee to the safe job, with no other change to the employee's terms and conditions of employment; or
 - (b) if the employee's employer does not think it to be reasonably practicable to transfer the employee to a safe job:
 - (i) the employee may take paid leave immediately for a period ending at the time mentioned in paragraph (4)(b); or
 - (ii) the employer may require the employee to take paid leave immediately for a period ending at the time mentioned in paragraph (4)(b).
- (3) If the employee takes paid leave under subparagraph (2)(b)(i) or (ii) during a period, the employer must pay the employee for that period the amount the employee would reasonably have expected to be paid by the employer if the employee had worked during that period.
- (4) If the employee takes paid leave under subparagraph (2)(b)(i) or (ii):
- (a) the entitlement to leave is in addition to any other leave entitlement she has; and
 - (b) the period of leave ends at the earliest of whichever of the following times is applicable:
 - (i) the end of the period stated in the medical certificate;
 - (ii) if the employee's pregnancy results in the birth of a living child—the end of the day before the date of birth;
-

-
- (iii) if the employee's pregnancy ends otherwise than with the birth of a living child—the end of the day before the end of the pregnancy.
 - (5) To avoid doubt, this section applies whether the employee gives the medical certificate to the employer because of a request under subsection 94L(2) or otherwise.

Subdivision C—Maternity leave: documentation

94G Special maternity leave—documentation

Requirement for application

- (1) To be entitled to special maternity leave during a period, an employee must give her employer a written application for special maternity leave, in accordance with this section, stating the first and last days of the period.

Pregnancy-related illness—medical certificate

- (2) An application for special maternity leave required because of a pregnancy-related illness must be accompanied by a medical certificate from a medical practitioner containing the following statements of the medical practitioner's opinion:
 - (a) a statement that the employee is pregnant;
 - (b) a statement of the expected date of birth;
 - (c) a statement to the effect that the employee is, was, or will be unfit to work for a stated period because of a pregnancy-related illness.

End of pregnancy—medical certificate and statutory declaration

- (3) An application for special maternity leave required because of the end of the employee's pregnancy otherwise than by the birth of a living child must be accompanied by:
 - (a) a medical certificate from a medical practitioner containing the following statements of the medical practitioner's opinion:
 - (i) a statement that the employee was pregnant, but that the pregnancy has ended otherwise than by the birth of a living child;

- (ii) a statement of what the expected date of birth would have been if the pregnancy had gone to full term;
 - (iii) a statement that the pregnancy ended on a stated day within 28 weeks before the expected date of birth;
 - (iv) a statement to the effect that the employee is, was, or will be unfit for work during a stated period; and
- (b) a statutory declaration made by the employee stating the following:
- (i) the first and last days of the period (or periods) of any other authorised leave taken by the employee because of a pregnancy-related illness or the end of the pregnancy;
 - (ii) that the employee will not engage in any conduct inconsistent with her contract of employment while on maternity leave.

Time for giving application to employer

- (4) The application, medical certificate and statutory declaration (if required) must be given to the employer before, or as soon as reasonably practicable after, starting a continuous period of leave including (or constituted by) the special maternity leave.

Section does not apply if could not be complied with

- (5) This section does not apply to an employee who could not comply with the section because of circumstances beyond her control.

Note: The use of personal information given to an employer under this section may be regulated under the *Privacy Act 1988*.

94H Ordinary maternity leave—medical certificate

Requirement for medical certificate

- (1) To be entitled to ordinary maternity leave, an employee must give her employer a medical certificate from a medical practitioner in accordance with this section.

General rules

- (2) The medical certificate must contain the following statements of the medical practitioner's opinion:
- (a) a statement that the employee is pregnant;

- (b) a statement of the expected date of birth.
- (3) The medical certificate mentioned in subsection (2) must be given to the employer no later than 10 weeks before the expected date of birth (as stated in the certificate).

Premature birth or other compelling reason

- (4) However, subsections (2) and (3) do not apply if it was not reasonably practicable for a medical certificate mentioned in subsection (2) to be given to the employer by the time required by subsection (3) because of:
 - (a) the premature birth of the employee's child; or
 - (b) any other compelling reason.
- (5) If subsections (2) and (3) do not apply:
 - (a) subject to paragraph (b), as soon as reasonably practicable before the birth of the child (which may be at a time before or after the maternity leave has started) the employee must give the employer a medical certificate from a medical practitioner containing the following statements of the medical practitioner's opinion:
 - (i) a statement that the employee is pregnant;
 - (ii) a statement of the expected date of birth if the pregnancy were to go to full term; or
 - (b) if it was not reasonably practicable for the employee to comply with paragraph (a) before the birth of the child—as soon as reasonably practicable after the birth of the child (which may be at a time before or after the maternity leave has started) the employee must give the employer a medical certificate from a medical practitioner containing the following statements of the medical practitioner's opinion (or knowledge):
 - (i) a statement of the actual date of birth;
 - (ii) a statement of the expected date of birth as at the 70th day before the actual date of birth.

Section does not apply if could not be complied with

- (6) This section does not apply to an employee who could not comply with the section because of circumstances beyond her control.

Note: The use of personal information given to an employer under this section may be regulated under the *Privacy Act 1988*.

94I Ordinary maternity leave—application

Requirement for application

- (1) To be entitled to ordinary maternity leave during a period, an employee must give her employer a written application for ordinary maternity leave in accordance with this section stating the first and last days of the period.

General rule

- (2) The application must be given to the employer no later than 4 weeks before the first day of the intended continuous period of leave including (or constituted by) ordinary maternity leave.

Premature birth or other compelling reason

- (3) However, subsection (2) does not apply if it was not reasonably practicable for the employee to comply with it because of:
 - (a) the premature birth of the employee's child; or
 - (b) any other compelling reason.
- (4) If subsection (2) does not apply, the application must be made as soon as reasonably practicable (which may be at a time before or after the maternity leave has started).

Statutory declaration with application

- (5) The application must be accompanied by a statutory declaration made by the employee stating the following:
 - (a) the first and last days of the period (or periods) of any other authorised leave (other than paid leave under subparagraph 94F(2)(b)(i) or (ii)) intended to be taken (or already taken) by the employee because of her pregnancy or the expected birth;
 - (b) the first and last days of the period (or periods) of any paternity leave, or any other authorised leave of the same type as paternity leave, intended to be taken (or already taken) by the employee's spouse because of the expected birth;

- (c) that the employee intends to be the child's primary care-giver at all times while on maternity leave;
- (d) that the employee will not engage in any conduct inconsistent with her contract of employment while on maternity leave.

Section does not apply if could not be complied with

- (6) This section does not apply to an employee who could not comply with the section because of circumstances beyond her control.

Note: The use of personal information given to an employer under this section may be regulated under the *Privacy Act 1988*.

Subdivision D—Maternity leave: from start to finish

94J Maternity leave—start of leave

Subject to section 94L, an employee may start a continuous period of leave including (or constituted by) ordinary maternity leave to which she is entitled at any time within 6 weeks before the expected date of birth of the child.

94K Requirement to take leave—for 6 weeks after birth

A continuous period of leave including (or constituted by) ordinary maternity leave must include a period of leave of at least 6 weeks starting from the date of birth of the child.

94L Requirement to take leave—within 6 weeks before birth

- (1) This section applies to an employee if:
 - (a) she is entitled to ordinary maternity leave; and
 - (b) she has already complied with the documentation requirements under sections 94H and 94I.
- (2) If the employee continues to work, during the period of 6 weeks before the expected date of birth, the employer may ask the employee to give the employer a medical certificate from a medical practitioner containing the following statement or statements of the medical practitioner's opinion:
 - (a) a statement of whether the employee is fit to work;
 - (b) if, in the opinion of the medical practitioner, the employee is fit to work—a statement of whether it is inadvisable for the

employee to continue in her present position for a stated period because of:

- (i) illness, or risks, arising out of the pregnancy; or
- (ii) hazards connected with the position.

Note: Under section 94F, the employee is entitled to be transferred to a safe job or to paid leave (depending on the circumstances) if the employee gives the employer a medical certificate stating that the employee is fit to work, but that illness or risks arising out of the employee's pregnancy or hazards connected with the work assigned to the employee make it inadvisable for the employee to continue in her present position.

- (3) The employer may require the employee to start a continuous period of leave including (or constituted by) maternity leave as soon as reasonably practicable, if the employee:
 - (a) does not give the employer the requested certificate within 7 days after the request; or
 - (b) within 7 days after the request for the certificate, gives the employer a medical certificate stating that the employee is unfit to work.

94M End of pregnancy—effect on ordinary maternity leave entitlement

- (1) This section applies if the pregnancy of an employee ends otherwise than by the birth of a living child.
- (2) If, when the pregnancy ended, the employee had not yet started a period of ordinary maternity leave, the employee is not, or is no longer, entitled to ordinary maternity leave in relation to the previously expected birth.

Note: However, the employee may be entitled to take special maternity leave because of the end of the pregnancy. An application for special maternity leave may be made after the leave has started (see section 94G).

- (3) If, when the pregnancy ended, the employee had started a period of ordinary maternity leave, the employee's entitlement to ordinary maternity leave in relation to the previously expected birth is not affected by the end of the pregnancy.

Note: The employee may shorten the period of ordinary maternity leave by agreement with the employer under section 94P. However, to take advantage of the return to work guarantee under section 94R, the

employee must also give the employer at least 4 weeks written notice of the proposed day of her return to work.

94N Death of child—effect on ordinary maternity leave entitlement

- (1) This section applies if:
 - (a) an employee gives birth to a living child, but the child later dies; and
 - (b) when the child died, the employee had started a period of ordinary maternity leave in relation to the child's birth.
- (2) Subject to subsections (3) and (4), the employee's entitlement to the ordinary maternity leave is not affected by the death of the child.

Note: The employee may shorten the period of ordinary maternity leave by agreement with the employer under section 94P. However, to take advantage of the return to work guarantee under section 94R, the employee must also give the employer at least 4 weeks written notice of the proposed day of her return to work.
- (3) The employee's employer may give the employee written notice that, from a stated day, any untaken ordinary maternity leave that the employee remains entitled to at the stated day is cancelled with effect from that day.
- (4) The day stated in the notice must be no earlier than the later of the following days:
 - (a) the day that is 4 weeks after the day the notice was given;
 - (b) the day that is 6 weeks after the date of birth.
- (5) The employee's entitlement to any untaken ordinary maternity leave in relation to the birth ends with effect from the day stated in the notice.

94O End of ordinary maternity leave if employee stops being primary care-giver

- (1) This section applies if:
 - (a) during a substantial period while an employee is on ordinary maternity leave after the birth of a living child, the employee is not the child's primary care-giver; and
 - (b) having regard to the length of that period and to any other relevant circumstances, it is reasonable to expect that the

employee will not again become the child's primary care-giver within a reasonable period.

- (2) The employee's employer may give the employee written notice that, from a stated day no earlier than 4 weeks after the day the notice is given, any untaken ordinary maternity leave that the employee remains entitled to at the stated day is cancelled with effect from that day.
- (3) The employee's entitlement to any untaken ordinary maternity leave in relation to the birth ends with effect from the day stated in the notice.

94P Variation of period of ordinary maternity leave

- (1) This section applies after an employee has started a continuous period of leave including (or constituted by) ordinary maternity leave.
- (2) Subject to Subdivision B and sections 94N and 94O:
 - (a) the employee may extend the period of maternity leave once by giving her employer 14 days written notice before the end of the period stating the period by which the leave is extended; and
 - (b) the period of maternity leave may be further extended by agreement between the employee and her employer.
- (3) Subject to section 94K, the period of maternity leave may be shortened by written agreement between the employee and her employer.

Note: However, to take advantage of the return to work guarantee under section 94R, the employee must also give her employer at least 4 weeks written notice of the proposed day for her return to work.

94Q Employee's right to terminate employment during maternity leave

- (1) An employee may terminate her employment at any time during a period of maternity leave or leave under subparagraph 94F(2)(b)(i) or (ii).
 - (2) The employee's right to terminate her employment is subject to any notice required to be given by the employee by or under:
-

-
- (a) a term or condition of her employment; or
 - (b) a law, or an instrument in force under a law, of the Commonwealth, a State or a Territory.

94R Return to work guarantee—maternity leave

- (1) This section applies to an employee who returns to work after a period of leave including (or constituted by) maternity leave (the *maternity-related leave period*) if:
 - (a) the employee gives her employer written notice of the proposed day of her return to work no later than 4 weeks before that day; or
 - (b) the period of leave includes (or is constituted by) special maternity leave, and does not include any ordinary maternity leave; or
 - (c) the employee's entitlement to ordinary maternity leave ends under section 94N or 94O.
- (2) This section also applies if an employee returns to work after a period of leave under subparagraph 94F(2)(b)(i) or (ii).
- (3) Subject to subsections (4) and (5), the employee is entitled to return:
 - (a) unless paragraph (b) or (c) applies—to the position she held immediately before the start of the maternity-related leave period; or
 - (b) if she was promoted or voluntarily transferred to a new position (other than to a safe job under paragraph 94F(2)(a)) during the maternity-related leave period—to the new position; or
 - (c) if paragraph (b) does not apply, and she began working part-time because of her pregnancy—to the position she held immediately before starting to work part-time.
- (4) If subsection (3) would, apart from this subsection, entitle the employee to return to a position that the employee had been transferred to under paragraph 94F(2)(a), the employee is instead entitled to return to the position she held immediately before the transfer.

- (5) If the position (the *former position*) no longer exists, and the employee is qualified and able to work for her employer in another position, the employee is entitled to return to:
 - (a) that position; or
 - (b) if there are 2 or more such positions—whichever position is nearest in status and remuneration to the former position.

94S Replacement employees—maternity leave

- (1) Before an employer engages an employee (a *primary replacement*) to do the work of another employee because the other employee is taking a continuous period of leave including (or constituted by) maternity leave, the employer must tell the primary replacement:
 - (a) that the engagement to do that work is temporary; and
 - (b) what the rights of the employee taking maternity leave are under section 94R when she returns to work after the period of leave.
- (2) Before an employer engages an employee (a *secondary replacement*) to do the work of another employee (the *primary replacement*) because the primary replacement has been temporarily promoted or transferred to do the work of a third employee while the third employee is taking a continuous period of leave including (or constituted by) maternity leave, the employer must tell the secondary replacement:
 - (a) that the engagement to do that work is temporary; and
 - (b) what the rights of the employee taking maternity leave are under section 94R when she returns to work after the period of leave.
- (3) In this section:

employee has the meaning given by subsection 4AA(1).

Subdivision E—Guarantee of paternity leave

94T The guarantee

- (1) For the purposes of this Division, *paternity leave* is:
 - (a) a single, unbroken period of unpaid leave (*short paternity leave*) of up to one week taken by a male employee within
-

the week starting on the day his spouse begins to give birth;
or

- (b) a single, unbroken period of unpaid leave (***long paternity leave***), other than short paternity leave, taken by a male employee after his spouse gives birth to a living child so that the employee can be the child's primary care-giver.

- (2) Subject to this Subdivision and Subdivision G, an employee is entitled to paternity leave if:
- (a) he complies with the documentation requirements under Subdivision F, to the extent to which they apply to him; and
 - (b) immediately before the first day on which the paternity leave is, or is to be, taken:
 - (i) he has, or will have, completed at least 12 months continuous service with his employer; or
 - (ii) he is, or will be, an eligible casual employee.

Note: Entitlement to paternity leave is subject to the restrictions in sections 94U and 94W and Subdivision G.

- (3) An employee is taken not to have been entitled to a period of paternity leave at any time after the start of the period if:
- (a) Subdivision F:
 - (i) required the employee to give a document (the ***required document***) to his employer; and
 - (ii) allowed the employee to give the required document to his employer after the start of the leave; and
 - (b) when the employee started the leave, the employee had not given his employer the required document; and
 - (c) the employee did not later give the required document to his employer within the period required under Subdivision F.

Note: Under Subdivision F, an employee may be required to give his employer a medical certificate, an application or a statutory declaration (depending on the circumstances).

- (4) Subject to this Division, an employee may take short paternity leave, long paternity leave, or both.

94U Period of paternity leave

- (1) In this section:
-

related authorised leave, in relation to paternity leave taken (or to be taken) by an employee because his spouse has given birth to a living child, means any of the following types of authorised leave other than the paternity leave:

- (a) authorised leave taken by the employee because of any of the following:
 - (i) the birth of the child;
 - (ii) the death of the child;
 - (b) maternity leave, or any other authorised leave of the same type as maternity leave, taken by the employee's spouse because of the birth of the child or the pregnancy.
- (2) An employee may take a period of paternity leave as part of a continuous period including any other authorised leave.
- (3) The maximum total amount of paternity leave (including short paternity leave and long paternity leave) to which an employee is entitled in relation to the birth of a child by his spouse is 52 weeks, less an amount equal to the total amount of related authorised leave taken:
- (a) by the employee before or after the paternity leave; and
 - (b) by the spouse before, during or after the paternity leave.

Example: Max's spouse Rachel is pregnant, and Max is an employee entitled to paternity leave. He intends to take 2 periods of authorised leave because of the birth of the child. The first is to consist of 5 weeks: 1 week of short paternity leave and 4 weeks of annual leave. The second is to consist of a later period of long paternity leave starting 20 weeks after the birth, when Max is to be the primary care-giver for the child after Rachel returns to work.

Rachel has not taken any special maternity leave or other authorised leave during her pregnancy. She intends to take 20 weeks of maternity leave because of the birth of the child.

The maximum amount of long paternity leave to which Max is entitled is 27 weeks, worked out as follows:

- (a) the maximum entitlement of any employee to paternity leave is 52 weeks;
 - (b) the maximum amount of long paternity leave available to Max must be reduced by 1 week for his short paternity leave;
 - (c) the maximum amount must also be reduced by 4 weeks for Max's annual leave;
 - (d) the maximum amount must be further reduced by 20 weeks for Rachel's maternity leave.
-

Note: A period of long paternity leave must end within 12 months after the date of birth of the child (see section 94ZB).

94V Short paternity leave—concurrent leave taken by spouse

An employee may take short paternity leave in relation to the birth of a child by his spouse while the spouse is taking any authorised leave, including maternity leave (if any), in relation to the birth.

94W Long paternity leave—not to be concurrent with maternity leave taken by spouse

A period of long paternity leave taken by an employee in relation to the birth of a child by his spouse must not include any period during which the spouse is taking maternity leave, or any other authorised leave of the same type as maternity leave, because of the birth.

Subdivision F—Paternity leave: documentation

94X Paternity leave—medical certificate

Requirement for medical certificate

- (1) To be entitled to paternity leave, an employee must give his employer a medical certificate from a medical practitioner in accordance with this section.
- (2) The medical certificate must contain the following statements of the medical practitioner's opinion (or knowledge):
 - (a) if the child has not yet been born:
 - (i) the name of the employee's spouse; and
 - (ii) that the employee's spouse is pregnant; and
 - (iii) the date on which the birth is expected;
 - (b) if the child has been born:
 - (i) the name of the employee's spouse; and
 - (ii) the actual date of birth of the child.

General rule

- (3) The medical certificate must be given to the employer no later than 10 weeks before the date stated in the certificate.

Premature birth or other compelling reason

- (4) However, the medical certificate must be given to the employer as soon as reasonably practicable (which may be at a time before or after the paternity leave has started) if it was not reasonably practicable for the employee to comply with subsection (3) because of:
- (a) the premature birth of the child; or
 - (b) any other compelling reason.

Section does not apply if could not be complied with

- (5) This section does not apply to an employee who could not comply with the section because of circumstances beyond his control.

Note: The use of personal information given to an employer under this section may be regulated under the *Privacy Act 1988*.

94Y Short paternity leave—application

- (1) To be entitled to short paternity leave during a period, an employee must give his employer a written application for short paternity leave, in accordance with this section, stating the first and last days of the period.
- (2) The application must be given to the employer as soon as reasonably practicable on or after the first day of the period of leave.
- (3) This section does not apply to an employee who could not comply with the section because of circumstances beyond his control.

Note: The use of personal information given to an employer under this section may be regulated under the *Privacy Act 1988*.

94Z Long paternity leave—documentation

Requirement for application

- (1) To be entitled to long paternity leave during a period, an employee must give his employer a written application for long paternity leave in accordance with this section stating the first and last days of the period.

General rule

- (2) The application must be given to the employer no later than 10 weeks before the first day of the intended continuous period of leave including (or constituted by) the long paternity leave.

Premature birth or other compelling reason

- (3) However, the application must be made as soon as reasonably practicable (which may be at a time before or after the long paternity leave has started) if it was not reasonably practicable for the employee to comply with subsection (2) because of:
- (a) the premature birth of the child; or
 - (b) any other compelling reason.

Statutory declaration with application

- (4) The application must be accompanied by a statutory declaration made by the employee stating the following:
- (a) the first and last days of the period (or periods) of any other authorised leave intended to be taken (or already taken) by the employee because of the birth or the expected birth;
 - (b) the first and last days of the period (or periods) of any maternity leave, or any other authorised leave of the same type as maternity leave, intended to be taken (or already taken) by the employee's spouse because of the pregnancy, the birth or the expected birth;
 - (c) that the employee intends to be the child's primary care-giver at all times while on long paternity leave;
 - (d) that the employee will not engage in any conduct inconsistent with his contract of employment while on long paternity leave.

Section does not apply if could not be complied with

- (5) This section does not apply to an employee who could not comply with the section because of circumstances beyond his control.

Note: The use of personal information given to an employer under this section may be regulated under the *Privacy Act 1988*.

Subdivision G—Paternity leave: from start to finish

94ZA Short paternity leave—when taken

An employee may take short paternity leave to which he is entitled at any time within the week starting on the day his spouse begins to give birth.

Note: Short paternity leave must be taken in a single, unbroken period (see section 94T). The combined total of paternity leave and related authorised leave taken by the employee and his spouse must be no more than 52 weeks (see section 94U). Short paternity leave may be taken concurrently with any authorised leave taken by the employee's spouse in relation to the birth of the child (see section 94V).

94ZB Long paternity leave—when taken

An employee may take long paternity leave to which he is entitled at any time within 12 months after the date of birth of the child.

Note: Long paternity leave must be taken in a single, unbroken period (see section 94T). The combined total of paternity leave and related authorised leave taken by the employee and his spouse must be no more than 52 weeks (see section 94U). Long paternity leave must not be taken concurrently with any maternity leave, or any other authorised leave of the same type as maternity leave, taken by the employee's spouse because of the birth of the child (see section 94W).

94ZC End of pregnancy—effect on paternity leave

- (1) This section applies if the pregnancy of an employee's spouse ends otherwise than by the birth of a living child.
- (2) The employee is not, or is no longer, entitled to paternity leave in relation to the pregnancy.
- (3) To avoid doubt, this section does not affect any entitlement of an employee to short paternity leave that was taken by the employee in expectation of the birth.

94ZD Death of child—effect on paternity leave

- (1) This section applies if an employee's spouse gives birth to a living child, but the child later dies.

-
- (2) If, when the child died, the employee had not yet started a period of paternity leave in relation to the birth, the employee is not, or is no longer, entitled to that leave.
 - (3) Subject to subsections (4) and (5), if, when the child died, the employee had started a period of paternity leave in relation to the birth, the employee's entitlement to the leave is not affected by the death of the child.

Note: The employee may shorten a period of long paternity leave by agreement with the employer under section 94ZF. However, if the period of leave including (or constituted by) long paternity leave is longer than 4 weeks, to take advantage of the return to work guarantee under section 94ZH, the employee must also give the employer at least 4 weeks written notice of the proposed day of his return to work.

- (4) The employee's employer may give the employee written notice that, from a stated day no earlier than 4 weeks after the day the notice is given, any untaken long paternity leave that the employee remains entitled to at the stated day is cancelled with effect from that day.
- (5) The employee's entitlement to any untaken long paternity leave in relation to the birth ends with effect from the day stated in the notice.

94ZE End of long paternity leave if employee stops being primary care-giver

- (1) This section applies if:
 - (a) during a substantial period while an employee is on long paternity leave after the birth of a living child, the employee is not the child's primary care-giver; and
 - (b) having regard to the length of that period and to any other relevant circumstances, it is reasonable to expect that the employee will not again become the child's primary care-giver within a reasonable period.
- (2) The employee's employer may give the employee written notice that, from a stated day no earlier than 4 weeks after the day the notice is given, any untaken long paternity leave that the employee remains entitled to at the stated day is cancelled with effect from that day.

- (3) The employee's entitlement to any untaken long paternity leave in relation to the birth ends with effect from the day stated in the notice.

94ZF Variation of period of long paternity leave

- (1) This section applies after an employee has started a continuous period of leave including (or constituted by) long paternity leave.
- (2) Subject to Subdivision E and sections 94ZB, 94ZD and 94ZE:
 - (a) the employee may extend the period of long paternity leave once by giving his employer 14 days written notice before the end of the period stating the period by which the leave is extended; and
 - (b) the period of long paternity leave may be further extended by agreement between the employee and his employer.
- (3) The period of long paternity leave may be shortened by written agreement between the employee and his employer.

Note: However, if the period of leave including (or constituted by) long paternity leave is longer than 4 weeks, to take advantage of the return to work guarantee under section 94ZH, the employee must also give his employer at least 4 weeks written notice of the proposed day of his return to work.

94ZG Employee's right to terminate employment during paternity leave

- (1) An employee may terminate his employment at any time during a period of paternity leave.
- (2) The employee's right to terminate his employment is subject to any notice required to be given by the employee by or under:
 - (a) a term or condition of his employment; or
 - (b) a law, or an instrument in force under a law, of the Commonwealth, a State or a Territory.

94ZH Return to work guarantee—paternity leave

- (1) This section applies to an employee who returns to work after a period of leave including (or constituted by) paternity leave (the *paternity-related leave period*) if:
 - (a) the paternity-related leave period is 4 weeks or less; or

-
- (b) if the paternity-related leave period is longer than 4 weeks—the employee has given his employer written notice of the proposed day of his return to work no later than 4 weeks before that day; or
 - (c) the employee’s entitlement to long paternity leave ends under section 94ZD or 94ZE.
- (2) The employee is entitled to return:
- (a) unless paragraph (b) or (c) applies—to the position he held immediately before the start of the paternity-related leave period; or
 - (b) if he was promoted or voluntarily transferred to a new position during the paternity-related leave period—to the new position; or
 - (c) if paragraph (b) does not apply, and he began working part-time because of his spouse’s pregnancy—to the position he held immediately before starting to work part-time.
- (3) However, if the position (the **former position**) no longer exists, and the employee is qualified and able to work for his employer in another position, the employee is entitled to return to:
- (a) that position; or
 - (b) if there are 2 or more such positions—whichever position is nearest in status and remuneration to the former position.

94ZI Replacement employees—long paternity leave

- (1) Before an employer engages an employee (a **primary replacement**) to do the work of another employee because the other employee is taking a continuous period of leave including (or constituted by) paternity leave, the employer must tell the primary replacement:
 - (a) that the engagement to do that work is temporary; and
 - (b) what the rights of the employee taking paternity leave are under section 94ZH when he returns to work after the period of leave.
- (2) Before an employer engages an employee (a **secondary replacement**) to do the work of another employee (the **primary replacement**) because the primary replacement has been temporarily promoted or transferred to do the work of a third employee while the third employee is taking a continuous period of

leave including (or constituted by) paternity leave, the employer must tell the secondary replacement:

- (a) that the engagement to do that work is temporary; and
 - (b) what the rights of the employee taking paternity leave are under section 94ZH when he returns to work after the period of leave.
- (3) In this section:

employee has the meaning given by subsection 4AA(1).

Subdivision H—Guarantee of adoption leave

94ZJ Meaning of *eligible child*

For the purposes of this Division, a child is an *eligible child* in relation to an employee with whom the child is, or is to be, placed for adoption, if the child:

- (a) is (or will be) under the age of 5 years as at the day of placement or the proposed day of placement; and
- (b) has not (or will have not) previously lived continuously with the employee for a period of 6 months or more as at the day of placement or the proposed day of placement; and
- (c) is not a child or step-child of the employee or the employee's spouse.

94ZK The guarantee—pre-adoption leave

- (1) This section applies if an employee is seeking to obtain approval to adopt an eligible child.

Entitlement to leave

- (2) The employee is entitled to a period of up to 2 days unpaid leave (*pre-adoption leave*) to attend any interviews or examinations required to obtain the approval.
- (3) However, the employee is not entitled to take a period of pre-adoption leave if:
- (a) the employee could take other authorised leave instead for the same period for the purpose mentioned in subsection (2); and

-
- (b) the employee's employer directs the employee to take such leave for the period.
 - (4) An employee who is entitled to a period of pre-adoption leave is entitled to take the leave as:
 - (a) a single, unbroken, period of up to 2 days; or
 - (b) any separate periods to which the employee and his or her employer agree.

Agreement between employees and employers

- (5) For the purposes of paragraph (4)(b), an employee and an employer are taken to agree about a particular matter in a particular way if a provision of a workplace agreement binding the employee and the employer specifies that the matter is to be dealt with in that way.
- (6) To avoid doubt, subsection (5) does not prevent employees and employers agreeing about matters by other means.

94ZL The guarantee—adoption leave

- (1) For the purposes of this Division, *adoption leave* is:
 - (a) a single, unbroken period of unpaid leave (*short adoption leave*) of up to 3 weeks taken by an employee within the 3 weeks starting on the day of placement of an eligible child with the employee for adoption; or
 - (b) a single, unbroken period of unpaid leave (*long adoption leave*), other than short adoption leave, taken by an employee after the day of placement of an eligible child with the employee for adoption so that the employee can be the child's primary care-giver.
- (2) Subject to this Subdivision and Subdivision J, an employee is entitled to adoption leave if:
 - (a) the employee complies with the applicable documentation requirements under Subdivision I; and
 - (b) immediately before the first day on which the adoption leave is, or is to be, taken:
 - (i) the employee has, or will have, completed at least 12 months continuous service with his or her employer; or
 - (ii) the employee is, or will be, an eligible casual employee.

Note: Entitlement to adoption leave is subject to the restrictions in sections 94ZM and 94ZO and Subdivision J.

- (3) Subject to this Division, an employee may take short adoption leave, long adoption leave, or both.

94ZM Period of adoption leave

- (1) In this section:

related authorised leave, in relation to adoption leave taken (or to be taken) by an employee because of the placement of a child with the employee and the employee's spouse, means any of the following types of authorised leave other than pre-adoption leave:

- (a) authorised leave, other than adoption leave, taken by the employee because of the placement of the child with the employee;
 - (b) adoption leave, or any other authorised leave of the same type as adoption leave, taken by the spouse because of the placement of the child with the employee.
- (2) An employee may take a period of adoption leave as part of a continuous period including any other authorised leave.
- (3) The maximum total amount of adoption leave (including short adoption leave and long adoption leave) that an employee is entitled to in relation to a placement is 52 weeks, less an amount equal to the total amount of related authorised leave taken:
- (a) by the employee before or after the adoption leave; and
 - (b) by the employee's spouse before or after the adoption leave.

Example: Susan and her spouse Ali propose to adopt a child, and both are employees entitled to adoption leave. Because of the placement of the child, Susan intends to take authorised leave consisting of 3 weeks of short adoption leave, 4 weeks of annual leave, 12 weeks of long service leave and a period of long adoption leave.

Because of the placement of the child, Ali intends to take 3 weeks of short adoption leave.

The maximum amount of long adoption leave to which Susan is entitled is 30 weeks, worked out as follows:

- (a) the maximum entitlement of any employee to adoption leave is 52 weeks;
 - (b) the maximum amount of long adoption leave available to Susan must be reduced by 3 weeks for her short adoption leave;
-

-
- (c) the maximum amount must also be reduced by 16 weeks for Susan's annual leave and long service leave;
 - (d) the maximum amount must also be further reduced by 3 weeks for Ali's short adoption leave.

Note: A period of long adoption leave must end within 12 months after the day of placement of the child (see section 94ZU).

94ZN Short adoption leave—concurrent leave taken by spouse

An employee may take short adoption leave in relation to the placement of a child while his or her spouse is taking any authorised leave, including adoption leave (if any), in relation to the placement.

94ZO Long adoption leave—not to be concurrent with adoption leave taken by spouse

A period of long adoption leave taken by an employee in relation to the placement of a child with the employee and the employee's spouse must not include any period during which the spouse is taking adoption leave, or any other authorised leave of the same type as adoption leave, because of the placement.

Subdivision I—Adoption leave: documentation

94ZP Adoption leave—notice

Requirement for notice

- (1) To be entitled to adoption leave, an employee must give his or her employer notice in accordance with this section.

Note: After an employee has given his or her employer notice in accordance with this section, the employee will have satisfied the notice requirement in relation to the employee's entitlement to both short adoption leave and long adoption leave.

Notices to be given to the employer

- (2) An employee must give written notice to his or her employer of the employee's intention to apply for adoption leave as soon as reasonably practicable after receiving notice (a **placement approval notice**) of the approval of the placement of an eligible child with the employee.

- (3) An employee must give written notice to his or her employer of the day when the placement of an eligible child with the employee is expected to start as soon as reasonably practicable after receiving notice (a **placement notice**) of the expected day.
- (4) An employee must give written notice to his or her employer of the first and last days of the periods of short and long adoption leave (or of either type of leave) the employee intends to apply for because of the placement:
 - (a) if the employee receives a placement notice about the placement within the period of 8 weeks after receiving the placement approval notice—before the end of that 8 week period; or
 - (b) if the employee receives a placement notice about the placement after the end of the period of 8 weeks after receiving the placement approval notice—as soon as reasonably practicable after receiving the placement notice.

Adoption of a relative of the employee

- (5) If an eligible child who is to be adopted by an employee is a relative of the employee, and the employee decides to take the child into custody pending the authorisation of the placement of the child with the employee, the employee must:
 - (a) give notice to his or her employer of the employee's decision as soon as reasonably practicable after the decision is made; and
 - (b) give the notices required by subsections (2), (3) and (4) in accordance with those subsections.

Note: The employee's entitlement to adoption leave after taking the child into custody starts when the adoption is authorised (this is the **day of placement** of the child—see definition of **day of placement** in section 94A).

Adoption process started before engagement with the employer

- (6) If, before starting an employee's current period of engagement with his or her employer, the employee had already received a placement approval notice or a placement notice, or had made a decision to take a child into custody as mentioned in subsection (5), the employee must give the notices required by this section to the employer as soon as reasonable practicable after starting the period of engagement.

Note: However, the employee is only entitled to take either short or long adoption leave if the employee will have completed 12 months continuous service with the employer immediately before the first day on which the leave is to be taken, or if the employee is an eligible casual employee (see section 94ZL).

If employee cannot comply

- (7) A notice under this section must be given to the employee's employer as soon as reasonably practicable before the first day of adoption leave taken by the employee, if the employee cannot comply with subsection (2), (3), (4), (5) or (6) because of:
- (a) the day when the placement is expected to start; or
 - (b) any other compelling reason.

- (8) In this section:

relative, of an employee, means:

- (a) a grandchild, nephew, niece or sibling of the employee; or
- (b) a grandchild, nephew, niece or sibling of the employee's spouse.

Note: The use of personal information given to an employer under this section may be regulated under the *Privacy Act 1988*.

94ZQ Short adoption leave—application

Requirement for application

- (1) To be entitled to short adoption leave during a period, an employee must give his or her employer a written application for short adoption leave, in accordance with this section, stating the first and last days of the period.

General rule

- (2) The application must be given to the employer no later than 14 days before the proposed day of placement of the child.

If employee cannot comply with general rule

- (3) The application must be given to the employer as soon as reasonably practicable before the first day of the short adoption leave applied for if the employee cannot comply with subsection (2) because of:

- (a) the day when the placement is expected to start; or
- (b) any other compelling reason.

Note: The use of personal information given to an employer under this section may be regulated under the *Privacy Act 1988*.

94ZR Long adoption leave—application

Requirement for application

- (1) To be entitled to long adoption leave during a period, an employee must give his or her employer a written application for long adoption leave, in accordance with this section, stating the first and last days of the period.

General rule

- (2) The application must be given to the employer no later than 10 weeks before the first day of the proposed continuous period of leave including (or constituted by) the long adoption leave applied for.

If employee cannot comply with general rule

- (3) The application must be given to the employer as soon as reasonably practicable before the first day of the long adoption leave applied for if the employee cannot comply with subsection (2) because of:
 - (a) the day when the placement is expected to start; or
 - (b) any other compelling reason.

Note: The use of personal information given to an employer under this section may be regulated under the *Privacy Act 1988*.

94ZS Adoption leave—additional documents

- (1) To be entitled to adoption leave, an employee must give his or her employer documents as required by this section.
- (2) The documents required by this section must be given to the employer:
 - (a) before the employee begins the period of adoption leave; or

- (b) if the employee is taking both short and long adoption leave—before the employee begins the period of short adoption leave.
- (3) The employee must give his or her employer the following documents:
 - (a) a statement from an adoption agency of the day when the placement is expected to start;
 - (b) a statutory declaration in accordance with subsection (4) made by the employee.
- (4) The statutory declaration must state the following:
 - (a) whether the employee is taking short adoption leave, long adoption leave, or both;
 - (b) the first and last days of the period (or periods) of any other authorised leave taken, or intended to be taken, by the employee because of the placement of the child;
 - (c) the first and last days of the period (or periods) of adoption leave, or any other authorised leave of the same type as adoption leave, taken, or intended to be taken, by the employee's spouse because of the placement of the child;
 - (d) that the child is an eligible child;
 - (e) for any period of long adoption leave to be taken by the employee—that the employee intends to be the child's primary care-giver at all times while on the long adoption leave;
 - (f) that the employee will not engage in any conduct inconsistent with his or her contract of employment while on adoption leave.

Note: The use of personal information given to an employer under this section may be regulated under the *Privacy Act 1988*.

Subdivision J—Adoption leave: from start to finish

94ZT Short adoption leave—when taken

An employee may take short adoption leave to which he or she is entitled at any time within the period of 3 weeks starting on the day of placement of the child.

Note: Short adoption leave must be taken in a single, unbroken period (see section 94ZL). The combined total of adoption leave and related

authorised leave taken by the employee and his or her spouse must be no more than 52 weeks (see section 94ZM). Short adoption leave may be taken concurrently with any authorised leave taken by the employee's spouse (see section 94ZN).

94ZU Long adoption leave—when taken

An employee may take long adoption leave to which he or she is entitled at any time within 12 months after the day of placement of the child.

Note: Long adoption leave must be taken in a single, unbroken period (see section 94ZL). The combined total of adoption and authorised leave taken by the employee and his or her spouse must be no more than 52 weeks (see section 94ZM). Long adoption leave must not be taken concurrently with any adoption leave, or any other authorised leave of the same type as adoption leave, taken by the employee's spouse because of the placement (see section 94ZO).

94ZV Placement does not proceed—effect on adoption leave

- (1) This section applies if a proposed placement of a child with an employee:
 - (a) is cancelled before it starts, whether at the initiative of an adoption agency, another body, or the employee; or
 - (b) starts but is later discontinued for any reason (including the death of the child).
- (2) If, when this section first applies, the employee had not yet started a period of adoption leave in relation to the placement, the employee is not, or is no longer, entitled to the leave.
- (3) Subject to subsections (4) and (5), if, when this section applies, the employee had started a period of adoption leave in relation to the placement, the employee's entitlement to the adoption leave is not affected by the cancellation or discontinuation of the placement.

Note: The employee may shorten a period of long adoption leave by agreement with the employer under section 94ZX. However, if the period of leave including (or constituted by) long adoption leave is longer than 4 weeks, to take advantage of the return to work guarantee under section 94ZZ, the employee must also give the employer at least 4 weeks written notice of the proposed day of his or her return to work.

- (4) The employee's employer may give the employee written notice that, from a stated day no earlier than 4 weeks after the day the notice is given, any untaken long adoption leave that the employee
-

remains entitled to at the stated day is cancelled with effect from that day.

- (5) The employee's entitlement to any untaken long adoption leave in relation to the placement ends with effect from the day stated in the notice.

94ZW End of long adoption leave if employee stops being primary care-giver

- (1) This section applies if:
- (a) during a substantial period while an employee is on long adoption leave after the placement of a child with the employee, the employee is not the child's primary care-giver; and
 - (b) having regard to the length of that period and to any other relevant circumstances, it is reasonable to expect that the employee will not again become the child's primary care-giver within a reasonable period.
- (2) The employee's employer may give the employee written notice that, from a stated day no earlier than 4 weeks after the day the notice is given, any untaken long adoption leave that the employee remains entitled to at the stated day is cancelled with effect from that day.
- (3) The employee's entitlement to any untaken long adoption leave in relation to the placement ends with effect from the day stated in the notice.

94ZX Variation of period of long adoption leave

- (1) This section applies after an employee has started a continuous period of leave including (or constituted by) long adoption leave.
- (2) Subject to Subdivision H and sections 94ZU, 94ZV and 94ZW:
- (a) the employee may extend the period of long adoption leave once by giving his or her employer 14 days written notice before the end of the period stating the period by which the leave is extended; and
 - (b) the period of long adoption leave may be further extended by agreement between the employee and his or her employer.

- (3) The period of long adoption leave may be shortened by written agreement between the employee and his or her employer.

Note: However, if the period of leave including (or constituted by) long adoption leave is longer than 4 weeks, to take advantage of the return to work guarantee under section 94ZZ, the employee must also give his or her employer at least 4 weeks written notice of the proposed day for his or her return to work.

94ZY Employee's right to terminate employment during adoption leave

- (1) An employee may terminate his or her employment at any time during a period of adoption leave.
- (2) The employee's right to terminate his or her employment is subject to any notice required to be given by the employee by or under:
- (a) a term or condition of his or her employment; or
 - (b) a law, or an instrument in force under a law, of the Commonwealth, a State or a Territory.

94ZZ Return to work guarantee—adoption leave

- (1) This section applies to an employee who returns to work after a period of leave including (or constituted by) adoption leave (the *adoption-related leave period*) if:
- (a) the adoption-related leave period is 4 weeks or less; or
 - (b) if the adoption-related leave period is longer than 4 weeks—the employee has given his or her employer written notice of the proposed day of his or her return to work no later than 4 weeks before that day; or
 - (c) the employee's entitlement to long adoption leave ends under section 94ZV or 94ZW.
- (2) The employee is entitled to return:
- (a) unless paragraph (b) applies—to the position he or she held immediately before the start of the adoption-related leave period; or
 - (b) if he or she was promoted or voluntarily transferred to a new position during the adoption-related leave period—to the new position.

-
- (3) However, if the position (the *former position*) no longer exists, and the employee is qualified and able to work for his or her employer in another position, the employer must employ the employee in:
- (a) that position; or
 - (b) if there are 2 or more such positions—whichever position is nearest in status and remuneration to the former position.

94ZZA Replacement employees—long adoption leave

- (1) Before an employer engages an employee (a *primary replacement*) to do the work of another employee because the other employee is taking a continuous period of leave including (or constituted by) adoption leave, the employer must tell the primary replacement:
- (a) that the engagement to do that work is temporary; and
 - (b) what the rights of the employee taking adoption leave are under section 94ZZ when he or she returns to work after the period of leave.
- (2) Before an employer engages an employee (a *secondary replacement*) to do the work of another employee (the *primary replacement*) because the primary replacement has been temporarily promoted or transferred to do the work of a third employee while the third employee is taking a continuous period of leave including (or constituted by) adoption leave, the employer must tell the secondary replacement:
- (a) that the engagement to do that work is temporary; and
 - (b) what the rights of the employee taking adoption leave are under section 94ZZ when he or she returns to work after the period of leave.
- (3) In this section:

employee has the meaning given by subsection 4AA(1).

Subdivision K—Parental leave: service

94ZZB Parental leave and service

- (1) A period of parental leave does not break an employee's continuity of service.

- (2) However, a period of parental leave does not otherwise count as service except:
- (a) for the purpose of determining the employee's entitlement to a later period of leave under this Division; or
 - (b) as expressly provided by or under:
 - (i) a term or condition of the employee's employment; or
 - (ii) a law, or an instrument in force under a law, of the Commonwealth, a State or a Territory; or
 - (c) as prescribed by the regulations.
- (3) In this section:
- parental leave* means any of the following:
- (a) maternity leave;
 - (b) paid leave under subparagraph 94F(2)(b)(i) or (ii);
 - (c) paternity leave;
 - (d) pre-adoption leave;
 - (e) adoption leave.

Division 7—Civil remedies

94ZZC Definition

In this Division:

Court means the Federal Court of Australia or the Federal Magistrates Court.

94ZZD Civil remedies

- (1) An employer must not contravene a term of the Australian Fair Pay and Conditions Standard contained in Division 3, 4, 5 or 6 of this Part in relation to an employee of the employer to whom that term applies.
- (2) Subsection (1) is a civil remedy provision.
- (3) The reference in subsection (1) to Division 6 of this Part includes a reference to that Division as it applies because of section 170KB.

94ZZE Standing for civil remedies

- (1) Any of the following persons may apply to the Court for an order under this Division in relation to a contravention referred to in subsection 94ZZD(1):
 - (a) the employee concerned;
 - (b) an organisation of employees (subject to subsection (2));
 - (c) a workplace inspector.
- (2) An organisation of employees must not apply on behalf of an employee for a remedy under this Division in relation to a contravention unless:
 - (a) a member of the organisation is employed by the respondent employer; and
 - (b) the contravention relates to, or affects, the member of the organisation or work carried on by the member for the employer.

94ZZF Court orders

The Court may, on application by a person in accordance with section 94ZZE, make one or more of the following orders in relation to an employer who has contravened a relevant term of the Australian Fair Pay and Conditions Standard:

- (a) an order requiring the employer to pay a specified amount to another person as compensation for damage suffered by the other person as a result of the contravention;
- (b) any other orders (including injunctions) that the Court considers necessary to stop the contravention or rectify its effects.

Part VB—Workplace agreements

Division 1—Preliminary

95 Definitions

In this Part:

Court means the Federal Court of Australia or the Federal Magistrates Court.

new business has the meaning given by section 95B.

prohibited content has the meaning given by section 101D.

undertakings means undertakings mentioned in section 103M.

verified copy, in relation to a document, means a copy that is certified as being a true copy of the document.

95A Single business and single employer

- (1) For the purposes of this Part, a *single business* is:
 - (a) a business, project or undertaking that is carried on by an employer; or
 - (b) the activities carried on by:
 - (i) the Commonwealth, a State or a Territory; or
 - (ii) a body, association, office or other entity established for a public purpose by or under a law of the Commonwealth, a State or a Territory; or
 - (iii) any other body in which the Commonwealth, a State or a Territory has a controlling interest.
- (2) For the purposes of this Part:
 - (a) if 2 or more employers carry on a business, project or undertaking as a joint venture or common enterprise, the employers are taken to be one employer; and
 - (b) if 2 or more corporations that are related to each other for the purposes of the *Corporations Act 2001* each carry on a single business:
 - (i) the corporations may be treated as one employer; and
 - (ii) the single businesses may be treated as one single business.
- (3) For the purposes of this Part, a part of a single business includes, for example:
 - (a) a geographically distinct part of the single business; or
 - (b) a distinct operational or organisational unit within the single business.

95B New business

For the purposes of sections 96C and 96D, an agreement relates to a *new business* if:

- (a) the agreement relates to:
 - (i) a new business, new project or new undertaking that the employer in relation to the agreement is proposing to establish; or
 - (ii) if the employer in relation to the agreement is an entity mentioned in paragraph 95A(1)(b)—new activities proposed to be carried on by the employer; and
- (b) the business, project or undertaking is, or the activities are, a single business (or a part of a single business).

95D Extended operation of Part in relation to proposed workplace agreements

So far as the context permits:

- (a) a reference in this Part to a workplace agreement includes a reference to a proposed workplace agreement; and
- (b) a reference in this Part to an employer, in relation to a workplace agreement, includes a reference to a person who will be an employer in relation to a proposed agreement when it comes into operation; and
- (c) a reference in this Part to an employee, in relation to a workplace agreement, includes a reference to a person who will be an employee in relation to a proposed agreement when it comes into operation.

95E Extraterritorial extension

- (1) This Part, and the rest of this Act so far as it relates to this Part, extends to persons, acts, omissions, matters and things outside Australia that are connected with a workplace agreement relating to an Australian-based employee or an Australian employer.

Note: In this context, *Australia* includes the Territory of Christmas Island, the Territory of Cocos (Keeling) Islands and the coastal sea. See section 15B and paragraph 17(a) of the *Acts Interpretation Act 1901*.

- (2) In this section:

this Act includes the Registration and Accountability of Organisations Schedule and regulations made under it.

Division 2—Types of workplace agreements

96 Australian workplace agreements (AWAs)

- (1) An employer may make an agreement (an *Australian workplace agreement* or *AWA*) in writing with a person whose employment will be subject to the agreement.
- (2) An AWA may be made before commencement of the employment.

96A Employee collective agreements

An employer may make an agreement (an *employee collective agreement*) in writing with persons employed at the time in a single business (or part of a single business) of the employer whose employment will be subject to the agreement.

96B Union collective agreements

An employer may make an agreement (a *union collective agreement*) in writing with one or more organisations of employees if, when the agreement is made, each organisation:

- (a) has at least one member whose employment in a single business (or part of a single business) of the employer will be subject to the agreement; and
- (b) is entitled to represent the industrial interests of the member in relation to work that will be subject to the agreement.

96C Union greenfields agreements

- (1) An employer may make an agreement (a *union greenfields agreement*) in writing with one or more organisations of employees if:
 - (a) the agreement relates to a new business that the employer proposes to establish, or is establishing, when the agreement is made; and
 - (b) the agreement is made before the employment of any of the persons:

- (i) who will be necessary for the normal operation of the business; and
 - (ii) whose employment will be subject to the agreement; and
 - (c) each organisation meets the requirements of subsection (2).
- (2) When the agreement is made, each organisation must be entitled to represent the industrial interests of one or more of the persons, whose employment is likely to be subject to the agreement, in relation to work that will be subject to the agreement.

96D Employer greenfields agreements

An employer may make an agreement (an *employer greenfields agreement*) in writing if:

- (a) the agreement relates to a new business that the employer proposes to establish, or is establishing, when the agreement is made; and
- (b) the agreement is made before the employment of any of the persons:
 - (i) who will be necessary for the normal operation of the business; and
 - (ii) whose employment will be subject to the agreement.

96E Multiple-business agreements

- (1) A *multiple-business agreement* is an agreement that:
- (a) relates to any combination or combinations of the following:
 - (i) one or more single businesses;
 - (ii) one or more parts of single businesses; carried on by one or more employers; and
 - (b) would be a collective agreement of a type mentioned in section 96A, 96B, 96C or 96D but for the matter in paragraph (a).

Note: For civil remedy provisions dealing with the making or variation of a multiple-business agreement, see sections 99A and 102I.

- (2) So far as the context permits, this Part (apart from this Division) has effect in relation to a multiple-business agreement of a particular type as if the agreement were a collective agreement (other than a multiple-business agreement) of that type.

- (3) So far as the context permits, this Part (apart from this Division) has effect in relation to a multiple-business agreement with more than one employer as if a reference to the employer in relation to an agreement were a reference to an employer in relation to the agreement.

96F Authorisation of multiple-business agreements

- (1) An employer may apply to the Employment Advocate for an authorisation to make or vary a multiple-business agreement.
- (2) The regulations may set out a procedure for applying to the Employment Advocate for the authorisation. The Employment Advocate need not consider an application if it is not made in accordance with the procedure.
- (3) The Employment Advocate must not grant the authorisation unless he or she is satisfied that it is in the public interest to do so, having regard to:
 - (a) whether the matters dealt with by the agreement (or the agreement as varied) could be more appropriately dealt with by a collective agreement other than a multiple-business agreement; and
 - (b) any other matter specified in regulations made for the purposes of this subsection.

96G When a workplace agreement is made

For the purposes of this Act, a workplace agreement is *made* at whichever of the following times is applicable:

- (a) for an AWA—the time when the AWA is approved in accordance with section 98C;
 - (b) for an employee collective agreement—the time when the agreement is approved in accordance with section 98C;
 - (c) for a union collective agreement—the time when the employer and the organisation or organisations agree to the terms of the agreement;
 - (d) for a union greenfields agreement—the time when the employer and the organisation or organisations agree to the terms of the agreement;
 - (e) for an employer greenfields agreement—the time when the employer lodges the agreement (see section 99B).
-

Division 3—Bargaining agents

97A Bargaining agents—AWAs

- (1) An employer or employee may appoint a person to be his or her bargaining agent in relation to the making, variation or termination of an AWA. The appointment must be made in writing.

Note: Subsection 104(3) provides a civil remedy for coercion in relation to appointments under this subsection.

- (2) Subject to subsection (3), an employer or employee must not refuse to recognise a bargaining agent duly appointed by the other party for the purposes of subsection (1).

- (3) Subsection (2) does not apply if the person refusing has not been given a copy of the bargaining agent's instrument of appointment before the refusal.

- (4) Subsection (2) is a civil remedy provision.

Note: See Division 11 for provisions on enforcement.

97B Bargaining agents—employee collective agreements

- (1) An employee whose employment is or will be subject to an employee collective agreement may request another person (the ***bargaining agent***) to represent the employee in meeting and conferring with the employer about the making or variation of the agreement.

Note: Subsection 104(4) provides a civil remedy for coercion in relation to requests under this subsection.

- (2) An employee whose employment is or will be subject to an employer greenfields agreement may request another person (the ***bargaining agent***) to represent the employee in meeting and conferring with the employer about the variation of the agreement.

Note: Subsection 104(4) provides a civil remedy for coercion in relation to requests under this subsection.

- (3) The employer must give the bargaining agent a reasonable opportunity to meet and confer with the employer about the agreement during the period:

- (a) beginning 7 days before the agreement or variation is approved in accordance with section 98C or section 102F; and
 - (b) ending when the agreement or variation is approved.
- (4) Subsection (3) is a civil remedy provision.
- Note: See Division 11 for provisions on enforcement.
- (5) The requirement in subsection (3) ceases to apply to the employer if at any time after the request is made the employee withdraws the request.
- (6) The Employment Advocate may issue a certificate that he or she is satisfied of one of the following matters if he or she is so satisfied:
- (a) on application by a bargaining agent—that the employee has made a request in accordance with subsection (1) or (2) for the bargaining agent to represent the employee in meeting and conferring with the employer;
 - (b) on application by the employer—that, after the making of the request, the requirement in subsection (3) for the employer to give a reasonable opportunity to the bargaining agent to meet and confer, has, because of subsection (5), ceased to apply to the employer.
- (7) The certificate must not identify any of the employees concerned. However, it must identify the bargaining agent, the employer and the agreement.
- (8) The certificate is, for all purposes of this Act, prima facie evidence that the employee or employees made the request or that the requirement has ceased to apply.

Division 4—Pre-lodgment procedure

97C Eligible employee

For the purposes of this Division, an *eligible employee* in relation to a workplace agreement is:

- (a) in the case of an AWA—the person whose employment will be subject to the AWA; or

-
- (b) in the case of a collective agreement—a person employed by the employer whose employment will be subject to the agreement.

98 Providing employees with ready access and information statement

- (1) If an employer intends to have a workplace agreement (other than a greenfields agreement) approved under section 98C, the employer must take reasonable steps to ensure that all eligible employees in relation to the agreement either have, or have ready access to, the agreement in writing during the period:
 - (a) beginning 7 days before the agreement is approved; and
 - (b) ending when the agreement is approved.
- (2) The employer must take reasonable steps to ensure that all eligible employees in relation to the agreement are given an information statement at least 7 days before the agreement is approved.
- (3) Despite subsections (1) and (2), if the agreement is a collective agreement and a person becomes an eligible employee at a time during the period mentioned in subsection (1), the employer must take reasonable steps to ensure that:
 - (a) the person is given an information statement at or before that time; and
 - (b) the person either has, or has ready access to, the agreement in writing during the period:
 - (i) beginning at that time; and
 - (ii) ending when the agreement is approved under section 98C.
- (4) The information statement mentioned in subsection (2) and paragraph (3)(a) must contain:
 - (a) information about the time at which and the manner in which the approval will be sought under section 98C; and
 - (b) if the agreement is an AWA—information about the effect of section 97A (which deals with bargaining agents); and
 - (c) if the agreement is an employee collective agreement—information about the effect of section 97B (which deals with bargaining agents); and

- (d) any other information that the Employment Advocate requires by notice published in the *Gazette*.
- (5) If a waiver has been made under section 98A in relation to the workplace agreement, subsection (1) and paragraph (3)(b) do not apply in relation to a time after the waiver takes effect.
- (6) For the purposes of this section, if the workplace agreement incorporates terms from an industrial instrument mentioned in subsection 101C(2), the eligible employees have ready access to the workplace agreement only if they have ready access to that instrument in writing.
- (7) To avoid doubt, if the content of the workplace agreement is changed during the period mentioned in subsection (1), the change results in a separate workplace agreement for the purposes of this section.

Note: If the content of an agreement for which the employer intends to seek approval is changed, the procedural steps set out in subsections (1), (2) and (3) must be repeated for the resulting separate agreement.

Contravention—ready access

- (8) An employer contravenes this subsection if:
 - (a) the employer lodges a workplace agreement; and
 - (b) the employer failed to comply with subsection (1) or (if applicable) paragraph (3)(b) in relation to the agreement.

Contravention—information statement

- (9) An employer contravenes this subsection if:
 - (a) the employer lodges a workplace agreement; and
 - (b) the employer failed to comply with subsection (2) or (if applicable) paragraph (3)(a) in relation to the agreement.
- (10) Subsections (8) and (9) are civil remedy provisions.

Note: See Division 11 for provisions on enforcement.

- (11) An employer cannot contravene subsection (8) or (9) more than once in relation to the lodgment of a particular workplace agreement.

98A Employees may waive ready access

- (1) The persons mentioned in subsection (2) may make a waiver under this section in relation to a workplace agreement.
- (2) The persons are all the eligible employees at the time the waiver is made.
- (3) The waiver must be in writing and dated.
- (4) The waiver is made when all the persons mentioned in subsection (2) sign the waiver.
- (5) The waiver takes effect when it is made.

98B Prohibition on withdrawal from union collective agreement

- (1) An employer that has made a union collective agreement must take reasonable steps to seek approval for the agreement under section 98C, within a reasonable period after the agreement was made.
- (2) Subsection (1) is a civil remedy provision.

Note: See Division 11 for provisions on enforcement.

98C Approval of a workplace agreement

- (1) An AWA is *approved* if:
 - (a) the AWA is signed and dated by the employee and the employer; and
 - (b) those signatures are witnessed; and
 - (c) if the employee is under the age of 18 years:
 - (i) the AWA is signed and dated by an appropriate person (such as a parent or guardian of the employee, but not the employer) on behalf of the employee, for the purpose of indicating that person's consent to the employee making the AWA; and
 - (ii) that person is aged at least 18 years; and
 - (iii) that person's signature is witnessed.
- (2) An employee collective agreement or union collective agreement is *approved* if:

- (a) the employer has given all of the persons employed at the time whose employment will be subject to the agreement a reasonable opportunity to decide whether they want to approve the agreement; and
- (b) either:
 - (i) if the decision is made by a vote—a majority of those persons who cast a valid vote decide that they want to approve the agreement; or
 - (ii) otherwise—a majority of those persons decide that they want to approve the agreement.

98D Employer must not lodge unapproved agreement

- (1) An employer contravenes this subsection if:
 - (a) the employer lodges a workplace agreement (other than a greenfields agreement); and
 - (b) the agreement has not been approved in accordance with section 98C.
- (2) Subsection (1) is a civil remedy provision.

Note: See Division 11 for provisions on enforcement.

Division 5—Lodgment

99 Employer must lodge certain workplace agreements with the Employment Advocate

- (1) If an AWA, an employee collective agreement or a union collective agreement has been approved in accordance with section 98C, the employer must lodge the agreement, in accordance with section 99B, within 14 days after the approval.
- (2) If a union greenfields agreement has been made, the employer must lodge the agreement, in accordance with section 99B, within 14 days after the agreement was made.
- (3) Subsections (1) and (2) are civil remedy provisions.

Note: See Division 11 for provisions on enforcement.

99A Lodging multiple-business agreement without authorisation

- (1) An employer contravenes this section if:
 - (a) the employer lodges a multiple-business agreement; and
 - (b) the agreement has not been authorised under section 96F.
- (2) Subsection (1) is a civil remedy provision.

Note: See Division 11 for provisions on enforcement.

99B Lodging of workplace agreement documents with the Employment Advocate

- (1) The employer in relation to a workplace agreement lodges the workplace agreement with the Employment Advocate if:
 - (a) the employer lodges a declaration under subsection (2); and
 - (b) a copy of the workplace agreement is annexed to the declaration.
- (2) An employer lodges a declaration with the Employment Advocate if:
 - (a) the employer gives it to the Employment Advocate; and
 - (b) it meets the form requirements mentioned in subsection (3).

Note: Sections 137.1 and 137.2 of the *Criminal Code* create offences for providing false or misleading information or documents.

- (3) The Employment Advocate may, by notice published in the *Gazette*, set out requirements for the form of a declaration for the purposes of paragraph (2)(b).
- (4) A declaration is given to the Employment Advocate for the purposes of subsection (2) only if the declaration is actually received by the Employment Advocate.

Note: This means that section 29 of the *Acts Interpretation Act 1901* (to the extent that it deals with the time of service of documents) and section 160 of the *Evidence Act 1995* do not apply to lodgment of a declaration.

- (5) The Employment Advocate is not required to consider or determine whether any of the requirements of this Part have been met in relation to the making or content of anything annexed to a declaration lodged in accordance with subsection (2).

99C Employment Advocate must issue receipt for lodgment of declaration for workplace agreement

- (1) If a declaration is lodged under subsection 99B(2), the Employment Advocate must issue a receipt for the lodgment.
- (2) The Employment Advocate must give a copy of the receipt to:
 - (a) the employer in relation to the workplace agreement; and
 - (b) if the workplace agreement is an AWA—the employee; and
 - (c) if the agreement is a union collective agreement or a union greenfields agreement—the organisation or organisations bound by the agreement.

99D Employer must notify employees after lodging workplace agreement

- (1) An employer that has received a receipt under section 99C in relation to a collective agreement must take reasonable steps to ensure that all persons whose employment is subject to the agreement when the employer receives the receipt are given a copy of the receipt within 21 days.
- (2) Subsection (1) is a civil remedy provision.

Note: See Division 11 for provisions on enforcement.
- (3) This section does not apply in relation to a greenfields agreement.

Division 6—Operation of workplace agreements and persons bound

100 When a workplace agreement is in operation

- (1) A workplace agreement comes into operation on the day the agreement is lodged.
 - (2) A workplace agreement comes into operation even if the requirements in Divisions 3 and 4 and section 99 have not been met in relation to the agreement.
 - (3) A multiple-business agreement comes into operation only if it has been authorised under section 96F.
 - (4) A workplace agreement ceases to be in operation if:
-

- (a) it is terminated in accordance with Division 9; or
 - (b) in the case of an AWA—it is replaced by another AWA; or
 - (c) the Court declares it to be void under paragraph 105F(a).
- (5) A collective agreement ceases to be in operation in relation to an employee if it has:
- (a) passed its nominal expiry date; and
 - (b) been replaced by another collective agreement in relation to that employee.
- Note: Part VIAA sets out the circumstances in which a workplace agreement binding an employer because of transmission of business will cease to operate.
- (6) A multiple-business agreement ceases to operate in relation to a single business (or a part of a single business) if:
- (a) the multiple-business agreement came into operation on a particular day; and
 - (b) a collective agreement (other than a multiple-business agreement) was lodged on a later day; and
 - (c) the multiple-business agreement and the collective agreement apply in relation to the same single business (or the same part of the single business).
- Example: Employers A, B and C lodge a multiple-business agreement which has a nominal expiry date 5 years after it is lodged. Six months later employer B lodges a collective agreement that applies in relation to its single business. This means that the multiple-business agreement ceases to operate in relation to that single business.
- (7) If a workplace agreement has ceased operating under subsection (4), it can never operate again.
- (8) If a workplace agreement has ceased operating in relation to an employee because of subsection (5), the agreement can never operate again in relation to that employee.
- (9) If a multiple-business agreement has ceased operating in relation to a single business (or a part of a single business), the agreement can never operate again in relation to that single business (or part of a business).
- (10) If:
- (a) a person or entity is the employer bound by a workplace agreement; and
-

- (b) the person or entity ceases to be an employer within the meaning of subsection 4AB(1);
the agreement ceases to be in operation.
- (11) Despite subsection (10), if the agreement mentioned in that subsection is a multiple-business agreement, it ceases to be in operation only in relation to a single business or part of a single business carried on by the person or entity.

100A Relationship between overlapping workplace agreements

- (1) Only one workplace agreement can have effect at a particular time in relation to a particular employee.
- (2) A collective agreement has no effect in relation to an employee while an AWA operates in relation to the employee.
- (3) If:
 - (a) a collective agreement (the *first agreement*) binding an employee is in operation; and
 - (b) another collective agreement (the *later agreement*) binding the employee is lodged before the nominal expiry date of the first agreement;

the later agreement has no effect in relation to the employee until the nominal expiry date of the first agreement.

Note: After that date, the first agreement ceases operating in relation to the employee (see subsection 100(5)), and the later agreement takes effect in relation to the employee.

100B Effect of awards while workplace agreement is in operation

An award has no effect in relation to an employee while a workplace agreement operates in relation to the employee.

100C Workplace agreement displaces certain Commonwealth laws

- (1) To the extent of any inconsistency, a workplace agreement displaces prescribed conditions of employment specified in a Commonwealth law that is prescribed by the regulations.
- (2) In this section:

Commonwealth law means an Act or any regulations or other instrument made under an Act.

prescribed conditions means conditions that are identified by the regulations.

100D Persons bound by workplace agreements

A workplace agreement that is in operation binds:

- (a) the employer in relation to the agreement; and
- (b) all persons whose employment is, at any time when the agreement is in operation, subject to the agreement; and
- (c) if the agreement is a union collective agreement or a union greenfields agreement—the organisation or organisations of employees with which the employer made the agreement.

Note: A person can be bound by a workplace agreement because of Part VIAA (which deals with transmission of business).

Division 7—Content of workplace agreements

Subdivision A—Required content

Note: For the operation of the Australian Fair Pay and Conditions Standard, see Part VA.

101 Nominal expiry date

- (1) The **nominal expiry date** of a workplace agreement is:
 - (a) in the case of an employer greenfields agreement:
 - (i) if a date is specified in the agreement as its nominal expiry date, and that date is no later than the first anniversary of the date on which the agreement was lodged—that specified date; or
 - (ii) otherwise—the first anniversary of the date on which the agreement was lodged; or
 - (b) otherwise:
 - (i) if a date is specified in the agreement as its nominal expiry date, and that date is no later than the fifth anniversary of the date on which the agreement was lodged—that specified date; or
 - (ii) otherwise—the fifth anniversary of the date on which the agreement was lodged.

- (2) However, if the agreement has been varied to extend its nominal expiry date, the *nominal expiry date* of the agreement is:
- (a) in the case of an employer greenfields agreement—the earlier of the following dates:
 - (i) the date specified in the agreement as varied as its nominal expiry date;
 - (ii) the first anniversary of the date on which the agreement was lodged; or
 - (b) otherwise—the earlier of the following dates:
 - (i) the date specified in the agreement as varied as its nominal expiry date;
 - (ii) the fifth anniversary of the date on which the agreement was lodged.

101A Workplace agreement to include dispute settlement procedures

- (1) A workplace agreement must include procedures for settling disputes (*dispute settlement procedures*) about matters arising under the agreement between:
- (a) the employer; and
 - (b) the employees whose employment will be subject to the agreement.
- (2) If a workplace agreement does not include dispute settlement procedures, the agreement is taken to include the model dispute resolution process mentioned in Part VIIA.

101B Protected award conditions

- (1) This section applies if:
- (a) a person's employment is subject to a workplace agreement; and
 - (b) protected award conditions would have effect (but for the agreement) in relation to the employment of the person.
- (2) Those protected award conditions:
- (a) are taken to be included in the workplace agreement; and
 - (b) have effect in relation to the employment of that person; and

- (c) have that effect subject to any terms of the workplace agreement that expressly exclude or modify all or part of them.
- (2A) Despite paragraph (2)(c), those protected award conditions have effect in relation to the employment of that person to the extent that those protected award conditions are about outworker conditions, despite any terms of the workplace agreement that provide, in a particular respect, a less favourable outcome for that person.

- (3) In this section:

outworker means an employee who, for the purposes of the business of the employer, performs work at private residential premises or at other premises that are not business or commercial premises of the employer.

outworker conditions means conditions (other than pay) for outworkers, but only to the extent necessary to ensure that their overall conditions of employment are fair and reasonable in comparison with the conditions of employment specified in a relevant award or awards for employees who perform the same kind of work at an employer's business or commercial premises.

protected allowable award matters means the following matters:

- (a) rest breaks;
- (b) incentive-based payments and bonuses;
- (c) annual leave loadings;
- (d) observance of days declared by or under a law of a State or Territory to be observed generally within that State or Territory, or a region of that State or Territory, as public holidays by employees who work in that State, Territory or region, and entitlements of employees to payment in respect of those days;
- (da) days to be substituted for, or a procedure for substituting, days referred to in paragraph (d);
- (e) monetary allowances for:
 - (i) expenses incurred in the course of employment; or
 - (ii) responsibilities or skills that are not taken into account in rates of pay for employees; or
 - (iii) disabilities associated with the performance of particular tasks or work in particular conditions or locations;

- (f) loadings for working overtime or for shift work;
- (g) penalty rates;
- (h) outworker conditions;
- (i) any other matter specified in the regulations.

Note: These matters are the same as certain allowable award matters mentioned in section 116.

protected award conditions means the terms of an award, as in force from time to time, to the extent that those terms:

- (a) are:
 - (i) about protected allowable award matters; or
 - (ii) terms that are incidental to protected allowable award matters and that may be included in an award as permitted by section 116I; or
 - (iii) machinery provisions that are in respect of protected allowable award matters and that may be included in an award as permitted by section 116I; and
- (b) are not about:
 - (i) matters that are not allowable award matters because of section 116B; or
 - (ii) any other matters specified in the regulations.

101C Calling up content of other documents

- (1) A workplace agreement may incorporate by reference terms from an industrial instrument mentioned in subsection (2) only if the requirements in subsection (3) are satisfied.
- (2) The industrial instruments are as follows:
 - (a) a workplace agreement;
 - (b) an award.

Note: For pre-reform certified agreements, see clause 9 in Schedule 14.

- (3) The requirements are as follows:
 - (a) if the industrial instrument is an award:
 - (i) just before the agreement is made the award regulates any term or condition of employment of persons engaged in a particular kind of work; and

- (ii) the employment of a person engaged in that kind of work will be subject to the agreement when the agreement comes into operation; and
 - (iii) the award is binding on the employer in relation to the agreement just before the agreement is made;
 - (b) if the industrial instrument is a workplace agreement—the instrument is binding on the employer in relation to the agreement mentioned in subsection (1) just before that agreement is made.
- (4) If those requirements are satisfied, the workplace agreement may incorporate terms by reference from the industrial instrument:
 - (a) as in operation just before the agreement is made; or
 - (b) as varied from time to time.
- (5) A term of a workplace agreement is void to the extent that:
 - (a) it incorporates by reference terms from an industrial instrument mentioned in subsection (2); and
 - (b) the requirements in subsection (3) are not satisfied.
- (6) A term of a workplace agreement is void to the extent that it incorporates by reference terms from any of the following instruments (other than an instrument mentioned in subsection (2)):
 - (a) an award or agreement regulating terms and conditions of employment that is in force under a law of a State (other than a contract of employment);
 - (b) an agreement, arrangement, deed or memorandum of understanding, that:
 - (i) regulates terms and conditions of employment; and
 - (ii) was created by a process of collective negotiation;
 - (c) an industrial instrument specified in the regulations.
- (7) A term of a workplace agreement is void to the extent that it applies or adopts terms from an instrument mentioned in subsection (2) or (6), without incorporating those terms by reference in accordance with this section.

Subdivision B—Prohibited content

101D Prohibited content

The regulations may specify matters that are *prohibited content* for the purposes of this Act.

101E Employer must not lodge agreement containing prohibited content

- (1) An employer contravenes this subsection if:
 - (a) the employer lodges a workplace agreement (or a variation to a workplace agreement); and
 - (b) the agreement (or the agreement as varied) contains prohibited content; and
 - (c) the employer was reckless as to whether the agreement (or the agreement as varied) contains prohibited content.
- (2) Subsection (1) does not apply if:
 - (a) before the agreement (or variation) was lodged, the Employment Advocate advised the employer that the agreement (or the agreement as varied) did not contain prohibited content; and
 - (b) that advice was in the form specified in regulations made for the purposes of this subsection.
- (3) Subsection (1) is a civil remedy provision.

Note: See Division 11 for provisions on enforcement.

101F Prohibited content in workplace agreement is void

A term of a workplace agreement is void to the extent that it contains prohibited content.

Note 1: The Employment Advocate can vary the workplace agreement to remove prohibited content (see section 101K).

Note 2: For civil remedy provisions relating to including prohibited content in a workplace agreement, see sections 101E, 101M and 101N.

101G Initiating consideration of removal of prohibited content

- (1) The Employment Advocate may exercise his or her power under section 101K to vary a workplace agreement to remove prohibited content:
 - (a) on his or her own initiative; or
 - (b) on application by any person.
- (2) This section and sections 101H, 101I and 101K are taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the Employment Advocate's decision whether to make a variation under section 101K.

101H Employment Advocate must give notice that he or she is considering variation

- (1) If the Employment Advocate is considering making a variation to a workplace agreement under section 101K, the Employment Advocate must give the persons mentioned in subsection (2) a written notice meeting the requirements in subsection 101I(1).
- (2) The persons are:
 - (a) the employer in relation to the workplace agreement; and
 - (b) if the workplace agreement is an AWA—the employee; and
 - (c) if the agreement is a union collective agreement or a union greenfields agreement—the organisation or organisations bound by the agreement.

101I Matters to be contained in notice

- (1) The requirements mentioned in subsection 101H(1) are that the notice must:
 - (a) be dated; and
 - (b) state that the Employment Advocate is considering making the variation; and
 - (c) state the reasons why the Employment Advocate is considering making the variation; and
 - (d) set out the terms of the variation; and
 - (e) invite each person mentioned in subsection (2) to make a written submission to the Employment Advocate about

whether the Employment Advocate should make the variation; and

(f) state that any submission must be made within the period (the *objection period*) of 28 days after the date of the notice.

(2) The persons are:

(a) the employer in relation to the workplace agreement; and

(b) each person whose employment is subject to the agreement at the date of the notice; and

(c) if the agreement is a union collective agreement or a union greenfields agreement—the organisation or organisations bound by the agreement.

101J Employer must ensure employees have ready access to notice

(1) An employer that has received a notice under section 101H in relation to a collective agreement must take reasonable steps to ensure that all persons whose employment is subject to the agreement at a time during the objection period are given a copy of the notice as soon as practicable.

(2) Subsection (1) is a civil remedy provision.

Note: See Division 11 for provisions on enforcement.

101K Employment Advocate must remove prohibited content from agreement

(1) If the Employment Advocate is satisfied that a term of the workplace agreement contains prohibited content, the Employment Advocate must vary the agreement so as to remove that content.

(2) In making a decision under subsection (1), the Employment Advocate must consider all written submissions (if any) received within the objection period from persons mentioned in subsection 101I(2).

(3) The Employment Advocate must not make the variation before the end of the objection period.

(4) If the Employment Advocate decides to make the variation, he or she must:

- (a) give the persons mentioned in subsection 101H(2) written notice of the decision, including the terms of the variation; and
- (b) if the workplace agreement is a collective agreement—publish a notice in the *Gazette* stating that the variation has been made and setting out particulars of the variation.

101L Employer must give employees notice of removal of prohibited content

- (1) An employer that has received a notice under subsection 101K(4) in relation to a collective agreement must take reasonable steps to ensure that all persons whose employment is subject to the agreement when the employer receives the notice are given a copy of the notice within 21 days.
- (2) Subsection (1) is a civil remedy provision.

Note: See Division 11 for provisions on enforcement.

101M Seeking to include prohibited content in an agreement

- (1) A person contravenes this subsection if:
 - (a) the person seeks to include a term:
 - (i) in a workplace agreement in the course of negotiations for the agreement; or
 - (ii) in a variation to a workplace agreement in the course of negotiations for the variation; and
 - (b) that term contains prohibited content; and
 - (c) the person is reckless as to whether the term contains prohibited content.
- (2) Subsection (1) is a civil remedy provision.

Note: See Division 11 for provisions on enforcement.

101N Misrepresentations about prohibited content

- (1) A person contravenes this subsection if:
 - (a) the person makes a misrepresentation in relation to a workplace agreement (or a variation to a workplace agreement) that a particular term does not contain prohibited content; and

(b) the person is reckless as to whether the term contains prohibited content.

(2) Subsection (1) is a civil remedy provision.

Note: See Division 11 for provisions on enforcement.

Division 8—Varying a workplace agreement

Subdivision A—General

102 Varying a workplace agreement

(1) The following persons may make a variation, in writing, to a workplace agreement that is in operation:

- (a) in the case of an AWA—the employer and the employee;
- (b) in the case of an employee collective agreement or an employer greenfields agreement—the employer and the persons whose employment will be subject to the agreement as varied;
- (c) in the case of a union collective agreement or a union greenfields agreement—the employer and the one or more organisations of employees that are bound by the agreement.

Example: A workplace agreement may be varied to provide additional pay.

(2) A workplace agreement cannot be varied except in accordance with:

- (a) this Division; or
- (b) section 101K (which deals with prohibited content); or
- (c) section 352A (which deals with discriminatory agreements);
or
- (d) an order of the Court under section 105G.

Note: Subsection (2) would not apply where the obligations under the agreement can change because of the terms of the agreement itself.

102A When a variation to a workplace agreement is made

For the purposes of this Act, a variation to a workplace agreement is *made* at whichever of the following times is applicable:

- (a) for an AWA—the time when the variation is approved in accordance with section 102F;

-
- (b) for an employee collective agreement—the time when the variation is approved in accordance with section 102F;
 - (c) for a union collective agreement—the time when the employer and the organisation or organisations agree to the terms of the variation;
 - (d) for a union greenfields agreement—the time when the employer and the organisation or organisations agree to the terms of the variation;
 - (e) for an employer greenfields agreement—the time when the variation is approved in accordance with section 102F.

Subdivision B—Pre-lodgment procedure for variations

102B Eligible employee in relation to variation of workplace agreement

For the purposes of this Subdivision, an *eligible employee* in relation to a variation to a workplace agreement is:

- (a) in the case of an AWA—the employee; or
- (b) in the case of a collective agreement:
 - (i) a person whose employment is subject to the agreement; or
 - (ii) a person employed by the employer whose employment will be subject to the agreement as varied.

102C Providing employees with ready access and information statement

- (1) If an employer intends to have a variation to a workplace agreement approved under section 102F, the employer must take reasonable steps to ensure that all eligible employees in relation to the variation either have, or have ready access to, the variation in writing during the period:
 - (a) beginning 7 days before the variation is approved; and
 - (b) ending when the variation is approved.
- (2) The employer must take reasonable steps to ensure that all eligible employees in relation to the variation are given an information statement at least 7 days before the variation is approved.

- (3) Despite subsections (1) and (2), if the variation is to a collective agreement and a person becomes an eligible employee at a time during the period mentioned in subsection (1), the employer must take reasonable steps to ensure that:
- (a) the person is given an information statement at or before that time; and
 - (b) the person either has, or has ready access to, the variation in writing during the period:
 - (i) beginning at that time; and
 - (ii) ending when the variation is approved under section 102F.
- (4) The information statement mentioned in subsection (2) and paragraph (3)(a) must contain:
- (a) information about the time at which and the manner in which the approval will be sought under section 102F; and
 - (b) if the relevant workplace agreement is an AWA— information about the effect of section 97A (which deals with bargaining agents); and
 - (c) if the relevant workplace agreement is an employee collective agreement or employer greenfields agreement— information about the effect of section 97B (which deals with bargaining agents); and
 - (d) any other information that the Employment Advocate requires by notice published in the *Gazette*.
- (5) If a waiver has been made under section 102D in relation to the variation, subsection (1) and paragraph (3)(b) do not apply in relation to a time after the waiver takes effect.
- (6) For the purposes of this section, if because of the variation, the agreement as varied would incorporate terms from an industrial instrument mentioned in subsection 101C(2), the eligible employees have ready access to the variation only if they have ready access to that instrument in writing.
- (7) To avoid doubt, if the content of the variation is changed during the period mentioned in subsection (1), the change results in a separate variation for the purposes of this section.

Note: If the content of a variation for which the employer intends to seek approval is changed, the procedural steps set out in

subsections (1), (2) and (3) must be repeated for the resulting separate variation.

Contravention—ready access

- (8) An employer contravenes this subsection if:
- (a) the employer lodges a variation to a workplace agreement; and
 - (b) the employer failed to comply with subsection (1) or (if applicable) paragraph (3)(b) in relation to the variation.

Contravention—information statement

- (9) An employer contravenes this subsection if:
- (a) the employer lodges a variation to a workplace agreement; and
 - (b) the employer failed to comply with subsection (2) or (if applicable) paragraph (3)(a) in relation to the variation.
- (10) Subsections (8) and (9) are civil remedy provisions.
- Note: See Division 11 for provisions on enforcement.
- (11) An employer cannot contravene subsection (8) or (9) more than once in relation to the lodgment of a particular variation.

102D Employees may waive ready access

- (1) The persons mentioned in subsection (2) may make a waiver under this section in relation to a variation to a workplace agreement.
- (2) The persons are all the eligible employees at the time the waiver is made.
- (3) The waiver must be in writing and dated.
- (4) The waiver is made when all the persons mentioned in subsection (2) sign the waiver.
- (5) The waiver takes effect when it is made.

102E Prohibition on withdrawal from variation to union collective agreement or union greenfields agreement

- (1) An employer that has made a variation to a union collective agreement or a union greenfields agreement must take reasonable steps to seek approval for the variation under section 102F, within a reasonable period after the variation was made.
- (2) Subsection (1) is a civil remedy provision.

Note: See Division 11 for provisions on enforcement.

102F Approval of a variation to a workplace agreement

- (1) A variation to an AWA is *approved* if:
 - (a) the variation is signed and dated by the employee and the employer; and
 - (b) those signatures are witnessed; and
 - (c) if the employee is under the age of 18 years:
 - (i) the variation is signed and dated by an appropriate person (such as a parent or guardian of the employee, but not the employer) on behalf of the employee, for the purpose of indicating that person's consent to the employee making the variation; and
 - (ii) that person is aged at least 18 years; and
 - (iii) that person's signature is witnessed.
- (2) A variation to a collective agreement is *approved* if:
 - (a) the employer has given all of the persons employed at the time whose employment:
 - (i) is subject to the agreement; or
 - (ii) will be subject to the agreement as varied;a reasonable opportunity to decide whether they want to approve the variation; and
 - (b) either:
 - (i) if the decision is made by a vote—a majority of those persons who cast a valid vote decide that they want to approve the variation; or
 - (ii) otherwise—a majority of those persons decide that they want to approve the variation.

102G Employer must not lodge unapproved variation

- (1) An employer contravenes this section if:
 - (a) the employer lodges a variation to a workplace agreement;
and
 - (b) the variation has not been approved in accordance with section 102F.
- (2) Subsection (1) is a civil remedy provision.

Note: See Division 11 for provisions on enforcement.

Subdivision C—Lodgment of variations

102H Employer must lodge variations with the Employment Advocate

- (1) If a variation has been approved in accordance with section 102F, the employer must lodge the variation, in accordance with section 102J, within 14 days after the variation was approved.
- (2) Subsection (1) is a civil remedy provision.

Note: See Division 11 for provisions on enforcement.

102I Lodging variation to multiple-business agreement without authorisation

- (1) An employer contravenes this subsection if:
 - (a) the employer lodges a variation to a multiple-business agreement; and
 - (b) the variation has not been authorised under section 96F.
- (2) Subsection (1) is a civil remedy provision.

Note: See Division 11 for provisions on enforcement.

102J Lodging of variation documents with the Employment Advocate

- (1) The employer in relation to a variation to a workplace agreement lodges the variation with the Employment Advocate if:
 - (a) the employer lodges a declaration under subsection (2); and
 - (b) a copy of the variation is annexed to the declaration.

(2) An employer lodges a declaration with the Employment Advocate if:

- (a) the employer gives it to the Employment Advocate; and
- (b) it meets the form requirements mentioned in subsection (3).

Note: Sections 137.1 and 137.2 of the *Criminal Code* create offences for providing false or misleading information or documents.

(3) The Employment Advocate may, by notice published in the *Gazette*, set out requirements for the form of a declaration for the purposes of paragraph (2)(b).

(4) A declaration is given to the Employment Advocate for the purposes of subsection (2) only if the declaration is actually received by the Employment Advocate.

Note: This means that section 29 of the *Acts Interpretation Act 1901* (to the extent that it deals with the time of service of documents) and section 160 of the *Evidence Act 1995* do not apply to lodgment of a declaration.

(5) The Employment Advocate is not required to consider or determine whether any of the requirements of this Part have been met in relation to the making or content of anything annexed to a declaration lodged in accordance with subsection (2).

102K Employment Advocate must issue receipt for lodgment of declaration for variation

- (1) If a declaration is lodged under subsection 102J(2), the Employment Advocate must issue a receipt for the lodgment.
- (2) The Employment Advocate must give a copy of the receipt to:
 - (a) the employer in relation to the relevant workplace agreement; and
 - (b) if the relevant workplace agreement is an AWA—the employee; and
 - (c) if the relevant workplace agreement is a union collective agreement or a union greenfields agreement—the organisation or organisations bound by the agreement.

102L Employer must notify employees after lodging variation

- (1) An employer that has received a receipt under section 102K in relation to a collective agreement must take reasonable steps to
-

ensure that all persons whose employment is subject to the agreement when the employer receives the receipt are given a copy of the receipt within 21 days.

- (2) Subsection (1) is a civil remedy provision.

Note: See Division 11 for provisions on enforcement.

Subdivision D—When a variation comes into operation

102M When a variation comes into operation

- (1) A variation to a workplace agreement comes into operation when the variation is lodged with the Employment Advocate in accordance with section 102J.
- (2) The variation comes into operation even if the requirements in Division 3, Subdivision B of this Division and section 102H have not been met in relation to the variation.
- (3) A variation to a multiple-business agreement comes into operation only if the variation has been authorised under section 96F.

Division 9—Terminating a workplace agreement

Subdivision A—General

103 Types of termination

- (1) A workplace agreement may be terminated:
- (a) by approval (see Subdivisions B and C); or
 - (b) unilaterally (see Subdivision D).
- (2) A workplace agreement is terminated when:
- (a) a termination of the agreement is lodged with the Employment Advocate in accordance with section 103H; or
 - (b) a declaration to terminate the agreement in accordance with subsection 103K(2) is lodged with the Employment Advocate in accordance with section 103N; or
 - (c) a declaration to terminate the agreement in accordance with subsection 103L(2) is lodged with the Employment Advocate in accordance with section 103N.

Subdivision B—Termination by approval (pre-lodgment procedure)

103A Terminating a workplace agreement by approval

A workplace agreement may be terminated in accordance with this Subdivision by the following:

- (a) in the case of an AWA—the employer and the employee;
- (b) in the case of an employee collective agreement or an employer greenfields agreement—the employer and the employees whose employment is subject to the agreement;
- (c) in the case of a union collective agreement or a union greenfields agreement—the employer and the one or more organisations of employees that are bound by the agreement.

103B Eligible employee in relation to termination of workplace agreement

For the purposes of this Subdivision, an *eligible employee* in relation to a termination of a workplace agreement in accordance with this Subdivision is:

- (a) in the case of an AWA—the employee; or
- (b) in the case of a collective agreement—a person employed at the time whose employment is subject to the agreement.

103C Providing employees with information statement

- (1) If an employer intends to have the termination of a workplace agreement approved under section 103E, the employer must take reasonable steps to ensure that all eligible employees in relation to the termination are given an information statement at or before the start of the period of 7 days ending when the termination is approved.
- (2) Despite subsection (1), if the relevant workplace agreement is a collective agreement and a person becomes an eligible employee at a time during the period mentioned in subsection (1), the employer must take reasonable steps to ensure that the person is given an information statement at or before that time.
- (3) The information statement mentioned in subsections (1) and (2) must contain:

- (a) information about the time at which and the manner in which the approval will be sought under section 103E; and
- (b) if the relevant workplace agreement is an AWA— information about the effect of section 97A (which deals with bargaining agents); and
- (c) any other information that the Employment Advocate requires by notice published in the *Gazette*.

Contravention—information statement

- (4) An employer contravenes this subsection if:
 - (a) the employer lodges a declaration to terminate a workplace agreement; and
 - (b) the employer failed to comply with subsection (1) or (if applicable) subsection (2) in relation to the termination.
- (5) Subsection (4) is a civil remedy provision.

Note: See Division 11 for provisions on enforcement.
- (6) An employer cannot contravene subsection (4) more than once in relation to the lodgment of a particular termination.

103D Prohibition on withdrawal from termination of union collective agreement or union greenfields agreement

- (1) An employer that has agreed to terminate a union collective agreement or a union greenfields agreement with the organisation or organisations bound by the agreement must take reasonable steps to seek approval for the termination under section 103E, within a reasonable period after agreeing to do so.
- (2) Subsection (1) is a civil remedy provision.

Note: See Division 11 for provisions on enforcement.

103E Approval of a termination

- (1) A termination of an AWA is *approved* if:
 - (a) the employer and employee make a written termination agreement to terminate the AWA; and
 - (b) the termination agreement is signed and dated by the employee and the employer; and
 - (c) those signatures are witnessed; and
-

- (d) if the employee is under the age of 18 years:
 - (i) the termination agreement is signed and dated by an appropriate person (such as a parent or guardian of the employee, but not the employer) on behalf of the employee, for the purpose of indicating that person's consent to the employee terminating the AWA; and
 - (ii) that person is aged at least 18 years; and
 - (iii) that person's signature is witnessed.
- (2) A termination of a collective agreement is *approved* if:
 - (a) the employer has given all of the persons employed at the time whose employment is subject to the agreement a reasonable opportunity to decide whether they want to approve the termination; and
 - (b) either:
 - (i) if the decision is made by a vote—a majority of those persons who cast a valid vote decide that they want to approve the termination; or
 - (ii) otherwise—a majority of those persons decide that they want to approve the termination.

103F Employer must not lodge unapproved termination

- (1) An employer contravenes this subsection if:
 - (a) the employer lodges a termination of a workplace agreement; and
 - (b) the termination has not been approved in accordance with section 103E.
- (2) Subsection (1) is a civil remedy provision.

Note: See Division 11 for provisions on enforcement.

Subdivision C—Termination by approval (lodgment)

103G Employer must lodge termination with the Employment Advocate

- (1) If a termination has been approved in accordance with section 103E, the employer must lodge the termination, in accordance with section 103H, within 14 days after the termination was approved.

-
- (2) Subsection (1) is a civil remedy provision.

Note: See Division 11 for provisions on enforcement.

103H Lodging termination documents with the Employment Advocate

- (1) The employer in relation to a workplace agreement to be terminated lodges the termination with the Employment Advocate if:
- (a) the employer lodges a declaration under subsection (2) for the termination of the workplace agreement; and
 - (b) if the workplace agreement is an AWA—a copy of the termination agreement is annexed to the declaration.

- (2) An employer lodges a declaration with the Employment Advocate if:
- (a) the employer gives it to the Employment Advocate; and
 - (b) it meets the form requirements mentioned in subsection (3).

Note: Sections 137.1 and 137.2 of the *Criminal Code* create offences for providing false or misleading information or documents.

- (3) The Employment Advocate may, by notice published in the *Gazette*, set out requirements for the form of a declaration for the purposes of paragraph (2)(b).
- (4) A declaration is given to the Employment Advocate for the purposes of subsection (2) only if the declaration is actually received by the Employment Advocate.

Note: This means that section 29 of the *Acts Interpretation Act 1901* (to the extent that it deals with the time of service of documents) and section 160 of the *Evidence Act 1995* do not apply to lodgment of a declaration.

- (5) The Employment Advocate is not required to consider or determine whether any of the requirements of this Division (other than this section) have been met in relation to the termination.

103I Employment Advocate must issue receipt for lodgment of declaration for termination

- (1) If a declaration is lodged under subsection 103H(2), the Employment Advocate must issue a receipt for the lodgment.

- (2) The Employment Advocate must give a copy of the receipt to:
 - (a) the employer in relation to the relevant workplace agreement; and
 - (b) if the relevant workplace agreement is an AWA—the employee; and
 - (c) if the relevant workplace agreement is a union collective agreement or a union greenfields agreement—the organisation or organisations bound by the agreement.

103J Employer must notify employees after lodging termination

- (1) An employer that has received a receipt under section 103I in relation to a collective agreement must take reasonable steps to ensure that all persons whose employment was subject to the agreement just before the declaration was lodged are given a copy of the receipt within 21 days.
- (2) Subsection (1) is a civil remedy provision.

Note: See Division 11 for provisions on enforcement.

Subdivision D—Unilateral termination after nominal expiry date

103K Unilateral termination in a manner provided for in workplace agreement

- (1) This section applies if a workplace agreement provides for a manner of terminating the agreement after its nominal expiry date.
- (2) Any of the following persons may terminate the agreement by lodging a declaration in accordance with section 103N:
 - (a) the employer in relation to the agreement;
 - (b) a majority of the employees whose employment is subject to the agreement when the notice mentioned in subsection (4) is given;
 - (c) in the case of an AWA—a bargaining agent at the request of the employer or the employee;
 - (d) an organisation of employees that is bound by the agreement.

Note: Sections 137.1 and 137.2 of the *Criminal Code* create offences for providing false or misleading information or documents.

-
- (3) However, this may be done only if:
- (a) the nominal expiry date of the workplace agreement has passed; and
 - (b) all the requirements in the agreement for terminating the agreement are met.
- (4) At least 14 days before the lodgment, and after the nominal expiry date of the agreement has passed, the person or persons intending to lodge the declaration must take reasonable steps to ensure that the following are given written notice of the termination:
- (a) the employer in relation to the agreement;
 - (b) each employee whose employment is subject to the agreement when the notice is given;
 - (c) an organisation of employees that is bound by the agreement.
- (5) The notice must:
- (a) state that the workplace agreement is to be terminated in the manner provided for by the agreement; and
 - (b) be in the form (if any) that the Employment Advocate requires by notice published in the *Gazette*; and
 - (c) contain the information (if any) that the Employment Advocate requires by notice published in the *Gazette*.
- (6) A person contravenes this subsection if:
- (a) the person lodges a declaration to terminate a workplace agreement under subsection (2); and
 - (b) the person failed to comply with subsection (4) or (5).
- (7) Subsection (6) is a civil remedy provision.
- Note: See Division 11 for provisions on enforcement.
- (8) This section does not apply in relation to a multiple-business agreement.

103L Unilateral termination with 90 days written notice

- (1) This section applies whether or not a workplace agreement provides for a manner of terminating the agreement after its nominal expiry date.
 - (2) Any of the following persons may terminate the agreement by lodging a declaration in accordance with section 103N:
-

- (a) the employer in relation to the agreement;
- (b) a majority of the employees whose employment is subject to the agreement when the notice mentioned in subsection (4) is given;
- (c) in the case of an AWA—a bargaining agent at the request of the employer or the employee;
- (d) an organisation of employees that is bound by the agreement.

Note: Sections 137.1 and 137.2 of the *Criminal Code* create offences for providing false or misleading information or documents.

- (3) However, this may be done only if the nominal expiry date of the workplace agreement has passed.
- (4) At least 90 days before the lodgment, and after the nominal expiry date of the agreement has passed, the person or persons intending to lodge the declaration must take reasonable steps to ensure that:
 - (a) the following are given written notice of the termination:
 - (i) the employer in relation to the agreement;
 - (ii) each employee whose employment is subject to the agreement when the notice is given;
 - (iii) an organisation of employees that is bound by the agreement; and
 - (b) if the person giving the notice is the employer bound by the agreement—a written copy of the undertakings (if any) made by the employer under section 103M.
- (5) The notice must:
 - (a) state that the workplace agreement is to be terminated; and
 - (b) specify the day on which the person or persons propose to lodge the notice; and
 - (c) be in the form (if any) that the Employment Advocate requires by notice published in the *Gazette*; and
 - (d) contain the information (if any) that the Employment Advocate requires by notice published in the *Gazette*.
- (6) A person contravenes this subsection if:
 - (a) the person lodges a declaration to terminate a workplace agreement under subsection (2); and
 - (b) the person failed to comply with subsection (4) or (5).

Note: See Division 11 for provisions on enforcement.

- (7) Subsection (6) is a civil remedy provision.

Note: See Division 11 for provisions on enforcement.

- (8) This section does not apply in relation to a multiple-business agreement.

103M Undertakings about post-termination conditions

- (1) An employer intending to terminate a workplace agreement under subsection 103L(2) may make undertakings as to the terms and conditions of employment of employees who were bound by the workplace agreement just before it was terminated.
- (2) The undertakings come into operation on the day that the workplace agreement is terminated.
- (3) The undertakings cease to operate in relation to an employee when the employee's employment becomes subject to a later workplace agreement.
- (4) Subject to this section, the following provisions apply to the undertakings as if they were a workplace agreement in operation:
- (a) Part VIII;
 - (b) Part V;
 - (c) any other provision of this Act specified in the regulations.
- (5) An employer contravenes this subsection if:
- (a) the employer lodges a declaration to terminate a workplace agreement under subsection (2); and
 - (b) the employer has made undertakings in relation to that termination; and
 - (c) the employer did not annex a copy of the undertakings to the declaration.
- (6) Subsection (5) is a civil remedy provision.
- Note: See Division 11 for provisions on enforcement.
- (7) If undertakings have ceased operating in relation to an employee because of subsection (3), they can never operate again in relation to that employee.

103N Lodging unilateral termination documents with the Employment Advocate

- (1) A person lodges a declaration to terminate a workplace agreement under section 103K or 103L with the Employment Advocate if:
- (a) the person gives it to the Employment Advocate; and
 - (b) it meets the form requirements mentioned in subsection (3).

Note: Sections 137.1 and 137.2 of the *Criminal Code* create offences for providing false or misleading information or documents.

- (2) If the person is the employer in relation to the agreement, the employer lodges undertakings in relation to the termination if:
- (a) the employer lodges a declaration under subsection (1); and
 - (b) a copy of the undertakings is annexed to the declaration.
- (3) The Employment Advocate may, by notice published in the *Gazette*, set out requirements for the form of a declaration for the purposes of paragraph (1)(b).
- (4) A declaration is given to the Employment Advocate for the purposes of subsection (1) only if the declaration is actually received by the Employment Advocate.

Note: This means that section 29 of the *Acts Interpretation Act 1901* (to the extent that it deals with the time of service of documents) and section 160 of the *Evidence Act 1995* do not apply to lodgment of a declaration.

- (5) The Employment Advocate is not required to consider or determine whether any of the requirements of this Subdivision (apart from this section) have been met in relation to the termination.

103O Employment Advocate must issue receipt for lodgment of declaration for notice of termination

- (1) If a declaration is lodged under subsection 103N(1) the Employment Advocate must issue a receipt for the lodgment.
- (2) The Employment Advocate must give a copy of the receipt to:
- (a) the person that lodged the declaration; and
 - (b) the employer in relation to the relevant workplace agreement; and

- (c) if the relevant workplace agreement is an AWA—the employee; and
- (d) if the relevant workplace agreement is a union collective agreement or a union greenfields agreement—the organisation or organisations bound by the agreement.

103P Employer must notify employees after lodging notice of termination

- (1) An employer that has received a receipt under section 103O in relation to a collective agreement must take reasonable steps to ensure that all persons whose employment was subject to the agreement just before the declaration was lodged are given a copy of the receipt within 21 days.
- (2) Subsection (1) is a civil remedy provision.

Note: See Division 11 for provisions on enforcement.

Subdivision E—Effect of termination

103Q When a termination takes effect

A termination takes effect even if:

- (a) the requirements in Division 3 have not been met in relation to the termination; or
- (b) in the case of a termination mentioned in paragraph 103(1)(a)—the requirements in Subdivision B and section 103G have not been met in relation to the termination; or
- (c) in the case of a termination mentioned in paragraph 103(1)(b)—the requirements in subsections 103K(4) and (5) and 103L(4) and (5) have not been met in relation to the termination.

103R Consequence of termination of agreement—application of other industrial instruments

- (1) An industrial instrument mentioned in subsection (3) has no effect in relation to an employee if:
 - (a) a workplace agreement operated in relation to the employee; and

(b) the workplace agreement was terminated.

Note 1: See Part VA for the operation of the Australian Fair Pay and Conditions Standard in these circumstances.

Note 2: See subsections 103M(2), (3) and (4) for the operation of undertakings (if any) in these circumstances.

- (2) Subsection (1) operates in relation to the period:
- (a) starting when the agreement is terminated; and
 - (b) ending when another workplace agreement comes into operation in relation to the employee.
- (3) The industrial instruments are as follows:
- (a) a workplace agreement;
 - (b) an award, except to the extent to which it contains protected award conditions as defined in section 101B (disregarding any exclusion or modification of those conditions made by the agreement that was terminated).

Division 10—Prohibited conduct

104 Coercion and duress

- (1) A person must not:
- (a) engage in or organise, or threaten to engage in or organise, any industrial action; or
 - (b) take, or threaten to take, other action; or
 - (c) refrain, or threaten to refrain, from taking any action;
- with intent to coerce another person to agree, or not to agree, to make, approve, lodge, vary or terminate a collective agreement.
- (2) Subsection (1) does not apply to protected action (within the meaning of section 108).
- (3) A person must not coerce, or attempt to coerce, an employer or employee in relation to an AWA:
- (a) to appoint, or not to appoint, a particular person as a bargaining agent under subsection 97A(1); or
 - (b) to terminate the appointment of a bargaining agent appointed under subsection 97A(1).
- (4) A person must not coerce, or attempt to coerce, an employee of an employer:
-

- (a) not to make a request mentioned in subsection 97B(1) or (2) in relation to a collective agreement; or
 - (b) to withdraw such a request.
- (5) A person must not apply duress to an employer or employee in connection with an AWA.
- (6) To avoid doubt, a person does not apply duress for the purposes of subsection (5) merely because the person requires another person to make an AWA as a condition of engagement.
- (7) Subsections (1), (3), (4) and (5) are civil remedy provisions.

Note: See Division 11 for provisions on enforcement.

104A False or misleading statements

- (1) A person contravenes this section if:
- (a) the person makes a false or misleading statement to another person; and
 - (b) the person is reckless as to whether the statement is false or misleading; and
 - (c) the making of that statement causes the other person:
 - (i) to make, approve, lodge, vary or terminate a workplace agreement; or
 - (ii) not to make, approve, lodge, vary or terminate a workplace agreement.
- (2) Subsection (1) is a civil remedy provision.

Note: See Division 11 for provisions on enforcement.

104B Employers not to discriminate between unionist and non-unionist

- (1) An employer must not, in negotiating a collective agreement, or a variation to a collective agreement, discriminate between employees of the employer:
- (a) because some of those employees are members of an organisation of employees while others are not members of such an organisation; or
 - (b) because some of those employees are members of a particular organisation of employees, while others are not members of

that organisation or are members of a different organisation of employees.

- (2) Subsection (1) is a civil remedy provision.

Note: See Division 11 for provisions on enforcement.

Division 11—Contravention of civil remedy provisions

Note: For other rules about civil remedy provisions, see Division 4 of Part VIII.

Subdivision A—General

105 General powers of Court not affected by this Division

This Division does not affect the following:

- (a) the powers of the Court under Part XIV;
- (b) any other powers of the Court.

105A Workplace inspector may take over proceeding

- (1) A workplace inspector may take over a proceeding that was instituted or is being carried on by another person for an order under this Division.
- (2) If a workplace inspector takes over such a proceeding, he or she may:
 - (a) carry it on further; or
 - (b) decline to carry it on further (whether immediately or at a later stage of the proceeding).

105B Standing for civil remedies

- (1) Any of the following persons may apply to the Court for an order under this Division in relation to a workplace agreement:
 - (a) an employee who is or will be bound by the agreement;
 - (b) if the person who contravened the civil remedy provision was not the employer in relation to the agreement, and the provision is mentioned in subsection (2)—the employer;
 - (c) an organisation of employees that is or will be bound by the agreement;

- (d) an organisation of employees that represents an employee who is or will be bound by the agreement (subject to subsection (3));
 - (e) if the agreement is an AWA—a bargaining agent of the employee or of the employer;
 - (f) a workplace inspector;
 - (g) a person specified in regulations made for the purposes of this paragraph.
- (2) The provisions are as follows:
- (a) subsection 97A(2);
 - (b) subsection 101M(1);
 - (c) subsection 101N(1);
 - (d) subsection 103K(6);
 - (e) subsection 103L(6);
 - (f) subsection 104(1);
 - (g) subsection 104(3);
 - (h) subsection 104(5);
 - (i) subsection 104A(1).
- (3) An organisation of employees that represents an employee (as mentioned in paragraph (1)(d)) must not apply on behalf of an employee for a penalty or other remedy under this Division in relation to a contravention of a civil remedy provision unless:
- (a) the employee has requested the organisation to apply on the employee's behalf; and
 - (b) a member of the organisation is employed by the employee's employer; and
 - (c) the organisation is entitled, under its eligibility rules, to represent the industrial interests of the employee.

Subdivision B—Pecuniary penalty for contravention of civil remedy provisions

105C Application of Subdivision

This Subdivision applies to a contravention by a person of a civil remedy provision in this Part.

105D Court may order pecuniary penalty

- (1) The Court may order the person who contravened the civil remedy provision to pay a pecuniary penalty of up to:
 - (a) if the person is an individual—the maximum number of penalty units specified in subsection (2); or
 - (b) if the person is a body corporate—5 times the maximum number of penalty units specified in subsection (2).

 - (2) The maximum number of penalty units is as follows:
 - (a) for subsection 97A(2)—30 penalty units;
 - (b) for subsection 97B(3)—30 penalty units;
 - (c) for subsection 98(8)—30 penalty units;
 - (d) for subsection 98(9)—30 penalty units;
 - (e) for subsection 98B(1)—30 penalty units;
 - (f) for subsection 98D(1)—60 penalty units;
 - (g) for subsection 99(1)—30 penalty units;
 - (h) for subsection 99(2)—30 penalty units;
 - (i) for subsection 99A(1)—60 penalty units;
 - (j) for subsection 99D(1)—30 penalty units;
 - (k) for subsection 101E(1)—60 penalty units;
 - (l) for subsection 101J(1)—30 penalty units;
 - (m) for subsection 101L(1)—30 penalty units;
 - (n) for subsection 101M(1)—60 penalty units;
 - (o) for subsection 101N(1)—60 penalty units;
 - (p) for subsection 102C(8)—30 penalty units;
 - (q) for subsection 102C(9)—30 penalty units;
 - (r) for subsection 102E(1)—30 penalty units;
 - (s) for subsection 102G(1)—60 penalty units;
 - (t) for subsection 102H(1)—30 penalty units;
 - (u) for subsection 102I(1)—60 penalty units;
 - (v) for subsection 102L(1)—30 penalty units;
 - (w) for subsection 103C(4)—30 penalty units;
 - (x) for subsection 103D(1)—30 penalty units;
 - (y) for subsection 103F(1)—60 penalty units;
 - (z) for subsection 103G(1)—30 penalty units;
 - (za) for subsection 103J(1)—30 penalty units;
 - (zb) for subsection 103K(6)—60 penalty units;
-

- (zc) for subsection 103L(6)—60 penalty units;
- (zd) for subsection 103M(5)—30 penalty units;
- (ze) for subsection 103P(1)—30 penalty units;
- (zf) for subsection 104(1)—60 penalty units;
- (zg) for subsection 104(3)—60 penalty units;
- (zh) for subsection 104(4)—60 penalty units;
- (zi) for subsection 104(5)—60 penalty units;
- (zj) for subsection 104A(1)—60 penalty units;
- (zk) for subsection 104B(1)—60 penalty units.

Subdivision C—Other remedies for contravention of certain civil remedy provisions

105E Application of Subdivision

This Subdivision applies to a contravention by a person of any of the following civil remedy provisions in relation to a workplace agreement:

- (a) subsection 98D(1);
- (b) subsection 102G(1);
- (c) subsection 103F(1);
- (d) subsection 103K(6);
- (e) subsection 103L(6);
- (f) subsection 104(1);
- (g) subsection 104(5);
- (h) subsection 104A(1).

105F Court may declare workplace agreement or part of workplace agreement void

The Court may make an order:

- (a) declaring that the workplace agreement is void; or
- (b) declaring that specified terms of the workplace agreement are void.

105G Court may vary terms of workplace agreement

The Court may make an order varying the terms of the workplace agreement.

105H Court may order that workplace agreement continues to operate despite termination

- (1) This section applies if the workplace agreement has been terminated as a result of the contravention mentioned in section 105E.
- (2) The Court may make an order declaring that the workplace agreement continues to operate despite the termination.

105I Date of effect and preconditions for orders under sections 105F, 105G and 105H

- (1) An order under section 105F, 105G or 105H takes effect from the date of the order or a later date specified in the order.
- (2) The Court may make an order under section 105F, 105G or 105H only to the extent that the Court considers appropriate to remedy the following:
 - (a) all or part of any loss or damage resulting from the contravention mentioned in section 105E;
 - (b) prevention or reduction of all or part of that loss or damage.

105J Court may order compensation

The Court may make an order that the person mentioned in section 105E pay compensation of such amount as the Court considers appropriate for any loss or damage resulting from the contravention suffered by an employee whose employment is subject to the agreement.

105K Court may order injunction

- (1) The Court may grant an injunction requiring the person mentioned in section 105E to cease contravening (or not to contravene) the civil remedy provision.
- (2) Subsection (1) also applies in relation to a contravention of subsection 104B(1).

Division 12—Miscellaneous

105L AWAs with Commonwealth employees

- (1) An Agency Head (within the meaning of the *Public Service Act 1999*) may act on behalf of the Commonwealth in relation to AWAs with persons in the Agency who are engaged under the *Public Service Act 1999*.
- (2) A Secretary of a Department (within the meaning of the *Parliamentary Service Act 1999*) may act on behalf of the Commonwealth in relation to AWAs with persons in the Department who are engaged under the *Parliamentary Service Act 1999*.

105M Evidence—verified copies

- (1) The Employment Advocate may issue a verified copy of any of the following:
 - (a) a declaration lodged under subsection 99B(2), 102J(2), 103H(2) or 103N(1) in relation to a workplace agreement;
 - (b) a document annexed to a declaration mentioned in paragraph (a);
 - (c) a receipt issued by the Employment Advocate under section 99C, 102K, 103I or 103O in relation to a workplace agreement;
 - (d) a written notice given by the Employment Advocate under subsection 101H(1) or paragraph 101K(4)(a) in relation to a workplace agreement;
 - (e) an authorisation granted by the Employment Advocate under section 96F for a workplace agreement that is a multiple-business agreement;
 - (f) a written advice in relation to a workplace agreement given by the Employment Advocate to an employer for the purposes of paragraph 101E(2)(a).

Note: For the definition of *verified copy*, see section 95.

- (2) The verified copy may only be issued to a person who is or was bound by the workplace agreement to which the verified copy relates.

- (3) In the Court and in proceedings in the Court, a verified copy issued by the Employment Advocate under subsection (1) is prima facie evidence of the document of which it is a verified copy.
- (4) A document that purports to be a verified copy issued by the Employment Advocate under subsection (1) is taken to be such a copy, unless evidence to the contrary is adduced.

105N Evidence—certificates

- (1) The Employment Advocate may issue a certificate stating any one or more of the following in relation to one or more workplace agreements:
 - (a) that a particular person lodged a particular declaration under subsection 99B(2), 102J(2), 103H(2) or 103N(1) with the Employment Advocate on a particular day;
 - (b) if the certificate states that a declaration was lodged with the Employment Advocate as mentioned in paragraph (a)—that a particular document was annexed to the declaration;
 - (c) that particular declarations lodged with the Employment Advocate as mentioned in paragraph (a) in relation to a particular workplace agreement are the only such declarations that were so lodged in relation to that workplace agreement before a particular day;
 - (d) if the certificate states that particular documents were annexed to declarations lodged with the Employment Advocate as mentioned in paragraph (b)—that those documents were the only documents annexed to those declarations;
 - (e) that the Employment Advocate issued a receipt under section 99C, 102K, 103I or 103O to a particular person on a particular day for such a lodgment;
 - (f) if the certificate states that particular receipts were issued by the Employment Advocate as mentioned in paragraph (e) in relation to a particular workplace agreement—that those receipts were the only receipts so issued in relation to the workplace agreement before a particular day;
 - (g) that the Employment Advocate gave a particular advice for the purposes of paragraph 101E(2)(a) to a particular person on a particular day;

- (h) if the certificate states that particular advices were given by the Employment Advocate as mentioned in paragraph (g) in relation to a particular workplace agreement—that those advices were the only advices so given in relation to the workplace agreement before a particular day;
 - (i) that the Employment Advocate granted an authorisation under section 96F on a particular day for a particular employer to make or vary a particular multiple-business agreement;
 - (j) if the certificate states that particular authorisations were granted by the Employment Advocate as mentioned in paragraph (i) in relation to a particular multiple-business agreement—that those authorisations were the only authorisations so granted in relation to the multiple-business agreement before a particular day;
 - (k) that the Employment Advocate gave a particular notice under subsection 101H(1) or paragraph 101K(4)(a) on a particular day to a particular employer;
 - (l) if the certificate states that particular notices were given by the Employment Advocate as mentioned in paragraph (k) in relation to a particular workplace agreement—that those notices were the only notices so given in relation to that workplace agreement before a particular day.
- (2) The certificate may only be issued to a person who is or was bound by the workplace agreement or all of the workplace agreements to which the certificate relates.
 - (3) In the Court and in proceedings in the Court, a certificate issued by the Employment Advocate under subsection (1) is prima facie evidence of the matters stated in the certificate.
 - (4) A document that purports to be a certificate issued by the Employment Advocate under subsection (1) is taken to be such a certificate, unless evidence to the contrary is adduced.

105O Regulations relating to workplace agreements

The regulations may make provision in relation to the following matters:

- (a) requiring an employer who is bound by a workplace agreement to supply copies of prescribed documents to the employee or employees bound by the workplace agreement;
- (b) the qualifications and appointment of bargaining agents;
- (c) the required form of workplace agreements (including a requirement that documents be in the English language);
- (d) the witnessing of signatures on AWAs;
- (e) the signing of workplace agreements by persons bound by those agreements, or representatives of those persons;
- (f) the retention by employers of signed workplace agreements (including the manner and period of retention);
- (g) prescribing fees for the issue by the Employment Advocate of certificates and verified copies.

Note: See section 359 for the types of sanctions that the regulations may provide for a breach of the regulations.

Part VC—Industrial action

Division 1—Preliminary

106 Definitions

- (1) In this Part:

authorised ballot agent means an authorised ballot agent as defined in section 109A for the purpose of Division 4.

bargaining period has the meaning given by section 107.

Court means the Federal Court of Australia or the Federal Magistrates Court.

industrial action has the meaning given by section 106A.

initiating notice has the meaning given by section 107.

initiating party has the meaning given by section 107.

negotiating party has the meaning given by section 107.

pattern bargaining has the meaning given by section 106B.

proposed collective agreement has the meaning given by section 107.

protected action has the meaning given by section 108.

protected action ballot means a ballot under Division 4.

- (2) Expressions used in this Part that are also used in Part VB have the same meanings in this Part as they have in that Part.

106A Meaning of *industrial action*

- (1) For the purposes of this Act, ***industrial action*** means any action of the following kinds:

- (a) the performance of work by an employee in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work by an employee, the result of which is a restriction or limitation on, or a delay in, the performance of the work;
- (b) a ban, limitation or restriction on the performance of work by an employee or on the acceptance of or offering for work by an employee;
- (c) a failure or refusal by employees to attend for work or a failure or refusal to perform any work at all by employees who attend for work;
- (d) the lockout of employees from their employment by the employer of the employees;

but does not include the following:

- (e) action by employees that is authorised or agreed to by the employer of the employees;
- (f) action by an employer that is authorised or agreed to by or on behalf of employees of the employer;
- (g) action by an employee if:
 - (i) the action was based on a reasonable concern by the employee about an imminent risk to his or her health or safety; and
 - (ii) the employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work, whether at the same or another workplace, that was safe and appropriate for the employee to perform.

Note 1: See also subsection (4), which deals with the burden of proof of the exception in subparagraph (g)(i) of this definition.

Note 2: The issue of whether action that is not industrial in character is industrial action was considered by the Commission in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v The Age Company Limited*, PR946290. In that case, the Full Bench of the Commission drew a distinction between an employee who does not attend for work in support of a collective demand that the employer agree to alteration of the conditions of employment as being clearly engaged in industrial action and an employee who does not attend for work on account of illness.

- (2) For the purposes of this Act:
- (a) conduct is capable of constituting industrial action even if the conduct relates to part only of the duties that employees are required to perform in the course of their employment; and
 - (b) a reference to industrial action includes a reference to a course of conduct consisting of a series of industrial actions.

Meaning of lockout

- (3) For the purposes of this section, an employer **locks out** employees from their employment if the employer prevents the employees from performing work under their contracts of employment without terminating those contracts (except to the extent that this would be an expansion of the ordinary meaning of that expression).

Burden of proof

- (4) Whenever a person seeks to rely on subparagraph (g)(i) of the definition of **industrial action** in subsection (1), that person has the burden of proving that subparagraph (g)(i) applies.

106B Meaning of *pattern bargaining*

What is pattern bargaining?

- (1) For the purposes of this Part, a course of conduct by a person is **pattern bargaining** if:
- (a) the person is a negotiating party to 2 or more proposed collective agreements; and
 - (b) the course of conduct involves seeking common wages or conditions of employment for 2 or more of those proposed collective agreements; and

(c) the course of conduct extends beyond a single business.

Exception: terms or conditions determined as national standards

(2) The course of conduct is not pattern bargaining to the extent that the negotiating party is seeking, for 2 or more of the proposed collective agreements, terms or conditions of employment determined by the Full Bench in a decision establishing national standards.

Exception: genuinely trying to reach an agreement for a single business or part of a single business

(3) The course of conduct, to the extent that it relates to a particular single business or part of a single business, is not pattern bargaining if the negotiating party is genuinely trying to reach an agreement for the business or part.

(4) For the purposes of subsection (3), factors relevant to working out whether the negotiating party is genuinely trying to reach an agreement for a single business or part of a single business include (but are not limited to) the following:

- (a) demonstrating a preparedness to negotiate an agreement which takes into account the individual circumstances of the business or part;
- (b) demonstrating a preparedness to negotiate a workplace agreement with a nominal expiry date which takes into account the individual circumstances of the business or part;
- (c) negotiating in a manner consistent with wages and conditions of employment being determined as far as possible by agreement between the employer and its employees at the level of the single business or part;
- (d) agreeing to meet face-to-face at reasonable times proposed by another negotiating party;
- (e) considering and responding to proposals made by another negotiating party within a reasonable time;
- (f) not capriciously adding or withdrawing items for bargaining.

(5) Whenever a person seeks to rely on subsection (3), the person has the burden of proving that subsection (3) applies.

- (6) This section does not affect, and is not affected by, the meaning of the term “genuinely trying to reach an agreement”, or any variant of the term, as used elsewhere in this Act.

106C Extraterritorial extension

Australia’s exclusive economic zone

- (1) This Part, and the rest of this Act so far as it relates to this Part, extend in relation to Australia’s exclusive economic zone in the way prescribed by the regulations (if any).
- (2) If the regulations prescribe modifications of this Act (other than this section) for its operation in relation to Australia’s exclusive economic zone under subsection (1), this Act has effect (in accordance with that subsection) as modified in relation to Australia’s exclusive economic zone.

Australia’s continental shelf

- (3) This Part, and the rest of this Act so far as it relates to this Part, extend, in the way prescribed by the regulations (if any), in relation to a part of Australia’s continental shelf that is prescribed by the regulations.
- (4) If the regulations prescribe modifications of this Act (other than this section) for its operation in relation to a prescribed part of Australia’s continental shelf under subsection (3), this Act has effect (in accordance with that subsection) as modified in relation to that part.

Note: The regulations may prescribe different modifications relating to different parts of Australia’s continental shelf. The regulations may need to do so to give effect to Australia’s international obligations.

Definitions

- (5) In this section:

modifications includes additions, omissions and substitutions.

this Act includes the Registration and Accountability of Organisations Schedule and regulations made under it.

Division 2—Bargaining periods

107 Initiation of bargaining period

- (1) This section applies in relation to a collective agreement that a person referred to in subsection (2) wants to try to make if the agreement, if made:
- (a) will be made under section 96A or 96B; and
 - (b) will not be:
 - (i) a multiple-business agreement; or
 - (ii) an agreement with 2 or more corporations that are treated as one employer because of paragraph 95A(2)(b).
- (2) If:
- (a) an employer; or
 - (b) an organisation of employees; or
 - (c) an employee acting on his or her own behalf and on behalf of other employees;
- wants to try to make a collective agreement to which this section applies in relation to employees who are employed in a single business or a part of a single business, the employer, organisation or employee (the *initiating party*) may initiate a period (the *bargaining period*) for negotiating the agreement.
- Note: This subsection has effect subject to subsections 107F(2), 107G(12) and (13), 107H(6) and (7) and 112(6).
- (3) The bargaining period is initiated by the initiating party giving written notice (the *initiating notice*) to each other negotiating party and to the Commission stating that the initiating party intends to try to make a collective agreement to which this section applies (the *proposed collective agreement*) with the other negotiating parties under section 96A or 96B.
- (4) Each of the following is a *negotiating party* in relation to the proposed collective agreement:
- (a) the initiating party;
 - (b) if the initiating party is an employer who intends to try to make the proposed collective agreement under section 96A—the employees at the time whose employment will be subject to the proposed collective agreement;

- (c) if the initiating party is an employer who intends to try to make the proposed collective agreement under section 96B—the organisation or organisations who are proposed to be bound by the proposed collective agreement;
- (d) if the initiating party is an organisation of employees—the employer who is proposed to be bound by the proposed collective agreement;
- (e) if the initiating party is an employee acting on his or her own behalf and on behalf of other employees—the employer who is proposed to be bound by the proposed collective agreement and the employees whose employment will be subject to the proposed collective agreement.

107A Employee may appoint agent to initiate bargaining period

- (1) A person referred to in paragraph 107(2)(c) who wishes to initiate a bargaining period under section 107, without disclosing the person's identity to the person's employer, may appoint an agent to initiate the bargaining period on the person's behalf.
- (2) If a person has appointed an agent under subsection (1), the notice to the Commission under subsection 107(3) must be accompanied by a document containing the person's name.
- (3) The regulations may make provision in relation to the qualifications and appointment of agents appointed under this section.

107B Identity of person who has appointed agent not to be disclosed

Disclosure by Commission prohibited

- (1) The Commission must not disclose information that the Commission has reasonable grounds to believe will identify a person who has appointed an agent under section 107A as a person who has initiated a bargaining period under section 107.
- (2) Each of the following is an exception to subsection (1):
 - (a) the disclosure is required or authorised by this Act or by another Act, by regulations made for the purposes of another provision of this Act, or by regulations made for the purposes of another Act;

-
- (b) the person whose identity is disclosed has, in writing, authorised the disclosure.

Disclosure by person prohibited

- (3) A person commits an offence if:
 - (a) the person discloses information; and
 - (b) the information is protected information; and
 - (c) the person has reasonable grounds to believe that the information will identify another person as a person referred to in subsection (1); and
 - (d) the disclosure is not made by the person in the course of performing functions or duties:
 - (i) as a Registry official; or
 - (ii) as, or on behalf of, an authorised ballot agent; and
 - (e) the disclosure is not required or authorised by this Act or by another Act, by regulations made for the purposes of another provision of this Act, or by regulations made for the purposes of another Act; and
 - (f) the person whose identity is disclosed has not, in writing, authorised the disclosure.

Penalty: Imprisonment for 6 months.

- (4) In this section:

protected information, in relation to a person, means information that the person acquired:

- (a) in the course of performing functions or duties as a Registry official; or
- (b) in the course of performing functions or duties as, or on behalf of, an authorised ballot agent; or
- (c) from a person referred to in paragraph (a) or (b) who acquired the information as mentioned in paragraph (a) or (b).

Registry official means:

- (a) the Industrial Registrar; or
- (b) a member of the staff of the Industrial Registry (including a Deputy Industrial Registrar).

107C Particulars to accompany notice

An initiating notice is to be accompanied by particulars of:

- (a) the single business or part of the single business to be covered by the proposed collective agreement; and
- (b) the types of employees whose employment will be subject to the proposed collective agreement and the other persons who will be bound by the proposed collective agreement; and
- (c) the matters that the initiating party proposes should be dealt with by the proposed collective agreement; and
- (d) the proposed nominal expiry date of the proposed collective agreement; and
- (e) any other matters prescribed by the regulations.

107D When bargaining period begins

A bargaining period begins at the end of 7 days after:

- (a) the day on which the initiating notice was given; or
- (b) if the notice was given to different persons on different days—the later or latest of those days.

107E When bargaining period ends

A bargaining period ends if any of the following events occurs:

- (a) a collective agreement under section 96A or 96B is made by the employer and any one or more of the other negotiating parties;
- (b) the initiating party tells the other negotiating party or each of the other negotiating parties in writing that the initiating party no longer wants to reach a collective agreement under section 96A or 96B with that other party or those other parties;
- (c) the bargaining period is terminated under section 107G, 107H or 112.

107F Power of Commission to restrict initiation of new bargaining periods

- (1) This section applies if a bargaining period (the *former bargaining period*) in relation to a proposed collective agreement has ended

because a negotiating party (the *former negotiating party*) has given a notice under paragraph 107E(b).

- (2) Subject to this section, the Commission may, by order, declare that, during a specified period, a specified former negotiating party, or a specified employee of the employer:
 - (a) is not allowed to initiate a new bargaining period in relation to specified matters that were dealt with by the proposed collective agreement; or
 - (b) may initiate a bargaining period only on conditions specified in the order.
- (3) The Commission must not make an order under subsection (2) unless:
 - (a) the Commission has given the former negotiating parties an opportunity to be heard; and
 - (b) the Commission considers that it is in the public interest to make the order; and
 - (c) either subsection (4) or (5) applies.
- (4) The Commission may make an order under subsection (2):
 - (a) on application by a former negotiating party; and
 - (b) if, assuming the former bargaining period had not ended, the Commission could make an order under subsection 107G(1) because a circumstance set out in subsection 107G(2), (7) or (8) exists or existed.
- (5) The Commission may make an order under subsection (2):
 - (a) on its own initiative, or on application by a former negotiating party; and
 - (b) if, assuming the former bargaining period had not ended, the Commission could make an order under subsection 107G(1) because a circumstance set out in subsection 107G(3) exists or existed.

107G Suspension and termination of bargaining periods—general powers of Commission

Suspension or termination required if certain circumstances exist

- (1) Subject to subsection (9), the Commission must, by order, suspend or terminate a bargaining period if, after giving the negotiating

parties an opportunity to be heard, it is satisfied that any of the circumstances set out in subsections (2), (3) (7) and (8) exists or existed.

Circumstance—failing to genuinely try to reach agreement etc.

- (2) A circumstance for the purposes of subsection (1) is that a negotiating party (not being the applicant for the order) that, before or during the bargaining period, has organised or taken, or is organising or taking, industrial action to support or advance claims in respect of the proposed collective agreement:
- (a) did not genuinely try to reach an agreement with the other negotiating parties before organising or taking the industrial action; or
 - (b) is not genuinely trying to reach an agreement with the other negotiating parties; or
 - (c) has failed to comply with any orders or directions of the Commission made during the bargaining period that relate to, or that relate to industrial action relating to, the making of the proposed collective agreement or to a matter that has arisen in the negotiations for the proposed collective agreement.

Note: The issue of whether or not a negotiating party is genuinely trying to reach agreement with the other negotiating parties was considered by Justice Munro in *Australian Industry Group v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union*, Print T1982.

Circumstance—industrial action endangering life etc.

- (3) A circumstance for the purposes of subsection (1) is that:
- (a) industrial action to support or advance claims in respect of the proposed collective agreement is being taken, or is threatened, impending or probable; and
 - (b) that industrial action is adversely affecting, or would adversely affect, the employer or employees of the employer; and
 - (c) that industrial action is threatening, or would threaten:
 - (i) to endanger the life, the personal safety or health, or the welfare, of the population or of part of it; or
 - (ii) to cause significant damage to the Australian economy or an important part of it.

Note: See also Division 8 (about workplace determinations once a bargaining period has been terminated).

- (4) If an application is made to the Commission for an order under subsection (1) on the grounds of or including a circumstance set out in subsection (3), the Commission must, as far as practicable, hear and determine the application within 5 days after the application is made.
- (5) If subsection (4) applies to an application and the Commission is unable to determine the application within the period referred to in that subsection, the Commission must, within that period, make an interim order suspending the bargaining period until the application is determined.
- (6) If the Commission makes an order under subsection (1) terminating a bargaining period in a circumstance set out in subsection (3), the Commission must send each of the negotiating parties a notice:
 - (a) setting out the effect of Division 8; and
 - (b) informing the negotiating parties that they may agree to submit the matters at issue to an alternative dispute resolution process conducted by the Commission or another provider (see Divisions 4 and 6 of Part VIIA).

Circumstance—organisations and employees who are not members

- (7) A circumstance for the purposes of subsection (1) is that industrial action is being organised or taken by:
 - (a) an organisation that is a negotiating party; or
 - (b) a member of such an organisation who is employed by the employer; or
 - (c) an officer or employee of such an organisation acting in that capacity;against an employer to support or advance claims in respect of employees:
 - (d) whose employment will be subject to the agreement; and
 - (e) who are neither members, nor eligible to become members, of the organisation.

Circumstance—demarcation disputes

- (8) A circumstance for the purposes of subsection (1) is that industrial action that is being organised or taken by an organisation that is a negotiating party:
- (a) relates, to a significant extent, to a demarcation dispute; or
 - (b) contravenes an order of the Commission that relates, to a significant extent, to a demarcation dispute.

Orders on application or Commission's initiative

- (9) The Commission:
- (a) may not make an order under subsection (1), in a circumstance set out in subsection (2), (7) or (8), except on application by a negotiating party; but
 - (b) may make an order under subsection (1), in a circumstance set out in subsection (3):
 - (i) on its own initiative; or
 - (ii) on application by a negotiating party or the Minister.

Application does not have to identify bargaining periods

- (10) An application may be made to the Commission for an order under subsection (1) for the suspension or termination of whatever bargaining periods apply to:
- (a) a specified business, or any part of that business; or
 - (b) a specified part of a specified business;
- without specifically identifying the bargaining periods. The application has effect as if it were an application for the suspension or termination of the bargaining period, or each of the bargaining periods, that applies to the specified business (or any part of it), or to the specified part of the business, as the case requires.

Note: The other requirements of this section must still be complied with in relation to the application.

- (11) If subsection (10) applies to an application, the Commission must satisfy itself as to which bargaining periods the application has effect in relation to.

Restrictions on initiating new bargaining periods

- (12) An order under subsection (1) suspending a bargaining period may, if the Commission considers it to be appropriate, contain a declaration that, during some or all of the period while the suspension has effect, a specified negotiating party or employee of the employer:
- (a) is not allowed to initiate a new bargaining period in relation to specified matters that are dealt with by the proposed collective agreement; or
 - (b) may initiate such a bargaining period only on conditions specified in the declaration.
- (13) An order under subsection (1) terminating a bargaining period may, if the Commission considers it to be appropriate, contain a declaration that, during a specified period beginning at the time of the termination, a specified negotiating party or employee of the employer:
- (a) is not allowed to initiate a new bargaining period in relation to specified matters that are dealt with by the proposed collective agreement; or
 - (b) may initiate such a bargaining period only on conditions specified in the declaration.

Extension of notice period required by subsection 107K(3)

- (14) In an order under subsection (1), the Commission may, if it is satisfied, in relation to any industrial action that might be taken (by virtue of section 107K) after the end of the period of suspension, that there are exceptional circumstances justifying the period of written notice required by subsection 107K(3) being longer than 3 days, specify a longer period, of up to 7 days.

107H Suspension and termination of bargaining periods—pattern bargaining*Suspension or termination required for pattern bargaining*

- (1) The Commission must, by order, suspend a bargaining period for a period specified in the order, or terminate the bargaining period, if:

- (a) a negotiating party, or a person prescribed by the regulations, applies to the Commission for an order under this section; and
- (b) another negotiating party is engaged in pattern bargaining in relation to the proposed collective agreement.

Note: For other provisions relating to pattern bargaining, see:

- (a) section 108D; and
- (b) section 109L; and
- (c) section 111A.

Negotiating parties must be given the opportunity to be heard

- (2) The Commission must not make an order under subsection (1) unless it has given the negotiating parties the opportunity to be heard.

Commission may suspend or terminate as it considers appropriate

- (3) If the Commission is required by subsection (1) to make an order under that subsection, then regardless of the order applied for:
 - (a) the order may be for the suspension or termination of the bargaining period, as the Commission considers appropriate; and
 - (b) any period of suspension specified in the order must be such a period as the Commission considers appropriate.

Application does not have to identify bargaining periods

- (4) An application may be made to the Commission for an order under subsection (1) for the suspension or termination of whatever bargaining periods apply to:
 - (a) a specified business, or any part of that business; or
 - (b) a specified part of a specified business;

without specifically identifying the bargaining periods. The application has effect as if it were an application for the suspension or termination of the bargaining period, or each of the bargaining periods, that applies to the specified business (or any part of it), or to the specified part of the business, as the case requires.

Note: The other requirements of this section must still be complied with in relation to the application.

- (5) If subsection (4) applies to an application, the Commission must satisfy itself as to which bargaining periods the application has effect in relation to.

Restrictions on initiating new bargaining periods

- (6) An order under subsection (1) suspending a bargaining period may, if the Commission considers it to be appropriate, contain a declaration that, during some or all of the period while the suspension has effect, a specified negotiating party or employee of the employer:
- (a) is not allowed to initiate a new bargaining period in relation to specified matters that are dealt with by the proposed collective agreement; or
 - (b) may initiate such a bargaining period only on conditions specified in the declaration.
- (7) An order under subsection (1) terminating a bargaining period may, if the Commission considers it to be appropriate, contain a declaration that, during a specified period beginning at the time of the termination, a specified negotiating party or employee of the employer:
- (a) is not allowed to initiate a new bargaining period in relation to specified matters that are dealt with by the proposed collective agreement; or
 - (b) may initiate such a bargaining period only on conditions specified in the declaration.

Extension of notice period required by subsection 107K(3)

- (8) In an order under subsection (1) suspending a bargaining period, the Commission may, if it is satisfied, in relation to any industrial action that might be taken (by virtue of section 107K) after the end of the period of suspension, that there are exceptional circumstances justifying the period of written notice required by subsection 107K(3) being longer than 3 days, specify a longer period, of up to 7 days.

107I Suspension of bargaining periods—cooling off

Suspension if would assist in resolving matters at issue

- (1) The Commission must, by order, suspend a bargaining period for a period specified in the order if:
 - (a) a negotiating party applies to the Commission for the bargaining period to be suspended under this section; and
 - (b) protected action is being taken in respect of the proposed collective agreement; and
 - (c) the Commission considers that the suspension is appropriate, having regard to:
 - (i) whether suspending the bargaining period would be beneficial to the negotiating parties because it would assist in resolving the matters at issue; and
 - (ii) the duration of the action; and
 - (iii) whether suspending the bargaining period would be contrary to the public interest or inconsistent with the objects of this Act; and
 - (iv) any other matters that the Commission considers relevant.

Period of suspension

- (2) The period of suspension specified in the order must be a period that the Commission considers appropriate.

Extension of suspension

- (3) The Commission must, by order, extend the period of suspension by a specified period that the Commission considers appropriate if:
 - (a) a negotiating party applies to the Commission for the period of suspension to be extended; and
 - (b) the Commission considers that the extension is appropriate, having regard to:
 - (i) the matters referred to in paragraph (1)(c); and
 - (ii) whether the negotiating parties, during the period of suspension, genuinely tried to reach an agreement.

- (4) The Commission must not make an order under subsection (3) extending the period of suspension if that period has previously been extended.

Negotiating parties must be given opportunity to be heard

- (5) The Commission must not make an order under subsection (1) or (3) unless it has given the negotiating parties the opportunity to be heard.

Commission to inform negotiating parties that they may submit matters at issue for alternative dispute resolution

- (6) If the Commission makes an order under subsection (1) or (3), the Commission must send each of the negotiating parties a notice informing the negotiating parties that they may agree to submit the matters at issue to an alternative dispute resolution process conducted by the Commission or another provider (see Part VIIA).

Extension of notice period required by subsection 107K(3)

- (7) In an order under subsection (1) or (3), the Commission may, if it is satisfied, in relation to any industrial action that might be taken (by virtue of section 107K) after the end of the period of suspension, that there are exceptional circumstances justifying the period of written notice required by subsection 107K(3) being longer than 3 days, specify a longer period, of up to 7 days.

107J Suspension of bargaining periods—significant harm to third party

Suspension if industrial action threatens significant harm to a person

- (1) The Commission must, by order, suspend a bargaining period for a period specified in the order if:
- (a) industrial action is being taken in respect of the proposed collective agreement; and
 - (b) an application for the bargaining period to be suspended under this section is made to the Commission by or on behalf of:
 - (i) an organisation, person or body directly affected by the action (other than a negotiating party); or

- (ii) the Minister; and
 - (c) the Commission considers that the action is adversely affecting the employer or employees of the employer; and
 - (d) the Commission considers that the action is threatening to cause significant harm to any person (other than a negotiating party); and
 - (e) the Commission considers that the suspension is appropriate, having regard to:
 - (i) whether suspending the bargaining period would be contrary to the public interest or inconsistent with the objects of this Act; and
 - (ii) any other matters that the Commission considers relevant.
- (2) For the purposes of paragraph (1)(d), in considering whether the action is threatening to cause significant harm to a person, the Commission may have regard to the following:
- (a) if the person is an employee—the extent to which the action affects the interests of the person as an employee;
 - (b) the extent to which the person is particularly vulnerable to the effects of the action;
 - (c) the extent to which the action threatens to:
 - (i) damage the ongoing viability of a business carried on by the person; or
 - (ii) disrupt the supply of goods or services to a business carried on by the person; or
 - (iii) reduce the person's capacity to fulfil a contractual obligation; or
 - (iv) cause other economic loss to the person;
 - (d) any other matters that the Commission considers relevant.

Period of suspension

- (3) The period of suspension specified in the order must be a period that the Commission considers appropriate. The period of suspension (as extended under subsection (4), if applicable) must not exceed 3 months.

Extension of suspension

- (4) The Commission must, by order, extend the period of suspension by a specified period that the Commission considers appropriate if:
- (a) an application for the period of suspension to be extended is made to the Commission by or on behalf of:
 - (i) an organisation, person or body directly affected by the action (other than a negotiating party); or
 - (ii) the Minister; and
 - (b) the Commission considers that the extension is appropriate, having regard to the matters referred to in paragraphs (1)(c), (d) and (e).
- (5) The Commission must not make an order under subsection (4) extending the period of suspension if that period has previously been extended.

Negotiating parties must be given opportunity to be heard

- (6) The Commission must not make an order under subsection (1) or (4) unless it has given the negotiating parties the opportunity to be heard.

Commission to inform negotiating parties that they may submit matters at issue for alternative dispute resolution

- (7) If the Commission makes an order under subsection (1) or (4), the Commission must send each of the negotiating parties a notice informing the negotiating parties that they may agree to submit the matters at issue to an alternative dispute resolution process conducted by the Commission or another provider (see Part VIIA).

Extension of notice period required by subsection 107K(3)

- (8) In an order under subsection (1) or (4), the Commission may, if it is satisfied, in relation to any industrial action that might be taken (by virtue of section 107K) after the end of the period of suspension, that there are exceptional circumstances justifying the period of written notice required by subsection 107K(3) being longer than 3 days, specify a longer period, of up to 7 days.

107K Industrial action without further protected action ballot after end of suspension of bargaining period

- (1) This section applies if:
 - (a) before a bargaining period was suspended under subsection 107G(1), 107H(1), 107I(1) or 107J(1), industrial action was authorised by a protected action ballot; and
 - (b) the ballot authorised industrial action:
 - (i) some or all of which had not been taken before the period of suspension began; or
 - (ii) that had not ended before the period of suspension began; or
 - (iii) beyond the period of suspension.
- (2) After the period of suspension, as extended under subsection 107I(3) or 107J(4) (if applicable), has ceased (whether because the period ended or was revoked):
 - (a) a relevant employee (within the meaning of Division 4) may organise, or engage in, that industrial action without another protected action ballot; and
 - (b) a negotiating party that is an organisation of employees may organise, or engage in, that industrial action without another protected action ballot.

For the purposes of working out when that industrial action may be organised, or engaged in, the period of suspension (including any dates authorised by a protected action ballot as dates on which action is to be taken) is to be ignored.
- (3) However, that industrial action is not protected action unless, after the period of suspension, the organisation, or the employee, gives the employer at least the required written notice of the intention to take the action. The notice must state the nature of the intended action and the day when it will begin.
- (4) For the purposes of subsection (3), the **required written notice** is:
 - (a) 3 working days' written notice; or
 - (b) if the Commission, in the order under subsection 107G(1), 107H(1), 107I(1) or 107J(1) suspending the bargaining period, or an order under subsection 107I(3) or 107J(4) extending the period of suspension, specifies a higher number of days—that number of days' written notice.

Note: For the maximum number of days the suspension order can specify, see subsection 107G(14), 107H(8), 107I(7) or 107J(8).

- (5) Nothing in this section authorises industrial action after the end of the period of suspension that is different in type or duration from the industrial action that was authorised by the protected action ballot.

Example 1: A protected action ballot authorised strike action for 20 consecutive working days from a specified date. Fourteen working days into the strike, the bargaining period was suspended for one month.

Under this section, once the period of suspension ends, the initiating party could give the required written notice, without another protected action ballot, of 6 further consecutive working days of strike action (the balance of the strike action authorised).

Example 2: A protected action ballot authorised the imposition of certain work bans every Monday, for a period of 8 consecutive weeks starting from a specified date. After 3 weeks, the bargaining period was suspended for a period of 2 weeks.

Under this section, once the period of suspension ends, the initiating party could give the required written notice, without another protected action ballot, that the work bans authorised by the ballot will be imposed for 5 further consecutive Mondays (the balance of the industrial action authorised).

Division 3—Protected action

Subdivision A—What is protected action?

108 Protected action

General

- (1) Action by a person is *protected action* if:
- (a) the action is protected action under subsection (2) or (3); and
 - (b) no provision of Subdivision B excludes the action from being protected action; and
 - (c) subsection 107K(3) does not exclude the action from being protected action.

Employee and employee organisation actions

- (2) During a bargaining period:
- (a) an organisation of employees that is a negotiating party; or

- (b) a member of such an organisation who is employed by the employer; or
- (c) an officer or employee of such an organisation acting in that capacity; or
- (d) an employee who is a negotiating party;

is entitled, for the purpose of:

- (e) supporting or advancing claims made in respect of the proposed collective agreement; or
- (f) responding to industrial action by the employer against employees whose employment will be subject to the proposed collective agreement;

to organise or engage in industrial action against the employer and, if the organisation, member, officer or employee does so, the organising of, or engaging in, that industrial action is protected action.

Employer actions

- (3) Subject to subsection (5), during a bargaining period, the employer is entitled, for the purpose of:
 - (a) supporting or advancing claims made by the employer in respect of the proposed collective agreement; or
 - (b) responding to industrial action by any of the employees whose employment will be subject to the proposed collective agreement;

to engage in industrial action against all or any of the employees whose employment will be subject to the agreement and, if the employer does so, the organising of, or engaging in, that industrial action is protected action.

Note 1: The existence of this entitlement does not affect any right of the employer to refuse to pay the employee where, under the common law, the employer is permitted to do so because the employee has not performed work as directed.

Note 2: The existence of this entitlement also does not affect any authorisation of the employer to stand-down the employee under an award.

- (4) If the employer engages in industrial action against employees in accordance with subsection (3), the employer is entitled to refuse to pay any remuneration to the employees in respect of the period of the industrial action.

- (5) The employer is not entitled to engage in industrial action against employees under subsection (3) (and so the industrial action will not be protected action) unless the continuity of the employees' employment, for such purposes as are prescribed by the regulations, is not affected by the industrial action.

Subdivision B—Exclusions from protected action

108A Exclusion—claims in support of inclusion of prohibited content

Engaging in industrial action in relation to a proposed collective agreement is not protected action if it is to support or advance claims to include prohibited content in the agreement.

108B Exclusion—industrial action while bargaining period is suspended

Engaging in industrial action in relation to a proposed collective agreement is not protected action if it is engaged in while the bargaining period is suspended.

108C Exclusion—industrial action must not involve persons who are not protected for that industrial action

- (1) Engaging in industrial action in relation to a proposed collective agreement is not protected action if:
- (a) it is engaged in in concert with one or more persons who are not protected persons for the industrial action; or
 - (b) it is organised other than solely by one or more protected persons for the industrial action.
- (2) Organising industrial action in relation to a proposed collective agreement is not protected action if:
- (a) it is organised in concert with one or more persons who are not protected persons for the industrial action; or
 - (b) it is intended to be engaged in other than solely by one or more protected persons for the industrial action.
- (3) In this section:

protected person, for industrial action in relation to a proposed collective agreement, means:

- (a) an organisation of employees that is a negotiating party to the proposed collective agreement; or
- (b) a member of such an organisation who is employed by the employer and whose employment will be subject to the proposed collective agreement; or
- (c) an officer or employee of such an organisation acting in that capacity; or
- (d) an employee who is a negotiating party to the proposed collective agreement; or
- (e) an employer who is a negotiating party to the proposed collective agreement.

108D Exclusion—industrial action must not be in support of pattern bargaining claims

Engaging in or organising industrial action is not protected action if:

- (a) the industrial action is for the purpose of supporting or advancing claims made by a negotiating party to a proposed collective agreement; and
- (b) the party is engaged in pattern bargaining in relation to the proposed collective agreement.

Note: For other provisions relating to pattern bargaining, see:

- (a) section 107H; and
- (b) section 109L; and
- (c) section 111A.

108E Exclusion—industrial action must not be taken until after nominal expiry date of workplace agreements or workplace determinations

Engaging in or organising industrial action in contravention of section 110 or 110A is not protected action.

108F Exclusion—notice of action to be given

Notice of employee and employee organisation actions

- (1) Any action taken as mentioned in subsection 108(2) by:
- (a) an organisation of employees; or
 - (b) a member of such an organisation; or
 - (c) an officer or employee of such an organisation acting in that capacity; or
 - (d) an employee who is a negotiating party;
- is not protected action unless the requirements set out in subsection (2) are met.
- (2) The requirements are that:
- (a) if the action is in response to, and is taken after the start of, industrial action against employees by the employer in respect of the proposed collective agreement—the organisation, or the employee who is a negotiating party, has given the employer written notice of the intention to take the action; or
 - (b) in any other case—the organisation, or the employee who is a negotiating party, has given the employer at least the required written notice of the intention to take the action.
- (3) For the purposes of paragraph (2)(b), the ***required written notice*** is:
- (a) 3 working days' written notice; or
 - (b) if a ballot order made under section 109M in respect of the action specifies a higher number of days—that number of days' written notice.

Note: For the maximum number of days the ballot order can specify, see subsection 109N(5).

Notice of employer actions

- (4) If one or more of the negotiating parties is an organisation of employees, any action taken as mentioned in subsection 108(3) by the employer:
- (a) is not protected action unless the employer has given the other negotiating party or each of the other negotiating parties:

- (i) if the industrial action is in response to, and takes place after the start of, industrial action organised or engaged in by an organisation that is a negotiating party in respect of the proposed collective agreement—written notice of the intended industrial action; or
 - (ii) in any other case—at least 3 working days' written notice of the intended industrial action; and
 - (b) is not protected action in so far as it relates to a particular employee unless:
 - (i) if subparagraph (a)(i) applies—before the industrial action begins; or
 - (ii) in any other case—at least 3 working days before the industrial action begins;the employer has given written notice to the particular employee, or has taken other reasonable steps to notify the particular employee, of the intended industrial action.
- (5) If one or more of the negotiating parties is an employee whose employment will be subject to the proposed collective agreement, any action taken as mentioned in subsection 108(3) by the employer is not protected action in so far as it relates to a particular employee unless:
 - (a) if the industrial action is in response to, and takes place after the start of, industrial action organised or engaged in by any of the employees who are negotiating parties in respect of the proposed collective agreement—before the industrial action begins; or
 - (b) in any other case—at least 3 working days before the industrial action begins;the employer has given written notice to the particular employee, or has taken other reasonable steps to notify the particular employee, of the intended industrial action.

Notice to state nature of intended action and start day

- (6) A written notice or other notification under this section must state the nature of the intended action and the day when it will begin.

Limitations on when notice may be given

- (7) A written notice or other notification under this section cannot be given:
-

-
- (a) if the notification relates to action that must, in order to be protected action, be authorised by a protected action ballot—before the declaration of the results of the ballot (see section 109ZA); or
 - (b) if the notification relates to industrial action by an employer (whether the notification is to be given by the employer, an organisation of employees or an employee)—before the start of the bargaining period.

108G Employee may appoint agent to give notice under section 108F

If:

- (a) a person referred to in paragraph 108F(1)(d) has appointed an agent under section 107A to initiate a bargaining period in relation to a proposed collective agreement; and
 - (b) the person wishes to give notice to an employer under section 108F of intention to take industrial action relating to the proposed collective agreement without disclosing the person's identity to the person's employer;
- the notice may be given by the agent on the person's behalf.

108H Exclusion—requirement that employee organisation or employee comply with Commission orders and directions

(1) If:

- (a) an organisation of employees is a negotiating party to a proposed collective agreement; and
- (b) the Commission has, during the bargaining period, made or given orders or directions that relate to, or that relate to industrial action relating to, the making of the proposed collective agreement or to a matter that has arisen in the negotiations for the proposed collective agreement;

industrial action engaged in by a person who is a member of the organisation is not protected action unless, before the person begins to engage in the industrial action, the organisation has complied with the order or direction so far as it applies to the organisation.

(2) If:

- (a) an employee is a negotiating party to a proposed collective agreement; and

- (b) the Commission has, during the bargaining period, made or given orders or directions that relate to, or that relate to industrial action relating to, the making of the proposed collective agreement or to a matter that has arisen in the negotiations for the proposed collective agreement;

industrial action engaged in by the employee is not protected action unless, before the employee begins to engage in the industrial action, the employee has complied with the order or direction so far as it applies to the employee.

108I Exclusion—requirement that employer genuinely try to reach agreement etc.

Industrial action engaged in by an employer against employees is not protected action unless the employer has, before the employer begins to engage in the industrial action:

- (a) if the employees are members of an organisation or organisations that are negotiating parties—genuinely tried to reach agreement with the organisation or organisations; and
- (b) if the employees are negotiating parties—genuinely tried to reach agreement with the employees; and
- (c) complied with all orders or directions made or given by the Commission during the bargaining period that relate to, or that relate to industrial action relating to, the making of the proposed collective agreement or to a matter that has arisen in the negotiations for the proposed collective agreement, so far as the orders or directions apply to the employer.

108J Exclusion—employee and employee organisation action to be authorised by secret ballot or be in response to employer action

Any action taken as mentioned in subsection 108(2) by:

- (a) an organisation of employees; or
- (b) a member of such an organisation; or
- (c) an officer or employee of such an organisation acting in that capacity; or
- (d) an employee who is a negotiating party;

is not protected action unless:

-
- (e) the action is in response to industrial action by the employer against employees whose employment will be subject to the proposed collective agreement; or
 - (f) the action has been authorised by a protected action ballot (see section 109ZC).

Note: The question whether industrial action is authorised by a protected action ballot is also affected by section 107K.

108K Exclusion—employee organisation action must be duly authorised

- (1) Engaging in industrial action by members of an organisation of employees that is a negotiating party is not protected action unless, before the industrial action begins:
 - (a) the industrial action is duly authorised by a committee of management of the organisation or by someone authorised by such a committee to authorise the industrial action; and
 - (b) if the rules of the organisation provide for the way in which the industrial action is to be authorised—the industrial action is duly authorised under those rules; and
 - (c) written notice of the giving of the authorisation is given to a Registrar.
- (2) Industrial action is taken, for the purposes of this section, to be duly authorised under the rules of an organisation of employees even though a technical breach has occurred in authorising the industrial action, so long as the person or persons who committed the breach acted in good faith.
- (3) Examples of a technical breach in authorising industrial action are as follows:
 - (a) a contravention of the rules of the organisation;
 - (b) an error or omission in complying with the requirements of this Act;
 - (c) participation, by a person not eligible to do so, in the making of a decision by a committee of management, or by members, of the organisation.
- (4) Industrial action is taken, for the purposes of this section, to have been duly authorised under the rules of an organisation of employees, and to have been so authorised before the industrial action began, unless:

- (a) the Court declares in a proceeding that the industrial action was not duly authorised under those rules; and
 - (b) the proceeding was brought in the Court within 6 months after the notification in relation to the industrial action was given to a Registrar under paragraph (1)(c).
- (5) In so far as the rules of an organisation of employees provide for the way in which industrial action that section 108 entitles the organisation to organise or engage in is to be authorised, the rules do not contravene section 159 of the Registration and Accountability of Organisations Schedule unless the manner provided for contravenes that section.

Subdivision C—Significance of action being protected action

108L Immunity provisions

- (1) Subject to subsection (2), no action lies under any law (whether written or unwritten) in force in a State or Territory in respect of any industrial action that is protected action unless the industrial action has involved or is likely to involve:
- (a) personal injury; or
 - (b) wilful or reckless destruction of, or damage to, property; or
 - (c) the unlawful taking, keeping or use of property.
- (2) Subsection (1) does not prevent an action for defamation being brought in respect of anything that occurred in the course of industrial action.

Note: Subsection 111(13) provides that an order under subsection 111(1) or (6) directing that industrial action stop or not occur does not apply to protected action.

108M Employer not to dismiss employee etc. for engaging in protected action

- (1) An employer must not:
- (a) dismiss an employee, injure an employee in his or her employment or alter the position of an employee to the employee's prejudice; or
 - (b) threaten to dismiss an employee, injure an employee in his or her employment or alter the position of an employee to the employee's prejudice;

wholly or partly because the employee is proposing to engage, is engaging, or has engaged, in protected action.

- (2) Subsection (1) does not apply to any of the following actions taken by the employer:
- (a) standing-down the employee;
 - (b) refusing to pay the employee, if:
 - (i) the refusal is in accordance with section 114; or
 - (ii) under the common law, the employer is permitted to do so because the employee has not performed work as directed;
 - (c) action that is itself protected action.

Civil remedy provisions

- (3) Subsection (1) is a civil remedy provision.
- (4) The Court may make one or more of the following orders in relation to a person who has contravened subsection (1):
- (a) an order imposing a pecuniary penalty on the person;
 - (b) injunctions, and any other orders, that the Court considers necessary to stop the contravention or remedy its effects.
- (5) The pecuniary penalty under paragraph (4)(a) cannot be more than 300 penalty units for a body corporate or 60 penalty units in any other case.
- (6) Other orders the Court may make under paragraph (4)(b) include (but are not limited to):
- (a) if the contravention was constituted by dismissing an employee—an order to reinstate the person dismissed to the position that the person occupied immediately before the dismissal or to a position no less favourable than that position; and
 - (b) in any case—to pay, to the person dismissed, injured or prejudiced, compensation for loss suffered as a result of the dismissal, injury or prejudice.
- (7) An application for an order under subsection (4) may be made by:
- (a) the employee concerned; or
 - (b) an organisation of employees of which that employee is a member; or

- (c) a workplace inspector; or
 - (d) any other person prescribed by the regulations.
- (8) In proceedings for an order under subsection (4), it is to be presumed, unless the employer proves otherwise, that the alleged conduct of the employer was carried out wholly or partly because the employee was proposing to engage, was engaging, or had engaged, in protected action.

Note: For other provisions about civil remedy provisions, see Division 4 of Part VIII.

Division 4—Secret ballots on proposed protected action

Subdivision A—General

109 Object of Division and overview of Division

Object

- (1) The object of this Division is to establish a transparent process which allows employees directly concerned to choose, by means of a fair and democratic secret ballot, whether to authorise industrial action supporting or advancing claims by organisations of employees, or by employees.

Overview of Division

- (2) Under Division 3, industrial action by employees is not protected action unless it has been authorised in advance by a secret ballot held under this Division (a ***protected action ballot***). This Division establishes the steps that organisations of employees, or employees, who wish to organise or engage in protected action must take in order to:
- (a) obtain an order from the Commission that will authorise a protected action ballot to be held; and
 - (b) hold a protected action ballot that may authorise the industrial action.
- (3) The rule that industrial action by employees is not protected action unless it has been authorised by a protected action ballot does not apply to action in response to an employer engaging in industrial action against the employees (see section 108J).

109A Definitions

In this Division:

applicant means an applicant for a ballot order.

applicant's agent means an agent appointed by an employee, or by a group of employees, under subsection 109B(5).

authorised ballot agent, in relation to a protected action ballot, means the person authorised by the Commission in the ballot order to conduct the ballot.

authorised independent adviser, in relation to a protected action ballot, means the person authorised by the Commission in the ballot order to be the independent adviser for the ballot.

ballot order means an order made under section 109M requiring a protected action ballot to be held.

declaration envelope means an envelope in the form prescribed by the regulations on which a voter is required to make a declaration containing the information prescribed by the regulations.

joint applicant means a person who is participating, or has participated, in making a joint application under section 109F.

party, in relation to an application for a ballot order, means either of the following:

- (a) the applicant;
- (b) the employer of the relevant employees.

prescribed number, in relation to relevant employees, means:

- (a) if there are fewer than 80 relevant employees—4; or
- (b) if there are at least 80, but not more than 5,000, relevant employees—5% of the number of such employees; or
- (c) if there are more than 5,000 relevant employees—250.

protected action ballot means a ballot under this Division.

relevant employee, in relation to proposed industrial action against an employer in respect of a proposed collective agreement, means:

- (a) if an organisation of employees is a negotiating party to the agreement—any member of the organisation who is

employed by the employer and whose employment will be subject to the agreement; and

- (b) if an employee is a negotiating party to the agreement—any employee who is a negotiating party to the agreement; but does not include an employee who is bound by an AWA whose nominal expiry date has not passed.

roll of voters means a list compiled:

- (a) by the Commission under section 109Q; or
- (b) by an authorised ballot agent in compliance with an order of the Commission under section 109Q.

Subdivision B—Application for order for protected action ballot to be held

109B Who may apply for a ballot order etc.

When application can be made

- (1) A person referred to in subsection (3) may, during a bargaining period, apply to the Commission for an order for a ballot to be held to determine whether proposed industrial action has the support of relevant employees.

Note: For the duration of a bargaining period, see sections 107D (when it begins) and 107E (when it ends).

- (2) However, if there are one or more existing collective agreements binding on relevant employees, the application must not be made before:
 - (a) if there is only one existing collective agreement—the nominal expiry date of the existing collective agreement; or
 - (b) if there are 2 or more existing collective agreements—whichever is the last occurring of the nominal expiry dates of those existing collective agreements.

Who can apply

- (3) The following people may apply:
 - (a) if the bargaining period was initiated by an organisation of employees—that organisation;

- (b) if the bargaining period was initiated by an employee or employees—any employee who is a negotiating party to the proposed collective agreement, or a group of such employees acting jointly.

Note: For joint applications, see section 109F.

Employee applications need support of prescribed number of employees

- (4) An employee, or a group of such employees acting jointly, cannot make an application unless the application has the support of at least the prescribed number of relevant employees.

Note: *Prescribed number* is defined in section 109A.

Employee applicants can appoint agent

- (5) A person or persons referred to in paragraph (3)(b) who wish to make an application under this section without disclosing their identities to their employer may appoint an agent to represent them for all purposes connected with the application.

109C Contents of application

- (1) The application must include the following:
 - (a) the question or questions to be put to the relevant employees in the ballot, including the nature of the proposed industrial action;
 - (b) details of the types of employees who are to be balloted;
 - (c) any details required by Rules of the Commission (see subsection (3)).

- (2) The application may include the name of a person nominated by the applicant to conduct the ballot.

Note: The question of who conducts the ballot is ultimately decided by the Commission—see paragraph 109N(1)(e) and section 109ZE.

- (3) Without limiting the generality of section 48, Rules of the Commission made under that section may deal with:
 - (a) the matters to be included in an application for a ballot order; and
 - (b) the form in which the application is to be made.

109D Material to accompany application

- (1) The application must be accompanied by:
 - (a) a copy of the notice given under subsection 107(3) to initiate the relevant bargaining period; and
 - (b) a copy of the particulars that accompanied that notice as required by section 107C; and
 - (c) a declaration by the applicant under subsection (4) of this section.
- (2) If the applicant is an organisation of employees, the application must be accompanied by a written notice showing that the application has been duly authorised by a committee of management of the organisation or by someone authorised by such a committee to authorise the application.
- (3) If the applicant is an employee, or a group of employees, represented by an applicant's agent, the application must be accompanied by a document containing the name of the employee, or each of those employees.
- (4) The applicant's declaration must state that the industrial action to which the application relates is not for the purpose of supporting or advancing claims to include in the proposed collective agreement any prohibited content.
- (5) The declaration must be in the form prescribed by the regulations.
- (6) A person commits an offence if:
 - (a) the person makes, or joins in making, a declaration under subsection (4); and
 - (b) the declaration contains a statement that is false or misleading in a material particular.

Penalty for contravention of this subsection: 30 penalty units.

109E Notice of application

The applicant must give a copy of the application (but not the material referred to in section 109D) to:

- (a) the other party; and
 - (b) any person nominated in the application to conduct the ballot;
-

within 24 hours after lodging the application with the Commission.

109F Joint applications

- (1) If the bargaining period for the proposed collective agreement was initiated by an employee, 2 or more employees who are negotiating parties may make a joint application for a ballot order.
- (2) An employee who has participated in making a joint application may withdraw his or her name from the application before the application is determined but cannot do so after the application is determined by the Commission.
- (3) If employees have made a joint application, the name of another employee who is a negotiating party may, before the application is determined, be joined to the application if the other applicants consent.
- (4) Without limiting the generality of section 48, Rules of the Commission made under that section may deal with:
 - (a) in the case of a provision of this Act permitting an applicant for a ballot order to do any thing—how the provision is to apply to joint applicants; and
 - (b) in the case of a provision of this Act requiring an applicant for a ballot order to be given notice, or otherwise informed, of any thing—how the requirement is to be fulfilled in relation to joint applicants.

Subdivision C—Determination of application and order for ballot to be held

109G Commission may notify parties etc. of procedure

If:

- (a) an application for a ballot order is lodged with the Commission; and
- (b) the Commission considers that notifying the parties, or a person who may become the authorised ballot agent, of the procedure to be followed by the Commission in dealing with that application will not delay, and may expedite, the determination of the application;

the Commission may notify the parties or person concerned accordingly.

109H Commission to act quickly in relation to application etc.

- (1) In exercising its powers under this Division, the Commission:
 - (a) must act as quickly as is practicable; and
 - (b) must, as far as is reasonably possible, determine all applications made under this Division within 2 working days after the application is made.

Note: In exercising its powers, the Commission is also required to act according to equity, good conscience and the substantial merits of the case, without regard to technicalities and legal forms (see paragraph 44H(1)(c)). It is not bound by the rules of evidence, and may inform itself in any manner it considers just (see paragraph 44H(1)(b)).

- (2) However, the Commission must not determine an application for a ballot order until it is satisfied that:
 - (a) the applicant has complied with section 109E; and
 - (b) the persons referred to in subsections 109I(1) and (2) have had a reasonable opportunity to make submissions in relation to the application.

109I Parties and relevant employees may make submissions and apply for directions

- (1) A party or a relevant employee may make submissions, and may apply for directions, relating to:
 - (a) an application for a ballot order; or
 - (b) any aspect of the conduct of a protected action ballot.
- (2) A person nominated in an application to conduct a ballot may make submissions, and apply for directions, relating to the application.
- (3) An authorised ballot agent may make submissions, and apply for directions, relating to any aspect of a protected action ballot.
- (4) The Commission may decline to consider a person's submission if the Commission is satisfied that the submission is vexatious, frivolous, misconceived or lacking in substance.

109J Commission may make orders or give directions

- (1) The Commission may make orders, or give directions, in connection with:
 - (a) an application for a ballot order; or
 - (b) any aspect of the conduct of a protected action ballot.
- (2) Without limiting subsection (1), the Commission may make orders, or give directions, aimed at ensuring that a protected action ballot is conducted expeditiously.
- (3) In deciding whether to make an order, or give a direction, under this section, and in deciding the content of any such order or direction, the Commission must have regard to the desirability of the ballot results being available to the parties within 10 days after the ballot order is made.

109K Commission procedure regarding multiple applications

- (1) If:
 - (a) more than one application for a ballot order is before the Commission for determination; and
 - (b) the applications relate to industrial action by employees of the same employer or by employees at the same place of work; and
 - (c) the Commission considers that determining the applications at the same time will not unreasonably delay the determination of any of the applications;the Commission may determine the applications at the same time.
- (2) If:
 - (a) the Commission has made an order requiring a ballot to be held in relation to industrial action by employees of an employer, or by employees at a place of work; and
 - (b) the Commission proposes to make another order requiring a ballot to be held in relation to industrial action against that employer, or at the same place of work; and
 - (c) the Commission considers that the level of disruption of the employer's business, or at the place of work (as the case requires), could be reduced if the ballots were held at the same time; and

- (d) the Commission considers that requiring the ballots to be held at the same time will not unreasonably delay the conduct of either ballot;
- the Commission may make, or vary, the relevant orders so as to require the ballots to be held at the same time.

109L Application not to be granted unless certain conditions are met

Commission must be satisfied of various matters

- (1) The Commission must grant an application for a ballot order if, and must not grant the application unless, it is satisfied that:
 - (a) during the bargaining period, the applicant genuinely tried to reach agreement with the employer of the relevant employees; and
 - (b) the applicant is genuinely trying to reach agreement with the employer; and
 - (c) the applicant is not engaged in pattern bargaining.

Note 1: An application for a ballot order must comply with the requirements set out in Subdivision B.

Note 2: To work out when a bargaining period began, see section 107D.

Note 3: For other provisions relating to pattern bargaining, see:

- (a) section 107H; and
- (b) section 108D; and
- (c) section 111A.

When Commission has discretion to refuse application

- (2) Despite subsection (1), the Commission may refuse the application if it is satisfied:
 - (a) that granting the application would be inconsistent with the object of this Division (see section 109); or
 - (b) that the applicant, or a relevant employee, has at any time contravened a provision of this Division or an order made, or direction given, under this Division.

109M Grant of application—order for ballot to be held

If the Commission grants the application, the Commission must order the applicant to hold a protected action ballot.

109N Matters to be included in order

- (1) An order for a protected action ballot to be held must specify the following:
- (a) the name of:
 - (i) if the applicant is an organisation of employees—the organisation; or
 - (ii) if the applicant is an employee, or a group of employees, represented by an applicant’s agent—the applicant’s agent; or
 - (iii) if the applicant is an employee, or a group of employees, not represented by an applicant’s agent—the employee or employees;
 - (b) the types of employees who are to be balloted;
 - (c) the voting method;
 - (d) the timetable for the ballot, including:
 - (i) the day on which the roll of voters is to close, which must be a day at least 2 working days before the day on which the ballot is to be held, or is to start to be held; and
 - (ii) the day on which the ballot is to close, and the time (the ***voting closing time***) on that day by which votes must be received (if the order specifies a postal ballot) or by which votes must be cast (if the order specifies an attendance ballot);
 - (e) the name of the person authorised by the Commission to conduct the ballot;
 - (f) the name of the person (if any) authorised by the Commission to be the independent adviser for the ballot;
 - (g) the question or questions to be put to the relevant employees in the ballot, including the nature of the proposed industrial action.
- Note 1: Section 109ZE specifies who may be authorised by the Commission to conduct protected action ballots.
- Note 2: Section 109ZF specifies who may be authorised by the Commission to be the independent adviser for a protected action ballot.
- (2) The order must specify a postal ballot as the voting method unless:
- (a) the order specifies another voting method; and

- (b) the Commission is satisfied that the other voting method is more efficient and expeditious than a postal ballot.
- (3) If the order specifies a postal ballot as the voting method, it must specify that the voting must take place by way of declaration voting. For this purpose, a person votes by way of **declaration voting** if the person:
 - (a) marks his or her vote on a ballot paper; and
 - (b) places the ballot paper in a declaration envelope; and
 - (c) seals that envelope and signs his or her name in the space provided on the back flap of that envelope; and
 - (d) places that envelope in an outer envelope that is addressed to the authorised ballot agent; and
 - (e) posts the outer envelope so that it reaches the authorised ballot agent before the voting closing time on the day on which the ballot is to close.
- (4) If the order specifies an attendance ballot as the voting method, then:
 - (a) votes must be cast before the voting closing time on the day on which the ballot is to close; and
 - (b) subject to paragraph (a):
 - (i) the order must specify that the voting must take place during the voters' meal-time or other breaks, or outside their hours of employment; and
 - (ii) the order may also specify other rules about the times when voters may vote.
- (5) If the Commission is satisfied, in relation to the proposed industrial action that is the subject of the order, that there are exceptional circumstances justifying the period of written notice referred to in paragraph 108F(2)(b) being longer than 3 days, the order may specify a longer period, of up to 7 days.

1090 Guidelines for ballot timetables

- (1) The President may develop guidelines in relation to appropriate timetables for the conduct of protected action ballots. The President may consult the Australian Electoral Commission, and any other person, in developing guidelines.

-
- (2) Guidelines developed under this section are not legislative instruments.

109P Power of Commission to require information relevant to roll of voters

- (1) The Commission may order the employer of the relevant employees, or the applicant, or both, to provide:
- (a) a list of employees of the type described in the application; and
 - (b) any other information that it is reasonable for the Commission to require in order to assist in the compilation of a roll of voters for the proposed ballot.
- (2) The order may require the list, or other information, to be provided to the Commission or to the authorised ballot agent.
- (3) The order may require the list, or other information, to be provided in whatever form the Commission considers appropriate.

109Q Roll to be compiled by Commission or ballot agent

If the Commission makes a ballot order, it must:

- (a) compile a list of the names of the persons who are eligible to be included on the roll of voters for the ballot and provide that list, as the roll of voters, to the authorised ballot agent; or
- (b) order, by separate order, the authorised ballot agent to compile the roll of voters for the ballot.

109R Eligibility to be included on the roll

- (1) A person is eligible to be included on the roll of voters for the ballot if, and only if:
- (a) if the applicant is an organisation of employees—the person:
 - (i) was a member of the organisation on the day the ballot order was made; and
 - (ii) was employed by the employer on the day the ballot order was made; and
 - (iii) will be subject to the proposed collective agreement; or
 - (b) if the applicant is an employee, or a group of employees—the person:

- (i) was employed by the employer on the day the ballot order was made; and
 - (ii) will be subject to the proposed collective agreement.
- (2) A person is not eligible to be included on the roll of voters for the ballot if, on the day the ballot order was made, the person was bound by an AWA whose nominal expiry date had not passed.

109S Adding or removing names from the roll

- (1) If:
 - (a) a person requests the authorised ballot agent to include the person's name on the roll of voters for a protected action ballot; and
 - (b) the ballot agent is satisfied that the person is eligible to be included on the roll; and
 - (c) the request is made before the day on which the roll of voters is to close;the ballot agent must add the person's name to the roll.
- (2) If:
 - (a) a person applies to the Commission for a declaration that the person is eligible to be included on the roll of voters for the ballot; and
 - (b) the Commission is satisfied that the person is eligible to be included on the roll; and
 - (c) the application is made before the day on which the roll of voters is to close;the Commission must make the declaration and direct the authorised ballot agent to include the person's name on the roll.
- (3) If:
 - (a) a party, the authorised ballot agent, or a person whose name is on the roll of voters for a protected action ballot, applies to the Commission for a declaration that a person whose name has been included on the roll of voters for the ballot is not eligible to be so included; and
 - (b) the application is made before the day on which the roll of voters is to close; and
 - (c) the Commission is satisfied that the person is not eligible to be so included;

the Commission must make the declaration and direct the authorised ballot agent to remove the person's name from the roll.

- (4) A person's name cannot be added to, or removed from, the roll of voters for a protected action ballot after the day on which the roll of voters is to close.

109T Variation of order

Variation sought by applicant

- (1) An applicant for a ballot order may apply to the Commission, at any time before the order expires, to vary the ballot order.

Variation sought by ballot agent

- (2) The authorised ballot agent for a particular ballot may apply to the Commission, at any time before the ballot has closed, to vary:
 - (a) the voting method specified in the ballot order; or
 - (b) the timetable for the ballot specified in the ballot order.

109U Expiry and revocation of order

- (1) If a ballot has not been held within the period specified in the ballot order, the order expires at the end of that period.
- (2) An applicant for a ballot order may apply to the Commission, at any time before the order expires, to revoke the ballot order.
- (3) If the applicant makes an application under subsection (2), the Commission must revoke the order.

109V Compliance with orders and directions

- (1) A person to whom an order or a direction under this Division is expressed to apply must comply with the order or direction.

Civil remedy provisions

- (2) Subsection (1) is a civil remedy provision.
- (3) The Court may order a person who has contravened subsection (1) to pay a pecuniary penalty.

- (4) The pecuniary penalty cannot be more than 300 penalty units for a body corporate or 60 penalty units in any other case.
- (5) An application for an order under subsection (3) may be made by:
 - (a) an employee who is eligible to be included on the roll of voters for the protected action ballot concerned; or
 - (b) an employer of employees referred to in paragraph (a); or
 - (c) an applicant for the order for the protected action ballot concerned to be held; or
 - (d) a workplace inspector; or
 - (e) any other person prescribed by the regulations.

Note: For other provisions about civil remedy provisions, see Division 4 of Part VIII.

109W Commission to notify parties and authorised ballot agent

- (1) As soon as practicable after making a ballot order, the Commission must ensure that a copy of the order is given to each party and to the authorised ballot agent.
- (2) As soon as practicable after varying a ballot order, the Commission must ensure that a copy of the variation is given to each party and to the authorised ballot agent.
- (3) As soon as practicable after revoking a ballot order, the Commission must ensure that a copy of the revocation is given to each party and to the authorised ballot agent.

Subdivision D—Conduct and results of protected action ballot

109X Conduct of ballot

A ballot is not a protected action ballot unless it is conducted by the authorised ballot agent for the ballot.

109Y Form of ballot paper

The ballot paper must be in the prescribed form and must include the following:

- (a) the name of the applicant or the applicant's agent (as the case requires);
- (b) the types of employees who are to be balloted;

- (c) the name of the ballot agent authorised to conduct the ballot;
- (d) the question or questions to be put to the relevant employees in the ballot, including the nature of the proposed industrial action;
- (e) a statement that the voter's vote is secret and that the voter is free to choose whether or not to support the proposed industrial action;
- (f) instructions to the voter on how to complete the ballot paper;
- (g) the day on which the ballot is to close.

109Z Who can vote

A person cannot vote in a protected action ballot unless the person's name is on the roll of voters for the ballot.

109ZA Declaration of ballot results

As soon as practicable after the day on which the ballot closes, the authorised ballot agent must, in writing:

- (a) make a declaration of the results of the ballot; and
- (b) inform the parties and the Industrial Registrar of the result.

109ZB Ballot reports

Report by authorised ballot agent

- (1) As soon as practicable after the day on which the ballot closes, the authorised ballot agent must give the Industrial Registrar a written report about the conduct of the ballot.

Note: This subsection is a civil remedy provision: see subsection (7).

- (2) A report under subsection (1) must set out details of:
 - (a) any complaints made to the authorised ballot agent about the conduct of the ballot; and
 - (b) any irregularities in relation to the conduct of the ballot that have come to the attention of the authorised ballot agent.
- (3) Subsection (2) does not limit subsection (1).

Report by authorised independent adviser

- (4) As soon as practicable after the end of the voting, the authorised independent adviser (if any) must give the Industrial Registrar a written report about the conduct of the ballot.

Note: This subsection is a civil remedy provision: see subsection (7).

- (5) A report under subsection (4) must set out details of:
- (a) any complaints made to the authorised independent adviser about the conduct of the ballot; and
 - (b) any irregularities in relation to the conduct of the ballot that have come to the attention of the authorised independent adviser.
- (6) Subsection (5) does not limit subsection (4).

Civil remedy provisions

- (7) Subsections (1) and (4) are civil remedy provisions.
- (8) The Court may order a person who has contravened subsection (1) or (4) to pay a pecuniary penalty.
- (9) The pecuniary penalty cannot be more than 300 penalty units for a body corporate or 60 penalty units in any other case.
- (10) An application for an order under subsection (8) may be made by:
- (a) an employee who is eligible to be included on the roll of voters for the protected action ballot concerned; or
 - (b) an employer of employees referred to in paragraph (a); or
 - (c) an applicant for the order for the protected action ballot concerned to be held; or
 - (d) a workplace inspector; or
 - (e) any other person prescribed by the regulations.

Note: For other provisions about civil remedy provisions, see Division 4 of Part VIII.

Definitions

- (11) In this section:

conduct, in relation to a protected action ballot, includes, but is not limited to, the compilation of the roll of voters for the ballot.

irregularity, in relation to the conduct of a protected action ballot, includes, but is not limited to, an act or omission by means of which the full and free recording of votes by all persons entitled to record votes and by no other persons is, or is attempted to be, prevented or hindered.

109ZC Effect of ballot

- (1) Industrial action is authorised by a protected action ballot if:
 - (a) the action was the subject of a protected action ballot; and
 - (b) at least 50% of persons on the roll of voters for the ballot voted in the ballot; and
 - (c) more than 50% of the votes validly cast were votes approving the action; and
 - (d) the action commences during the 30-day period beginning on the date of the declaration of the results of the ballot.

Note: Industrial action must be authorised under this Division if it is to be protected action under Division 3 (unless the action is in response to industrial action by the employer)—see section 108J.

- (2) However, the action is not authorised to the extent that it occurs after the end of the bargaining period referred to in section 109B.

Note: If another bargaining period is initiated later, and industrial action is proposed for that later period, it can only be authorised if a fresh application for a ballot order is granted, and the other steps required by this Division are completed, during that later period.

- (3) The Commission may, by order, extend the 30-day period mentioned in paragraph (1)(d) by up to 30 days if the employer and the applicant for the ballot order jointly apply to the Commission for the period to be extended.
- (4) The Commission must not make an order under subsection (3) extending the 30-day period if that period has previously been extended.

109ZD Registrar to record questions put in ballot, and to publish results of ballot

- (1) The Industrial Registrar must, in relation to each protected action ballot that has been held, keep a record of:
 - (a) the questions put to voters in the ballot; and

- (b) the results of the ballot declared by the authorised ballot agent under section 109ZA.
- (2) The Industrial Registrar must, as soon as practicable after being informed of the results of a ballot by the authorised ballot agent under section 109ZA, publish the results.

Subdivision E—Authorised ballot agents and authorised independent advisers

109ZE Who may be an authorised ballot agent?

- (1) In a ballot order, the Commission may name as the authorised ballot agent:
 - (a) the Australian Electoral Commission; or
 - (b) another person.
- (2) The Commission must not name a person other than the Australian Electoral Commission as the authorised ballot agent for the ballot unless the Commission is satisfied that the person:
 - (a) is capable of ensuring the secrecy and security of votes cast in the ballot; and
 - (b) is capable of ensuring that the ballot will be fair and democratic; and
 - (c) will conduct the ballot expeditiously; and
 - (d) is otherwise a fit and proper person to conduct the ballot.
- (3) The Commission must not name the applicant as the authorised ballot agent for the ballot unless:
 - (a) the applicant nominates another person to be the authorised independent adviser for the ballot; and
 - (b) the Commission names the other person as the authorised independent adviser for the ballot.

Note: Section 109ZF specifies who may be authorised by the Commission to be the independent adviser for a protected action ballot.

- (4) If the Commission is satisfied that a person is not sufficiently independent of the applicant, the Commission must not name the person as the authorised ballot agent for the ballot unless:
 - (a) the applicant nominates a third person as the authorised independent adviser for the ballot; and

- (b) the Commission names the third person as the authorised independent adviser for the ballot.

Note: Section 109ZF specifies who may be authorised by the Commission to be the independent adviser for a protected action ballot.

- (5) The regulations may prescribe:
 - (a) conditions that a person must meet in order to satisfy the Commission that the person is a fit and proper person to conduct a ballot; and
 - (b) factors to be taken into account by the Commission in determining whether a person is a fit and proper person to conduct a ballot.

109ZF Who may be an authorised independent adviser?

- (1) In a ballot order, the Commission may name a person nominated by the applicant as the authorised independent adviser.
- (2) The Commission must not name a person as the authorised independent adviser for the ballot unless the Commission is satisfied that the person:
 - (a) is sufficiently independent of the applicant; and
 - (b) is capable of giving the authorised ballot agent:
 - (i) advice that is; and
 - (ii) recommendations that are; directed towards ensuring that the ballot will be fair and democratic; and
 - (c) has consented to be so named.
- (3) The regulations may prescribe factors to be taken into account by the Commission in determining whether a person is capable of giving an authorised ballot agent:
 - (a) advice that is; and
 - (b) recommendations that are; directed towards ensuring that a protected action ballot will be fair and democratic.

Subdivision F—Funding of ballots

109ZG Liability for cost of ballot

- (1) The applicant for a ballot order is liable for the cost of holding the ballot.
- (2) If the application for the ballot order was made by joint applicants, each applicant is jointly and severally liable for the cost of holding the ballot.
- (3) Subsections (1) and (2) have effect subject to subsections 109ZH(3) and (6).
- (4) In this section:

cost of holding the ballot means:

- (a) if the applicant, or one of the applicants, is the authorised ballot agent—the costs incurred by the authorised ballot agent in relation to the holding of the ballot; or
- (b) otherwise—the amount the authorised ballot agent charges to the applicant or applicants in relation to the holding of the ballot.

109ZH Commonwealth has partial liability for cost of ballot

Authorised ballot agent someone other than the Australian Electoral Commission

- (1) If:
 - (a) the authorised ballot agent for the ballot is not the Australian Electoral Commission; and
 - (b) the applicant notifies the Industrial Registrar of the cost of holding the ballot; and
 - (c) the applicant does so within a reasonable time after the day on which the ballot closed;the Industrial Registrar must determine how much (if any) of that cost was reasonably and genuinely incurred in relation to the holding of the ballot.
- (2) If subsection (1) applies, the Commonwealth is liable to pay to the authorised ballot agent 80% of the amount determined under that subsection.

- (3) The applicant is, to the extent of the Commonwealth's liability under subsection (2), discharged from liability under section 109ZG for the cost of holding the ballot.
- (4) The regulations may prescribe matters to be taken into account by the Industrial Registrar in determining whether costs are reasonably and genuinely incurred in relation to the holding of the ballot.

Authorised ballot agent the Australian Electoral Commission

- (5) If the authorised ballot agent for the ballot is the Australian Electoral Commission, the Australian Electoral Commission must certify, within a reasonable time after the completion of the ballot, the amount of the reasonable costs charged by the Australian Electoral Commission to the applicant in relation to holding the ballot.
- (6) The applicant is, to the extent of 80% of the amount certified under subsection (5), discharged from liability under section 109ZG for the cost of holding the ballot.

Definition

- (7) In this section:
cost of holding the ballot has the same meaning as in section 109ZG.

109ZI Liability for cost of legal challenges

- (1) The regulations may make provision for who is liable for costs incurred in relation to legal challenges to matters connected with protected action ballots.
- (2) The regulations may also make provision for a person who is liable for costs referred to in subsection (1) to be indemnified by another person for some or all of those costs.
- (3) For the purposes of sections 109ZG and 109ZH, *costs of holding the ballot* do not include costs referred to in subsection (1) of this section.

Subdivision G—Miscellaneous

109ZJ Identity of certain persons not to be disclosed by Commission

- (1) The Commission must not disclose information that the Commission has reasonable grounds to believe will identify a person as:
 - (a) an applicant who is represented by an applicant's agent; or
 - (b) a relevant employee who was one of the prescribed number of employees supporting an application for a ballot order (as required by subsection 109B(4)); or
 - (c) a person whose name appears on the roll of voters for a protected action ballot; or
 - (d) a person who is a party to an AWA.
- (2) Each of the following is an exception to subsection (1):
 - (a) the disclosure is required or authorised by this Act or by another Act, by regulations made for the purposes of another provision of this Act, or by regulations made for the purposes of another Act;
 - (b) the person whose identity is disclosed has, in writing, authorised the disclosure.

109ZK Persons not to disclose identity of certain persons

- (1) A person commits an offence if:
 - (a) the person discloses information; and
 - (b) the information is protected information; and
 - (c) the person has reasonable grounds to believe that the information will identify another person as a person referred to in paragraph 109ZJ(1)(a), (b), (c) or (d); and
 - (d) the disclosure is not made by the person in the course of performing functions or duties:
 - (i) as a Registry official; or
 - (ii) as, or on behalf of, an authorised ballot agent; or
 - (iii) as an authorised independent adviser; and
 - (e) the disclosure is not required or authorised by this Act or by another Act, by regulations made for the purposes of another provision of this Act, or by regulations made for the purposes of another Act; and

- (f) the person whose identity is disclosed has not, in writing, authorised the disclosure.

Penalty: Imprisonment for 6 months.

- (2) In this section:

protected information, in relation to a person, means information that the person acquired:

- (a) in the course of performing functions or duties as a Registry official; or
- (b) in the course of performing functions or duties as, or on behalf of, an authorised ballot agent; or
- (c) from a person referred to in paragraph (a) or (b) who acquired the information as mentioned in paragraph (a) or (b).

Registry official means:

- (a) the Industrial Registrar; or
- (b) a member of the staff of the Industrial Registry (including a Deputy Industrial Registrar).

109ZL Immunity if person acted in good faith on ballot results

- (1) If:

- (a) the results of a protected action ballot, as declared by the authorised ballot agent, purported to authorise particular industrial action; and
- (b) an organisation or person, acting in good faith on the declared ballot results, organised or engaged in that industrial action; and
- (c) it is subsequently determined that the action was not authorised by the ballot;

no action lies against the organisation or person under any law (whether written or unwritten) in force in a State or Territory in respect of the action unless the action involved:

- (d) personal injury; or
- (e) wilful or reckless destruction of, or damage to, property; or
- (f) the unlawful taking, keeping or use of property.

- (2) Subsection (1) does not prevent an action for defamation being brought in respect of anything that occurred in the course of industrial action.

109ZM Limits on challenges etc. to ballot orders etc.

- (1) An order of the Commission that a person hold a protected action ballot, and any order, direction or decision of the Commission in connection with the order:
- (a) is final and conclusive; and
 - (b) must not be challenged, appealed against, reviewed, quashed, set aside or called in question in any court on any ground; and
 - (c) is not subject to mandamus, prohibition, certiorari or injunction, or the making of a declaratory or other order, in any court on any ground;
- unless subsection (2) applies to the order or decision.
- (2) This subsection applies to an order for a protected action ballot, or to an order, direction or decision of the Commission in connection with the order, if:
- (a) in proceedings relating to the order, direction or decision, as the case requires, a person claims that another person or persons:
 - (i) contravened this Division, or an order or direction of the Commission under this Division, if the contravention is not merely a technical breach; or
 - (ii) misled the Commission (whether by a false statement or by an omission) in such a way as to affect the order, direction or decision; and
 - (b) the court is satisfied that there are reasonable grounds for the claim.

109ZN Limits on challenges etc. to ballots

- (1) If a protected action ballot has been conducted, or has purportedly been conducted:
- (a) the declaration of the results of the ballot is final and conclusive; and
 - (b) the declaration of the results of the ballot must not be quashed or set aside by any court on any ground; and
-

-
- (c) the conduct of the ballot, and the declaration of the results of the ballot, must not be challenged, appealed against, reviewed or called in question, as applicable, in any court on any ground; and
- (d) the conduct of the ballot, and the declaration of the results of the ballot, are not subject to mandamus, prohibition, certiorari or injunction, or the making of a declaratory or other order, as applicable, in any court on any ground; unless subsection (2) applies to the conduct or declaration.
- (2) This subsection applies to the conduct of a protected action ballot, and to the declaration of the results of a ballot, if:
- (a) in proceedings relating to the conduct or declaration, as the case requires, a person claims that another person or persons:
- (i) contravened this Division, or an order or direction of the Commission under this Division, if the contravention is not merely a technical breach; or
- (ii) acted fraudulently in relation to the conduct or declaration; or
- (iii) acted in such a way as to cause an irregularity in relation to the conduct or declaration, being an irregularity that affected the outcome of the ballot; and
- (b) the court is satisfied that there are reasonable grounds for the claim.
- (3) In this section:

conduct, in relation to a protected action ballot, includes, but is not limited to, the compilation of the roll of voters for the ballot.

irregularity, in relation to the conduct or declaration of a protected action ballot, includes, but is not limited to, an act or omission by means of which:

- (a) the full and free recording of votes by all persons entitled to record votes and by no other persons; or
- (b) a correct ascertainment or declaration of the results of the voting;

is, or is attempted to be, prevented or hindered.

109ZO Penalties not affected

Nothing in section 109ZM or 109ZN is to be taken to prevent a penalty being imposed upon a person for a contravention of this Act.

109ZP Preservation of roll of voters, ballot papers etc.

A person commits an offence if:

- (a) the person has conducted a protected action ballot; and
- (b) the person was the authorised ballot agent for the ballot; and
- (c) the person fails to keep the following for a period of one year after the day on which the ballot closed:
 - (i) the roll of voters;
 - (ii) all the ballot papers, envelopes and other documents and records relevant to the ballot.

Penalty: Imprisonment for 6 months.

109ZQ Conferral of function on Australian Electoral Commission

- (1) If the Australian Electoral Commission is the authorised ballot agent for a protected action ballot, it is a function of the Australian Electoral Commission to conduct the ballot.
- (2) If the Australian Electoral Commission is:
 - (a) the ballot agent nominated in an application for a ballot order; or
 - (b) the authorised ballot agent for such a ballot;the Australian Electoral Commission cannot make a submission or an application to the Commission seeking to cease having that status in relation to the ballot.

109ZR Regulations

The regulations may make provision in relation to the following matters:

- (a) the qualifications and appointment of applicants' agents;
- (b) procedures to be followed in relation to the conduct of a ballot, or class of ballot, under this Division;

- (c) the qualifications, appointment, powers and duties of scrutineers;
- (d) the powers and duties of authorised independent advisers;
- (e) the manner in which ballot results are to be published under section 109ZD.

Division 5—Industrial action not to be engaged in before nominal expiry date of workplace agreement or workplace determination

110 Industrial action etc. must not be taken before nominal expiry date of collective agreement or workplace determinations

- (1) From the day when:

- (a) a collective agreement; or
- (b) a workplace determination;

comes into operation until its nominal expiry date has passed, an employee, organisation or officer covered by subsection (2) must not organise or engage in industrial action (whether or not that action relates to a matter dealt with in the agreement or determination).

Note 1: This subsection is a civil remedy provision: see subsection (4).

Note 2: Action that contravenes this subsection is not protected action (see section 108E).

- (2) For the purposes of subsection (1), the following are covered by this subsection:

- (a) an employee who is bound by the agreement or determination;
- (b) an organisation of employees that is bound by the agreement or determination;
- (c) an officer or employee of such an organisation acting in that capacity.

- (3) From the time when:

- (a) a collective agreement; or
- (b) a workplace determination;

is made until its nominal expiry date has passed, the employer must not engage in industrial action against an employee whose employment is subject to the agreement or determination (whether

or not that industrial action relates to a matter dealt with in the agreement or determination).

Note 1: This subsection is a civil remedy provision: see subsection (4).

Note 2: Action that contravenes this subsection is not protected action (see section 108E).

Civil remedy provisions

- (4) Subsections (1) and (3) are civil remedy provisions.
- (5) The Court may make one or more of the following orders in relation to a person who has contravened subsection (1) or (3):
 - (a) an order imposing a pecuniary penalty on the person;
 - (b) injunctions, and any other orders, that the Court considers necessary to stop the contravention or remedy its effects.
- (6) The pecuniary penalty under paragraph (5)(a) cannot be more than 300 penalty units for a body corporate or 60 penalty units in any other case.
- (7) An application for an order under subsection (5), in relation to a contravention of subsection (1), may be made by:
 - (a) the employer concerned; or
 - (b) a workplace inspector; or
 - (c) any person affected by the industrial action; or
 - (d) any other person prescribed by the regulations.
- (8) An application for an order under subsection (5), in relation to a contravention of subsection (3), may be made by:
 - (a) the employee concerned; or
 - (b) an organisation of employees if:
 - (i) a member of the organisation is employed by the employer concerned; and
 - (ii) the contravention relates to, or affects, the member of the organisation or work carried on by the member for that employer; or
 - (c) a workplace inspector; or
 - (d) any person affected by the industrial action; or
 - (e) any other person prescribed by the regulations.

Note: For other provisions about civil remedy provisions, see Division 4 of Part VIII.

110A Industrial action must not be taken before nominal expiry date of AWA

- (1) From the day when an AWA comes into operation until its nominal expiry date, the employee must not engage in industrial action in relation to the employment to which the AWA relates.

Note 1: This subsection is a civil remedy provision: see subsection (3).

Note 2: Action that contravenes this subsection is not protected action: see section 108E.

- (2) From the day when an AWA comes into operation until its nominal expiry date, the employer must not engage in industrial action against the employee.

Note 1: This subsection is a civil remedy provision: see subsection (3).

Note 2: Action that contravenes this subsection is not protected action (see section 108E).

Civil remedy provisions

- (3) Subsections (1) and (2) are civil remedy provisions.
- (4) The Court may make one or more of the following orders in relation to a person who has contravened subsection (1) or (2):
- (a) an order imposing a pecuniary penalty on the person;
 - (b) injunctions, and any other orders, that the Court considers necessary to stop the contravention or remedy its effects.
- (5) The pecuniary penalty under paragraph (4)(a) cannot be more than 300 penalty units for a body corporate or 60 penalty units in any other case.
- (6) An application for an order under subsection (4), in relation to a contravention of subsection (1), may be made by:
- (a) the employer concerned; or
 - (b) a workplace inspector; or
 - (c) any other person prescribed by the regulations.
- (7) An application for an order under subsection (4), in relation to a contravention of subsection (2), may be made by:
- (a) the employee concerned; or
 - (b) an organisation of employees that represents that employee if:

- (i) that employee has requested the organisation to apply on that employee's behalf; and
 - (ii) a member of the organisation is employed by that employee's employer; and
 - (iii) the organisation is entitled, under its eligibility rules, to represent the industrial interests of that employee in relation to work carried on by that employee for the employer; or
- (c) a workplace inspector; or
- (d) any other person prescribed by the regulations.

Note: For other provisions about civil remedy provisions, see Division 4 of Part VIII.

Division 6—Orders and injunctions against industrial action

111 Orders and injunctions against industrial action—general

Orders relating to action by federal-system employees and employers

- (1) If it appears to the Commission that industrial action by an employee or employees, or by an employer, that is not, or would not be, protected action:
- (a) is happening; or
 - (b) is threatened, impending or probable; or
 - (c) is being organised;
- the Commission must make an order that the industrial action stop, not occur and not be organised.

Orders relating to action by non-federal system employees and employers

- (2) If it appears to the Commission that industrial action by a non-federal system employee or non-federal system employees, or by a non-federal system employer:
- (a) is:
 - (i) happening; or
 - (ii) threatened, impending or probable; or
 - (iii) being organised; and

- (b) will, or would, be likely to have the effect of causing substantial loss or damage to the business of a constitutional corporation;
- the Commission must make an order that the relevant industrial action stop, not occur and not be organised.
- (3) For the purposes of subsection (2), and other provisions of this Act as they relate to orders under that subsection:
- (a) **non-federal system employee** means a person who is an employee, within the ordinary meaning of that word, but who is not covered by the definition of **employee** in subsection 4AA(1); and
 - (b) **non-federal system employer** means a person who is an employer, within the ordinary meaning of that word, but who is not covered by the definition of **employer** in subsection 4AB(1); and
 - (c) section 106A (which defines **industrial action**) applies as if references in that section to employees and employers were instead references to non-federal system employees and non-federal system employers.

Order may be made on application or on Commission's own initiative

- (4) The Commission may make an order under subsection (1) or (2) on its own initiative, or on the application of:
- (a) a person who is affected (whether directly or indirectly), or who is likely to be affected (whether directly or indirectly), by the industrial action; or
 - (b) an organisation of which a person referred to in paragraph (a) is a member.

Applications generally to be heard and determined within 48 hours

- (5) As far as practicable, the Commission must hear and determine an application for an order under subsection (1) or (2) within 48 hours after the application is made.

Interim orders if applications cannot be heard and determined within 48 hours

- (6) If the Commission is unable to determine an application for an order under subsection (1) or (2) within the period referred to in subsection (5), the Commission must (within that period) make an interim order to stop and prevent engagement in, and organisation of, the industrial action referred to in subsection (1) or (2).
- (7) However, the Commission must not make such an interim order if the Commission is satisfied that it would be contrary to the public interest to do so.
- (8) An interim order is to have effect until the application is determined.

Commission does not have to specify the industrial action

- (9) In ordering under subsection (1), (2) or (6) that industrial action stop, not occur and not be organised, the Commission does not have to specify the particular industrial action.

Obligation to comply with orders

- (10) A person to whom an order under subsection (1), (2) or (6) is expressed to apply must comply with the order.
- (11) Subsection (10) is a civil remedy provision.
- (12) The Court may, on application by a person affected by an order of the Commission under subsection (1), (2) or (6), grant an injunction on such terms as the Court considers appropriate if it is satisfied that another person:
 - (a) has engaged in conduct that constitutes a contravention of subsection (10); or
 - (b) is proposing to engage in conduct that would constitute such a contravention.

Note: For other provisions about civil remedy provisions, see Division 4 of Part VIII.

Orders do not apply to protected action

- (13) An order under subsection (1), or under subsection (6) that relates to an application for an order under subsection (1), does not apply to protected action.

111A Injunction against industrial action if pattern bargaining engaged in in relation to proposed collective agreement

The Court may grant an injunction in such terms as the Court considers appropriate if, on application by any person, the Court is satisfied that:

- (a) industrial action in relation to a proposed collective agreement is being engaged in, or is threatened, impending or probable; and
- (b) the industrial action is or would be for the purpose of supporting or advancing claims made by a negotiating party to the proposed collective agreement; and
- (c) the party is engaged in pattern bargaining in relation to the proposed collective agreement.

Note: For other provisions relating to pattern bargaining, see:

- (a) section 107H; and
- (b) section 108D; and
- (c) section 109L.

Division 7—Ministerial declarations terminating bargaining periods

112 Minister's declaration

Making of declaration

- (1) The Minister may make a written declaration terminating a specified bargaining period, or specified bargaining periods, if the Minister is satisfied that:
- (a) industrial action is being taken, or is threatened, impending or probable; and
 - (b) the industrial action is adversely affecting, or would adversely affect, the employer or employers who are

negotiating parties, or employees of the employer or employers; and

- (c) the industrial action is threatening, or would threaten:
 - (i) to endanger the life, the personal safety or health, or the welfare, of the population or of part of it; or
 - (ii) to cause significant damage to the Australian economy or an important part of it.

Note: See also Division 8 (about workplace determinations once a bargaining period has been terminated).

- (2) The declaration takes effect on the day that it is made.

Making persons aware of the declaration

- (3) The Minister must publish the declaration in the *Gazette*.
- (4) The Minister must inform the Commission of the making of the declaration.
- (5) The Minister must, as soon as reasonably practicable, take all reasonable steps to make the negotiating parties to the proposed collective agreement or agreements concerned aware:
 - (a) of the making of the declaration; and
 - (b) of the effect of Division 8 (about workplace determinations once a bargaining period has been terminated); and
 - (c) that the negotiating parties may agree to submit the matters at issue to an alternative dispute resolution process conducted by the Commission or another provider (see Divisions 4 and 6 of Part VIIA).

Restriction on initiating new bargaining period

- (6) The Minister may specify in the declaration that, during a specified period beginning on the day that the declaration is made, a specified person:
 - (a) is not allowed to initiate a new bargaining period in relation to specified matters that are dealt with by the proposed collective agreement or agreements concerned; or
 - (b) may initiate such a bargaining period only on specified conditions.

Declaration not a legislative instrument

- (7) A declaration made under subsection (1) is not a legislative instrument.

112A Minister's directions to remove or reduce the threat

- (1) If the Minister makes a declaration under 112, the Minister may make the following kinds of written directions if the Minister is satisfied that they are reasonably directed to removing or reducing the threat referred to in paragraph 112(1)(c):
- (a) directions requiring specified negotiating parties, or specified employees of an employer who is a negotiating party, to take specified actions;
 - (b) directions requiring specified negotiating parties, or specified employees of an employer who is a negotiating party, to refrain from taking specified actions.

Making persons aware of the directions

- (2) The Minister must, as soon as reasonably practicable, take all reasonable steps to make the specified persons concerned aware of the directions.

Directions not legislative instruments

- (3) Directions made under subsection (1) are not legislative instruments.

Compliance with directions

- (4) A person must comply with a direction under this section.

Civil remedy provisions

- (5) Subsection (4) is a civil remedy provision.
- (6) The Court may order a person who has contravened subsection (4) to pay a pecuniary penalty.
- (7) The pecuniary penalty cannot be more than 300 penalty units for a body corporate or 60 penalty units in any other case.

- (8) An application for an order under subsection (6) may be made by a workplace inspector.

Note: For other provisions about civil remedy provisions, see Division 4 of Part VIII.

Division 8—Workplace determinations

113 Application of Division

This Division applies if a bargaining period has been terminated:

- (a) on the ground set out in subsection 107G(3); or
- (b) because a declaration has been made under Division 7.

113A Definitions

In this Division:

matters at issue means the matters that were at issue during the bargaining period.

negotiating period has the meaning given by section 113B.

113B Negotiating period

- (1) The *negotiating period* is the period that:
 - (a) starts on the day on which the bargaining period was terminated; and
 - (b) ends:
 - (i) if the Commission has not extended the period under subsection (2)—21 days after that day; or
 - (ii) if the Commission has so extended the period—42 days after that day.
- (2) The Commission must extend the period if:
 - (a) all of the negotiating parties apply to the Commission for an extension under this subsection within 21 days after the day on which the bargaining period was terminated; and
 - (b) the negotiating parties have not settled the matters at issue (whether or not by making a workplace agreement).

113C When Full Bench must make workplace determination

- (1) The Commission must make a determination (a *workplace determination*) under this section if:
 - (a) the negotiating period has ended; and
 - (b) the negotiating parties have not settled the matters at issue (whether or not by making a workplace agreement).
- (2) The workplace determination can be made only by a Full Bench.
- (3) The Full Bench must make the workplace determination as quickly as practicable after the end of the negotiating period.
- (4) For the purposes of paragraph (1)(b), the negotiating parties are taken not to have settled the matters at issue if:
 - (a) the negotiating parties make a workplace agreement purporting to settle the matters at issue; and
 - (b) the workplace agreement is not approved in accordance with section 98C.
- (5) Workplace determinations are not legislative instruments.

113D Content of workplace determination

- (1) The workplace determination must contain terms that, in the opinion of the Full Bench, deal with the matters at issue.
- (2) The workplace determination comes into operation on the day on which it is made.
- (3) The workplace determination must contain a term specifying a nominal expiry date for the determination that is no later than 5 years after the date on which the determination commences operating.
- (4) The workplace determination must not contain prohibited content.
- (5) In deciding which terms to include in the workplace determination, the Full Bench must have regard to the following factors only:
 - (a) the matters at issue;
 - (b) the merits of the case;
 - (c) the interests of the negotiating parties and the public interest;

- (d) how productivity might be improved in the business or part of the business concerned;
 - (e) the extent to which the conduct of the negotiating parties during the bargaining period was reasonable;
 - (f) incentives to encourage parties to pursue negotiated outcomes at a later stage;
 - (g) the employer's capacity to pay;
 - (h) decisions of the AFPC;
 - (i) any other factors specified in the regulations.
- (6) The workplace determination must require disputes about matters arising under the determination to be dealt with in accordance with the model dispute resolution process (see Part VIIA).
- (7) The workplace determination must not contain any terms other than those required by this section.

113E Who is bound by a workplace determination?

A workplace determination binds:

- (a) the negotiating parties referred to in subsection 113C(1)(b);
and
- (b) all employees whose employment is subject to the determination.

113F Act applies to workplace determination as if it were a collective agreement

- (1) Subject to this section, this Act applies to the workplace determination as if it were a collective agreement in operation.
- (2) The following provisions do not apply to the workplace determination:
 - (a) section 100D (persons bound by workplace agreements);
 - (b) Subdivision A of Division 7 of Part VB (content of workplace agreements);
 - (c) Division 8 of Part VB (varying workplace agreements).
- (3) Subdivision B of Division 9 of Part VB (termination by approval (pre-lodgment procedures)) applies in relation to the workplace determination, but only after the determination has passed its nominal expiry date.

-
- (4) Despite sections 100(5), the workplace determination ceases to be in operation in relation to an employee if a collective agreement that binds the employee is lodged, even if this happens before the nominal expiry date of the determination.

Division 9—Payments in relation to periods of industrial action

114 Payments not to be made or accepted in relation to periods of industrial action

- (1) This section applies if an employee engaged, or engages, in industrial action (whether or not protected action) in relation to an employer on a day.
- (2) The employer must not make a payment to an employee in relation to:
- (a) if the total duration of the industrial action on that day is less than 4 hours—4 hours of that day; or
 - (b) otherwise—the total duration of the industrial action on that day.

Note: This subsection is a civil remedy provision: see subsection (6).

- (3) If:
- (a) the industrial action is during a shift (or other period of work); and
 - (b) the shift (or other period of work) occurs partly on 1 day and partly on the next day;

then, for the purposes of this section, the shift is taken to be a day and the remaining parts of the days are taken not to be part of that day.

Example: An employee, who is working a shift from 10 pm on Tuesday until 7 am on Wednesday, engages in industrial action from 11 pm on Tuesday until 1 am on Wednesday. That industrial action would prevent the employer making a payment to the employee in relation to 4 hours of the shift, but would not prevent the employer from making a payment in relation to the remaining 5 hours of the shift.

- (4) For the purposes of subsection (3), overtime is taken not to be a separate shift.

- (5) An employee must not accept a payment from an employer if the employer would contravene subsection (2) by making the payment.

Note: This subsection is a civil remedy provision: see subsection (6).

Civil remedy provisions

- (6) Subsections (2) and (5) are civil remedy provisions.
- (7) The Court may make one or more of the following orders in relation to a person who has contravened subsection (2) or (5):
- (a) an order imposing a pecuniary penalty on the person;
 - (b) injunctions, and any other orders, that the Court considers necessary to stop the contravention or remedy its effects;
 - (c) any other consequential orders.
- (8) The pecuniary penalty under paragraph (7)(a) cannot be more than 300 penalty units for a body corporate or 60 penalty units in any other case.
- (9) An application for an order under subsection (7) may be made by:
- (a) a workplace inspector; or
 - (b) a person who has an interest in the matter; or
 - (c) any other person prescribed by the regulations.

Note: For other provisions about civil remedy provisions, see Division 4 of Part VIII.

- (10) A regulation prescribing persons for the purposes of paragraph (9)(c) may limit its application to specified circumstances.

114A Organisations not to take action for payments in relation to periods of industrial action

- (1) An organisation, or an officer, member or employee of an organisation, must not:
- (a) make a claim for an employer to make a payment to an employee in relation to a day during which the employee engaged, or engages, in industrial action; or
 - (b) organise or engage in, or threaten to organise or engage in, industrial action against an employer with intent to coerce the employer to make such a payment.

Note: This subsection is a civil remedy provision: see subsection (4).

- (2) For the purposes of subsection (1), action done by one of the following bodies or persons is taken to have been done by an organisation:
- (a) the committee of management of the organisation;
 - (b) an officer, employee or agent of the organisation acting in that capacity;
 - (c) a member or group of members of the organisation acting under the rules of the organisation;
 - (d) a member of the organisation, who performs the function of dealing with an employer on behalf of the member and other members of the organisation, acting in that capacity.
- (3) Paragraphs (2)(c) and (d) do not apply if:
- (a) a committee of management of the organisation; or
 - (b) a person authorised by the committee; or
 - (c) an officer of the organisation;
- has taken reasonable steps to prevent the action.

Civil remedy provisions

- (4) Subsection (1) is a civil remedy provision.
- (5) The Court may make one or more of the following orders in relation to a person who has contravened subsection (1):
- (a) an order imposing a pecuniary penalty on the person;
 - (b) an order requiring the person to pay to the employer concerned compensation of such amount as the Court thinks appropriate;
 - (c) injunctions, and any other orders, that the Court considers necessary to stop the contravention or remedy its effects;
 - (d) any other consequential orders.
- (6) The pecuniary penalty under paragraph (5)(a) cannot be more than 300 penalty units for a body corporate or 60 penalty units in any other case.
- (7) The Court must not make an order under paragraph (5)(b) if the employer concerned has contravened subsection 114(2) in connection with the contravention of subsection (1) of this section.
- (8) An application for an order under subsection (5) may be made by:
- (a) the employer concerned; or
-

- (b) a workplace inspector; or
- (c) a person who has an interest in the matter; or
- (d) any other person prescribed by the regulations.

Note: For other provisions about civil remedy provisions, see Division 4 of Part VIII.

- (9) A regulation prescribing persons for the purposes of paragraph (8)(d) may limit its application to specified circumstances.

114B Persons not to coerce people for payments in relation to periods of industrial action

- (1) A person must not take, or threaten to take, action that would have the effect of directly or indirectly prejudicing the engagement, or possible engagement, of another person as an independent contractor with the intention of coercing the other person to make a payment to an employee of the other person in relation to a day on which the employee engaged or engages in industrial action (whether or not protected action).

Civil remedy provisions

- (2) Subsection (1) is a civil remedy provision.
- (3) The Court may make one or more of the following orders in relation to a person who has contravened subsection (1):
 - (a) an order imposing a pecuniary penalty on the person;
 - (b) injunctions, and any other orders, that the Court considers necessary to stop the contravention or remedy its effects;
 - (c) any other consequential orders.
- (4) The pecuniary penalty under paragraph (3)(a) cannot be more than 300 penalty units for a body corporate or 60 penalty units in any other case.
- (5) An application for an order under subsection (3) may be made by:
 - (a) the other person referred to in subsection (1); or
 - (b) a workplace inspector; or
 - (c) a person who has an interest in the matter; or
 - (d) any other person prescribed by the regulations.

Note: For other provisions about civil remedy provisions, see Division 4 of Part VIII.

- (6) A regulation prescribing persons for the purposes of paragraph (5)(d) may limit its application to specified circumstances.

Interpretation

- (7) In this section, a reference to an independent contractor is not confined to a natural person.

Part VI—Awards

Division 1—Preliminary

115 Objects of Part

The objects of this Part are:

- (a) to ensure that minimum safety net entitlements are protected through a system of enforceable awards maintained by the Commission; and
- (b) to ensure that awards are rationalised and simplified so they are less complex and are more conducive to the efficient performance of work; and
- (c) to ensure that the Commission performs its functions under this Part in a way that:
 - (i) encourages the making of agreements between employers and employees at the workplace or enterprise level; and
 - (ii) protects the competitive position of young people in the labour market, promotes youth employment, youth skills and community standards, and assists in reducing youth unemployment.

115A Performance of functions by the Commission

- (1) The Commission must perform its functions under this Part in a way that furthers the objects of this Act and, in particular, the objects of this Part.

- (2) In performing its functions under this Part, the Commission must have regard to:
- (a) the desirability of high levels of productivity, low inflation, creation of jobs and high levels of employment; and
 - (b) decisions of the AFPC, and, in particular, the need to ensure that Commission decisions are not inconsistent with AFPC decisions; and
 - (c) the importance of providing minimum safety net entitlements that do not act as a disincentive to bargaining at the workplace level.

115C Extraterritorial extension

- (1) This Part, and the rest of this Act so far as it relates to this Part, extend:
- (a) to an employee outside Australia who meets any of the conditions in this section; and
 - (b) to the employee's employer (whether the employer is in or outside Australia); and
 - (c) to acts, omissions, matters and things relating to the employee (whether they are in or outside Australia).

Note: In this context, *Australia* includes the Territory of Christmas Island, the Territory of Cocos (Keeling) Islands and the coastal sea. See section 15B and paragraph 17(a) of the *Acts Interpretation Act 1901*.

In Australia's exclusive economic zone

- (2) One condition is that the employee is in Australia's exclusive economic zone and either:
- (a) is an employee of an Australian employer and is not prescribed by the regulations as an employee to whom this subsection does not apply; or
 - (b) is an employee prescribed by the regulations as an employee to whom this subsection applies.

Note: The regulations may prescribe the employee by reference to a class. See subsection 13(3) of the *Legislative Instruments Act 2003*.

On Australia's continental shelf outside exclusive economic zone

- (3) Another condition is that the employee:

-
- (a) is outside the outer limits of Australia's exclusive economic zone, but is in, on or over a part of Australia's continental shelf prescribed by the regulations for the purposes of this subsection, in connection with the exploration of the continental shelf or the exploitation of its natural resources; and
 - (b) meets the requirements that are prescribed by the regulations for that part.

Note: The regulations may prescribe different requirements relating to different parts of Australia's continental shelf. The regulations may need to do so to give effect to Australia's international obligations.

Outside Australia's exclusive economic zone and continental shelf

- (4) Another condition is that the employee:
 - (a) is neither in Australia's exclusive economic zone nor in, on or over a part of Australia's continental shelf described in paragraph (3)(a); and
 - (b) is an Australian-based employee of an Australian employer; and
 - (c) is not prescribed by the regulations as an employee to whom this subsection does not apply.

Definition

- (5) In this section:

this Act includes the Registration and Accountability of Organisations Schedule and regulations made under it.

Division 2—Terms that may be included in awards

Subdivision A—Allowable award matters

116 Allowable award matters

- (1) Subject to this Part, an award may include terms about the following matters (*allowable award matters*) only:
 - (a) ordinary time hours of work and the time within which they are performed, rest breaks, notice periods and variations to working hours;
 - (b) incentive-based payments and bonuses;

- (c) annual leave loadings;
- (d) ceremonial leave;
- (da) leave for the purpose of seeking other employment after the giving of a notice of termination by an employer to an employee;
- (e) observance of days declared by or under a law of a State or Territory to be observed generally within that State or Territory, or a region of that State or Territory, as public holidays by employees who work in that State, Territory or region, and entitlements of employees to payment in respect of those days;
- (ea) days to be substituted for, or a procedure for substituting, days referred to in paragraph (e);
- (f) monetary allowances for:
 - (i) expenses incurred in the course of employment; or
 - (ii) responsibilities or skills that are not taken into account in rates of pay for employees; or
 - (iii) disabilities associated with the performance of particular tasks or work in particular conditions or locations;
- (g) loadings for working overtime or for shift work;
- (h) penalty rates;
- (i) redundancy pay, within the meaning of subsection (4);
- (j) stand-down provisions;
- (k) dispute settling procedures, but only as provided by section 116A;
- (l) type of employment, such as full-time employment, casual employment, regular part-time employment and shift work;
- (m) conditions for outworkers, but only to the extent necessary to ensure that their overall conditions of employment are fair and reasonable in comparison with the conditions of employment specified in a relevant award or awards for employees who perform the same kind of work at an employer's business or commercial premises.

Note 1: The matters referred to in subsection 116(1) have a meaning that is affected by section 116B.

Note 2: Entitlements relating to certain matters that were allowable award matters immediately before the reform commencement are preserved under Division 3.

Note 3: Certain allowable award matters are protected in workplace agreements as *protected award conditions*—see section 101B.

-
- (2) A matter referred to in subsection (1) is an allowable award matter only to the extent that the matter pertains to the relationship between employers bound by the award and employees of those employers.
- (3) An award may include terms about the matters referred to in subsection (1) only to the extent that the terms provide minimum safety net entitlements.
- (4) For the purposes of paragraph (1)(i), **redundancy pay** means redundancy pay in relation to a termination of employment that is:
- (a) by an employer of 15 or more employees; and
 - (b) either:
 - (i) at the initiative of the employer and on the grounds of operational requirements; or
 - (ii) because the employer is insolvent.
- (5) For the purposes of paragraph (4)(a):
- (a) whether an employer employs 15 or more employees, or fewer than 15 employees, is to be worked out as at the time (the **relevant time**):
 - (i) when notice of the redundancy is given; or
 - (ii) when the redundancy occurs;whichever happens first; and
 - (b) a reference to employees includes a reference to:
 - (i) the employee who becomes redundant and any other employee who becomes redundant at the relevant time; and
 - (ii) any casual employee who, at the relevant time, has been engaged by the employer on a regular and systematic basis for at least 12 months (but not including any other casual employee).
- (6) For the purposes of paragraph (1)(m):
- conditions** does not include pay.
- outworker** means an employee who, for the purposes of the business of the employer, performs work at private residential premises or at other premises that are not business or commercial premises of the employer.
-

116A Dispute settling procedures

- (1) Each award is taken to include a term that specifies a model dispute resolution process in the same terms as the model dispute resolution process set out in Division 1 of Part VIIA, and a term providing for any other dispute settling process or procedure is taken not to be about an allowable award matter for the purposes of paragraph 116(1)(k).
- (2) The dispute settling process included in an award may only be used to resolve disputes:
 - (a) about matters arising under the award; and
 - (b) between persons bound by the award.

116B Matters that are not allowable award matters

- (1) For the purposes of subsection 116(1), matters that are not allowable award matters within the meaning of that subsection include, but are not limited to, the following:
 - (a) rights of an organisation of employers or employees to participate in, or represent an employer or employee in, the whole or part of a dispute settling procedure, unless the organisation is the representative of the employer's or employee's choice;
 - (b) conversion from casual employment to another type of employment;
 - (c) the number or proportion of employees that an employer may employ in a particular type of employment;
 - (d) prohibitions (whether direct or indirect) on an employer employing employees in a particular type of employment;
 - (e) the maximum or minimum hours of work for regular part-time employees;
 - (f) restrictions on the range or duration of training arrangements;
 - (g) restrictions on the engagement of independent contractors and requirements relating to the conditions of their engagement;
 - (h) restrictions on the engagement of labour hire workers, and requirements relating to the conditions of their engagement, imposed on an entity or person for whom the labour hire worker performs work under a contract with a labour hire agency;

-
- (i) union picnic days;
 - (j) tallies in the meat industry;
 - (k) dispute resolution training leave;
 - (l) trade union training leave.
- (2) Paragraph (1)(e) does not prevent any of the following being included in an award:
- (a) terms setting a minimum number of consecutive hours that an employer may require a regular part-time employee to work;
 - (b) terms facilitating a regular pattern in the hours worked by regular part-time employees.
- (2A) Paragraph (1)(g) does not limit the operation of paragraph 116(1)(m).
- (3) In this section:

labour hire agency means an entity or a person who conducts a business that includes the employment or engagement of workers for the purpose of supplying those workers to another entity or person under a contract with that other entity or person.

labour hire worker means a person:

- (a) who:
 - (i) is employed by a labour hire agency; or
 - (ii) is engaged by a labour hire agency as an independent contractor; and
- (b) who performs work for another entity or person under a contract between that entity or person and the labour hire agency.

Note: In this Part, references to independent contractors are not confined to natural persons (see subsection 4(2)).

116C Matters provided for by the Australian Fair Pay and Conditions Standard

- (1) A matter for which provision is made by the Australian Fair Pay and Conditions Standard is not an allowable award matter, except as mentioned in subsection (2).

- (2) Despite subsection (1), an award may include a term about ordinary time hours of work.

Note: An award may also include preserved award terms (see section 116G).

116D Awards may not include terms involving discrimination and preference

To the extent that a term of an award requires or permits, or has the effect of requiring or permitting, any conduct that would contravene Part XA, it is taken not to be about allowable award matters.

116E Awards may not include certain terms about rights of entry

To the extent that a term of an award requires or authorises an officer or employee of an organisation:

- (a) to enter premises:
 - (i) occupied by an employer that is bound by the award; or
 - (ii) in which work to which the award applies is being carried on; or
- (b) to inspect or view any work, material, machinery, appliance, article, document or other thing on such premises; or
- (c) to interview an employee on such premises;

it is taken not to be about allowable award matters.

116F Awards may not include enterprise flexibility provisions

To the extent that a term of an award is an enterprise flexibility provision within the meaning of section 113A of this Act as in force immediately before the reform commencement, it is taken not to be about allowable award matters.

Subdivision B—Other terms that are permitted to be in awards

116G Preserved award terms

An award may include preserved award terms (see Division 3).

116H Facilitative provisions

- (1) An award may include a facilitative provision that allows agreement at the workplace or enterprise level, between employers and employees (including individual employees), on how a term in the award about an allowable award matter or a preserved award term is to operate.
- (2) A facilitative provision must not require agreement between a majority of employees and an employer, but must permit agreement between an individual employee and an employer, on how a term in an award about an allowable award matter or a preserved award term is to operate.
- (3) A facilitative provision may only operate in respect of an allowable award matter or a preserved award term.
- (4) A facilitative provision is of no effect to the extent that it does not comply with subsections (2) and (3).

116I Incidental and machinery terms

- (1) An award may include terms that are:
 - (a) incidental to an allowable award matter about which there is a term in the award; and
 - (b) essential for the purpose of making a particular term operate in a practical way.
- (2) For the purposes of this section, to the extent that a term of an award is about a matter that is not an allowable award matter because of the operation of section 116B, 116D, 116E or 116F, the term is not, and cannot be, incidental to an allowable award matter, and is of no effect to that extent.
- (2A) However, to avoid doubt, paragraph 116B(1)(g) does not limit the operation of subsections (1) and (3) to the extent that those subsections relate to the matter referred to in paragraph 116(1)(m).
- (3) An award may include machinery provisions including, but not limited to, provisions about the following:
 - (a) commencement;
 - (b) definitions;
 - (c) titles;

- (d) arrangement;
- (e) employers, employees and organisations;
- (f) term of the award.

116J Anti-discrimination clauses

An award may include a model anti-discrimination clause.

116K Boards of reference

- (1) An award may include, in accordance with subsection (2) or (3), a term:
 - (a) appointing, or giving power to appoint, for the purposes of the award, a board of reference consisting of a person or 2 or more persons; and
 - (b) assigning to the board of reference functions as described in subsection (4).
- (2) A term of a pre-reform award that appoints, or gives power to appoint, a board of reference is taken:
 - (a) to continue in effect after the reform commencement, to the extent that it complies with subsection (4); and
 - (b) to cease to have effect after the reform commencement, to the extent that it does not comply with subsection (4).
- (3) An award (the *rationalised award*) made under section 118E or varied under section 118J may include a term that appoints, or gives power to appoint, a board of reference, but the term has effect only to the extent that:
 - (a) the term was included in one or more of the following awards (the *replaced award*):
 - (i) any award that the rationalised award has the effect of replacing;
 - (ii) if the rationalised award is an award varied under section 118J—the award as in force immediately before the variation; and
 - (b) the functions of the board of reference that relate to preserved award terms relate only to preserved award terms that were included in the replaced award immediately before the making or variation of the rationalised award; and
 - (c) the term complies with subsection (4).

- (4) A term of an award that appoints, or gives power to appoint, a board of reference:
 - (a) may confer upon the board of reference an administrative function in respect of allowing, approving, fixing or dealing with, in the manner and subject to the conditions specified in the award, a matter or thing that, under the award, may from time to time be required to be allowed, approved, fixed or dealt with; and
 - (b) must not confer upon the board of reference a function of settling or determining disputes about any matter arising under the award.
- (5) A function conferred under subsection (4) may relate only to allowable award matters or terms permitted by this Subdivision to be included in the award.
- (6) A board of reference may consist of or include a Commissioner.
- (7) Subject to this section, the regulations may make provision in relation to:
 - (a) a particular board of reference; or
 - (b) boards of reference in general;including, but not limited to, the functions and powers of the board or boards.

Subdivision C—Terms in awards that cease to have effect

116L Terms in awards that cease to have effect after the reform commencement

- (1) Immediately after the reform commencement, a term of an award ceases to have effect to the extent that it is about matters that are not allowable award matters, except to the extent (if any) that the term is permitted by Subdivision B to be included in the award.
- (2) This section does not affect the operation of preserved award terms.

Subdivision D—Regulations relating to part-time employees

116M Award conditions for part-time employees

- (1) The regulations may do either or both of the following in relation to an award:
 - (a) provide for the award to have effect so that a part-time employee is entitled to conditions to which a full-time employee is entitled under the award;
 - (b) provide for the award to have effect so that conditions to which a part-time employee is otherwise entitled under the award (including because of paragraph (a)) are adjusted (in accordance with the regulations or a method set out in the regulations) in proportion to the hours worked by the part-time employee.
- (2) The award has effect accordingly.

Division 3—Preserved award entitlements

117 Preservation of certain award terms

- (1) A *preserved award term* is a term, or more than one term, of an award that is about a matter referred to in subsection (2), and:
 - (a) if the award is a pre-reform award that has not been varied under section 118J—was in effect immediately before the reform commencement; or
 - (b) in any other case—is taken to be included in the award because of the operation of section 117A.

Note: Section 116L, which provides for certain terms of awards to cease immediately after the reform commencement, does not affect the operation of preserved award terms—see subsection 116L(2).

- (2) For the purposes of subsection (1), the matters are as follows:
 - (a) annual leave;
 - (b) personal/carer's leave;
 - (c) parental leave, including maternity and adoption leave;
 - (d) long service leave;
 - (e) notice of termination;
 - (f) jury service;
 - (g) superannuation.

-
- (3) If a term of an award referred to in subsection (1) is about both matters referred to in subsection (2) and other matters, it is taken to be a preserved award term only to the extent that it is about the matters referred to in subsection (2).
- (3A) If more than one term of an award is about a matter referred to in subsection (2), then those terms, taken together, constitute the preserved award term of that award about that matter.
- (4) A preserved award term about the matter referred to in paragraph (2)(g) (superannuation) ceases to have effect at the end of 30 June 2008.
- (5) A preserved award term continues to have effect for the purposes of this Act.

Note: Preserved award terms may not be varied.

- (6) In this section:

personal/carer's leave includes war service sick leave, infectious diseases sick leave and other like forms of sick leave.

- (7) The regulations may provide that for the purposes of subsection (2):
- (a) the matter referred to in paragraph (2)(c) does not include one or both of the following:
- (i) special maternity leave (within the meaning of section 94C);
 - (ii) the entitlement under section 94F to transfer to a safe job or to take paid leave; and
- (b) *personal/carer's leave* does not include one or both of the following:
- (i) compassionate leave (within the meaning of section 93Q);
 - (ii) unpaid carer's leave (within the meaning of section 93D).

Note: The effect of excluding a form of leave or an entitlement in relation to a matter is that the entitlement in relation to that form of leave or matter under the Australian Fair Pay and Conditions Standard will automatically apply.

- (8) Regulations under subsection (7) may be expressed to apply generally or in respect of employees engaged in specified types of
-

employment, such as full-time employment, part-time employment, casual employment, regular part-time employment or shift work.

117A Preserved award terms of rationalised awards

- (1) This section applies to an award (the *rationalised award*) if:
- (a) the award is made under section 118E or is varied under section 118J; and
 - (b) immediately before the making or variation, a preserved award term was included in one or more of the following awards (the *replaced award*):
 - (i) any award that the rationalised award has the effect of replacing;
 - (ii) if the rationalised award is an award varied under section 118J—the award as in force immediately before the variation.

Note: A replaced award may be either an award made under section 118E or a pre-reform award (which may subsequently have been varied).

- (2) The preserved award term of the replaced award is taken to be included in the rationalised award.
- (3) The preserved award term is taken to have the effect that:
- (a) employees belonging to the class of employees that had entitlements under the preserved award term of the replaced award have corresponding entitlements under the rationalised award; and
 - (b) employees belonging to any class of employees that did not have entitlements under the preserved award term of the replaced award do not gain entitlements under the rationalised award.

Note: This means that the class of employees who had preserved award entitlements under replaced awards retain those preserved award entitlements after award rationalisation, but the class of employees who have such entitlements is not expanded.

- (4) The preserved award term is taken to have the effect that:
- (a) only an employer bound by the preserved award term of the replaced award is bound by the corresponding preserved award term of the rationalised award; and
 - (b) other employers are not so bound.

Note 1: This means that the class of employers bound by preserved award terms is not expanded as a result of award rationalisation.

Note 2: The operation of this subsection is affected by Part VIAA, which deals with transmission of business.

- (5) For the purposes of subsection (3), whether an employee belongs to a class of employees that had entitlements under a preserved award term of a replaced award is to be determined without reference to whether the employee was employed before or after the making of the rationalised award.

117B When preserved award entitlements have effect

- (1) This section applies to an employee if:
- (a) the employee's employment is regulated by an award that includes a preserved award term about a matter; and
 - (b) the employee has an entitlement (the *preserved award entitlement*) in relation to that matter under the preserved award term.
- (2) If:
- (a) the preserved award term is about a matter referred to in paragraph 117(2)(a), (b) or (c); and
 - (b) the employee's preserved award entitlement in relation to the matter is more generous than the employee's entitlement in relation to the corresponding matter under the Australian Fair Pay and Conditions Standard;

the employee's entitlement under the Australian Fair Pay and Conditions Standard is excluded, and the employee's preserved award entitlement has effect in accordance with the preserved award term. Otherwise, the employee's entitlement under the Australian Fair Pay and Conditions Standard has effect.

Note: See section 117C for the meaning of *more generous*.

- (3) If:
- (a) the preserved award term is about a matter referred to in paragraph 117(2)(a), (b) or (c) and the employee has no entitlement in relation to the corresponding matter under the Australian Fair Pay and Conditions Standard; or
 - (b) the preserved award term is about a matter referred to in paragraph 117(2)(d), (e), (f) or (g);

the employee's preserved award entitlement has effect in accordance with the preserved award term.

Note 1: Preserved award terms relating to matters referred to in paragraph 117(2)(g) cease to have effect at the end of 30 June 2008—see subsection 117(4).

Note 2: Subsection 7C(2) provides that State laws dealing with long service leave, jury service or superannuation (among other things) are not excluded by this Act, but section 7D provides that awards prevail over State laws to the extent of any inconsistency.

117C Meaning of *more generous*

- (1) Whether an employee's entitlement under a preserved award term in relation to a matter is *more generous* than the employee's entitlement in relation to the corresponding matter under the Australian Fair Pay and Conditions Standard:
 - (a) is as specified in, or as worked out in accordance with a method specified in, regulations made under this paragraph; or
 - (b) to the extent that regulations made under paragraph (a) do not so specify—is to be ascertained in accordance with the ordinary meaning of the term *more generous*.
- (2) If a matter to which an entitlement under a preserved award term relates does not correspond directly to a matter to which the Australian Fair Pay and Conditions Standard relates, regulations made under paragraph (1)(a) may nevertheless specify that the matters correspond for the purposes of this Division.

117D Modifications that may be prescribed—personal/carer's leave

- (1) The regulations may provide that a preserved award term about personal/carer's leave is to be treated as a separate preserved award term about separate matters, to the extent that the preserved award term is about any of the following:
 - (a) war service sick leave;
 - (b) infectious diseases sick leave;
 - (c) any other like form of sick leave.
- (2) If the regulations so provide, sections 117, 117A, 117B and 117C have effect in relation to each separate matter.

Note: There is no entitlement in relation to war service sick leave, infectious diseases sick leave or any other like form of sick leave under the Australian Fair Pay and Conditions Standard, so there is no corresponding matter for the purposes of subsection 117B(3).

117E Modifications that may be prescribed—parental leave

- (1) The regulations may provide that a preserved award term about parental leave is to be treated as being about separate matters to the extent that it is about paid and unpaid parental leave.
- (2) If the regulations provide that a preserved award term about parental leave is to be treated as being about separate matters to the extent that it is about paid and unpaid parental leave:
 - (a) sections 117, 117A and 117B have effect in relation to each separate matter; and
 - (b) in accordance with section 94D, the entitlement that an employee would have to unpaid parental leave under the Australian Fair Pay and Conditions Standard is reduced by any amount of paid parental leave to which the employee is entitled under the preserved award term.

Note 1: There is no entitlement in relation to paid parental leave under the Australian Fair Pay and Conditions Standard, so there is no corresponding matter for the purposes of subsection 117B(3).

Note 2: Paragraph (b) does not have the effect of reducing entitlements. It simply ensures that the operation of section 94D is not affected by treating paid and unpaid parental leave separately under the regulations.

117F Preserved award terms—employers bound after reform commencement

An employer that was not bound by a particular award immediately before the reform commencement, but is subsequently bound by the award under section 120, is not bound by any preserved award terms included in the award.

Division 4—Award rationalisation and award simplification

Subdivision A—Award rationalisation

118 Commission’s award rationalisation function

- (1) It is a function of the Commission to undertake award rationalisation.
- (2) Award rationalisation is to be carried out in accordance with a written request (an *award rationalisation request*) made to the President by the Minister.
- (3) Each award rationalisation request must specify:
 - (a) the award rationalisation process that is to be undertaken under this section; and
 - (b) the principles to be applied by the Commission in undertaking the award rationalisation process; and
 - (c) the time by which the award rationalisation process must be completed, which must not be later than 3 years after the making of the request.
- (4) Principles under paragraph (3)(b) relating to an award rationalisation request may include, but are not limited to the following:
 - (a) the awards to which the award rationalisation process relates;
 - (b) the nature of, and the extent of the coverage of, awards that may be made as a result of the award rationalisation process;
 - (c) subject to this Act, the matters that may be included in such awards and limits on the matters that may be included in such awards.
- (5) An award rationalisation request may be varied or revoked by the Minister by written instrument.
- (6) The following are not legislative instruments:
 - (a) an award rationalisation request;
 - (b) an instrument under subsection (5).

118A Commission must deal with State-based differences

- (1) In undertaking the first award rationalisation process requested under subsection 118(2), the Commission must ensure that:
 - (a) terms and conditions of employment included in awards are not determined by reference to State or Territory boundaries; and
 - (b) awards have effect in each State and Territory.
- (2) If the award rationalisation request under which the first award rationalisation process is undertaken is not expressed to relate to all awards, the Commission must nevertheless review all awards as part of that award rationalisation process to the extent necessary to satisfy the requirements of subsection (1).
- (3) In undertaking subsequent award rationalisation processes, the Commission must ensure that:
 - (a) terms and conditions of employment included in awards made or varied as a result of the subsequent award rationalisation process are not determined by reference to State or Territory boundaries; and
 - (b) an award made or varied as a result of the subsequent award rationalisation process has effect in each State and Territory.
- (4) This section does not affect the operation of Division 3.

118B Award rationalisation to be undertaken by Full Bench

As soon as practicable after receiving an award rationalisation request, the President must establish one or more Full Benches to undertake the award rationalisation process requested.

118C Award rationalisation request to be published

- (1) As soon as practicable after receiving an award rationalisation request, the President must give a copy of the request to a Registrar.
- (2) The Registrar must publish the request as follows:
 - (a) if requirements relating to publication are prescribed by the regulations—in accordance with those requirements;
 - (b) if no such requirements are prescribed—in such manner as the Registrar thinks appropriate.

118D Minister may intervene

The Minister may intervene in a proceeding that relates to an award rationalisation process.

118E Making awards as a result of award rationalisation

A Full Bench may make one or more awards to give effect to the outcome of an award rationalisation process.

118F Making awards as a result of award rationalisation

The Commission must not make an award other than under section 118E.

118G Awards may not include certain terms

A Full Bench must not include a term in an award made under section 118E if the term may not be included in the award because of the operation of Division 2.

118H Awards must include term about regular part-time employment

A Full Bench must include in an award made under section 118E a term providing for regular part-time employment.

Note: Clauses 15.3.1 to 15.3.5 of the Hospitality Industry—Accommodation, Hotels, Resorts and Gaming Award 1998 provide a model (see the Award Simplification Decision at P7500).

118I Who is bound by awards

- (1) An award made under section 118E binds the employers, employees and organisations that it is expressed to bind.

Note: An award may be expressed to bind additional employers, employees and organisations under Division 6 and may bind eligible entities under Division 6A.

- (2) An award must be expressed to bind the following:
 - (a) specified employers;
 - (b) specified employees of employers bound by the award, in respect of work that is expressed to be regulated by the award.
-

- (3) An award may be expressed to bind one or more specified organisations.
- (4) For the purposes of subsections (2) and (3):
 - (a) employers may be specified by name or by inclusion in a specified class or specified classes; and
 - (b) employees must be specified by inclusion in a specified class or specified classes; and
 - (c) organisations must be specified by name.
- (5) Without limiting the way in which a class may be described for the purposes of subsection (4), the class may be described by reference to a particular industry or particular kinds of work.
- (6) The power of the Commission under subsections (2) and (3) must be exercised in accordance with the terms of the award rationalisation request to which the making of the award relates.

118J Variation of awards as part of award rationalisation

- (1) The Commission may make an order varying an award to give effect to the outcome of an award rationalisation process.
- (2) The Commission must not vary an award under this section in such a way that the award includes a term that may not be included in the award because of the operation of Division 2.
- (3) If the Commission varies an award under this section, the Commission must include in the award a term providing for regular part-time employment, unless such a term is already included in the award.

Note: Clauses 15.3.1 to 15.3.5 of the Hospitality Industry—Accommodation, Hotels, Resorts and Gaming Award 1998 provide a model (see the Award Simplification Decision at P7500).

- (4) If the Commission varies an award under this section, it must specify the additional employers, employees and organisations (if any) bound by the award.

Note: An award may also be varied to bind eligible entities and employers under Division 6A.

- (5) For the purposes of subsection (4), employers, employees and organisations must be specified in the same manner, and subject to

the same limitations, as provided in subsections 118I(2) to (6) in relation to awards made under section 118E.

118K Revocation of awards as part of award rationalisation

The Commission may make an order revoking an award to give effect to the outcome of an award rationalisation process.

118L Preserved award terms

To avoid doubt, the Commission's power under this Division to make or vary an award is subject to, and must not be exercised in a manner that is inconsistent with, Division 3.

Subdivision B—Award simplification

118M Review and simplification of awards

- (1) The Commission must review all awards for the purpose of determining whether the awards include terms that may not be included in awards under this Part.
Note: Division 2 deals with terms that may be included in awards.
- (2) The Commission may review awards for this purpose at the same time as reviewing them for other purposes.
- (3) The Commission must carry out the review:
 - (a) within the period prescribed by the regulations; and
 - (b) in accordance with any directions prescribed by the regulations.
- (4) After reviewing an award, the Commission must make an order varying the award to the extent (if any) necessary to ensure that the award includes only terms that may be included under this Part.
- (5) After reviewing an award, the Commission must make an order revoking the award if the Commission is satisfied that the award is obsolete or no longer capable of operating.

118N Principles for award simplification

- (1) A Full Bench may (subject to section 118M) establish principles for the review and simplification of awards under section 118M.
-

-
- (2) Principles under subsection (1) may relate to the following:
 - (a) the making or varying of awards in relation to each of the allowable award matters;
 - (b) terms that may be included in awards (including, subject to Division 2, about allowable award matters).
 - (3) After principles (if any) have been established under subsection (1), the power of the Commission to vary an award is exercisable only in a manner consistent with those principles.
 - (4) The President or a Full Bench may, in relation to the exercise of powers under this section, direct a member of the Commission to provide a report in relation to a specified matter.
 - (5) After making such investigation (if any) as is necessary, a member given a direction under subsection (4) must provide a report to the President or Full Bench.
 - (6) To avoid doubt, principles under subsection (1) must be consistent with, and cannot be such as to override, a provision of this Act that relates to the variation of awards.

118O Minister may intervene

The Minister may intervene in a proceeding that relates to an award simplification process.

Subdivision C—Special technical requirements

118P Inclusion of preserved award terms in written awards

- (1) This section applies if a preserved award term is taken under Division 3 to be included in an award (a *rationalised award*) made under section 118E or varied under section 118J.
- (2) In reducing the rationalised award to writing as required by section 121, the Commission must:
 - (a) include the preserved award term in the rationalised award; and
 - (b) identify it as a preserved award term; and
 - (c) identify the employers bound by the preserved award term; and
 - (d) identify the employees bound by the preserved award term.

Note: Section 117A deals with the employers bound by preserved award terms.

- (3) If more than one preserved award term to the same substantive effect is taken under Division 3 to be included in the rationalised award:
 - (a) paragraph (2)(a) requires that the preserved award term be included only once in the rationalised award; and
 - (b) to avoid doubt, paragraphs (2)(b), (c) and (d) have effect according to their terms in relation to the preserved award term.
- (4) For the purposes of paragraphs (2)(c) and (d) respectively:
 - (a) employers may be identified by name or by inclusion in a specified class or specified classes; and
 - (b) employees must be identified by inclusion in a specified class or specified classes.
- (5) Without limiting the way in which a class may be described for the purposes of this section, the class may be described by reference to a particular industry or particular kinds of work.

118Q Reprints of varied awards

- (1) If an award is varied under this Division, the Registrar must, as soon as practicable after receiving a copy of the order varying the award under subsection 121(2), publish a consolidated reprint of the award as varied.
- (2) To avoid doubt, this requirement is in addition to, and not instead of, the requirements of Division 7.

Division 5—Variation and revocation of awards

Subdivision A—Variation of awards

119 Variation of awards—general

- (1) The Commission must not make an order varying an award except:
 - (a) as a result of an award rationalisation process; or
 - (b) as a result of an award simplification process; or

- (c) if the variation is essential to the maintenance of minimum safety net entitlements (see section 119A); or
- (d) on a ground set out in section 119B; or
- (e) to bind additional employers, employees or organisations in accordance with section 120; or
- (f) under section 273; or
- (g) in circumstances prescribed by the regulations for the purposes of this paragraph.

Note: The variation that the Commission can make as a result of an award rationalisation process is affected by sections 117F and 118P.

- (2) The Commission must not vary a preserved award term.
- (3) The Commission must not vary a facilitative provision within the meaning of section 116H except:
 - (a) as a result of an award rationalisation process; or
 - (b) as a result of an award simplification process; or
 - (c) on a ground set out in section 119B.
- (4) The Commission must not vary a term taken to be included in an award by section 116A (which deals with dispute settling procedures).

119A Variation of awards if essential to maintain minimum safety net entitlements

- (1) An employer, employee or organisation bound by an award may apply to the Commission for an order varying the award on the ground that that the variation is essential to the maintenance of minimum safety net entitlements.
- (2) If an application is made under subsection (1), the Commission must take such steps as it thinks appropriate to ensure that each employer, employee and organisation bound by the award, and any other interested persons and bodies, are made aware of the application.
- (3) The Minister may intervene in relation to the application.
- (4) The Commission may make an order under this subsection varying the award only if the Commission is satisfied that:

- (a) the variation is essential to the maintenance of minimum safety net entitlements; and
- (b) all of the following conditions are met:
 - (i) the award as varied would not be inconsistent with decisions of the AFPC;
 - (ii) the award as varied would provide only minimum safety net entitlements for employees bound by the award;
 - (iii) the award as varied would not be inconsistent with the outcomes (if any) of award simplification and award rationalisation;
 - (iv) the making of the variation would not operate as a disincentive to agreement-making at the workplace level;
 - (v) such other requirements prescribed by the regulations (if any) for the purposes of this paragraph have been satisfied.

119B Variation of awards—other grounds

- (1) The Commission may, if it considers that an award or a term of an award is ambiguous or uncertain, make an order varying the award so as to remove the ambiguity or uncertainty.
- (2) If an award is referred to the Commission under section 46PW of the *Human Rights and Equal Opportunity Commission Act 1986*, the Commission must convene a hearing to review the award.
- (3) In a review under subsection (2):
 - (a) the Commission must take such steps as it thinks appropriate to ensure that each employer, employee and organisation bound by the award is made aware of the hearing; and
 - (b) the Sex Discrimination Commissioner may intervene in the proceeding.
- (4) If the Commission considers that an award reviewed under subsection (2) is a discriminatory award, the Commission must take the necessary action to remove the discrimination by making an order varying the award.
- (5) The Commission may, on application by an employer or organisation bound by an award, make an order varying a term of

the award referring by name to an employer or organisation bound by the award:

- (a) to reflect a change in the name of the employer or organisation; or
 - (b) if:
 - (i) the registration of the organisation has been cancelled; or
 - (ii) the employer or organisation has ceased to exist; to omit the reference to its name.
- (6) The onus of demonstrating that an award should be varied as set out in an application under subsection (5) rests with the applicant.
- (7) In this section:

discriminatory award means an award that:

- (a) has been referred to the Commission under section 46PW of the *Human Rights and Equal Opportunity Commission Act 1986*; and
- (b) requires a person to do any act that would be unlawful under Part II of the *Sex Discrimination Act 1984*, except for the fact that the act would be done in direct compliance with the award.

For the purposes of this definition, the fact that an act is done in direct compliance with the award does not of itself mean that the act is reasonable.

Subdivision B—Revocation of awards

119C Revocation of awards—general

The Commission must not make an order revoking an award except:

- (a) as a result of an award rationalisation process; or
- (b) as a result of an award simplification process; or
- (c) if the award is obsolete or no longer capable of operating (see section 119D).

119D Revocation of awards—award obsolete or no longer capable of operating

- (1) An employer, employee or organisation bound by an award may apply to the Commission to have the award revoked on the ground that the award is obsolete or is no longer capable of operating.
- (2) If an application is made under subsection (1), the Commission must take such steps as it thinks appropriate to ensure that each employer, employee and organisation bound by the award is made aware of the application.
- (3) The Commission must make an order revoking the award if it is satisfied that:
 - (a) the award is obsolete or is no longer capable of operating; and
 - (b) revocation of the award would not be contrary to the public interest.

Division 6—Binding additional employers, employees and organisations to awards

120 Binding additional employers, employees and organisations to an award

- (1) The Commission may make an order varying an award to bind an employer, employee or organisation to the award.

Note 1: Section 118E enables the Commission to make awards binding specified employers, employees and organisations.

Note 2: Pre-reform awards are taken to bind certain employers, employees and organisations. A pre-reform award may be varied under section 118J in a manner that affects who is bound.

Note 3: An award may also be varied to bind eligible entities and employers under Division 6A.

- (2) The Commission may make an order varying an award under subsection (1) only in accordance with this Division.

120A Application to be bound by an award—agreement between employer and employees

- (1) An employer may apply to the Commission for an order varying a specified award to bind the employer and a specified class or specified classes of employees of the employer.
- (2) If an application is made under subsection (1), the Commission must take such steps as it thinks appropriate to ensure that each employer, employee and organisation bound by the award is made aware of the application.
- (3) The Commission may make an order varying the award as specified in the application if it is satisfied that:
 - (a) a valid majority of the employees of the employer who would be bound by the award support the application; and
 - (b) the award is appropriate to regulate the terms and conditions of employment of those employees; and
 - (c) the employer is not already bound by an award that regulates the terms and conditions of employment of those employees.
- (4) The Commission may make the order without holding a hearing unless the Commission considers that it cannot be satisfied of the matters referred to in paragraphs (3)(a) and (b) based on the information provided.

120B Application to be bound by an award—no agreement between employer and employees

- (1) An employer, or an employee or employees of an employer, may apply to the Commission for an order varying an award specified in the application to bind the employer and a specified class or specified classes of employees of the employer.
- (2) An employer may make an application under subsection (1) even if a valid majority of the employees of the employer who would be bound by the award do not support the application.
- (3) An employee or employees of an employer may make an application under subsection (1) even if the employer does not support the application.

- (4) If an application is made under subsection (1), the Commission must take such steps as it thinks appropriate to ensure that each employer, employee and organisation bound by the award is made aware of the application.
- (5) The Commission may make an order varying the award as specified in the application only if the Commission is satisfied:
 - (a) that the employer, and the employees of the employer who would be bound by the award, have been unable to make a workplace agreement, despite having made reasonable efforts to do so; and
 - (b) the award is appropriate to govern the terms and conditions of employment of those employees; and
 - (c) the employer is not already bound by an award that regulates the terms and conditions of employment of those employees.
- (6) An organisation may make an application under subsection (1) on behalf of an employee or employees, and may represent the employee or employees in proceedings relating to the application, if:
 - (a) the employee or employees have requested that the organisation do so; and
 - (b) the organisation is entitled (under its eligibility rules) to represent the interests of the employee or employees.
- (7) In this section:

protected action has the meaning given by section 108.

reasonable efforts does not require the taking of protected action.

120C Application to be bound by an award—new organisations

- (1) A new organisation may apply to the Commission for an order varying an award to bind the organisation.
 - (2) If an application is made under subsection (1), the Commission must take such steps as it thinks appropriate to ensure that each employer, employee and organisation bound by the award, and any other interested persons and bodies, are made aware of the application.
 - (3) The Minister may intervene in relation to the application.
-

-
- (4) The Commission may make the order if the Commission is satisfied that:
- (a) the new organisation has at least one member bound by the award whose industrial interests the new organisation is entitled (under its eligibility rules) to represent; and
 - (b) the making of the order is necessary to enable the new organisation to represent properly the industrial interests of those of its members who are bound by the award; and
 - (c) the award regulates an industry in respect of which the new organisation has traditionally been entitled to represent the industrial interests of its members.
- (5) In this section:
- new organisation*** means:
- (a) an association granted registration as an organisation under the Registration and Accountability of Organisations Schedule on or after the reform commencement; or
 - (b) a transitionally registered association registered under clause 2 of Schedule 17.

**120D Application by new organisation to be bound by an award—
additional matters**

- (1) An application under subsection 120C(1) must be made within the period of one year commencing on the day on which the new organisation was registered under the Registration and Accountability of Organisations Schedule or Schedule 17.
- (2) If an application under subsection 120C(1) relates to an award made under section 118E or an award that has been varied under section 118J, a Full Bench must consider the application.

120E Process for valid majority of employees

The regulations may prescribe the meaning of, or the method for establishing what constitutes, a valid majority of the employees of an employer or of a class of employees of an employer, for the purposes of this Division.

120F General provisions

- (1) Without limiting the way in which a class of employees may be described for the purposes of this Division, the class may be described by reference to a particular industry or particular kinds of work.
- (2) For the purposes of making an order binding an employer, employee or organisation to an award:
 - (a) employers may be specified by name or by inclusion in a specified class or specified classes; and
 - (b) employees must be specified by inclusion in a specified class or specified classes; and
 - (c) organisations must be specified by name.

Division 6A—Outworkers

120G Definitions

In this Division:

eligible entity means any of the following entities, other than in the entity's capacity as an employer:

- (a) a constitutional corporation;
- (b) the Commonwealth;
- (c) a Commonwealth authority;
- (d) a body corporate incorporated in a Territory;
- (e) a person or entity (which may be an unincorporated club) that carries on an activity (whether of a commercial, governmental or other nature) in a Territory in Australia, in connection with the activity carried on in the Territory.

outworker term means a term of an award that is:

- (a) about the matter referred to in paragraph 116(1)(m); or
- (b) incidental to such a matter, and included in the award as permitted by section 116I; or
- (c) a machinery provision in respect of such a matter included in the award as permitted by section 116I.

120H Outworker terms may bind eligible entities and employers

- (1) This section applies to an award made under section 118E or varied under section 118J if the award includes outworker terms.
- (2) In addition to the employers, organisations and persons that the award is expressed to bind under section 118I or 118J, as the case requires, the award may be expressed to bind, but only in relation to the outworker terms, an eligible entity or an employer that operates in an industry:
 - (a) to which the award relates; or
 - (b) in respect of which the outworker terms are applicable.

120I Binding additional eligible entities and employers

- (1) An organisation, an eligible entity or an employer may apply to the Commission for an order varying an award that includes outworker terms to bind an eligible entity or an employer to the award, but only in relation to the outworker terms.
- (2) If an application is made under subsection (1), the Commission must take such steps as it thinks appropriate to ensure that each employer, employee and organisation bound by the award, and any other interested persons and bodies, are made aware of the application.
- (3) The Minister may intervene in relation to the application.
- (4) If an application is made under subsection (1), the Commission may make the order if it is satisfied that:
 - (a) the eligible entity or employer operates in an industry to which the award relates; and
 - (b) the eligible entity or employer is not already bound by an award that includes outworker terms in respect of such an industry in relation to those terms; and
 - (c) making the order is consistent with the objective of protecting the overall conditions of employment of outworkers.

Division 7—Technical matters

121 Making and publication of awards and award-related orders

- (1) An award or award-related order must:
 - (a) be reduced to writing; and
 - (b) be signed by:
 - (i) in the case of an award or order made by a Full Bench—at least one member of the Full Bench; or
 - (ii) in the case of any other order—at least one member of the Commission; and
 - (c) show the day on which it is signed.
- (2) If the Commission makes an award or an award-related order, the Commission must promptly give to a Registrar:
 - (a) a copy of the award or order; and
 - (b) written reasons for the award or order; and
 - (c) a list specifying the employers, employees and organisations bound by the award or order.
- (3) A Registrar who receives a copy of an award or an award-related order under subsection (2) must promptly:
 - (a) make available a copy of the award or order and the written reasons received by a Registrar in respect of the making of the award or order to each employer, employee and organisation shown on the list given to the Registrar under paragraph (2)(c); and
 - (b) ensure that a copy of the award or order and the written reasons received by the Registrar in respect of the making of the award or order are available for inspection at each registry; and
 - (c) ensure that the award or order and any written reasons received by the Registrar in respect of the making of the award or order are published as soon as practicable.

121A Awards and award-related orders must meet certain requirements

- (1) The Commission must, when making an award or an award-related order, if it considers it appropriate, ensure that the award or order:
-

- (a) does not include matters of detail or process that are more appropriately dealt with by agreement at the workplace or enterprise level; and
 - (b) does not prescribe work practices or procedures that restrict or hinder the efficient performance of work; and
 - (c) does not include terms that have the effect of restricting or hindering productivity, having regard to fairness to employees.
- (2) The Commission must, when making an award or an award-related order, ensure that the award or order:
- (a) where appropriate, includes facilitative provisions that allow agreement at the workplace or enterprise level, between employers and employees (including individual employees), on how the award terms are to apply; and
 - (b) includes terms providing for the employment of regular part-time employees; and
- Note: Clauses 15.3.1 to 15.3.5 of the Hospitality Industry—Accommodation, Hotels, Resorts and Gaming Award 1998 provide a model (see the Award Simplification Decision at P7500).
- (c) is expressed in plain English and is easy to understand in structure and content; and
 - (d) does not include terms that are obsolete or that need updating; and
 - (e) does not include terms that discriminate against an employee because of, or for reasons including, race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.
- (3) An award or an award-related order does not discriminate against an employee for the purposes of paragraph (2)(e) merely because:
- (a) it discriminates, in respect of particular employment, on the basis of the inherent requirements of that employment; or
 - (b) it discriminates, in respect of employment as a member of the staff of an institution that is conducted in accordance with the teachings or beliefs of a particular religion or creed:
 - (i) on the basis of those teachings or beliefs; and
 - (ii) in good faith.

121B Registrar's powers if member ceases to be a member

If:

- (a) a member of the Commission ceases to be a member at a time after an award or an award-related order has been made by the Commission constituted by the member; and
- (b) at that time, the award or order has not yet been reduced to writing or has been reduced to writing but has not yet been signed by the member;

the Registrar must reduce the award or order to writing, sign it and seal it with the seal of the Commission, and the award or order has effect as if it had been signed by the member of the Commission.

121C Form of awards

An award or an award-related order is to be framed so as best to express the decision of the Commission and to avoid unnecessary technicalities.

121D Date of awards

The date of an award or an award-related order is the day on which the award or order was signed under section 121.

121E Commencement of awards

- (1) An award or an award-related order is to be expressed to come into force on a specified day.
- (2) Unless the Commission is satisfied that there are exceptional circumstances, the day specified in an award or an award-related order for the purposes of subsection (1) must not be earlier than the date of the award or order.

121F Continuation of awards

An award continues in force until it is revoked under a provision referred to in section 119C.

121G Awards of Commission are final

- (1) Subject to this Act, an award or an award-related order (including an award or order made on appeal):
 - (a) is final and conclusive; and
 - (b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and
 - (c) is not subject to prohibition, mandamus or injunction in any court on any account.
- (2) An award or an award-related order is not invalid because it was made by the Commission constituted otherwise than as provided by this Act.

121H Reprints of awards as varied

A document purporting to be a copy of a reprint of an award as varied, and purporting to have been printed by the Government Printer, is in all courts evidence of the award as varied.

121I Expressions used in awards

Unless the contrary intention appears in an award or an award-related order, an expression used in the award or order has the same meaning as it has in an Act because of the *Acts Interpretation Act 1901* or as it has in this Act.

Part VIAA—Transmission of business rules**Division 1—Introductory****122 Object**

The object of this Part is 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.

122A Simplified outline

- (1) Division 2 describes the transmission of business situation this Part is designed to deal with. It identifies the *old employer*, the *new*

employer, the *business being transferred*, the *time of transmission* and the *transferring employees*.

- (2) Divisions 3 to 6 deal with the transmission of particular instruments as follows:
 - (a) Division 3 deals with the transmission of AWAs;
 - (b) Division 4 deals with the transmission of collective agreements;
 - (c) Division 5 deals with the transmission of awards;
 - (d) Division 6 deals with the transmission of APCSs.
- (3) Division 7 deals with what happens with entitlements under the Australian Fair Pay and Conditions Standard when there is a transmission of business.
- (4) Division 8 deals with notification requirements, the lodgment of notices with the Employment Advocate and the enforcement of employer obligations by pecuniary penalties.
- (5) Division 9 allows regulations to be made to deal with other transmission of business issues.

122B Definitions

In this Part:

business being transferred has the meaning given by subsection 123(2).

Court means the Federal Court of Australia or the Federal Magistrates Court.

instrument means:

- (a) an AWA; or
- (b) a collective agreement; or
- (c) an award; or
- (d) an APCS.

new employer has the meaning given by subsection 123(1).

old employer has the meaning given by subsection 123(1).

operational reasons has the meaning given by subsection 170CE(5D).

parental leave has the same meaning as in subsection 94ZZB(3).

time of transmission has the meaning given by subsection 123(3).

transferring employee has the meaning given by sections 123A and 123B.

transmission period has the meaning given by subsection 123(4).

Division 2—Application of Part

123 Application of Part

- (1) This Part applies if a person (the *new employer*) becomes the successor, transmittee or assignee of the whole, or a part, of a business of another person (the *old employer*).
- (2) The business, or the part of the business, to which the new employer is successor, transmittee or assignee is the *business being transferred* for the purposes of this Part.
- (3) The time at which the new employer becomes the successor, transmittee or assignee of the business being transferred is the *time of transmission* for the purposes of this Part.
- (4) The period of 12 months after the time of transmission is the *transmission period* for the purposes of this Part.

123A Transferring employees

- (1) A person is a *transferring employee* for the purposes of this Part if:
 - (a) the person is employed by the old employer immediately before the time of transmission; and
 - (b) the person:
 - (i) ceases to be employed by the old employer; and
 - (ii) becomes employed by the new employer in the business being transferred;within 2 months after the time of transmission.
- (2) A person is also a *transferring employee* for the purposes of this Part if:

- (a) the person is employed by the old employer at any time within the period of 1 month before the time of transmission; and
 - (b) the person's employment with the old employer is terminated by the old employer before the time of transmission for genuine operational reasons or for reasons that include genuine operational reasons; and
 - (c) the person becomes employed by the new employer in the business being transferred within 2 months after the time of transmission.
- (3) In applying section 123B and Divisions 3 to 7 in relation to a person who is a transferring employee under subsection (2) of this section, a reference in those provisions to a particular state of affairs existing immediately before the time of transmission is to be read as a reference to that state of affairs existing immediately before the person last ceased to be an employee of the old employer.

123B Transferring employees in relation to particular instrument

- (1) A transferring employee is a *transferring employee* in relation to a particular instrument if:
- (a) the instrument applied to the transferring employee's employment with the old employer immediately before the time of transmission; and
 - (b) when the transferring employee becomes employed by the new employer, the nature of the transferring employee's employment with the new employer is such that the instrument is capable of applying to employment of that nature.
- (2) The transferring employee ceases to be a *transferring employee* in relation to the instrument if:
- (a) the transferring employee ceases to be employed by the new employer after the time of transmission; or
 - (b) the nature of the transferring employee's employment with the new employer changes so that the instrument is no longer capable of applying to employment of that nature; or
 - (c) the transmission period ends.

Paragraph (c) does not apply if the instrument is an APCS.

- (3) This section applies to a preserved APCS as if it were an instrument.

Division 3—Transmission of AWA

124 Transmission of AWA

New employer bound by AWA

- (1) If:
- (a) immediately before the time of transmission:
 - (i) the old employer; and
 - (ii) an employee;were bound by an AWA; and
 - (b) the employee is a transferring employee in relation to the AWA;
- the new employer is bound by the AWA by force of this section.

Note: The new employer must notify the transferring employee and lodge a copy of the notice with the Employment Advocate (see sections 129 and 129A).

Period for which new employer remains bound

- (2) The new employer remains bound by the AWA, by force of this section, until whichever of the following first occurs:
- (a) the AWA is terminated (see Division 9 of Part VB as modified by section 124A);
 - (b) the AWA ceases to be in operation because it is replaced by another AWA between the new employer and the transferring employee (see paragraph 100(4)(b));
 - (c) the transferring employee ceases to be a transferring employee in relation to the AWA;
 - (d) the transmission period ends.

Old employer's rights and obligations that arose before time of transmission not affected

- (3) This section does not affect the rights and obligations of the old employer that arose before the time of transmission.

124A Termination of transmitted AWA

Modified operation of subsections 103K(2) and 103L(2)

- (1) The AWA cannot be terminated under subsection 103K(2) or 103L(2) during the transmission period (even if the AWA has passed its nominal expiry date).

Subsection 103R(1) does not apply

- (2) Despite subsection 103R(1), a workplace agreement or an award may have effect in relation to the transferring employee's employment with the new employer even if:
 - (a) the AWA is terminated during the transmission period; or
 - (b) the new employer ceases to be bound by the AWA because the transmission period ends.

Note: Paragraph (2)(b) is included for the avoidance of doubt. Subsection 103R(1) only applies if a workplace agreement is terminated. Technically, the end of the transmission period does not terminate the transmitted AWA. The new employer merely ceases to be bound by it.

Division 4—Transmission of collective agreement

Subdivision A—General

125 Transmission of collective agreement

New employer bound by collective agreement

- (1) If:
 - (a) immediately before the time of transmission:
 - (i) the old employer; and
 - (ii) employees of the old employer;were bound by a collective agreement; and
 - (b) there is at least one transferring employee in relation to the collective agreement;the new employer is bound by the collective agreement by force of this section.

Note 1: The new employer must notify transferring employees and lodge a copy of a notice with the Employment Advocate (see sections 129 and 129A).

Note 2: See also section 125A for the interaction between the collective agreement and other industrial instruments.

Period for which new employer remains bound

- (2) The new employer remains bound by the collective agreement, by force of this section, until whichever of the following first occurs:
- (a) the collective agreement is terminated (see Division 9 of Part VB as modified by section 125C);
 - (b) there cease to be any transferring employees in relation to the collective agreement;
 - (c) the new employer ceases to be bound by the collective agreement in relation to all the transferring employees in relation to the collective agreement;
 - (d) the transmission period ends.

Note: Paragraph (c)—see subsection (3).

Period for which new employer remains bound in relation to particular transferring employee

- (3) The new employer remains bound by the collective agreement in relation to a particular transferring employee, by force of this section, until whichever of the following first occurs:
- (a) the collective agreement ceases to be in operation in relation to the transferring employee's employment with the new employer because the new employer makes an AWA with the transferring employee (see subsection 125B(2));
 - (b) the collective agreement ceases to be in operation in relation to the transferring employee's employment with the new employer because it has been replaced by another collective agreement in relation to the transferring employee's employment with the new employer (see subsection 100(5) as modified by subsection 125B(3));
 - (c) the employer ceases to be bound by the collective agreement under subsection (2).

New employer bound only in relation to employment of transferring employees in the business being transferred

- (4) The new employer is bound by the collective agreement, by force of this section, only in relation to the employment, in the business

being transferred, of employees who are transferring employees in relation to the collective agreement.

New employer bound subject to Commission order

- (5) Subsections (1), (2) and (3) have effect subject to any order of the Commission under section 125E.

Old employer's rights and obligations that arose before time of transmission not affected

- (6) This section does not affect the rights and obligations of the old employer that arose before the time of transmission.

125A Interaction rules

Transmitted agreement

- (1) This section applies if subsection 125(1) applies to a collective agreement (the *transmitted collective agreement*).

Existing collective agreement

- (2) If:
- (a) the new employer is bound by a collective agreement (the *existing collective agreement*) immediately before the time of transmission; and
 - (b) a person is a transferring employee in relation to the transmitted collective agreement; and
 - (c) the existing collective agreement would, but for this subsection, apply, according to its terms, to the transferring employee when the transferring employee becomes employed by the new employer;
- the existing collective agreement does not apply to the transferring employee.
- (3) Subsection (2) ceases to apply at the end of the transmission period.

125B Transmitted collective agreement ceasing in relation to transferring employee

Transmitted agreement

- (1) This section applies if subsection 125(1) applies to a collective agreement (the *transmitted collective agreement*).

AWA

- (2) Despite subsection 100A(2), the transmitted collective agreement ceases to be in operation in relation to a transferring employee's employment with the new employer if the new employer makes an AWA with the transferring employee after the time of transmission.

Note: Subsection 100A(2) provides that a collective agreement is normally only suspended while an AWA is in operation. The effect of subsection (2) of this section is to terminate the operation of the transmitted collective agreement in relation to the transferring employee's employment when the AWA is made.

Replacement collective agreement

- (3) Despite subsection 100(5), the transmitted collective agreement ceases to be in operation in relation to a transferring employee if the transmitted collective agreement has been replaced by another collective agreement in relation to the employee (even if the transmitted collective agreement has not passed its nominal expiry date).

125C Termination of transmitted collective agreement

Transmitted agreement

- (1) This section applies if subsection 125(1) applies to a collective agreement (the *transmitted collective agreement*).

Modified operation of subsections 103K(2) and 103L(2)

- (2) The transmitted collective agreement cannot be terminated under subsection 103K(2) or 103L(2) during the transmission period (even if the transmitted collective agreement has passed its nominal expiry date).

Subsection 103R(1) does not apply

- (3) Despite subsection 103R(1), a workplace agreement or an award may have effect in relation to a transferring employee's employment with the new employer if:
- (a) the transmitted collective agreement is terminated during the transmission period; or
 - (b) the new employer ceases to be bound by the transmitted collective agreement because the transmission period ends.

Note: Paragraph (3)(b) is included for the avoidance of doubt. Subsection 103R(1) only applies if a workplace agreement is terminated. Technically, the end of the transmission period does not terminate the transmitted collective agreement. The new employer merely ceases to be bound by it.

Special rule for transmitted workplace determination

- (4) If the transmitted collective agreement is a workplace determination, subsection 113F(3) ceases to apply to the transmitted collective agreement at the time of transmission.

Note 1: Subsection 113F(1) provides that this Act generally applies to a workplace determination as if it were a collective agreement.

Note 2: Subsection 113F(3) would otherwise prevent the transmitted workplace determination from being terminated under Subdivision B of Division 9 of Part VB before it had passed its nominal expiry date.

Subdivision B—Commission's powers

125D Application and terminology

- (1) The Subdivision applies if:
- (a) a person is bound by a collective agreement; and
 - (b) another person:
 - (i) becomes at a later time; or
 - (ii) is likely to become at a later time;the successor, transmittee or assignee of the whole, or a part, of the business of the person referred to in paragraph (a).
- (2) For the purposes of this Subdivision:
- (a) the *outgoing employer* is the person referred to in paragraph (1)(a); and

- (b) the *incoming employer* is the person first referred to in paragraph (1)(b); and
- (c) the *business concerned* is the business, or the part of the business, to which the incoming employer becomes, or is likely to become, the successor, transmittee or assignee; and
- (d) the *transfer time* is the time at which the incoming employer becomes, or is likely to become, the successor, transmittee or assignee of the business concerned.

125E Commission may make order

- (1) The Commission may make an order that the incoming employer:
 - (a) is not, or will not be, bound by the collective agreement; or
 - (b) is, or will be, bound by the collective agreement, but only to the extent specified in the order.

The order must specify the day from which the order takes effect. That day must not be before the day on which the order is made or before the transfer time.

- (2) Without limiting paragraph (1)(b), the Commission may make an order under that paragraph that the incoming employer is, or will be, bound by the collective agreement but only for the period specified in the order.
- (3) To avoid doubt, the Commission cannot make an order under subsection (1) that would have the effect of extending the transmission period.

125F When application for order can be made

An application for an order under subsection 125E(1) may be made before, at or after the transfer time.

125G Who may apply for order

- (1) Before the transfer time, an application for an order under subsection 125E(1) may be made only by the outgoing employer.
- (2) At or after the transfer time, an application for an order under subsection 125E(1) may be made only by:
 - (a) the incoming employer; or

- (b) a transferring employee in relation to the collective agreement; or
- (c) an organisation of employees that is bound by the collective agreement; or
- (d) an organisation of employees that:
 - (i) is entitled, under its eligibility rules, to represent the industrial interests of a transferring employee; and
 - (ii) has been requested by the transferring employee to apply for the order on the transferring employee's behalf.

125H Applicant to give notice of application

The applicant for an order under subsection 125E(1) must take reasonable steps to give written notice of the application to the persons who may make submissions in relation to the application (see section 125I).

125I Submissions in relation to application

- (1) Before deciding whether to make an order under subsection 125E(1) in relation to the collective agreement, the Commission must give the following an opportunity to make submissions:
 - (a) the applicant;
 - (b) before the transfer time—the persons covered by subsection (2);
 - (c) at and after the transfer time—the persons covered by subsection (3).
- (2) For the purposes of paragraph (1)(b), this subsection covers:
 - (a) an employee of the outgoing employer:
 - (i) who is bound by the collective agreement; and
 - (ii) who is employed in the business concerned; and
 - (b) the incoming employer; and
 - (c) an organisation of employees that is bound by the collective agreement; and
 - (d) an organisation of employees that:
 - (i) is entitled, under its eligibility rules, to represent the industrial interests of an employee referred to in paragraph (a); and

-
- (ii) has been requested by the employee to make submissions on the employee's behalf in relation to the application for the order under subsection 125E(1).
- (3) For the purposes of paragraph (1)(c), this subsection covers:
- (a) the incoming employer; and
 - (b) a transferring employee in relation to the collective agreement; and
 - (c) an organisation of employees that is bound by the collective agreement; and
 - (d) an organisation of employees that:
 - (i) is entitled, under its eligibility rules, to represent the industrial interests of a transferring employee; and
 - (ii) has been requested by the transferring employee to make submissions on the transferring employee's behalf in relation to the application for the order under subsection 125E(1).

Division 5—Transmission of award

126 Transmission of award

New employer bound by award

- (1) If:
- (a) the old employer was, immediately before the time of transmission, bound by an award that regulated the employment of employees of the old employer; and
 - (b) there is at least one transferring employee in relation to the award; and
 - (c) but for this section, the new employer would not be bound by the award in relation to the transferring employees in relation to the award;

the new employer is bound by the award by force of this section.

Note 1: Paragraph (c)—the award might already bind the new employer, for example, because the new employer happens to be a respondent to the award.

Note 2: The new employer must notify transferring employees and lodge a copy of a notice with the Employment Advocate (see sections 129 and 129A).

Note 3: See also section 126A for the interaction between the award and other industrial instruments.

Period for which new employer remains bound

- (2) The new employer remains bound by the award, by force of this section, until whichever of the following first occurs:
- (a) the award is revoked;
 - (b) there cease to be any transferring employees in relation to the award;
 - (c) the new employer ceases to be bound by the award in relation to all the transferring employees in relation to the award;
 - (d) the transmission period ends.

Note: Paragraph (c)—see subsection (3).

Period for which new employer remains bound in relation to particular transferring employee

- (3) The new employer remains bound by the award in relation to a particular transferring employee, by force of this section, until whichever of the following first occurs:
- (a) the award ceases to be in operation in relation to the transferring employee's employment with the new employer because the new employer makes an AWA with the transferring employee after the time of transmission (see subsection 126B(2));
 - (b) the award ceases to be in operation in relation to the transferring employee's employment with the new employer because a collective agreement comes into operation, after the time of transmission, in relation to the transferring employee's employment with the new employer (see subsection 126B(3));
 - (c) the employer ceases to be bound by the award under subsection (2).

New employer bound only in relation to employment of transferring employees

- (4) The new employer is bound by the award, by force of this section, only in relation to the employment of employees who are transferring employees in relation to the award.

Commission order

- (5) Subsections (1), (2) and (3) have effect subject to any order of the Commission.
- (6) To avoid doubt, the Commission cannot make an order under subsection (5) that would have the effect of extending the transmission period.

Old employer's rights and obligations that arose before time of transmission not affected

- (7) This section does not affect the rights and obligations of the old employer that arose before the time of transmission.

126A Interaction rules

Transmitted award

- (1) This section applies if subsection 126(1) applies to an award (the *transmitted award*).

Collective agreement

- (2) Despite section 100B but subject to subsection (3), a collective agreement that is in operation at the time of transmission does not have effect in relation to an employee's employment while the transmitted award operates, in accordance with subsection 126(1), in relation to that employment.

Note 1: But for subsection (2), section 100B would have the effect that the transmitted award would not have effect in relation to the employee's employment while a collective agreement operates in relation to that employment.

Note 2: Section 126B modifies the operation of section 100B in relation to AWAs and collective agreements that come into operation after the time of transmission.

- (3) Despite subsection 126(1), if the employee agrees that the collective agreement is to operate in relation to that employment:
 - (a) the collective agreement comes into operation in relation to that employment; and
 - (b) the transmitted award ceases to be in operation in relation to that employment in accordance with subsection 126B(3).

126B Transmitted award ceasing in relation to transferring employee

Transmitted award

- (1) This section applies if subsection 126(1) applies to an award (the *transmitted award*).

AWA

- (2) Despite section 100B, the transmitted award ceases to be in operation in relation to a transferring employee's employment with the new employer if the new employer makes an AWA with the transferring employee after the time of transmission.

Note: Section 100B provides that an award is normally only suspended while an AWA is in operation. The effect of subsection (2) of this section is to terminate the operation of the transmitted award in relation to the transferring employee when the AWA is made.

Collective agreement

- (3) Despite section 100B, the transmitted award ceases to be in operation in relation to a transferring employee's employment with the new employer if a collective agreement comes into operation in relation to the transferring employee's employment with the new employer after the time of transmission.

Note: Section 100B provides that an award is normally only suspended while a collective agreement is in operation. The effect of subsection (3) of this section is to terminate the operation of the transmitted award in relation to the transferring employee when the collective agreement is made.

Division 6—Transmission of APCS

127 Transmission of APCS

New employer bound by APCS

- (1) If:
- (a) immediately before the time of transmission, an employee's employment with the old employer was covered by an APCS; and

- (b) the employee is a transferring employee in relation to the APCS; and
- (c) but for this section, the transferring employee's employment with the new employer would not be covered by the APCS; the transferring employee's employment with the new employer is covered by the APCS by force of this section.

Employee ceasing to be transferring employee

- (2) The transferring employee's employment with the new employer ceases to be covered by the APCS, by force of this section, if the employee ceases to be a transferring employee in relation to the APCS.

Old employer's rights and obligations that arose before time of transmission not affected

- (3) This section does not affect the rights and obligations of the old employer that arose before the time of transmission.

Division 7—Entitlements under the Australian Fair Pay and Conditions Standard

128 Parental leave entitlements

- (1) At the time of transmission:
 - (a) the new employer becomes liable for a transferring employee's entitlements (if any) in relation to parental leave that are:
 - (i) entitlements under the Australian Fair Pay and Conditions Standard; and
 - (ii) entitlements for which the old employer was liable immediately before the time of transmission; and
 - (b) the old employer ceases to be liable for those entitlements.
- (2) The following count as service with the new employer for the purpose of working out a transferring employee's entitlement to parental leave under the Australian Fair Pay and Conditions Standard:

- (a) the transferring employee's service with the old employer that counted for the purposes of working out the transferring employee's entitlement to parental leave;
 - (b) any service with a previous employer that the old employer recognised as service with the old employer for the purposes of working out the transferring employee's entitlement to parental leave.
- (3) If:
- (a) documentation for parental leave, required under Division 6 of Part VA, is given to the old employer by a transferring employee before the time of transmission; and
 - (b) the leave applied for has not started before the time of transmission; and
 - (c) the entitlement to that leave arises under the Australian Fair Pay and Conditions Standard; and
 - (d) the old employer notifies the new employer of the documentation under subsection (4);
- the documentation is treated as if it had been given to the new employer.
- (4) The old employer must notify the new employer of:
- (a) any person who:
 - (i) is, or who is likely to be, a transferring employee; and
 - (ii) is on parental leave at the time of transmission on the basis of an entitlement under the Australian Fair Pay and Conditions Standard; and
 - (b) documentation for parental leave that is given to the old employer before the time of transmission by a person who is, or is likely to be, a transferring employee if the documentation was given to the old employer on the basis of an entitlement under the Australian Fair Pay and Conditions Standard.

The notification must be given in writing within 14 days after the time of transmission.

Note: This is a civil remedy provision, see section 129C.

128A New employer assuming liability for particular entitlements

- (1) This section applies if the new employer agrees, in writing, before the time of transmission:
-

- (a) to assume liability for; or
 - (b) to recognise continuity of service in relation to;
a transferring employee's entitlements in relation to a particular matter.
- (2) At the time of transmission:
- (a) the new employer becomes liable for the transferring employee's entitlements (if any):
 - (i) that accrued under the Australian Fair Pay and Conditions Standard in relation to that matter before the time of transmission; and
 - (ii) that are not entitlements in relation to parental leave; and
 - (iii) for which the old employer was liable immediately before the time of transmission; and
 - (b) the old employer ceases to be liable for those accrued entitlements.
- (3) The following count as service with the new employer for the purpose of working out the transferring employee's entitlements under the Australian Fair Pay and Conditions Standard in relation to that matter:
- (a) the transferring employee's service with the old employer that counted for the purposes of working out the transferring employee's entitlements in relation to that matter;
 - (b) any service with a previous employer that the old employer recognised as service with the old employer for the purposes of working out the transferring employee's entitlements in relation to that matter.

128B New employer assuming entitlements generally

- (1) This section also applies if the new employer agrees in writing before the time of transmission:
- (a) to assume liability for a transferring employee's entitlements generally; or
 - (b) to recognise continuity of service in relation to a transferring employee generally.
- (2) At the time of transmission:
-

- (a) the new employer becomes liable for the transferring employee's entitlements (if any):
 - (i) that accrued under the Australian Fair Pay and Conditions Standard before the time of transmission;
and
 - (ii) that are not entitlements in relation to parental leave;
and
 - (iii) for which the old employer was liable immediately before the time of transmission; and
 - (b) the old employer ceases to be liable for those accrued entitlements.
- (3) The following count as service with the new employer for the purpose of working out the transferring employee's entitlements under the Australian Fair Pay and Conditions Standard in relation to a particular matter:
- (a) the transferring employee's service with the old employer that counted for the purposes of working out the transferring employee's entitlements in relation to that matter;
 - (b) any service with a previous employer that the old employer recognised as service with the old employer for the purposes of working out the transferring employee's entitlements in relation to that matter.

Division 8—Notice requirements and enforcement

129 Informing transferring employees about transmission of instrument

- (1) This section applies if:
- (a) an employer is bound by an instrument (the *transmitted instrument*) in relation to a transferring employee by force of:
 - (i) section 124 (AWA); or
 - (ii) section 125 (collective agreement); or
 - (iii) section 126 (award); and
 - (b) a person is a transferring employee in relation to the transmitted instrument.

The provision referred to in paragraph (a) is the *transmission provision*.

- (2) Within 28 days after the transferring employee starts being employed by the employer, the employer must take reasonable steps to give the transferring employee a written notice that complies with subsection (3).

Note: This is a civil remedy provision, see section 129C.

- (3) The notice must:
- (a) identify the transmitted instrument; and
 - (b) state that the employer is bound by the transmitted instrument; and
 - (c) specify the date on which the transmission period for the transmitted instrument ends; and
 - (d) state that the employer will remain bound by the transmitted instrument until the end of the transmission period unless the transmitted instrument is terminated, or otherwise ceases to be in operation, before the end of that period; and
 - (e) specify the kinds of instruments (if any) that can replace, or exclude the operation of, the transmitted instrument; and
 - (f) identify:
 - (i) any provisions of the Australian Fair Pay and Conditions Standard; or
 - (ii) any other instrument;that the employer intends to be the source for terms and conditions that will apply to the matters that are dealt with by the transmitted instrument when the transmitted instrument ceases to bind the employer; and
 - (g) identify any collective agreement or award that binds:
 - (i) the employer; and
 - (ii) employees of the employer who are not transferring employees in relation to the transmitted instrument;and that would bind the transferring employee but for the transmission provision.

- (3A) Subject to subsection (3B), if the notice under subsection (3) identifies an instrument under paragraph (3)(g), the employer must give the transferring employee a copy of the instrument together with the notice.

Note: This is a civil remedy provision, see section 129C.

- (3B) Subsection (3A) does not apply if:
-

- (a) the transferring employee is able to easily access a copy of the instrument in a particular way; and
- (b) the notice under subsection (3) tells the transferring employee that a copy of the instrument is accessible in that way.

Note: Paragraph (a)—the copy may be available, for example, on the Internet.

- (4) Subsection (2) does not apply if:
 - (a) the transmitted instrument is an award and the new employer and the transferring employee become bound by an AWA or a collective agreement at the time of transmission or within 14 days after the time of transmission; or
 - (b) the transmitted instrument is a workplace agreement and the new employer and the transferring employee become bound by an AWA within 14 days after the time of transmission.

129A Lodging copy of notice with Employment Advocate

Only one transferring employee

- (1) If an employer:
 - (a) gives a notice under subsection 129(2) to a transferring employee in relation to an AWA; or
 - (b) gives a notice under subsection 129(2) to the only person who is a transferring employee in relation to a collective agreement or award;

the employer must lodge a copy of the notice with the Employment Advocate within 14 days after the notice is given to the transferring employee. The copy must be lodged in accordance with subsection (4).

Note 1: This is a civil remedy provision, see section 129C.

Note 2: Sections 137.1 and 137.2 of the *Criminal Code* create offences for providing false or misleading information or documents.

Multiple transferring employees and notices all given on the one day

- (2) If:

(a) an employer gives a number of notices under subsection 129(2) to people who are transferring employees in relation to a collective agreement or award; and

(b) all of those notices are given on the one day;

the employer must lodge a copy of one of those notices with the Employment Advocate within 14 days after that notice is given. The copy must be lodged in accordance with subsection (4).

Note 1: This is a civil remedy provision, see section 129C.

Note 2: Sections 137.1 and 137.2 of the *Criminal Code* create offences for providing false or misleading information or documents.

Multiple transferring employees and notices given on different days

(3) If:

(a) an employer gives a number of notices under subsection 129(2) to people who are transferring employees in relation to a collective agreement or award; and

(b) the notices are given on different days;

the employer must lodge a copy of the notice, or one of the notices that was given on the earliest of those days, with the Employment Advocate within 14 days after that notice is given. The copy must be lodged in accordance with subsection (4).

Note 1: This is a civil remedy provision, see section 129C.

Note 2: Sections 137.1 and 137.2 of the *Criminal Code* create offences for providing false or misleading information or documents.

Lodgment with Employment Advocate

(4) A notice is lodged with the Employment Advocate in accordance with this subsection only if it is actually received by the Employment Advocate.

Note: This means that section 29 of the *Acts Interpretation Act 1901* (to the extent that it deals with the time of service of documents) does not apply to lodgment of a notice.

129B Employment Advocate must issue receipt for lodgment

(1) If a notice is lodged under section 129A, the Employment Advocate must issue a receipt for the lodgment.

- (2) The receipt must state that the notice was lodged under section 129A on a particular day.
- (3) The Employment Advocate must give a copy of the receipt to the person who lodged the notice under section 129A.

129C Civil penalties

- (1) The following are *civil remedy provisions* for the purposes of this section:
 - (a) subsection 128(4);
 - (b) subsections 129(2) and (3A);
 - (c) subsections 129A(1), (2) and (3).

Note: Division 4 of Part VIII contains other provisions relevant to civil remedies.

- (2) The Court may order a person who has contravened a civil remedy provision to pay a pecuniary penalty.
- (3) The penalty cannot be more than 300 penalty units for a body corporate or 60 penalty units in other cases.
- (4) An application for an order under subsection (2) in relation to subsection 128(4) (parental leave entitlements) may be made by:
 - (a) a transferring employee mentioned in that subsection; or
 - (b) an organisation of employees that is entitled, under its eligibility rules, to represent the industrial interests of a transferring employee mentioned in that subsection and has been requested by the transferring employee to apply for the order on the transferring employee's behalf; or
 - (c) a workplace inspector; or
 - (d) the new employer mentioned in that subsection.
- (5) An application for an order under subsection (2) in relation to an instrument listed in the following table may be made by a person specified in the item of the table relating to that kind of instrument:

Item	Instrument	People with standing to apply for order
1	AWA	(a) the transferring employee; or (b) an organisation of employees that is entitled, under its eligibility rules, to represent the industrial interests of the transferring employee and has been requested by the transferring employee to apply for the order on the transferring employee's behalf; or (c) a workplace inspector
2	collective agreement	(a) the transferring employee; or (b) an organisation of employees that is bound by the agreement; or (c) an organisation of employees that is entitled, under its eligibility rules, to represent the industrial interests of a transferring employee and has been requested by the transferring employee to apply for the order on the transferring employee's behalf; or (d) a workplace inspector
3	award	(a) a transferring employee; or (b) an organisation of employees that is entitled, under its eligibility rules, to represent the industrial interests of a transferring employee; or (c) a workplace inspector

Division 9—Miscellaneous

130 Regulations

The regulations may make provision in relation to the effects that the succession, transmission or assignment of a business, or a part

of a business, have on the obligations of employers and the terms and conditions of employees.

72 Before Division 2 of Part VIA

Insert:

Division 1—Entitlement to meal breaks

170AA Meal breaks

An employer must not require an employee to work for more than 5 hours continuously without an unpaid interval of at least 30 minutes for a meal.

Note: Compliance with this section is dealt with in Part VIII.

170AB Displacement of entitlement to meal breaks

Section 170AA does not apply in relation to particular employment of an employee while any of the following operates in relation to the employee in relation to the employment:

- (a) an award;
- (b) a workplace agreement;
- (c) an industrial instrument prescribed by the regulations.

170AC Model dispute resolution process

The model dispute resolution process applies to a dispute under this Division.

Note: The model dispute resolution process is set out in Part VIIA.

170AD Extraterritorial extension

- (1) This Division, and the rest of this Act so far as it relates to this Division, extend:
 - (a) to an employee outside Australia who meets any of the conditions in this section; and
 - (b) to the employee's employer (whether the employer is in or outside Australia); and
 - (c) to acts, omissions, matters and things relating to the employee (whether they are in or outside Australia).

Note: In this context, *Australia* includes the Territory of Christmas Island, the Territory of Cocos (Keeling) Islands and the coastal sea. See section 15B and paragraph 17(a) of the *Acts Interpretation Act 1901*.

Employee in Australia's exclusive economic zone

- (2) One condition is that the employee is in Australia's exclusive economic zone and either:
- (a) is an employee of an Australian employer and is not prescribed by the regulations as an employee to whom this subsection does not apply; or
 - (b) is an employee prescribed by the regulations as an employee to whom this subsection applies.

Note: The regulations may prescribe the employee by reference to a class. See subsection 13(3) of the *Legislative Instruments Act 2003*.

On Australia's continental shelf outside exclusive economic zone

- (3) Another condition is that the employee:
- (a) is outside the outer limits of Australia's exclusive economic zone, but is in, on or over a part of Australia's continental shelf prescribed by the regulations for the purposes of this subsection, in connection with the exploration of the continental shelf or the exploitation of its natural resources; and
 - (b) meets the requirements that are prescribed by the regulations for that part.

Note: The regulations may prescribe different requirements relating to different parts of Australia's continental shelf. The regulations may need to do so to give effect to Australia's international obligations.

Outside Australia's exclusive economic zone and continental shelf

- (4) Another condition is that the employee:
- (a) is neither in Australia's exclusive economic zone nor in, on or over a part of Australia's continental shelf described in paragraph (3)(a); and
 - (b) is an Australian-based employee of an Australian employer; and
 - (c) is not prescribed by the regulations as an employee to whom this subsection does not apply.

Definition

(5) In this section:

this Act includes the Registration and Accountability of Organisations Schedule and regulations made under it.

Division 1A—Entitlement to public holidays

170AE Definition of *public holiday*

In this Division:

public holiday means:

(a) each of these days:

- (i) 1 January (New Year's Day);
- (ii) 26 January (Australia Day);
- (iii) Good Friday;
- (iv) Easter Monday;
- (v) 25 April (Anzac Day);
- (vi) 25 December (Christmas Day);
- (vii) 26 December (Boxing Day); and

(b) any other day declared by or under a law of a State or Territory to be observed generally within the State or Territory, or a region of that State or Territory, as a public holiday by people who work in that State, Territory or region, other than:

- (i) a day declared by or under (or determined in accordance with a procedure under) the law of the State or Territory to be observed as a public holiday in substitution for a day named in paragraph (a); or
- (ii) a union picnic day; or
- (iii) a day, or kind of day, that is excluded by regulations made for the purposes of this paragraph from counting as a public holiday.

170AF Entitlement to public holidays

(1) An employee is entitled to a day off on a public holiday, subject to subsections (2) and (3).

- (2) An employer may request an employee to work on a particular public holiday.
- (3) The employee may refuse the request (and take the day off) if the employee has reasonable grounds for doing so.
- (4) A term to the contrary in:
 - (a) a workplace agreement; or
 - (b) an award;has no effect.

Note: Compliance with this section is dealt with in Part VIII.

170AG Reasonableness of refusal

In determining whether an employee has reasonable grounds for refusing a request to work on a public holiday, regard must be had to:

- (a) the nature of the work performed by the employee; and
- (b) the type of employment (for example, whether full-time, part-time, casual or shift work); and
- (c) the nature of the employer's workplace or enterprise (including its operational requirements); and
- (d) the employee's reasons for refusing the request; and
- (e) the employee's personal circumstances (including family responsibilities); and
- (f) whether the employee is entitled to additional remuneration or other benefits as a consequence of working on the public holiday; and
- (g) whether a workplace agreement, award, other industrial instrument, contract of employment or written guideline or policy that regulates the employee's employment contemplates that the employer might require work on public holidays, or particular public holidays; and
- (h) whether the employee has acknowledged or could reasonably expect that the employer might require work on public holidays, or particular public holidays; and
- (i) the amount of notice in advance of the public holiday given by the employer when making the request; and
- (j) the amount of notice in advance of the public holiday given by the employee in refusing the request; and

- (k) whether an emergency or other unforeseen circumstances are involved; and
- (l) any other relevant factors.

170AH Model dispute resolution process

The model dispute resolution process applies to a dispute under this Division.

Note: The model dispute resolution process is set out in Part VIIA.

170AI Employer not to prejudice employee for reasonable refusal

- (1) An employer must not, for the reason, or for reasons including the reason, that an employee has refused on reasonable grounds to work on a particular public holiday, do or threaten to do any of the following:
 - (a) dismiss an employee;
 - (b) injure an employee in his or her employment;
 - (c) alter the position of an employee to the employee's prejudice.
- (2) Subsection (1) is a civil remedy provision.

170AJ Penalties etc. for contravention of section 170AI

- (1) The Court, or the Federal Magistrates Court, on application by an eligible person, may make one or more of the following orders in relation to an employer who has contravened section 170AI:
 - (a) an order imposing a pecuniary penalty on the employer;
 - (b) an order requiring the employer to pay a specified amount to the employee as compensation for damage suffered by the employee as a result of the contravention;
 - (c) any other order that the court considers appropriate.
- (2) The maximum pecuniary penalty under paragraph (1)(a) is 300 penalty units if the employer is a body corporate and otherwise 60 penalty units.
- (3) The orders that may be made under paragraph (1)(c) include:
 - (a) injunctions; and
 - (b) any other orders that the court considers necessary to stop the conduct or remedy its effects.

(4) In this section:

eligible person means any of the following:

- (a) a workplace inspector;
 - (b) an employee affected by the contravention;
 - (c) an organisation of employees that:
 - (i) has been requested in writing, by the employee concerned, to apply on the employee's behalf; and
 - (ii) has a member employed by the employee's employer; and
 - (iii) is entitled, under its eligibility rules, to represent the industrial interests of the employee in relation to work carried on by the employee for the employer;
 - (d) a person prescribed by the regulations for the purposes of this paragraph.
- (5) A regulation prescribing persons for the purposes of paragraph (d) of the definition of *eligible person* may provide that a person is prescribed only in relation to circumstances specified in the regulation.

170AK Burden of proof in relation to reasonableness of refusal

In establishing, for the purposes of an application under section 170AJ, whether an employee's refusal to work on a particular public holiday was on reasonable grounds, the burden of proof lies on the applicant.

170AL Proof not required of the reason for conduct

- (1) If:
- (a) in an application under section 170AJ relating to a person's conduct, it is alleged that the conduct was, or is being, carried out for a particular reason; and
 - (b) for the person to carry out the conduct for that reason would constitute a contravention of section 170AI;
- it is presumed, in proceedings under this Division arising from the application, that the conduct was, or is being, carried out for that reason, unless the person proves otherwise.

- (2) This section does not apply in relation to the granting of an interim injunction.

Note: See section 354A for interim injunctions.

170AM Extraterritorial extension

- (1) This Division, and the rest of this Act so far as it relates to this Division, extend:
- (a) to an employee outside Australia who meets any of the conditions in this section; and
 - (b) to the employee's employer (whether the employer is in or outside Australia); and
 - (c) to acts, omissions, matters and things relating to the employee (whether they are in or outside Australia).

Note: In this context, *Australia* includes the Territory of Christmas Island, the Territory of Cocos (Keeling) Islands and the coastal sea. See section 15B and paragraph 17(a) of the *Acts Interpretation Act 1901*.

In Australia's exclusive economic zone

- (2) One condition is that the employee is in Australia's exclusive economic zone and either:
- (a) is an employee of an Australian employer and is not prescribed by the regulations as an employee to whom this subsection does not apply; or
 - (b) is an employee prescribed by the regulations as an employee to whom this subsection applies.

Note: The regulations may prescribe the employee by reference to a class. See subsection 13(3) of the *Legislative Instruments Act 2003*.

On Australia's continental shelf outside exclusive economic zone

- (3) Another condition is that the employee:
- (a) is outside the outer limits of Australia's exclusive economic zone, but is in, on or over a part of Australia's continental shelf that is prescribed by the regulations for the purposes of this subsection, in connection with the exploration of the continental shelf or the exploitation of its natural resources; and
 - (b) meets the requirements that are prescribed by the regulations for that part.

Note: The regulations may prescribe different requirements relating to different parts of Australia's continental shelf. The regulations may need to do so to give effect to Australia's international obligations.

Definition

(4) In this section:

this Act includes the Registration and Accountability of Organisations Schedule and regulations made under it.

73 At the end of section 170BA

Add:

Note: *Employer, employee* and *employment* have their ordinary meaning in this Division. See sections 4AA, 4AB and 4AC and Schedule 1.

74 After section 170BA

Insert:

170BAB Relationship of this Division to other laws providing alternative remedies

- (1) The Commission must not deal with an application under this Division if the Commission is satisfied that there is available to the applicant, or to the employees whom the applicant represents, an adequate alternative remedy that:
 - (a) exists under a law of the Commonwealth (other than this Division) or under a law of a State or Territory; and
 - (b) will ensure, for the employees concerned, equal remuneration for work of equal value.
- (2) The Commission must not deal with an application under this Division for an order to secure equal remuneration for work of equal value for an employee if proceedings for an alternative remedy:
 - (a) to secure such remuneration for the employee; or
 - (b) against unequal remuneration for work of equal value for the employee;have begun:
 - (c) under another provision of this Act; or
 - (d) under another law of the Commonwealth; or
 - (e) under a law of a State or Territory.

- (3) Subsection (2) does not prevent the Commission from dealing with an application under this Division if the proceedings for the alternative remedy:
 - (a) have been discontinued by the party who initiated the proceedings; or
 - (b) have failed for want of jurisdiction.
- (4) If an application has been made for an order under this Division to secure equal remuneration for work of equal value for an employee, a person is not entitled to take proceedings for an alternative remedy under a provision or law of a kind referred to in subsection (2):
 - (a) to secure such remuneration for the employee; or
 - (b) against unequal remuneration for work of equal value for the employee.
- (5) Subsection (4) does not prevent the taking of proceedings for an alternative remedy if the proceedings under this Division:
 - (a) have been discontinued by the party who initiated the proceedings; or
 - (b) have failed for want of jurisdiction.
- (6) A remedy under a law of the Commonwealth, a State or a Territory relating to discrimination in relation to employment, that consists solely of compensation for past actions, is not an alternative remedy, or an adequate alternative remedy, for the purposes of this section.

170BAC Relationship of this Division to AFPC decisions and the Australian Fair Pay and Conditions Standard

- (1) The Commission is to have regard to decisions of the AFPC in making orders under this Division.
- (2) The Commission must not deal with an application for an order under this Division, to the extent to which the application is for an order relating to a basic periodic rate of pay, a basic piece rate of pay or casual loading, if:
 - (a) the group of employees who would be covered by the order applied for; and
 - (b) the comparator group of employees;

are both entitled to a rate of pay that is equal to the applicable guaranteed rate of pay under the provisions of the Australian Fair Pay and Conditions Standard contained in Division 2 of Part VA.

- (3) To avoid doubt, subsection (2) does not apply if employees in one or both of the groups are entitled to a rate of pay higher than the applicable guaranteed rate.
- (4) The Commission must not deal with an application for an order under this Division, to the extent to which the application is for an order relating to a basic periodic rate of pay, a basic piece rate of pay or casual loading, if:
 - (a) the group of employees who would be covered by the order applied for is entitled to a rate of pay that is higher than the rate of pay the group would be entitled to under the provisions of the Australian Fair Pay and Conditions Standard contained in Division 2 of Part VA; and
 - (b) the comparator group of employees is entitled to a rate of pay that is equal to the applicable guaranteed rate of pay under the provisions of the Australian Fair Pay and Conditions Standard contained in Division 2 of Part VA.
- (5) To avoid doubt, subsection (4) does not apply if the comparator group of employees is entitled to a rate of pay higher than the applicable guaranteed rate.
- (6) To avoid doubt, subsections (2) and (4) apply regardless of the source of the employee's entitlement to be paid the rate of pay.
- (7) In this section:

basic periodic rate of pay has the same meaning as in Division 2 of Part VA.

basic piece rate of pay has the same meaning as in Division 2 of Part VA.

casual loading has the same meaning as in Division 2 of Part VA.

comparator group of employees means employees whom the applicant contends are performing work of equal value to the work performed by the employees to whom the application relates.

75 Subsection 170BC(2)

Omit “including minimum rates”, substitute “other than those set by the AFPC”.

76 Paragraph 170BC(3)(b)

Repeal the paragraph, substitute:

- (b) the order can reasonably be regarded as appropriate and adapted to giving effect to one or more of the following:
 - (i) the Anti-Discrimination Conventions;
 - (ii) the provisions of Recommendations referred to in paragraphs 170BA(b) and (c).

77 After section 170BD

Insert:

170BDA Conciliation or mediation

- (1) If an application is made for an order under this Division, the Commission must, before starting to hear and determine the matter to which the application relates:
 - (a) attempt to settle the matter by conciliation; or
 - (b) at the request or with the consent of both the applicant and any employer of employees who, if the order applied for were made, would be covered by it—refer the matter for mediation by an independent person specified in the request or consent.
- (2) The Commission may order:
 - (a) the applicant, or a representative of the applicant; and
 - (b) each employer of employees who, if the order applied for were made, would be covered by it, or a representative of those employers;to attend the conciliation or mediation.
- (3) The Commission may order that the employees who, if the order applied for were made, would be covered by it, or a representative of those employees, be allowed to attend the conciliation or mediation.
- (4) The Commission may order that:
 - (a) the applicant; or

- (b) each employer of employees who, if the order applied for were made, would be covered by it;
inform the employees concerned of:
 - (c) the making of the application for an order under this Division; and
 - (d) the details of the application and the order applied for; and
 - (e) the time and place at which conciliation or mediation will take place.

170BDB If conciliation or mediation is unsuccessful

- (1) If:
 - (a) the Commission forms the view that all reasonable attempts to settle the matter, or part of the matter, to which the application relates by conciliation have been unsuccessful; or
 - (b) if the Commission referred the matter to an independent person for mediation—the independent person informs the Commission that all reasonable attempts to settle the matter, or part of the matter, by mediation have been unsuccessful;the Commission must advise accordingly the applicant and each employer of employees who, if the order applied for were made, would be covered by it.
- (2) The Commission may order that:
 - (a) the applicant; or
 - (b) each employer of employees who, if the order applied for were made, would be covered by it;inform the employees concerned of the Commission's advice under subsection (1).
- (3) If the Commission advises persons under subsection (1), the Commission is to proceed to hear and determine the matter, or part, that was not settled.

170BDC Hearing of matter by member who conducted conciliation

- (1) If a member of the Commission has exercised conciliation powers under section 170BDA in relation to a matter, the member must not hear or determine, or take part in the hearing or determination of, the matter if a person who was present at the conciliation objects.

- (2) The member is not taken to have exercised conciliation powers in relation to the matter merely because:
 - (a) the member arranged for a conference of the parties or their representatives to be presided over by the member, but the conference did not take place or was not presided over by the member; or
 - (b) the member arranged for the parties or their representatives to confer among themselves at a conference at which the member was not present.

78 Section 170BE

Repeal the section.

79 After section 170BG

Insert:

170BGA Employer not to prejudice employee

- (1) An employer must not, for the reason, or for reasons including the reason, that an application or order has been made under this Division, do or threaten to do any of the following:
 - (a) dismiss an employee;
 - (b) injure an employee in his or her employment;
 - (c) alter the position of an employee to the employee's prejudice.
- (2) Subsection (1) is a civil remedy provision.

170BGB Penalties etc. for contravention of section 170BGA

- (1) The Court, or the Federal Magistrates Court, on application by an eligible person, may make one or more of the following orders in relation to a person (the *defendant*) who has contravened section 170BGA:
 - (a) an order imposing a pecuniary penalty on the defendant;
 - (b) an order requiring the defendant to pay a specified amount to another person as compensation for damage suffered by the other person as a result of the contravention;
 - (c) any other order that the court considers appropriate.

- (2) The maximum pecuniary penalty under paragraph (1)(a) is 300 penalty units if the defendant is a body corporate and otherwise 60 penalty units.
- (3) The orders that may be made under paragraph (1)(c) include:
 - (a) injunctions; and
 - (b) any other orders that the court considers necessary to stop the conduct or remedy its effects.
- (4) In this section:

eligible person means any of the following:

 - (a) a workplace inspector;
 - (b) a person affected by the contravention;
 - (c) an organisation of employees that:
 - (i) has been requested in writing, by the employee concerned, to apply on the employee's behalf; and
 - (ii) has a member employed by the employee's employer; and
 - (iii) is entitled, under its eligibility rules, to represent the industrial interests of the employee in relation to work carried on by the employee for the employer;
 - (d) the Sex Discrimination Commissioner;
 - (e) a person prescribed by the regulations for the purposes of this paragraph.
- (5) A regulation prescribing persons for the purposes of paragraph (e) of the definition of *eligible person* may provide that a person is prescribed only in relation to circumstances specified in the regulation.

170BGC Proof not required of the reason for conduct

- (1) If:
 - (a) in an application under section 170BGB relating to a person's conduct, it is alleged that the conduct was, or is being, carried out for a particular reason; and
 - (b) for the person to carry out the conduct for that reason would constitute a contravention of section 170BGA;

it is presumed, in proceedings under this Division arising from the application, that the conduct was, or is being, carried out for that reason, unless the person proves otherwise.

- (2) This section does not apply in relation to the granting of an interim injunction.

Note: See section 354A for interim injunctions.

170BGD Extraterritorial extension

- (1) This Division, and the rest of this Act so far as it relates to this Division, extends to an employee whose remuneration is determined by or under this Act, a law of a State or Territory or a contract of employment made in Australia, even though one or both of the following apply:
- (a) the employee is employed wholly or partly in work outside Australia;
 - (b) the employee's employer operates, exists, is incorporated, or is otherwise established, outside Australia.

Note: In this context, *Australia* includes the Territory of Christmas Island, the Territory of Cocos (Keeling) Islands and the coastal sea. See section 15B and paragraph 17(a) of the *Acts Interpretation Act 1901*.

- (2) In this section:

this Act includes the Registration and Accountability of Organisations Schedule and regulations made under it.

80 Sections 170BH, 170BHA and 170BI

Repeal the sections.

81 Paragraph 170CA(1)(e)

Omit "Subdivisions D and E", substitute "Subdivision E".

82 After section 170CA

Insert:

170CAA Meaning of *employee*, *employer* and *employment*

In this Division, unless the contrary intention appears:

employee means:

- (a) to the extent that a provision applies to, or in relation to, the termination of employment of an employee within the meaning of subsection 4AA(1)—an employee within the meaning of that subsection; or
- (b) otherwise—an employee within the ordinary meaning of the expression.

employer means:

- (a) to the extent that a provision applies to, or in relation to, the termination of employment of an employee within the meaning of subsection 4AA(1)—an employer within the meaning of subsection 4AB(1); or
- (b) otherwise—an employer within the ordinary meaning of the expression.

employment means:

- (a) to the extent that a provision applies to, or in relation to, the termination of employment of an employee within the meaning of subsection 4AA(1)—employment within the meaning of subsection 4AC(1); or
- (b) otherwise—the employment of an employee (within the ordinary meaning of the expression) by an employer (within the ordinary meaning of the expression).

83 Subsection 170CB(1)

Omit all the words after “before”, substitute “the termination, an employee within the meaning of subsection 4AA(1).”.

84 Subsection 170CB(2)

Omit “170CL, 170CM and 170CN”, substitute “170CL and 170CM”.

85 Subsection 170CB(3)

Omit “Subdivisions C, D”, substitute “Subdivisions C”.

86 Subsection 170CB(4)

Omit “Subdivisions C, D”, substitute “Subdivisions C”.

87 Subsection 170CB(4)

Omit all the words after “termination”, substitute “of employment of an employee within the meaning of subsection 4AA(1).”.

88 Subsection 170CB(5)

Omit “Subdivisions C, D”, substitute “Subdivisions C”.

89 Subsection 170CBA(1)

Omit “D,”.

Note: The heading to subsection 170CBA(1) is altered by omitting “D,”.

90 Subparagraph 170CBA(1)(f)(i)

Omit “award conditions”, substitute “award-derived conditions (see subsection 170CD(3))”.

91 At the end of subsection 170CBA(1)

Add:

; (g) an employee engaged on a seasonal basis, within the meaning of subsection (6A).

92 Subsection 170CBA(1) (note 2)

Omit “a State law”, substitute “a provision of a State law that is not excluded under section 7C”.

93 After subsection 170CBA(1)

Insert:

(1A) Despite the exclusion of an employee from the operation of Subdivisions B and F because of subsection (1):

(a) the employee may make an application under section 170CE for relief in respect of the termination of his or her employment on the ground of an alleged contravention of section 170CK; and

(b) if the employee does so, those Subdivisions have effect, in so far as they relate to that application, as if the employee had not been excluded from their operation.

94 Subsection 170CBA(2)

Omit “Subdivision B, D”, substitute “Subdivision B”.

95 Subsection 170CBA(4)

Repeal the subsection.

96 After subsection 170CBA(6)

Insert:

- (6A) For the purposes of paragraph (1)(g), an employee is engaged on a seasonal basis if the employee is engaged to perform work for the duration of a specified season.
- (6B) For the purposes of subsection (6A), a *season* is a period that:
- (a) is determined at the commencement of the employee's engagement (the *commencement time*); and
 - (b) begins at the commencement time; and
 - (c) ends at a time in the future that:
 - (i) is uncertain at the commencement time; and
 - (ii) is related to the nature of the work to be performed by the employee; and
 - (iii) is objectively ascertainable when it occurs.

Note: Examples of seasons are:

- (a) the part of a year characterised by particular conditions of weather or temperature;
- (b) the part of a year when a product is best or available;
- (c) the part of a year marked by certain conditions, festivities or other activities.

- (6C) The regulations may provide that a particular period is, or is not, a *season* for the purposes of subsection (6A).

97 Subsection 170CBA(7)

Omit "Subdivisions D and E", substitute "Subdivision E".

Note: The heading to subsection 170CBA(7) is altered by omitting "*Subdivisions D and E*" and substituting "*Subdivision E*".

98 Subsection 170CBA(7) (note 1)

Omit "a State law", substitute "a provision of a State law that is not excluded under section 7C".

99 After section 170CCA

Insert:

170CCB Extraterritorial extension

(1) This Division, and the rest of this Act so far as it relates to this Division, extend to the termination, or proposed termination, of the employment of an Australian-based employee even though one or both of the following apply:

- (a) the employee was employed outside Australia at the time of the termination, the proposed time of termination or the time of the making of the proposal to terminate;
- (b) the act causing termination, or the proposal to terminate, occurred outside Australia.

Note: In this context, **Australia** includes the Territory of Christmas Island, the Territory of Cocos (Keeling) Islands and the coastal sea. See section 15B and paragraph 17(a) of the *Acts Interpretation Act 1901*.

(2) However, subsection (1) does not apply in relation to the employee if either:

- (a) all the following conditions are met at the time of the termination, the proposed time of termination or the time of the making of the proposal to terminate:
 - (i) the employee's employer is not an Australian employer;
 - (ii) the employee's primary place of work is in Australia's exclusive economic zone or Australia's continental shelf;
 - (iii) the employee is not prescribed by the regulations as an employee in relation to whom subsection (1) applies despite this subsection; or
- (b) the employee is prescribed by the regulations as an employee in relation to whom subsection (1) does not apply.

(3) In this section:

Australian-based employee means a person who would be an Australian-based employee (as defined in subsection 4(1)) if the definition of **employee** in section 170CAA applied to the definition of **Australian-based employee** in that subsection.

Australian employer means a person who would be an Australian employer (as defined in subsection 4(1)) if the definition of **employer** in section 170CAA applied to the definition of **Australian employer** in that subsection.

this Act includes the Registration and Accountability of Organisations Schedule and regulations made under it.

100 Subsection 170CD(1) (definition of *Commonwealth public sector employee*)

Repeal the definition.

101 Subsection 170CD(1)

Insert:

Court means the Federal Court of Australia or the Federal Magistrates Court.

102 Subsection 170CD(1) (paragraph (a) of the definition of *daily hire employee*)

Repeal the paragraph, substitute:

(a) whose employment:

- (i) is regulated by an award or a workplace agreement; and
- (ii) under the award or workplace agreement is, or is normally, apart from the application to the employee of this Division:
 - (A) terminated at the end of each day or shift; or
 - (B) able to be terminated by the employer giving to the employee not more than 1 day's notice; and

103 Subsection 170CD(1) (definition of *Federal award employee*)

Repeal the definition.

104 Subsection 170CD(1) (definition of *State or Territory training authority*)

Repeal the definition.

105 After subsection 170CD(1)

Insert:

- (1A) For the purposes of paragraph (b) of the definition of *daily hire employee* in subsection (1), *award*, *old IR agreement*, *State award* and *State employment agreement* have the meanings given by

subsection 4(1) of this Act as in force immediately before the reform commencement.

105A After subsection 170CD(1B)

Insert:

- (1C) For the purposes of this Division, the resignation of an employee is taken to constitute the termination of the employment of that employee at the initiative of the employer if the employee can prove, on the balance of probabilities, that the employee did not resign voluntarily but was forced to do so because of conduct, or a course of conduct, engaged in by the employer.

106 Subsection 170CD(2)

Omit “Subdivision C, D”, substitute “Subdivision C”.

107 Subsection 170CD(3)

Omit all the words after “under”, substitute:

award-derived conditions if the employer is bound:

- (a) in relation to the employee’s wages and conditions of employment—by an award or a workplace agreement; or
- (b) in relation to:
 - (i) the employee’s wages—by an APCS; and
 - (ii) in relation to the employee’s conditions of employment—by an award or a workplace agreement.

108 Subsection 170CE(1)

Omit “subsections (5) and (5A)”, substitute “subsections (5), (5A), (5C) and (5E)”.

109 Paragraph 170CE(1)(b)

Omit “170CL, 170CM or 170CN”, substitute “170CL or 170CM”.

110 Subsection 170CE(3)

Omit “170CK, 170CM and 170CN”, substitute “170CK and 170CM”.

111 Paragraph 170CE(5B)(a)

Omit “3”, substitute “6”.

112 After subsection 170CE(5B)

Insert:

- (5C) An application under subsection (1) must not be made on the ground referred to in paragraph (1)(a), or on grounds that include that ground, if the employee's employment was terminated for genuine operational reasons or for reasons that include genuine operational reasons.
- (5D) For the purposes of subsection (5C), *operational reasons* are reasons of an economic, technological, structural or similar nature relating to the employer's undertaking, establishment, service or business, or to a part of the employer's undertaking, establishment, service or business.

113 Before subsection 170CE(6)

Insert:

- (5E) An application under subsection (1) must not be made on the ground referred to in paragraph (1)(a), or on grounds that include that ground, if, at the relevant time, the employer employed 100 employees or fewer, including:
 - (a) the employee whose employment was terminated; and
 - (b) any casual employee who had been engaged by the employer on a regular and systematic basis for at least 12 months; but not including any other casual employee.
- (5EA) For the purposes of calculating the number of employees employed by an employer as mentioned in subsection (5E), related bodies corporate (within the meaning of section 50 of the *Corporations Act 2001*) are taken to be one entity.
- (5F) For the purposes of subsection (5E):
 - (a) the *relevant time* is the time when the employer gave the employee the notice of termination, or the time when the employer terminated the employee's employment, whichever happened first; and
 - (b) for the purposes of calculating the number of employees employed by the employer, *employee* has the same meaning as in paragraph (b) of the definition of that term in section 170CAA.

114 At the end of section 170CEA

Add:

- (4) If a respondent has moved for the dismissal of an application made, or purported to have been made, under subsection 170CE(1):
 - (a) on the ground referred to in paragraph 170CE(1)(a); or
 - (b) on grounds that include that ground;subsection (5) applies to the application.
- (5) If the Commission is satisfied that an application to which this subsection applies cannot be made under subsection 170CE(1) on the ground referred to in paragraph 170CE(1)(a):
 - (a) because the employee is excluded from the operation of Subdivision B by section 170CBA; or
 - (b) because of the operation of subsection 170CE(5A) (which relates to qualifying periods); or
 - (c) because of the operation of subsection 170CE(5E) (which relates to employers of 100 employees or fewer);the Commission must:
 - (d) if paragraph (4)(a) applies—make an order dismissing the application; or
 - (e) if paragraph (4)(b) applies—make an order dismissing the application to the extent that it is made on the ground referred to in paragraph 170CE(1)(a).
- (5A) If:
 - (a) a respondent has moved for the dismissal of an application to which subsection (5) applies; and
 - (b) the Commission is not satisfied as mentioned in paragraph (5)(a), (b) or (c) in relation to the application;the Commission must make an order refusing the motion for dismissal.
- (6) The Commission is not required to hold a hearing in relation to the making of an order under subsection (5) or (5A).

115 After section 170CEA

Insert:

170CEB Applications that are frivolous, vexatious or lacking in substance

(1) If:

- (a) an application is made, or purported to have been made, under subsection 170CE(1):
 - (i) on the ground referred to in paragraph 170CE(1)(a); or
 - (ii) on grounds that include that ground; and
- (b) the respondent moves for dismissal of the application on the ground that it is frivolous, vexatious or lacking in substance; and
- (c) the Commission is satisfied that the application is frivolous, vexatious or lacking in substance, in relation to the ground referred to in paragraph 170CE(1)(a);

the Commission must:

- (d) if subparagraph (a)(i) applies—make an order dismissing the application; or
- (e) if subparagraph (a)(ii) applies—make an order dismissing the application to the extent that it is made on the ground referred to in paragraph 170CE(1)(a).

(1A) If:

- (a) an application is made, or purported to have been made, under subsection 170CE(1):
 - (i) on the ground referred to in paragraph 170CE(1)(a); or
 - (ii) on grounds that include that ground; and
- (b) the respondent moves for dismissal of the application on the ground that it is frivolous, vexatious or lacking in substance; and
- (c) the Commission is not satisfied that the application is frivolous, vexatious or lacking in substance, in relation to the ground referred to in paragraph 170CE(1)(a);

the Commission must:

- (d) if subparagraph (a)(i) applies—make an order refusing the motion for dismissal; or
- (e) if subparagraph (a)(ii) applies—make an order refusing the motion for dismissal, to the extent that the application is made on the ground referred to in paragraph 170CE(1)(a).

- (2) The Commission is not required to hold a hearing in relation to the making of an order under subsection (1) or (1A).

170CEC Extension of time applications may be decided without a hearing

If:

- (a) an employee whose employment has been terminated by an employer makes an application (the *extension of time application*) under subsection 170CE(7) requesting the Commission to allow an application to be lodged under subsection 170CE(1) after the period of 21 days after the termination took effect; and
- (b) the proposed application under subsection 170CE(1) is an application:
 - (i) on the ground referred to in paragraph 170CE(1)(a); or
 - (ii) on grounds that include that ground;

the Commission is not required to hold a hearing in relation to the extension of time application.

170CED Matters that do not require a hearing

- (1) The Commission must, in deciding whether or not to hold a hearing for the purposes of deciding:
 - (a) whether to make an order under subsection 170CEA(5) or (5A) or 170CEB(1) or (1A); or
 - (b) whether to grant an extension of time application within the meaning of section 170CEC;take into account the cost that would be caused to the business of the employer concerned by requiring the employer to attend a hearing.
- (2) If the Commission decides not to hold a hearing, the Commission must, before making a decision:
 - (a) invite the employee and the employer concerned to provide further information that relates to whether the order should be made or the extension of time granted; and
 - (b) take account of any such information.

- (3) If, as a result of information provided as mentioned in subsection (2), the Commission considers that it would be desirable to hold a hearing, the Commission may do so.
- (4) An invitation under paragraph (2)(a) must:
 - (a) be given by notice in writing to the employee and the employer concerned; and
 - (b) specify the time by which the information referred to in the invitation is to be provided.

170CEE Dismissal of application relating to termination for operational reasons

- (1) If:
 - (a) an application is made, or is purported to have been made, under subsection 170CE(1):
 - (i) on the ground referred to in paragraph 170CE(1)(a); or
 - (ii) on grounds that include that ground; and
 - (b) either:
 - (i) the respondent has moved for the dismissal of the application on the ground that the application is outside the jurisdiction of the Commission because the employee's employment was terminated for genuine operational reasons or for reasons that include genuine operational reasons; or
 - (ii) it appears to the Commission, on the face of all the materials before it, that the employee's employment may have been terminated for genuine operational reasons or for reasons that include genuine operational reasons;

the Commission must hold a hearing to deal with the operational reasons issue before taking any further action in relation to the application, other than dealing with a matter on the papers as provided by section 170CEA, 170CEB, 170CEC or 170CED.

- (2) If, as a result of the hearing, the Commission is satisfied that the operational reasons relied on by the respondent were genuine, the Commission must:
 - (a) if subparagraph (1)(a)(i) applies—make an order dismissing the application; or

- (b) if subparagraph (1)(a)(ii) applies—make an order dismissing the application to the extent that it is made on the ground referred to in paragraph 170CE(1)(a).
- (3) Subject to any right of appeal to a Full Bench of the Commission, a finding by the Commission that it is not satisfied that the operational reasons relied on by the respondent were genuine is final and binding between the parties in any proceedings before the Commission.
- (3A) To avoid doubt, this section does not require the Commission to hold a hearing in relation to an application that has been dismissed under subsection 170CEA(5) or 170CEB(1).
- (4) In this section:
 - operational reasons* has the meaning given by subsection 170CE(5D).

116 Paragraph 170CFA(3)(b)

Omit “170CK, 170CL and 170CN”, substitute “170CK and 170CL”.

117 Subsection 170CFA(4)

Omit “170CL, 170CM and 170CN”, substitute “170CL and 170CM”.

118 Paragraph 170CFA(5)(c)

Omit “170CK, 170CL and 170CN”, substitute “170CK and 170CL”.

118A Paragraph 170CFA(6)(b)

Repeal the paragraph, substitute:

- (b) be lodged with the Commission:
 - (i) if the certificate given by the Commission under subsection 170CF(2) identifies the ground of an alleged contravention of section 170CK as a ground on which conciliation is, or is likely to be, unsuccessful (whether or not one or more other grounds are so identified)—not later than 28 days after the day of issue of the certificate; or
 - (ii) in any other case—not later than 7 days after the day of issue of the certificate.

119 Subsection 170CFA(7)

Omit all the words after “period” (second occurring).

120 Subsection 170CFA(8)

Repeal the subsection, substitute:

- (8) The Commission must not, under any provision of this Act, extend the period within which an election is required by subsection (6) to be lodged, other than as mentioned in subsection (8A).
- (8A) The Commission may accept an election referred to in subparagraph (6)(b)(i) that is lodged out of time if the Commission considers that it would be unfair not to do so, and, if the Commission accepts such an election, the original application is taken not to have been discontinued in spite of subsection (7).
- (9) An appeal to a Full Bench under section 45 may not be made in relation to the discontinuance of an application under subsection (7).

121 Paragraph 170CG(3)(a)

Omit “the capacity or conduct of the employee”, substitute “the employee’s capacity or conduct (including its effect on the safety and welfare of other employees)”.

122 Paragraph 170CG(3)(a)

Omit “or to the operational requirements of the employer’s undertaking, establishment or service”.

123 After section 170CG

Insert:

170CGA Exercise of arbitration powers by member who has exercised conciliation powers

- (1) If a member of the Commission has exercised conciliation powers in relation to an application under this Division, the member must not exercise, or take part in the exercise of, arbitration powers in relation to the application if a party to the arbitration proceeding objects.
- (2) The member is not taken to have exercised conciliation powers in relation to the application merely because:

- (a) the member arranged for a conference of the parties or their representatives to be presided over by the member, but the conference did not take place or was not presided over by the member; or
- (b) the member arranged for the parties or their representatives to confer among themselves at a conference at which the member was not present.

124 Paragraph 170CH(4)(b)

Omit “subject to subsection (5)”, substitute “subject to subsections (4A) and (5)”.

125 After subsection 170CH(4)

Insert:

- (4A) In determining an amount for the purposes of an order under paragraph (4)(b), the Commission must have regard to:
 - (a) the amount of any income earned by the employee from employment or other work during the period between the termination and the making of the order for reinstatement; and
 - (b) the amount of any income reasonably likely to be so earned by the employee during the period between the making of the order for reinstatement and the actual reinstatement.

126 Subsection 170CH(7)

Omit “Subject to subsection (8)”, substitute “Subject to subsections (7A), (7B), (8) and (9)”.

127 After paragraph 170CH(7)(d)

Insert:

- (da) any misconduct of the employee that contributed to the employer’s decision to terminate the employee’s employment; and

128 After subsection 170CH(7)

Insert:

- (7A) An amount ordered by the Commission under subsection (4) or (6) to be paid to an employee may not include a component by way of compensation for shock, distress or humiliation, or other analogous

hurt, caused to the employee by the manner of terminating the employee's employment.

129 Before subsection 170CH(8)

Insert:

- (7B) If the Commission is satisfied that misconduct of the employee contributed to the employer's decision to terminate the employee's employment, the Commission must reduce the amount it would otherwise fix under subsection (6) by an appropriate amount on account of the misconduct.

130 Subsections 170CH(8) and (9)

Omit "award conditions", substitute "award-derived conditions (see subsection 170CD(3))".

131 After subsection 170CJ(3)

Insert:

- (3A) If the Commission is satisfied:

- (a) that a person (the *representative*) representing a party to a proceeding relating to an application made under section 170CE caused costs to be incurred by the other party to the proceeding; and
- (b) that the representative caused the costs to be incurred because of the representative's unreasonable act or omission in connection with the conduct of the proceeding;

the Commission may, on an application by the other party, make an order for costs against the representative.

131A After subsection 170CK(4)

Insert:

- (4A) To avoid doubt, if:

- (a) an employer terminates an employee's employment; and
- (b) the reason, or a reason, for the termination is that the position held by the employee no longer exists, or will no longer exist; and
- (c) the reason, or a reason, that the position held by the employee no longer exists, or will no longer exist, is the

employee's absence, or proposed or probable absence, during maternity leave or other parental leave;
the employee's employment is taken, for the purposes of paragraph (2)(h), to have been terminated for the reason, or for reasons including the reason, of absence from work during maternity leave or other parental leave.

132 Section 170CN

Repeal the section.

133 Section 170CO

Omit "170CL, 170CM or 170CN", substitute "170CL or 170CM".

134 Subsection 170CP(1)

Omit "170CK, 170CL and 170CN", substitute "170CK and 170CL".

Note: The heading to section 170CP is altered by omitting "**170CL, 170CM or 170CN**" and substituting "**170CL or 170CM**".

135 Subsection 170CP(2)

Omit "a court of competent jurisdiction", substitute "an eligible court".

136 Subsection 170CP(3)

Omit "170CK, 170CM and 170CN", substitute "170CK and 170CM".

137 Subsection 170CP(5)

Omit "170CL, 170CM or 170CN", substitute "170CL or 170CM".

138 Subsection 170CR(1)

Omit "or 170CN".

139 Paragraph 170CR(1)(c)

Omit "subject to subsection (2)", substitute "subject to subsections (1A), (2), (2A) and (2B)".

140 After subsection 170CR(1)

Insert:

(1A) An amount of compensation ordered by the Court under paragraph (1)(c) or (d) to be paid to an employee may not include a component by way of compensation for shock, distress or

humiliation, or other analogous hurt, caused to the employee by the manner of terminating the employee's employment.

141 Subsection 170CR(2)

Repeal the subsection, substitute:

- (2) In fixing an amount under paragraph (1)(c) for an employee who was employed under award-derived conditions immediately before the termination, the Court must not fix an amount that exceeds the total of the following amounts:
 - (a) the total amount of remuneration:
 - (i) received by the employee; or
 - (ii) to which the employee was entitled;(whichever is higher) for any period of employment with the employer during the period of 6 months immediately before the termination (other than any period of leave without full pay); and
 - (b) if the employee was on leave without pay or without full pay while so employed during any part of that period—the amount of remuneration taken to have been received by the employee for the period of leave in accordance with the regulations.
- (2A) In fixing an amount under paragraph (1)(c) for an employee who was not employed under award-derived conditions immediately before the termination, the Court must not fix an amount that exceeds:
 - (a) the total of the amounts determined under subsection (2) if the employee were an employee covered by the subsection; or
 - (b) the amount of \$32,000, as indexed from time to time in accordance with a formula prescribed by the regulations;whichever is the lower amount.
- (2B) For the avoidance of doubt, an order by the Court under paragraph (1)(c) or (d) may permit the employer concerned to pay the amount required in instalments specified in the order.

142 Subsection 170CR(6)

Omit "170CL, 170CM or 170CN", substitute "170CL or 170CM".

143 Section 170CR (note)

Omit “170CL, 170CM or 170CN”, substitute “170CL or 170CM”.

144 Subdivision D of Division 3 of Part VIA

Repeal the Subdivision.

145 Subsection 170GA(2)

Omit “The”, substitute “Subject to subsection (2A), the”.

146 After subsection 170GA(2)

Insert:

- (2A) The power to make orders under subsection (2) does not include the power to make orders for any of the following:
- (a) reinstatement of an employee;
 - (b) withdrawal of a notice of termination if the notice period has not expired;
 - (c) payment of an amount in lieu of reinstatement;
 - (d) payment of severance pay;
 - (e) disclosure of confidential information or commercially sensitive information relating to the employer, unless the recipient of such information gives an enforceable undertaking not to disclose the information to any other person;
 - (f) disclosure of personal information relating to a particular employee, unless the employee has given written consent to the disclosure of the information and the disclosure is in accordance with that consent.

147 At the end of section 170GA

Add:

- (4) For the purposes of subsection (2A), *commercially sensitive information*, *confidential information* and *personal information* have their ordinary meanings unless the regulations provide otherwise.

148 After section 170GB

Insert:

170GBA Powers and procedures of Commission for dealing with applications

The Commission may, in relation to an application for an order under section 170GA, attempt to settle the matter to which the application relates by conciliation.

149 Section 170GD

Repeal the section.

150 Subdivision F of Division 3 of Part VIA (heading)

Repeal the heading, substitute:

Subdivision F—Rights relating to termination of employment

151 Section 170HA

Repeal the section.

152 Section 170HB

Repeal the section, substitute:

170HB Limitation on applications alleging termination on paragraph 170CE(1)(a) grounds

- (1) An application under subsection 170CE(1) alleging termination of employment on the ground referred to in paragraph 170CE(1)(a), or grounds that include that ground, must not be made if other termination proceedings have already been commenced in respect of the termination of employment, unless the other termination proceedings:
 - (a) have been discontinued by the employee who commenced the proceedings; or
 - (b) have failed for want of jurisdiction.

Note: Subsection (3) defines *other termination proceedings*.

- (2) An employee must not commence other termination proceedings in respect of a termination of employment if an application under subsection 170CE(1) alleging termination of employment on the ground referred to in paragraph 170CE(1)(a), or on grounds that include that ground, has already been made, unless the application:

- (a) has been discontinued by the employee; or
- (b) has failed for want of jurisdiction.

(3) In this section:

other termination proceedings means proceedings, in respect of a termination of the employment of an employee:

- (a) for a remedy in respect of the termination:
 - (i) under a provision of this Act other than section 170CE; or
 - (ii) under another law of the Commonwealth; or
 - (iii) under a provision of a law of a State or Territory that is not excluded by section 7C; and
- (b) that allege that the termination was unlawful for any reason (other than a failure by the employer to provide a benefit to which the employee was entitled on the termination).

Note: Section 7C provides for the exclusion of certain State and Territory laws.

(3A) Without limiting subsection (3), ***other termination proceedings*** includes an inquiry in respect of a complaint (the ***HREOC complaint***):

- (a) made under the *Human Rights and Equal Opportunity Commission Act 1986*; and
- (b) that relates to the termination of employment of an employee (whether or not as a result of an amendment of the complaint).

(3B) For the purposes of this section, an employee commences other termination proceedings of a kind referred to in subsection (3A):

- (a) unless paragraph (b) applies—when the employee makes the HREOC complaint; or
- (b) if the HREOC complaint constitutes, or would constitute, other termination proceedings only as a result of an amendment of the complaint—when the complaint is amended.

(4) For the avoidance of doubt, a proceeding seeking compensation, or the imposition of a penalty, because an employer has failed, in relation to a termination of employment, to meet an obligation:

- (a) to give adequate notice of the termination; or
-

(b) to provide a severance payment as a result of the termination;
or

(c) to provide any other entitlement payable as a result of the termination;

is taken to be a proceeding alleging that the termination was unlawful because of a failure to provide a benefit to which the employee was entitled on the termination.

153 Section 170HC

Repeal the section, substitute:

170HC Limitation on applications alleging unlawful termination

- (1) An application alleging unlawful termination of employment must not be made by an employee if other termination proceedings have already been commenced in respect of the termination of employment, unless the other termination proceedings:
- (a) have been discontinued by the employee; or
 - (b) have failed for want of jurisdiction.

Note: Subsection (3) defines an *application alleging unlawful termination* and *other termination proceedings*.

- (2) An employee must not commence other termination proceedings in respect of a termination of employment if an application alleging unlawful termination of the employment has already been made, unless the application:
- (a) has been discontinued by the employee; or
 - (b) has failed for want of jurisdiction.
- (3) In this section:

application alleging unlawful termination means an application under section 170CE, in respect of a termination of employment, on the ground that the termination constitutes a contravention of section 170CK because it was done for a reason set out in subsection 170CK(2).

other termination proceedings means proceedings, in respect of a termination of employment:

- (a) for a remedy in respect of the termination:
 - (i) under a provision of this Act other than section 170CE;
 - or

- (ii) under another law of the Commonwealth; or
 - (iii) under a provision of a law of a State or Territory that is not excluded by section 7C; and
- (b) that allege that the termination was:
- (i) harsh, unjust or unreasonable (however described); or
 - (ii) unlawful;
- for any reason (other than a failure by the employer to provide a benefit to which the employee was entitled on the termination).

Note: Section 7C provides for the exclusion of certain State or Territory laws.

- (4) Without limiting subsection (3), ***other termination proceedings*** includes an inquiry in respect of a complaint (the ***HREOC complaint***):
- (a) made under the *Human Rights and Equal Opportunity Commission Act 1986*; and
 - (b) that relates to the termination of employment of an employee (whether or not as a result of an amendment of the complaint).
- (5) For the purposes of this section, an employee commences other termination proceedings of a kind referred to in subsection (4):
- (a) unless paragraph (b) applies—when the employee makes the HREOC complaint; or
 - (b) if the HREOC complaint constitutes, or would constitute, other termination proceedings as a result of an amendment of the complaint—when the complaint is amended.

154 Subsection 170JC(1)

Repeal the subsection.

155 Subsection 170JC(2)

Omit “For the purpose of applying Part VIII in that way, an”, substitute “An”.

156 Subsection 170JC(3)

Omit “(as it applies in accordance with this section)”.

157 Paragraph 170JC(3)(a)

After “the Court” (wherever occurring), insert “or the Federal Magistrates Court”.

158 Paragraph 170JC(3)(b)

Omit “a court of competent jurisdiction”, substitute “an eligible court”.

159 At the end of section 170JD

Add:

- (4) This section does not apply to an order under subsection 170CEA(5) or section 170CEB or to a decision on an extension of time application within the meaning of section 170CEC.

160 Section 170JE

Repeal the section.

161 Section 170JEA

Omit “ or the Court”, substitute “, the Court or the Federal Magistrates Court”.

162 Sections 170JEB and 170JEC

Repeal the sections.

163 At the end of section 170JF

Add:

- (3) An appeal to a Full Bench under section 45 may not be made in relation to an order under subsection 170CEA(5) or section 170CEB or in relation to a decision on an extension of time application within the meaning of section 170CEC.

164 Section 170JG

Omit “, or certified agreement or AWA,”, substitute “or workplace agreement”.

165 Section 170JH

Repeal the section.

166 At the end of Division 4 of Part VIA

Add:

170JI Meaning of *employee* and *employer*

To avoid doubt, the expression *employee* or *employer*, when used in a provision of this Division, is taken to have the same meaning as in the provision of this Act to which the provision of this Division relates.

167 Division 5 of Part VIA

Repeal the Division, substitute:

Division 5—Parental leave

170KA Object and application of Division

The object of this Division is to give effect, or further effect, to:

- (a) the Family Responsibilities Convention; and
- (b) the Workers with Family Responsibilities Recommendation, 1981, which the General Conference of the International Labour Organisation adopted on 23 June 1981 and is also known as Recommendation No. 165;

by providing for a system of unpaid parental leave, and a system of unpaid adoption leave, that will help men and women workers who have responsibilities in relation to their dependent children:

- (c) to prepare for, enter, participate in or advance in economic activity; and
- (d) to reconcile their employment and family responsibilities.

Note: *Employer, employee* and *employment* have their ordinary meaning in this Division. See sections 4AA, 4AB and 4AC and Schedule 1.

170KB Entitlement to parental leave

The provisions of Division 6 of Part VA are taken to apply in relation to an employee:

- (a) who is not an employee within the meaning of subsection 4AA(1); and
- (b) if the employee is a casual employee—who would be an eligible casual employee within the meaning of Division 6 of Part VA, if he or she were an employee within the meaning of subsection 4AA(1);

as if he or she were an employee to whom Division 6 of Part VA applied.

Note 1: Employees within the meaning of subsection 4AA(1) are entitled to the key minimum entitlements of employment provided by the Australian Fair Pay and Conditions Standard. These include an entitlement to parental leave (see Division 6 of Part VA).

Note 2: Compliance with this section is dealt with in Part VIII.

170KC Division supplements other laws

This Division is intended to supplement, not to override, entitlements under other Commonwealth, State and Territory legislation and awards.

170KD Model dispute resolution process

The model dispute resolution process applies to a dispute under this Division.

Note: The model dispute resolution process is set out in Part VIIA.

168 Parts VIB, VID, VIE and VII

Repeal the Parts, substitute:

Part VIIA—Dispute resolution processes

Division 1—Preliminary

171 Object

The objects of this Part are:

- (a) to encourage employers and employees who are parties to a dispute to resolve it at the workplace level; and
- (b) to introduce greater flexibility for the resolution of disputes by allowing the parties to determine the best forum in which to resolve them.

172 Court process

The fact that the model dispute resolution process, an alternative dispute resolution process or any other dispute resolution process applies in relation to a dispute does not affect any right of a party to the dispute to take court action to resolve it.

Division 2—Model dispute resolution process

173 Model dispute resolution process

- (1) This Division sets out the *model dispute resolution process*.
- (2) The model dispute resolution process does not apply in relation to a particular dispute, unless it applies in relation to that dispute because of a provision of this Act, other than one contained in this Division, or a term of an award, a workplace agreement or a workplace determination.

Note: The model dispute resolution process applies in relation to a variety of disputes, including:

- (a) disputes about entitlements under the Australian Fair Pay and Conditions Standard (see section 89E); and
- (b) disputes about the terms of a workplace agreement, where the agreement itself includes the model dispute resolution process or is taken to include that process (see section 101A); and
- (c) disputes about the application of a workplace determination (see section 113D); and
- (d) disputes about the application of awards (see section 116A); and
- (e) disputes under Division 1 of Part VIA, which deals with meal breaks (see section 170AC); and
- (f) disputes under Division 1A of Part VIA, which deals with public holidays (see section 170AH); and
- (g) disputes under Division 5 of Part VIA, which deals with parental leave (see section 170KD).

174 Resolving dispute at workplace level

The parties to a dispute must genuinely attempt to resolve the dispute at the workplace level.

Note: This may involve an affected employee first discussing the matter in dispute with his or her supervisor, then with more senior management.

175 Where dispute cannot be resolved at workplace level

Alternative dispute resolution process using an agreed provider

- (1) If a matter in dispute cannot be resolved at the workplace level, a party to the dispute may elect to use an alternative dispute resolution process in an attempt to resolve the matter.

-
- (2) The alternative dispute resolution process is to be conducted by a person agreed between the parties in dispute on the matter.

Where parties cannot agree on a provider

- (3) If the parties cannot reach agreement on who is to conduct the alternative dispute resolution process, a party to the dispute on the matter may notify the Industrial Registrar of that fact.
- (4) On receiving notification under subsection (3), the Industrial Registrar must provide the parties with the prescribed information.
- (5) If the parties cannot agree on who is to conduct the alternative dispute resolution process within the consideration period, a party to the dispute on the matter may apply to the Commission to have the alternative dispute resolution process conducted by the Commission.
- (6) If an alternative dispute resolution process is used to resolve a dispute on a matter, the parties to the dispute must genuinely attempt to resolve the dispute using that process.
- (7) In this section:

consideration period is a period beginning on the last day on which the Industrial Registrar gives the prescribed information to a party to the dispute on the matter and ending 14 days later.

176 Conduct during dispute

- (1) An employee who is a party to a dispute must, while the dispute is being resolved:
- (a) continue to work in accordance with his or her contract of employment, unless the employee has a reasonable concern about an imminent risk to his or her health or safety; and
 - (b) comply with any reasonable direction given by his or her employer to perform other available work, either at the same workplace or at another workplace.
- (2) In directing an employee to perform other available work, an employer must have regard to:
- (a) the provisions (if any) of the law of the Commonwealth or of a State or Territory dealing with occupational health and safety that apply to that employee or that other work; and

- (b) whether that work is appropriate for the employee to perform.

Division 3—Alternative dispute resolution process conducted by Commission under model dispute resolution process

176A Alternative dispute resolution process

An *alternative dispute resolution process* is a procedure for the resolution of disputes, and includes:

- (a) conferencing; and
- (b) mediation; and
- (c) assisted negotiation; and
- (d) neutral evaluation; and
- (e) case appraisal; and
- (f) conciliation; and
- (g) arbitration, or other determination of the rights and obligations of the parties in dispute; and
- (h) a procedure or service specified in the regulations.

176B Application

- (1) A person may apply to the Commission to have an alternative dispute resolution process conducted by the Commission under this Division in relation to a matter or matters in dispute if:
 - (a) the dispute is one that may (whether under an award, a workplace determination, a workplace agreement, a provision of this Act or otherwise) be resolved using the model dispute resolution process; and
 - (b) the parties to the dispute on the matter or matters have been unable to resolve the dispute at the workplace level.
- (2) An application to have an alternative dispute resolution process conducted by the Commission under this Division must:
 - (a) be in the form (if any) prescribed by the regulations; and
 - (b) describe the matter, or matters, in dispute in relation to which the alternative dispute resolution process is to be conducted; and

- (c) be signed by the party to the dispute on that matter or those matters who is making the application; and
 - (d) specify that the alternative dispute resolution process is to be conducted under the model dispute resolution process.
- (3) The Commission may request the parties to provide further information about:
 - (a) the matter or matters in dispute; and
 - (b) the steps taken to resolve the matter at the workplace level.
- (4) The Commission may do either of the following in relation to an application under this section:
 - (a) allow the amendment, on any terms that it thinks appropriate, of the application;
 - (b) correct, amend or waive any error, defect or irregularity whether in substance or form in the application.

176C Refusing application

- (1) The Commission must refuse to conduct an alternative dispute resolution process under this Division in relation to a matter if:
 - (a) the dispute is not one that may be resolved using the model dispute resolution process; or
 - (b) the matter is the subject of proceedings or has already been settled as a result of proceedings, whether before a court or another body, under a law of the Commonwealth or of a State or Territory relating to the prevention of discrimination or to equal opportunity.
- (2) The Commission may refuse to conduct an alternative dispute resolution process under this Division if the parties in dispute on the matter have not made a genuine attempt:
 - (a) to resolve the dispute at the workplace level; or
 - (b) to reach agreement on who would conduct the alternative dispute resolution process.

176D Commission's powers

- (1) If the Commission conducts an alternative dispute resolution process under this Division, the Commission must take such action as is appropriate to assist the parties to resolve the matter.

- (2) The action that the Commission may take includes:
 - (a) arranging conferences of the parties or their representatives at which the Commission is present; and
 - (b) arranging for the parties or their representatives to confer among themselves at conferences at which the Commission is not present.
- (3) The Commission must, as far as is practicable, act:
 - (a) quickly; and
 - (b) in a way that avoids unnecessary technicalities and legal forms; and
 - (c) if the parties have agreed that an aspect of the process is to be conducted in a particular way—subject to subsection (4), in accordance with that agreement.
- (4) The Commission does not have power:
 - (a) to compel a person to do anything; or
 - (b) to arbitrate the matter, or matters, in dispute; or
 - (c) to otherwise determine the rights or obligations of a party to the dispute; or
 - (d) to make an award in relation to the matter, or matters, in dispute; or
 - (e) to make an order in relation to the matter, or matters, in dispute; or
 - (f) to appoint a board of reference.
- (5) The Commission does not have the power to do any of the things mentioned in paragraph (4)(a), (d), (e) or (f), even if the parties agree that the Commission should do it.
- (6) The Commission may, subject to any reasonable limitations imposed by the Commission, permit a party to the dispute on the matter to be represented in the alternative dispute resolution process.
- (7) If the parties request the Commission to make recommendations about particular aspects of a matter about which they are unable to reach agreement, then the Commission may make recommendations about those aspects of the matter.

- (8) Subdivision B of Division 3A of Part II of this Act does not apply in relation to the conduct of the alternative dispute resolution process by the Commission under this Division.

176E Privacy

- (1) The Commission must conduct the alternative dispute resolution process in private.
- (2) The Commission must not disclose or use any information or document that is given to the Commission in the course of conducting the alternative dispute resolution process to any person, unless:
- (a) the information or document is disclosed or used for the purpose of conducting the process; or
 - (b) the parties to the process consent to the disclosure or use; or
 - (c) the information or document is disclosed or used in circumstances specified in regulations made for the purposes of this paragraph; or
 - (d) the disclosure or use is otherwise required or authorised by law.
- (3) Evidence of anything said, or any act done, in the alternative dispute resolution process is not admissible in proceedings relating to the dispute:
- (a) in any court; or
 - (b) before a person authorised by a law of the Commonwealth or of a State or Territory to hear evidence; or
 - (c) before a person authorised by the consent of the parties to hear evidence;
- unless:
- (d) the parties agree to the evidence being admissible; or
 - (e) the evidence is admitted in circumstances specified in regulations made for the purposes of this paragraph.

176F When alternative dispute resolution process complete

The alternative dispute resolution process is completed when:

- (a) the parties agree that the matters in dispute are resolved; or

- (b) the party who elected to use the alternative dispute resolution process has informed the Commission that the party no longer wishes to continue with the process.

Division 4—Alternative dispute resolution process used to resolve other disputes

176G Application

- (1) A person may apply to the Commission to have an alternative dispute resolution process conducted by the Commission under this Division in relation to a matter or matters in dispute if:
 - (a) the dispute on the matter or matters arises in the course of bargaining in relation to a proposed collective agreement (as defined for the purposes of Part VC); and
 - (b) all parties to the dispute agree that the process is to be conducted by the Commission.
- (2) An application to have an alternative dispute resolution process conducted by the Commission under this Division must:
 - (a) be in the form (if any) prescribed by the regulations; and
 - (b) describe the matter, or matters, in dispute in relation to which the alternative dispute resolution process is to be conducted; and
 - (c) be signed by the party to the dispute on that matter or those matters who is making the application; and
 - (d) specify that the alternative dispute resolution process is to be conducted in relation to a dispute on a matter or matters arising in the course of bargaining in relation to a proposed collective agreement (as defined for the purposes of Part VC).
- (3) The Commission may request the parties to provide further information about the matter or matters in dispute.

176H Grounds on which Commission must refuse application

The Commission must refuse to conduct the alternative dispute resolution process if the circumstances mentioned in subsection 176G(1) do not exist.

176I Powers of the Commission

- (1) If the Commission conducts an alternative dispute resolution process under this Division, the Commission must take such action as is appropriate to assist the parties to resolve the matter.
- (2) The action that the Commission may take includes:
 - (a) arranging conferences of the parties or their representatives at which the Commission is present; and
 - (b) arranging for the parties or their representatives to confer among themselves at conferences at which the Commission is not present.
- (3) The Commission must, as far as is practicable, act:
 - (a) quickly; and
 - (b) in a way that avoids unnecessary technicalities and legal forms; and
 - (c) if the parties have agreed that an aspect of the process is to be conducted in a particular way—subject to subsection (4), in accordance with that agreement.
- (4) The Commission does not have power:
 - (a) to compel a person to do anything; or
 - (b) to arbitrate the matter, or matters, in dispute; or
 - (c) to otherwise determine the rights or obligations of a party to the dispute; or
 - (d) to make an award in relation to the matter, or matters, in dispute; or
 - (e) to make an order in relation to the matter, or matters, in dispute; or
 - (f) to appoint a board of reference.
- (5) The Commission does not have power to do any of the things mentioned in subsection (4), even if the parties agree that the Commission should do it.
- (6) The Commission may, subject to any reasonable limitations imposed by the Commission, permit a party to the dispute on the matter to be represented in the alternative dispute resolution process.

- (7) If the parties request the Commission to make recommendations about particular aspects of a matter about which they are unable to reach agreement, then the Commission may make recommendations about those aspects of the matter.
- (8) Subdivision B of Division 3A of Part II of this Act does not apply in relation to the conduct of the alternative dispute resolution process by the Commission under this Division.

176J Privacy

- (1) The Commission must conduct the alternative dispute resolution process in private.
- (2) The Commission must not disclose or use any information or document that is given to the Commission in the course of conducting the alternative dispute resolution process to any person, unless:
 - (a) the information or document is disclosed or used for the purpose of conducting the process; or
 - (b) the parties to the process consent to the disclosure or use; or
 - (c) the information or document is disclosed or used in circumstances specified in regulations made for the purposes of this paragraph; or
 - (d) the disclosure or use is otherwise required or authorised by law.
- (3) Evidence of anything said, or any act done, in the alternative dispute resolution process is not admissible in proceedings relating to the dispute:
 - (a) in any court; or
 - (b) before a person authorised by a law of the Commonwealth or of a State or Territory to hear evidence; or
 - (c) before a person authorised by the consent of the parties to hear evidence;unless:
 - (d) the parties agree to the evidence being admissible; or
 - (e) the evidence is admitted in circumstances specified in regulations made for the purposes of this paragraph.

176K When alternative dispute resolution process complete

The alternative dispute resolution process is completed when the parties agree that the matters in dispute are resolved.

Division 5—Dispute resolution process conducted by the Commission under workplace agreement

176L Application

- (1) A person may apply to the Commission to have a dispute resolution process conducted by the Commission under this Division in relation to a matter or matters in dispute if:
 - (a) the dispute is one that, under the terms of a workplace agreement, may be resolved using a dispute resolution process conducted by the Commission; and
 - (b) any steps that, under the terms of agreement, must be taken before the matter is referred to the Commission have been taken.
- (2) An application to have a dispute resolution process conducted by the Commission under this Division must:
 - (a) be in the form (if any) prescribed by the regulations; and
 - (b) describe the matter, or matters, in dispute in relation to which the dispute resolution process is to be conducted; and
 - (c) be signed by the party to the dispute on that matter or those matters who is making the application; and
 - (d) specify that the dispute resolution process is to be conducted under the terms of a workplace agreement and not under the model dispute resolution process.
- (3) The Commission may request the parties to provide further information about:
 - (a) the matter or matters in dispute; and
 - (b) the steps that have been taken to resolve the dispute.

Note: Under section 101A, a workplace agreement must include a dispute resolution process. That process may be something other than the model dispute resolution process, and may involve applying to have the Commission conduct an alternative dispute resolution process.

176M Grounds on which Commission must refuse application

The Commission must refuse to conduct a dispute resolution process under this Division in relation to a matter in dispute if:

- (a) the dispute is not one that, under the terms of the workplace agreement, may be resolved using a dispute resolution process conducted by the Commission; or
- (b) any of the steps that, under the terms of agreement, must be taken before the matter is referred to the Commission have not been taken.

176N Commission's powers

- (1) In conducting the dispute resolution process under this Division, the Commission has, subject to subsection (2), the functions and powers:
 - (a) given to it under the workplace agreement; or
 - (b) otherwise agreed by the parties.
- (2) The Commission does not have the power to make orders.
- (3) The Commission must, as far as is practicable, act:
 - (a) quickly; and
 - (b) in a way that avoids unnecessary technicalities and legal forms; and
 - (c) if the parties have agreed, either in the workplace agreement or otherwise, that an aspect of the process is to be conducted in a particular way—in accordance with that agreement.
- (4) Subdivision B of Division 3A of Part II of this Act does not apply in relation to the conduct of the dispute resolution process by the Commission under this Division.

176O Privacy

- (1) The Commission must conduct the dispute resolution process in private.
 - (2) The Commission must not disclose or use any information or document that is given to the Commission in the course of conducting the dispute resolution process to any person, unless:
-

- (a) the information or document is disclosed or used for the purpose of conducting the process; or
 - (b) the parties to the process consent to the disclosure or use; or
 - (c) the information or document is disclosed or used in circumstances specified in regulations made for the purposes of this paragraph; or
 - (d) the disclosure or use is otherwise required or authorised by law.
- (3) Evidence of anything said, or any act done, in the dispute resolution process is not admissible in any proceedings relating to the dispute:
- (a) in any court; or
 - (b) before a person authorised by a law of the Commonwealth or of a State or Territory to hear evidence; or
 - (c) before a person authorised by the consent of the parties to hear evidence;
- unless:
- (d) the parties agree to the evidence being admissible; or
 - (e) the evidence is admitted in circumstances specified in regulations made for the purposes of this paragraph.

Division 6—Dispute resolution process conducted by another provider

176P Application of this Division

This Division applies to a dispute resolution process in relation to a dispute on a matter or matters that is not conducted by the Commission.

176Q Representation

- (1) If the dispute resolution process is an alternative dispute resolution process, the person conducting the process may allow a party to be represented in the process if the person conducting the process believes that it is appropriate to do so.
- (2) The person conducting the dispute resolution process may set reasonable limits on the conduct of the representative in relation to the process.

- (3) If:
- (a) the dispute resolution process is conducted under the terms of a workplace agreement; and
 - (b) the agreement makes provision for a party to the dispute to be represented in the process;
- the person conducting the dispute resolution process must allow the party to be represented in accordance with the agreement.

176R Privacy

- (1) The person conducting the dispute resolution process must do so in private.
- (2) A person who is conducting, or has conducted, a dispute resolution process must not disclose or use any information or document that is given to the person in the course of conducting that process to any person, unless:
 - (a) the information or document is disclosed or used for the purpose of conducting the process; or
 - (b) the parties to the process consent to the disclosure or use; or
 - (c) the information or document is disclosed or used in circumstances specified in regulations made for the purposes of this paragraph; or
 - (d) the disclosure or use is otherwise required or authorised by law.
- (3) Subsections (1) and (2) are civil remedy provisions.
- (4) Evidence of anything said, or any act done, in the dispute resolution process is not admissible in proceedings relating to the dispute:
 - (a) in any court; or
 - (b) before a person authorised by a law of the Commonwealth or of a State or Territory to hear evidence; or
 - (c) before a person authorised by the consent of the parties to hear evidence;unless:
 - (d) the parties agree to the evidence being admissible; or
 - (e) the evidence is admitted in circumstances specified in regulations made for the purposes of this paragraph.

- (5) The Court may make an order imposing a pecuniary penalty on a person who has contravened subsection (1) or (2).
- (6) The pecuniary penalty cannot be more than 300 penalty units for a body corporate or 60 penalty units in any other case.
- (7) An application for an order under subsection (5) may be made by:
 - (a) a party to the dispute in relation to which the dispute resolution process is conducted; or
 - (b) an organisation that has at least one member who is an employee bound by the agreement, and that is entitled to represent the industrial interests of at least one such employee; or
 - (c) a workplace inspector; or
 - (d) any other person prescribed by the regulations.

Note: For other provisions about civil remedy provisions, see Division 4 of Part VIII.

176S Where anti-discrimination or equal opportunity proceedings in progress

A person must not conduct an alternative dispute resolution process in relation to a dispute on a matter if the matter is the subject of proceedings or has already been settled as a result of proceedings, whether before a court or another body, under a law of the Commonwealth or of a State or Territory relating to the prevention of discrimination or to equal opportunity.

169 Division 1 of Part VIII (heading)

Repeal the heading, substitute:

Division 1—Definitions

170 Section 177A

Repeal the section, substitute:

177A Definitions

In this Part:

applicable provision, in relation to a person, means:

- (a) a term of one of these that applies to the person:
 - (i) an AWA;
 - (ii) the Australian Fair Pay and Conditions Standard;
 - (iii) an award;
 - (iv) a collective agreement;
 - (v) an order of the Commission (except one made under Division 4 of Part VC); and
- (b) section 170AA (meal breaks); and
- (ba) section 170AF (public holidays); and
- (c) section 170KB (extended entitlement to parental leave).

Note 1: Workplace determinations are treated for the purposes of the Act as if they were collective agreements (see section 113F). Undertakings are treated the same way (see section 103M). This means that a term of one of these is an applicable provision for the purposes of this Part.

Note 2: Division 4 of Part VC deals with protected action ballots. Breaches of orders made under that Division are dealt with under section 109V.

eligible court means:

- (a) the Court; or
- (b) the Federal Magistrates Court; or
- (c) a District, County or Local Court; or
- (d) a magistrate's court; or
- (e) the Industrial Relations Court of South Australia; or
- (f) any other State or Territory court that is prescribed by the regulations.

171 Before section 178

Insert:

Division 2—Penalties and other remedies for contravention of applicable provisions

177AA Standing to apply for penalties or remedies under this Division

- (1) The table sets out the persons who may apply for a penalty or other remedy under this Division in relation to a breach of an applicable provision.

Standing		
Item	If the applicable provision is...	These persons may apply...
1	a term of an AWA	(a) an employer that is bound by the AWA; (b) an employee who is bound by the AWA; (c) an organisation of employees that represents an employee who is bound by the AWA (subject to subsection (2)); (d) an inspector
2	a term of the Australian Fair Pay and Conditions Standard	(a) an employee whose employment is subject to the Standard; (b) an organisation of employees (subject to subsection (3)); (c) an inspector
3	a term of an award	(a) an employer that is bound by the award; (b) an employee whose employment is subject to the award; (c) an organisation of employers that has a member affected by the breach; (d) an organisation of employees, a member of which is employed by the respondent employer and whose industrial interests the organisation is entitled, under its eligibility rules, to represent in relation to work carried on by the member for the employer; (da) if the term is an outworker term (within the meaning of Division 6A of Part VI)—a person or eligible entity (within the meaning of Division 6A of Part VI) that is bound by the award; (e) an inspector
4	a term of a collective agreement	(a) an employer that is bound by the agreement; (b) an employee who is bound by the agreement; (c) an organisation of employees (subject to subsection (3)); (d) an inspector

Schedule 1 Main amendments

Standing		
Item	If the applicable provision is...	These persons may apply...
5	a term of an order of the Commission	(a) a person who is bound by the order; (b) an organisation of employers that has a member affected by the breach; (c) an organisation of employees, a member of which is employed by the respondent employer and whose industrial interests the organisation is entitled, under its eligibility rules, to represent in relation to work carried on by the member for the employer; (d) an inspector
6	section 170AA (meal breaks)	(a) an employee to whom section 170AA applies; (b) an organisation of employees (subject to subsection (3)); (c) an inspector
6A	section 170AF (public holidays)	(a) an employee to whom section 170AF applies; (b) an organisation of employees (subject to subsection (3)); (c) an inspector
7	section 170KB (extended entitlement to parental leave)	(a) an employee to whom section 170KB applies; (b) an organisation of employees (subject to subsection (3)); (c) an inspector

Note 1: Workplace determinations are treated for the purposes of this Act as if they were collective agreements (see section 113F). Undertakings are treated the same way (see section 103M). This means that they are covered by table item 4.

Note 2: An outworker term is a protected award condition under section 101B.

(1A) For the purposes of table items 2, 3, 4, 6, 6A and 7 in subsection (1), a reference to an employee is a reference to an employee who is affected by the breach of the applicable provision.

-
- (1B) For the purposes of table items 3 and 4 in subsection (1), a reference to an employer is a reference to an employer that is affected by the breach of the applicable provision.
- (1C) For the purposes of table item 5 in subsection (1), a reference to a person bound by the order is a reference to a person bound by the order who is affected by the breach of the order.
- (2) An organisation of employees that represents an employee who is bound by an AWA must not apply on behalf of the employee for a penalty or other remedy under this Division in relation to a breach of an applicable provision of the AWA unless:
- (a) the employee has requested, in writing, the organisation to apply on the employee's behalf; and
 - (b) a member of the organisation is employed by the employee's employer; and
 - (c) the organisation is entitled, under its eligibility rules, to represent the industrial interests of the employee in relation to work carried on by the employee for the employer.
- (3) An organisation of employees must not apply for a penalty or other remedy under this Division in relation to a breach of an applicable provision that is:
- (a) a term of the Australian Fair Pay and Conditions Standard; or
 - (b) a term of a collective agreement; or
 - (c) section 170AA; or
 - (ca) section 170AF; or
 - (d) section 170KB;
- unless:
- (e) a member of the organisation is employed by the respondent employer; and
 - (f) the breach relates to, or affects, the member of the organisation or work carried on by the member for the employer.

172 Subsection 178(1)

Repeal the subsection, substitute:

- (1) An eligible court may impose a penalty in accordance with this Division on a person if:
- (a) the person is bound by an applicable provision; and

(b) the person breaches the provision.

173 Paragraph 178(2)(a)

Repeal the paragraph, substitute:

(a) 2 or more breaches of an applicable provision are committed by the same person; and

174 Paragraph 178(2)(b)

Omit “organisation or”.

175 Subsection 178(3)

Repeal the subsection, substitute:

(3) Subsection (2) does not apply to a breach of an applicable provision that is committed by a person after an eligible court has imposed a penalty on the person for an earlier breach of the provision.

176 Subsections 178(4) to (5A)

Repeal the subsections, substitute:

- (4) The maximum penalty that may be imposed under subsection (1) for a breach of an applicable provision is:
- (a) 60 penalty units for an individual; or
 - (b) 300 penalty units for a body corporate.
- (5) If, in a proceeding under this section in relation to an AWA, it appears to the eligible court that a party to the AWA has suffered loss or damage as a result of a breach of the AWA by the other party, the court may order the other party to pay the amount of the loss or damage to the first-mentioned party.

177 Subsection 178(6)

Omit “court concerned”, substitute “eligible court”.

178 Subsection 178(6)

Omit “award, order or agreement”, substitute “applicable provision (except a term of an AWA)”.

179 Subsection 178(6A)

Omit “court concerned”, substitute “eligible court”.

180 Subsection 178(6A)

Omit “award, order or agreement”, substitute “applicable provision (except a term of an AWA)”.

181 Subsection 178(6B)

Omit “court concerned”, substitute “eligible court”.

182 Subsection 178(7)

Omit “shall”, substitute “must”.

183 Subsection 178(8)

Omit “a term of an award, order or agreement shall”, substitute “an applicable provision must”.

184 Subsection 178(9)

Repeal the subsection.

185 Section 179

Repeal the section, substitute:

179 Recovery of wages etc.

If an employer is required by an applicable provision (except a term of an AWA) to pay an amount to an employee or to pay an amount to a superannuation fund on behalf of an employee, the employee, or an inspector on behalf of the employee, may, not later than 6 years after the employer was required to make the payment to the employee or fund, sue for the amount of the payment in an eligible court.

179AA Damages for breach of AWA

- (1) A party to an AWA who suffers loss or damage as a result of a breach of the AWA by the other party may recover the amount of the loss or damage in an eligible court.
- (2) The action must be brought within 6 years after the date on which the cause of action arose.

186 Subsection 179A(1)

Omit “subsection 178(6) or in a proceeding under section 179, the Court or a court of competent jurisdiction”, substitute “subsection 178(5) or (6) or in a proceeding under section 179 or 179AA, the eligible court”.

187 Paragraph 179A(1)(a)

Omit “Court or court of competent jurisdiction, as the case may be,”, substitute “eligible court”.

188 Section 179B

Repeal the section, substitute:

179B Interest on judgment

A debt under a judgment or order of an eligible court made under subsection 178(5) or (6) or section 179 or 179AA carries interest from the date on which the judgment is entered or order made at such rate as would apply under section 52 of the *Federal Court of Australia Act 1976* if the debt were a judgment debt to which that section applies.

189 Paragraph 179C(a)

After “section 179”, insert “or 179AA”.

190 Paragraph 180(1)(a)

Omit “award, order or certified agreement”, substitute “applicable provision”.

191 Division 3 of Part VIII

Repeal the Division.

192 At the end of Part VIII

Add:

Division 4—General provisions relating to civil remedies

188 Operation of this Division

- (1) This Division sets out rules that apply for the purposes of these provisions:
 - (a) section 178; and
 - (b) another provision of this Act that is declared (whether by that provision or by another provision of this Act) to be a civil remedy provision (whether or not for the purposes of a particular segment of this Act); and
 - (c) another provision of this Act that provides a remedy for a contravention of a provision referred to in paragraph (b).
- (2) Those provisions are called the *civil remedy provisions*.

189 Involvement in contravention treated in same way as actual contravention

- (1) A person who is involved in a contravention of a civil remedy provision is treated as having contravened that provision.
- (2) For this purpose, a person is *involved in* a contravention of a civil remedy provision if, and only if, the person:
 - (a) has aided, abetted, counselled or procured the contravention;
or
 - (b) has induced the contravention, whether by threats or promises or otherwise; or
 - (c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or
 - (d) has conspired with others to effect the contravention.

190 Civil evidence and procedure rules for civil remedy orders

A court hearing a proceeding under a civil remedy provision must apply the rules of evidence and procedure for civil matters.

191 Recovery of pecuniary penalties

A pecuniary penalty payable under a civil remedy provision may be recovered as a debt due to the person to whom the penalty is payable.

192 Civil proceedings after criminal proceedings

A court must not make an order under a civil remedy provision requiring a person to pay a pecuniary penalty if the person has been convicted of an offence constituted by conduct that is substantially the same as the conduct in relation to which the order would be made.

193 Criminal proceedings during civil proceedings

- (1) Proceedings for an order under a civil remedy provision requiring a person to pay a pecuniary penalty are stayed if:
 - (a) criminal proceedings are started or have already been started against the person for an offence; and
 - (b) the offence is constituted by conduct that is substantially the same as the conduct in relation to which the order would be made.
- (2) The proceedings for the order may be resumed if the person is not convicted of the offence. Otherwise, the proceedings for the order are dismissed.

194 Criminal proceedings after civil proceedings

Criminal proceedings may be started against a person for conduct that is substantially the same as conduct in relation to which an order under a civil remedy provision requiring the person to pay a pecuniary penalty could be made regardless of whether such an order has been made against the person.

195 Evidence given in proceedings for pecuniary penalty not admissible in criminal proceedings

Evidence of information given or evidence of production of documents by an individual is not admissible in criminal proceedings against the individual if:

- (a) the individual previously gave the evidence or produced the documents in proceedings for an order under a civil remedy provision requiring the individual to pay a pecuniary penalty (whether or not the order was made); and
- (b) the conduct alleged to constitute the offence is substantially the same as the conduct in relation to which the order was sought.

However, this does not apply to a criminal proceeding in respect of the falsity of the evidence given by the individual in the proceedings under the civil remedy provision.

196 Civil double jeopardy

If a person is ordered to pay a pecuniary penalty under a civil remedy provision in respect of particular conduct, the person is not liable to be ordered to pay a pecuniary penalty under some other provision of a law of the Commonwealth law in respect of that conduct.

193 Parts VIIIA, IX and XA

Repeal the Parts, substitute:

Part IX—Right of entry

Division 1—Preliminary

197 Objects of this Part

In addition to the object set out in section 3, this Part has the following objects:

- (a) to establish a framework that balances:
 - (i) the right of organisations to represent their members in the workplace, hold discussions with potential members and investigate suspected breaches of industrial laws, industrial instruments and OHS laws; and
 - (ii) the right of occupiers of premises and employers to conduct their businesses without undue interference or harassment;
- (b) to ensure that permits to enter premises and inspect records are only held by persons who understand their rights and

obligations under this Part and who are fit and proper persons to exercise those rights;

- (c) to ensure that occupiers of premises and employers understand their rights and obligations under this Part;
- (d) to ensure that permits are suspended or revoked where rights granted under this Part are misused.

198 Definitions

In this Part:

affected employee means:

- (a) in relation to the entry onto premises under section 208 to investigate a suspected breach—an employee for whom all the following are satisfied:
 - (i) the employee carries out work on the premises;
 - (ii) the employee is a member of the permit holder's organisation;
 - (iii) the suspected breach relates to, or affects, the employee or the work; and
- (b) in relation to the entry onto premises under section 221 to hold discussions—an employee for whom all the following are satisfied:
 - (i) the employee carries out work on the premises;
 - (ii) the employee is a member of the permit holder's organisation or is eligible to become a member of that organisation;
 - (iii) the employee is one of the employees with whom the discussions are to be held.

affected employer means an employer of affected employees.

authority documents, in relation to the entry onto premises by a permit holder, means:

- (a) if the permit holder entered the premises in reliance on an entry notice:
 - (i) the permit holder's permit; and
 - (ii) the entry notice; or
- (b) if the permit holder entered the premises in reliance on an exemption certificate:
 - (i) the permit holder's permit; and

- (ii) the exemption certificate; or
- (c) if the permit holder entered the premises in reliance on an order of the Commission:
 - (i) the permit holder's permit; and
 - (ii) the order.

Commonwealth place means a place referred to in paragraph 52(i) of the Constitution, other than the seat of government.

conduct includes an omission.

Court means the Federal Court of Australia or the Federal Magistrates Court.

entry notice means an entry notice in the form approved under section 199.

exemption certificate means an exemption certificate under section 211.

industrial law means:

- (a) this Act; or
- (b) the Registration and Accountability of Organisations Schedule; or
- (c) a law of the Commonwealth, however designated, that regulates the relationships between employers and employees; or
- (d) a State or Territory industrial law.

official, in relation to an organisation, means an officer or employee of the organisation.

OHS law means a law of a State or Territory prescribed by the regulations for the purposes of this definition.

permit means a permit under this Part.

permit holder means a person who holds a permit.

permit holder's organisation, in relation to a permit, means the organisation in respect of which the permit was issued.

repealed Part IX means Part IX of this Act, as in force at any time before the reform commencement.

199 Form of entry notice

- (1) The Industrial Registrar must, in writing, approve a form of entry notice for the purposes of this section.
- (2) The form:
 - (a) must require the following matters to be specified by the person using the form:
 - (i) the premises that are proposed to be entered;
 - (ii) the organisation in respect of which the relevant permit was issued;
 - (iii) any other matters prescribed by the regulations; and
 - (b) must include any other information prescribed by the regulations.
- (3) Subsection (2) does not, by implication, limit the matters that may be contained in, or required by, the form.

200 Extraterritorial extension

In Australia's exclusive economic zone

- (1) This Part, and the rest of this Act so far as it relates to this Part, extend to premises that:
 - (a) are in Australia's exclusive economic zone; and
 - (b) are owned or occupied by an Australian employer.

This subsection has effect subject to Australia's obligations under international law concerning jurisdiction over ships that fly the flag of a foreign country and aircraft registered under the law of a foreign country.

On Australia's continental shelf outside exclusive economic zone

- (2) This Part, and the rest of this Act so far as it relates to this Part, extend to premises that:
 - (a) are outside the outer limits of Australia's exclusive economic zone, but in, on or over a part of Australia's continental shelf prescribed for the purposes of this subsection; and
 - (b) are connected with the exploration of the continental shelf or the exploitation of its natural resources; and

- (c) meet the requirements that are prescribed by the regulations for that part.

Note: The regulations may prescribe different requirements relating to different parts of Australia's continental shelf. The regulations may need to do so to give effect to Australia's international obligations.

Definition

- (3) In this section:

this Act includes the Registration and Accountability of Organisations Schedule and regulations made under it.

Division 2—Issue of permits

201 Issue of permit

- (1) An organisation may apply to a Registrar for the issue of a permit to an official of the organisation. The application must be in writing.
- (2) The Registrar may issue a permit to the official named in the application.
- (3) The permit:
 - (a) must include any conditions that are imposed by the Registrar under section 202; and
 - (b) must include any conditions that are applicable under section 231 at the time of issue.
- (4) The regulations may make provision in relation to the following matters:
 - (a) the form of an application for a permit;
 - (b) the declarations and other documents that must accompany the application;
 - (c) verification, by statutory declaration, of those documents;
 - (d) the form of a permit.

Note: Under the *Criminal Code* and the *Statutory Declarations Act 1959*, penalties apply to false statements etc.

202 Imposition of permit conditions at time of issue

- (1) At the time of issuing a permit, a Registrar may impose conditions that limit the circumstances in which the permit has effect.

Note: For example, the conditions could limit the premises to which the permit applies or the time of day when the permit operates.

- (2) In deciding whether to impose conditions, a Registrar must have regard to the matters specified in subsection 203(2).

203 Permit not to be issued in certain cases

Official not a fit and proper person

- (1) A Registrar must not issue a permit to an official unless the Registrar is satisfied that the official is a fit and proper person to hold the permit.
- (2) For the purposes of subsection (1), the Registrar must have regard to the following matters:
 - (a) whether the official has received appropriate training about the rights and responsibilities of a permit holder;
 - (b) whether the official has ever been convicted of an offence against an industrial law;
 - (c) whether the official has ever been convicted of an offence against a law of the Commonwealth, a State, a Territory or a foreign country, involving:
 - (i) entry onto premises; or
 - (ii) fraud or dishonesty; or
 - (iii) intentional use of violence against another person or intentional damage or destruction of property;
 - (d) whether the official, or any other person, has ever been ordered to pay a penalty under this Act or any other industrial law in respect of conduct of the official;
 - (e) whether any permit issued to the official under this Part, or under the repealed Part IX, has been revoked or suspended or made subject to conditions;
 - (f) whether a court, or other person or body, under a State or Territory industrial law or an OHS law, has cancelled, suspended or imposed conditions on a right of entry for

industrial or occupational health and safety purposes that the official had under that law;

- (g) whether a court, or other person or body, under a State or Territory industrial law or an OHS law, has disqualified the official from exercising, or applying for, a right of entry for industrial or occupational health and safety purposes under that law;
- (h) any other matters that the Registrar considers relevant.

Note: Part VIIC of the *Crimes Act 1914* includes provisions that, in certain circumstances, relieve persons from the requirement to disclose spent convictions and require persons aware of such convictions to disregard them.

Banning order or disqualification applies under this Part

- (3) A Registrar must not issue a permit to an official:
 - (a) during a disqualification period specified by a Registrar under section 205; or
 - (b) if the issue is prevented by a Commission order under section 231 or 233.

Disqualification etc. applies under State law

- (4) A Registrar must not issue a permit to an official at a time when:
 - (a) a suspension, imposed by a court or other person or body, applies under a State or Territory industrial law or an OHS law to a right of entry for industrial or occupational health and safety purposes that the official has under that law; or
 - (b) a disqualification, imposed by a court or other person or body, prevents the official from exercising, or applying for, a right of entry for industrial or occupational health and safety purposes under a State or Territory industrial law or an OHS law.

Division 3—Expiry, revocation, suspension etc. of permits

204 Expiry of permit

Unless earlier revoked, a permit expires at the earlier of the following times:

- (a) at the end of the third anniversary of the date of issue;

- (b) when the permit holder ceases to be an official of the organisation that applied for the permit.

205 Revocation, suspension etc. by Registrar

- (1) A workplace inspector, or a person prescribed by the regulations, may apply to a Registrar to take action under this section against a permit holder. The application must be made in accordance with the regulations.
- (2) On application made under subsection (1), the Registrar may do any of the following in relation to one or more permits held by the permit holder:
 - (a) revoke the permit (whether or not the permit is already suspended);
 - (b) suspend the permit for a specified period;
 - (c) impose conditions on the permit (whether or not the permit is already suspended).
- (3) In exercising powers under subsection (2), the Registrar must have regard to the matters specified in subsection 203(2).

Registrar must revoke or suspend in certain circumstances

- (4) If the Registrar is satisfied that any of the things mentioned in subsection (5) has happened since the first of the permits was issued, then the Registrar must take the following action in relation to each permit held by the permit holder:
 - (a) if the permit expires before the end of the minimum disqualification period—the Registrar must revoke the permit;
 - (b) if the permit does not expire before the end of the minimum disqualification period—the Registrar must either:
 - (i) revoke the permit; or
 - (ii) suspend the permit for a period that does not end earlier than the end of the minimum disqualification period.

The Registrar must also specify a disqualification period for the purposes of section 203. The disqualification period cannot be shorter than the minimum disqualification period.

- (5) The things are:

-
- (a) the permit holder was found, in proceedings under this Act, to have contravened section 229; or
 - (b) the permit holder, or another person, was ordered to pay a penalty under this Act in respect of a contravention of this Part by the permit holder; or
 - (c) a court, or other person or body, under a State or Territory industrial law, cancelled or suspended a right of entry for industrial purposes that the permit holder had under that law; or
 - (d) a court, or other person or body, under a State or Territory industrial law, disqualified the permit holder from exercising, or applying for, a right of entry for industrial purposes under that law; or
 - (e) the holder has, in exercising a right of entry under an OHS law, engaged in conduct that was not authorised by that law.
- (6) The Commission may make an order quashing or varying the revocation or suspension of a permit if:
- (a) the permit was revoked or suspended on grounds set out in paragraph (5)(b) or (e); and
 - (b) the Commission is satisfied, on application by the permit holder, that the revocation or suspension was harsh or unreasonable in the circumstances.

Definition

- (7) In this section:

minimum disqualification period, in relation to action by a Registrar under subsection (4) (the ***current action***), means:

- (a) if a Registrar has never previously taken action against the permit holder under that subsection—the period of 3 months starting when the current action is taken; or
- (b) if a Registrar has previously taken action against the permit holder under that subsection on only one occasion—the period of 12 months starting when the current action is taken; or
- (c) if a Registrar has previously taken action against the permit holder under that subsection on at least 2 occasions—the period of 5 years starting when the current action is taken.

206 Revoked etc. permit must be returned to Registrar

- (1) If any of the following happens to a permit, then the permit holder must within 7 days return the permit to a Registrar:
 - (a) the permit is revoked;
 - (b) the permit expires;
 - (c) the permit is suspended;
 - (d) conditions are imposed on the permit after it is issued.

- (2) Subsection (1) is a civil remedy provision.

Note: See Division 8 for enforcement.

- (3) In the case of a suspended permit, a Registrar must, on application by the permit holder or the permit holder's organisation, return the permit to the permit holder after the end of the suspension period if the Registrar is satisfied that the permit is then still in force.

Note: In the meantime the permit might have been revoked or might have expired.

207 Extra conditions to be endorsed on permit

If conditions are imposed on a permit by a Registrar under section 205 or by the Commission under section 231, then the permit ceases to have effect until the Registrar endorses those conditions on the permit.

Division 4—Right of entry to investigate suspected breaches

208 Right of entry to investigate breach

Right of entry for breach of Commonwealth industrial law etc.

- (1) If a permit holder for an organisation suspects, on reasonable grounds, that a breach has occurred, or is occurring, of:
 - (a) this Act; or
 - (b) an AWA; or
 - (c) an award or collective agreement or an order of the Commission under this Act, being an award, collective agreement or order that is binding on the permit holder's organisation; or

(ca) an employee collective agreement, or an employer greenfields agreement, that is binding on an employee who is a member of the permit holder's organisation;

then, for the purpose of investigating the suspected breach, the permit holder may, during working hours, enter premises if:

(d) work is being carried out on the premises by one or more employees who are members of the permit holder's organisation; and

(e) the suspected breach relates to, or affects, that work or any of those employees.

No right to investigate AWA breach unless employee requests

(2) Paragraph (1)(b) does not apply unless the employee who is a party to the AWA makes a written request to the organisation to investigate the breach.

209 Rights of permit holder after entering premises

(1) This section applies if a permit holder has entered premises under section 208 for the purpose of investigating a suspected breach.

Inspection of work etc. and interviewing employees

(2) While on the premises, the permit holder may, for the purpose of investigating the suspected breach:

(a) during working hours, inspect or view any work, material, machinery, or appliance, that is relevant to the suspected breach; and

(b) during working hours, interview the following persons about the suspected breach:

(i) employees who are members of the permit holder's organisation;

(ii) employees who are eligible to become members of the permit holder's organisation.

(3) For the avoidance of doubt, a refusal or failure by a person to participate in an interview under this section is not to be treated as conduct covered by section 149.1 of the *Criminal Code*.

Inspection of records while on the premises

- (4) While on the premises, the permit holder may, for the purpose of investigating the suspected breach, require an affected employer to allow the permit holder, during working hours, to inspect and make copies of, any records relevant to the suspected breach (other than non-member records) that:
- (a) are kept on the premises by the employer; or
 - (b) are accessible from a computer that is kept on the premises by the employer.

Inspection of records at later time

- (5) The permit holder may, for the purpose of investigating the suspected breach, by notice in writing, require an affected employer, on a later day or days specified in the notice:
- (a) to produce, or allow access to, all records, or particular records, relevant to the suspected breach (other than non-member records), either at the premises or at another place that is agreed between the permit holder and the employer; and
 - (b) to allow the permit holder, during working hours, to inspect and make copies of, any of those records.

The permit holder may give the notice while on the premises or within 5 days after the day on which the permit holder entered the premises.

- (6) A day specified in a notice to an employer under subsection (5) cannot be earlier than 14 days after the notice is given to the employer.
- (7) Before issuing a requirement to an affected employer under subsection (4) or (5), the permit holder must produce the permit holder's authority documents for inspection by the employer.
- (8) If a permit holder has given a notice to an employer under subsection (5) requiring the employer to produce, or allow access to, records at the premises, then the permit holder is entitled to enter the premises during working hours for the purpose of inspecting and copying the records in accordance with the notice.

Note: The *Privacy Act 1998* has rules about the disclosure of personal information.

Application to Commission for access to non-member records

- (9) The permit holder may, for the purposes of investigating the suspected breach, apply to the Commission for either or both of the following orders:
- (a) an order to allow the permit holder to enter the premises and to inspect and make copies of non-member records that are relevant to the suspected breach;
 - (b) an order to require an affected employer to produce, or allow access to, such records for inspection and copying.
- (10) The Commission may make such an order if it is satisfied that the order is necessary to investigate the suspected breach. Before doing so, the Commission must have regard to the conditions (if any) that apply to the permit holder's permit.
- (11) An application for an order under subsection (9):
- (a) must be in accordance with the regulations; and
 - (b) must set out the grounds on which the application is made.

Definitions

- (12) In this section:

non-member record means a record that:

- (a) relates to the employment of a person who is not a member of the permit holder's organisation; and
- (b) does not also relate to the employment of a person who is a member of the permit holder's organisation.

record relevant to the suspected breach means a record:

- (a) that is relevant to the suspected breach; and
- (b) that is of the following kind:
 - (i) a time sheet;
 - (ii) a pay sheet;
 - (iii) any other record or document, other than an AWA.

210 Limitation on rights—entry notice or exemption certificate

- (1) Section 208 does not authorise entry to premises unless:
- (a) the conditions in subsection (2) of this section are satisfied;
- or

- (b) the conditions in subsection (3) of this section are satisfied.
- (2) The conditions are:
 - (a) the permit holder gave an entry notice to the occupier of the premises and gave the notice during working hours at least 24 hours, but not more than 14 days, before the entry; and
 - (b) the entry notice specifies section 208 as the section that authorises the entry; and
 - (c) the entry notice specifies particulars of the suspected breach or breaches; and
 - (d) the entry is on a day specified in the entry notice.
- (3) The conditions are:
 - (a) the entry is on a day specified in an exemption certificate under section 211 and the premises are the premises specified in the exemption certificate; and
 - (b) the permit holder gave a copy of the exemption certificate to the occupier of the premises not more than 14 days before the entry.
- (4) Conduct after entry is not authorised by section 209 unless the conduct is for the purpose of investigating a suspected breach identified in the permit holder's authority documents.

211 Exemption from requirement to provide entry notice

- (1) An organisation may apply to a Registrar for an exemption certificate in respect of the entry onto premises under section 208 to investigate a suspected breach.
- (2) If the Registrar is satisfied that there are reasonable grounds for believing that advance notice of entry onto the premises under section 208 might result in the destruction, concealment or alteration of relevant evidence, then the Registrar must issue an exemption certificate in respect of entry onto those premises.
- (3) An exemption certificate must:
 - (a) specify the premises to which it applies; and
 - (b) specify the organisation to which it relates; and
 - (c) specify the day or days on which it operates; and
 - (d) specify particulars of the suspected breach or breaches to which it relates; and

-
- (e) specify section 208 as the section that authorises the entry.
 - (4) The regulations may make provision in relation to the following matters:
 - (a) the form of an application for an exemption certificate;
 - (b) the form of an exemption certificate.

212 Limitation on rights—failure to comply with requests of occupier or affected employer

- (1) This Division does not authorise a permit holder to enter, or remain on, premises if the permit holder fails to produce the permit holder's authority documents for inspection when requested to do so by an affected employer or by the occupier of the premises.
- (2) This Division does not authorise a permit holder to enter, or remain on, premises if:
 - (a) an affected employer or the occupier of the premises requests the permit holder to comply with an occupational health and safety requirement that applies to the premises; and
 - (b) the request is a reasonable request; and
 - (c) the permit holder fails to comply with the request.

Note: The Commission may make an order under section 232 if the request is unreasonable.

- (3) This Division does not authorise a permit holder to enter, or remain on, premises if:
 - (a) an affected employer or the occupier of the premises requests the permit holder to do either or both of the following:
 - (i) to conduct interviews in a particular room or area of the premises;
 - (ii) to take a particular route to reach a particular room or area of the premises; and
 - (b) the request is a reasonable request; and
 - (c) the permit holder fails to comply with the request.

Note: The Commission may make an order under section 232 if the request is unreasonable.

- (4) For the purposes of subsection (3), if an affected employer or the occupier requests the permit holder to hold discussions in a particular room or area, or to take a particular route to reach a

particular room or area, the request is not unreasonable only because it is not the room, area or route that the permit holder would have chosen.

213 Limitation on rights—residential premises

This Division does not authorise a person to enter any part of premises that is used for residential purposes.

214 Limitation on rights—permit conditions

- (1) A permit holder's rights under this Division in respect of a permit are subject to any conditions that apply to the permit.
- (2) Subsection (1) does not apply to rights of a permit holder under an order by the Commission under section 209.

215 Burden of proving reasonable grounds for suspecting breach

Whenever it is relevant to determine whether a permit holder had reasonable grounds for suspecting a breach, as mentioned in section 208, the burden of proving the existence of reasonable grounds lies on the person asserting the existence of those grounds.

Division 5—Entry for OHS purposes

216 OHS entries to which this Division applies

- (1) This Division has effect in relation to a right to enter premises under an OHS law if:
 - (a) the premises are occupied or otherwise controlled by:
 - (i) a constitutional corporation; or
 - (ii) the Commonwealth; or
 - (b) the premises are located in a Territory; or
 - (c) the premises are, or are located in, a Commonwealth place;
or
 - (d) the right relates to requirements to be met by:
 - (i) a constitutional corporation or the Commonwealth in its capacity as an employer; or
 - (ii) an employee of a constitutional corporation or the Commonwealth; or

- (iii) a contractor providing services for a constitutional corporation or the Commonwealth; or
 - (e) the right relates to conduct engaged in, or activity undertaken or controlled, by:
 - (i) a constitutional corporation or the Commonwealth in its capacity as an employer; or
 - (ii) an employee of a constitutional corporation or the Commonwealth; or
 - (iii) a contractor providing services for a constitutional corporation or the Commonwealth; or
 - (f) the exercise of the right will have a direct effect on:
 - (i) a constitutional corporation or the Commonwealth in its capacity as an employer; or
 - (ii) an employee of a constitutional corporation or the Commonwealth; or
 - (iii) a contractor providing services for a constitutional corporation or the Commonwealth.
- (2) In this section:
- constitutional corporation* includes:
- (a) a Commonwealth authority; and
 - (b) a body corporate incorporated in a Territory.

217 Permit required for OHS entry

- (1) An official of an organisation who has a right under an OHS law to enter premises must not exercise that right unless the official:
 - (a) holds a permit under this Part; and
 - (b) exercises the right during working hours.
- (2) Subsection (1) is a civil remedy provision.

Note: See Division 8 for enforcement.

218 Rights to inspect employment records after entering premises

- (1) A person who:
 - (a) is required to enter premises under an OHS law in accordance with section 217; and
 - (b) has a right under the OHS law to inspect or otherwise access employment records on the premises;
-

must not exercise the right unless he or she has complied with subsection (2).

(2) At least 24 hours before the entry, the person must have given the occupier of the premises written notice of his or her intention to exercise the right and the reasons for doing so.

(3) Subsection (1) is a civil remedy provision.

Note: See Division 8 for enforcement.

Definition

(4) In this section:

employment record means a record relating to the employment of an employee:

(a) that relates to any of the following matters:

- (i) hours of work;
- (ii) overtime;
- (iii) remuneration or other benefits;
- (iv) leave;
- (v) superannuation contributions;
- (vi) termination of employment;
- (vii) type of employment (for example, permanent, temporary, casual, full-time or part-time);
- (viii) personal details of the employee;
- (ix) any other matter prescribed by the regulations; or

(b) that sets out the kind of industrial instrument that regulates the employment of the employee (for example, an AWA, a collective agreement, an award or a contract of employment).

219 Limitation on OHS entry—failure to comply with requests of occupier

(1) A permit holder must not enter, or remain on, premises under an OHS law unless the permit holder produces his or her permit for inspection when requested to do so by the occupier of the premises.

(2) Subsection (1) is a civil remedy provision.

Note: See Division 8 for enforcement.

-
- (3) A permit holder must not enter, or remain on, premises under an OHS law if:
- (a) the occupier of the premises requests the permit holder to comply with an occupational health and safety requirement that applies to the premises; and
 - (b) the request is a reasonable request; and
 - (c) the permit holder fails to comply with the request.

Note: The Commission may make an order under section 232 if the request is unreasonable.

- (4) Subsection (3) is a civil remedy provision.

Note: See Division 8 for enforcement.

220 Limitation on OHS entry—permit conditions

A permit holder's right to enter premises under an OHS law in accordance with section 217 is subject to any conditions that apply to the permit.

Division 6—Right of entry to hold discussions with employees

221 Right of entry to hold discussions with employees

A permit holder for an organisation may enter premises for the purposes of holding discussions with any eligible employees who wish to participate in those discussions. For this purpose, *eligible employee* means any employee who:

- (a) on the premises, carries out work that is covered by an award or collective agreement that is binding on the permit holder's organisation; and
- (b) is a member of the permit holder's organisation or is eligible to become a member of that organisation.

222 Limitation on rights—times of entry and discussions

The permit holder may only enter the premises under section 221 during working hours and may only hold the discussions during the employees' mealtime or other breaks.

223 Limitation on rights—conscientious objection certificates

- (1) This Division does not authorise entry to premises, or subsequent conduct on the premises, if all of the following conditions are satisfied:
 - (a) no more than 20 employees are employed to work at the premises;
 - (b) all the employees at the premises are employed by an employer who is the holder of a conscientious objection certificate in force under section 180 of the Registration and Accountability of Organisations Schedule, that has been endorsed by a Registrar under subsection (2) of this section, or under section 285C of the repealed Part IX;
 - (c) none of the employees employed at the premises is a member of an organisation.
- (2) A Registrar may, on the application of an employer, endorse a certificate issued to that employer under section 180 of the Registration and Accountability of Organisations Schedule if the Registrar is satisfied that the employer is a practising member of a religious society or order whose doctrines or beliefs preclude membership of an organisation or body other than the religious society or order of which the employer is a member.
- (3) An application under subsection (2) may be made at the time of an application under section 180 of the Registration and Accountability of Organisations Schedule or at any later time.
- (4) The endorsement of a Registrar under subsection (2) remains in force for the period that the certificate remains in force.

Note: A certificate issued under section 180 of the Registration and Accountability of Organisations Schedule remains in force for the period (not exceeding 12 months) specified in the certificate, but may be renewed. A Registrar's endorsement under subsection (2) does not remain in force when a certificate is renewed, but a new application for endorsement may be made.

224 Limitation on rights—entry notice

This Division does not authorise entry to premises, or subsequent conduct on the premises, unless all the following conditions are satisfied:

- (a) the permit holder gave an entry notice to the occupier of the premises at least 24 hours, but not more than 14 days, before the entry;
- (b) the entry notice specifies section 221 as the section that authorises the entry;
- (c) the entry is on a day specified in the entry notice.

225 Limitation on rights—residential premises

This Division does not authorise a person to enter any part of premises that is used for residential purposes.

226 Limitation on rights—failure to comply with requests of occupier or affected employer

- (1) This Division does not authorise a permit holder to enter, or remain on, premises if the permit holder fails to produce the permit holder's authority documents for inspection when requested to do so by an affected employer or by the occupier of the premises.
- (2) This Division does not authorise a permit holder to enter, or remain on, premises if:
 - (a) an affected employer or the occupier of the premises requests the permit holder to comply with an occupational health and safety requirement that applies to the premises; and
 - (b) the request is a reasonable request; and
 - (c) the permit holder fails to comply with the request.

Note: The Commission may make an order under section 232 if the request is unreasonable.

- (3) This Division does not authorise a permit holder to enter, or remain on, premises if:
 - (a) an affected employer or the occupier of the premises requests the permit holder to do either or both of the following:
 - (i) to hold discussions in a particular room or area of the premises;
 - (ii) to take a particular route to reach a particular room or area of the premises; and
 - (b) the request is a reasonable request; and
 - (c) the permit holder fails to comply with the request.

Note: The Commission may make an order under section 232 if the request is unreasonable.

- (4) For the purposes of subsection (3), if an affected employer or the occupier requests the permit holder to hold discussions in a particular room or area, or to take a particular route to reach a particular room or area, the request is not unreasonable only because it is not the room, area or route that the permit holder would have chosen.

227 Limitation on rights—permit conditions

A permit holder's rights under this Division in respect of a permit are subject to any conditions that apply to the permit.

Division 7—Prohibitions

228 Hindering, obstruction etc. in relation to this Part

- (1) A permit holder exercising, or seeking to exercise, rights:
- (a) under section 208, 209 or 221; or
 - (b) under an OHS law in accordance with section 217 or 218;
- must not intentionally hinder or obstruct any person, or otherwise act in an improper manner.
- (2) Subsection (1) is a civil remedy provision.
- Note: See Division 8 for enforcement.
- (3) A person must not refuse or unduly delay entry to premises by a permit holder who is entitled to enter the premises:
- (a) under section 208, subsection 209(8) or (10) or section 221; or
 - (b) under an OHS law in accordance with section 217.
- (4) Subsection (3) is a civil remedy provision.
- Note: See Division 8 for enforcement.
- (5) An employer must not refuse or fail to comply with a requirement under subsection 209(4) or (5).
- (6) Subsection (5) is a civil remedy provision.
- Note: See Division 8 for enforcement.

(7) A person must not otherwise intentionally hinder or obstruct a permit holder exercising rights:

- (a) under section 208, 209 or 221; or
- (b) under an OHS law in accordance with section 217 or 218.

(8) Subsection (7) is a civil remedy provision.

Note: See Division 8 for enforcement.

(9) To avoid doubt, a failure to agree on a place as mentioned in paragraph 209(5)(a) does not constitute hindering or obstructing a permit holder exercising rights under section 209.

(10) Without limiting subsection (7), that subsection:

- (a) extends to hindering or obstructing that occurs after the entry notice is given but before the permit holder enters the premises; and
- (b) applies whether or not the person who is hindering or obstructing knows at the time which permit holder will be exercising the rights in respect of the entry notice.

Note: For example, if an entry notice is given to the occupier and a person then destroys, conceals or manufactures evidence relating to the suspected breach, that conduct would amount to hindering or obstructing.

229 Misrepresentations about right of entry

(1) A person must not, in the circumstances mentioned in subsection (2), engage in conduct:

- (a) with the intention of giving a second person the impression;
or
- (b) reckless as to whether a second person would get the impression;

that the first person, or a third person, is authorised by this Part to do a particular thing.

(2) The circumstances are:

- (a) the first person or the third person (as the case requires) is not authorised by this Part to do that thing; and
- (b) the first person knows, or has reasonable grounds to believe, that the first person or the third person (as the case requires) is not authorised by this Part to do that thing.

- (3) Subsection (1) is a civil remedy provision.

Note: See Division 8 for enforcement.

Division 8—Enforcement

230 Penalties etc. for contravention of civil remedy provisions

- (1) The Court, on application by an eligible person, may make one or more of the following orders in relation to a person (the *defendant*) who has contravened a civil remedy provision of this Part:

- (a) an order imposing a pecuniary penalty on the defendant;
- (b) an order requiring the defendant to pay a specified amount to another person as compensation for damage suffered by the other person as a result of the contravention;
- (c) any other order that the Court considers appropriate.

- (2) The maximum pecuniary penalty under paragraph (1)(a) is 300 penalty units if the defendant is a body corporate and otherwise 60 penalty units.

- (3) The orders that may be made under paragraph (1)(c) include:

- (a) injunctions; and
- (b) any other orders that the Court considers necessary to stop the conduct or remedy its effects.

- (4) Each of the following is an *eligible person* for the purposes of this section:

- (a) a workplace inspector;
- (b) a person affected by the contravention;
- (c) a person prescribed by the regulations for the purposes of this paragraph.

- (5) A regulation prescribing persons for the purposes of paragraph (4)(c) may provide that a person is prescribed only in relation to circumstances specified in the regulation.

Note: Division 4 of Part VIII contains other provisions relevant to civil remedies.

Division 9—Powers of the Commission

231 Orders by Commission for abuse of system

- (1) If the Commission is satisfied that an organisation, or any official of an organisation, has abused the rights conferred by this Part, then the Commission may make whatever orders it considers appropriate to restrict the rights of the organisation, or officials of the organisation, under this Part.
- (2) The Commission may make the orders:
 - (a) on its own initiative; or
 - (b) on application by a workplace inspector.
- (3) The orders may include:
 - (a) an order that revokes or suspends some or all of the permits that have been issued in respect of the organisation; and
 - (b) an order that imposes limiting conditions on some or all of the permits that have been issued in respect of the organisation or that might in future be issued in respect of the organisation; and
 - (c) an order that bans, for a specified period, the issue of permits in respect of the organisation, either generally or to specified persons.

For the purposes of this subsection, *limiting condition* means a condition that limits the circumstances in which a permit has effect.

- (4) An organisation, or an official of an organisation, who is subject to an order under this section must comply with the order.
- (5) Subsection (4) is a civil remedy provision.

Note: See Division 8 for enforcement.
- (6) The powers of the Commission under this section are exercisable by:
 - (a) the President; or
 - (b) a Presidential Member assigned by the President for the purposes of the matter concerned; or
 - (c) a Full Bench, if the President so directs.

- (7) Without limiting subsection (1), a permit holder abuses rights conferred by this Part if, in exercising rights under Division 6, the permit holder engages in recruitment conduct that is unduly disruptive, either because the permit holder's exercise of powers of entry is excessive in the circumstances or for some other reason.
- (8) In this section:
- recruitment conduct* means encouraging employees to become members of an organisation.

232 Unreasonable requests by occupier or affected employer

- (1) If the Commission is satisfied that:
- (a) an affected employer or the occupier of premises has made a request to a permit holder as mentioned in section 212, 219 or 226; and
 - (b) the request is not a reasonable request;
- then the Commission may make whatever orders it considers appropriate in respect of the rights of the organisation, or officials of the organisation, to investigate breaches as mentioned in section 208, to enter premises under an OHS law in accordance with section 217 or to hold discussions with employees as mentioned in section 221, as the case requires.
- Note: Unreasonable requests might amount to a breach of subsection 228(7).
- (2) Without limiting subsection (1), the Commission may order that, for a specified period, the permit holder who was exercising or seeking to exercise rights under section 209 or 221 or under an OHS law in accordance with section 217 or 218 is entitled to enter specified premises, or a specified part of specified premises, for a specified period, and exercise those rights.
- (3) The powers of the Commission under this section are exercisable by:
- (a) the President; or
 - (b) a Presidential Member assigned by the President for the purposes of the matter concerned; or
 - (c) a Full Bench, if the President so directs.
- (4) The Commission may make an order under this section on its own initiative or on application in accordance with the regulations.

233 Disputes about the operation of this Part

- (1) The Commission may make orders for the purposes of settling disputes about the operation of this Part.
- (2) The Commission may make orders under subsection (1) on application by:
 - (a) a permit holder; or
 - (b) a permit holder's organisation; or
 - (c) an affected employer; or
 - (d) an occupier of, or an employer who employs employees who carry out work on, OHS premises.
- (3) In making orders under subsection (1), the Commission:
 - (a) must have regard to fairness between the parties concerned; and
 - (b) must not confer rights that are additional to, or inconsistent with, rights exercisable under this Part.
- (4) However, the Commission does have power, under subsection (1), to:
 - (a) revoke or suspend a permit issued to a person under this Part; or
 - (b) impose limiting conditions on a permit issued to a person under this Part.

If the Commission does so, it may make any order that it considers appropriate, for the purpose of settling the dispute, about the issue of any further permit to the person, or of any permit or further permit to any other person, under this Part.

- (5) In this section:

limiting condition means a condition that limits the circumstances in which a permit has effect.

OHS premises means premises in relation to which a person must hold a permit in order to exercise a right of entry under an OHS law.

234 Powers of inspection

- (1) For the purposes of dealing with a proceeding under this Part, a member of the Commission may at any time during working hours do one or more of the following:
 - (a) enter prescribed premises;
 - (b) inspect or view any work, material, machinery, appliance, article, document or other thing on the prescribed premises;
 - (c) interview, on the prescribed premises, any employee who is usually engaged in work on the prescribed premises.
- (2) In this section:

prescribed premises means premises in relation to which a person must hold a permit in order to exercise a right of entry under:

- (a) this Part; or
- (b) an OHS law.

235 Parties to proceedings

The Commission may direct that parties be joined or struck out as parties to proceedings under this Part.

236 Kinds of orders

The orders that the Commission may make under this Part include the following:

- (a) orders by consent of the parties to the proceedings;
- (b) provisional or interim orders;
- (c) orders including, or varying orders to include, a provision to the effect that engaging in conduct in breach of a specified term of the order is to be taken to constitute the commission of a separate breach of the term on each day on which the conduct continues.

237 Relief not limited to claim

In making an order in proceedings under this Part, the Commission is not restricted to the specific relief claimed by the parties concerned, but may include in the order anything which the Commission considers necessary or expedient for the purposes of dealing with the proceeding.

238 Publishing orders

- (1) If the Commission makes an order under this Part, the Commission must promptly:
 - (a) reduce the order to writing that:
 - (i) is signed by at least one member of the Commission;
and
 - (ii) shows the day on which it is signed; and
 - (b) give to a Registrar:
 - (i) a copy of the order; and
 - (ii) a list specifying each party who appeared at the hearing of the proceeding concerned.
- (2) The Commission must ensure that an order under this Part is expressed in plain English and is easy to understand in structure and content.
- (3) A Registrar who receives a copy of an order under subsection (1) must promptly:
 - (a) provide a copy of:
 - (i) the order; and
 - (ii) any written reasons received by the Registrar for the order;
to each party shown on the list given to the Registrar under subparagraph (1)(b)(ii); and
 - (b) ensure that copies of each of the following are available for inspection at each registry:
 - (i) the order;
 - (ii) any written reasons received by the Registrar for the order.
- (4) The Industrial Registrar must ensure that the following are published as soon as practicable:
 - (a) an order under this Part;
 - (b) any written reasons for the order that are received by a Registrar.
- (5) If a member of the Commission ceases to be a member:
 - (a) after an order under this Part has been made by the Commission constituted by the member; but

- (b) before the order has been reduced to writing or before it has been signed by the member;
- a Registrar must reduce the order to writing, sign it and seal it with the seal of the Commission, and the order has effect as if it had been signed by the member of the Commission.

Part XA—Freedom of association

Division 1—Preliminary

239 Objects of Part

In addition to the object set out in section 3, this Part has the following objects:

- (a) to ensure that employers, employees and independent contractors are free to become, or not become, members of industrial associations;
- (b) to ensure that employers, employees and independent contractors are not discriminated against or victimised because they are, or are not, members or officers of industrial associations;
- (c) to provide effective relief to employers, employees and independent contractors who are prevented or inhibited from exercising their rights to freedom of association;
- (d) to provide effective remedies to penalise and deter persons who engage in conduct which prevents or inhibits employers, employees or independent contractors from exercising their rights to freedom of association.

240 Definitions

- (1) In this Part:

bargaining services means services provided by (or on behalf of) an industrial association in relation to an agreement, or a proposed agreement, under Part VB (including the negotiation, making, approval, lodgment, operation, extension, variation or termination of the agreement).

bargaining services fee means a fee (however described) payable:

- (a) to an industrial association; or

(b) to someone else in lieu of an industrial association; wholly or partly for the provision, or purported provision, of bargaining services, but does not include membership dues.

Commonwealth place means a place referred to in paragraph 52(i) of the Constitution, other than the seat of government.

conduct includes an omission.

Court means the Federal Court of Australia or the Federal Magistrates Court.

industrial association means:

- (a) an association of employees and/or independent contractors, or an association of employers, that is registered or recognised as such an association (however described) under an industrial law; or
 - (b) an association of employees and/or independent contractors a principal purpose of which is the protection and promotion of their interests in matters concerning their employment, or their interests as independent contractors, as the case requires; or
 - (c) an association of employers a principal purpose of which is the protection and promotion of their interests in matters concerning employment and/or independent contractors;
- and includes a branch of such an association, and an organisation.

industrial body means:

- (a) the Commission; or
- (b) a court or commission, however designated, exercising under an industrial law powers and functions corresponding to those conferred on the Commission by this Act; or
- (c) a court or commission, however designated, exercising under an industrial law powers and functions corresponding to those conferred on the Commission by the Registration and Accountability of Organisations Schedule.

industrial instrument means an award or agreement, however designated, that:

- (a) is made under or recognised by an industrial law; and
- (b) concerns the relationship between an employer and the employer's employees, or provides for the prevention or

settlement of a dispute between an employer and the employer's employees.

industrial law means this Act, the Registration and Accountability of Organisations Schedule or a law, however designated, of the Commonwealth or of a State or Territory that regulates the relationships between employers and employees or provides for the prevention or settlement of disputes between employers and employees.

objectionable provision has the meaning given by section 271.

office, in relation to an organisation or industrial association or a branch of an organisation or industrial association, has the meaning given by section 242.

officer, in relation to an industrial association, means:

- (a) a person who holds an office in the association; or
- (b) a delegate or other representative of the association; or
- (c) an employee of the association.

organisation includes a branch of an organisation.

threat means a threat of any kind, whether direct or indirect and whether express or implied.

- (2) For the purposes of this Part, the following conduct is taken to be conduct of an industrial association:
- (a) conduct of the committee of management of the industrial association;
 - (b) conduct of an officer or agent of the industrial association acting in that capacity;
 - (c) conduct of a member, or group of members, of the industrial association where the conduct is authorised by:
 - (i) the rules of the industrial association; or
 - (ii) the committee of management of the industrial association; or
 - (iii) an officer or agent of the industrial association acting in that capacity;
 - (d) conduct of a member of the industrial association, who performs the function of dealing with an employer on behalf

of the member and other members of the industrial association, acting in that capacity.

- (3) Paragraphs (2)(c) and (d) do not apply if:
- (a) a committee of management of the industrial association; or
 - (b) a person authorised by the committee; or
 - (c) an officer of the industrial association;
- has taken reasonable steps to prevent the action.
- (4) A reference in this Part, or in regulations made for the purposes of this Part, to an independent contractor is not confined to a natural person.

241 Meaning of industrial action

For the purposes of this Part, section 106A has effect as if the words *employer*, *employee* and *employment* had their ordinary meaning.

242 Meaning of office

- (1) In this Part:

office, in relation to an association, means:

- (a) an office of president, vice president, secretary or assistant secretary of the association; or
- (b) the office of a voting member of a collective body of the association, being a collective body that has power in relation to any of the following functions:
 - (i) the management of the affairs of the association;
 - (ii) the determination of policy for the association;
 - (iii) the making, alteration or rescission of rules of the association;
 - (iv) the enforcement of rules of the association, or the performance of functions in relation to the enforcement of such rules; or
- (c) an office the holder of which is, under the rules of the association, entitled to participate directly in any of the functions referred to in subparagraphs (b)(i) and (iv), other than an office the holder of which participates only in

accordance with directions given by a collective body or another person for the purpose of implementing:

- (i) existing policy of the association; or
- (ii) decisions concerning the association; or
- (d) an office the holder of which is, under the rules of the association, entitled to participate directly in any of the functions referred to in subparagraphs (b)(ii) and (iii); or
- (e) the office of a person holding (whether as trustee or otherwise) property:
 - (i) of the association; or
 - (ii) in which the association has a beneficial interest.

(2) In subsection (1):

association means an organisation or branch of an organisation, or an industrial association or branch of an industrial association.

(3) A reference in this Part to an office in an organisation or industrial association includes a reference to an office in a branch of the organisation or association.

Division 2—Conduct to which this Part applies

243 Application

Divisions 3 to 8 of this Part apply only to the extent provided in this Part.

244 Organisations

This Part applies to:

- (a) conduct by an organisation; and
- (b) conduct by an officer of an organisation acting in that capacity; and
- (c) conduct carried out with a purpose or intent relating to a person's membership or non-membership of an organisation.

245 Matters arising under this Act or the Registration and Accountability of Organisations Schedule

- (1) This Part applies to conduct carried out with a purpose or intent relating to a person's participation or non-participation (in any capacity) in:
 - (a) any proceedings under this Act; or
 - (b) any other activity provided for by this Act; or
 - (c) any proceedings under the Registration and Accountability of Organisations Schedule; or
 - (d) any other activity provided for by the Registration and Accountability of Organisations Schedule.
- (2) This Part applies to conduct carried out with a purpose or intent relating to:
 - (a) the fact that an award or a workplace agreement applies to a person's employment; or
 - (b) the fact that a person is bound by an award or a workplace agreement.

246 Constitutional corporations

- (1) This Part applies to the following conduct:
 - (a) conduct by a constitutional corporation;
 - (b) conduct against a constitutional corporation;
 - (c) conduct that adversely affects a constitutional corporation;
 - (d) conduct carried out with intent to adversely affect a constitutional corporation;
 - (e) conduct that directly affects a person in the capacity of:
 - (i) an employee, or prospective employee, of a constitutional corporation; or
 - (ii) a contractor, or prospective contractor, of a constitutional corporation;
 - (f) conduct carried out with intent to directly affect a person in the capacity of:
 - (i) an employee, or prospective employee, of a constitutional corporation; or
 - (ii) a contractor, or prospective contractor, of a constitutional corporation;

(g) conduct that consists of advising, encouraging or inciting a constitutional corporation:

- (i) to take, or not to take, particular action in relation to another person; or
- (ii) to threaten to take, or not to take, particular action in relation to another person.

(2) In this section:

constitutional corporation includes a body corporate incorporated in a Territory.

247 Commonwealth and Commonwealth authorities

This Part applies to the following conduct:

- (a) conduct by the Commonwealth or a Commonwealth authority;
- (b) conduct that affects, or is carried out with intent to affect, the Commonwealth, or a Commonwealth authority, in its relationships with its employees or contractors;
- (c) conduct that affects, or is carried out with intent to affect, a person in the capacity of an employee or contractor of the Commonwealth or of a Commonwealth authority.

248 Territories and Commonwealth places

This Part applies to conduct in a Territory or a Commonwealth place.

249 Extraterritorial extension

In Australia's exclusive economic zone

- (1) This Part, and the rest of this Act so far as it relates to this Part, extend to the following conduct in Australia's exclusive economic zone:
 - (a) conduct that:
 - (i) is by an organisation, an Australian-based employee or a group of persons including either an organisation or an Australian-based employee; and
 - (ii) affects adversely, or is intended to affect adversely, an Australian employer;
-

-
- (b) conduct that:
 - (i) is by an Australian employer or a group including an Australian employer; and
 - (ii) affects adversely, or is intended to affect adversely, an Australian-based employee, whether alone or with other persons;
 - (c) conduct that affects adversely, or is intended to affect adversely, either an independent contractor who has a connection with Australia that is prescribed for the purposes of this paragraph or a group including such an independent contractor.

On Australia's continental shelf outside exclusive economic zone

- (2) This Part, and the rest of this Act so far as it relates to this Part, extend to the following conduct outside the outer limits of Australia's exclusive economic zone and in, on or over a part of Australia's continental shelf prescribed by the regulations for the purposes of this subsection:
 - (a) conduct that:
 - (i) is by an organisation, an Australian-based employee or a group of persons including either an organisation or an Australian-based employee; and
 - (ii) affects adversely, or is intended to affect adversely, an Australian employer; and
 - (iii) meets the requirements prescribed by the regulations for that part of Australia's continental shelf;
 - (b) conduct that:
 - (i) is by an Australian employer or a group including an Australian employer; and
 - (ii) affects adversely, or is intended to affect adversely, an Australian-based employee, whether alone or with other persons; and
 - (iii) meets the requirements prescribed by the regulations for that part of Australia's continental shelf;
 - (c) conduct that:
 - (i) affects adversely, or is intended to affect adversely, either an independent contractor who has a connection with Australia that is prescribed for the purposes of this

subparagraph or a group including such an independent contractor; and

- (ii) meets the requirements prescribed by the regulations for that part of Australia's continental shelf.

Note: The regulations may prescribe different requirements relating to different parts of Australia's continental shelf. The regulations may need to do so to give effect to Australia's international obligations.

Outside Australia's exclusive economic zone and continental shelf

- (3) This Part, and the rest of this Act so far as it relates to this Part, extend to the following conduct outside Australia and neither in Australia's exclusive economic zone nor in, on or over a part of Australia's continental shelf described in subsection (2):
 - (a) conduct that:
 - (i) is by an organisation, an Australian-based employee or a group of persons including either an organisation or an Australian-based employee; and
 - (ii) affects adversely, or is intended to affect adversely, an Australian employer;
 - (b) conduct that:
 - (i) is by an Australian employer or a group including an Australian employer; and
 - (ii) affects adversely, or is intended to affect adversely, an Australian-based employee, whether alone or with other persons;
 - (c) conduct that affects adversely, or is intended to affect adversely, either an independent contractor who has a connection with Australia that is prescribed for the purposes of this paragraph or a group including such an independent contractor.

Definition

- (4) In this section:

this Act includes the Registration and Accountability of Organisations Schedule and regulations made under it.

Division 3—General prohibitions relating to freedom of association

250 Coercion

- (1) A person must not organise or take, or threaten to organise or take, any action against another person with intent to coerce the other person or a third person:
- (a) to become, or not become, an officer or member of an industrial association; or
 - (b) to remain, or cease to be, an officer or member of an industrial association.
- (2) Subsection (1) is a civil remedy provision.

Note: See Division 9 for enforcement.

251 False or misleading statements about membership

- (1) A person must not make a false or misleading representation about:
- (a) another person's obligation:
 - (i) to be, or become, an officer or member of an industrial association; or
 - (ii) not to be, not to become or to cease to be, an officer or member of an industrial association; or
 - (b) another person's obligation to disclose whether he or she, or a third person, is, or has been, an officer or member of an industrial association or of a particular industrial association; or
 - (c) the need for another person to be, or not to be, an officer or member of an industrial association, or of a particular industrial association, in order for the other person to obtain the benefit of an industrial instrument.
- (2) Subsection (1) is a civil remedy provision.

Note: See Division 9 for enforcement.

252 Industrial action for reasons relating to membership

- (1) A person must not organise or take, or threaten to organise or take, industrial action against another person for the reason that, or for reasons that include the reason that, a person:

- (a) is, has been, proposes to become or has at any time proposed to become an officer or member of an industrial association; or
 - (b) is not, does not propose to become or proposes to cease to be, an officer or member of an industrial association.
- (2) Subsection (1) is a civil remedy provision.

Note: See Division 9 for enforcement.

Division 4—Conduct by employers etc.

253 Dismissal etc. of members of industrial associations etc.

- (1) An employer must not, for a prohibited reason, or for reasons that include a prohibited reason, do or threaten to do any of the following:
- (a) dismiss an employee;
 - (b) injure an employee in his or her employment;
 - (c) alter the position of an employee to the employee's prejudice;
 - (d) refuse to employ another person as an employee;
 - (e) discriminate against another person in the terms or conditions on which the employer offers to employ the other person as an employee.
- (2) Subsection (1) is a civil remedy provision.
- Note: See Division 9 for enforcement.
- (3) For the purposes of paragraph (1)(d), an employer does not refuse to employ another person if the employer does not intend to employ anyone.
- (3A) An employer does not contravene subsection (1) because of paragraph 254(1)(i) unless the entitlement described in that paragraph is the sole or dominant reason for the employer doing any of the things described in paragraphs (1)(a), (b), (c), (d) and (e) of this section.
- (4) A person must not, for a prohibited reason, or for reasons that include a prohibited reason, do or threaten to do any of the following:
-

- (a) terminate a contract for services that he or she has entered into with an independent contractor;
 - (b) injure the independent contractor in relation to the terms and conditions of the contract for services;
 - (c) alter the position of the independent contractor to the independent contractor's prejudice;
 - (d) refuse to engage another person as an independent contractor;
 - (e) discriminate against another person in the terms or conditions on which the person offers to engage the other person as an independent contractor.
- (5) Subsection (4) is a civil remedy provision.
- Note: See Division 9 for enforcement.
- (6) For the purposes of paragraph (4)(d), a person does not refuse to engage another person if the person does not intend to engage anyone.
- (7) A person does not contravene subsection (4) because of paragraph 254(1)(i) unless the entitlement described in that paragraph is the sole or dominant reason for the person doing any of the things described in paragraphs (4)(a), (b), (c), (d) and (e) of this section.

254 Prohibited reasons

- (1) Conduct referred to in subsection 253(1) or (4) is for a ***prohibited reason*** if it is carried out because the employee, independent contractor or other person concerned:
- (a) is, has been, proposes to become or has at any time proposed to become an officer, delegate or member of an industrial association; or
 - (b) is not, does not propose to become or proposes to cease to be, a member of an industrial association; or
 - (c) in the case of a refusal to engage another person as an independent contractor—has one or more employees who are not, or do not propose to become, members of an industrial association; or
 - (d) has not paid, or does not propose to pay, a fee (however described) to an industrial association; or
 - (e) has refused or failed to join in industrial action; or

- (f) in the case of an employee—has refused or failed to agree or consent to, or vote in favour of, the making of an agreement to which an industrial association of which the employee is a member would be a party; or
- (g) has made, proposes to make or has at any time proposed to make an application to an industrial body for an order under an industrial law for the holding of a secret ballot; or
- (h) has participated in, proposes to participate in or has at any time proposed to participate in a secret ballot ordered by an industrial body under an industrial law; or
- (i) is entitled to the benefit of an industrial instrument, an order of an industrial body or the Australian Fair Pay and Conditions Standard; or
- (j) has made or proposes to make any inquiry or complaint to a person or body having the capacity under an industrial law to seek:
 - (i) compliance with that law; or
 - (ii) the observance of a person's rights under an industrial instrument; or
- (k) has participated in, proposes to participate in or has at any time proposed to participate in a proceeding under an industrial law; or
- (l) has given or proposes to give evidence in a proceeding under an industrial law; or
- (m) in the case of an employee, or an independent contractor, who is a member of an industrial association that is seeking better industrial conditions—is dissatisfied with his or her conditions; or
- (n) in the case of an employee or an independent contractor—has absented himself or herself from work without leave if:
 - (i) the absence was for the purpose of carrying out duties or exercising rights as an officer of an industrial association; and
 - (ii) the employee or independent contractor applied for leave before absenting himself or herself and leave was unreasonably refused or withheld; or
- (o) as an officer or member of an industrial association, has done, or proposes to do, an act or thing for the purpose of furthering or protecting the industrial interests of the industrial association, being an act or thing that is:

- (i) lawful; and
 - (ii) within the limits of an authority expressly conferred on the employee, independent contractor or other person by the industrial association under its rules; or
 - (p) in the case of an employee or independent contractor—has not paid, has not agreed to pay, or does not propose to pay, a bargaining services fee.
- (2) If:
- (a) a threat is made to engage in conduct referred to in subsection 253(1) or (4); and
 - (b) one of the prohibited reasons in subsection (1) of this section refers to a person doing or proposing to do a particular act, or not doing or proposing not to do a particular act; and
 - (c) the threat is made with the intent of dissuading or preventing the person from doing the act, or coercing the person to do the act, as the case requires;
- the threat is taken to have been made for that prohibited reason.

255 Inducements to cease membership etc. of industrial associations etc.

- (1) An employer, or a person who has engaged an independent contractor, must not (whether by threats or promises or otherwise) induce an employee, or the independent contractor, as the case requires:
- (a) to become an officer or member of an industrial association; or
 - (b) to remain an officer or member of an industrial association; or
 - (c) not to become an officer or member of an industrial association; or
 - (d) to cease to be an officer or member of an industrial association.

- (2) Subsection (1) is a civil remedy provision.

Note: See Division 9 for enforcement.

Division 5—Conduct by employees etc.

256 Cessation of work

- (1) An employee or independent contractor must not cease work in the service of his or her employer, or of the person who engaged the independent contractor, as the case requires, because the employer or person:
 - (a) is an officer or member of an industrial association; or
 - (b) is entitled to the benefit of an industrial instrument or an order of an industrial body; or
 - (c) has made or proposes to make any inquiry or complaint to a person or body having the capacity under an industrial law to seek:
 - (i) compliance with that law; or
 - (ii) the observance of a person's rights under an industrial instrument; or
 - (d) has participated in, proposes to participate in or has at any time proposed to participate in any proceedings under an industrial law; or
 - (e) has given evidence in a proceeding under an industrial law.
- (2) Subsection (1) is a civil remedy provision.

Note: See Division 9 for enforcement.

Division 6—Conduct by industrial associations etc.

257 Industrial associations acting against employers

- (1) An industrial association, or an officer or member of an industrial association, must not organise or take, or threaten to organise or take, industrial action against an employer because the employer is an officer or member of an industrial association.
- (2) Subsection (1) is a civil remedy provision.

Note: See Division 9 for enforcement.
- (3) An industrial association, or an officer or member of an industrial association, must not organise or take, or threaten to organise or take, industrial action against an employer with intent to coerce the employer:

- (a) to become an officer or member of an industrial association;
or
 - (b) to remain an officer or member of an industrial association;
or
 - (c) not to become an officer or member of an industrial association; or
 - (d) to cease to be an officer or member of an industrial association; or
 - (e) to pay a fee (however described) to an industrial association.
- (4) Subsection (3) is a civil remedy provision.
Note: See Division 9 for enforcement.
- (5) An industrial association, or an officer or member of an industrial association, must not:
- (a) advise, encourage or incite an employer; or
 - (b) organise or take, or threaten to organise or take, industrial action against an employer with intent to coerce the employer;
- to take action in relation to a person that would, if taken, contravene subsection 253(1).
- (6) Subsection (5) is a civil remedy provision.
Note: See Division 9 for enforcement.
- (7) An industrial association, or an officer or member of an industrial association, must not, because a member of the association has refused or failed to comply with a direction given by the association:
- (a) advise, encourage or incite an employer; or
 - (b) organise or take, or threaten to organise or take, industrial action against an employer with intent to coerce the employer;
- to prejudice the member in the member's employment or possible employment.
- (8) Subsection (7) is a civil remedy provision.
Note: See Division 9 for enforcement.

258 Industrial associations acting against employees etc.

(1) An industrial association, or an officer or member of an industrial association, must not take, or threaten to take, action having the effect, directly or indirectly, of prejudicing a person in the person's employment, or prospective employment, with intent:

- (a) to coerce the person to join in industrial action; or
- (b) to dissuade or prevent the person from making an application to an industrial body for an order under an industrial law for the holding of a secret ballot.

(2) Subsection (1) is a civil remedy provision.

Note: See Division 9 for enforcement.

(3) An industrial association, or an officer or member of an industrial association, must not:

- (a) take, or threaten to take, action having the effect, directly or indirectly, of prejudicing a person in the person's employment or prospective employment; or
- (b) advise, encourage or incite a person to take action having the effect, directly or indirectly, of prejudicing another person in the other person's employment or prospective employment;

for any of the following reasons, or for reasons that include any of the following reasons:

- (c) the person has not paid, has not agreed to pay, or does not propose to pay, a bargaining services fee;
- (d) the person is, has been, proposes to become, or has at any time proposed to become, an officer or member of an industrial association;
- (e) the person is not, does not propose to become or proposes to cease to be, a member of an industrial association;
- (f) the person has not paid, has not agreed to pay, or does not propose to pay, a fee (however described) to an industrial association;
- (g) the person has refused or failed to join in industrial action;
- (h) the person has made, or proposes to make, any inquiry or complaint to a person or body having the capacity under an industrial law to seek:
 - (i) compliance with that law; or

(ii) the observance of a person's rights under an industrial instrument.

(4) Subsection (3) is a civil remedy provision.

Note: See Division 9 for enforcement.

259 Industrial associations acting against members

- (1) An industrial association, or an officer or member of an industrial association, must not impose, or threaten to impose, a penalty, forfeiture or disability of any kind on a member of the association:
- (a) with intent to coerce the member to join in industrial action; or
 - (b) because the member has refused or failed to join in industrial action; or
 - (c) because the member has made, proposes to make, or has at any time proposed to make, an application to an industrial body for an order under an industrial law for the holding of a secret ballot; or
 - (d) because the member has participated in, proposes to participate in, or has at any time proposed to participate in, a secret ballot ordered by an industrial body under an industrial law; or
 - (e) because the member has made, or proposes to make, any inquiry or complaint to a person or body having the capacity under an industrial law to seek:
 - (i) compliance with that law; or
 - (ii) the observance of a person's rights under an industrial instrument; or
 - (f) because the member has refused or failed to agree or consent to, or vote in favour of, the making of an agreement to which the industrial association would be a party; or
 - (g) because the member has participated in, proposes to participate in, or has at any time proposed to participate in, a proceeding under an industrial law; or
 - (h) because the member has given, or proposes to give, evidence in a proceeding under an industrial law.

(2) Subsection (1) is a civil remedy provision.

Note: See Division 9 for enforcement.

260 Industrial associations acting against independent contractors etc.

(1) In this section:

discriminatory action, in relation to an eligible person, means:

- (a) a refusal to make use of, or to agree to make use of, services offered by the eligible person; or
- (b) a refusal to supply, or to agree to supply, goods or services to the eligible person; or
- (c) threatening to refuse as mentioned in paragraph (a) or (b).

eligible person means a person who is not an employee, but who:

- (a) is eligible to become a member of an industrial association; or
- (b) would be eligible to become a member of an industrial association if he or she were an employee.

(2) An industrial association, or an officer or member of an industrial association, must not:

- (a) advise, encourage or incite a person (whether an employer or not) to take discriminatory action against an eligible person because the eligible person, or any person employed or engaged by the eligible person:
 - (i) is, has been, proposes to become or has at any time proposed to become, a member of an industrial association; or
 - (ii) is not, proposes not to become or proposes to cease to be, a member of an industrial association; or
 - (iii) is a member of an industrial association who has refused or failed to comply with a direction given by the association; or
 - (iv) has not paid, or does not propose to pay, a fee (however described) to an industrial association; or
 - (v) has made or proposes to make any inquiry or complaint to a person or body having the capacity under an industrial law to seek compliance with that law; or
 - (vi) has made or proposes to make any inquiry or complaint to a person or body having the capacity under an industrial law to seek the observance of a person's rights under an industrial instrument; or

-
- (b) take, or threaten to take, industrial action against a person (whether an employer or not) with intent to coerce the person to take discriminatory action against an eligible person because the eligible person, or any person employed or engaged by the eligible person:
- (i) is, has been, proposes to become or has at any time proposed to become, a member of an industrial association; or
 - (ii) is not, proposes not to become or proposes to cease to be, a member of an industrial association; or
 - (iii) is a member of an industrial association who has refused or failed to comply with a direction given by the association; or
 - (iv) has not paid, or does not propose to pay, a fee (however described) to an industrial association; or
 - (v) has made or proposes to make any inquiry or complaint to a person or body having the capacity under an industrial law to seek compliance with that law; or
 - (vi) has made or proposes to make any inquiry or complaint to a person or body having the capacity under an industrial law to seek the observance of a person's rights under an industrial instrument; or
- (c) take, or threaten to take, industrial action against an eligible person with intent to coerce the eligible person, or any person employed or engaged by the eligible person:
- (i) to become, or to remain, a member of an industrial association; or
 - (ii) not to become, or not to remain, a member of an industrial association; or
 - (iii) to comply with a direction given by the association.
- (3) Subsection (2) is a civil remedy provision.
- Note: See Division 9 for enforcement.
- (4) For the avoidance of doubt, nothing in subsection (2) prevents an industrial association from entering into an agreement or arrangement with another person for the supply of goods or services to members of the industrial association (including the supply on particular terms or conditions).
-

- (5) An industrial association, or an officer or member of an industrial association, must not:
- (a) advise, encourage or incite a person (whether an employer or not) to take discriminatory action against an eligible person for a prohibited reason; or
 - (b) take, or threaten to take, industrial action against a person (whether an employer or not) with intent to coerce the person to take discriminatory action against an eligible person for a prohibited reason; or
 - (c) take, or threaten to take, industrial action against an eligible person for a prohibited reason.
- (6) Subsection (5) is a civil remedy provision.
- Note: See Division 9 for enforcement.
- (7) Conduct mentioned in subsection (5) is carried out for a *prohibited reason* if it is carried out because the eligible person concerned has not paid, has not agreed to pay, or does not propose to pay, a bargaining services fee.

261 Industrial associations acting against independent contractors etc. to encourage contraventions

- (1) An industrial association, or an officer or member of an industrial association, must not:
- (a) advise, encourage or incite a person; or
 - (b) organise or take, or threaten to organise or take, industrial action against a person with intent to coerce the person; to take action in relation to another person that would, if taken, contravene subsection 253(4).
- (2) Subsection (1) is a civil remedy provision.
- Note: See Division 9 for enforcement.

262 Industrial associations not to demand bargaining services fee

- (1) An industrial association, or an officer or member of an industrial association, must not demand (whether orally or in writing) payment of a bargaining services fee from another person.
- (2) Subsection (1) is a civil remedy provision.
-

Note: See Division 9 for enforcement.

- (3) Nothing in this section prevents an industrial association from demanding payment of a bargaining services fee that is payable to the association under a contract for the provision of bargaining services.
- (4) In this section:
 - demand* includes:
 - (a) purport to demand; and
 - (b) have the effect of demanding; and
 - (c) purport to have the effect of demanding.

263 Action to coerce person to pay bargaining services fee

- (1) An industrial association, or an officer or member of an industrial association, must not take, or threaten to take, action against another person with intent to coerce the person, or a third person, to pay a bargaining services fee.
- (2) Subsection (1) is a civil remedy provision.

Note: See Division 9 for enforcement.

264 Industrial associations not prevented from entering contracts

To avoid doubt, nothing in this Division prevents an industrial association from entering into a contract for the provision of bargaining services with a person who is not a member of the association.

Division 7—Conduct in relation to industrial instruments

265 Discrimination against employer in relation to industrial instruments

- (1) A person (the *first person*) must not discriminate against another person (the *second person*) on the ground that:
 - (a) the employment of the second person's employees is covered, or is not covered, by:
 - (i) the Australian Fair Pay and Conditions Standard; or
 - (ii) a particular kind of industrial instrument; or

- (iii) an industrial instrument made with a particular person;
or
- (b) it is proposed that the employment of the second person's employees be covered, or not be covered, by:
 - (i) a particular kind of industrial instrument; or
 - (ii) an industrial instrument made with a particular person.
- (2) Subsection (1) is a civil remedy provision.

Note: See Division 9 for enforcement.
- (3) Subsection (1) does not apply to conduct that is protected action (within the meaning of section 108).

Division 8—False or misleading representations about bargaining services fees etc.

266 False or misleading representations about bargaining services fees etc.

- (1) A person must not make a false or misleading representation about:
 - (a) another person's liability to pay a bargaining services fee; or
 - (b) another person's obligation to enter into an agreement to pay a bargaining services fee; or
 - (c) another person's obligation to become a member of an industrial association.
- (2) Subsection (1) is a civil remedy provision.

Note: See Division 9 for enforcement.

Division 9—Enforcement

267 Definition

In this Division:

person, in relation to a contravention of a civil remedy provision, includes an industrial association.

Note: A person who is involved in a contravention of a civil remedy provision is treated as having contravened that provision: see section 189.

268 Penalties etc. for contravention of civil remedy provisions

- (1) The Court, on application by an eligible person, may make one or more of the following orders in relation to a person (the *defendant*) who has contravened a civil remedy provision of this Part:
 - (a) an order imposing a pecuniary penalty on the defendant;
 - (b) an order requiring the defendant to pay a specified amount to another person as compensation for damage suffered by the other person as a result of the contravention;
 - (c) any other order that the Court considers appropriate.
- (2) The maximum pecuniary penalty under paragraph (1)(a) is 300 penalty units if the defendant is a body corporate and otherwise 60 penalty units.
- (3) The orders that may be made under paragraph (1)(c) include:
 - (a) injunctions; and
 - (b) any other orders that the Court considers necessary to stop the conduct or remedy its effects.
- (4) Each of the following is an *eligible person* for the purposes of this section:
 - (a) a workplace inspector;
 - (b) a person affected by the contravention;
 - (c) a person prescribed by the regulations for the purposes of this paragraph.
- (5) A regulation prescribing persons for the purposes of paragraph (4)(c) may provide that a person is prescribed only in relation to circumstances specified in the regulation.

Note: Division 4 of Part VIII contains other provisions relevant to civil remedies.

269 Conduct that contravenes Division 3 and another Division of this Part

If:

- (a) a person engages in conduct; and
- (b) the conduct contravenes both Division 3 and another Division of this Part;

the Court may make orders under section 268 in relation to only one of those contraventions.

270 Proof not required of the reason for, or the intention of, conduct

- (1) If:
 - (a) in an application under section 268 relating to a person's conduct, it is alleged that the conduct was, or is being, carried out for a particular reason or with a particular intent; and
 - (b) for the person to carry out the conduct for that reason or with that intent would constitute a contravention of this Part;it is presumed, in proceedings under this Division arising from the application, that the conduct was, or is being, carried out for that reason or with that intent, unless the person proves otherwise.
- (2) This section does not apply in relation to the granting of an interim injunction.

Note: See section 354A for interim injunctions.

Division 10—Objectionable provisions

271 Meaning of *objectionable provision*

- (1) For the purposes of this Division, each of the following provisions (however it is described in the document concerned) is an ***objectionable provision***:
 - (a) a provision that requires or permits any conduct that would contravene this Part, or that would contravene this Part if Division 2 were disregarded;
 - (b) a provision that directly or indirectly requires a person:
 - (i) to encourage another person to become, or remain, a member of an industrial association; or
 - (ii) to discourage another person from becoming, or remaining, a member of an industrial association;
 - (c) a provision that indicates support for persons being members of an industrial association;
 - (d) a provision that indicates opposition to persons being members of an industrial association;
 - (e) a provision that requires or permits payment of a bargaining services fee to an industrial association.
- (2) For the purpose of determining whether a provision is an objectionable provision, it does not matter whether that provision is void because of section 272.

(3) In this section:

permits includes:

- (a) purports to permit; and
- (b) has the effect of permitting; and
- (c) purports to have the effect of permitting.

requires includes:

- (a) purports to require; and
- (b) has the effect of requiring; and
- (c) purports to have the effect of requiring.

272 Objectionable provisions etc. in industrial instruments etc.

- (1) A provision of an award is void to the extent that it is an objectionable provision.
- (2) A provision of an industrial instrument, or an agreement or arrangement (whether written or unwritten), is void to the extent that it requires or permits, or has the effect of requiring or permitting, any conduct that would contravene this Part.

273 Removal of objectionable provisions from awards

- (1) Where, on application by a person mentioned in subsection (2), the Commission is satisfied that an award contains objectionable provisions, the Commission must vary the award so as to remove the objectionable provisions.
- (2) The application may be made by:
 - (a) an employer, employee or an organisation bound by the award; or
 - (b) an employee whose employment is subject to the award; or
 - (c) a workplace inspector.

Division 11—Miscellaneous

274 Freedom of association not dependent on certificate

- (1) A person's rights under this Part do not depend on whether the person is the holder of a conscientious objection certificate in force under section 180 of Schedule 1B to this Act.

(2) This section is enacted for the avoidance of doubt.

194 Paragraph 299(1)(d)

Omit “Commission; or”, substitute “Commission.”.

195 Paragraph 299(1)(e)

Repeal the paragraph.

196 At the end of section 299

Add:

Note 1: This section is not the only provision creating an offence relating to improper influence on a member of the Commission. Sections 135.1, 135.4, 139.1, 141.1 and 142.1 of the *Criminal Code* create offences of using various dishonest means (including bribery, providing benefits and making demands with menaces) to influence a Commonwealth public official in the performance of his or her duties.

Note 2: This section is not the only provision creating an offence relating to interference with a witness in a proceeding before the Commission. Sections 301 and 303 of this Act and sections 36A, 37, 38 and 40 of the *Crimes Act 1914* also do so. Section 39 of that Act also makes it an offence to destroy evidence that may be required in such a proceeding.

Contravening an order of the Commission

(3) A person commits an offence if:

- (a) the Commission has made an order under this Act (other than an order under Part VI (Awards)) or the Registration and Accountability of Organisations Schedule; and
- (b) the order binds the person; and
- (c) the person engages in conduct; and
- (d) the conduct contravenes the order.

Penalty: Imprisonment for 12 months.

(4) In subsection (3):

engage in conduct means:

- (a) do an act; or
- (b) omit to perform an act.

Publishing false allegation of misconduct affecting Commission

- (5) A person commits an offence if:
- (a) the person publishes a statement; and
 - (b) the statement implies or expressly states there was misconduct by a member (whether identified or not) of the Commission in relation to the performance of the functions, or exercise of the powers, of the Commission; and
 - (c) there was not such misconduct as implied or stated by the statement; and
 - (d) the publication is likely to have a significant adverse effect on public confidence that the Commission is properly performing its functions and exercising its powers.

Penalty: Imprisonment for 12 months.

Note: The following heading to subsection 299(1) is inserted “*General offences*”.

197 Section 300

Omit “119(1)”, substitute “44M(1)”.

198 Section 305A

Repeal the section.

199 Section 307

Repeal the section, substitute:

307 False statement in application for protected action ballot order

A person commits an offence if:

- (a) the person makes, or joins with other persons in making, an application for a protected action ballot order under Division 4 of Part VC; and
- (b) the application contains a statement that is false or misleading in a material particular.

Penalty: 30 penalty units.

200 Section 308

Repeal the section.

201 Subsections 317(1) and (1A)

Repeal the subsections.

202 Subsections 317(2), (3) and (4)

After “in relation to a ballot”, insert “ordered under Division 4 of Part VC”.

Note: The heading to section 317 is replaced by the heading “**Offences in relation to secret ballots ordered under Division 4 of Part VC**”.

203 Subsection 317(5)

Repeal the subsection.

204 Section 338

Omit “certified”, substitute “collective”.

205 Subsection 347(1)

Omit “shall”, substitute “must”.

206 After subsection 347(1)

Insert:

(1A) Despite subsection (1), if a court hearing a proceeding (including an appeal) in a matter arising under this Act (other than an application under section 170CP) is satisfied that a party to the proceeding has, by an unreasonable act or omission, caused another party to the proceeding to incur costs in connection with the proceeding, the court may order the first-mentioned party to pay some or all of those costs.

207 Subsection 347(2)

Omit “subsection (1)”, substitute “subsections (1) and (1A)”.

208 After section 349

Insert:

349A Signature on behalf of body corporate

For the purposes of this Act, a document may be signed on behalf of a body corporate by a duly authorised officer of the body corporate and need not be made under the body corporate’s seal.

209 After section 352

Insert:

352A Variation of workplace agreements on grounds of sex discrimination

- (1) Subsections 119B(2), (3), (4) and (7) apply in relation to a workplace agreement, as if a reference in those subsections to an award or a term of an award were a reference to a workplace agreement or a term of a workplace agreement.
- (2) Before taking action under subsections 119B(2) or (4) as applied by force of subsection (1) of this section, the Commission must give the persons bound by the agreement and the employees whose employment is subject to the agreement an opportunity to amend the agreement so as to remove the discrimination.

352B Court's powers in relation to unfair contracts with independent contractors

- (1) In this section and in section 352C:

contract means:

- (a) a contract for services that:
 - (i) is binding on an independent contractor; and
 - (ii) relates to the performance of work by the independent contractor, other than work for the private and domestic purposes of the other party to the contract; and
- (b) any condition or collateral arrangement relating to such a contract.

Note: The meaning of *contract* is limited by section 352D for constitutional reasons.

- (2) Application may be made to the Court to review a contract on either or both of the following grounds:
 - (a) the contract is unfair;
 - (b) the contract is harsh.
- (3) An application under subsection (2) may be made only by:
 - (a) a party to the contract; or

- (b) an organisation of employees of which the independent contractor is (or has applied to become) a member, if it is acting with the written consent of the independent contractor; or
 - (c) an organisation or association of employers of which the person contracting for the services is (or has applied to become) a member, if it is acting with the written consent of the person.
- (4) In reviewing the contract, the Court may have regard to:
- (a) the relative strength of the bargaining positions of the parties to the contract and, if applicable, any persons acting on behalf of the parties; and
 - (b) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, a party to the contract; and
 - (c) whether the contract provides total remuneration that is, or is likely to be, less than that of an employee performing similar work; and
 - (d) any other matter that the Court thinks relevant.
- (5) If the Court forms the opinion that a ground referred to in subsection (2) is established in relation to the whole or part of the contract, it must record its opinion, stating whether the opinion relates to the whole or a specified part of the contract.
- (6) The Court may form the opinion that a ground referred to in subsection (2) is established in relation to the whole or part of the contract even if the ground was not canvassed in the application.
- (7) The Court must exercise its powers under this section in a way that furthers the objects of this Act as far as practicable.

352C Court may make orders about unfair contracts

- (1) If the Court records an opinion under section 352B in relation to a contract, it may make one or more of the following orders in relation to the opinion:
- (a) an order setting aside the whole or part of the contract;
 - (b) an order varying the contract.

- (2) An order may only be made for the purpose of placing the parties to the contract as nearly as practicable on such a footing that the ground on which the opinion is based no longer applies.
- (3) While the application is pending, the Court may make an interim order if it thinks it is desirable to do so to preserve the position of a party to the contract.
- (4) An order takes effect from the date of the order or a later date specified in the order.
- (5) A party to the contract may apply to the Court to enforce an order by injunction or otherwise as the Court thinks fit.
- (6) This section does not limit any other rights of a party to the contract.

352D Application of sections 352B and 352C

- (1) Sections 352B and 352C apply only as follows:
 - (a) in relation to a contract to which a constitutional corporation is a party;
 - (b) in relation to a contract entered into by a constitutional corporation for the purposes of the business of the corporation;
 - (c) in relation to a contract relating to work in trade or commerce to which paragraph 51(i) of the Constitution applies;
 - (d) in relation to a contract so far as it affects matters that take place in or are otherwise connected with a Territory;
 - (e) in relation to a contract to which the Commonwealth or a Commonwealth authority is a party.
- (2) In this section:

contract has the same meaning as in section 352B.

210 Paragraph 353A(1)(a)

Omit “persons under an award, a certified agreement or an AWA”, substitute “employees”.

210A Subsection 353A(2)

Omit “persons employed under an award, a certified agreement or an AWA to issue pay slips to those persons”, substitute “employees to issue pay slips to those employees”.

211 After section 354

Insert:

354A Interim injunctions

If, under a provision of this Act, a court may grant an injunction, the court may, if in its opinion it is desirable to do so, grant an interim injunction pending its decision on the granting of an injunction.

212 After section 355

Insert:

355A Powers of courts

A provision of this Act conferring a power on a court does not affect any other power of the court conferred by this Act or otherwise.

213 Section 356

Omit “monetary penalty”, substitute “pecuniary penalty”.

214 Paragraph 357(1)(a)

Omit “monetary penalty”, substitute “pecuniary penalty”.

215 Paragraph 357(1)(b)

Omit “178(6)”, substitute “178(5) or (6)”.

216 Paragraphs 358A(1)(a) and (b)

Repeal the paragraphs, substitute:

- (a) the period of 3 years beginning on 1 January 2004; and
- (b) the period of 3 years beginning on 1 January 2007; and
- (ba) the period of 5 years beginning on 1 January 2010 and each subsequent period of 5 years;

217 Paragraph 358A(1)(c)

Omit “agreements covered by Parts VIB and VID”, substitute “workplace agreements”.

218 Paragraph 358A(1)(d)

Omit “and young persons”, substitute “, mature age persons, young persons and such other persons as are prescribed by the regulations”.

219 After section 358A

Insert:

358B Acquisition of property

(1) The following laws and instruments:

- (a) this Act;
- (b) regulations, or any other instrument, made under this Act;
- (c) Schedule 1B;
- (d) regulations, or any other instrument, made under Schedule 1B;
- (e) regulations made under item 1 of Schedule 4 to the *Workplace Relations Amendment (Work Choices) Act 2005*;
- (f) Part 2 of Schedule 4 to the *Workplace Relations Amendment (Work Choices) Act 2005*;

do not apply, and are taken never to have applied, to the extent that the operation of the law or instrument would result in an acquisition of property from a person otherwise than on just terms.

(2) The repeals and amendments made by the following laws and instruments:

- (a) the *Workplace Relations Amendment (Work Choices) Act 2005*;
- (b) any other Act, so far as it repeals or amends a provision of:
 - (i) this Act; or
 - (ii) regulations, or any other instrument, made under this Act; or
 - (iii) Schedule 1B; or
 - (iv) regulations, or any other instrument, made under Schedule 1B;
- (c) regulations made under item 2 of Schedule 4 to the *Workplace Relations Amendment (Work Choices) Act 2005*;

- (d) any other regulation or instrument, so far as it repeals or amends a provision of:
 - (i) this Act; or
 - (ii) regulations, or any other instrument, made under this Act; or
 - (iii) Schedule 1B; or
 - (iv) regulations, or any other instrument, made under Schedule 1B;

do not apply, and are taken never to have applied, to the extent that the repeals or amendments would result in an acquisition of property from a person otherwise than on just terms.

- (3) In this section:

acquisition of property has the same meaning as in paragraph 51(xxxi) of the Constitution.

just terms has the same meaning as in paragraph 51(xxxi) of the Constitution.

220 Paragraph 359(2)(f)

Omit “certified”, substitute “workplace”.

221 Paragraphs 359(2)(fa) and (g)

Repeal the paragraphs, substitute:

- (g) penalties for offences against the regulations, not exceeding 10 penalty units; and
- (h) civil penalties for contraventions of the regulations, not exceeding:
 - (i) 5 penalty units for an individual; or
 - (ii) 25 penalty units for a body corporate.

222 At the end of section 359

Add:

- (4) If jurisdiction in relation to a provision of this Act relating to a civil remedy provision referred to in section 188 is conferred on the Court or the Federal Magistrates Court, the regulations may confer jurisdiction in relation to that provision on a specified court of a State or Territory.

-
- (5) The regulations may provide for a person who is alleged to have committed an offence against the regulations to pay a penalty to the Commonwealth as an alternative to prosecution.
 - (6) A penalty under subsection (5) must not exceed one-fifth of the maximum fine that a court could impose on the person as a penalty for that offence.
 - (7) The regulations may make provision enabling a person who is alleged to have contravened a civil remedy provision the remedy for which consists of or includes a pecuniary penalty to pay to the Commonwealth, as an alternative to proceedings against the person, a specified penalty.
 - (8) A penalty under subsection (7) must not exceed one-tenth of the maximum pecuniary penalty that could have been imposed on the person for contravening that civil remedy provision.

223 Part XIV (heading)

Repeal the heading, substitute:

Part XIV—Jurisdiction of the Federal Court of Australia and Federal Magistrates Court**224 At the end of section 412**

Add:

- (4) The Federal Magistrates Court has jurisdiction with respect to matters arising under this Act in relation to which:
 - (a) applications may be made to it under this Act; or
 - (b) actions may be brought in it under this Act; or
 - (c) questions may be referred to it under this Act; or
 - (d) penalties may be sued for and recovered under this Act; or
 - (e) prosecutions may be instituted for offences against this Act.

Note: A proceeding pending in the Federal Magistrates Court may be transferred to the Federal Court: see Part 5 of the *Federal Magistrates Act 1999*.

225 Subsection 413(1)

After “The Court”, insert “or the Federal Magistrates Court”.

226 Subsection 413(2)

After “the Court” (wherever occurring), insert “or the Federal Magistrates Court”.

227 Subsection 413A(1)

Omit “The Court may give an interpretation of a certified agreement”, substitute “The Court or the Federal Magistrates Court may give an interpretation of a collective agreement”.

228 Paragraph 413A(1)(b)

Omit “certified”.

229 Subsection 413A(2)

After “the Court” (wherever occurring), insert “or the Federal Magistrates Court”.

230 Subsection 414(1)

After “the Court”, insert “and the Federal Magistrates Court”.

231 At the end of subsection 414(1)

Add:

Note: The regulations can confer jurisdiction on a specified court of a State or Territory in relation to a civil remedy provision: see subsection 359(4).

232 After subsection 469(1)

Insert:

(1A) A party to a proceeding before the Federal Magistrates Court in a matter arising under this Act or the BCII Act may appear in person.

233 Subsections 469(2) and (2B)

After “the Court”, insert “or the Federal Magistrates Court”.

Note: The heading to section 469 is altered by omitting “Court” and substituting “the Court or the Federal Magistrates Court”.

234 Subsection 469(9)

After “the Court”, insert “or the Federal Magistrates Court”.

235 Section 470

Before “If”, insert “(1)”.

236 At the end of section 470

Add:

- (2) If the Federal Magistrates Court is of the opinion that an organisation, person or body should be heard in a proceeding before that court in a matter arising under this Act or the BCII Act, that court may grant leave to the organisation, person or body to intervene in the proceeding.

237 After subsection 471(1)

Insert:

- (1A) The Minister may, on behalf of the Commonwealth, by giving written notice to a Registrar of the Federal Magistrates Court, intervene in the public interest in a proceeding before that court in a matter arising under this Act or the BCII Act.

238 Subsection 471(2)

Omit “the Court, the Court may”, substitute “the Court or the Federal Magistrates Court, that court may”.

239 Subsection 471(3)

After “the Court”, insert “or the Federal Magistrates Court”.

240 Part XV

Repeal the Part, substitute:

Part XV—Matters referred by Victoria

Division 1—Introduction

488 Objects

The main objects of this Part are:

- (a) to extend certain provisions of this Act; and
- (b) to include additional provisions in this Act;

as a result of the referral of certain matters to the Parliament of the Commonwealth by the *Commonwealth Powers (Industrial Relations) Act 1996* of Victoria.

489 Definitions

In this Part (other than Division 10):

employee has the same meaning as in section 3 of the *Commonwealth Powers (Industrial Relations) Act 1996* of Victoria, but does not include:

- (a) a person who is undertaking a vocational placement; or
- (b) a person so far as the definition of **employee** in subsection 4AA(1) of this Act covers the person.

employer has the same meaning as in section 3 of the *Commonwealth Powers (Industrial Relations) Act 1996* of Victoria, but does not include an employer so far as the definition of **employer** in subsection 4AB(1) of this Act covers the employer.

employment means employment of an employee, and **employed** has a corresponding meaning.

490 Part only has effect if supported by reference

A provision of this Part (other than paragraph 493(b) or Division 9 or 10) has effect only for so long, and in so far, as the *Commonwealth Powers (Industrial Relations) Act 1996* of Victoria refers to the Parliament of the Commonwealth a matter or matters that result in the Parliament of the Commonwealth having sufficient legislative power for the provision so to have effect.

Division 2—Pay and conditions

491 Additional effect of Act—AFPC’s powers

- (1) Without affecting its operation apart from this section, Part IA also has effect in relation to the employment of any employee in Victoria, and for this purpose, each reference in paragraph 7J(d) to an employee (within the meaning of that paragraph) is to be read as a reference to an employee (within the meaning of this Division) in Victoria.

-
- (2) Subsection (1) has effect subject to:
- (a) sections 495, 496, 497, 498 and 525; and
 - (b) clause 30 of Schedule 14.

492 Additional effect of Act—Australian Fair Pay and Conditions Standard

- (1) Without affecting its operation apart from this section, Part VA also has effect in relation to the employment of any employee in Victoria, and for this purpose:
- (a) each reference in that Part to an employer (within the meaning of that Part) is to be read as a reference to an employer (within the meaning of this Division) in Victoria; and
 - (b) each reference in that Part to an employee (within the meaning of that Part) is to be read as a reference to an employee (within the meaning of this Division) in Victoria; and
 - (c) each reference in that Part to employment (within the meaning of that Part) is to be read as a reference to the employment of an employee (within the meaning of this Division) in Victoria; and
 - (d) Division 2 of Part VA has effect as if the following provisions had not been enacted:
 - (i) Subdivisions D, E, F, I, K and L of that Division;
 - (ii) sections 90ZA, 90ZB, 90ZC, 90ZL and 90ZM;
 - (iii) subsections 90F(3) and (4);
 - (iv) item 3 of the table in subsection 90H(3);
 - (v) paragraph 90W(2)(b); and
 - (e) Division 2 of Part VA has effect as if an order that was in force under repealed section 501 or 501A on the reform comparison day (within the meaning of that Division) were a pre-reform federal wage instrument (within the meaning of that Division); and
 - (f) section 89E has effect as if Part VIIA had been modified in a corresponding way to the way in which Part VA is modified by paragraphs (a), (b) and (c); and
 - (g) Part VA has effect as if Division 6 of that Part had not been enacted.

- (2) Subsection (1) has effect subject to:
 - (a) sections 495, 496, 497, 498 and 525; and
 - (b) clause 30 of Schedule 14.
- (3) The repeal of sections 501 and 501A by the *Workplace Relations Amendment (Work Choices) Act 2005* does not affect the continuity of an APCS (within the meaning of Part VA) derived from an order under either of those sections.

493 Application of the Australian Fair Pay and Conditions Standard to employees in Victoria

For the purposes of the application of a provision of this Act (other than this Division or Divisions 3 to 9) to an employee in Victoria, a reference in the provision to the Australian Fair Pay and Conditions Standard:

- (a) is to be read as a reference to the Australian Fair Pay and Conditions Standard that applies to the employee because of section 492; and
- (b) includes a reference to the provisions of Division 6 of Part VA as they apply to the employee because of section 170KB.

494 Additional provisions of the Australian Fair Pay and Conditions Standard

For the purposes of this Act, sections 495, 496, 497 and 498 are additional provisions of the Australian Fair Pay and Conditions Standard that applies to an employee in Victoria because of section 492.

495 Adjustment of APCSs

- (1) The AFPC may adjust an APCS if the adjustment:
 - (a) relates to the employment of one or more employees in Victoria; and
 - (b) is of a rate provision or casual loading provision.
- (2) The power to adjust an APCS under subsection (1) is subject to:
 - (a) sections 90 and 90A; and
 - (b) section 90X; and

- (c) section 90Y; and
 - (d) section 90ZR; and
 - (e) sections 496, 497 and 498.
- (3) For the purposes of section 90ZK, an adjustment under subsection (1) of this section is taken to be an adjustment under Subdivision J of Division 2 of Part VA.
- (4) In this section:
- casual loading provision* has the same meaning as in Division 2 of Part VA.
- rate provision* has the same meaning as in Division 2 of Part VA.

496 Limitation on application of minimum wage standards

- (1) If the AFPC exercises its wage-setting powers so as to set or adjust a minimum wage for employees in Victoria:
- (a) the setting or adjustment has no effect unless the employees are within a work classification; and
 - (b) the setting or adjustment has no effect, in relation to a particular employee, while the employee is subject to an award or agreement under this Act.
- (2) If a provision of the Australian Fair Pay and Conditions Standard sets or adjusts a minimum wage for employees in Victoria:
- (a) the setting or adjustment has no effect unless the employees are within a work classification; and
 - (b) the setting or adjustment has no effect, in relation to a particular employee, while the employee is subject to an award or agreement under this Act.
- (3) In this section:
- minimum wage* has the same meaning as in subsection 4(7) of the *Commonwealth Powers (Industrial Relations) Act 1996* of Victoria.
- work classification* means a work classification that, immediately before the commencement of subsection 4(7) of the *Commonwealth Powers (Industrial Relations) Act 1996* of Victoria:

- (a) was a declared work classification under the *Employee Relations Act 1992* of Victoria; or
- (b) had been declared by the Employee Relations Commission of Victoria to be an interim work classification.

Note: See also clauses 89, 95 and 102 of Schedule 13 (extended meaning of award).

497 Guarantee against reductions below pre-reform basic periodic rates of pay

- (1) This section applies if:
 - (a) the AFPC proposes to exercise its power under subsection 495(1) to adjust a preserved APCS; and
 - (b) immediately after the exercise of the power takes effect, there will, under section 90F, be a guaranteed basic periodic rate of pay (the *resulting guaranteed basic periodic rate*) for a particular employee (within the meaning of this Division) in Victoria who is affected by the exercise of the power; and
 - (c) immediately after the reform commencement (and after any relevant adjustments mentioned in sections 90ZE to 90ZH took effect), there would, under section 90F, have been a guaranteed basic periodic rate of pay (the *commencement guaranteed basic periodic rate*) for the employee if the employee had at that time been in his or her current circumstances of employment.
- (2) The AFPC must ensure that the result of the exercise of the power, so far as it affects the employee, is such that the resulting guaranteed basic periodic rate of pay for the employee will not be less than the commencement guaranteed basic periodic rate of pay for the employee.

- (3) In this section:

basic periodic rate of pay has the same meaning as in Division 2 of Part VA.

498 Guarantee against reductions below pre-reform casual loadings that apply to basic periodic rates of pay

- (1) This section applies in relation to the exercise by the AFPC of its power under subsection 495(1) to adjust a preserved APCS.

-
- (2) The AFPC must ensure that the result of the exercise of the power, so far as it affects a particular casual employee (within the meaning of this Division) in Victoria, is such that the resulting guaranteed casual loading percentage for the employee will not be less than the commencement guaranteed casual loading percentage for the employee.
- (3) For the purposes of subsection (2):
- (a) the *resulting guaranteed casual loading percentage* for the employee is the guaranteed casual loading percentage referred to in section 90H for the employee, as it will be immediately after the exercise of the power takes effect; and
 - (b) the *commencement guaranteed casual loading percentage* for the employee is the percentage that, immediately after the reform commencement (and after any relevant adjustments mentioned in sections 90ZE to 90ZH took effect), would have been the guaranteed casual loading percentage referred to in section 90H for the employee if the employee had, at that time, been in his or her current circumstances of employment.

499 Additional effect of Act—enforcement of, and compliance with, the Australian Fair Pay and Conditions Standard

Without affecting its operation apart from this section, Part VIII also has effect in relation to a term of the Australian Fair Pay and Conditions Standard that applies to an employee in Victoria because of section 492, and for this purpose:

- (a) each reference in that Part to an employer (within the meaning of that Part) is to be read as a reference to an employer (within the meaning of this Division) in Victoria; and
- (b) each reference in that Part to an employee (within the meaning of that Part) is to be read as a reference to an employee (within the meaning of this Division) in Victoria; and
- (c) each reference in that Part to employment (within the meaning of that Part) is to be read as a reference to the employment of an employee (within the meaning of this Division) in Victoria; and

- (d) each reference in that Part to the Australian Fair Pay and Conditions Standard (within the meaning of that Part) is to be read as a reference to the Australian Fair Pay and Conditions Standard as that Standard applies to an employee in Victoria because of section 492.

Division 3—Workplace agreements

500 Additional effect of Act—workplace agreements

- (1) In addition to the effect that Part VB and related provisions of this Act (other than Part VIAA) have in relation to agreements about matters pertaining to the relationship between:
 - (a) an employer, or employers, within the meaning of that Part; and
 - (b) an employee, or employees, within the meaning of that Part;that Part and those provisions also have effect as mentioned in this section.
- (2) That Part and those provisions have effect in the same way as mentioned in subsection (1) in relation to agreements about matters pertaining to the relationship between:
 - (a) an employer or employers in Victoria; and
 - (b) an employee or employees in Victoria;and for this purpose:
 - (c) each reference in that Part and those provisions to an employer (within the meaning of that Part) is to be read as a reference to an employer (within the meaning of this Division) in Victoria; and
 - (d) each reference in that Part and those provisions to an employee (within the meaning of that Part) is to be read as a reference to an employee (within the meaning of this Division) in Victoria; and
 - (e) each reference in that Part and those provisions to employment (within the meaning of that Part) is to be read as a reference to the employment of an employee (within the meaning of this Division) in Victoria by an employer (within the meaning of this Division) in Victoria.
- (3) The regulations may provide that a specified provision of this Act is taken to be a related provision for the purposes of this section.

-
- (4) The regulations may provide that a specified provision of this Act is taken not to be a related provision for the purposes of this section.

Note: See also section 513 (transmission of business).

501 Workplace agreements—mandatory term about basic periodic rate of pay

- (1) This section applies to an agreement under Part VB (as that Part has effect because of section 500).
- (2) The agreement must contain an express term to the effect that, for so long as an employee is subject to the agreement, the basic periodic rate of pay that is payable to the employee must not be less than:
- (a) if a basic periodic rate of pay would have been applicable to the employee under the Australian Fair Pay and Conditions Standard if the employee had not been subject to an award or the agreement—the basic periodic rate of pay that would so have been applicable; or
 - (b) if:
 - (i) paragraph (a) does not apply to the employee; and
 - (ii) the employee is a junior employee, an employee with a disability, or an employee to whom a training arrangement applies;
the rate of pay specified in, or worked out in accordance with a method specified in, regulations made for the purposes of this paragraph; or
 - (c) if neither paragraph (a) nor (b) applies to the employee—the standard FMW.
- (3) The agreement is void if the requirement in subsection (2) is not satisfied.
- (4) In this section:

basic periodic rate of pay has the same meaning as in Division 2 of Part VA.

employee with a disability means an employee who is qualified for a disability support pension as set out in section 94 or 95 of the

Social Security Act 1991, or who would be so qualified but for paragraph 94(1)(e) or 95(1)(c) of that Act.

junior employee means an employee who is under the age of 21.

standard FMW has the same meaning as in Division 2 of Part VA.

502 Workplace agreements—mandatory term about casual loading

- (1) This section applies to an agreement under Part VB (as that Part has effect because of section 500) if a casual employee is subject to the agreement.
- (2) The agreement must contain an express term to the effect that, for so long as the casual employee is subject to the agreement, the casual loading that is payable to the employee must not be less than the default casual loading percentage (within the meaning of Division 2 of Part VA).
- (3) The agreement is void if the requirement in subsection (2) is not satisfied.

Division 4—Industrial action

503 Additional effect of Act—industrial action

Without affecting its operation apart from this section, Part VC also has the effect it would have if:

- (a) each reference in that Part to an employer (within the meaning of that Part) were read as a reference to an employer (within the meaning of this Division) in Victoria; and
- (b) each reference in that Part to an employee (within the meaning of that Part) were read as a reference to an employee (within the meaning of this Division) in Victoria; and
- (c) each reference in that Part to employment (within the meaning of that Part) were read as a reference to the employment of an employee (within the meaning of this Division) in Victoria by an employer (within the meaning of this Division) in Victoria; and
- (d) Division 8 of that Part had not been enacted; and
- (e) subsections 106A(1) to (4) were replaced by the following subsections:

(1) For the purposes of this Act (other than Part XA), **industrial action** means any action of the following kind:

- (a) the performance of work by an employee in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work by an employee, the result of which is a restriction or limitation on, or a delay in, the performance of the work;
- (b) a ban, limitation or restriction on the performance of work by an employee or on acceptance of or offering for work by an employee;
- (c) a failure or refusal by employees to attend for work or a failure or refusal to perform any work at all by employees who attend for work;
- (d) the lockout of employees from their employment by the employer of the employees;

but does not include the following:

- (e) action that is not agreement-related (as defined by subsection (3));
- (f) action by employees that is authorised or agreed to by the employer of the employees;
- (g) action by an employer that is authorised or agreed to by or on behalf of employees of the employer;
- (h) action by an employee if:
 - (i) the action was based on a reasonable concern by the employee about an imminent risk to his or her health or safety; and
 - (ii) the employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work, whether at the same or another workplace, that was safe and appropriate for the employee to perform.

Note 1: See also subsection (5), which deals with the burden of proof of the exception in paragraph (e) of this definition.

Note 2: See also subsection (6), which deals with the burden of proof of the exception in subparagraph (h)(i) of this definition.

(2) For the purposes of this Act (other than Part XA):

- (a) conduct is capable of constituting industrial action even if the conduct relates to part only of the duties that employees are required to perform in the course of their employment; and

- (b) a reference to industrial action includes a reference to a course of conduct consisting of a series of industrial actions.

Meaning of agreement-related

- (3) For the purposes of this section, action is *agreement-related* if:
 - (a) it relates to the negotiation or proposed negotiation of an agreement under Part VB (as that Part has effect because of section 500); or
 - (b) it affects or relates to work that is regulated by an agreement under Part VB (as that Part has effect because of section 500).

Meaning of lockout

- (4) For the purposes of this section, an employer *locks out* employees from their employment if the employer prevents the employees from performing work under their contracts of employment without terminating those contracts (except to the extent that this would be an expansion of the ordinary meaning of that expression).

Burden of proof

- (5) Whenever a person seeks to rely on paragraph (e) of the definition of *industrial action* in subsection (1), that person has the burden of proving that paragraph (e) applies.
- (6) Whenever a person seeks to rely on subparagraph (h)(i) of the definition of *industrial action* in subsection (1), that person has the burden of proving that subparagraph (h)(i) applies.

504 Intervention in proceedings under Part VC

- (1) The Commission must, on application, grant to a Minister of Victoria, on behalf of the Government of Victoria, leave to intervene in proceedings under Division 2 of Part VC if one or more of the employees to be covered by the proposed agreement is an employee in Victoria.
- (2) The Full Bench must, on application, grant to a Minister of Victoria, on behalf of the Government of Victoria, leave to intervene in an appeal against a decision of a member of the Commission if:

-
- (a) the decision is made under Division 2 of Part VC in relation to a bargaining period for negotiating a proposed agreement; and
 - (b) one or more of the employees to be covered by the proposed agreement is an employee in Victoria.

505 Additional effect of Act—enforcement of, and compliance with, orders under Part VC

Without affecting its operation apart from this section, Part VIII also has effect in relation to an order of the Commission under Part VC as Part VC applies because of section 503, and for this purpose:

- (a) each reference in Part VIII to an employer (within the meaning of Part VIII) is to be read as a reference to an employer (within the meaning of this Division) in Victoria; and
- (b) each reference in Part VIII to an employee (within the meaning of Part VIII) is to be read as a reference to an employee (within the meaning of this Division) in Victoria; and
- (c) each reference in Part VIII to employment (within the meaning of Part VIII) is to be read as a reference to the employment of an employee (within the meaning of this Division) in Victoria.

Division 5—Meal breaks

506 Additional effect of Act—meal breaks

Without affecting its operation apart from this section, Division 1 of Part VIA also has effect in relation to the employment of any employee in Victoria, and for this purpose:

- (a) each reference in that Division to an employer (within the meaning of that Division) is to be read as a reference to an employer (within the meaning of this Division) in Victoria; and
- (b) each reference in that Division to an employee (within the meaning of that Division) is to be read as a reference to an employee (within the meaning of this Division) in Victoria; and

- (c) each reference in that Division to employment (within the meaning of that Division) is to be read as a reference to the employment of an employee (within the meaning of this Division) in Victoria; and
- (d) section 170AC has effect as if Part VIIA had been modified in a corresponding way to the way in which Division 1 of Part VIA is modified by paragraphs (a), (b) and (c).

507 Additional effect of Act—enforcement of, and compliance with, section 170AA

Without affecting its operation apart from this section, Part VIII also has effect in relation to section 170AA as that section applies because of section 506, and for this purpose:

- (a) each reference in that Part to an employer (within the meaning of that Part) is to be read as a reference to an employer (within the meaning of this Division) in Victoria; and
- (b) each reference in that Part to an employee (within the meaning of that Part) is to be read as a reference to an employee (within the meaning of this Division) in Victoria; and
- (c) each reference in that Part to employment (within the meaning of that Part) is to be read as a reference to the employment of an employee (within the meaning of this Division) in Victoria; and
- (d) each reference in that Part to section 170AA is to be read as a reference to section 170AA as that section has effect because of section 506.

Division 5A—Public holidays

507A Additional effect of Act—public holidays

Without affecting its operation apart from this section, Division 1A of Part VIA also has effect in relation to the employment of any employee in Victoria, and for this purpose:

- (a) each reference in that Division to an employer (within the meaning of that Division) is to be read as a reference to an employer (within the meaning of this Division) in Victoria; and

- (b) each reference in that Division to an employee (within the meaning of that Division) is to be read as a reference to an employee (within the meaning of this Division) in Victoria; and
- (c) each reference in that Division to employment (within the meaning of that Division) is to be read as a reference to the employment of an employee (within the meaning of this Division) in Victoria; and
- (d) section 170AH has effect as if Part VIIA had been modified in a corresponding way to the way in which Division 1A of Part VIA is modified by paragraphs (a), (b) and (c).

507B Additional effect of Act—enforcement of, and compliance with, section 170AF

Without affecting its operation apart from this section, Part VIII also has effect in relation to section 170AF as that section applies because of section 507A, and for this purpose:

- (a) each reference in that Part to an employer (within the meaning of that Part) is to be read as a reference to an employer (within the meaning of this Division) in Victoria; and
- (b) each reference in that Part to an employee (within the meaning of that Part) is to be read as a reference to an employee (within the meaning of this Division) in Victoria; and
- (c) each reference in that Part to employment (within the meaning of that Part) is to be read as a reference to the employment of an employee (within the meaning of this Division) in Victoria; and
- (d) each reference in that Part to section 170AF is to be read as a reference to section 170AF as that section has effect because of section 507A.

Division 6—Termination of employment

508 Additional effect of Act—termination of employment

Without affecting its operation apart from this section, Division 3 of Part VIA also has effect in relation to the termination of

employment, at the initiative of the employer, of any employee in Victoria, and for this purpose:

- (a) each reference in that Division to an employer within the meaning of subsection 4AB(1) is to be read as a reference to an employer (within the meaning of this Division) in Victoria; and
- (b) each reference in that Division to an employee within the meaning of subsection 4AA(1) is to be read as a reference to an employee (within the meaning of this Division) in Victoria; and
- (c) each reference in that Division to employment within the meaning of subsection 4AC(1) is to be read as a reference to the employment of an employee (within the meaning of this Division) in Victoria.

509 Additional effect of Act—enforcement of, and compliance with, orders under Division 3 of Part VIA

Without affecting its operation apart from this section, Part VIII also has effect in relation to an order of the Commission under Division 3 of Part VIA as that Division applies because of section 508, and for this purpose:

- (a) each reference in Part VIII to an employer (within the meaning of Part VIII) is to be read as a reference to an employer (within the meaning of this Division) in Victoria; and
- (b) each reference in Part VIII to an employee (within the meaning of Part VIII) is to be read as a reference to an employee (within the meaning of this Division) in Victoria; and
- (c) each reference in Part VIII to employment (within the meaning of Part VIII) is to be read as a reference to the employment of an employee (within the meaning of this Division) in Victoria.

Division 7—Freedom of association

510 Additional effect of Act—freedom of association

- (1) Without affecting its operation apart from this section, Part XA also has effect in relation to conduct in Victoria.

-
- (2) Subsection (1) has effect despite section 243.

Division 8—Right of entry

511 Right of entry

Part IX has effect, in relation to premises of an employer in Victoria, as if:

- (a) Division 4 of that Part did not authorise entering any such premises for the purposes of investigating a suspected breach unless the suspected breach relates to:
 - (i) a provision of this Act (as that provision has effect because of this Part); or
 - (ii) an agreement under Part VB (as Part VB has effect because of section 500); and
- (b) Division 6 of that Part did not authorise entering any such premises for the purposes of holding discussions unless the discussions relate to:
 - (i) an agreement under Part VB (as Part VB has effect because of section 500); or
 - (ii) a proposed agreement under Part VB (as Part VB has effect because of section 500).

512 Additional effect of Act—enforcement of, and compliance with, orders under Part IX

Without affecting its operation apart from this section, Part VIII also has effect in relation to an order of the Commission under Part IX in relation to premises of an employer in Victoria, and for this purpose:

- (a) each reference in Part VIII to an employer (within the meaning of Part VIII) includes a reference to an employer (within the meaning of this Division) in Victoria; and
- (b) each reference in Part VIII to an employee (within the meaning of Part VIII) includes a reference to an employee (within the meaning of this Division) in Victoria; and
- (c) each reference in Part VIII to employment (within the meaning of Part VIII) includes a reference to the employment of an employee (within the meaning of this Division) in Victoria.

Division 8A—Employee records and pay slips

512A Additional effect of Act—employee records and pay slips

Without affecting its operation apart from this section, section 353A also has effect in relation to the employment of any employee in Victoria, and for this purpose:

- (a) each reference in that section to an employer (within the meaning of that section) is to be read as a reference to an employer (within the meaning of this Division) in Victoria; and
- (b) each reference in that section to an employee (within the meaning of that section) is to be read as a reference to an employee (within the meaning of this Division) in Victoria; and
- (c) each reference in that section to employment (within the meaning of that section) is to be read as a reference to the employment of an employee (within the meaning of this Division) in Victoria.

Division 9—Transmission of business

513 Additional effect of Act—transmission of business

- (1) Without affecting its operation apart from this section, Part VIAA also has the effect it would have if:
 - (a) each reference in that Part to an employer (within the meaning of that Part) included a reference to an employer (within the meaning of this Division) in Victoria; and
 - (b) each reference in that Part to an employee (within the meaning of that Part) included a reference to an employee (within the meaning of this Division) in Victoria; and
 - (c) each reference in that Part to employment (within the meaning of that Part) included a reference to the employment of an employee (within the meaning of this Division) in Victoria by an employer (within the meaning of this Division) in Victoria; and
 - (d) each reference in that Part to employed (within the meaning of that Part) included a reference to employed (within the meaning of this Division) in Victoria by an employer (within the meaning of this Division) in Victoria; and

- (e) Division 5 of that Part had not been enacted; and
 - (f) each reference in that Part to an AWA (within the meaning of that Part) included a reference to an AWA made under Part VB (as Part VB has effect because of section 500); and
 - (g) each reference in that Part to a post-reform AWA (within the meaning of that Part) included a reference to a post-reform AWA made under Part VB (as Part VB has effect because of section 500); and
 - (h) each reference in that Part to a collective agreement (within the meaning of that Part) included a reference to a collective agreement made under Part VB (as Part VB has effect because of section 500); and
 - (i) each reference in that Part to a workplace agreement (within the meaning of that Part) included a reference to a workplace agreement made under Part VB (as Part VB has effect because of section 500); and
 - (j) each reference in that Part to the Australian Fair Pay and Conditions Standard (within the meaning of that Part) included a reference to the Australian Fair Pay and Conditions Standard as that Standard has effect because of section 492; and
 - (k) each reference in that Part to an APCS (within the meaning of that Part) included a reference to an APCS in force under Part VA (as Part VA has effect because of section 492).
- (2) To the extent to which Part VIAA (as it has effect because of subsection (1)) applies if an employer (within the meaning of this Division) in Victoria becomes the successor, transmittee or assignee of the whole, or a part, of a business of:
- (a) another employer (within the meaning of subsection 4AB(1)); or
 - (b) another employer (within the meaning of this Division) in Victoria;
- that Part has effect only for so long, and in so far, as the *Commonwealth Powers (Industrial Relations) Act 1996* of Victoria refers to the Parliament of the Commonwealth a matter or matters that result in the Parliament of the Commonwealth having sufficient legislative power for that Part so to have effect.
- (3) To the extent to which Subdivision B of Division 4 of Part VIAA (as it has effect because of subsection (1)) applies if an employer
-

(within the meaning of this Division) in Victoria is likely to become the successor, transmittee or assignee of the whole, or a part, of a business of:

- (a) another employer (within the meaning of subsection 4AB(1)); or
- (b) another employer (within the meaning of this Division) in Victoria;

that Subdivision has effect only for so long, and in so far, as the *Commonwealth Powers (Industrial Relations) Act 1996* of Victoria refers to the Parliament of the Commonwealth a matter or matters that result in the Parliament of the Commonwealth having sufficient legislative power for that Subdivision so to have effect.

514 Additional effect of Act—enforcement of, and compliance with, orders under Part VIAA

Without affecting its operation apart from this section, Part VIII also has effect in relation to an order of the Commission under Part VIAA as Part VIAA applies because of section 513, and for this purpose:

- (a) each reference in Part VIII to an employer (within the meaning of Part VIII) is to be read as a reference to an employer (within the meaning of this Division) in Victoria; and
- (b) each reference in Part VIII to an employee (within the meaning of Part VIII) is to be read as a reference to an employee (within the meaning of this Division) in Victoria; and
- (c) each reference in Part VIII to employment (within the meaning of Part VIII) is to be read as a reference to the employment of an employee (within the meaning of this Division) in Victoria.

Division 10—Employment agreements

515 Definitions

In this Division:

employee has the same meaning as in section 3 of the *Commonwealth Powers (Industrial Relations) Act 1996* of

Victoria, but does not include a person who is undertaking a vocational placement.

employer has the same meaning as in section 3 of the *Commonwealth Powers (Industrial Relations) Act 1996* of Victoria.

employment means employment of an employee, and **employed** has a corresponding meaning.

employment agreement means an agreement that, immediately before the reform commencement, was continued in force by Subdivision E of Division 3 of Part XV of this Act.

Note: These agreements were entered into under Part 2 of the *Employee Relations Act 1992* of Victoria before 1 January 1997.

516 Application of this Division

- (1) This Division applies to an employment agreement about matters pertaining to the relationship between an employer (within the meaning of this Division) in Victoria and an employee (within the meaning of this Division) in Victoria if:
 - (a) both:
 - (i) the employer is also an employer within the meaning of Division 1; and
 - (ii) the employee is also an employee within the meaning of Division 1; or
 - (b) both:
 - (i) the employer is also an employer within the meaning of subsection 4AB(1); and
 - (ii) the employee is also an employee within the meaning of subsection 4AA(1).
- (2) This Division, to the extent to which it applies to an employment agreement because of paragraph (1)(a), has effect only for so long, and in so far, as the *Commonwealth Powers (Industrial Relations) Act 1996* of Victoria refers to the Parliament of the Commonwealth a matter or matters that result in the Parliament of the Commonwealth having sufficient legislative power for this Division so to have effect.

517 Inconsistency with other Commonwealth laws

Subject to clause 39 of Schedule 14, this Division does not have effect to the extent of any inconsistency with a law of the Commonwealth other than this Act.

518 Continued operation of employment agreements

- (1) Subject to subsection (2), for the purposes of this Act, an employment agreement continues in force as if Part 2 of the *Employee Relations Act 1992* of Victoria had not been repealed.
- (2) For the purposes of this Act, an employment agreement ceases to be in force in relation to an employee if the employment of the employee is subject to an AWA, a collective agreement or a workplace determination.

519 Stand down provisions

- (1) If an employment agreement does not contain provision for the standing-down of the employee if the employee cannot be usefully employed because of:
 - (a) any strike; or
 - (b) any breakdown of machinery; or
 - (c) any stoppage of work for any cause for which the employer cannot reasonably be held responsible;the agreement is taken to include the provision mentioned in subsection (2).
- (2) The provision is that:
 - (a) the employer may deduct payment for any part of a day during which the employee cannot usefully be employed because of:
 - (i) any strike; or
 - (ii) any breakdown of machinery; or
 - (iii) any stoppage of work for any cause for which the employer cannot reasonably be held responsible; and
 - (b) this does not break the continuity of employment of the employee for the purpose of any entitlements.

520 Model dispute resolution process

- (1) An employment agreement is taken to include a term requiring disputes about the application of the agreement to be resolved using the model dispute resolution process.

Note: The model dispute resolution process is set out in Part VIIA.

- (2) Any term of the employment agreement that would otherwise deal with the resolution of those disputes is void to that extent.
- (3) Without affecting its operation apart from this subsection, Part VIIA also has effect in relation to an employment agreement, and for this purpose:
 - (a) each reference in that Part to an employer (within the meaning of that Part) is to be read as a reference to an employer (within the meaning of this Division) in Victoria; and
 - (b) each reference in that Part to an employee (within the meaning of that Part) is to be read as a reference to an employee (within the meaning of this Division) in Victoria; and
 - (c) each reference in that Part to a contract of employment (within the meaning of that Part) is to be read as a reference to an employment agreement; and
 - (d) each reference in that Part to a workplace agreement is to be read as a reference to an employment agreement.

521 Additional effect of Act—enforcing employment agreements

Without affecting its operation apart from this section, Part VIII also has effect in relation to an employment agreement, and for this purpose:

- (a) each reference in that Part to an employer (within the meaning of that Part) is to be read as a reference to an employer (within the meaning of this Division) in Victoria; and
- (b) each reference in that Part to an employee (within the meaning of that Part) is to be read as a reference to an employee (within the meaning of this Division) in Victoria; and

- (c) each reference in that Part to employment (within the meaning of that Part) is to be read as a reference to the employment of a person under an employment agreement; and
- (d) each reference in that Part to an AWA is to be read as a reference to an employment agreement.

522 Employer to give copy of employment agreement

Each employer bound by an employment agreement must, on being requested to do so by the employee bound by the agreement, give a copy of the agreement to the employee as soon as possible.

524 Registrar not to divulge information in employment agreements

If a Registrar has a copy of an employment agreement, the Registrar must not allow the information in the copy to become available to any person other than:

- (a) a party to the agreement; or
- (b) a person with authority to enforce the provisions of the agreement.

525 Relationship between employment agreements and Australian Fair Pay and Conditions Standard

- (1) An employment agreement that operates in relation to an employee prevails over the Australian Fair Pay and Conditions Standard to the extent to which, in a particular respect, the employment agreement provides a more favourable outcome for the employee.
- (2) The Australian Fair Pay and Conditions Standard prevails over an employment agreement that operates in relation to an employee to the extent to which, in a particular respect, the Australian Fair Pay and Conditions Standard provides a more favourable outcome for the employee.
- (3) The regulations may prescribe:
 - (a) what a particular respect is for the purposes of this section; or
 - (b) the circumstances in which an employment agreement provides or does not provide a more favourable outcome in a particular respect; or

-
- (c) the circumstances in which the Australian Fair Pay and Conditions Standard provides or does not provide a more favourable outcome in a particular respect.

526 Relationship between employment agreements and awards

An award prevails to the extent of any inconsistency with an employment agreement.

Note: See also clauses 89, 95 and 102 of Schedule 13 (extended meaning of award).

Division 11—Exclusion of Victorian laws

527 Additional effect of Act—exclusion of Victorian laws

- (1) This Act is intended to apply to the exclusion of all the following laws of Victoria so far as they would otherwise apply in relation to an employee or employer:
 - (a) a law of Victoria that applies to employment generally and relates to one or more of the following matters:
 - (i) agreements about matters pertaining to the relationship between an employer or employers in Victoria and an employee or employees in Victoria;
 - (ii) minimum terms and conditions of employment (other than minimum wages) for employees in Victoria;
 - (iii) setting and adjusting of minimum wages for employees in Victoria within a work classification;
 - (iv) termination, or proposed termination, of the employment of an employee in Victoria;
 - (v) freedom of association;
 - (b) a law of Victoria that is prescribed by regulations made for the purposes of this paragraph.

Victorian laws that are not excluded

- (2) However, subsection (1) does not apply to a law of Victoria so far as:
 - (a) the law deals with the prevention of discrimination and is neither a State or Territory industrial law nor contained in such a law; or

- (b) the law is prescribed by the regulations as a law to which subsection (1) does not apply.

Definitions

- (3) In this section:

freedom of association has the same meaning as in subsection 4(6) of the *Commonwealth Powers (Industrial Relations) Act 1996* of Victoria.

minimum terms and conditions of employment has the same meaning as in subsection 4(4) of the *Commonwealth Powers (Industrial Relations) Act 1996* of Victoria.

minimum wage has the same meaning as in subsection 4(7) of the *Commonwealth Powers (Industrial Relations) Act 1996* of Victoria.

work classification has the same meaning as in section 496.

Note: See also clause 87 of Schedule 13 (common rules in Victoria), which has effect despite any other provision of this Act.

Division 12—Additional effect of other provisions of this Act

528 Additional effect of other provisions of this Act

The regulations may provide that, without affecting the operation of specified provisions of this Act apart from those regulations, those provisions also have a specified effect.

Note: The regulations must deal with matters referred by Victoria (see section 490).

241 Section 538 (definition of *employee*)

Repeal the definition, substitute:

employee means an individual so far as he or she is employed by a constitutional corporation.

242 Subsection 541(1)

Omit “or (5) (as appropriate)”.

243 Subsection 541(3)

Omit “clause 1 of Schedule 1A”, substitute “a provision of the Australian Fair Pay and Conditions Standard”.

244 Subsection 541(3)

Omit “This subsection is subject to subsection (5).”.

245 Subsection 541(4)

Omit “provisions in clause 1 of Schedule 1A that deal”, substitute “a provision of the Australian Fair Pay and Conditions Standard that deals”.

246 Subsection 541(5)

Repeal the subsection.

247 Paragraph 548(1)(a)

Omit “monetary penalty”, substitute “pecuniary penalty”.

248 Section 550 (definition of *additional condition*)

Omit “a wage instrument other than a rate of pay”, substitute “an award or notional agreement preserving State awards”.

249 Section 550 (definition of *employee*)

Repeal the definition.

250 Section 550 (definition of *employer*)

Repeal the definition.

251 Section 550 (definition of *full-time apprentice*)

Omit “wage instrument”, substitute “award or notional agreement preserving State awards”.

252 Section 550 (definition of *State or Territory training authority*)

Repeal the definition.

253 Section 550 (definition of *training arrangement*)

Repeal the definition.

254 Section 550 (definition of *wage instrument*)

Repeal the definition.

255 Section 551

Repeal the section.

256 Section 552

Repeal the section.

257 Subsection 553(5)

Repeal the subsection, substitute:

School-based apprentices not covered by this section

- (5) This section does not apply to a school-based apprentice if:
- (a) an award or notional agreement preserving State awards covers the employment of the school-based apprentice; and
 - (b) the award or notional agreement preserving State awards specifies additional conditions for the school-based apprentice; and
 - (c) the award or notional agreement preserving State awards does so by making specific provision for school-based apprentices.

258 Subsection 554(1)

Omit “a wage instrument”, substitute “an APCS”.

259 Section 555

Repeal the section.

260 Subsection 556(6)

Repeal the subsection, substitute:

School-based trainees not covered by this section

- (6) This section does not apply to a school-based trainee if:
- (a) an award or notional agreement preserving State awards covers the employment of the school-based trainee; and

- (b) the award or notional agreement preserving State awards specifies additional conditions for the school-based trainee; and
- (c) the award or notional agreement preserving State awards does so by making specific provision for school-based trainees.

261 At the end of section 557

Add:

- (3) This section has effect as if it were a provision of the Australian Fair Pay and Conditions Standard.

262 Section 558

Omit “paid, or provided additional conditions,” substitute “provided additional conditions”.

263 Section 558

Omit “552(1), 553(2), 555(1) or 556(2)”, substitute “553(2) or 556(2)”.

264 Schedule 1A

Repeal the Schedule.

265 Section 1 of Schedule 1B

Omit “the objects of the Schedule”, substitute “Parliament’s intention in enacting this Schedule”.

266 Section 5 of Schedule 1B

Repeal the section, substitute:

5 Parliament’s intention in enacting this Schedule

- (1) It is Parliament’s intention in enacting this Schedule to enhance relations within workplaces between federal system employers and federal system employees and to reduce the adverse effects of industrial disputation.
- (2) Parliament considers that those relations will be enhanced and those adverse effects will be reduced, if associations of employers and employees are required to meet the standards set out in this

Schedule in order to gain the rights and privileges accorded to associations under this Schedule and the Workplace Relations Act.

- (3) The standards set out in this Schedule:
- (a) ensure that employer and employee organisations registered under this Schedule are representative of and accountable to their members, and are able to operate effectively; and
 - (b) encourage members to participate in the affairs of organisations to which they belong; and
 - (c) encourage the efficient management of organisations and high standards of accountability of organisations to their members; and
 - (d) provide for the democratic functioning and control of organisations; and
 - (e) facilitate the registration of a diverse range of employer and employee organisations.
- (4) It is also Parliament's intention in enacting this Schedule to assist employers and employees to promote and protect their economic and social interests through the formation of employer and employee organisations, by providing for the registration of those associations and according rights and privileges to them once registered.

Note: The Workplace Relations Act contains many provisions that affect the operation of this Schedule. For example, provisions of the Workplace Relations Act deal with some powers and functions of the Commission and of Registrars. Decisions made under this Schedule may be subject to procedures and rules (for example, about appeals) that are set out in the Workplace Relations Act.

267 Section 6 of Schedule 1B

Insert:

Australian Building and Construction Commissioner has the same meaning as in the *Building and Construction Industry Improvement Act 2005*.

268 Section 6 of Schedule 1B

Insert:

Australian Building and Construction Inspector has the same meaning as in the *Building and Construction Industry Improvement Act 2005*.

269 Section 6 of Schedule 1B (definition of *AWA*)

Repeal the definition, substitute:

AWA has the same meaning as in the Workplace Relations Act.

270 Section 6 of Schedule 1B (definition of *award*)

Repeal the definition, substitute:

award means:

- (a) an award within the meaning of the Workplace Relations Act; and
- (b) a transitional award within the meaning of Schedule 13 to the Workplace Relations Act.

271 Section 6 of Schedule 1B (definition of *certified agreement*)

Repeal the definition.

272 Section 6 of Schedule 1B

Insert:

collective agreement has the same meaning as in the Workplace Relations Act.

273 Section 6 of Schedule 1B (definition of *enterprise*)

Repeal the definition, substitute:

enterprise means:

- (a) a business that is carried on by a single employer; or
- (b) a business that is carried on by related bodies corporate, at least one of which is an employer; or
- (c) an operationally distinct part of a business mentioned in paragraph (a) or (b); or
- (d) a grouping of 2 or more operationally distinct parts of a business mentioned in paragraph (a) or (b).

Whether bodies corporate are related is to be determined in accordance with the principles set out in section 50 of the *Corporations Act 2001*.

274 Section 6 of Schedule 1B (definition of *enterprise association*)

Repeal the definition, substitute:

enterprise association has the meaning given by subsection 18C(1).

275 Section 6 of Schedule 1B (definition of *enterprise organisation*)

Repeal the definition.

276 Section 6 of Schedule 1B

Insert:

federally registrable:

- (a) in relation to an association of employers—has the meaning given by section 18A; and
- (b) in relation to an association of employees—has the meaning given by section 18B; and
- (c) in relation to an enterprise association—has the meaning given by section 18C.

277 Section 6 of Schedule 1B

Insert:

federal system employee has the meaning given by subsection 18B(2).

278 Section 6 of Schedule 1B

Insert:

federal system employer has the meaning given by subsection 18A(2).

279 Section 6 of Schedule 1B (definition of *industrial dispute*)

Repeal the definition.

280 Section 6 of Schedule 1B (definition of *old IR agreement*)

Repeal the definition.

281 Section 6 of Schedule 1B

Insert:

State award has the same meaning as in the Workplace Relations Act.

282 Section 6 of Schedule 1B

Insert:

State demarcation order means a State award, to the extent that it relates to the rights of a State-registered association to represent the interests under a State or Territory industrial law of a particular class or group of employees.

283 Section 6 of Schedule 1B

Insert:

State or Territory industrial law has the same meaning as in the Workplace Relations Act.

284 Section 6 of Schedule 1B

Insert:

State-registered association has the meaning given by clause 1 of Schedule 17 to the Workplace Relations Act.

285 Section 6 of Schedule 1B

Insert:

transitionally registered association has the meaning given by clause 1 of Schedule 17 to the Workplace Relations Act.

286 Section 6 of Schedule 1B

Insert:

workplace inspector means a person appointed as a workplace inspector under section 84 of the Workplace Relations Act.

287 Section 7 of Schedule 1B

Repeal the section, substitute:

7 Meaning of *industrial action*

- (1) For the purposes of this Schedule, *industrial action* means any action of the following kinds:

- (a) the performance of work by an employee in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work by an employee, the result of which is a restriction or limitation on, or a delay in, the performance of the work;
- (b) a ban, limitation or restriction on the performance of work by an employee or on acceptance of or offering for work by an employee;
- (c) a failure or refusal by employees to attend for work or a failure or refusal to perform any work at all by employees who attend for work;
- (d) the lockout of employees from their employment by the employer of the employees;

but does not include the following:

- (e) action by employees that is authorised or agreed to by the employer of the employees;
- (f) action by an employer that is authorised or agreed to by or on behalf of employees of the employer;
- (g) action by an employee if:
 - (i) the action was based on a reasonable concern by the employee about an imminent risk to his or her health or safety; and
 - (ii) the employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work, whether at the same or another workplace, that was safe and appropriate for the employee to perform.

Note 1: See also subsection (4), which deals with the burden of proof of the exception in subparagraph (g)(i) of this definition.

Note 2: The issue of whether action that is not industrial in character is industrial action was considered by the Commission in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v The Age Company Limited*, PR946290. In that case, the Full Bench of the Commission drew a distinction between an employee who does not attend for work in support of a collective demand that the employer agree to alteration of the conditions of employment as being clearly engaged in industrial action and an employee who does not attend for work on account of illness.

(2) For the purposes of this Schedule:

- (a) conduct is capable of constituting industrial action even if the conduct relates to part only of the duties that employees are required to perform in the course of their employment; and
- (b) a reference to industrial action includes a reference to a course of conduct consisting of a series of industrial actions.

Meaning of lockout

- (3) For the purposes of this section, an employer **locks out** employees from their employment if the employer prevents the employees from performing work under their contracts of employment without terminating those contracts (except to the extent that this would be an expansion of the ordinary meaning of that expression).

Burden of proof

- (4) Whenever a person seeks to rely on subparagraph (g)(i) of the definition of **industrial action** in subsection (1), that person has the burden of proving that subparagraph (g)(i) applies.

288 Section 8 of Schedule 1B

Repeal the section.

289 Section 18 of Schedule 1B

Repeal the section, substitute:

18 Employer and employee associations may apply

Any of the following associations may apply for registration as an organisation:

- (a) a federally registrable association of employers;
- (b) a federally registrable association of employees;
- (c) a federally registrable enterprise association.

18A Federally registrable employer associations

- (1) An association of employers is **federally registrable** if:
 - (a) it is a constitutional corporation; or
 - (b) the majority of its members are federal system employers.
- (2) An employer is a **federal system employer** if the employer is:

- (a) a constitutional corporation; or
 - (b) an employer in relation to an enterprise that:
 - (i) operates principally within or from a Territory; or
 - (ii) is engaged principally in trade or commerce between Australia and a place outside Australia; or
 - (iii) is engaged principally in trade or commerce among the States; or
 - (iv) is engaged principally in trade or commerce within a Territory, between a State and a Territory or between 2 Territories; or
 - (v) is engaged principally in the supply of postal, telegraphic, telephonic or other like services; or
 - (vi) is engaged principally in banking (other than State banking not extending beyond the limits of a State); or
 - (vii) is engaged principally in insurance (other than State insurance not extending beyond the limits of a State); or
 - (c) an employer in relation to public sector employment; or
 - (d) an employer in Victoria, provided the provisions of this Schedule that would apply to the employer as a federal system employer, or to an association of which the employer is a member, fall within the legislative power referred to the Commonwealth under the *Commonwealth Powers (Industrial Relations) Act 1996* of Victoria.
- (3) An association of employers is not ***federally registrable*** if it has a member who is not one of the following:
- (a) an employer;
 - (b) a person who was an employer when admitted to membership, but who has not resigned or whose membership has not been terminated;
 - (c) a person (other than an employee) who carries on business;
 - (d) an officer of the association.
- (4) An association of employers is not ***federally registrable*** if:
- (a) it is only a body corporate because it is or has been registered under this Schedule (whether before or after the commencement of this subsection); and
 - (b) the majority of its members are not federal system employers.

18B Federally registrable employee associations

- (1) An association of employees is *federally registrable* if:
 - (a) it is a constitutional corporation; or
 - (b) the majority of its members are federal system employees.
- (2) A person is a *federal system employee* if the person is:
 - (a) employed by a constitutional corporation; or
 - (b) employed in an enterprise that:
 - (i) operates principally within or from a Territory; or
 - (ii) is engaged principally in trade or commerce between Australia and a place outside Australia; or
 - (iii) is engaged principally in trade or commerce among the States; or
 - (iv) is engaged principally in trade or commerce within a Territory, between a State and a Territory or between 2 Territories; or
 - (v) is engaged principally in the supply of postal, telegraphic, telephonic or other like services; or
 - (vi) is engaged principally in banking (other than State banking not extending beyond the limits of a State); or
 - (vii) is engaged principally in insurance (other than State insurance not extending beyond the limits of a State); or
 - (c) employed in public sector employment; or
 - (d) employed in Victoria, provided the provisions of this Schedule that would apply to the employee as a federal system employee, or to an association of which the employee is a member, fall within the legislative power referred to the Commonwealth under the *Commonwealth Powers (Industrial Relations) Act 1996* of Victoria; or
 - (e) an independent contractor who, if he or she were an employee performing work of the kind which he or she usually performs as an independent contractor, would be an employee who could be characterised in one or more of the ways mentioned in paragraphs (a) to (d).
- (3) An association of employees is not *federally registrable* if it has a member who is not one of the following:
 - (a) an employee;
 - (b) a person specified in subsection (4);

- (c) an independent contractor who, if he or she were an employee performing work of the kind which he or she usually performs as an independent contractor, would be an employee eligible for membership of the association;
 - (d) an officer of the association.
- (4) The persons specified for the purpose of paragraph (3)(b) are persons (other than employees) who:
- (a) are, or are able to become, members of an industrial organisation of employees within the meaning of the *Industrial Relations Act 1996* of New South Wales; or
 - (b) are employees for the purposes of the *Industrial Relations Act 1999* of Queensland; or
 - (c) are employees for the purposes of the *Industrial Relations Act 1979* of Western Australia; or
 - (d) are employees for the purposes of the *Industrial and Employee Relations Act 1994* of South Australia.
- (5) An association of employees is not ***federally registrable*** if:
- (a) it is only a body corporate because it is or has been registered under this Schedule (whether before or after the commencement of this subsection); and
 - (b) the majority of the association's members are not federal system employees.

18C Federally registrable enterprise associations

- (1) An ***enterprise association*** is an association the majority of the members of which are employees performing work in the same enterprise.
- (2) An enterprise association is ***federally registrable*** if:
- (a) it is a constitutional corporation; or
 - (b) the majority of its members are federal system employees; or
 - (c) the employer or employers in relation to the relevant enterprise are constitutional corporations; or
 - (d) the relevant enterprise operates principally within or from a Territory; or
 - (e) the relevant enterprise is engaged principally in trade or commerce between Australia and a place outside Australia; or

-
- (f) the relevant enterprise is engaged principally in trade or commerce among the States; or
 - (g) the relevant enterprise is engaged principally in trade or commerce within a Territory, between a State and a Territory or between 2 Territories; or
 - (h) the relevant enterprise is engaged principally in the supply of postal, telegraphic, telephonic or other like services; or
 - (i) the relevant enterprise is engaged principally in banking (other than State banking not extending beyond the limits of a State); or
 - (j) the relevant enterprise is engaged principally in insurance (other than State insurance not extending beyond the limits of a State); or
 - (k) the relevant enterprise is in Victoria, and the provisions of this Schedule that would apply to the association (both before and after registration), fall within the legislative power referred to the Commonwealth under the *Commonwealth Powers (Industrial Relations) Act 1996* of Victoria.
- (3) An enterprise association is not **federally registrable** if it has a member who is not one of the following:
- (a) an employee performing work in the relevant enterprise;
 - (b) a person specified in subsection (4) performing work in the enterprise;
 - (c) an independent contractor performing work in the relevant enterprise who, if he or she were an employee performing work of the kind which he or she usually performs as an independent contractor, would be:
 - (i) an employee who could be characterised in one or more of the ways mentioned in paragraphs 18B(2)(a) to (d); and
 - (ii) an employee who would be eligible for membership of the association;
 - (d) an officer of the association.
- (4) The persons specified for the purpose of paragraph (3)(b) are persons (other than employees) who:
- (a) are, or are able to become, members of an industrial organisation of employees within the meaning of the *Industrial Relations Act 1996* of New South Wales; or
-

- (b) are employees for the purposes of the *Industrial Relations Act 1999* of Queensland; or
 - (c) are employees for the purposes of the *Industrial Relations Act 1979* of Western Australia; or
 - (d) are employees for the purposes of the *Industrial and Employee Relations Act 1994* of South Australia.
- (5) An enterprise association is not ***federally registrable*** if:
- (a) it is only a body corporate because it is or has been registered under this Schedule (whether before or after the commencement of this subsection); and
 - (b) it does not satisfy paragraphs (b) to (k) of subsection (2).

18D Constitutional validity

Associations of employers

- (1) If the Parliament would not have sufficient legislative power to provide for the registration of a particular association of employers if a particular class of employers mentioned in paragraphs 18A(2)(a) to (d) were included when working out whether the majority of its members are federal system employers, subsection 18A(2) applies as if it did not include a reference to that class of employers.
- (2) If the Parliament would only have sufficient legislative power to provide for the registration of a particular association of employers if the membership of the association were entirely made up of one or more of the following:
 - (a) federal system employers;
 - (b) persons (other than employees) who carry on business and who would, if they were employers, be federal system employers;
 - (c) officers of the association;then, despite subsection 18A(1), the association is not ***federally registrable*** unless it is either a constitutional corporation or made up in that way.

Associations of employees

- (3) If the Parliament would not have sufficient legislative power to provide for the registration of an association of employees if a
-

particular class of person mentioned in paragraphs 18B(2)(a) to (e) were included when working out whether the majority of its members are federal system employees, subsection 18B(2) applies as if it did not include a reference to that class of employees.

- (4) If the Parliament would only have sufficient legislative power to provide for the registration of a particular association of employees if the membership of the association were entirely made up of one or more of the following:
- (a) federal system employees;
 - (b) persons specified in subsection 18B(4);
 - (c) officers of the association;
- then, despite subsection 18B(1), the association is not *federally registrable* unless it is either a constitutional corporation or made up in that way.

Enterprise associations

- (5) If the Parliament would only have sufficient legislative power to provide for the registration of an enterprise association if the membership of the association were entirely made up of one or more of the following:
- (a) federal system employees performing work in the relevant enterprise;
 - (b) persons specified in subsection 18C(4);
 - (c) officers of the association;
- then, despite subsection 18C(2), the association is not *federally registrable* unless it is either a constitutional corporation or made up in that way.

290 Subparagraph 19(1)(a)(i) of Schedule 1B

Omit “section 18”, substitute “paragraph 18(a) or (b)”.

291 Paragraph 19(1)(i) of Schedule 1B

Omit “the objects set out in section 5 of this Schedule and section 3 of the Workplace Relations Act”, substitute “Parliament’s intention in enacting this Schedule (see section 5) and the object set out in section 3 of the Workplace Relations Act”.

292 Subsection 19(3) of Schedule 1B

Omit “the objects set out in section 5 of this Schedule and section 3 of the Workplace Relations Act”, substitute “Parliament’s intention in enacting this Schedule (see section 5) and the object set out in section 3 of the Workplace Relations Act”.

293 Subparagraph 20(1)(a)(i) of Schedule 1B

Omit “section 18”, substitute “paragraph 18(c)”.

294 Paragraph 20(1)(c) of Schedule 1B

Omit “50”, substitute “20”.

295 Paragraph 20(1)(i) of Schedule 1B

Omit “the objects set out in section 5 of this Schedule and section 3 of the Workplace Relations Act”, substitute “Parliament’s intention in enacting this Schedule (see section 5) and the object set out in section 3 of the Workplace Relations Act”.

296 Subsection 20(1B) of Schedule 1B

Repeal the subsection.

297 Paragraphs 21(3)(a), 21(4)(a) and 22(3)(a) of Schedule 1B

Omit “paragraph 18(1)(b) or (c)”, substitute “paragraph 18(b) or (c)”.

298 Paragraph 28(1)(a) of Schedule 1B

Repeal the paragraph, substitute:

(a) the conduct of:

- (i) the organisation (in relation to its continued breach of an award, an order of the Commission or a collective agreement, or its continued failure to ensure that its members comply with and observe an award, an order of the Commission or a collective agreement, or in any other respect); or
- (ii) a substantial number of the members of the organisation (in relation to their continued breach of an award, an order of the Commission or a collective agreement, or in any other respect);

has prevented or hindered the achievement of Parliament’s intention in enacting this Schedule (see section 5) or of an object of this Schedule or the Workplace Relations Act; or

299 Paragraph 28(1)(b) of Schedule 1B

Repeal the paragraph, substitute:

- (b) the organisation, or a substantial number of the members of the organisation or of a section or class of members of the organisation, has engaged in industrial action that has prevented, hindered or interfered with:
 - (i) the activities of a federal system employer; or
 - (ii) the provision of any public service by the Commonwealth or a State or Territory or an authority of the Commonwealth or a State or Territory; or

300 Paragraphs 28(1)(d) and (e) of Schedule 1B

Repeal the paragraphs, substitute:

- (d) the organisation, or a substantial number of the members of the organisation or of a section or class of members of the organisation, has or have failed to comply with:
 - (i) an injunction granted under subsection 111(12) of the Workplace Relations Act (which deals with orders to stop industrial action); or
 - (ii) an order made under section 114A or 114B of the Workplace Relations Act (which deals with contraventions of the strike pay provisions); or
 - (iii) an order made under section 268 of the Workplace Relations Act (which deals with contraventions of the freedom of association provisions); or
 - (iv) an interim injunction granted under section 354A of the Workplace Relations Act so far as it relates to conduct or proposed conduct that could be the subject of an injunction or order under a provision of the Workplace Relations Act mentioned in subparagraphs (i) to (iii); or
 - (v) an order made under section 23 (which deals with contraventions of the employee associations provisions); or
 - (vi) an order made under subsection 131(2) (which deals with contraventions of the withdrawal from amalgamation provisions).

301 After subsection 28(1) of Schedule 1B

Insert:

- (1A) The Industrial Registrar may apply to the Federal Court for an order cancelling the registration of an organisation on the ground that the organisation has failed to comply with an order of the Federal Court made under subsection 336(5) in relation to the organisation.

Note: Section 336 deals with the situation where a Registrar is satisfied, after an investigation, that a reporting unit of an organisation has contravened Part 3 of Chapter 8, or guidelines or rules relating to financial matters.

302 Subsection 28(2) of Schedule 1B

After “subsection (1)”, insert “or (1A)”.

303 Subsection 28(7) of Schedule 1B

Repeal the subsection, substitute:

- (7) A finding of fact in proceedings under section 23 or subsection 131(2) of this Schedule, or section 111, 114A, 114B or 268 of the Workplace Relations Act, is admissible as prima facie evidence of that fact in an application made on a ground specified in paragraph (1)(d).

304 Subsection 29(1) of Schedule 1B

After “subsection 28(1)”, insert “or (1A)”.

305 Paragraph 29(2)(a) of Schedule 1B

Omit “certified agreements or old IR agreements”, substitute “collective agreements”.

306 Subparagraph 30(1)(c)(ii) of Schedule 1B

Repeal the subparagraph, substitute:

- (ii) the organisation is an organisation of employees, other than an enterprise association, and has fewer than 50 members who are employees; or
- (iii) the organisation is an enterprise association and has fewer than 20 members who are employees; or
- (iv) the organisation is an organisation of employers and the members who are employers have, in the aggregate, throughout the 6 months before the application, not employed on an average taken per month at least 50 employees; or

- (v) the organisation is not, or is no longer, a federally registrable association.

307 Paragraph 32(c) of Schedule 1B

Omit “, certified agreement or old IR agreement”, substitute “or collective agreement”.

308 Subsection 38(6) of Schedule 1B

Omit “certified agreement or old IR agreement”, substitute “collective agreement”.

309 Paragraph 38(8)(c) of Schedule 1B

After “attainment of”, insert “Parliament’s intention in enacting this Schedule (see section 5) or”.

310 Paragraph 55(1)(d) of Schedule 1B

Omit “, certified agreements and old IR agreements”, substitute “or collective agreements”.

311 Paragraph 57(1)(b) of Schedule 1B

Omit “, certified agreements and old IR agreements”, substitute “and collective agreements”.

312 Sub-subparagraph 73(2)(c)(ii)(A) of Schedule 1B

Omit “certified agreements or old IR agreements”, substitute “collective agreements”.

313 Paragraph 76(a) of Schedule 1B

Omit “certified agreement or old IR agreement”, substitute “collective agreement”.

Note: The heading to section 76 of Schedule 1B is altered by omitting “**certified**” and substituting “**collective**”.

313A Subsection 93(1) of Schedule 1B (subparagraph (b)(i) of the definition of *constituent part*)

Omit “Part 4”, substitute “Part 2”.

313B Subsection 94(1) of Schedule 1B

Omit “Federal Court”, substitute “Commission”.

Note: The heading to section 94 is altered by omitting “**Federal Court**” and substituting “**Commission**”.

314 Paragraphs 94(1)(b) and (c) of Schedule 1B

Repeal the paragraphs, substitute:

- (b) the amalgamation occurred no less than 2 years prior to the date of the application; and
- (c) the application is made:
 - (i) if the amalgamation occurred before 31 December 1996—before the period of 3 years after the commencement of this subparagraph has elapsed or, if a longer period is prescribed, before that longer period has elapsed; or
 - (ii) if the amalgamation occurred after 31 December 1996—before the period of 5 years after the amalgamation occurred has elapsed.

314A Paragraph 94(2)(a) of Schedule 1B

Omit “Court”, substitute “Commission”.

315 After paragraph 94(3)(a) of Schedule 1B

Insert:

- (aa) a person authorised to make the application by the prescribed number of constituent members; or

316 At the end of subsection 94(3) of Schedule 1B

Add:

- ; or (d) a person who is:
 - (i) either a constituent member or a member of a committee of management referred to in paragraph (b) or (c); and
 - (ii) authorised to make the application by a committee of management referred to in paragraph (b) or (c).

317 At the end of section 94 of Schedule 1B

Add:

- (6) The regulations may prescribe the manner in which an authorisation for the purposes of paragraph (3)(aa) and subparagraph (3)(d)(ii) must be made.

317A Paragraph 95(1)(b) of Schedule 1B

Repeal the paragraph, substitute:

- (b) address particulars of any proposal by the applicant for the apportionment of the assets and liabilities of the amalgamated organisation and the constituent part; and
- (c) address such other matters as are prescribed.

317B Subsection 95(2) of Schedule 1B

Omit “Federal Court”, substitute “Commission”.

317C After subsection 95(3) of Schedule 1B

Insert:

- (3A) If the applicant has insufficient information to prepare an outline that complies with subsection (3), the applicant may request the Industrial Registrar to:
 - (a) give the applicant all information in the possession of the Industrial Registrar that may be relevant in the preparation of the outline; or
 - (b) direct the amalgamated organisation to give the applicant all information in the possession of the organisation that may be relevant in the preparation of the outline.
- (3B) The Industrial Registrar may provide that information, or direct the amalgamated organisation to provide that information.
- (3C) The amalgamated organisation must comply with a direction of the Industrial Registrar under subsection (3B).

317D Subsection 95(4) of Schedule 1B

Omit “Federal Court”, substitute “Commission”.

317E Subsection 95(4) of Schedule 1B

Omit “the Court”, substitute “the Commission”.

317F Subsection 96(1) of Schedule 1B

Omit “Federal Court”, substitute “Commission”.

317G Paragraph 96(2)(b) of Schedule 1B

Omit “Court”, substitute “Commission”.

317H Subsection 96(3) of Schedule 1B

Omit “Court”, substitute “Commission”.

317I Subsection 97(1) of Schedule 1B

Omit “Federal Court”, substitute “Commission”.

317J Subsections 97(2) and (3) of Schedule 1B

Omit “Court” (wherever occurring), substitute “Commission”.

317K Subsection 98(1) of Schedule 1B

Omit “Federal Court”, substitute “Commission”.

317L Subsection 98(2) of Schedule 1B

Omit “Court” (wherever occurring), substitute “Commission”.

317M Subsection 99(1) of Schedule 1B

Omit “Registrar of the Federal Court”, substitute “Industrial Registrar”.

317N Subsection 100(1) of Schedule 1B

Omit “Federal Court”, substitute “Commission”.

317O Subsection 100(1) of Schedule 1B

Omit “the Court”, substitute “the Commission”.

317P Subparagraph 100(1)(b)(ii) of Schedule 1B

Omit “prescribed for the purposes of paragraph 95(1)(b)”, substitute “mentioned in paragraph 95(1)(b) or prescribed for the purposes of paragraph 95(1)(c)”.

317Q Subsections 100(2) and (3) of Schedule 1B

Omit “Court”, substitute “Commission”.

317R Paragraph 106(2)(a) of Schedule 1B

Repeal the paragraph.

317S Paragraph 107(1)(a) of Schedule 1B

Repeal the paragraph.

317T Subsection 108(1) of Schedule 1B

Omit “Federal Court”, substitute “Commission”.

317U Subsections 108(1), (2) and (3) of Schedule 1B

Omit “the Court” (wherever occurring), substitute “the Commission”.

317V At the end of Division 2 of Part 3 of Chapter 3 of Schedule 1B

Add:

108A Powers of the Commission to be exercised by President or Full Bench

The powers of the Commission under this Division are exercisable by:

- (a) the President; or
- (b) if the President directs—a Full Bench of which the President is a member.

318 Paragraph 106(2)(c) of Schedule 1B

Omit “paragraph 94(3)(b) or (c)”, substitute “paragraph 94(3)(aa), (b), (c) or (d)”.

319 Paragraph 107(1)(c) of Schedule 1B

Omit “paragraph 94(3)(b) or (c)”, substitute “paragraph 94(3)(aa), (b), (c) or (d)”.

319A Paragraph 109(2)(c) of Schedule 1B

Repeal the paragraph, substitute:

- (c) any proposal for the apportionment of the assets and liabilities of the amalgamated organisation and the constituent part contained in the outline under section 95 relating to the application for the ballot; and
- (d) if the constituent part is a separately identifiable constituent part—the proportion of the members of the amalgamated organisation that are included in the constituent part; and
- (e) the interests of the creditors of the amalgamated organisation.

319B Subsection 111(2) of Schedule 1B

Omit “the amalgamated organisation” (first occurring), substitute “a Registrar”.

319C Subsection 111(2) of Schedule 1B

Omit all the words after “was”, substitute “a constituent member of the constituent part.”.

319D Paragraph 111(6)(a) of Schedule 1B

After “effect from”, insert “the end of”.

319E Subsection 111(7) of Schedule 1B

Repeal the subsection, substitute:

- (7) If a person referred to in subsection (2) gives written notice in accordance with paragraph (3)(b), within the notice period, that he or she wants to remain a member of the amalgamated organisation, he or she remains a member of the amalgamated organisation.
- (7A) If a person referred to in subsection (2) fails to give written notice in accordance with paragraph (3)(b), he or she:
 - (a) ceases, by force of this subsection, to be a member of the amalgamated organisation with effect from the end of the day after the end of the notice period; and
 - (b) becomes, by force of this subsection and without payment of entrance fee, a member of the newly registered organisation with effect from the day after the day referred to in paragraph (a).

319F Subsection 111(9) of Schedule 1B

Omit “Notwithstanding paragraph (7)(b), if a person to whom that paragraph”, substitute “Despite subsection (7A), if a person to whom that subsection”.

319G Subsection 111(9) of Schedule 1B

Omit all the words after “wishes to”, substitute “remain a member of the amalgamated organisation after the registration of the constituent part as an organisation under section 110, that person remains a member of the amalgamated organisation.”.

320 Subsection 113(1) of Schedule 1B

Omit “, a certified agreement or an old IR agreement”, substitute “or a collective agreement”.

Note: The heading to section 113 of Schedule 1B is replaced by the heading “**Orders of the Commission, awards etc. made before withdrawal**”.

321 Subsection 113(2) of Schedule 1B

Omit “, certified agreement or old IR agreement”, substitute “or collective agreement”.

322 After section 113 of Schedule 1B

Insert:

113A Collective agreements made after withdrawal

- (1) This section applies to a collective agreement that:
 - (a) is made on or after the day the registration takes effect; and
 - (b) is binding on the amalgamated organisation; and
 - (c) covers employees who are eligible to be members of the newly registered organisation.
- (2) On and from the day the agreement becomes binding on the amalgamated organisation, it also:
 - (a) becomes binding on the newly registered organisation and its members; and
 - (b) has effect for all purposes (including the obligations of employers and organisations of employers) as if references in the agreement to the amalgamated organisation included references to the newly registered organisation.
- (3) Subsection (2) ceases to have effect on the day occurring 5 years after the day on which the registration of the newly registered organisation takes effect.

323 Subsection 134(1) of Schedule 1B

Repeal the subsection.

324 Subsection 134(2) of Schedule 1B

Omit “(2)”.

325 Section 135 of Schedule 1B (note)

Repeal the note.

326 At the end of Part 2 of Chapter 4 of Schedule 1B

Add:

138A Representation rights of former State-registered associations

- (1) Regulations made for the purposes of this subsection may modify the way in which this Chapter applies in relation to an organisation that, before becoming registered under this Schedule, was a State-registered association or a transitionally registered association.
- (2) Without limiting subsection (1), the regulations may specify the weight that the Commission is to give, in making an order in relation to the rights of such an organisation to represent the interests under this Schedule or the Workplace Relations Act of a particular class or group of employees, to a State demarcation order.

327 Paragraph 142(1)(a) of Schedule 1B

Omit “, a certified agreement or an old IR agreement”, substitute “or a collective agreement”.

328 Subparagraphs 142(1)(b)(i) and (ii) of Schedule 1B

Omit “, a certified agreement or an old IR agreement”, substitute “or a collective agreement”.

329 Paragraph 142(1)(c) of Schedule 1B

Omit “the objects of this Schedule and the Workplace Relations Act and the purposes of the registration of organisations under this Schedule”, substitute “Parliament’s intention in enacting this Schedule (see section 5) and the objects of this Schedule and the Workplace Relations Act”.

330 Subparagraph 144(3)(a)(i) of Schedule 1B

Omit “, certified agreements and old IR agreements”, substitute “or collective agreements”.

331 Before subparagraph 151(5)(a)(i) of Schedule 1B

Insert:

(ia) Parliament's intention in enacting this Schedule (see section 5); or

332 Paragraph 152(6)(a) of Schedule 1B

After "contrary to", insert "Parliament's intention in enacting this Schedule (see section 5) or".

333 Paragraph 159(1)(a) of Schedule 1B

Omit ", certified agreements and old IR agreements", substitute "and collective agreements".

334 Subsection 177(3) of Schedule 1B

Omit ", certified agreement or old IR agreement", substitute "or collective agreement".

335 Subparagraph 180(1)(a)(i) of Schedule 1B

Omit "paragraph 18(1)(a)", substitute "paragraph 18(a)".

336 Subparagraph 180(1)(a)(ii) of Schedule 1B

Omit "paragraph 18(1)(b) or 18(1)(c)", substitute "paragraph 18(b) or (c)".

337 Subsection 180(5) of Schedule 1B

Repeal the subsection.

338 Subparagraph 246(2)(b)(i) of Schedule 1B

Omit ", certified agreements or old IR agreements", substitute "or collective agreements".

339 Subparagraph 249(5)(b)(i) of Schedule 1B

Omit ", certified agreements or old IR agreements", substitute "or collective agreements".

340 At the end of section 281 of Schedule 1B

Add:

<p>Part 3 sets out the general duties of officers and employees in relation to orders or directions of the Federal Court or the Commission.</p>

341 At the end of Chapter 9 of Schedule 1B

Add:

Part 3—General duties in relation to orders and directions

Division 1—Preliminary

294 Simplified outline

<p>This Part sets out the general duties of officers and employees in relation to orders or directions of the Federal Court or the Commission.</p>
--

295 Meaning of *involved*

For the purposes of this Part, a person is *involved* in a contravention if, and only if, the person has:

- (a) aided, abetted, counselled or procured the contravention; or
- (b) induced, whether by threats or promises or otherwise, the contravention; or
- (c) been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or
- (d) conspired with others to effect the contravention.

296 Application to officers and employees of branches

In this Part:

- (a) a reference to an officer of an organisation includes a reference to an officer of a branch of an organisation; and
- (b) a reference to an employee of an organisation includes a reference to an employee of a branch of an organisation.

Division 2—General duties in relation to orders and directions

297 Order or direction applying to organisation—civil obligation

- (1) This section applies if:
 - (a) the Federal Court or the Commission has made an order or a direction under this Schedule or the Workplace Relations Act; and
 - (b) the order or direction is in force; and
 - (c) the order or direction applies to an organisation.
- (2) An officer or employee of the organisation must not do anything that would cause the organisation to contravene the order or direction, knowing, or reckless as to whether, the doing of the thing would result in the contravention.

Note: This subsection is a civil penalty provision (see section 305).

- (3) An officer or employee of the organisation who is involved in a contravention of the order or direction, or of subsection (2), contravenes this subsection.

Note: This subsection is a civil penalty provision (see section 305).

298 Prohibition order or direction applying to organisation—civil obligation

- (1) This section applies if:
 - (a) the Federal Court or the Commission has made an order or a direction under this Schedule or the Workplace Relations Act; and
 - (b) the order or direction is in force; and
 - (c) the order or direction applies to an organisation; and
 - (d) the order or direction prohibits the organisation from doing something.
- (2) An officer or employee of the organisation must not do anything that would contravene the order or direction if the order or direction had applied to him or her, knowing, or reckless as to whether, the doing of the thing would result in such a contravention.

Note: This subsection is a civil penalty provision (see section 305).

- (3) An officer or employee of the organisation who is involved in a contravention of subsection (2) contravenes this subsection.

Note: This subsection is a civil penalty provision (see section 305).

299 Order or direction applying to officer—civil obligation

- (1) This section applies if:
- (a) the Federal Court or the Commission has made an order or a direction under this Schedule or the Workplace Relations Act; and
 - (b) the order or direction is in force; and
 - (c) the order or direction applies to an officer of an organisation.

- (2) The officer must not knowingly or recklessly contravene the order or direction.

Note: This subsection is a civil penalty provision (see section 305).

- (3) An officer or employee of the organisation who is involved in a contravention of subsection (2) contravenes this subsection.

Note: This subsection is a civil penalty provision (see section 305).

300 Prohibition order or direction applying to officer—civil obligation

- (1) This section applies if:
- (a) the Federal Court or the Commission has made an order or a direction under this Schedule or the Workplace Relations Act; and
 - (b) the order or direction is in force; and
 - (c) the order or direction applies to an officer of an organisation; and
 - (d) the order or direction prohibits the officer from doing something.

- (2) An officer or employee of the organisation must not do anything that would contravene the order or direction if the order or direction had applied to him or her, knowing, or reckless as to whether, the doing of the thing would result in such a contravention.

Note: This subsection is a civil penalty provision (see section 305).

- (3) An officer or employee of the organisation who is involved in a contravention of subsection (2) contravenes this subsection.

Note: This subsection is a civil penalty provision (see section 305).

301 Order or direction applying to employee—civil obligation

- (1) This section applies if:
- (a) the Federal Court or the Commission has made an order or a direction under this Schedule or the Workplace Relations Act; and
 - (b) the order or direction is in force; and
 - (c) the order or direction applies to an employee of an organisation.

- (2) The employee must not knowingly or recklessly contravene the order or direction.

Note: This subsection is a civil penalty provision (see section 305).

- (3) An officer or employee of the organisation who is involved in a contravention of subsection (2) contravenes this subsection.

Note: This subsection is a civil penalty provision (see section 305).

302 Prohibition order or direction applying to employee—civil obligation

- (1) This section applies if:
- (a) the Federal Court or the Commission has made an order or a direction under this Schedule or the Workplace Relations Act; and
 - (b) the order or direction is in force; and
 - (c) the order or direction applies to an employee of an organisation; and
 - (d) the order or direction prohibits the employee from doing something.

- (2) An officer or employee of the organisation must not do anything that would contravene the order or direction if the order or direction had applied to him or her, knowing, or reckless as to whether, the doing of the thing would result in such a contravention.

Note: This subsection is a civil penalty provision (see section 305).

- (3) An officer or employee of the organisation who is involved in a contravention of subsection (2) contravenes this subsection.

Note: This subsection is a civil penalty provision (see section 305).

303 Order or direction applying to member of organisation—civil obligation

- (1) This section applies if:
- (a) the Federal Court or the Commission has made an order or a direction under this Schedule or the Workplace Relations Act; and
 - (b) the order or direction is in force; and
 - (c) the order or direction applies to a member of an organisation.
- (2) An officer or employee of the organisation who is involved in a contravention of the order or direction contravenes this subsection.

Note: This subsection is a civil penalty provision (see section 305).

303A Application of this Division

This Division applies in relation to:

- (a) orders and directions made by the Federal Court or the Commission before, on or after the commencement of this Division; and
- (b) acts done or omissions made on or after that commencement.

341A After paragraph 305(2)(b) of Schedule 1B

Insert:

- (ba) subsection 95(3C) (direction to provide information);

342 After paragraph 305(2)(zj) of Schedule 1B

Insert:

- (zk) subsections 297(2) and (3), 298(2) and (3), 299(2) and (3), 300(2) and (3), 301(2) and (3), 302(2) and (3), and 303(2) (officers' duties);

343 After subsection 307(1) of Schedule 1B

Insert:

Compensation for damage suffered—contravention of Part 3 of Chapter 9

- (1A) The Federal Court may order a person to compensate an organisation for damage suffered by the organisation if:
- (a) the person has contravened a civil penalty provision in Part 3 of Chapter 9 in relation to the organisation; and
 - (b) the Court is satisfied that the organisation took reasonable steps to prevent the contravention of the provision; and
 - (c) the damage resulted from the contravention.

The order must specify the amount of the compensation.

Note: The heading to subsection 307(1) of Schedule 1B is replaced by the heading “*Compensation for damage suffered—contravention of Part 2 of Chapter 9*”.

344 At the end of subsection 310(1) of Schedule 1B

Add “(other than an order in relation to a contravention of a provision covered by paragraph 305(2)(zk))”.

345 After subsection 310(1) of Schedule 1B

Insert:

Application by Minister

- (2) The Minister, or some other person authorised in writing by the Minister under this subsection to make the application, may apply for an order under this Part in relation to a contravention of a provision covered by paragraph 305(2)(zk).

346 Section 317 of Schedule 1B (after the paragraph relating to Part 4A)

Insert:

Part 4B confers functions and powers on the Commission in relation to matters arising under this Schedule, in addition to those conferred by Division 3A of Part II of the Workplace Relations Act.

346A After paragraph 324(2)(o) of Schedule 1B

Insert:

- (oa) a person who was a party to a proceeding under Part 3 of Chapter 3;

347 Subparagraphs 337A(b)(iii), (iv) and (v) of Schedule 1B

Repeal the subparagraphs, substitute:

- (iii) the Australian Building and Construction Commissioner;
- (iv) an Australian Building and Construction Inspector;
- (v) a workplace inspector; and

348 After Part 4A of Chapter 11 of Schedule 1B

Insert:

Part 4B—Functions and powers of the Commission

337E Additional functions and powers

The functions and powers conferred on the Commission by a provision of this Part or this Schedule are in addition to those conferred on the Commission by Division 3A of Part II of the Workplace Relations Act.

337F Powers of inspection

- (1) For the purpose of, or in relation to, the exercise of another power, or the performance of a function, conferred by this Schedule, a member of the Commission may at any time during working hours:
 - (a) enter prescribed premises; and
 - (b) inspect or view any work, material, machinery, appliance, article, document or other thing on the prescribed premises; and
 - (c) interview, on the prescribed premises, any employee who is usually engaged in work on the prescribed premises.
- (2) In this section:

prescribed premises means premises on which or in relation to which:

- (a) an industry is carried on; or
- (b) work is being, or has been done, or commenced; or
- (c) an award or an order of the Commission has been made; or
- (d) a collective agreement is in operation.

337G Parties to proceedings

The Commission may direct that parties be joined or struck out as parties to proceedings under this Schedule.

337H Kinds of orders

The orders that the Commission may make under this Schedule include the following:

- (a) orders by consent of the parties to the proceedings;
- (b) provisional or interim orders;
- (c) orders including, or varying orders to include, a provision to the effect that engaging in conduct in breach of a specified term of the order is to be taken to constitute the commission of a separate breach of the term on each day on which the conduct continues.

337J Relief not limited to claim

In making an order in proceedings under this Schedule, the Commission is not restricted to the specific relief claimed by the parties concerned, but may include in the order anything which the Commission considers necessary or expedient for the purposes of dealing with the proceedings.

337K Publishing orders

- (1) If the Commission makes an order under this Schedule, the Commission must promptly:
 - (a) reduce the order to writing that:
 - (i) is signed by at least one member of the Commission; and
 - (ii) shows the day on which it is signed; and
 - (b) give to a Registrar:

- (i) a copy of the order; and
 - (ii) a list specifying each party who appeared at the hearing of the proceeding concerned.
- (2) The Commission must ensure that an order under this Schedule is expressed in plain English and is easy to understand in structure and content.
- (3) A Registrar who receives a copy of an order under subsection (1) must promptly:
 - (a) provide a copy of:
 - (i) the order; and
 - (ii) any written reasons received by the Registrar for the order;to each party shown on the list given to the Registrar under subparagraph (1)(b)(ii); and
 - (b) ensure that copies of each of the following are available for inspection at each registry:
 - (i) the order;
 - (ii) any written reasons received by the Registrar for the order.
- (4) The Industrial Registrar must ensure that the following are published as soon as practicable:
 - (a) an order under this Schedule;
 - (b) any written reasons for the order that are received by the Registrar.
- (5) If a member of the Commission ceases to be a member:
 - (a) after an order under this Schedule has been made by the Commission constituted by the member; but
 - (b) before the order has been reduced to writing or before it has been signed by the member;a Registrar must reduce the order to writing, sign it and seal it with the seal of the Commission, and the order has effect as if it had been signed by the member of the Commission.

348A After paragraph 340(1)(a) of Schedule 1B

Insert:

- (aa) matters in relation to which applications are made to the Court under subsection 109(1) (giving effect to withdrawal of constituent part from amalgamated organisation); and
- (ab) matters in relation to which applications are made to the Court under subsection 118(2) (giving effect to requirement to take necessary steps in relation to withdrawal from amalgamation); and
- (ac) matters in relation to which applications are made to the Court under subsection 125(1) (resolving difficulties in relation to application of Part 3 of Chapter 3 to a matter); and
- (ad) matters in relation to which applications are made to the Court under subsection 128(1) (validation of certain acts done for purposes of proposed or completed withdrawal from amalgamation); and
- (ae) matters in relation to which applications are made to the Court under subsection 129(1) (invalidity in proposed or completed withdrawal from amalgamation); and

349 Section 345 of Schedule 1B

Before “Subject”, insert “(1).”

350 At the end of section 345 of Schedule 1B

Add:

- (2) This section does not apply to protected action ballots ordered under Division 4 of Part VC of the Workplace Relations Act.

351 Section 346 of Schedule 1B

Before “A financial”, insert “(1)”.

352 At the end of section 346 of Schedule 1B

Add:

- (2) This section does not apply to protected action ballots ordered under Division 4 of Part VC of the Workplace Relations Act.

353 Section 357 of Schedule 1B

Omit “monetary penalty”, substitute “pecuniary penalty”.

354 Paragraph 358(1)(a) of Schedule 1B

Omit “monetary penalty”, substitute “pecuniary penalty”.

355 Schedule 1 (heading)

Repeal the heading, substitute:

Schedule 1—Extra provisions relating to definitions

Note: See sections 4, 4AA, 4AB and 4AC.

356 Clause 1 of Schedule 1 (definition of *flight crew officer’s employer*)

Repeal the definition.

357 Clause 1 of Schedule 1 (definition of *waterside employer*)

Repeal the definition.

358 Clause 2 of Schedule 1

Repeal the clause, substitute:

2 References to employee with its ordinary meaning

Each of the following references to employee has its ordinary meaning (subject to subsections 4AA(3) and (4)):

- (a) a reference in section 3;
- (b) a reference in any of the following definitions in subsection 4(1):
 - (i) *applies to employment generally*;
 - (ii) *industry*;
 - (iii) *State employment agreement*;
 - (iv) *State or Territory training authority*;
 - (v) *training arrangement*;
 - (vi) *trade union*;
- (c) a reference in paragraph 7C(3)(f) or (m);
- (d) a reference in section 44E;
- (f) a reference in section 90Z;
- (g) the first reference in subsection 90ZD(1);
- (h) a reference in Division 2 or 5 of Part VIA;

- (i) a reference in Part IX;
- (j) a reference in Part XA;
- (k) a reference in Part 4, 5 or 6 of Schedule 14.

Note 1: Subsection 4AA(3) provides that a reference to an employee with its ordinary meaning includes a reference to a person who is usually an employee.

Note 2: Subsection 4AA(4) provides that a reference to an employee with its ordinary meaning does not include a reference to a person on a vocational placement.

Note 3: The regulations may amend this clause. See clause 5.

3 References to employer with its ordinary meaning

Each of the following references to employer has its ordinary meaning (subject to subsection 4AB(3)):

- (a) a reference in section 3;
- (b) a reference in any of the following definitions in subsection 4(1):
 - (i) *applies to employment generally*;
 - (ii) *industry*;
 - (iii) *State employment agreement*;
 - (iv) *training arrangement*;
 - (v) *vocational placement*;
- (c) a reference in paragraph 7C(3)(m);
- (d) a reference in section 90Z;
- (e) a reference in Division 2 or 5 of Part VIA;
- (f) a reference in Part IX;
- (g) a reference in Part XA;
- (h) a reference in Division 2 of Part 2 of Schedule 14.

Note 1: Subsection 4AB(3) provides that a reference to employer with its ordinary meaning includes a reference to a person who is usually an employer.

Note 2: The regulations may amend this clause. See clause 5.

4 References to employment with its ordinary meaning

Each of the following references to employment has its ordinary meaning:

- (a) a reference in section 3;

- (b) a reference in any of the following definitions in subsection 4(1), except a reference forming part of the defined term itself:
 - (i) *applies to employment generally*;
 - (ii) *public sector employment*;
 - (iii) *State employment agreement*;
 - (iv) *State or Territory industrial law*;
 - (v) *trade union*;
- (c) a reference in section 44A, 44D or 44E;
- (d) a reference in section 90Z;
- (e) a reference in Division 2 or 5 of Part VIA;
- (f) a reference in Part IX;
- (g) a reference in Part XA.

Note: The regulations may amend this clause. See clause 5.

5 Regulations may amend clauses 2, 3 and 4

- (1) The regulations may amend clauses 2, 3 and 4.
- (2) For the purposes of the *Amendments Incorporation Act 1905*, amendments of any of clauses 2, 3 and 4 made by regulations are to be treated as if they had been made by an Act.

Note: Subclause (2) ensures that the amendments can be incorporated into a reprint of this Act.

359 After Schedule 12

Insert:

Schedule 13—Transitional arrangements for parties bound by federal awards

Note: See section 4A.

Part 1—Preliminary

Division 1—Objects of Schedule

1 Objects of Schedule

- (1) This Schedule provides transitional arrangements for certain employers (*transitional employers*) that were bound immediately before the reform commencement by an award (a *transitional award*), and their employees (*transitional employees*).
- (2) The objects of this Schedule are to ensure that, during the transitional period:
 - (a) transitional awards continue in operation and are maintained by the Commission, within the limits specified in this Schedule; and
 - (b) transitional employers and their employees are able to cease to be bound by a transitional award in appropriate circumstances, including by making agreements under State laws; and
 - (c) the Commission's functions and powers to vary transitional awards are exercised so that wages and other monetary entitlements are not inconsistent with wage-setting decisions of the AFPC; and
 - (d) appropriate compliance and enforcement mechanisms remain available.

Division 2—Interpretation

2 Definitions

- (1) In this Schedule:

allowable transitional award matters means the matters covered by subclause 17(1).

Note: The matters referred to in subclause 17(1) have a meaning that is affected by clause 18.

arbitration powers means the powers of the Commission in relation to arbitration.

award means an award within the meaning of subsection 4(1) of this Act as in force immediately before the reform commencement.

breach includes non-observance.

cease dealing, in relation to an industrial dispute, means:

- (a) to dismiss the whole or a part of a matter to which the industrial dispute relates; or
- (b) to refrain from further hearing or from determining the industrial dispute or part of the industrial dispute.

committee of management, in relation to an organisation, association or branch of an organisation or association, means the group or body of persons (however described) that manages the affairs of the organisation, association or branch.

conciliation powers means the powers of the Commission in relation to conciliation.

Court means the Federal Court of Australia or the Federal Magistrates Court.

employee means an individual so far as:

- (a) he or she is employed by an excluded employer, except on a vocational placement; or
- (b) his or her usual occupation involves being employed by an excluded employer, except on a vocational placement.

employer means an excluded employer.

employment means employment of an employee within the meaning of this Schedule.

excluded employer means an employer (within the ordinary meaning of the term) so far as the definition of employer in subsection 4AB(1) does not cover the employer.

industrial action has the meaning given by clause 3.

industrial dispute means:

- (a) an industrial dispute (including a threatened, impending or probable industrial dispute):
 - (i) extending beyond the limits of any one State; and

- (ii) that is about allowable transitional award matters pertaining to the relationship between transitional employers and transitional employees; or
- (b) a situation that is likely to give rise to an industrial dispute of the kind referred to in paragraph (a).

outworker means a transitional employee who, for the purposes of the business of a transitional employer, performs work at private residential premises or at other premises that are not business or commercial premises of the employer.

preserved transitional award term has the meaning given by subclause 22(2).

reform commencement means the time at which this Schedule commences.

relevant Presidential Member, in relation to an industrial dispute, means the Presidential Member who has been given the responsibility by the President for organising and allocating the work of the panel to which the industry concerned has been assigned or, if the industry concerned has not been assigned to a panel, the President.

State award means an award, order, decision or determination of a State industrial authority.

State employment agreement means an agreement:

- (a) between an employer and either or both of the following:
 - (i) one or more employees of the employer;
 - (ii) one or more trade unions; and
- (b) that regulates wages and conditions of employment of one or more employees; and
- (c) that is made under a law of a State that provides for such agreements; and
- (d) that prevails over an inconsistent State award.

State industrial authority means:

- (a) a board or court of conciliation or arbitration, or tribunal, body or persons, having authority under a State Act to exercise any power of conciliation or arbitration in relation to industrial disputes within the limits of the State; or

- (b) a special board constituted under a State Act relating to factories; or
- (c) any other State board, court, tribunal, body or official prescribed for the purposes of this definition.

transitional award means an award as continued in force on and from the reform commencement by subclause 4(2), and, to avoid doubt, includes any variations made under this Schedule.

transitional award-related order means an order varying, revoking or suspending a transitional award under this Schedule.

transitional employee means an employee of a transitional employer.

transitional employer means an excluded employer that is bound by a transitional award.

transitional period means the period of 5 years beginning on the reform commencement.

Victorian reference award means an award made under this Act in its operation in accordance with repealed subsection 493(1).

- (2) In this Schedule, a reference to an industrial dispute includes a reference to:
 - (a) a part of an industrial dispute; and
 - (b) an industrial dispute so far as it relates to a matter in dispute; and
 - (c) a question arising in relation to an industrial dispute.
- (3) In this Schedule, a reference to engaging in conduct includes a reference to being, whether directly or indirectly, a party to or concerned in the conduct.
- (4) A reference in this Schedule to a term of a transitional award includes a reference to a provision of a transitional award.
- (5) A reference in this Schedule to an independent contractor is not confined to a natural person.

3 Meaning of *industrial action*

- (1) For the purposes of this Schedule, *industrial action* means any action of the following kinds:
- (a) the performance of work by a transitional employee in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work by a transitional employee, the result of which is a restriction or limitation on, or a delay in, the performance of the work, where:
 - (i) the terms and conditions of the work are prescribed, wholly or partly, by a transitional award; or
 - (ii) the work is performed, or the practice is adopted, in connection with an industrial dispute;
 - (b) a ban, limitation or restriction on the performance of work by a transitional employee, or on acceptance of or offering for work by a transitional employee, in accordance with the terms and conditions prescribed by a transitional award;
 - (c) a ban, limitation or restriction on the performance of work by a transitional employee, or on acceptance of or offering for work by a transitional employee, that is adopted in connection with an industrial dispute;
 - (d) a failure or refusal by transitional employees to attend for work or a failure or refusal to perform any work at all by transitional employees who attend for work, if:
 - (i) the transitional employees are members of an organisation and the failure or refusal is in accordance with a decision made, or direction given, by an organisation, the committee of management of the organisation, or an officer or a group of members of the organisation acting in that capacity; or
 - (ii) the failure or refusal is in connection with an industrial dispute;
 - (e) the lockout of transitional employees from their employment by the transitional employer of the employees if:
 - (i) the terms and conditions of the employment are prescribed, wholly or partly, by a transitional award; or
 - (ii) the lockout is in connection with an industrial dispute;
- but does not include any of the following:

- (f) action by transitional employees that is authorised or agreed to by the transitional employer of the employees;
- (g) action by a transitional employer that is authorised or agreed to by or on behalf of transitional employees of the employer;
- (h) action by a transitional employee if:
 - (i) the action was based on a reasonable concern by the transitional employee about an imminent risk to his or her health or safety; and
 - (ii) the transitional employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work, whether at the same or another workplace, that was safe and appropriate for the employee to perform.

Note 1: See also subclause (4) which deals with the burden of proof of the exception in subparagraph (h)(i) of this definition.

Note 2: The issue of whether action that is not industrial in character is industrial action was considered by the Commission in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and Others v The Age Company Limited*, PR946290. In that case, the Full Bench of the Commission drew a distinction between an employee who does not attend for work in support of a collective demand that the employer agree to alteration of the conditions of employment as being clearly engaged in industrial action and an employee who does not attend for work on account of illness.

- (2) For the purposes of this Schedule:
 - (a) conduct is capable of constituting industrial action even if the conduct relates to part only of the duties that transitional employees are required to perform in the course of their employment; and
 - (b) a reference to industrial action includes a reference to a course of conduct consisting of a series of industrial actions.
- (3) For the purposes of this clause, a transitional employer **locks out** transitional employees from their employment if the transitional employer prevents the transitional employees from performing work under their contracts of employment without terminating those contracts (except to the extent that this would be an expansion of the ordinary meaning of that expression).
- (4) Whenever a person seeks to rely on subparagraph (1)(h)(i), that person has the burden of proving that subparagraph (1)(h)(i) applies.

Division 3—Continuing operation of awards

4 Continuing operation of awards in force before reform commencement

- (1) Despite the repeals and amendments made by the *Workplace Relations Amendment (Work Choices) Act 2005*, an award in force immediately before the reform commencement continues in force, on and from the reform commencement, in accordance with this clause.
- (2) An award that is continued in force by this clause binds the following:
 - (a) all excluded employers that were bound by the award immediately before the reform commencement;
 - (b) any transitional employer bound by the award under Part 6A of this Schedule (transmission of business);
 - (c) all organisations that were bound by the award immediately before the reform commencement;
 - (d) all employees who, immediately before the reform commencement, were members of organisations that were bound by the award;
 - (e) each other entity that:
 - (i) is not an employer within the meaning of subsection 4AB(1) or an eligible entity within the meaning of Division 6A of Part VI; and
 - (ii) was bound by the award immediately before the reform commencement;but only in relation to outworker terms.
- (3) To avoid doubt, an award that is continued in force by this clause binds an excluded employer or other entity that was bound by the award immediately before the reform commencement, whether the employer or other entity was bound:
 - (a) in its own right or as a member of an organisation; or
 - (b) because of the operation of paragraph 149(1)(d), as in force immediately before the reform commencement.

Note: Clause 69 provides for who is bound by an order varying a transitional award.

- (4) An award that is continued in force by this clause is called a *transitional award*.
- (5) In this clause:
 - outworker term* means a term of a transitional award that is:
 - (a) about the matter referred to in paragraph 17(1)(q); or
 - (b) incidental to such a matter, and included in the award as permitted by clause 24; or
 - (c) a machinery provision in respect of such a matter included in the award as permitted by clause 24.

5 Particular rules about transitional awards

- (1) If an excluded employer was, immediately before the reform commencement, regulated by a State employment agreement in respect of the employment of an employee, the employer is not bound by a transitional award in respect of the employment of that employee at any time after the reform commencement.
- (2) If a transitional employer that is bound by a transitional award as a member of an organisation ceases to be a member of that organisation, the transitional employer ceases to be bound by the transitional award at the time the transitional employer ceases to be a member of the organisation, unless the transitional employer is otherwise bound by the transitional award.
- (3) If a transitional employee who is bound by a transitional award as a member of an organisation ceases to be a member of that organisation, the transitional employee ceases to be bound by the transitional award at the time the transitional employee ceases to be a member of the organisation.

6 Cessation of transitional awards

- (1) A transitional award that has not ceased to be in force during the transitional period ceases to be in force at the end of that period.
- (2) To avoid doubt, this clause does not affect any rights accrued or liabilities incurred under a transitional award before it ceases to be in force.

Part 2—Performance of Commission’s functions

7 General functions of Commission

- (1) The functions of the Commission under this Schedule are to prevent and settle industrial disputes:
 - (a) so far as possible, by conciliation; and
 - (b) as a last resort and within the limits of the Commission’s powers under this Schedule, by arbitration.
- (2) In performing its functions under paragraph (1)(b), the Commission may vary a transitional award as permitted by clause 29.
- (3) However, the Commission must not make any new awards.

8 Performance of Commission’s functions under this Schedule

- (1) The Commission must perform its functions under this Schedule in a way that furthers the objects of this Schedule.
- (2) In performing its functions under this Schedule, the Commission must ensure that minimum safety net entitlements are maintained for wages and other specified monetary entitlements, having regard to:
 - (a) the desirability of high levels of productivity, low inflation, creation of jobs and high levels of employment; and
 - (b) the principle that the wages and other monetary entitlements of transitional employees should not place them at a disadvantage compared with the entitlements of employees (within the meaning of subsection 4AA(1)); and
 - (c) the principle that the costs to transitional employers of wages and other monetary entitlements should not place them at a competitive disadvantage in relation to employers (within the meaning of subsection 4AB(1)).
- (3) In having regard to the factors referred to in paragraph (2)(a), the Commission must have regard to:
 - (a) wage-setting decisions of the AFPC; and

- (b) in particular, any statements by the AFPC about the effect of wage increases on productivity, inflation and levels of employment.
- (4) In performing its functions under this Schedule, the Commission must have regard to:
 - (a) the desirability of its decisions being consistent with wage-setting decisions of the AFPC; and
 - (b) the importance of providing minimum safety net entitlements that act as an incentive to bargaining at the workplace level.

9 Anti-discrimination considerations

- (1) Without limiting clause 8, in exercising any of its powers under this Schedule, the Commission must:
 - (a) apply the principle that men and women should receive equal remuneration for work of equal value; and
 - (b) have regard to the need to provide pro-rata disability pay methods for transitional employees with disabilities; and
 - (c) take account of the principles embodied in the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984*, the *Disability Discrimination Act 1992* and the *Age Discrimination Act 2004* relating to discrimination in relation to employment; and
 - (d) take account of the principles embodied in the Family Responsibilities Convention, in particular those relating to:
 - (i) preventing discrimination against workers who have family responsibilities; or
 - (ii) helping workers to reconcile their employment and family responsibilities; and
 - (e) ensure that its decisions do not contain provisions that discriminate because of, or for reasons including, race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.
- (2) For the purposes of the Acts referred to in paragraph (1)(c) and paragraph (1)(e), the Commission does not discriminate against a transitional employee or transitional employees by (in accordance with this Schedule) determining or adjusting terms in a transitional award that determine a basic periodic rate of pay for:

- (a) all junior transitional employees, or a class of junior transitional employees; or
- (b) all transitional employees with a disability, or a class of transitional employees with a disability; or
- (c) all transitional employees to whom training arrangements apply, or a class of transitional employees to whom training arrangements apply.

10 Commission to have regard to operation of Superannuation Guarantee legislation

In varying a term dealing with rates of pay in a transitional award, the Commission must have regard to the operation of:

- (a) the *Superannuation Guarantee Charge Act 1992*; and
- (b) the *Superannuation Guarantee (Administration) Act 1992*.

11 Commission to encourage agreement on procedures for preventing and settling disputes

In dealing with an industrial dispute, the Commission must, if it appears practicable and appropriate, encourage the parties to agree on procedures for preventing and settling, by discussion and agreement, further disputes between the parties or any of them.

12 Commission to have regard to compliance with disputes procedures

If the parties to an industrial dispute are bound by a transitional award that provides for procedures for preventing or settling industrial disputes between them, the Commission must, in considering whether or when it will exercise its powers in relation to the industrial dispute, have regard to the extent to which the procedures (if applicable to the industrial dispute) have been complied with by the parties and the circumstances of any compliance or non-compliance with the procedures.

13 No automatic flow-on of terms of certain agreements

- (1) The Commission does not have power to vary a transitional award to include in it terms that are based on the terms of a workplace agreement, a pre-reform certified agreement or a section 170MX

award unless the Commission is satisfied that including the terms in the award:

- (a) would not be inconsistent with the objects of this Schedule set out in clause 1; and
 - (b) would not be inconsistent with wage-setting decisions of the AFPC; and
 - (c) would not be otherwise contrary to the public interest.
- (2) In this clause:

pre-reform certified agreement has the same meaning as in Schedule 14.

section 170MX award has the same meaning as in Schedule 14.

14 Commission to act quickly

- (1) The Commission must perform its functions under this Schedule as quickly as practicable.
- (2) However, the Commission must give a higher priority to performing its other functions under this Act than it gives to performing its functions under this Schedule.

15 Commission not required to have regard to certain matters

Section 44A does not apply to the performance of a function by the Commission under this Schedule.

Part 3—Powers and procedures of Commission for dealing with industrial disputes

Division 1—Settlement of industrial disputes

Subdivision A—Scope of industrial disputes

16 Scope of industrial disputes

- (1) For the purposes of dealing with an industrial dispute by conciliation, an industrial dispute may be about any allowable transitional award matter.

-
- (2) An industrial dispute is taken to be only about the allowable transitional award matters referred to in subclause 29(2) for the following purposes:
- (a) dealing with an industrial dispute by arbitration;
 - (b) preventing or settling an industrial dispute, and maintaining the settlement of an industrial dispute, by varying a transitional award.

Note: For the purposes of this Schedule, an industrial dispute can only be about allowable transitional award matters—see the definition of *industrial dispute* in subclause 2(1).

Subdivision B—Allowable transitional award matters

17 Allowable transitional award matters

- (1) Subject to this Division, a transitional award may include terms about the following matters (*allowable transitional award matters*) only:
- (a) classifications of transitional employees and skill-based career paths;
 - (b) ordinary time hours of work and the times within which they are performed, rest breaks, notice periods and variations to working hours;
 - (c) rates of pay generally (such as hourly rates and annual salaries), rates of pay for juniors and transitional employees to whom training arrangements apply, and rates of pay for transitional employees under the supported wage system;
 - (d) incentive-based payments, piece rates and bonuses;
 - (e) annual leave and annual leave loadings;
 - (f) personal/carer's leave;
 - (g) ceremonial leave;
 - (ga) leave for the purpose of seeking other employment after the giving of a notice of termination by an employer to an employee;
 - (h) parental leave, including maternity and adoption leave;
 - (i) observance of days declared by or under a law of a State or Territory to be observed generally within that State or Territory, or a region of that State or Territory, as public holidays by employees who work in that State, Territory or

region, and entitlements of transitional employees to payment in respect of those days;

- (ia) days to be substituted for, or a procedure for substituting, days referred to in paragraph (i);
- (j) monetary allowances for:
 - (i) expenses incurred in the course of employment; or
 - (ii) responsibilities or skills that are not taken into account in rates of pay for transitional employees; or
 - (iii) disabilities associated with the performance of particular tasks or work in particular conditions or locations;
- (k) loadings for working overtime or for casual or shift work;
- (l) penalty rates;
- (m) redundancy pay, within the meaning of subclause (3);
- (n) stand-down provisions;
- (o) dispute settling procedures;
- (p) type of employment, such as full-time employment, casual employment, regular part-time employment and shift work;
- (q) pay and conditions for outworkers, but only to the extent necessary to ensure that their overall pay and conditions of employment are fair and reasonable in comparison with the pay and conditions of employment specified in a relevant transitional award or transitional awards for transitional employees who perform the same kind of work at a transitional employer's business or commercial premises.

Note 1: The matters referred to in subclause (1) have a meaning that is affected by clause 18.

Note 2: Entitlements relating to certain matters that were allowable award matters immediately before the reform commencement are preserved under clause 22.

- (2) For the purposes of paragraph (1)(f), *personal/carer's leave* includes war service sick leave, infectious diseases sick leave and other like forms of sick leave.
- (3) For the purposes of paragraph (1)(m), *redundancy pay* means redundancy pay in relation to a termination of employment that is:
 - (a) by a transitional employer of 15 or more transitional employees; and
 - (b) either:

-
- (i) at the initiative of the transitional employer and on the grounds of operational requirements; or
 - (ii) because the transitional employer is insolvent.
- (4) For the purposes of paragraph (3)(a):
- (a) whether a transitional employer employs 15 or more transitional employees, or fewer than 15 transitional employees, is to be worked out as at the time (the *relevant time*):
 - (i) when notice of the redundancy is given; or
 - (ii) when the redundancy occurs;whichever happens first; and
 - (b) a reference to transitional employees includes a reference to:
 - (i) the transitional employee who becomes redundant and any other transitional employee who becomes redundant at the relevant time; and
 - (ii) any casual transitional employee who, at the relevant time, has been engaged by the transitional employer on a regular and systematic basis for at least 12 months (but not including any other casual transitional employee).

18 Matters that are not allowable transitional award matters

- (1) For the purposes of subclause 17(1), matters that are not allowable transitional award matters within the meaning of that subclause include, but are not limited to, the following:
- (a) rights of an organisation to participate in, or represent a transitional employer or transitional employee in, the whole or part of a dispute settling procedure, unless the organisation is the representative of the employer's or employee's choice;
 - (b) conversion from casual employment to another type of employment;
 - (c) the number or proportion of transitional employees that a transitional employer may employ in a particular type of employment or in a particular classification;
 - (d) prohibitions (whether direct or indirect) on a transitional employer employing transitional employees in a particular type of employment or in a particular classification;

- (e) the maximum or minimum hours of work for regular part-time transitional employees;
 - (f) restrictions on the range or duration of training arrangements;
 - (g) restrictions on the engagement of independent contractors and requirements relating to the conditions of their engagement;
 - (h) restrictions on the engagement of labour hire workers, and requirements relating to the conditions of their engagement, imposed on an entity or person for whom the labour hire worker performs work under a contract with a labour hire agency;
 - (i) union picnic days;
 - (j) tallies in the meat industry;
 - (k) dispute resolution training leave;
 - (l) trade union training leave.
- (2) Paragraph (1)(e) does not prevent any of the following being included in a transitional award:
- (a) terms setting a minimum number of consecutive hours that a transitional employer may require a regular part-time transitional employee to work;
 - (b) terms facilitating a regular pattern in the hours worked by regular part-time transitional employees.
- (2A) Paragraph (1)(g) does not limit the operation of paragraph 17(1)(q).
- (3) In this clause:
- labour hire agency** means an entity or a person who conducts a business that includes the employment or engagement of workers for the purpose of supplying those workers to another entity or person under a contract with that other entity or person.
- labour hire worker** means a person:
- (a) who:
 - (i) is employed by a labour hire agency; or
 - (ii) is engaged by a labour hire agency as an independent contractor; and
 - (b) who performs work for another entity or person under a contract between that entity or person and the labour hire agency.

Note: In this Schedule, references to independent contractors are not confined to natural persons (see subclause 2(5)).

19 Terms involving discrimination and preference not to be included

To the extent that a term of a transitional award requires or permits, or has the effect of requiring or permitting, any conduct that would contravene Part XA, it is taken not to be about allowable transitional award matters.

20 Terms about rights of entry not to be included

To the extent that a term of a transitional award requires or authorises an officer or employee of an organisation:

- (a) to enter premises:
 - (i) occupied by a transitional employer who is bound by the award; or
 - (ii) in which work to which the award applies is being carried on; or
 - (b) to inspect or view any work, material, machinery, appliance, article, document or other thing on such premises; or
 - (c) to interview a transitional employee on such premises;
- it is taken not to be about allowable transitional award matters.

21 Enterprise flexibility provisions not to be included

To the extent that a term of a transitional award is an enterprise flexibility provision within the meaning of section 113A as in force immediately before the reform commencement, it is taken not to be about an allowable transitional award matter.

Subdivision C—Other terms that may be included in transitional awards

22 Preserved transitional award terms

- (1) A transitional award may include preserved transitional award terms.
- (2) A *preserved transitional award term* is a term, or more than one term, of a transitional award that:
 - (a) is about a matter referred to in subclause (3); and

- (b) had effect under the transitional award on the reform commencement.
- (3) For the purposes of subclause (2), the matters are as follows:
 - (a) long service leave;
 - (b) notice of termination;
 - (c) jury service;
 - (d) superannuation.
- (4) If a term of a transitional award is about both matters referred to in subclause (3) and other matters, it is taken to be a preserved transitional award term only to the extent that it is about the matters referred to in subclause (3).
- (4A) If more than one term of a transitional award is about a matter referred to in subclause (3), then those terms, taken together, constitute the preserved transitional award term of that transitional award about that matter.
- (5) A preserved transitional award term continues to have effect for the purposes of this Schedule.

Note: Preserved transitional award terms may not be varied.
- (6) A preserved transitional award term about superannuation ceases to have effect at the end of 30 June 2008.

23 Facilitative provisions

- (1) A transitional award may include a facilitative provision that allows agreement at the workplace or enterprise level, between transitional employers and transitional employees (including individual transitional employees), on how a term in the award about an allowable transitional award matter or a preserved transitional award term is to operate.
- (2) A facilitative provision must not require agreement between a majority of transitional employees and a transitional employer, but must permit agreement between an individual transitional employee and a transitional employer, on how a term in an award about an allowable transitional award matter or a preserved transitional award term is to operate.

- (3) A facilitative provision may only operate in respect of an allowable transitional award matter or a preserved transitional award term.
- (4) A facilitative provision is of no effect to the extent that it does not comply with subclause (2) or (3).

24 Incidental and machinery terms

- (1) A transitional award may include terms that are:
 - (a) incidental to an allowable transitional award matter about which there is a term in the award; and
 - (b) essential for the purpose of making a particular term operate in a practical way.
- (2) For the purposes of this clause, to the extent that a term of a transitional award provides for a matter that is not an allowable transitional award matter because of the operation of clause 18, 19, 20 or 21, the term is not, and cannot be, incidental to a term in the award providing for an allowable transitional award matter, and is of no effect to that extent.
- (2A) However, to avoid doubt, paragraph 18(1)(g) does not limit the operation of subclauses (1) and (3) to the extent that those subclauses relate to the matter referred to in paragraph 17(1)(q).
- (3) A transitional award may include machinery provisions including, but not limited to, provisions providing for the following:
 - (a) commencement;
 - (b) definitions;
 - (c) titles;
 - (d) arrangement;
 - (e) transitional employers, transitional employees and organisations bound;
 - (f) term of the award.

25 Anti-discrimination clauses

A transitional award may include a model anti-discrimination clause.

26 Boards of reference

- (1) A transitional award may include, in accordance with subclause (2), a term:
 - (a) appointing, or giving power to appoint, for the purposes of the award, a board of reference consisting of a person or 2 or more persons; and
 - (b) assigning to the board of reference functions as described in subclause (3).
- (2) A term of a transitional award that appoints, or gives power to appoint, a board of reference is taken:
 - (a) to continue in effect after the reform commencement, to the extent that it complies with subclause (3); and
 - (b) to cease to have effect after the reform commencement, to the extent that it does not comply with subclause (3).
- (3) A term of a transitional award that appoints, or gives power to appoint, a board of reference:
 - (a) may confer upon the board of reference an administrative function in respect of allowing, approving, fixing, or dealing with, in the manner and subject to the conditions specified in the award, a matter or thing that, under the award, may from time to time be required to be allowed, approved, fixed, or dealt with; and
 - (b) must not confer upon the board of reference a function of settling or determining disputes about any matter arising under the award.
- (4) A function conferred under subclause (3) may relate only to allowable transitional award matters or terms permitted by this Subdivision to be included in the transitional award.
- (5) A board of reference may consist of or include a Commissioner.
- (6) Subject to subclauses (3) and (4), the regulations may make provision in relation to:
 - (a) a particular board of reference; or
 - (b) boards of reference in general;including, but not limited to, the functions and powers of the board or boards.

Subdivision D—Terms in transitional awards that cease to have effect

27 Terms in transitional awards that cease to have effect after the reform commencement

- (1) Immediately after the reform commencement, a term of a transitional award ceases to have effect to the extent that it is about matters that are not allowable transitional award matters, except to the extent (if any) that the term is permitted by Subdivision C to be included in the award.
- (2) This clause does not affect the operation of preserved transitional award terms.

Division 2—Variation and revocation of transitional awards

28 Variation of transitional awards—general

- (1) The Commission may make an order varying a transitional award only:
 - (a) as permitted by clause 29; or
 - (b) on a ground set out in clause 30.
- (2) The Commission must not vary a preserved transitional award term.
- (3) The Commission must not vary a facilitative provision within the meaning of clause 23 except on a ground set out in clause 30.

29 Variation of transitional awards—dealing with industrial dispute

- (1) In preventing or settling an industrial dispute, or maintaining the settlement of an industrial dispute, the Commission's power to vary a transitional award is limited to varying the award:
 - (a) to provide minimum safety net entitlements about the matters referred to in subclause (2); and
 - (b) to do anything that the Commission is permitted to do by regulations made under subclause (3); and

- (c) to include incidental and machinery terms, as permitted by clause 24, relating to the matters that may be varied.
- (2) For the purposes of subclause (1), the matters are:
 - (a) rates of pay generally (such as hourly rates and annual salaries), rates of pay for juniors and transitional employees to whom training arrangements apply, and rates of pay for transitional employees under the supported wage system;
 - (b) incentive-based payments, piece rates and bonuses;
 - (c) annual leave loadings;
 - (d) monetary allowances described in paragraph 17(1)(j);
 - (e) loadings for working overtime or for casual or shift work;
 - (f) penalty rates;
 - (g) pay for outworkers;
 - (h) any other allowable transitional award matter prescribed by the regulations.

Note: The Commission must have regard to the matters referred to in clauses 8 and 9 in exercising its functions under this clause.

- (3) If the Commission considers it appropriate to vary a transitional award in respect of rates of pay for part-time transitional employees, junior transitional employees or transitional employees to whom training arrangements apply, the Commission may, if it considers it appropriate, also vary the application of the terms of the award to those employees in accordance with the regulations.
- (4) Regulations under subclause (3) may specify:
 - (a) the matters in respect of which a transitional award may be varied as mentioned in that subclause, which must be matters referred to in subclause 17(1); and
 - (b) the circumstances in which a transitional award may be varied as mentioned in that subclause.

Example: For example, regulations under subclause (4) could permit the Commission to vary a transitional award, if it considers it appropriate, to ensure that certain conditions to which a part-time transitional employee is entitled are determined in proportion to the hours worked by the part-time employee.

30 Variation of transitional awards—discrimination, etc.

- (1) If the Commission considers that a term of a transitional award about a matter referred to in subclause 29(2) is ambiguous or
-

uncertain, the Commission may make an order varying the award so as to remove the ambiguity or uncertainty.

- (2) If a transitional award is referred to the Commission under section 46PW of the *Human Rights and Equal Opportunity Commission Act 1986*, the Commission must convene a hearing to review the award.
- (3) In a review under subclause (2):
 - (a) the Commission must take such steps as it considers appropriate to ensure that each transitional employer and organisation bound by the transitional award is made aware of the hearing; and
 - (b) the Sex Discrimination Commissioner may intervene in the proceeding.
- (4) If the Commission considers that a transitional award reviewed under subclause (2) is a discriminatory award, the Commission must take the necessary action to remove the discrimination, by making an order varying the award.
- (5) The Commission may, on application by a transitional employer or organisation bound by a transitional award, vary a term of the award referring by name to a transitional employer or organisation bound by the award:
 - (a) to reflect a change in the name of the transitional employer or organisation; or
 - (b) if:
 - (i) the registration of the organisation has been cancelled; or
 - (ii) the transitional employer or organisation has ceased to exist;to omit the reference to its name.
- (6) The onus of demonstrating that a transitional award should be varied as set out in an application under subclause (5) rests with the applicant.
- (7) In this clause:

discriminatory award means a transitional award that:

- (a) has been referred to the Commission under section 46PW of the *Human Rights and Equal Opportunity Commission Act 1986*; and
- (b) requires a person to do any act that would be unlawful under Part II of the *Sex Discrimination Act 1984*, except for the fact that the act would be done in direct compliance with the award.

For the purposes of this definition, the fact that an act is done in direct compliance with the award does not of itself mean that the act is reasonable.

31 Revocation of transitional awards

- (1) The Commission may make an order revoking a transitional award only if:
 - (a) it is satisfied that the award is obsolete or is no longer operating; and
 - (b) it would not be contrary to the public interest to revoke the award.
- (2) If an application for an order under subclause (1) is made, the Commission must take such steps as it considers appropriate to ensure that each transitional employer and organisation bound by the transitional award is made aware of the application.
- (3) The Commission must not make an order revoking a transitional award if one or more transitional employees have an entitlement in relation to a matter under a preserved transitional award term included in the transitional award.

32 Applications for variation, suspension or revocation of transitional awards

This Schedule applies in relation to applications, and proceedings in relation to applications, for the variation, suspension or revocation of transitional awards in the same manner, as far as possible, as it applies in relation to industrial disputes and proceedings in relation to industrial disputes, and for that purpose such an application is to be treated as if it were the notification of an industrial dispute.

Division 3—Procedure for dealing with industrial disputes

33 Notification of industrial disputes

- (1) If an entitled organisation or a transitional employer becomes aware of the existence of an alleged industrial dispute affecting the organisation or its members or affecting the employer, as the case may be, the organisation or employer may notify the relevant Presidential Member or a Registrar.

Note: For the purposes of this Schedule, an industrial dispute may only be about allowable transitional award matters—see the definition of *industrial dispute* in subclause 2(1).

- (2) A Minister who is aware of the existence of an alleged industrial dispute may notify the relevant Presidential Member or a Registrar.
- (3) If a Registrar is notified of an alleged industrial dispute, or a member of the Commission who is not the relevant Presidential Member becomes aware of the existence of an alleged industrial dispute, the Registrar or member must inform the relevant Presidential Member.
- (4) For the purposes of this clause, an organisation is an *entitled organisation* if:
 - (a) the organisation is bound by a transitional award; and
 - (b) at least one member of the organisation is a transitional employer or a transitional employee that is bound by the transitional award; and
 - (c) the organisation is entitled under its eligibility rules to represent the industrial interests of that member.

34 Disputes to be dealt with by conciliation where possible

- (1) If an alleged industrial dispute is notified under clause 33 or the relevant Presidential Member otherwise becomes aware of the existence of an alleged industrial dispute, the relevant Presidential Member must, unless satisfied that it would not assist the prevention or settlement of the alleged industrial dispute, refer it for conciliation by himself or herself or by another member of the Commission.
- (2) If the Presidential Member does not refer the alleged industrial dispute for conciliation:

- (a) the Presidential Member must publish reasons for not doing so; and
- (b) the Commission must deal with the alleged industrial dispute by arbitration.

35 Findings as to industrial disputes

- (1) Subject to subclause (2), if a proceeding in relation to an alleged industrial dispute comes before the Commission, it must, if it considers that the alleged industrial dispute is an industrial dispute:
 - (a) determine the parties to the industrial dispute and the matters in dispute; and
 - (b) record its findings;but the Commission may vary or revoke any of the findings.
- (2) If the Commission constituted in any manner has made findings in relation to an industrial dispute, the Commission (however constituted) may, for the purpose of exercising powers in subsequent proceedings in relation to the same industrial dispute (other than powers on an appeal in relation to the finding), proceed on the basis of the findings or any of them.
- (3) A determination or finding of the Commission on a question as to the existence of an industrial dispute is, in all courts and for all purposes, conclusive and binding on all persons affected by the question.

36 Action to be taken where dispute referred for conciliation

- (1) If an industrial dispute is referred for conciliation, a member of the Commission must do everything that appears to the member to be right and proper to assist the parties to agree on terms for the prevention or settlement of the industrial dispute.
- (2) The action that may be taken by a member of the Commission under this clause includes:
 - (a) arranging conferences of the parties or their representatives presided over by the member; and
 - (b) arranging for the parties or their representatives to confer among themselves at conferences at which the member is not present.

37 Completion of conciliation proceeding

- (1) A conciliation proceeding before a member of the Commission is to be regarded as completed when:
 - (a) the parties have reached agreement for the settlement of the whole of the industrial dispute; or
 - (b) whether or not the parties have reached agreement for the settlement of part of the industrial dispute, the member of the Commission is satisfied that there is no likelihood that, within a reasonable period, conciliation, or further conciliation, will result in agreement, or further agreement, by the parties on terms for the settlement of the industrial dispute or any matter in dispute.
- (2) Nothing in this Schedule prevents the exercise of conciliation powers in relation to an industrial dispute merely because arbitration powers have been exercised in relation to the industrial dispute.

38 Arbitration

- (1) When a conciliation proceeding before a member of the Commission in relation to the industrial dispute is completed but the industrial dispute has not been fully settled, the Commission must, to the extent that the industrial dispute is about matters referred to in subclause 29(2), or the matters remaining in dispute are matters referred to in that clause, proceed to deal with the industrial dispute, or the matters remaining in dispute, by arbitration.

- (2) The Commission must not proceed to deal with the industrial dispute, or any matters remaining in dispute, by arbitration to the extent that the industrial dispute is not about matters referred to in subclause 29(2), or the matters remaining in dispute are not matters referred to in that clause.
- (3) Unless the member of the Commission who conducted the conciliation proceeding is competent, having regard to clause 39, to exercise arbitration powers in relation to the industrial dispute and proposes to do so, the member must make a report under subclause (4).
- (4) The member must, for the purpose of enabling arrangements to be made for arbitration in relation to the industrial dispute, report to the relevant Presidential Member or, if the member is a Presidential Member, to the President, as to:
 - (a) the matters in dispute; and
 - (b) the extent to which those matters are matters referred to in subclause 29(2); and
 - (c) the parties to the dispute; and
 - (d) the extent to which the dispute has been settled.
- (5) The member must not disclose anything said or done in the conciliation proceeding in relation to matters in dispute that remain unsettled.
- (6) In an arbitration proceeding under this Schedule, unless all the parties agree, evidence must not be given, or statements made, that would disclose anything said or done in a conciliation proceeding under this Schedule (whether before a member of the Commission or at a conference arranged by a member of the Commission) in relation to matters in dispute that remain unsettled.

39 Exercise of arbitration powers by member who has exercised conciliation powers

- (1) If a member of the Commission has exercised conciliation powers in relation to an industrial dispute, the member must not exercise, or take part in the exercise of, arbitration powers in relation to the industrial dispute if a party to the arbitration proceeding objects.
 - (2) The member is not taken to have exercised conciliation powers in relation to the industrial dispute merely because:
-

- (a) after having begun to exercise arbitration powers in relation to the industrial dispute, the member exercised conciliation powers; or
- (b) the member arranged for a conference of the parties or their representatives to be presided over by the member, but the conference did not take place or was not presided over by the member; or
- (c) the member arranged for the parties or their representatives to confer among themselves at a conference at which the member was not present.

40 Principles for varying transitional awards

- (1) A Full Bench of the Commission may establish principles about varying transitional awards in relation to each allowable transitional award matter referred to in subclause 29(2).
- (2) After such principles (if any) have been established under subclause (1), the power of the Commission to vary a transitional award in relation to a matter referred to in subclause 29(2) is exercisable only by a Full Bench unless the variation:
 - (a) gives effect to orders of a Full Bench made after the reform commencement; or
 - (b) is consistent with principles established by a Full Bench after that day.
- (3) The President or a Full Bench may, in relation to the exercise of powers under this clause, direct a member of the Commission to provide a report in relation to a specified matter.
- (4) After making such investigation (if any) as is necessary, the member must provide a report to the President or Full Bench, as the case may be.
- (5) To avoid doubt, principles established under subclause (1) must be consistent with, and cannot be such as to override, a provision of this Act that relates to the variation of transitional awards.

41 Reference of disputes to Full Bench

- (1) A reference in this clause to a part of an industrial dispute includes a reference to:
-

- (a) an industrial dispute so far as it relates to a matter in dispute;
or
 - (b) a question arising in relation to an industrial dispute.
- (2) If a proceeding in relation to an industrial dispute or an alleged industrial dispute is before a member of the Commission, a party to the proceeding or the Minister may apply to the member:
- (a) in the case of a proceeding in relation to an alleged industrial dispute—to have the proceeding dealt with by a Full Bench because the subject matter of the proceeding is of such importance that, in the public interest, the proceeding should be dealt with by a Full Bench; or
 - (b) in the case of a proceeding by way of conciliation or arbitration—to have the industrial dispute or a part of the industrial dispute dealt with by a Full Bench because the industrial dispute or the part of the industrial dispute is of such importance that, in the public interest, it should be dealt with by a Full Bench.

Note: An industrial dispute must not be dealt with by arbitration unless it is about a matter referred to in subclause 29(2)—see clause 38.

- (3) An application under paragraph (2)(a) may be accompanied by an application under paragraph (2)(b), to be dealt with if the application under paragraph (2)(a) is granted and there is a finding that there is an industrial dispute.
- (4) If an application is made under subclause (2) to a member of the Commission other than the President:
- (a) the member must refer the application to the President to be dealt with; and
 - (b) the President must confer with the member about whether the application should be granted.
- (5) If the President is of the opinion:
- (a) in the case of an application under paragraph (2)(a)—that the subject matter of the proceeding is of such importance that, in the public interest, the proceeding should be dealt with by a Full Bench; or

-
- (b) in the case of an application under paragraph (2)(b)—that the industrial dispute or the part of the industrial dispute is of such importance that, in the public interest, it should be dealt with by a Full Bench;
- the President must grant the application.
- (6) If the President grants an application under paragraph (2)(a):
- (a) the Full Bench must, if it considers that there is an industrial dispute, record findings under clause 35; and
 - (b) if the application was accompanied by an application under paragraph (2)(b) that was granted—the Full Bench must, subject to subclause (9), hear and determine the industrial dispute or the part of the industrial dispute.
- (7) If the President grants an application under paragraph (2)(b), the Full Bench must, subject to subclause (8), hear and determine the industrial dispute or the part of the industrial dispute and, in the hearing, may have regard to any evidence given, and any arguments adduced, in arbitration proceedings in relation to the industrial dispute, or the part of the industrial dispute, before the Full Bench commenced the hearing.
- (8) If the President grants an application under paragraph (2)(b) in relation to an industrial dispute:
- (a) the Full Bench may refer a part of the industrial dispute to a member of the Commission to hear and determine; and
 - (b) the Full Bench must hear and determine the rest of the industrial dispute.
- (9) The President or a Full Bench may, in relation to the exercise of powers under this clause, direct a member of the Commission to provide a report in relation to a specified matter.
- (10) The member must, after making such investigation (if any) as is necessary, provide a report to the President or Full Bench, as the case may be.
- (11) The President may before a Full Bench has been established for the purpose of hearing and determining, under this clause, an industrial dispute or part of an industrial dispute, authorise a member of the Commission to take evidence for the purposes of the hearing and determination, and:
-

- (a) the member has the powers of a person authorised to take evidence under subclause 46(3); and
- (b) the Full Bench must have regard to the evidence.

42 President may deal with certain proceedings

- (1) A reference in this clause to a part of an industrial dispute includes a reference to:
 - (a) an industrial dispute so far as it relates to a matter in dispute; or
 - (b) a question arising in relation to an industrial dispute.
- (2) The President may, whether or not another member of the Commission has begun to deal with a particular proceeding in relation to an alleged industrial dispute or an industrial dispute, decide to deal with the proceeding.
- (3) If the President decides to deal with the proceeding, then, unless the President considers that the proceeding does not relate to an industrial dispute:
 - (a) the President must make such findings (if any) in relation to the proceeding as are required to be made by clause 35 and have not already been made by another member of the Commission; and
 - (b) the President must:
 - (i) if the President is of the opinion that it would assist the settlement of the industrial dispute or a part of the industrial dispute—endeavour to settle the industrial dispute or the part of the industrial dispute by conciliation; and
 - (ii) if the President is not of that opinion, or has not been able to settle the industrial dispute or a part of the industrial dispute by conciliation:
 - (A) hear and determine the industrial dispute or the part of the industrial dispute; or
 - (B) refer the industrial dispute or the part of the industrial dispute to a Full Bench.

Note: An industrial dispute must not be dealt with by arbitration unless it is about a matter referred to in subclause 29(2)—see clause 38.

-
- (4) If the President refers the industrial dispute or the part of the industrial dispute to a Full Bench, the Full Bench must hear and determine the industrial dispute or the part of the industrial dispute.
 - (5) In the hearing of an industrial dispute or a part of an industrial dispute by the President under subclause (3) or by a Full Bench under subclause (4), the President or Full Bench may have regard to any evidence given, and any arguments adduced, in arbitration proceedings in relation to the industrial dispute, or the part of the industrial dispute, before the President or Full Bench commenced to deal with the proceeding concerned.
 - (6) If the President has under subclause (3) referred an industrial dispute to a Full Bench:
 - (a) the Full Bench may refer a part of the industrial dispute to a member of the Commission to hear and determine; and
 - (b) the Full Bench must hear and determine the rest of the industrial dispute.
 - (7) If, before an industrial dispute is dealt with by the President under this clause or while an industrial dispute is being dealt with by the President under this clause, the parties to the industrial dispute, or any of them, reach agreement on terms for the settlement of all or any of the matters in dispute, the President must cease dealing with the industrial dispute.
 - (8) The President or a Full Bench may, in relation to the exercise of powers under this clause, direct a member of the Commission to provide a report in relation to a specified matter.
 - (9) The member must, after making such investigation (if any) as is necessary, provide a report to the President or Full Bench, as the case may be.

43 Review on application by Minister

- (1) The Minister may apply to the President for a review by a Full Bench of an order made for the purposes of this Schedule, or a decision relating to the making of such an order, made by a member of the Commission under this Schedule if it appears to the Minister that the order or decision is contrary to the public interest.

- (2) If an application is made to the President under subclause (1), the President must establish a Full Bench to hear and determine the application.
- (3) The Full Bench must, if in its opinion the matter is of such importance that, in the public interest, the order or decision should be reviewed, make such review of the order or decision as appears to it to be desirable having regard to the matters referred to in the application.
- (4) Subsections 45(4) to (8) apply in relation to a review under this clause in the same manner as they apply in relation to an appeal under section 45.
- (5) In a review under this clause:
 - (a) the parties to the proceeding in which the order or decision was made are parties to the proceeding on the review and are entitled to notice of the hearing; and
 - (b) the Minister is a party to the proceeding.
- (6) Each provision of this Schedule relating to the hearing and determination of an industrial dispute extends to a review under this clause.
- (7) Nothing in this clause affects any right of appeal or any power of a Full Bench under section 45, and an appeal under that section and a review under this clause may, if the Full Bench considers it appropriate, be dealt with together.

44 Procedure of Commission

- (1) If the Commission is dealing with an industrial dispute, it must, in such manner as it considers appropriate, carefully and quickly inquire into and investigate the industrial dispute and all matters affecting the merits, and right settlement, of the industrial dispute.
- (2) In the hearing and determination of an industrial dispute or in any other proceeding before the Commission under this Schedule:
 - (a) the procedure of the Commission is, subject to this Act and the Rules of the Commission, within the discretion of the Commission; and

- (b) the Commission is not bound to act in a formal manner and is not bound by any rules of evidence, but may inform itself on any matter in such manner as it considers just; and
 - (c) the Commission must act according to equity, good conscience and the substantial merits of the case, without regard to technicalities and legal forms.
- (3) The Commission may determine the periods that are reasonably necessary for the fair and adequate presentation of the respective cases of the parties to an industrial dispute or other proceeding and require that the cases be presented within the respective periods.
 - (4) The Commission may require evidence or argument to be presented in writing, and may decide the matters on which it will hear oral evidence or argument.

45 Provisions in Part II that do not apply to performance of Commission's functions under this Schedule

Sections 44B, 44C, 44D, 44F, 44H, 44I, 44J, 44K and 44L do not apply to the performance of a function by the Commission under this Schedule.

Division 4—Powers of Commission for dealing with industrial disputes

46 Particular powers of Commission

- (1) Subject to this Schedule, the Commission may do any of the following things in relation to an industrial dispute arising under this Schedule:
 - (a) inform itself in any manner it considers appropriate;
 - (b) take evidence on oath or affirmation;
 - (c) give directions orally or in writing in the course of, or for the purposes of, procedural matters relating to the hearing or determination of the industrial dispute;
 - (d) within the limits of the Commission's powers under this Schedule, vary or revoke a transitional award, order, direction, recommendation or other decision of the Commission made for the purposes of this Schedule;

- (e) dismiss a matter or part of a matter, or refrain from further hearing or from determining the industrial dispute or part of the industrial dispute, if it appears:
 - (i) that the industrial dispute or part is trivial; or
 - (ii) that the industrial dispute or part has been dealt with, is being dealt with or is proper to be dealt with by a State industrial authority; or
 - (iii) that further proceedings are not necessary or desirable in the public interest; or
 - (iv) that a party to the industrial dispute is engaging in conduct that, in the Commission's opinion, is hindering the settlement of the industrial dispute or another industrial dispute; or
 - (v) that a party to the industrial dispute:
 - (A) has breached a transitional award or order of the Commission or a Division 3 pre-reform certified agreement (within the meaning of Schedule 14); or
 - (B) has contravened a direction or recommendation of the Commission to stop industrial action; or
 - (C) has contravened a recommendation of the Commission under clause 47;
- (f) hear and determine the industrial dispute in the absence of a party who has been summoned or served with a notice to appear;
- (g) sit at any place;
- (h) conduct the hearing of the industrial dispute, or any part of the hearing, in private;
- (i) adjourn the hearing of the industrial dispute to any time and place;
- (j) refer any matter to an expert and accept the expert's report as evidence;
- (k) if the industrial dispute is being dealt with by a Full Bench—direct a member of the Commission to consider a particular matter and prepare a report for the Full Bench on that matter;
- (l) allow the amendment, on such terms as it considers appropriate, of any application or other document relating to the industrial dispute;

- (m) correct, amend or waive any error, defect or irregularity, whether in substance or form;
 - (n) summon before it the parties to the industrial dispute, the witnesses, and any other persons whose presence the Commission considers would help in the hearing or determination of the industrial dispute;
 - (o) compel the production before it of documents and other things for the purpose of reference to such entries or matters only as relate to the industrial dispute.
- (2) The Commission must not, in relation to an industrial dispute, dismiss or refrain as mentioned in paragraph (1)(e) because of subparagraph (1)(e)(i), (ii) or (iii) unless it has made a determination and findings under clause 35 in relation to the dispute.
- (3) The Commission may, in writing, authorise a person (including a member of the Commission) to take evidence on its behalf, with such limitations (if any) as the Commission directs, in relation to an industrial dispute, and the person has all the powers of the Commission to secure:
- (a) the attendance of witnesses; and
 - (b) the production of documents and things; and
 - (c) the taking of evidence on oath or affirmation.

47 Recommendations by consent

- (1) If:
- (a) the Commission is exercising powers of conciliation in relation to a particular allowable transitional award matter; and
 - (b) all the parties request the Commission to conduct a hearing and make recommendations about particular aspects of the matter on which they are unable to reach agreement (which may be all aspects of the matter); and
 - (c) the Commission is satisfied that all the parties:
 - (i) have made a genuine attempt to agree about those aspects of the matter; and
 - (ii) have agreed to comply with the Commission's recommendations;

the Commission must conduct a hearing and make recommendations about those aspects of the matter.

- (2) This clause does not prevent the Commission from making recommendations in other circumstances.

Division 5—Other powers of the Commission

48 Power to make further orders in settlement of industrial dispute etc.

- (1) The fact that a transitional award-related order has been made for the settlement of an industrial dispute, or that a transitional award or order made for the settlement of an industrial dispute is in force, does not prevent:
 - (a) a further order being made for the settlement of the industrial dispute; or
 - (b) an order being made for the settlement of a further industrial dispute between all or any of the parties to the earlier award or order, and whether or not the subject matter of the further industrial dispute is the same (in whole or part) as the subject matter of the earlier industrial dispute.
- (2) The Commission's power to make a further order under this clause is limited to making an order that is permitted under this Schedule.

49 Relief not limited to claim

Subject to clauses 17, 18 and 29, in making an order to vary a transitional award, the Commission is not restricted to the specific relief claimed by the parties to the industrial dispute concerned, or to the demands made by the parties in the course of the industrial dispute, but may include in the order anything:

- (a) that the Commission considers necessary or expedient for the purpose of preventing or settling the industrial dispute or preventing further industrial disputes; and
- (b) that is within the Commission's powers under this Schedule.

50 Power to provide special rates of wages

If a transitional award prescribes a minimum rate of wages, the Commission may vary the award to provide:

- (a) for the payment of wages at a lower rate to transitional employees who are unable to earn a wage at the minimum rate; and
- (b) that the lower rate must not be paid to a transitional employee unless a particular person or authority has certified that the transitional employee is unable to earn a wage at the minimum rate.

51 Orders to stop or prevent industrial action

- (1) If it appears to the Commission that industrial action is happening, or is threatened, impending or probable, in relation to an industrial dispute about a matter referred to in subclause 29(2), the Commission may, by order, give directions that the industrial action stop or not occur.
- (2) The Commission may make such an order on its own initiative, or on the application of:
 - (a) a party to the industrial dispute (if any); or
 - (b) a person who is directly affected, or who is likely to be directly affected, by the industrial action; or
 - (c) an organisation of which a person referred to in paragraph (b) is a member.
- (3) The Commission must hear and determine an application for an order under this clause as quickly as practicable.
- (4) The Commission may make an interim order under this clause.
- (5) An interim order made under subclause (4) ceases to have effect if the application is determined.
- (6) The powers conferred on the Commission by subclauses (1) and (4) are in addition to, and not in derogation of, the powers conferred on the Commission by the rest of this Schedule.
- (7) A person or organisation to whom an order under subclause (1) or (4) is expressed to apply must comply with the order.
- (8) The Court may, on the application of a person or organisation affected by an order under subclause (1) or (4), grant an injunction on such terms as the Court considers appropriate if it is satisfied that another person or organisation:

- (a) has engaged in conduct that constitutes a contravention of subclause (7); or
 - (b) is proposing to engage in conduct that would constitute such a contravention.
- (9) If, in the opinion of the Court it is desirable to do so, the Court may grant an interim injunction pending determination of an application under subclause (8).

Part 4—Ballots ordered by Commission

52 Commission may order secret ballot

- (1) If:
- (a) an organisation is concerned in an industrial dispute with which the Commission is empowered to deal under this Schedule (whether or not proceedings in relation to the dispute are before the Commission); and
 - (b) the Commission considers that the prevention or settlement of the industrial dispute might be helped by finding out the attitudes of the members, or the members of a section or class of the members, of the organisation or a branch of the organisation in relation to a matter;
- the Commission may order that a vote of the members be taken by secret ballot (with or without provision for absent voting), in accordance with directions given by the Commission, for the purpose of finding out their attitudes to the matter.
- (2) The powers of the Commission to make an order under subclause (1), and to revoke such an order, are exercisable only by a Presidential Member or a Full Bench.

53 Scope of directions for secret ballots

- (1) Directions given by the Commission under subclause 52(1) must provide for all matters relating to the ballot concerned, including the following matters:
- (a) the questions to be put to the vote;
 - (b) the eligibility of persons to vote;
 - (c) the conduct of the ballot generally.

-
- (2) Before giving a direction relating to the conduct of the ballot, the Commission must consult with the Industrial Registrar or, if the ballot is to be conducted by the Australian Electoral Commission, with the Electoral Commissioner.

54 Conduct of ballot

- (1) If, under this Part, the Commission orders the holding of a secret ballot, the Commission must, by order:
- (a) direct the organisation concerned to make arrangements for the conduct of the ballot by a person approved by the Industrial Registrar; or
 - (b) direct the Industrial Registrar to make arrangements for the conduct of the ballot;
- and may give any further directions that it considers necessary for ensuring the secrecy of votes and otherwise for the purposes of the conduct of the ballot or the communication of the result to the Commission.
- (2) An organisation or person (other than the Industrial Registrar) to whom a direction has been given under subclause (1) must comply with the direction.
- Penalty: 30 penalty units.
- (3) Subclause (2) is an offence of strict liability.
- (4) If a direction is given under paragraph (1)(a), the Commonwealth is liable to pay to the organisation the reasonable costs of the conduct of the ballot concerned as assessed by a Registrar.
- (5) If a direction is given under paragraph (1)(b), the Industrial Registrar must conduct the ballot concerned, or make arrangements for its conduct, in accordance with the direction.
- (6) If the result of a ballot conducted under an order under this Part is communicated to the Commission, the Commission must cause the Industrial Registrar to inform each of the following persons, by written notice, of the result:
- (a) the persons who were eligible to vote in the ballot;
 - (b) the organisation (if any) to which those persons belonged, and the transitional employers by whom those persons were

employed, when those persons became eligible to vote in the ballot.

55 Commission to have regard to result of ballot

In any conciliation or arbitration proceeding before the Commission in relation to a matter in relation to which the attitudes of persons have been expressed in a ballot conducted under an order under this Part, the Commission must have regard to the result of the ballot.

56 Offences in relation to ballots

For the purposes of this Part, section 317 applies to a ballot ordered under this Part in the same way as it applies to a ballot ordered under Division 4 of Part VC of this Act.

Part 5—Circumstances in which transitional awards cease to be binding

57 Ceasing to be bound by transitional award—making a State employment agreement

- (1) If a transitional employer that is bound by a transitional award in respect of the employment of a transitional employee makes a State employment agreement with the transitional employee:
 - (a) the transitional employer ceases to be bound by that award in respect of that employment; and
 - (b) the transitional employer cannot subsequently be bound by the transitional award in respect of that employment.

Note: A State employment agreement may be made with one or more transitional employees employed by the transitional employer.

- (2) To avoid doubt, the transitional award does not prevent the State employment agreement from coming into force and regulating the wages and conditions of employment of the transitional employee.

58 Ceasing to be bound by transitional award—inability to make a State employment agreement

- (1) If a transitional employer has made genuine efforts to make a State employment agreement with one or more transitional employees employed by the transitional employer, but has been unable to do so, the transitional employer, or any of the transitional employees, may apply to the Commission for an order that the transitional award cease to bind the transitional employer in respect of the employment of the transitional employees.
- (2) The Commission must make the order sought if it is satisfied that the transitional employer has made genuine efforts to make a State employment agreement with one or more of the transitional employees, but has been unable to do so.

59 Ceasing to be bound by transitional award—inability to resolve industrial dispute under this Schedule

- (1) This clause applies if an industrial dispute has not been able to be resolved under this Schedule, despite genuine efforts having been made to do so.
- (2) A party to the industrial dispute may apply to the Commission for an order that the transitional award to which the industrial dispute relates cease to bind a transitional employer affected by the industrial dispute in respect of the employment of transitional employees employed by the transitional employer.
- (3) The Commission must make the order sought if it is satisfied that genuine efforts were made to resolve the industrial dispute.

60 Interaction between transitional awards, State laws and State awards

Subject to this clause, if a State law or a State award is inconsistent with, or deals with a matter dealt with in, a transitional award:

- (a) the transitional award prevails; and
- (b) the State law or State award, to the extent of the inconsistency or in relation to the matter dealt with, is invalid.

Part 6—Technical matters relating to transitional awards

61 Making and publication of orders

- (1) An order made by the Commission for the purposes of this Schedule must:
 - (a) be reduced to writing; and
 - (b) be signed by:
 - (i) in the case of an order made by a Full Bench—at least one member of the Full Bench; and
 - (ii) in any other case—at least one member of the Commission; and
 - (c) show the day on which it is signed.
- (2) If the Commission makes an order for the purposes of this Schedule, the Commission must promptly give to a Registrar:
 - (a) a copy of the order; and
 - (b) written reasons for the order; and
 - (c) a list specifying each party who appeared at the hearing of the proceeding concerned.
- (3) A Registrar who receives a copy of an order under subclause (2) must promptly ensure that a copy of the order and the written reasons received by the Registrar in respect of the making of the order:
 - (a) are made available to each party shown on the list given to the Registrar under paragraph (2)(c); and
 - (b) are available for inspection at each registry; and
 - (c) are published as soon as practicable.

62 Requirement for transitional award-related orders

- (1) The Commission must, when making a transitional award-related order, if it considers it appropriate, ensure that the order:
 - (a) is expressed in plain English and is easy to understand in structure and content; and
 - (b) does not contain terms that are obsolete or that need updating; and

- (c) if appropriate, provides for the employment of workers with disabilities in general employment by including terms for the Supported Wage System; and

Note: The Supported Wage System was endorsed by the Commission in the Full Bench decision dated 10 October 1994 (Print L5723).

- (d) includes wage arrangements for the full range of apprenticeships, traineeships and other training arrangements that are relevant to the work covered by the transitional award to which the order relates, including for part-time and school-based apprenticeships and traineeships.
- (2) A transitional award-related order does not discriminate against a transitional employee for the purposes of paragraph 9(1)(e) merely because:
- (a) it discriminates, in respect of particular employment, on the basis of the inherent requirements of that employment; or
 - (b) it discriminates, in respect of employment as a member of the staff of an institution that is conducted in accordance with the teachings or beliefs of a particular religion or creed:
 - (i) on the basis of those teachings or beliefs; and
 - (ii) in good faith.

63 Registrar's powers if member ceases to be member after making an order

If:

- (a) a member of the Commission ceases to be a member after an order has been made for the purposes of this Schedule by the Commission constituted by the member; and
- (b) at that time, the order has not been reduced to writing or has been reduced to writing but has not yet been signed by the member;

a Registrar must reduce the order to writing, sign it and seal it with the seal of the Commission, and the order has effect as if it had been signed by the member of the Commission.

64 Form of orders

An order made by the Commission for the purposes of this Schedule must be framed so as best to express the decision of the Commission and to avoid unnecessary technicalities.

65 Date of orders

The date of an order made by the Commission for the purposes of this Schedule is the day when the order was signed under subclause 61(1).

66 Date of effect of orders

- (1) An order made by the Commission for the purposes of this Schedule must be expressed to come into force on a specified day.
- (2) Unless the Commission is satisfied that there are exceptional circumstances, the day specified in the order must not be earlier than the date of the order.

67 Term of orders

- (1) An order made by the Commission for the purposes of this Schedule must specify the period for which the order is to continue in force.
- (2) In determining the period to be specified under subclause (1), the Commission must have regard to:
 - (a) the wishes of the parties to the industrial dispute concerned as to the period for which the order should continue in force; and
 - (b) the desirability of stability in workplace relations.

68 Continuation of transitional awards

- (1) Subject to clause 31 and any order of the Commission, a transitional award and an order varying a transitional award continue in force until the end of the transitional period.
- (2) A term of a transitional award about:
 - (a) long service leave with pay; or
 - (b) sick leave with pay;is not taken to be ineffective merely because the term is so expressed as not to be capable of operating, or of operating fully, during the period for which the award is to continue in force.

Note: A term in a transitional award about long service leave is preserved under clause 22.

-
- (3) If, under subclause (1), a transitional award has continued in force after the end of the period specified in the award as the period for which the award is to continue in force, an order made by the Commission for the settlement of a further industrial dispute between the parties may be expressed to operate from a day not earlier than the day on which the industrial dispute arose.

69 Persons bound by orders varying transitional awards

- (1) Subject to subclause (2) and any order of the Commission, an order that determines an industrial dispute by varying a transitional award is binding on:
- (a) all parties to the industrial dispute who appeared or were represented before the Commission; and
 - (b) all parties to the industrial dispute who were summoned or notified (either personally or as prescribed) to appear as parties to the industrial dispute (whether or not they appeared); and
 - (c) all parties who, having been notified (either personally or as prescribed) of the industrial dispute and of the fact that they were alleged to be parties to the industrial dispute, did not, within the time prescribed, satisfy the Commission that they were not parties to the industrial dispute; and
 - (d) any transitional employer bound by the award under Part 6A of this Schedule (transmission of business);
 - (e) all transitional employers and transitional employees who, on the reform commencement and on the date of the order varying the transitional award, were members of an organisation that is a party to the industrial dispute.
- (2) An order that determines an industrial dispute by varying a transitional award must not bind any transitional employer, transitional employee or organisation that was not bound by the transitional award on the reform commencement.

Note 1: Clause 4 provides for who is bound by a transitional award on and from the reform commencement.

Note 2: The term *transitional award* includes the award as varied.

70 Transitional awards and transitional award-related orders of Commission are final

- (1) Subject to this Act, a transitional award or a transitional award-related order (including a transitional award-related order made on appeal):
 - (a) is final and conclusive; and
 - (b) may not be challenged, appealed against, reviewed, quashed or called in question in any court; and
 - (c) is not subject to prohibition, mandamus or injunction in any court on any account.
- (2) A transitional award or transitional award-related order is not invalid because it was made by the Commission constituted otherwise than as provided by this Act.

71 Reprints of transitional awards as varied

A document purporting to be a copy of a reprint of a transitional award as varied, and purporting to have been printed by the Government Printer, is in all courts evidence of the transitional award as varied.

72 Expressions used in transitional awards

Unless the contrary intention appears in a transitional award, an expression used in the award has the same meaning as it has in an Act by virtue of the *Acts Interpretation Act 1901* or as it has in this Act.

Part 6A—Transmission of transitional awards

Division 1—Introductory

72A Object

The object of this Part is to provide for the transfer of obligations under transitional awards when the whole, or a part, of a transitional employer's business is transmitted to another transitional employer.

72B Simplified outline

- (1) Division 2 describes the transmission of business situation this Part is designed to deal with. It identifies the *old transitional employer*, the *new transitional employer*, the *business being transferred*, the *time of transmission* and the *transferring transitional employees*.
- (2) Division 3 deals with the transmission of certain transitional awards.
- (3) Division 4 deals with notification requirements, the lodgment of notices with the Employment Advocate and the enforcement of the new transitional employer's obligations by pecuniary penalties.
- (4) Division 5 allows regulations to be made to deal with other transmission of business issues in relation to transitional awards.

72C Definitions

In this Part:

business being transferred has the meaning given by subclause 72D(2).

Court means the Federal Court of Australia or the Federal Magistrates Court.

new transitional employer has the meaning given by subclause 72D(1).

old transitional employer has the meaning given by subclause 72D(1).

operational reasons has the meaning given by subsection 170CE(5D).

time of transmission has the meaning given by subclause 72D(3).

transferring transitional employee has the meaning given by clauses 72E and 72F.

transmission period has the meaning given by subclause 72D(4).

Division 2—Application of Part

72D Application of Part

- (1) This Part applies if a person (the *new transitional employer*) becomes the successor, transmittee or assignee of the whole, or a part, of a business of another person (the *old transitional employer*).
- (2) The business, or the part of the business, to which the new transitional employer is successor, transmittee or assignee is the *business being transferred* for the purposes of this Part.
- (3) The time at which the new transitional employer becomes the successor, transmittee or assignee of the business being transferred is the *time of transmission* for the purposes of this Part.
- (4) The period of 12 months after the time of transmission is the *transmission period* for the purposes of this Part.

72E Transferring transitional employees

- (1) A person is a *transferring transitional employee* for the purposes of this Part if:
 - (a) the person is employed by the old transitional employer immediately before the time of transmission; and
 - (b) the person:
 - (i) ceases to be employed by the old transitional employer; and
 - (ii) becomes employed by the new transitional employer in the business being transferred; within 2 months after the time of transmission.
- (2) A person is also a *transferring transitional employee* for the purposes of this Part if:
 - (a) the person is employed by the old transitional employer at any time within the period of 1 month before the time of transmission; and
 - (b) the person's employment with the old transitional employer is terminated by the old transitional employer before the time of transmission for genuine operational reasons or for reasons that include genuine operational reasons; and

-
- (c) the person becomes employed by the new transitional employer in the business being transferred within 2 months after the time of transmission.
- (3) In applying clause 72F and Division 3 in relation to a person who is a transferring transitional employee under subclause (2) of this clause, a reference in those provisions to a particular state of affairs existing immediately before the time of transmission is to be read as a reference to that state of affairs existing immediately before the person last ceased to be an employee of the old transitional employer.

72F Transferring transitional employees in relation to particular transitional award

- (1) A transferring transitional employee is a *transferring transitional employee* in relation to a particular transitional award if:
 - (a) the transitional award applied to the transferring transitional employee's employment with the old transitional employer immediately before the time of transmission; and
 - (b) when the transferring transitional employee becomes employed by the new transitional employer, the nature of the transferring transitional employee's employment with the new transitional employer is such that the transitional award is capable of applying to employment of that nature.
- (2) The transferring transitional employee ceases to be a *transferring transitional employee* in relation to the transitional award if:
 - (a) the transferring transitional employee ceases to be employed by the new transitional employer after the time of transmission; or
 - (b) the nature of the transferring transitional employee's employment with the new transitional employer changes so that the transitional award is no longer capable of applying to employment of that nature; or
 - (c) the transmission period ends.

Division 3—Transmission of transitional award

72G Transmission of transitional award

New transitional employer bound by transitional award

- (1) If:
- (a) the old transitional employer was, immediately before the time of transmission, bound by a transitional award that regulated the employment of employees of the old transitional employer; and
 - (b) there is at least one transferring transitional employee in relation to the transitional award; and
 - (c) but for this clause, the new transitional employer would not be bound by the transitional award in relation to the transferring transitional employees in relation to the transitional award; and
 - (d) the new transitional employer is a transitional employer at the time of transmission;

the new transitional employer is bound by the transitional award by force of this clause.

Note 1: Paragraph (c)—the transitional award might already bind the new transitional employer, for example, because the new transitional employer happens to be a respondent to the transitional award.

Note 2: The new transitional employer must notify transferring transitional employees and lodge a copy of a notice with the Employment Advocate (see clauses 72J and 72K).

Period for which new transitional employer remains bound

- (2) The new transitional employer remains bound by the transitional award, by force of this clause, until whichever of the following first occurs:
- (a) the transitional award is revoked;
 - (b) there cease to be any transferring transitional employees in relation to the transitional award;
 - (c) the new transitional employer ceases to be bound by the transitional award under Part 5;
 - (d) the transmission period ends;
 - (e) the transitional period ends.

New transitional employer bound only in relation to employment of transferring transitional employees

- (3) The new transitional employer is bound by the transitional award, by force of this clause, only in relation to the employment of employees who are transferring transitional employees in relation to the transitional award.

Commission order

- (4) Subclauses (1) and (2) have effect subject to any order of the Commission.
- (5) To avoid doubt, the Commission cannot make an order under subclause (4) that would have the effect of extending the transmission period.

Old transitional employer's rights and obligations that arose before time of transmission not affected

- (6) This clause does not affect the rights and obligations of the old transitional employer that arose before the time of transmission.

72H Interaction rules

Transmitted award

- (1) This clause applies if subclause 72G(1) applies to a transitional award (the ***transmitted award***).

Division 3 pre-reform certified agreement

- (2) If:
 - (a) the new transitional employer is bound by a Division 3 pre-reform certified agreement (within the meaning of Schedule 14); and
 - (b) a transferring transitional employee in relation to the transmitted award was not bound by that certified agreement immediately before the time of transmission; and
 - (c) that certified agreement would, but for this subclause, apply to the transferring transitional employee's employment with the new transitional employer and would prevail over the

transmitted award to the extent of any inconsistency with the transmitted award;

the transmitted award, to the extent to which it relates to the transferring transitional employee's employment with the new transitional employer, prevails over that certified agreement to the extent of any inconsistency with that certified agreement.

- (3) Subclause (2) has effect despite section 170LY of the pre-reform Act (as applied by clause 2 of Schedule 14).

Division 4—Notice requirements and enforcement

72J Informing transferring transitional employees about transmitted award

- (1) This clause applies if:
- (a) a transitional employer is bound by a transitional award (the *transmitted award*) in relation to a transferring transitional employee by force of clause 72G; and
 - (b) a person is a transferring transitional employee in relation to the transmitted award.
- (2) Within 28 days after the transferring transitional employee starts being employed by the transitional employer, the transitional employer must take reasonable steps to give the transferring transitional employee a written notice that complies with subclause (3).

Note: This is a civil remedy provision, see clause 72M.

- (3) The notice must:
- (a) identify the transmitted award; and
 - (b) state that the transitional employer is bound by the transmitted award; and
 - (c) specify the date on which the transmission period for the transmitted award ends; and
 - (d) state that the transitional employer will remain bound by the transmitted award until the end of the transmission period unless the transmitted award is revoked, or otherwise ceases to be in operation, before the end of that period.

72K Lodging copy of notice with Employment Advocate

Only one transferring transitional employee

- (1) If a transitional employer gives a notice under subclause 72J(2) to the only person who is a transferring transitional employee in relation to a transitional award, the transitional employer must lodge a copy of the notice with the Employment Advocate within 14 days after the notice is given to the transferring transitional employee. The copy must be lodged in accordance with subclause (4).

Note 1: This is a civil remedy provision, see clause 72M.

Note 2: Sections 137.1 and 137.2 of the *Criminal Code* create offences for providing false or misleading information or documents.

Multiple transferring transitional employees and notices all given on the one day

- (2) If:
- (a) a transitional employer gives a number of notices under subclause 72J(2) to people who are transferring transitional employees in relation to a transitional award; and
 - (b) all of those notices are given on the one day;
- the transitional employer must lodge a copy of one of those notices with the Employment Advocate within 14 days after that notice is given. The copy must be lodged in accordance with subclause (4).

Note 1: This is a civil remedy provision, see clause 72M.

Note 2: Sections 137.1 and 137.2 of the *Criminal Code* create offences for providing false or misleading information or documents.

Multiple transferring transitional employees and notices given on different days

- (3) If:
- (a) a transitional employer gives a number of notices under subclause 72J(2) to people who are transferring transitional employees in relation to a transitional award; and
 - (b) the notices are given on different days;
- the transitional employer must lodge a copy of the notice, or one of the notices that was given on the earliest of those days, with the

Employment Advocate within 14 days after that notice is given.
The copy must be lodged in accordance with subclause (4).

Note 1: This is a civil remedy provision, see clause 72M.

Note 2: Sections 137.1 and 137.2 of the *Criminal Code* create offences for providing false or misleading information or documents.

Lodgment with Employment Advocate

- (4) A notice is lodged with the Employment Advocate in accordance with this subclause only if it is actually received by the Employment Advocate.

Note: This means that section 29 of the *Acts Interpretation Act 1901* (to the extent that it deals with the time of service of documents) does not apply to lodgment of a notice.

72L Employment Advocate must issue receipt for lodgment

- (1) If a notice is lodged under clause 72K, the Employment Advocate must issue a receipt for the lodgment.
- (2) The receipt must state that the notice was lodged under clause 72K on a particular day.
- (3) The Employment Advocate must give a copy of the receipt to the person who lodged the notice under clause 72K.

72M Civil penalties

- (1) The following are *civil remedy provisions* for the purposes of this section:
- (a) subclause 72J(2);
- (b) subclauses 72K(1), (2) and (3).

Note: Division 4 of Part VIII contains other provisions relevant to civil remedies.

- (2) The Court may order a person who has contravened a civil remedy provision to pay a pecuniary penalty.
- (3) The penalty cannot be more than 300 penalty units for a body corporate or 60 penalty units in other cases.
- (4) An application for an order under subclause (2) in relation to a transitional award may be made by:

- (a) a transferring transitional employee; or
- (b) an organisation of employees that is entitled, under its eligibility rules, to represent the industrial interests of a transferring transitional employee; or
- (c) a workplace inspector.

Division 5—Miscellaneous

72N Regulations

The regulations may make provision in relation to the effects that the succession, transmission or assignment of a business, or a part of a business, have on the obligations of transitional employers, and the terms and conditions of transitional employees, under transitional awards.

Part 7—Matters relating to Victoria

Division 1—Matters referred by Victoria

Subdivision A—Introduction

73 Definitions

In this Division:

employee has the same meaning as in Division 1 of Part XV of this Act.

employer has the same meaning as in Division 1 of Part XV of this Act.

employment has the same meaning as in Division 1 of Part XV of this Act.

transitional employee means an employee of a transitional employer.

transitional employer means an employer that:

- (a) is an excluded employer (within the meaning of clause 2);
and
- (b) is bound by a transitional award.

transitional Victorian reference award means a transitional award that is a Victorian reference award.

underlying award, in relation to a common rule, means the award to which the common rule relates.

Victorian public sector has the same meaning as the expression *public sector* has in section 3 of the *Commonwealth Powers (Industrial Relations) Act 1996* of Victoria.

74 Division only has effect if supported by reference

- (1) Either of the following:
 - (a) a clause of this Division;
 - (b) a clause of this Schedule (other than this Division), to the extent to which it relates to a Victorian reference award;has effect only for so long, and in so far, as the *Commonwealth Powers (Industrial Relations) Act 1996* of Victoria refers to the Parliament of the Commonwealth a matter or matters that result in the Parliament of the Commonwealth having sufficient legislative power for the clause so to have effect.
- (2) Paragraph (1)(a) does not apply to a clause to the extent to which it relates to so much of the Australian Fair Pay and Conditions Standard as consists of the provisions of Division 6 of Part VA of this Act as they apply to an employee because of section 170KB.

Subdivision B—Industrial disputes

75 Industrial disputes

- (1) Without affecting its operation apart from this clause, this Schedule also has effect, subject to this clause, as if the definition of *industrial dispute* in clause 2 were replaced by the following:

industrial dispute means:

- (a) an industrial dispute (including a threatened, impending or probable industrial dispute):
 - (i) within the limits of Victoria; and
 - (ii) that is about allowable transitional award matters pertaining to the relationship between transitional employers and transitional employees; or

-
- (b) a situation that is likely to give rise to an industrial dispute of the kind referred to in paragraph (a).
 - (2) A law of Victoria prescribed for the purposes of this clause prevails to the extent of any inconsistency over a transitional Victorian reference award that regulates matters pertaining to the relationship between:
 - (a) employers; and
 - (b) employees in the Victorian public sector.

Subdivision C—Allowable transitional award matters

76 Allowable transitional award matters

Subclause 17(1) has effect, in relation to a transitional Victorian reference award, as if:

- (a) “annual leave and” were omitted from paragraph 17(1)(e); and
- (b) paragraphs 17(1)(f) and (h) had not been enacted.

Subdivision D—Preserved transitional award terms

77 Preserved transitional award terms

- (1) Clause 22 has effect, in relation to a transitional Victorian reference award, as if the following paragraphs were added at the end of subclause 22(3):
 - (e) annual leave;
 - (f) personal/carer’s leave;
 - (g) parental leave, including maternity and adoption leave.
- (2) In this clause:

personal/carer’s leave includes war service sick leave, infectious diseases sick leave and other like forms of sick leave.
- (3) The regulations may provide that for the purposes of subclause (1):
 - (a) *parental leave* does not include one or both of the following:
 - (i) special maternity leave (within the meaning of section 94C);
 - (ii) paid leave under subparagraph 94F(2)(b)(i) or (ii); and

- (b) *personal/carer's leave* does not include one or both of the following:
 - (i) compassionate leave (within the meaning of section 93Q (as that section applies to an employee in Victoria because of section 492));
 - (ii) unpaid carer's leave (within the meaning of section 93D (as that section applies to an employee in Victoria because of section 492)).
- (4) Regulations under subclause (3) may be expressed to apply generally or in respect of employees engaged in specified types of employment, such as full-time employment, part-time employment, casual employment, regular part-time employment or shift work.

78 When preserved transitional award entitlements have effect

- (1) This clause applies to an employee if:
 - (a) the employee's employment is regulated by a transitional Victorian reference award that includes a preserved transitional award term about a matter; and
 - (b) the employee has an entitlement (the *preserved transitional award entitlement*) in relation to that matter under the preserved transitional award term.
- (2) If:
 - (a) the preserved transitional award term is about a matter referred to in paragraph 22(3)(e), (f) or (g); and
 - (b) the employee's preserved transitional award entitlement in relation to the matter is more generous than the employee's entitlement in relation to the corresponding matter under the Australian Fair Pay and Conditions Standard;the employee's entitlement under the Australian Fair Pay and Conditions Standard is excluded, and the employee's preserved transitional award entitlement has effect in accordance with the preserved transitional award term. Otherwise, the employee's entitlement under the Australian Fair Pay and Conditions Standard has effect.

Note: See clause 79 for the meaning of *more generous*.

- (3) If:
-

- (a) the preserved transitional award term is about a matter referred to in paragraph 22(3)(e), (f) or (g); and
- (b) the employee has no entitlement in relation to the corresponding matter under the Australian Fair Pay and Conditions Standard;

the employee's preserved transitional award entitlement has effect in accordance with the preserved transitional award term.

79 Meaning of *more generous*

- (1) For the purposes of this Subdivision, whether an employee's entitlement under a preserved transitional award term in relation to a matter is *more generous* than the employee's entitlement in relation to the corresponding matter under the Australian Fair Pay and Conditions Standard:
 - (a) is as specified in, or as worked out in accordance with a method specified in, regulations made under this paragraph; or
 - (b) to the extent that regulations made under paragraph (a) do not so specify—is to be ascertained in accordance with the ordinary meaning of the term *more generous*.
- (2) If a matter to which an entitlement under a preserved transitional award term relates does not correspond directly to a matter to which the Australian Fair Pay and Conditions Standard relates, regulations made under paragraph (1)(a) may nevertheless specify that the matters correspond for the purposes of this Subdivision.

80 Modifications that may be prescribed—personal/carer's leave

- (1) This clause applies to a transitional Victorian reference award.
- (2) The regulations may provide that a preserved transitional award term about personal/carer's leave is to be treated, for the purposes of the application of this Schedule to the award, as a separate preserved transitional award term about separate matters, to the extent that the preserved transitional award term is about any of the following:
 - (a) war service sick leave;
 - (b) infectious diseases sick leave;
 - (c) any other like form of sick leave.

- (3) If the regulations so provide, clauses 22, 78 and 79 have effect, for the purposes of the application of this Schedule to the award, in relation to each separate matter.

Note: There is no entitlement in relation to war service sick leave, infectious diseases sick leave or any other like form of sick leave under the Australian Fair Pay and Conditions Standard, so there is no corresponding matter for the purposes of subclause 78(3).

81 Modifications that may be prescribed—parental leave

- (1) This clause applies to a transitional Victorian reference award.
- (2) The regulations may provide that a preserved transitional award term about parental leave is to be treated, for the purposes of the application of this Schedule to the award, as being about separate matters to the extent that it is about paid and unpaid parental leave.
- (3) If the regulations provide that a preserved transitional award term about parental leave is to be treated, for the purposes of the application of this Schedule to the award, as being about separate matters to the extent that it is about paid and unpaid parental leave:
- (a) clauses 22, 78 and 79 have effect, for the purposes of the application of this Schedule to the award, in relation to each separate matter; and
 - (b) in accordance with section 94D, the entitlement that an employee would have to unpaid parental leave under the Australian Fair Pay and Conditions Standard is reduced by any amount of paid parental leave to which the employee is entitled under the preserved transitional award term.

Note 1: There is no entitlement in relation to paid parental leave under the Australian Fair Pay and Conditions Standard, so there is no corresponding matter for the purposes of subclause 78(3).

Note 2: Paragraph (b) does not have the effect of reducing entitlements. It simply ensures that the operation of section 94D is not affected by treating paid and unpaid parental leave separately under the regulations.

Subdivision E—Common rules**82 Common rules continue to have effect during the transitional period**

- (1) Despite the repeal of sections 141, 142 and 493A by the *Workplace Relations Amendment (Work Choices) Act 2005*, if, immediately before the reform commencement, a common rule had effect because of repealed section 493A, the common rule continues to have effect, to the extent to which it regulates employers in respect of the employment of their employees, until:
 - (a) the revocation of the underlying award; or
 - (b) the revocation of the relevant declaration that was made under repealed subsection 141(1) (as that subsection had effect because of repealed section 493A); or
 - (c) the end of the transitional period;whichever comes first, as if those repeals had not happened.
- (2) For this purpose:
 - (a) the underlying award is taken to be the relevant transitional award, and
 - (b) the relevant declaration under repealed subsection 141(1) (as that subsection had effect because of repealed section 493A) is to be construed accordingly.
- (3) Subclause (1) has effect subject to:
 - (a) clause 85; and
 - (b) subsection 45(7) (including that subsection as applied by subsection 109(4)).
- (4) Paragraph 46(1)(d) applies to a declaration under repealed subsection 141(1) (as that subsection had effect because of repealed section 493A), to the extent to which the declaration relates to a common rule that continues to have effect because of this Subdivision, as if the declaration were a decision of the Commission made under this Schedule.

83 Certain declarations continue to have effect during the transitional period

- (1) Despite the repeal of sections 142 and 493A by the *Workplace Relations Amendment (Work Choices) Act 2005*, if, immediately before the reform commencement, a declaration had effect under repealed subsection 142(5) (as applied by repealed section 493A), the declaration continues to have effect, to the extent to which it relates to a common rule that continues to have effect because of this Subdivision, until:
 - (a) the revocation of the declaration; or
 - (b) the end of the transitional period;whichever comes first, as if those repeals had not happened.
- (2) Subclause (1) has effect subject to subsection 45(7) (including that subsection as applied by subsection 109(4)).
- (3) Paragraph 46(1)(d) applies to a declaration under repealed subsection 142(5) (as that subsection had effect because of repealed section 493A), to the extent to which the declaration relates to a common rule that continues to have effect because of this Subdivision, as if the declaration were a decision of the Commission made under this Schedule.

84 Variation of common rules before the reform commencement

- (1) Despite the repeal of sections 142 and 493A by the *Workplace Relations Amendment (Work Choices) Act 2005*, if:
 - (a) before the reform commencement, the Commission varied a term of an award that was a common rule in Victoria for an industry; and
 - (b) before the reform commencement, a Registrar published a notice under repealed subsection 142(4) (as applied by repealed section 493A) inviting any organisation or person interested and wanting to be heard to lodge notice of objection to the variation binding the organisation or person; and
 - (c) either:
 - (i) the prescribed time (as defined by repealed subsection 142(8)) had not expired before the reform commencement; or

-
- (ii) a notice of objection was lodged before the reform commencement, but the hearing of the objection had not been finally disposed of before the reform commencement;

then, to the extent to which the variation relates to a common rule that continues to have effect because of this Subdivision, repealed subsections 142(4) to (8) and repealed section 493A continue to apply, in relation to the variation, as if those repeals had not happened.

- (2) Despite the repeal of sections 142 and 493A by the *Workplace Relations Amendment (Work Choices) Act 2005*, if, after the reform commencement, the Commission makes a declaration under repealed subsection 142(5) (as it continues to apply because of subclause (1) of this clause), the declaration continues to have effect, until:
 - (a) the revocation of the declaration; or
 - (b) the end of the transitional period;
 whichever comes first, as if those repeals had not happened.
- (3) Paragraph 46(1)(d) applies to a declaration under repealed subsection 142(5) (as it continues to apply because of subclause (1) of this clause) as if the declaration were a decision of the Commission made under this Schedule.

85 Variation of common rules during the transitional period

- (1) Subject to this clause, if, during the transitional period, the Commission varies a term of a transitional award that is the underlying award for a common rule in Victoria for an industry, the variation is, by force of this subclause, a common rule in Victoria for the industry, to the extent to which the variation regulates employers in respect of the employment of their employees, during the period:
 - (a) beginning on the date of effect of the variation; and
 - (b) ending:
 - (i) on the revocation of the underlying award; or
 - (ii) on the revocation of the variation; or
 - (iii) at the end of the transitional period;
 whichever comes first.

- (2) Before the Commission varies a term of a kind referred to in subclause (1), a Registrar must, as prescribed, give notice of the place where, and the time when, it is proposed to hear the matter involving the term.
- (3) If the Commission varies a term of a kind referred to in subclause (1), a Registrar must immediately publish, as prescribed, a notice inviting any organisation or person interested and wanting to be heard to lodge notice of objection to the variation binding the organisation or person.
- (4) If a notice of objection in relation to a variation is lodged within the prescribed time by an organisation or person under subclause (3), the Commission:
 - (a) must hear the objection; and
 - (b) may declare that the variation is not binding on the organisation or person.
- (5) If the Commission makes a declaration under subclause (4), a Registrar must give notice of the declaration as prescribed.
- (6) A variation that is a common rule under this clause:
 - (a) is not enforceable before the end of 28 days after the date of effect of the variation; and
 - (b) if a notice of objection in relation to the variation is lodged within the prescribed time by an organisation or person under subclause (3)—is not enforceable against the organisation or person before the hearing of the objection is finally disposed of.
- (7) In this clause:

the prescribed time means the period, after the publication of the notice under subclause (3), prescribed by Rules of the Commission made under section 48.

86 Intervention by Minister of Victoria

The Commission must, on application, grant to a Minister of Victoria, on behalf of the Government of Victoria, leave to intervene in proceedings in which it is proposed to make a declaration under:

- (a) subclause 85(4); or

- (b) repealed subsection 142(5) (as it continues to apply because of clause 84).

87 Concurrent operation of laws of Victoria

- (1) Despite any other provision of this Act, this Subdivision is not intended to exclude or limit the operation of a law of Victoria that is capable of operating concurrently with this Subdivision.
- (2) In particular, a common rule as it has effect, or continues to have effect, because of this Subdivision is not intended to exclude or limit the operation of a law of Victoria that is capable of operating concurrently with the common rule.

88 Pre-commencement applications for review

- (1) This clause applies if, before the reform commencement, an application (the *review application*) had been made under subsection 109(1) (as applied by repealed section 142B) for review of:
 - (a) a declaration under repealed Division 5 of Part VI (as that provision had effect because of repealed subsection 493A(2)); or
 - (b) a decision not to make such a declaration.
- (2) Despite the repeal of sections 142B and 493A by the *Workplace Relations Amendment (Work Choices) Act 2005*, this Act continues to apply, in relation to:
 - (a) the review application; and
 - (b) any review made as a result of the review application;as if those repeals had not happened.

89 Common rule taken to be award

- (1) A common rule that has effect, or continues to have effect, because of this Subdivision is taken to be an award for the purposes of:
 - (a) sections 100B, 101B, 103R, 496 and 526; and
 - (b) clauses 5, 15 and 19 of Schedule 14.
- (2) A common rule that has effect, or continues to have effect, because of this Subdivision is taken to be a transitional award for the purposes of clause 60.

90 Meaning of *industrial action*

A common rule that has effect, or continues to have effect, because of this Subdivision is taken to be a transitional award for the purposes of clause 3.

91 Right of entry

A common rule that has effect, or continues to have effect, because of this Subdivision is taken to be a transitional award for the purposes of:

- (a) subclause 105(1); and
- (b) the definitions of *transitional employee* and *transitional employer* in subclause 2(1), so far as those definitions apply to subclause 105(1).

92 Application of provisions of Act relating to workplace inspectors

A common rule that has effect, or continues to have effect, because of this Subdivision is taken to be a transitional award for the purposes of clause 106.

93 Application of provisions of Act relating to compliance

A common rule that has effect, or continues to have effect, because of this Subdivision is taken to be a transitional award for the purposes of paragraph 107(a).

Subdivision F—Transmission of business

94 Transmission of business

Subclause 72J(3) has effect, in relation to a transitional Victorian reference award, as if the following paragraphs were added at the end:

- (e) specify the kinds of instruments (if any) that can replace, or exclude the operation of, the transmitted award; and
- (f) set out the source for the terms and conditions that the employer intends to apply to the matters that are dealt with by the transmitted award when the transmitted award ceases to bind the employer; and
- (g) identify any collective agreement or award that binds:

- (i) the employer; and
- (ii) employees of the employer who are not transferring employees in relation to the transmitted award.

Subdivision G—Modification of certain provisions of this Act

95 Modification of certain provisions of this Act

A transitional Victorian reference award is taken to be an award for the purposes of:

- (a) sections 100B, 101B, 103R, 496 and 526; and
- (b) clauses 5, 15 and 19 of Schedule 14.

Subdivision H—Ceasing to be bound by transitional Victorian reference award

95A Ceasing to be bound by transitional Victorian reference award—inability to resolve industrial dispute under this Schedule

Clause 59 has effect, in relation to a transitional Victorian reference award, as if the reference in subclause 59(3) to must were read as a reference to may.

Division 2—Other matters

Subdivision A—Allowable transitional award matters

96 Allowable transitional award matters

- (1) This clause applies to a transitional award (other than a Victorian reference award) to the extent that the award regulates excluded employers in respect of the employment of employees in Victoria.
- (2) Subclause 17(1) has effect, in relation to the award, as if:
 - (a) “annual leave and” were omitted from paragraph 17(1)(e); and
 - (b) paragraphs 17(1)(f) and (h) had not been enacted.

Subdivision B—Preserved transitional award terms

97 Preserved transitional award terms

- (1) This clause applies to a transitional award (other than a Victorian reference award) to the extent that the award regulates excluded employers in respect of the employment of employees in Victoria.
- (2) Clause 22 has effect, in relation to the award, as if the following paragraphs were inserted before paragraph 22(3)(a):
 - (aa) annual leave;
 - (ab) personal/carer's leave;
 - (ac) parental leave, including maternity and adoption leave.
- (3) In this clause:

personal/carer's leave includes war service sick leave, infectious diseases sick leave and other like forms of sick leave.
- (4) The regulations may provide that for the purposes of subclause (2):
 - (a) *parental leave* does not include one or both of the following:
 - (i) special maternity leave (within the meaning of section 94C);
 - (ii) paid leave under subparagraph 94F(2)(b)(i) or (ii); and
 - (b) *personal/carer's leave* does not include one or both of the following:
 - (i) compassionate leave (within the meaning of section 93Q);
 - (ii) unpaid carer's leave (within the meaning of section 93D).
- (5) Regulations under subclause (4) may be expressed to apply generally or in respect of employees engaged in specified types of employment, such as full-time employment, part-time employment, casual employment, regular part-time employment or shift work.

98 When preserved transitional award entitlements have effect

- (1) This clause applies to an employee if:
 - (a) the employee's employment is regulated by a transitional award (other than a Victorian reference award) that includes
-

a preserved transitional award term dealing with a matter;
and

- (b) the employee has an entitlement (the ***preserved transitional award entitlement***) in relation to that matter under the preserved transitional award term.

(2) If:

- (a) the preserved transitional award term is about a matter referred to in paragraph 22(3)(aa), (ab) or (ac); and
- (b) the employee's preserved transitional award entitlement in relation to the matter is more generous than the employee's entitlement in relation to the corresponding matter under the Australian Fair Pay and Conditions Standard;

the employee's entitlement under the Australian Fair Pay and Conditions Standard is excluded, and the employee's preserved transitional award entitlement has effect in accordance with the preserved transitional award term. Otherwise, the employee's entitlement under the Australian Fair Pay and Conditions Standard has effect.

Note: See clause 99 for the meaning of ***more generous***.

(3) If:

- (a) the preserved transitional award term is about a matter referred to in paragraph 22(3)(aa), (ab) or (ac); and
- (b) the employee has no entitlement in relation to the corresponding matter under the Australian Fair Pay and Conditions Standard;

the employee's preserved transitional award entitlement has effect in accordance with the preserved transitional award term.

99 Meaning of *more generous*

- (1) For the purposes of this Subdivision, whether an employee's entitlement under a preserved transitional award term in relation to a matter is ***more generous*** than the employee's entitlement in relation to the corresponding matter under the Australian Fair Pay and Conditions Standard:
 - (a) is as specified in, or as worked out in accordance with a method specified in, regulations made under this paragraph;
 - or

- (b) to the extent that regulations made under paragraph (a) do not so specify—is to be ascertained in accordance with the ordinary meaning of the term *more generous*.
- (2) If a matter to which an entitlement under a preserved transitional award term relates does not correspond directly to a matter to which the Australian Fair Pay and Conditions Standard relates, regulations made under paragraph (1)(a) may nevertheless specify that the matters correspond for the purposes of this Subdivision.

100 Modifications that may be prescribed—personal/carer’s leave

- (1) This clause applies to a transitional award (other than a Victorian reference award) to the extent that the award regulates excluded employers in respect of the employment of employees in Victoria.
- (2) The regulations may provide that a preserved transitional award term about personal/carer’s leave is to be treated, for the purposes of the application of this Schedule to the award, as a separate preserved transitional award term about separate matters, to the extent that the preserved transitional award term is about any of the following:
- (a) war service sick leave;
 - (b) infectious diseases sick leave;
 - (c) any other like form of sick leave.
- (3) If the regulations so provide, clauses 22, 98 and 99 have effect, for the purposes of the application of this Schedule to the award, in relation to each separate matter.

Note: There is no entitlement in relation to war service sick leave, infectious diseases sick leave or any other like form of sick leave under the Australian Fair Pay and Conditions Standard, so there is no corresponding matter for the purposes of subclause 98(3).

101 Modifications that may be prescribed—parental leave

- (1) This clause applies to a transitional award (other than a Victorian reference award) to the extent that the award regulates excluded employers in respect of the employment of employees in Victoria.
- (2) The regulations may provide that a preserved transitional award term about parental leave is to be treated, for the purposes of the

application of this Schedule to the award, as being about separate matters to the extent that it is about paid and unpaid parental leave.

- (3) If the regulations provide that a preserved transitional award term about parental leave is to be treated, for the purposes of the application of this Schedule to the award, as being about separate matters to the extent that it is about paid and unpaid parental leave:
- (a) clauses 22, 74 and 99 have effect for the purposes of the application of this Schedule to the award, in relation to each separate matter; and
 - (b) in accordance with section 94D, the entitlement that an employee would have to unpaid parental leave under the Australian Fair Pay and Conditions Standard is reduced by any amount of paid parental leave to which the employee is entitled under the preserved transitional award term.

Note 1: There is no entitlement in relation to paid parental leave under the Australian Fair Pay and Conditions Standard, so there is no corresponding matter for the purposes of subclause 98(3).

Note 2: Paragraph (b) does not have the effect of reducing entitlements. It simply ensures that the operation of section 94D is not affected by treating paid and unpaid parental leave separately under the regulations.

Subdivision BA—Transmission of business

101A Transmission of business

- (1) This clause applies to a transitional award (other than a Victorian reference award) to the extent that the award regulates excluded employers in respect of the employment of employees in Victoria.
- (2) Subclause 72J(3) has effect, in relation to the award, as if the following paragraphs were added at the end:
 - (e) specify the kinds of instruments (if any) that can replace, or exclude the operation of, the transmitted award; and
 - (f) set out the source for the terms and conditions that the employer intends to apply to the matters that are dealt with by the transmitted award when the transmitted award ceases to bind the employer; and
 - (g) identify any collective agreement or award that binds:
 - (i) the employer; and

- (ii) employees of the employer who are not transferring employees in relation to the transmitted award.

Subdivision C—Modification of certain provisions of this Act

102 Modification of certain provisions of this Act

A transitional award (other than a Victorian reference award), to the extent that the award regulates excluded employers in respect of the employment of employees in Victoria, is taken to be an award for the purposes of:

- (a) sections 100B, 101B, 103R, 496 and 526; and
- (b) clauses 5, 15 and 19 of Schedule 14.

Subdivision D—Ceasing to be bound by transitional award

102A Ceasing to be bound by transitional award—inability to resolve industrial dispute under this Schedule

- (1) This clause applies to a transitional award (other than a Victorian reference award) to the extent that the award regulates excluded employers in respect of the employment of employees in Victoria.
- (2) Clause 59 has effect, in relation to the award, as if the reference in subclause 59(3) to must were read as a reference to may.

Part 8—Miscellaneous

102B Continuation of hearing by Commission

For the purposes of this Schedule, subsection 34(4) applies as if the reference to any award were a reference to any transitional award.

103 Revocation and suspension of transitional awards

For the purposes of this Schedule, section 44Q applies as if:

- (a) a reference to an award were a reference to a transitional award; and
- (b) a reference to an order were a reference to an order made for the purposes of this Schedule; and

-
- (c) “award or” were omitted from paragraph (4)(c).

104 Appeals to Full Bench

For the purposes of this Schedule, section 45 applies, to the extent possible, as if:

- (a) paragraph (1)(a) of that section as in force immediately before the reform commencement had not been repealed by the *Workplace Relations Amendment (Work Choices) Act 2005*; and
- (b) the reference in paragraph (1)(b) to an award or order were a reference to an order for the purposes of this Schedule; and
- (c) the reference in paragraph (1)(c) to an award or order were a reference to an order for the purposes of this Schedule; and
- (d) the reference in paragraph (1)(d) to paragraph 44I(1)(e) were a reference to paragraph 46(1)(e) of this Schedule; and
- (e) the reference in paragraph (1)(ed) to an award were a reference to a transitional award; and
- (f) the reference in paragraph (3)(a) to the award or order were a reference to the order made for the purposes of this Schedule; and
- (g) the reference in paragraph (3)(bb) to the award were a reference to the transitional award; and
- (h) “award,” were omitted from paragraph (7)(b); and
- (i) “award or” were omitted from paragraph (7)(d); and
- (j) the reference in paragraph (7)(d) to paragraph 44I(1)(e) were a reference to paragraph 46(1)(e) of this Schedule; and
- (k) subsection (9) of that section as in force immediately before the reform commencement had not been repealed by the *Workplace Relations Amendment (Work Choices) Act 2005*.

105 Application of provisions of Act relating to right of entry

For the purposes of this Schedule, Part IX (Right of entry) applies, to the extent possible, as if:

- (a) a reference to an award were a reference to a transitional award; and
- (b) a reference to an employee were a reference to a transitional employee; and

- (c) a reference to an employer were a reference to a transitional employer; and
- (d) a reference to an affected employee were a reference to an affected transitional employee; and
- (e) a reference to an affected employer were a reference to an affected transitional employer; and
- (f) Division 5 of that Part were omitted and any references to a provision in that Division were omitted.

106 Application of provisions of Act relating to workplace inspectors

For the purposes of this Schedule, Part V (Workplace inspectors) applies, to the extent possible, as if a reference to an award were a reference to a transitional award.

107 Application of provisions of Act relating to compliance

For the purposes of this Schedule, Part VIII (Compliance) applies, to the extent possible, as if:

- (a) a reference to an award were a reference to a transitional award; and
- (b) a reference to an employee were a reference to a transitional employee; and
- (c) a reference to an employer were a reference to a transitional employer; and
- (d) a reference to employment were a reference to employment within the meaning of this Schedule; and
- (e) paragraph (da) of table item 3 of subsection 177AA(1) were replaced by the following paragraph:
 - (da) if the term is an outworker term (within the meaning of subclause 4(5) of Schedule 13)—a person, or an entity referred to in paragraph 4(2)(e) of that Schedule, that is bound by the transitional award;

107A Application of provisions of Act relating to freedom of association

For the purposes of this Schedule, Part XA (Freedom of association) applies, to the extent possible, as if:

- (a) a reference to an award were a reference to a transitional award; and
- (b) a reference to an employee were a reference to a transitional employee; and
- (c) a reference to an employer were a reference to a transitional employer; and
- (d) section 241 had not been enacted; and
- (e) the following section were inserted after section 244:

244A Industrial action

This Part applies to conduct carried out with a purpose or intent relating to a person's participation or non-participation in industrial action within the meaning of clause 3 of Schedule 13.

107B Contracts entered into by agents of transitional employees

For the purposes of this Schedule, section 338 applies, to the extent possible, as if:

- (a) a reference to an employee were a reference to a transitional employee; and
- (b) a reference to an employer were a reference to a transitional employer; and
- (c) a reference to an award were a reference to a transitional award.

107C Records relating to transitional employees

For the purposes of this Schedule, section 353A applies, to the extent possible, as if:

- (a) a reference to an employee were a reference to a transitional employee; and
- (b) a reference to an employer were a reference to a transitional employer; and
- (c) a reference to employment were a reference to employment within the meaning of this Schedule.

107D Interpretation of transitional awards

For the purposes of this Schedule, section 413 applies as if a reference to an award were a reference to a transitional award.

108 Application of other Parts of Act

- (1) The regulations may make provision dealing with how this Act applies in relation to matters or persons covered by this Schedule.
- (2) Without limiting the generality of subclause (1), regulations for the purposes of that subclause may provide that this Act applies with specified modifications.
- (3) In this clause:
modifications includes additions, omissions and substitutions.

360 Schedule 14

Repeal the Schedule, substitute:

Schedule 14—Transitional arrangements for existing pre-reform Federal agreements etc.

Note: See section 4A.

Part 1—Preliminary

1 Definitions

In this Schedule:

Division 3 pre-reform certified agreement means a pre-reform certified agreement that was made under Division 3 of Part VIB of this Act before the reform commencement.

exceptional matters order has the same meaning as in the pre-reform Act.

excluded employer has the same meaning as in Schedule 13.

old IR agreement means an agreement certified or approved under any of the following provisions of this Act:

- (a) section 115, as in force immediately before the commencement of the Schedule to the *Industrial Relations Legislation Amendment Act 1992*;
- (b) Division 3A of Part VI, as in force immediately before the commencement of Schedule 2 to the *Industrial Relations Reform Act 1993*;
- (c) Division 2 of Part VIB, as in force immediately before the commencement of item 19 of Schedule 8 to the *Workplace Relations and Other Legislation Amendment Act 1996*;
- (d) Division 3 of Part VIB, as in force immediately before the commencement of item 1 of Schedule 9 to the *Workplace Relations and Other Legislation Amendment Act 1996*.

pre-reform Act means this Act as in force just before the reform commencement.

pre-reform AWA means an AWA (within the meaning of the pre-reform Act) that:

- (a) was made before the reform commencement; and
- (b) was approved under Part VID of this Act (whether before the reform commencement, or after the reform commencement because of Part 8 of this Schedule).

pre-reform certified agreement means an agreement that:

- (a) was made under Division 2 or 3 of Part VIB of this Act before the reform commencement; and
- (b) was certified under Division 4 of Part VIB of this Act (whether before the reform commencement, or after the reform commencement because of Part 8 of this Schedule).

section 170MX award means an award under subsection 170MX(3) of the pre-reform Act.

transitional period means the period of 5 years beginning on the reform commencement.

Part 2—Pre-reform certified agreements

Division 1—General

2 Continuing operation of pre-reform certified agreements—under old provisions

- (1) Subject to this Schedule, the following provisions of the pre-reform Act continue to apply in relation to a pre-reform certified agreement, despite the repeals and amendments made by the *Workplace Relations Amendment (Work Choices) Act 2005*:
 - (a) sections 170LA and 170LB;
 - (b) subsections 170LC(1) and (5);
 - (c) sections 170LD and 170LE;
 - (d) subsection 170LV(2);
 - (e) section 170LW;
 - (f) subsections 170LX(1) and (4);
 - (g) sections 170LY and 170LZ;
 - (h) section 170M;
 - (i) paragraph 170MD(6)(a);
 - (j) paragraphs 170MD(7)(a), (b) and (e);
 - (k) sections 170MDA, 170MG, 170MH and 170MHA;
 - (l) paragraph 170ND(a);
 - (m) section 170NE;
 - (n) subsections 170NF(1), (2) and (3);
 - (o) section 170NG;
 - (p) Division 10A of Part VIB;
 - (q) sections 298Y and 298Z;
 - (r) any other provision relating to the operation of the provisions mentioned in the preceding paragraphs.
- (2) Regulations made under the pre-reform Act, to the extent that they relate to the provisions mentioned in subclause (1), continue to apply in relation to a pre-reform certified agreement.

3 Rules replacing subsections 170LX(2) and (3)

- (1) A pre-reform certified agreement ceases to be in operation in relation to an employee if a collective agreement or workplace determination comes into operation in relation to that employee.
- (2) A pre-reform certified agreement has no effect in relation to an employee while an AWA operates in relation to the employee.
- (3) A pre-reform certified agreement:
 - (a) ceases to be in operation if it is terminated under section 170LV, 170MG, 170MH or 170MHA of the pre-reform Act; and
 - (b) does not operate if subsection 170LY(2) of the pre-reform Act applies.
- (4) If a pre-reform certified agreement has ceased operating under paragraph (3)(a), it can never operate again.
- (5) If a pre-reform certified agreement has ceased operating in relation to an employee because of subclause (1), the agreement can never operate again in relation to that employee.
- (6) A pre-reform certified agreement may be set aside under subsection 113(2A) of the pre-reform Act.

4 Rules replacing section 170NC—coercion of persons to terminate certified agreements etc.

- (1) A person must not:
 - (a) take or threaten to take any industrial action or other action;
or
 - (b) refrain or threaten to refrain from taking any action;
with intent to coerce another person to agree, or not to agree, to terminate or approve the termination of a pre-reform certified agreement.
- (2) Subclause (1) does not apply to protected action (within the meaning of this Act as in force after the reform commencement).
- (3) The following provisions in Division 10 of Part VIB of the pre-reform Act apply in relation to a contravention of subclause (1):

- (a) paragraph 170ND(e);
- (b) section 170NE;
- (c) subsection 170NF(7);
- (d) section 170NG.

5 Interaction of agreement with other instruments

- (1) The following have no effect in relation to an employee while a pre-reform certified agreement operates in relation to the employee:
 - (a) a preserved State agreement;
 - (b) a notional agreement preserving State awards.
- (2) While a pre-reform certified agreement is in operation, it prevails over an award to the extent of any inconsistency (subject to section 170LY of the pre-reform Act, as it applies because of clause 2).

6 Continuing operation of pre-reform certified agreements—under new provisions

Subject to this Schedule, the following provisions of this Act apply in relation to a pre-reform certified agreement as if it were a collective agreement:

- (a) Part V;
- (b) section 110;
- (c) subsection 109B(2);
- (d) Part VIII;
- (e) Part IX.

7 Effect of pre-reform certified agreement if AWA is terminated

- (1) A pre-reform certified agreement has no effect in relation to an employee if:
 - (a) an AWA operated in relation to the employee; and
 - (b) the AWA was terminated.

Note 1: See Part VA for the operation of the Australian Fair Pay and Conditions Standard in these circumstances.

Note 2: See subsections 103M(2), (3) and (4) for the operation of undertakings (if any) in these circumstances.

- (2) Subclause (1) operates in relation to the period:
 - (a) starting when the AWA was terminated; and
 - (b) ending when another workplace agreement comes into operation in relation to the employee.

8 Anti-AWA terms taken to be prohibited content

- (1) Sections 101F, 101G, 101H, 101I, 101J, 101K and 101L of this Act apply in relation to an anti-AWA term in a pre-reform certified agreement as if:
 - (a) the term was prohibited content; and
 - (b) the agreement was a workplace agreement.

- (2) In this clause:

anti-AWA term means a term of a pre-reform certified agreement that prevents the employer bound by the agreement from making a pre-reform AWA or an AWA with an employee bound by the agreement.

9 Calling up contents of pre-reform certified agreement in workplace agreement

A workplace agreement may incorporate by reference terms from a pre-reform certified agreement under section 101C of this Act as if the pre-reform certified agreement were a workplace agreement.

10 Application of Division to certain Division 3 pre-reform certified agreements

- (1) This Division applies to a Division 3 pre-reform certified agreement as if the agreement had been made under section 170LJ of the pre-reform Act, if the employer in relation to the agreement:
 - (a) is an employer (within the meaning of subsection 4AB(1)) at the reform commencement; or
 - (b) becomes such an employer during the transitional period.
- (2) This Division does not apply in relation to a Division 3 pre-reform certified agreement while Division 2 of this Part applies to the agreement.

Division 2—Special rules for Division 3 pre-reform certified agreements with excluded employers

11 Application of Division

- (1) This Division applies to a Division 3 pre-reform certified agreement if the employer in relation to the agreement is an excluded employer at the reform commencement.
- (2) This Division applies to the agreement while the employer remains an excluded employer during the transitional period.

12 Cessation of Division 3 pre-reform certified agreements

- (1) The agreement ceases to be in operation:
 - (a) at the end of the transitional period; or
 - (b) when both of these conditions are satisfied (before the end of the transitional period):
 - (i) the agreement has passed its nominal expiry date;
 - (ii) it has been replaced by a State employment agreement.
- (2) To avoid doubt, this clause does not affect any rights accrued or liabilities incurred under the agreement before it ceases to be in operation.
- (3) To avoid doubt, if the employer in relation to the agreement becomes an employer (within the meaning of subsection 4AB(1)) at a time before the end of the transitional period, subclause (1) does not apply after that time.

Note: On and after that time, Division 1 of this Part applies to the agreement.

- (4) Once the agreement has ceased operating, it can never operate again.

13 Continuing operation of pre-reform certified agreements—under old provisions

- (1) Subject to this Schedule, the following provisions of the pre-reform Act continue to apply in relation to the agreement, despite the repeals and amendments made by the *Workplace Relations Amendment (Work Choices) Act 2005*:

-
- (a) sections 170LA and 170LB;
 - (b) subsections 170LC(1) and (5);
 - (c) sections 170LD and 170LE;
 - (d) subsection 170LV(2);
 - (e) section 170LW;
 - (f) subsections 170LX(1) and (4);
 - (g) paragraph 170LY(1)(b);
 - (h) subsections 170LY(2) and (3);
 - (i) section 170LZ;
 - (j) section 170MA;
 - (k) paragraph 170MD(6)(a);
 - (l) paragraphs 170MD(7)(a), (b) and (e);
 - (m) sections 170MDA;
 - (n) sections 170MG, 170MH and 170MHA;
 - (o) paragraph 170ND(a);
 - (p) section 170NE;
 - (q) subsections 170NF(1), (2) and (3);
 - (r) section 170NG;
 - (s) Division 10A of Part VIB;
 - (t) sections 298Y and 298Z;
 - (u) any other provision relating to the operation of the provisions mentioned in the preceding paragraphs.
- (2) Regulations made under the pre-reform Act, to the extent that they relate to the provisions mentioned in subclause (1), continue to apply in relation to the agreement.

14 Rules replacing subsections 170LX(2) and (3)

- (1) The agreement:
- (a) ceases to be in operation if it is terminated under section 170LV, 170MG, 170MH or 170MHA of the pre-reform Act; and
 - (b) does not operate if subsection 170LY(2) of the pre-reform Act applies.
- (2) If the agreement has ceased operating under paragraph (1)(a), it can never operate again.

- (3) The agreement may also be set aside under subsection 113(2A) of the pre-reform Act.

15 Interaction of agreement with awards

While the agreement is in operation, it prevails over an award to the extent of any inconsistency (subject to section 170LY of the pre-reform Act, as it applies because of clause 13).

16 Continuing operation of pre-reform certified agreements—under new provisions

Subject to this Schedule, the following provisions of this Act apply in relation to the agreement as if it were a collective agreement:

- (a) Part V;
- (b) section 110;
- (c) subsection 109B(2);
- (d) Part VIII;
- (e) Part IX.

Part 3—Pre-reform AWAs

17 Continuing operation of pre-reform AWAs—under old provisions

- (1) Subject to this Schedule, the following provisions of the pre-reform Act continue to apply in relation to a pre-reform AWA, despite the repeals and amendments made by the *Workplace Relations Amendment (Work Choices) Act 2005*:
- (a) section 170VG;
 - (b) subsections 170VH(1) and (2);
 - (c) section 170VM;
 - (d) subsections 170VN(1) and (2);
 - (e) subsections 170VO(5) and (6);
 - (f) subsections 170VPA(4) and (5);
 - (g) sections 170VPD, 170VPK, 170VQ, 170VR, 170VV and 170VZ;
 - (h) Division 8A of Part VID;

- (i) Division 9 of Part VID (except sections 170WHC and 170WHD);
 - (j) any other provision relating to the operation of the provisions mentioned in the preceding paragraphs.
- (2) Regulations made under the pre-reform Act, to the extent that they relate to the provisions mentioned in subclause (1), continue to apply in relation to a pre-reform AWA.

18 Rules replacing section 170VJ—period of operation of AWA

- (1) A pre-reform AWA ceases to be in operation in relation to an employee if an AWA comes into operation in relation to the employee.
- (2) A pre-reform AWA ceases to be in operation when a termination under section 170VM of the pre-reform Act takes effect.
- (3) If a pre-reform AWA has ceased operating under subclause (2), it can never operate again.
- (4) If a pre-reform AWA has ceased operating in relation to an employee because of subclause (1), the agreement can never operate again in relation to that employee.

19 Interaction of pre-reform AWAs with other instruments

The following have no effect in relation to an employee while a pre-reform AWA operates in relation to the employee:

- (a) a collective agreement;
- (b) a workplace determination;
- (c) a preserved State agreement;
- (d) a notional agreement preserving State awards;
- (e) an award.

20 Continuing operation of pre-reform AWAs—under new provisions

Subject to this Schedule, the following provisions of this Act apply in relation to a pre-reform AWA as if it were an AWA:

- (a) Part V;
- (b) section 110;

- (c) subsection 109B(2);
- (d) Part VIII;
- (e) Part IX.

21 Calling up contents of pre-reform AWA in workplace agreement

A workplace agreement may incorporate by reference terms from a pre-reform AWA under section 101C of this Act as if the pre-reform AWA were a workplace agreement.

Part 4—Awards under subsection 170MX(3) of the pre-reform Act

22 Application of Part

This Part applies in relation to a section 170MX award that:

- (a) was in force just before the reform commencement; or
- (b) was made after the reform commencement because of Part 8 of this Schedule.

23 Continuing operation of section 170MX awards—under old provisions

- (1) Subject to this Schedule, provisions of the pre-reform Act (including regulations made under that Act) relating to section 170MX of the pre-reform Act continue to apply in relation to the award, despite the repeals and amendments made by the *Workplace Relations Amendment (Work Choices) Act 2005*.
- (2) Subclause (1) does not apply in relation to the following provisions of the pre-reform Act:
 - (a) section 170MN;
 - (b) subsections 170MZ(4) and (5);
 - (c) paragraph 170MZ(6)(b);
 - (d) subsections 170MZ(7) and (8).

24 Continuing operation of section 170MX awards—under new provisions

Subject to this Schedule, the following provisions of this Act apply in relation to the award as if it were a workplace determination:

- (a) Part V;
- (b) section 110;
- (c) subsection 109B(2);
- (d) Part VIII;
- (e) Part IX.

25 Interaction of section 170MX awards with other instruments

- (1) A section 170MX award has no effect in relation to an employee while an AWA operates in relation to that employee.
- (2) A section 170MX award ceases to be in operation in relation to an employee when one of the following comes into operation in relation to the employee:
 - (a) a collective agreement;
 - (b) a workplace determination.
- (3) The following have no effect in relation to an employee to the extent to which they are inconsistent with a section 170MX award that operates in relation to the employee:
 - (a) an award;
 - (b) a preserved State agreement;
 - (c) a notional agreement preserving State awards.

26 Effect of section 170MX award if AWA is terminated

- (1) A section 170MX award has no effect in relation to an employee if:
 - (a) an AWA operated in relation to the employee; and
 - (b) the AWA was terminated.

Note 1: See Part VA for the operation of the Australian Fair Pay and Conditions Standard in these circumstances.

Note 2: See subsections 103M(2), (3) and (4) for the operation of undertakings (if any) in these circumstances.

- (2) Subclause (1) operates in relation to the period:
 - (a) starting when the AWA was terminated; and

- (b) ending when another workplace agreement comes into operation in relation to the employee.

Part 5—Exceptional matters orders

27 Exceptional matters orders

An exceptional matters order ceases to be in force in relation to an employee at the earlier of the following times:

- (a) 2 years after it was made;
- (b) when a workplace agreement or workplace determination comes into operation in relation to that employee.

Part 6—Old IR agreements

28 Operation of old IR agreement

- (1) An old IR agreement ceases to be in operation no later than 3 years after the reform commencement.
- (2) An old IR agreement has no effect in relation to an employee if a workplace agreement or workplace determination comes into operation in relation to the employee.
- (3) If an old IR agreement has ceased operating because of subclause (1), the agreement can never operate again.
- (4) If an old IR agreement has ceased operating in relation to an employee because of subclause (2), the agreement can never operate again in relation to that employee.

29 Old IR agreement cannot be varied after the reform commencement

An old IR agreement cannot be varied after the reform commencement.

Part 7—Relationships between pre-reform agreements etc. and Australian Fair Pay and Conditions Standard

30 Relationships between pre-reform agreements etc. and Australian Fair Pay and Conditions Standard

The Australian Fair Pay and Conditions Standard does not apply to an employee if the employee's employment is subject to any of the following instruments:

- (a) a pre-reform certified agreement;
- (b) a pre-reform AWA;
- (c) a section 170MX award.

Part 7A—Relationship between pre-reform agreements etc. and public holiday entitlement

30A Relationship between pre-reform agreements etc. and public holiday entitlement

Division 1A of Part VIA (public holidays) does not apply to an employee if the employee's employment is subject to any of the following instruments:

- (a) a pre-reform certified agreement;
- (b) a pre-reform AWA;
- (c) a section 170MX award.

Part 8—Applications for certification etc. before reform commencement

31 Certifications under pre-reform Act after the reform commencement

- (1) This clause applies if an application for certification was made under section 170LM or 170LS of the pre-reform Act before the reform commencement.
- (2) The pre-reform Act continues to apply, despite the repeals and amendments made by the *Workplace Relations Amendment (Work Choices) Act 2005*, in relation to the application and certification.

32 Approvals of pre-reform AWAs under pre-reform Act after the reform commencement

- (1) This clause applies if an AWA was filed under section 170VN of the pre-reform Act before the reform commencement.
- (2) The pre-reform Act continues to apply, despite the repeals and amendments made by the *Workplace Relations Amendment (Work Choices) Act 2005*, in relation to the filing and approval of the AWA.

32A Approvals of section 170MX awards under pre-reform Act after the reform commencement

- (1) This clause applies if the Commission has started to exercise arbitration powers in accordance with subsection 170MX(3) of the pre-reform Act before the reform commencement to make an award under that subsection.
- (2) The pre-reform Act continues to apply, despite the repeals and amendments made by the *Workplace Relations Amendment (Work Choices) Act 2005*, in relation to the making of the award.

Part 9—Matters relating to Victoria

33 Definitions

In this Part:

employee has the same meaning as in Division 1 of Part XV of this Act.

employer has the same meaning as in Division 1 of Part XV of this Act.

employment has the same meaning as in Division 1 of Part XV of this Act.

this Schedule does not include this Part.

Victorian reference AWA means an AWA (within the meaning of the pre-reform Act) made under this Act in its operation in accordance with repealed section 495.

Victorian reference certified agreement means an agreement that was made under Division 2 or 3 of Part VIB of this Act, in that Division's operation in accordance with repealed Division 2 of Part XV, before the reform commencement.

Victorian reference Division 3 pre-reform certified agreement means a pre-reform certified agreement that was made under Division 3 of Part VIB of this Act, in its operation in accordance with repealed Division 2 of Part XV, before the reform commencement.

Victorian reference section 170MX award means a section 170MX award that:

- (a) was made before the reform commencement under this Act in its operation in accordance with repealed Division 2 of Part XV; or
- (b) was made after the reform commencement because of clause 32A of this Schedule (as that clause applies because of clause 38A of this Schedule).

34 Part only has effect if supported by reference etc.

Any of the following:

- (a) a clause of this Part;
- (b) a clause of this Schedule, to the extent to which it relates to a Victorian reference certified agreement;
- (c) a clause of this Schedule, to the extent to which it relates to a Victorian reference AWA;
- (d) a clause of this Schedule, to the extent to which it relates to a Victorian reference section 170MX award;

has effect only for so long, and in so far, as the *Commonwealth Powers (Industrial Relations) Act 1996* of Victoria refers to the Parliament of the Commonwealth a matter or matters that result in the Parliament of the Commonwealth having sufficient legislative power for the clause so to have effect.

35 Continuing operation of pre-reform certified agreements—under old provisions

Clause 2 has effect, in relation to a Victorian reference certified agreement, as if each reference in a paragraph of subclause 2(1) to a provision of the pre-reform Act were read as a reference to the provision as it had effect because of repealed Division 2 of Part XV.

36 Victorian reference Division 3 pre-reform certified agreements

- (1) Clause 10 and Division 2 of Part 2 of this Schedule do not apply to a Victorian reference Division 3 pre-reform certified agreement.
- (2) Division 1 of Part 2 of this Schedule applies to a Victorian reference Division 3 pre-reform certified agreement as if the agreement had been made under section 170LJ of the pre-reform Act in that section's operation in accordance with repealed Division 2 of Part XV.

37 Continuing operation of pre-reform AWAs—under old provisions

Clause 17 has effect, in relation to a Victorian reference AWA, as if each reference in a paragraph of subclause 17(1) to a provision

of the pre-reform Act were read as a reference to the provision as it had effect because of repealed section 495.

38 Continuing operation of section 170MX awards—under old provisions

Clause 23 has effect, in relation to a Victorian reference section 170MX award, as if the reference in subclause 23(1) to section 170MX of the pre-reform Act were read as a reference to that section as it had effect because of repealed Division 2 of Part XV.

38A Approvals of section 170MX awards under pre-reform Act after the reform commencement

Clause 32A has effect, in relation to the making of a section 170MX award under this Act in its operation in accordance with repealed Division 2 of Part XV, as if the reference in subclause 32A(1) to subsection 170MX(3) of the pre-reform Act were read as a reference to that subsection as it had effect because of repealed Division 2 of Part XV.

39 Relationship between Victorian employment agreements and designated old IR agreements

- (1) A designated old IR agreement prevails to the extent of any inconsistency with an employment agreement.
- (2) In this clause:

designated old IR agreement means an old IR agreement covered by paragraph (d) of the definition of *old IR agreement* in clause 1.

employment agreement has the same meaning as in Division 10 of Part XV of this Act.

Schedule 15—Transitional treatment of State employment agreements and State awards

Note: See section 4A.

Part 1—Preliminary

1 Definitions

(1) In this Schedule:

discriminatory:

- (a) in relation to a preserved State agreement—has the meaning given by subclause 18(4); and
- (b) in relation to a notional agreement preserving State awards—has the meaning given by subclause 41(4).

notional agreement preserving State awards is an agreement that is taken to come into operation under clause 31.

preserved collective State agreement is an agreement that is taken to come into operation under clause 10.

preserved individual State agreement is an agreement that is taken to come into operation under clause 3.

preserved notional entitlement has the meaning given by subclause 46(1).

preserved notional term has the meaning given by subclause 45(1).

preserved State agreement means:

- (a) a preserved individual State agreement; or
- (b) a preserved collective State agreement.

(2) A reference in regulations made for the purposes of clause 9, subclause 19(1), clause 37 or subclause 42(1) to an independent contractor is not confined to a natural person.

2 Objects

The objects of this Schedule are:

- (a) to preserve for a time the terms and conditions of employment, as they were immediately before the reform commencement, for those employees:

-
- (i) who, but for the reforms commenced at that time, would be bound by a State employment agreement, a State award or a State or Territory industrial law; or
 - (ii) whose employment, but for the reforms commenced at that time, would be subject to a State employment agreement, a State award or a State or Territory industrial law; and
- (b) to encourage employees and employers for whom those terms and conditions have been preserved to enter into workplace agreements during that time.

Part 2—Preserved State agreements

Division 1—Preserved individual State agreements

Subdivision A—What is a preserved individual State agreement?

3 Preserved individual State agreements

If, immediately before the reform commencement:

- (a) the terms and conditions of employment of an employee were determined, in whole or in part, under a State employment agreement (the *original individual agreement*); and
- (b) that employee was the only employee who was bound by the agreement, or whose employment was subject to the agreement;

a *preserved individual State agreement* is taken to come into operation on the reform commencement.

Subdivision B—Who is bound by or subject to a preserved individual State agreement?

4 Who is bound by or subject to a preserved individual State agreement?

- (1) Any person who:
 - (a) immediately before the reform commencement, was bound by, or a party to, the original individual agreement, under the

terms of that agreement or a State or Territory industrial law as in force at that time; and

(b) is one of the following:

- (i) an employer;
- (ii) an employee;
- (iii) an organisation;

is bound by the preserved individual State agreement.

- (2) The employment of a person is subject to the preserved individual State agreement if, immediately before the reform commencement, that employment was subject to the original individual agreement.

Subdivision C—Terms of a preserved individual State agreement

5 Terms of a preserved individual State agreement

- (1) A preserved individual State agreement is taken to include the terms of the original individual agreement, as in force immediately before the reform commencement.
- (2) If, immediately before the reform commencement, a term of another State employment agreement determined, in whole or in part, a term or condition of employment of the employee who was bound by, or whose employment was subject to, the original individual agreement, then, to that extent, that term of the other State employment agreement, as in force at that time, is taken to be a term of the preserved individual State agreement.
- (3) If, immediately before the reform commencement, a term of a State award determined, in whole or in part, a term or condition of the employment of the employee who was bound by, or whose employment was subject to, the original individual agreement, then, to that extent, that term, as in force at that time, is taken to be a term of the preserved individual State agreement.
- (4) If, immediately before the reform commencement, a provision of a State or Territory industrial law determined, in whole or in part, a preserved entitlement of the employee who was bound by, or whose employment was subject to, the original individual agreement, then, to that extent, that provision, as in force at that

time, is taken to be a term of the preserved individual State agreement.

(5) In this clause:

preserved entitlement means:

- (a) an entitlement to:
 - (i) annual leave and annual leave loadings; or
 - (ii) parental leave, including maternity leave and adoption leave; or
 - (iii) personal/carer's leave; or
 - (iv) leave relating to bereavement; or
 - (v) ceremonial leave; or
 - (vi) notice of termination; or
 - (vii) redundancy pay; or
 - (viii) loadings for working overtime or shift work; or
 - (ix) penalty rates, including the rate of payment for work on a public holiday; or
 - (x) rest breaks; or
- (b) another prescribed entitlement.

6 Nominal expiry date of a preserved individual State agreement

The ***nominal expiry date*** of a preserved individual State agreement is:

- (a) the day on which the original individual agreement would nominally have expired under the relevant State or Territory industrial law; or
- (b) if that day falls after the end of a period of 3 years beginning on the commencement of the original individual agreement—the last day of that 3 year period.

7 Powers of State industrial authorities

- (1) If a preserved individual State agreement confers a function or power on a State industrial authority, that function must not be performed and that power must not be exercised by the State industrial authority on or after the reform commencement.
- (2) However, the employer and the persons bound by the preserved individual State agreement may, by agreement, confer such a

function or power on the Commission, provided it does not relate to the resolution of a dispute about the application of the agreement.

8 Dispute resolution processes

- (1) A preserved individual State agreement is taken to include a term requiring disputes about the application of the agreement to be resolved in accordance with the model dispute resolution process.
- (2) Any term of the preserved individual State agreement that would otherwise deal with the resolution of those disputes is void to that extent.

9 Prohibited content

A term of a preserved individual State agreement is void to the extent that it contains prohibited content of a prescribed kind.

Note: The Employment Advocate can alter the document recording the terms of a preserved State agreement to remove prohibited content of a prescribed kind (see clause 19).

Division 2—Preserved collective State agreements

Subdivision A—What is a preserved collective State agreement?

10 Preserved collective State agreements

If, immediately before the reform commencement:

- (a) the terms and conditions of employment of an employee were determined, in whole or in part, under a State employment agreement (the *original collective agreement*); and
- (b) that employee was one of a number of employees who were bound by the agreement, or whose employment was subject to the agreement;

a *preserved collective State agreement* is taken to come into operation on the reform commencement.

Subdivision B—Who is bound by or subject to a preserved collective State agreement?

11 Who is bound by a preserved collective State agreement?

Current employees

- (1) Any person who:
- (a) immediately before the reform commencement, was bound by, or a party to, the original collective agreement, under the terms of that agreement or a State or Territory industrial law as in force at that time; and
 - (b) is one of the following:
 - (i) an employer;
 - (ii) an employee;
 - (iii) an organisation;
- is bound by the preserved collective State agreement.

Future employees

- (2) If:
- (a) an employer who is bound by a preserved collective State agreement employs a person after the reform commencement; and
 - (b) under the terms of the original collective agreement, as in force immediately before the reform commencement, the person would have been bound by that agreement;
- that person is bound by the preserved collective State agreement.

12 Whose employment is subject to a preserved collective State agreement?

Current employees

- (1) The employment of a person is subject to a preserved collective State agreement if that employment was, immediately before the reform commencement, subject to the original collective agreement.

Future employees

- (2) If:
- (a) an employer who is bound by a preserved collective State agreement employs a person after the reform commencement; and
 - (b) under the terms of the original collective agreement, as in force immediately before the reform commencement, that person's employment would have been subject to that agreement;
- that employment is subject to the preserved collective State agreement.

Subdivision C—Terms of a preserved collective State agreement

13 Terms of a preserved collective State agreement

- (1) A preserved collective State agreement is taken to include the terms of the original collective agreement, as in force immediately before the reform commencement.
- (2) If, immediately before the reform commencement, a term of a State award would have determined, in whole or in part, a term or condition of employment of a person who would have been bound by, or whose employment would have been subject to, the original collective agreement, then, to that extent, that term, as in force at that time, is taken to be a term of the preserved collective State agreement.
- (3) If, immediately before the reform commencement, a provision of a State or Territory industrial law would have determined, in whole or in part, a preserved entitlement of a person who would have been bound by, or whose employment would have been subject to, the original collective agreement, then, to that extent, that provision, as in force at that time, is taken to be a term of the preserved collective State agreement.
- (4) In this clause:

preserved entitlement means:

 - (a) an entitlement to:

- (i) annual leave and annual leave loadings; or
 - (ii) parental leave, including maternity leave and adoption leave; or
 - (iii) personal/carer's leave; or
 - (iv) leave relating to bereavement; or
 - (v) ceremonial leave; or
 - (vi) notice of termination; or
 - (vii) redundancy pay; or
 - (viii) loadings for working overtime or shift work; or
 - (ix) penalty rates, including the rate of payment for work on a public holiday; or
 - (x) rest breaks; or
- (b) another prescribed entitlement.

14 Nominal expiry date of a preserved collective State agreement

The *nominal expiry date* of a preserved collective State agreement is:

- (a) the day on which the original collective agreement would nominally have expired under the relevant State or Territory industrial law; or
- (b) if that day falls after the end of a period of 3 years beginning on the commencement of the original collective agreement—the last day of that 3 year period.

15 Powers of State industrial authorities

- (1) If a preserved collective State agreement confers a function or power on a State industrial authority, that function must not be performed and that power must not be exercised by the State industrial authority on or after the reform commencement.
- (2) However, the employer and the persons bound by the preserved collective State agreement may, by agreement, confer such a function or power on the Commission, provided it does not relate to the resolution of a dispute about the application of the agreement.

15A Dispute resolution processes

- (1) A preserved collective State agreement is taken to include a term requiring disputes about the application of the agreement to be resolved in accordance with the model dispute resolution process.
- (2) Any term of the preserved collective State agreement that would otherwise deal with the resolution of those disputes is void to that extent.

15B Prohibited content

A term of a preserved collective State agreement is void to the extent that it contains prohibited content of a prescribed kind.

Note: The Employment Advocate can alter the document recording the terms of a preserved State agreement to remove prohibited content of a prescribed kind (see clause 19).

Division 2A—Effect and operation of a preserved State agreement

15C Effect of a preserved State agreement

- (1) Except as provided in or under this Part, or otherwise in or under this Act, a preserved State agreement has effect according to its terms.
- (2) This Part has effect despite the terms of the preserved State agreement itself, or any State award or law of a State or Territory.
- (3) None of the terms and conditions of employment included in the preserved State agreement are enforceable under the law of a State or Territory.

15D Effect of awards while a preserved State agreement in operation

An award has no effect in relation to an employee while the terms of a preserved State agreement operate in relation to the employee.

15E Relationship between a preserved State agreement and the Australian Fair Pay and Conditions Standard

The Australian Fair Pay and Conditions Standard does not apply to an employee if the employee is bound by a preserved State agreement, or the employee's employment is subject to a preserved State agreement.

15F Relationship between a preserved State agreement and public holiday entitlement

Division 1A of Part VIA (public holidays) does not apply to an employee if the employee is bound by a preserved State agreement, or the employee's employment is subject to a preserved State agreement.

15G When preserved State agreements cease to operate

- (1) A preserved State agreement ceases to be in operation if it is terminated under clause 21.
- (2) A preserved State agreement ceases to be in operation, in relation to an employee, when one of the following comes into operation in relation to the employee:
 - (a) a workplace agreement;
 - (b) a workplace determination;even if the nominal expiry date of the preserved State agreement has not passed.
- (3) If a preserved State agreement has ceased operating in relation to an employee because of subclause (2), the agreement can never operate again in relation to that employee.

Division 3—Varying a preserved State agreement

16 Varying a preserved State agreement

A preserved State agreement may only be varied on or after the reform commencement in accordance with this Division.

17 Variation to remove ambiguity or uncertainty

The Commission may, on application by any person bound by a preserved State agreement or whose employment is subject to the agreement, by order, vary the agreement for the purpose of removing ambiguity or uncertainty.

18 Variation to remove discrimination

- (1) If a preserved State agreement is referred to the Commission under section 46PW of the *Human Rights and Equal Opportunity Commission Act 1986*, the Commission must convene a hearing to review the agreement.
- (2) In a review under subclause (1):
 - (a) the Commission must take such steps as it thinks appropriate to ensure that each person bound by the agreement is made aware of the hearing; and
 - (b) the Sex Discrimination Commissioner is entitled to intervene in the proceeding.
- (3) If the Commission considers that a preserved State agreement reviewed under subclause (1) is discriminatory, the Commission must take the necessary action to remove the discrimination by making an order varying the agreement.
- (4) A preserved State agreement is *discriminatory* if:
 - (a) the agreement has been referred to the Commission under section 46PW of the *Human Rights and Equal Opportunity Commission Act 1986*; and
 - (b) the agreement requires a person to do any act that would be unlawful under Part II of the *Sex Discrimination Act 1984*, except for the fact that the act would be done in direct compliance with the agreement.

For the purposes of this definition, the fact that an act is done in direct compliance with the preserved State agreement does not of itself mean that the act is reasonable.

19 Variation to remove prohibited content

Initiating consideration of removal of prohibited content

- (1) The Employment Advocate may exercise his or her power under subclause (9) to vary a preserved State agreement to remove prohibited content of a prescribed kind:
 - (a) on his or her own initiative; or
 - (b) on application by any person.
- (2) This subclause and subclauses (3) to (6) and (9) to (12) are taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the Employment Advocate's decision whether to make a variation under subclause (9).

Employment Advocate must give notice that considering variation

- (3) If the Employment Advocate is considering making a variation to a preserved State agreement under subclause (9), the Employment Advocate must give the persons mentioned in subclause (4) a written notice meeting the requirements in subclause (5).
- (4) The persons are:
 - (a) an employer that is bound by the preserved State agreement; and
 - (b) if the agreement is a preserved individual State agreement—the employee; and
 - (c) if an organisation is bound by the agreement—the organisation.

Matters to be contained in notice

- (5) The requirements mentioned in subclause (3) are that the notice must:
 - (a) be dated; and
 - (b) state that the Employment Advocate is considering making the variation; and
 - (c) state the reasons why the Employment Advocate is considering making the variation; and
 - (d) set out the terms of the variation; and
 - (e) invite each person mentioned in subclause (6) to make a written submission to the Employment Advocate about

whether the Employment Advocate should make the variation; and

(f) state that any submission must be made within the period (the *objection period*) of 28 days after the date of the notice.

(6) The persons are:

- (a) an employer that is bound by the preserved State agreement; and
- (b) each person whose employment is subject to the agreement as at the date of the notice; and
- (c) if an organisation is bound by the agreement—the organisation.

Employer must ensure employees have ready access to notice

(7) An employer that has received a notice under subclause (3) in relation to the preserved State agreement must take reasonable steps to ensure that all persons whose employment is subject to the preserved State agreement at a time during the objection period are given a copy of the notice within the period:

- (a) starting on the day the employer received the notice; and
- (b) ending at the end of the objection period.

(8) Subclause (7) is a civil remedy provision and may be enforced under Division 11 of Part VB as if the preserved State agreement were a workplace agreement.

Employment Advocate must remove prohibited content from agreement

(9) If the Employment Advocate is satisfied that a term of the preserved State agreement contains prohibited content of the prescribed kind, the Employment Advocate must vary the agreement so as to remove that content.

(10) In making a decision under subclause (9), the Employment Advocate must consider all written submissions (if any) received within the objection period from a person mentioned in subclause (6).

(11) The Employment Advocate must not make the variation before the end of the objection period.

- (12) If the Employment Advocate decides to make the variation, he or she must:
- (a) give the persons mentioned in subclause (4) written notice of the decision, including the terms of the variation; and
 - (b) if the agreement is a preserved collective State agreement—publish a notice in the *Gazette* stating that the variation has been made and setting out particulars of the variation.

Employer must give employees notice of removal of prohibited content

- (13) An employer that has received a notice under subclause (12) in relation to a preserved collective State agreement must take reasonable steps to ensure that all persons whose employment is subject to the agreement when the employer receives the notice are given a copy of the notice within 21 days.
- (14) Subclause (13) is a civil remedy provision and may be enforced under Division 11 of Part VB as if the preserved collective State agreement were a collective agreement.

Division 4—Enforcing preserved State agreements

20 Enforcing a preserved State agreement

- (1) A preserved collective State agreement may be enforced as if it were a collective agreement.
- (2) A workplace inspector has the same functions and powers in relation to a preserved collective State agreement as he or she has in relation to a collective agreement.
- (3) A preserved individual State agreement may be enforced as if it were an AWA.
- (4) A workplace inspector has the same functions and powers in relation to a preserved individual State agreement as he or she has in relation to an AWA.

Division 5—Terminating a preserved State agreement

21 Terminating a preserved State agreement

- (1) This clause applies to the termination of a preserved State agreement on or after the reform commencement day.
- (2) If the agreement is a preserved collective State agreement, it may only be terminated in the way in which a certified agreement could have been terminated immediately before the reform commencement, and the Commission has the same powers in relation to that termination as it would have had at that time in relation to the termination of a certified agreement.
- (3) If the agreement is a preserved individual State agreement, it may only be terminated in the way in which an AWA could have been terminated immediately before the reform commencement, and the Commission has the same powers in relation to that termination as it would have had at that time in relation to the termination of an AWA.

22 Coercion of persons to terminate a preserved State agreement

- (1) A person must not:
 - (a) take or threaten to take any industrial action or other action;
or
 - (b) refrain or threaten to refrain from taking any action;
with intent to coerce another person to agree, or not to agree, to terminate or approve the termination of a preserved State agreement.
- (2) Subclause (1) does not apply to protected action (within the meaning of this Act as in force after the reform commencement).
- (3) The following provisions in Division 10 of Part VIB of this Act as in force immediately before the reform commencement apply in relation to a contravention of subclause (1) as if it were a contravention of subsection 170CN(1) as in force at that time:
 - (a) paragraph 170ND(e);
 - (b) section 170NE;
 - (c) subsections 170NF(1), (2) and (7);
 - (d) section 170NG.

Division 6—Industrial action

23 Industrial action must not be taken until after nominal expiry date—preserved collective State agreements

- (1) During the period beginning on the reform commencement day and ending on the nominal expiry date of a preserved collective State agreement, an employee, organisation or officer covered by subclause (2) must not organise or engage in industrial action (whether or not that action relates to a matter dealt with in the agreement).

Note 1: This subclause is a civil remedy provision: see subclause (4).

Note 2: Action that contravenes this subclause is not protected action (see clause 25).

- (2) For the purposes of subclause (1), the following are covered by this subclause:
- (a) an employee who is bound by the agreement;
 - (b) an organisation of employees that is bound by the agreement;
 - (c) an officer or employee of such an organisation acting in that capacity.

- (3) An employer that is bound by a preserved collective State agreement must not engage in industrial action against an employee whose employment is subject to the agreement (whether or not that industrial action relates to a matter dealt with in the agreement) during the period beginning on the reform commencement and ending on the agreement's nominal expiry date.

Note 1: This subclause is a civil remedy provision: see subclause (4).

Note 2: Action that contravenes this subclause is not protected action (see clause 25).

- (4) Subclauses (1) and (3) are civil remedy provisions.
- (5) The Court may make one or more of the following orders in relation to a person who has contravened subclause (1) or (3):
- (a) an order imposing a pecuniary penalty on the person;
 - (b) injunctions, and any other orders, that the Court considers necessary to stop the contravention or remedy its effects.

- (6) The pecuniary penalty under paragraph (5)(a) cannot be more than 300 penalty units for a body corporate or 60 penalty units in any other case.
- (7) An application for an order under subclause (5), in relation to a contravention of subclause (1), may be made by:
- (a) the employer concerned; or
 - (b) a workplace inspector; or
 - (c) any person affected by the industrial action; or
 - (d) any other person prescribed by the regulations.
- (8) An application for an order under subclause (5), in relation to a contravention of subclause (3), may be made by:
- (a) the employee concerned; or
 - (b) an organisation of employees if:
 - (i) a member of the organisation is employed by the employer concerned; and
 - (ii) the contravention relates to, or affects, the member of the organisation, or work carried on by the member for that employer; or
 - (c) a workplace inspector; or
 - (d) any person affected by the industrial action; or
 - (e) any other person prescribed by the regulations.

Note: For other provisions about civil remedy provisions, see Division 4 of Part VIII.

- (9) In this section:

Court means the Federal Court of Australia or the Federal Magistrates Court.

24 Industrial action must not be taken until after nominal expiry date—preserved individual State agreements

- (1) An employee who is bound by a preserved individual State agreement must not engage in industrial action in relation to the employment to which the agreement relates, during the period beginning on the reform commencement and ending on the agreement's nominal expiry date.

Note 1: This subclause is a civil remedy provision: see subclause (3).

Note 2: Action that contravenes this subclause is not protected action (see clause 25).

- (2) An employer that is bound by a preserved individual State agreement must not engage in industrial action in relation to the employment to which the agreement relates, during the period beginning on the reform commencement and ending on the agreement's nominal expiry date.

Note 1: This subclause is a civil remedy provision: see subclause (3).

Note 2: Action that contravenes this subclause is not protected action (see clause 25).

Civil remedy provisions

- (3) Subclauses (1) and (2) are civil remedy provisions.
- (4) The Court may make one or more of the following orders in relation to a person who has contravened subclause (1) or (2):
- (a) an order imposing a pecuniary penalty on the person;
 - (b) injunctions, and any other orders, that the Court considers necessary to stop the contravention or remedy its effects.
- (5) The pecuniary penalty under paragraph (4)(a) cannot be more than 300 penalty units for a body corporate or 60 penalty units in any other case.
- (6) An application for an order under subclause (4), in relation to a contravention of subclause (1), may be made by:
- (a) the employer concerned; or
 - (b) a workplace inspector; or
 - (c) any other person prescribed by the regulations.
- (7) An application for an order under subclause (4), in relation to a contravention of subclause (2), may be made by:
- (a) the employee concerned; or
 - (b) an organisation of employees that represents that employee if:
 - (i) that employee has requested the organisation to apply on that employee's behalf; and
 - (ii) a member of the organisation is employed by that employee's employer; and

(iii) the organisation is entitled, under its eligibility rules, to represent the industrial interests of that employee in relation to work carried on by that employee for the employer; or

(c) a workplace inspector; or

(d) any other person prescribed by the regulations.

Note: For other provisions about civil remedy provisions, see Division 4 of Part VIII.

(8) In this section:

Court means the Federal Court of Australia or the Federal Magistrates Court.

25 Industrial action taken before nominal expiry date not protected action

Engaging in or organising industrial action in contravention of clause 23 or 24 is not protected action for the purposes of this Act.

Division 6A—Protected conditions

25A Protected conditions where employment was subject to preserved State agreement

(1) This clause applies if:

(a) a person's employment was subject to a preserved State agreement; and

(b) the agreement ceased to operate because a workplace agreement came into operation in relation to the employee.

(2) Protected preserved conditions:

(a) are taken to be included in the workplace agreement; and

(b) have effect in relation to the employment of that person; and

(c) have that effect subject to any terms of the workplace agreement that expressly exclude or modify all or part of them.

(3) Despite paragraph (2)(c), those protected preserved conditions have effect in relation to the employment of that person to the extent that those protected preserved conditions are about outworker conditions, despite any terms of the workplace

agreement that provide, in a particular respect, a less favourable outcome for that person.

(4) In this clause:

outworker means an employee who, for the purposes of the business of the employer, performs work at private residential premises or at other premises that are not business or commercial premises of the employer.

outworker conditions means conditions (other than pay) for outworkers, but only to the extent necessary to ensure that their overall conditions of employment are fair and reasonable in comparison with the conditions of employment specified in a relevant award or awards for employees who perform the same kind of work at an employer's business or commercial premises.

protected allowable award matters means the following matters:

- (a) rest breaks;
- (b) incentive-based payments and bonuses;
- (c) annual leave loadings;
- (d) observance of days declared by or under a law of a State or Territory to be observed generally within that State or Territory, or a region of that State or Territory, as public holidays by employees who work in that State, Territory or region, and entitlements of employees to payment in respect of those days;
- (e) days to be substituted for, or a procedure for substituting, days referred to in paragraph (d);
- (f) monetary allowances for:
 - (i) expenses incurred in the course of employment; or
 - (ii) responsibilities or skills that are not taken into account in rates of pay for employees; or
 - (iii) disabilities associated with the performance of particular tasks or work in particular conditions or locations;
- (g) loadings for working overtime or for shift work;
- (h) penalty rates;
- (i) outworker conditions;
- (j) any other matter specified in the regulations.

Note: These matters are the same as certain allowable award matters mentioned in section 116.

protected preserved condition, in relation to the employment of a person, means a term of a State award or a provision of a State or Territory industrial law, as in force immediately before the reform commencement, that would have determined a term or condition of that employment, had the person been employed at that time and that employment not been subject to a State employment agreement, to the extent that the term or provision:

- (a) is:
 - (i) about protected allowable award matters; or
 - (ii) incidental to a protected allowable award matter and may be included in an award as permitted by section 116I; or
 - (iii) a machinery provision that is in respect of a protected allowable award matter and may be included in an award as permitted by section 116I; and
- (b) is not about:
 - (i) matters that are not allowable award matters because of section 116B; or
 - (ii) any other matters specified in the regulations.

Division 7—Miscellaneous

26 Calling up contents of a preserved State agreement in a workplace agreement

- (1) A workplace agreement may incorporate by reference under section 101C terms from a preserved State agreement as if the preserved State agreement were a workplace agreement.
- (2) Despite subsection 101C(6), a term of a workplace agreement is not void to the extent that it incorporates by reference such terms.

27 Application of section 109B in relation to a preserved State agreement

Section 109B (which deals with applications for orders for protected action ballots) applies at a particular time in relation to a preserved collective State agreement that is in operation at that time as if the agreement were an existing collective agreement.

28 Application of Part IX in relation to a preserved State agreement

Part IX of this Act (which deals with right of entry) applies:

- (a) in relation to a preserved collective State agreement in the same way as it applies in relation to a collective agreement; and
- (b) in relation to a preserved individual State agreement in the same way as it applies in relation to an AWA.

29 Application of Part XA in relation to a preserved State agreement

Part XA of this Act (which deals with freedom of association) applies in relation to a preserved collective State agreement as if it were a collective agreement.

Division 8—Regulations

30 Regulations may apply, modify or adapt Act

- (1) The Governor-General may make regulations for the purposes of:
 - (a) applying provisions of this Act or the Registration and Accountability of Organisations Schedule to preserved State agreements; and
 - (b) modifying or adapting provisions of this Act or that Schedule that apply to those agreements.
- (2) Despite subsection 12(2) of the *Legislative Instruments Act 2003*, regulations made under subclause (1) may be expressed to take effect from a date before the regulations are registered under that Act.

Part 3—Notional agreements preserving State awards

Division 1—What is a notional agreement preserving State awards?

Subdivision A—What is a notional agreement preserving State awards?

31 Notional agreements preserving State awards

If, immediately before the reform commencement, the terms and conditions of employment of one or more employees in a single business or a part of a single business:

- (a) were not determined under a State employment agreement; and
- (b) were determined, in whole or in part, under a State award (the *original State award*) or a State or Territory industrial law (the *original State law*);

a *notional agreement preserving State awards* is taken to come into operation on the reform commencement in respect of the business or that part of the business.

Subdivision B—Who is bound by or subject to a notional agreement preserving State awards?

32 Who is bound by a notional agreement preserving State awards?

Current employees

- (1) Any person who:
 - (a) immediately before the reform commencement, was bound by, or a party to, the original State award or original State law; and
 - (b) is one of the following:
 - (i) an employer in the business, or that part of the business;
 - (ii) an employee who is employed in the business, or that part of the business, who was so employed immediately before the reform commencement, who was not bound

by, or a party to, a State employment agreement at that time and whose employment was not subject to such an agreement at that time;

- (iii) an organisation that has at least one member who is such an employee, and that is entitled to represent the industrial interests of at least one such employee;

is bound by the notional agreement.

Future employees

(2) If:

- (a) a person is employed in the business or that part of the business after the reform commencement; and
- (b) under the terms of the original State award or the original State law, as in force immediately before the reform commencement, the person would have been bound by that award or law; and
- (c) the person is not bound by a preserved State agreement; the person is bound by the notional agreement.

33 Whose employment is subject to a notional agreement preserving State awards?

Current employees

- (1) The employment of a person in the business or that part of the business is subject to the notional agreement, if:
 - (a) that employment was, immediately before the reform commencement, subject to the original State award or the original State law; and
 - (b) that employment was not subject to a State employment agreement at that time.

Future employees

(2) If:

- (a) a person is employed in the business, or that part of the business, after the reform commencement; and
- (b) under the terms of the original State award or the original State law, that employment would have been subject to that award or that law; and

- (c) that employment is not subject to a preserved State agreement;
that employment is subject to the notional agreement.

Subdivision C—Terms of a notional agreement preserving State awards

34 Terms of a notional agreement preserving State awards

- (1) If, immediately before the reform commencement, a term of the original State award would have determined, in whole or in part, a term or condition of employment in the business or that part of the business of a person who was not bound by or a party to a State employment agreement, or whose employment was not subject to such an agreement, then to that extent, that term, as in force at that time, is taken to be a term of the notional agreement.
- (2) If, immediately before the reform commencement, a provision of a State or Territory industrial law would have determined, in whole or in part, a preserved entitlement of a person employed in the business or that part of the business who was not bound by or a party to a State employment agreement, or whose employment was not subject to such an agreement, then to that extent, that provision, as in force at that time, is taken to be a term of the notional agreement.
- (3) In this clause:
 - preserved entitlement*** means:
 - (a) an entitlement to:
 - (i) annual leave and annual leave loadings; or
 - (ii) parental leave, including maternity leave and adoption leave; or
 - (iii) personal/carer’s leave; or
 - (iv) leave relating to bereavement; or
 - (v) ceremonial leave; or
 - (vi) notice of termination; or
 - (vii) redundancy pay; or
 - (viii) loadings for working overtime or shift work; or
 - (ix) penalty rates, including the rate of payment for work on a public holiday; or

- (x) rest breaks; or
- (b) another prescribed entitlement.

35 Powers of State industrial authorities

- (1) If a notional agreement preserving State awards confers a function or power on a State industrial authority, that function must not be performed and that power must not be exercised by the State industrial authority on or after the reform commencement.
- (2) However, the employer and the persons bound by the notional agreement may, by agreement, confer such a function or power on the Commission, provided it does not relate to the resolution of a dispute about the application of the agreement.

36 Dispute resolution processes

- (1) A notional agreement preserving State awards is taken to include a term requiring disputes about the application of the agreement to be resolved in accordance with the model dispute resolution process.
- (2) Any term of the notional agreement that would otherwise deal with the resolution of those disputes is void to that extent.

37 Prohibited content

A term of a notional agreement preserving State awards is void to the extent that it contains prohibited content of a prescribed kind.

Division 2—Effect and operation of a notional agreement preserving State awards

38 Effect of a notional agreement preserving State awards

- (1) Except as provided in or under this Part, or otherwise in or under this Act, a notional agreement preserving State awards has effect according to its terms.
- (2) This Part has effect despite the terms of the original State award, the original State law or any other law of a State or Territory.

- (3) None of the terms and conditions of employment included in the notional agreement are enforceable under the law of a State or Territory.

38A Operation of a notional agreement preserving State awards

- (1) A notional agreement preserving State awards ceases to be in operation at the end of a period of 3 years beginning on the reform commencement.
- (2) A notional agreement preserving State awards ceases to be in operation in relation to an employee if a workplace agreement comes into operation in relation to the employee.

Note: The reference in subclause (2) to a workplace agreement includes a reference to a workplace determination (see section 113F).

- (3) A notional agreement preserving State awards ceases to be in operation in relation to an employee if the employee becomes bound by an award.
- (4) If the notional agreement has ceased operating in relation to an employee because of subclause (2) or (3), the agreement can never operate again in relation to that employee.

Division 3—Varying a notional agreement preserving State awards

39 Varying a notional agreement preserving State awards

A notional agreement preserving State awards may only be varied on or after the reform commencement in accordance with this Division.

40 Variation to remove ambiguity or uncertainty

The Commission may, on application by any person bound by a notional agreement preserving State awards or whose employment is subject to such an agreement, by order, vary the notional agreement for the purpose of removing ambiguity or uncertainty.

41 Variation to remove discrimination

- (1) If a notional agreement preserving State awards is referred to the Commission under section 46PW of the *Human Rights and Equal Opportunity Commission Act 1986*, the Commission must convene a hearing to review the agreement.
- (2) In a review under subclause (1):
 - (a) the Commission must take such steps as it thinks appropriate to ensure that each person bound by the agreement is made aware of the hearing; and
 - (b) the Sex Discrimination Commissioner is entitled to intervene in the proceeding.
- (3) If the Commission considers that a notional agreement preserving State awards reviewed under subclause (1) is discriminatory, the Commission must take the necessary action to remove the discrimination by making an order varying the agreement.
- (4) A notional agreement preserving State awards is **discriminatory** if:
 - (a) the agreement has been referred to the Commission under section 46PW of the *Human Rights and Equal Opportunity Commission Act 1986*; and
 - (b) the agreement requires a person to do any act that would be unlawful under Part II of the *Sex Discrimination Act 1984*, except for the fact that the act would be done in direct compliance with the agreement.

For the purposes of this definition, the fact that an act is done in direct compliance with the notional agreement does not of itself mean that the act is reasonable.

42 Variation to remove prohibited content

Initiating consideration of removal of prohibited content

- (1) The Employment Advocate may exercise his or her power under subclause (9) to vary a notional agreement preserving State awards to remove prohibited content of a prescribed kind:
 - (a) on his or her own initiative; or
 - (b) on application by any person.

- (2) This subclause and subclauses (3) to (6) and (9) to (12) are taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the Employment Advocate's decision whether to make a variation under subclause (9).

Employment Advocate must give notice that considering variation

- (3) If the Employment Advocate is considering making a variation to a notional agreement preserving State awards under subclause (9), the Employment Advocate must give the persons mentioned in subclause (4) a written notice meeting the requirements in subclause (5).
- (4) The persons are:
- (a) an employer that is bound by the notional agreement; and
 - (b) if an organisation is bound by the agreement—the organisation.

Matters to be contained in notice

- (5) The requirements mentioned in subclause (3) are that the notice must:
- (a) be dated; and
 - (b) state that the Employment Advocate is considering making the variation; and
 - (c) state the reasons why the Employment Advocate is considering making the variation; and
 - (d) set out the terms of the variation; and
 - (e) invite each person mentioned in subclause (6) to make a written submission to the Employment Advocate about whether the Employment Advocate should make the variation; and
 - (f) state that any submission must be made within the period (the ***objection period***) of 28 days after the date of the notice.
- (6) The persons are:
- (a) an employer that is bound by the notional agreement; and
 - (b) each person whose employment is subject to the notional agreement as at the date of the notice; and
 - (c) if an organisation is a party to the notional agreement—the organisation.
-

Employer must ensure employees have ready access to notice

- (7) An employer that has received a notice under subclause (3) in relation to the notional agreement must take reasonable steps to ensure that all persons whose employment is subject to the notional agreement at a time during the objection period are given a copy of the notice within the period:
 - (a) starting on the day the employer received the notice; and
 - (b) ending at the end of the objection period.
- (8) Subclause (7) is a civil remedy provision and may be enforced under Division 11 of Part VB as if the notional agreement were a workplace agreement.

Employment Advocate must remove prohibited content from agreement

- (9) If the Employment Advocate is satisfied that a term of the notional agreement contains prohibited content of the prescribed kind, the Employment Advocate must vary the agreement so as to remove that content.
- (10) In making a decision under subclause (9), the Employment Advocate must consider all written submissions (if any) received within the objection period from a person mentioned in subclause (6).
- (11) The Employment Advocate must not make the variation before the end of the objection period.
- (12) If the Employment Advocate decides to make the variation, he or she must:
 - (a) give the persons mentioned in subclause (4) written notice of the decision, including the terms of the variation; and
 - (b) publish a notice in the *Gazette* stating that the variation has been made and setting out particulars of the variation.

Employer must give employees notice of removal of prohibited content

- (13) An employer that has received a notice under subclause (12) must take reasonable steps to ensure that all persons whose employment

is subject to the agreement when the employer receives the notice are given a copy of the notice within 21 days.

- (14) Subclause (13) is a civil remedy provision and may be enforced under Division 11 of Part VB as if the notional agreement were a collective agreement.

Division 4—Enforcing the notional agreement

43 Enforcing the notional agreement

- (1) A notional agreement preserving State awards may be enforced as if it were a collective agreement.
- (2) A workplace inspector has the same functions and powers in relation to a notional agreement preserving State awards as he or she has in relation to a collective agreement.

44 Matters provided for by the Australian Fair Pay and Conditions Standard

Subject to Division 5 of this Schedule, if the Australian Fair Pay and Conditions Standard makes provision for a matter, then a term (other than a preserved notional term) of the notional agreement that also deals with that matter is unenforceable.

Note 1: See section 90ZD (deeming there to be a preserved APCS if rate provisions are contained in a pre-reform wage instrument).

Note 2: See also section 90ZC (deeming APCS rates to at least equal FMW rates after the first exercise of powers under Division 2 of Part VA by the AFPC).

Division 5—Preserved notional terms and preserved notional entitlements

45 Preserved notional terms of notional agreement

- (1) A *preserved notional term* is a term, or more than one term, of a notional agreement preserving State awards that is about any or all of the following matters:
- (a) annual leave;
 - (b) personal/carer's leave;
 - (c) parental leave, including maternity and adoption leave;

- (d) long service leave;
 - (e) notice of termination;
 - (f) jury service;
 - (g) superannuation.
- (2) If a term of a notional agreement preserving State awards is about both matters referred to in paragraphs (1)(a) to (g) and other matters, it is taken to be a preserved notional term only to the extent that it is about the matters referred to in those paragraphs.
- (3) A preserved notional term about the matter referred to in paragraph (1)(g) (superannuation) ceases to have effect at the end of 30 June 2008.
- (3A) If more than one term of a notional agreement preserving State awards is about a matter referred to in subclause (2), then those terms, taken together, constitute the preserved notional term of that notional agreement about that matter.
- (4) In this clause:
- personal/carer's leave* includes war service sick leave, infectious diseases sick leave and other like forms of sick leave.
- (5) The regulations may provide that for the purposes of subclause (1):
- (a) the matter referred to in paragraph (1)(c) does not include one or both of the following:
 - (i) special maternity leave (within the meaning of section 94C);
 - (ii) the entitlement under section 94F to transfer to a safe job or to take paid leave; and
 - (b) *personal/carer's leave* does not include one or both of the following:
 - (i) compassionate leave (within the meaning of section 93Q);
 - (ii) unpaid carer's leave (within the meaning of section 93D).
- Note: The effect of excluding a form of leave or an entitlement in relation to a matter is that the entitlement in relation to that form of leave or matter under the Australian Fair Pay and Conditions Standard will automatically apply.

- (6) Regulations under subclause (5) may be expressed to apply generally or in respect of employees engaged in specified types of employment, such as full-time employment, part-time employment, casual employment, regular part-time employment or shift work.

46 When preserved notional entitlements have effect

- (1) This clause applies to an employee if:
- (a) the employee is bound by, or the employee's employment is subject to, a notional agreement preserving State awards that includes a preserved notional term about a matter; and
 - (b) the employee has an entitlement (the *preserved notional entitlement*) in relation to that matter under the preserved notional term.

- (2) If:

- (a) the preserved notional term is about a matter referred to in paragraph 45(1)(a), (b) or (c); and
- (b) the employee's preserved notional entitlement in relation to the matter is more generous than the employee's entitlement in relation to the corresponding matter under the Australian Fair Pay and Conditions Standard;

the employee's entitlement under the Australian Fair Pay and Conditions Standard is excluded, and the employee's preserved notional entitlement has effect in accordance with the preserved notional term. Otherwise, the employee's entitlement under the Australian Fair Pay and Conditions Standard has effect.

Note: See clause 47 for the meaning of *more generous*.

- (3) If:

- (a) the preserved notional term is about a matter referred to in paragraph 45(1)(a), (b) or (c) and the employee has no entitlement in relation to the corresponding matter under the Australian Fair Pay and Conditions Standard; or
- (b) the preserved notional term is about a matter referred to in paragraph 45(1)(d), (e), (f) or (g);

the employee's preserved notional entitlement has effect in accordance with the preserved notional term.

Note: Preserved notional terms about matters referred to in paragraph 45(1)(g) cease to have effect at the end of 30 June 2008—see subclause 45(3).

47 Meaning of *more generous*

- (1) Whether an employee's entitlement under a preserved notional term in relation to a matter is *more generous* than the employee's entitlement in relation to the corresponding matter under the Australian Fair Pay and Conditions Standard:
 - (a) is as specified in, or as worked out in accordance with a method specified in, regulations made under this paragraph; or
 - (b) to the extent that regulations made under paragraph (a) do not so specify—is to be ascertained in accordance with the ordinary meaning of the term *more generous*.
- (2) If a matter to which an entitlement under a preserved notional term relates does not correspond directly to a matter to which the Australian Fair Pay and Conditions Standard relates, regulations made under paragraph (1)(a) may nevertheless specify that the matters correspond for the purposes of this Division.

48 Modifications that may be prescribed—personal/carer's leave

- (1) The regulations may provide that a preserved notional term about personal/carer's leave is to be treated as a separate preserved notional term about separate matters, to the extent that the preserved notional term is about any of the following:
 - (a) war service sick leave;
 - (b) infectious diseases sick leave;
 - (c) any other like form of sick leave.
- (2) If the regulations so provide, clauses 45, 46, 47 and 50 have effect in relation to each separate matter.

49 Modifications that may be prescribed—parental leave

- (1) The regulations may provide that a preserved notional term about parental leave is to be treated as being about separate matters to the extent that it is about paid and unpaid parental leave.

- (2) If the regulations provide that a preserved notional term about parental leave is to be treated as being about separate matters to the extent that it is about paid and unpaid parental leave:
- (a) clauses 45, 46 and 50 have effect in relation to each separate matter; and
 - (b) in accordance with section 94D, the entitlement that an employee would have to unpaid parental leave under the Australian Fair Pay and Conditions Standard is reduced by any amount of paid parental leave to which the employee is entitled under the preserved notional term.

Note 1: There is no entitlement in relation to paid parental leave under the Australian Fair Pay and Conditions Standard, so there is no corresponding matter for the purposes of subclause 46(3).

Note 2: Paragraph (b) does not have the effect of reducing entitlements. It simply ensures that the operation of section 94D is not affected by treating paid and unpaid parental leave separately under the regulations.

50 Preserved notional terms taken to be included in awards

- (1) This clause applies to an award if:
- (a) an award is made under section 118E or is varied under section 118J, 120A or 120B; and
 - (b) the award is binding on:
 - (i) an employer that was bound by a notional agreement preserving State awards immediately before the making or variation of the award; or
 - (ii) an employee who was bound by, or whose employment was subject to, a notional agreement preserving State awards immediately before the making or variation of the award; and
 - (c) the notional agreement contained a preserved notional term.
- (2) The preserved notional term is taken to be included in the award.
- (3) The preserved notional term is taken to have the effect that:
- (a) employees belonging to the class of employees that had entitlements under the preserved notional term of the notional agreement have corresponding entitlements under the award; and

- (b) employees belonging to any class of employees that did not have entitlements under the preserved notional term of the notional agreement do not gain entitlements under the award.
 - (4) The preserved notional term is taken to have the effect that:
 - (a) only an employer bound by the preserved notional term of the notional agreement is bound by the corresponding preserved notional term of the award; and
 - (b) other employers are not so bound.
- Note: The operation of this subclause is affected by Part VIAA, which deals with transmission of business.
- (5) For the purposes of subclause (3), whether an employee belongs to a class of employees that had entitlements under a preserved notional term of a notional agreement preserving State awards is to be determined without reference to whether the employee was employed before or after the making of the award.
 - (6) The Commission must not vary a preserved notional term that has been included in an award under this clause.
 - (7) Section 118P applies in relation to a preserved notional term included in an award under this clause in the same way as it applies in relation to a preserved award term included in an award made under section 118E or varied under section 118J.

51 Application of hours of work provision of Australian Fair Pay and Conditions Standard to notional agreements preserving State awards

Division 3 of Part VA (hours of work) does not apply to the employment of an employee while the employee is bound by, or that employment is subject to, a notional agreement preserving State awards that is in operation.

Division 6—Protected conditions

52 Protected conditions in notional agreements preserving State awards

- (1) This clause applies if:
-

- (a) a person's employment is subject to a workplace agreement; and
 - (b) protected notional conditions would have effect (but for the agreement) in relation to the employment of the person.
- (2) Those protected notional conditions:
- (a) are taken to be included in the workplace agreement; and
 - (b) have effect in relation to the employment of that person; and
 - (c) have that effect subject to any terms of the workplace agreement that expressly exclude or modify all or part of them.
- (2A) Despite paragraph (2)(c), those protected notional conditions have effect in relation to the employment of that person to the extent that those protected notional conditions are about outworker conditions, despite any terms of the workplace agreement that provide, in a particular respect, a less favourable outcome for that person.
- (3) In this clause:

outworker means an employee who, for the purposes of the business of the employer, performs work at private residential premises or at other premises that are not business or commercial premises of the employer.

outworker conditions means conditions (other than pay) for outworkers, but only to the extent necessary to ensure that their overall conditions of employment are fair and reasonable in comparison with the conditions of employment specified in a relevant award or awards for employees who perform the same kind of work at an employer's business or commercial premises.

protected allowable award matters means the following matters:

- (a) rest breaks;
- (b) incentive-based payments and bonuses;
- (c) annual leave loadings;
- (d) observance of days declared by or under a law of a State or Territory to be observed generally within that State or Territory, or a region of that State or Territory, as public holidays by employees who work in that State, Territory or region, and entitlements of employees to payment in respect of those days;

-
- (da) days to be substituted for, or a procedure for substituting, days referred to in paragraph (d);
 - (e) monetary allowances for:
 - (i) expenses incurred in the course of employment; or
 - (ii) responsibilities or skills that are not taken into account in rates of pay for employees; or
 - (iii) disabilities associated with the performance of particular tasks or work in particular conditions or locations;
 - (f) loadings for working overtime or for shift work;
 - (g) penalty rates;
 - (h) outworker conditions;
 - (i) any other matter specified in the regulations.

Note: These matters are the same as certain allowable award matters mentioned in section 116.

protected notional conditions means the terms of a notional agreement preserving State awards, to the extent that those terms:

- (a) are:
 - (i) about protected allowable award matters; or
 - (ii) incidental to protected allowable award matters and may be included in an award as permitted by section 116I; or
 - (iii) machinery provisions that are in respect of protected allowable award matters and may be included in an award as permitted by section 116I; and
- (b) are not about:
 - (i) matters that are not allowable award matters because of section 116B; or
 - (ii) any other matters specified in the regulations.

Division 6A—Industrial action during the life of an enterprise award

52AA Action taken during life of enterprise award not protected

- (1) Engaging in or organising industrial action is not protected action if:
 - (a) either:
 - (i) the person engaging in the industrial action is bound by a notional agreement preserving State awards that

includes terms and conditions from an enterprise award;
or

- (ii) the employment of the person engaging in the industrial action is subject to such a notional agreement; and
- (b) a term or condition of the enterprise award included in the notional agreement relates to industrial action; and
- (c) engaging in the industrial action would breach that term or condition; and
- (d) the nominal expiry date of the enterprise award has not yet passed.

(2) In this clause:

enterprise award means a State award:

- (a) that regulates a term or condition of employment of a person or persons by an employer in a single business or a part of a single business specified in the award; and
- (b) that is specified to have effect for a period, either by reference to an actual or nominal expiry date or by reference to an actual or nominal period; and
- (c) a term of which provides that one or more of the parties will not make further claims before the nominal expiry date for the award.

nominal expiry date for an enterprise award, means the last day of the actual or nominal period during which the enterprise award is specified to have effect.

Division 7—Miscellaneous

52A Calling up a notional agreement preserving State awards in a workplace agreement

- (1) A workplace agreement may incorporate by reference under section 101C terms from a notional agreement preserving State awards as if the notional agreement were a workplace agreement.
- (2) Despite subsection 101C(6), a term of a workplace agreement is not void to the extent that it incorporates by reference such terms.

53 Application of Part IX in relation to a notional agreement preserving State awards

Part IX of this Act (which deals with right of entry) applies in relation to a notional agreement preserving State awards in the same way as it applies in relation to a collective agreement.

54 Application of Part XA in relation to a notional agreement preserving State awards

Part XA of this Act (which deals with freedom of association) applies in relation to a notional agreement preserving State awards as if it were a collective agreement.

Division 8—Regulations

55 Regulations may apply, modify or adapt Act

- (1) The Governor-General may make regulations for the purposes of:
 - (a) applying provisions of this Act or the Registration and Accountability of Organisations Schedule to notional agreements preserving State awards; and
 - (b) modifying or adapting provisions of this Act or that Schedule that apply to those agreements.
- (2) Despite subsection 12(2) of the *Legislative Instruments Act 2003*, regulations made under subclause (1) may be expressed to take effect from a date before the regulations are registered under that Act.

**Schedule 16—Transmission of business rules
(transitional instruments)**

Note: See section 4A.

Part 1—Introductory

1 Object

The object of this Schedule is to provide for the transfer of employer obligations under certain transitional instruments when the whole, or a part, of a person's business is transmitted to another person.

2 Simplified outline

- (1) Part 2 of this Schedule describes the general transmission of business situation this Schedule is designed to deal with. It identifies the *old employer*, the *new employer*, the *business being transferred*, the *time of transmission* and the *transferring employees*.
- (2) Parts 3 to 5 of this Schedule deal with the transmission of particular transitional instruments as follows:
 - (a) Part 3 deals with the transmission of pre-reform AWAs;
 - (b) Part 4 deals with the transmission of pre-reform certified agreements;
 - (c) Part 5 deals with the transmission of State transitional instruments.
- (3) Part 6 of this Schedule deals with notification requirements, the lodgment of notices with the Employment Advocate and the enforcement of employer obligations by pecuniary penalties.
- (4) Part 7 of this Schedule deals with special rules for Victoria.
- (5) Part 8 of this Schedule deals with the interaction between transitional instruments and collective agreements and awards that are transmitted under Part VIAA.
- (6) Part 9 of this Schedule allows regulations to be made to deal with other transmission of business issues in relation to transitional industrial instruments.

3 Definitions

In this Schedule:

business being transferred has the meaning given by subclause 4(2).

Court means the Federal Court of Australia or the Federal Magistrates Court.

Division 2 pre-reform certified agreement means a pre-reform certified agreement that was made under Division 2 of Part VIB of this Act before the reform commencement.

Division 3 pre-reform certified agreement means a pre-reform certified agreement that was made under Division 3 of Part VIB of this Act before the reform commencement.

exceptional matters order has the same meaning as in Schedule 14.

new employer has the meaning given by subclause 4(1).

notional agreement preserving State awards has the same meaning as in Schedule 15.

old employer has the meaning given by subclause 4(1).

operational reasons has the meaning given by subsection 170CE(5D).

pre-reform Act has the same meaning as in Schedule 14.

pre-reform AWA has the same meaning as in Schedule 14.

pre-reform certified agreement has the same meaning as in Schedule 14.

preserved collective State agreement has the same meaning as in Schedule 15.

preserved individual State agreement has the same meaning as in Schedule 15.

preserved State agreement has the same meaning as in Schedule 15.

section 170MX award has the same meaning as in Schedule 14.

State transitional instrument means:

- (a) a notional agreement preserving State awards; or
- (b) a preserved State agreement.

time of transmission has the meaning given by subclause 4(3).

transferring employee has the meaning given by clauses 5 and 6.

transitional industrial instrument means:

- (a) a pre-reform AWA; or
- (b) a pre-reform certified agreement; or
- (c) a section 170MX award; or
- (d) an exceptional matters order; or
- (e) a notional agreement preserving State awards; or
- (f) a preserved State agreement.

transitional instrument means:

- (a) a pre-reform AWA; or
- (b) a pre-reform certified agreement; or
- (c) a notional agreement preserving State awards; or
- (d) a preserved State agreement.

transmission period has the meaning given by subclause 4(4).

Part 2—Application of Schedule

4 Application of Schedule

- (1) This Schedule applies if a person (the *new employer*) becomes the successor, transmittee or assignee of the whole, or a part, of a business of another person (the *old employer*).
- (2) The business, or the part of the business, to which the new employer is successor, transmittee or assignee is the *business being transferred* for the purposes of this Schedule.
- (3) The time at which the new employer becomes the successor, transmittee or assignee of the business being transferred is the *time of transmission* for the purposes of this Schedule.
- (4) The period of 12 months after the time of transmission is the *transmission period* for the purposes of this Schedule.

5 Transferring employees

- (1) A person is a *transferring employee* for the purposes of this Schedule if:
- (a) the person is employed by the old employer immediately before the time of transmission; and
 - (b) the person:
 - (i) ceases being employed by the old employer; and
 - (ii) becomes employed by the new employer in the business being transferred;within 2 months after the time of transmission.

Note: Clause 6A of this Schedule provides that references to *employees* and *employment* have their ordinary meanings in relation to a Division 3 pre-reform certified agreement if the old employer is not an employer (within the meaning of subsection 4AB(1)).

- (2) A person is also a *transferring employee* for the purposes of this Schedule if:
- (a) the person is employed by the old employer at any time within the period of 1 month before the time of transmission; and
 - (b) the person's employment with the old employer is terminated by the old employer before the time of transmission for genuine operational reasons or for reasons that include genuine operational reasons; and
 - (c) the person becomes employed by the new employer, in the business being transferred, within 2 months after the time of transmission.

Note: Clause 6A of this Schedule provides that references to *employees* and *employment* have their ordinary meanings in relation to a Division 3 pre-reform certified agreement if the old employer is not an employer (within the meaning of subsection 4AB(1)).

- (3) In applying clause 6 and Parts 3 to 5 of this Schedule in relation to a person who is a transferring employee under subclause (2) of this clause, a reference in those provisions to a particular state of affairs existing immediately before the time of transmission is to be read as a reference to that state of affairs existing immediately before the person last ceased to be an employee of the old employer.

6 Transferring employees in relation to particular instrument

- (1) A transferring employee is a *transferring employee* in relation to a particular transitional instrument if:
 - (a) the instrument applied to the transferring employee immediately before the time of transmission; and
 - (b) when the transferring employee becomes employed by the new employer, the transferring employee's employment with the new employer is such that the instrument is capable of applying to that employment.

Note: Clause 6A of this Schedule provides that references to *employees* and *employment* have their ordinary meanings in relation to a Division 3 pre-reform certified agreement if the old employer is not an employer (within the meaning of subsection 4AB(1)).

- (2) The transferring employee ceases to be a *transferring employee* in relation to the transitional instrument if:
 - (a) the transferring employee ceases to be employed by the new employer after the time of transmission; or
 - (b) the transferring employee's employment with the new employer ceases to be such that the instrument is capable of applying to that employment; or
 - (c) the transmission period ends.

Note: Clause 6A of this Schedule provides that references to *employees* and *employment* have their ordinary meanings in relation to a Division 3 pre-reform certified agreement if the old employer is not an employer (within the meaning of subsection 4AB(1)).

- (3) This clause applies to a notional agreement preserving State awards as if it were a transitional instrument.

6A Application of Schedule to certain Division 3 pre-reform certified agreements

- (1) This clause applies if the old employer in relation to a Division 3 pre-reform certified agreement is not an employer (within the meaning of subsection 4AB(1)).
- (2) In applying this Schedule to the Division 3 pre-reform certified agreement, references in this Schedule to:
 - (a) an employee; or
 - (b) employment;have their ordinary meanings.

Part 3—Transmission of pre-reform AWAs

7 Transmission of pre-reform AWA

New employer bound by pre-reform AWA

- (1) If:
- (a) immediately before the time of transmission:
 - (i) the old employer; and
 - (ii) an employee of the old employer; were bound by a pre-reform AWA; and
 - (b) the employee is a transferring employee in relation to the pre-reform AWA;

the new employer is bound by the pre-reform AWA by force of this clause.

Note 1: The new employer must notify the transferring employee and lodge a copy of the notice with the Employment Advocate (see clauses 28 and 29).

Note 2: See also clause 8 for the interaction between the pre-reform AWA and other industrial instruments.

Period for which new employer remains bound

- (2) The new employer remains bound by the pre-reform AWA, by force of this clause, until whichever of the following first occurs:
- (a) the pre-reform AWA ceases to be in operation because it is terminated under subsection 170VM(1) of the pre-reform Act (as applied by subclause 18(2) of Schedule 14);
 - (b) the pre-reform AWA ceases to be in operation in relation to the transferring employee's employment with the new employer under subclause 18(1) of Schedule 14 (AWA between the new employer and the transferring employee coming into operation);
 - (c) the transferring employee ceases to be a transferring employee in relation to the pre-reform AWA;
 - (d) the transmission period ends.

Old employer's rights and obligations that arose before time of transmission not affected

- (3) This clause does not affect the rights and obligations of the old employer that arose before the time of transmission.

8 Interaction rules

- (1) From the time of transmission, a transitional industrial instrument (other than a pre-reform AWA) does not apply to the transferring employee's employment with the new employer.
- (2) Subclause (1) has effect despite section 170VQ of the pre-reform Act (as applied by subclause 17(1) of Schedule 14).

9 Termination of transmitted pre-reform AWA

Transmitted instrument

- (1) This clause applies if subclause 7(1) applies to a pre-reform AWA (the *transmitted pre-reform AWA*).

Modified operation of subsections 170VM(3) to (7) of the pre-reform Act

- (2) The transmitted pre-reform AWA cannot be terminated under subsection 170VM(3) or (6) of the pre-reform Act during the transmission period (even if the transmitted pre-reform AWA has passed its nominal expiry date).

Part 4—Transmission of pre-reform certified agreements

Division 1—General

10 Transmission of pre-reform certified agreement

New employer bound by Division 2 pre-reform certified agreement

- (1) If:
 - (a) immediately before the time of transmission:
 - (i) the old employer; and
-

- (ii) employees of the old employer;
were bound by a Division 2 pre-reform certified agreement;
and
- (b) there is at least one transferring employee in relation to the
Division 2 pre-reform certified agreement;
the new employer is bound by the Division 2 pre-reform certified
agreement by force of this subclause.

Note 1: The new employer must notify transferring employees and lodge a copy of the notices with the Employment Advocate (see clauses 28 and 29).

Note 2: See also clause 11 for the interaction between the Division 2 pre-reform certified agreement and other industrial instruments.

New employer bound by Division 3 pre-reform certified agreement

- (2) If:
 - (a) the old employer is an employer (within the meaning of subsection 4AB(1)); and
 - (b) immediately before the time of transmission:
 - (i) the old employer; and
 - (ii) employees of the old employer;
were bound by a Division 3 pre-reform certified agreement;
and
 - (c) there is at least one transferring employee in relation to the
Division 3 pre-reform certified agreement;
the new employer is bound by the Division 3 pre-reform certified
agreement by force of this subclause.

Note 1: The new employer must notify transferring employees and lodge a copy of the notices with the Employment Advocate (see clauses 28 and 29).

Note 2: See also clause 11 for the interaction between the Division 3 pre-reform certified agreement and other industrial instruments.

- (3) If:
 - (a) the old employer is not an employer (within the meaning of subsection 4AB(1)); and
 - (b) immediately before the time of transmission:
 - (i) the old employer; and
 - (ii) employees of the old employer;

were bound by a Division 3 pre-reform certified agreement;
and

- (c) there is at least one transferring employee in relation to the Division 3 pre-reform certified agreement; and
- (d) one or more of the following are satisfied:
 - (i) the new employer is an employer (within the meaning of subsection 4AB(1)) at the time of transmission;
 - (ii) the new employer is bound by another Division 3 pre-reform certified agreement at the time of transmission;

the new employer is bound by the Division 3 pre-reform certified agreement referred to in paragraph (b) by force of this subclause.

Note 1: Clause 6A of this Schedule provides that references to *employees* and *employment* have their ordinary meanings in relation to the Division 3 pre-reform certified agreement. This is because the old employer is not an employer (within the meaning of subsection 4AB(1)).

Note 2: The new employer must notify transferring employees and lodge a copy of the notices with the Employment Advocate (see clauses 28 and 29).

Note 3: See also clause 11 for the interaction between the Division 3 pre-reform certified agreement and other industrial instruments.

Period for which new employer remains bound

- (4) The new employer remains bound by the pre-reform certified agreement, by force of subclause (1), (2) or (3), until whichever of the following first occurs:
 - (a) the pre-reform certified agreement ceases to be in operation because it is terminated under section 170MG of the pre-reform Act (as applied by subclause 2(1) of Schedule 14);
 - (b) there cease to be any transferring employees in relation to the pre-reform certified agreement;
 - (c) the new employer ceases to be bound by the pre-reform certified agreement in relation to all the transferring employees in relation to the agreement;
 - (d) the transmission period ends;
 - (e) if:
 - (i) the pre-reform certified agreement is a Division 3 pre-reform certified agreement; and

- (ii) the new employer is an excluded employer (within the meaning of Schedule 13) when the period of 5 years beginning on the reform commencement ends; the period referred to in subparagraph (ii) ends.

Note: Paragraph (c)—see subclause (6).

- (5) Paragraph (4)(d) does not apply if:
 - (a) the pre-reform certified agreement is a Division 3 pre-reform certified agreement; and
 - (b) the old employer is not an employer within the meaning of subsection 4AB(1) immediately before the time of transmission; and
 - (c) the new employer is an employer within the meaning of subsection 4AB(1) at the time of transmission; and
 - (d) the transmission occurs as part of the process of the employer in relation to the business being transferred becoming an employer within the meaning of subsection 4AB(1).

Period for which new employer remains bound in relation to particular transferring employee

- (6) The new employer remains bound by the pre-reform certified agreement in relation to a particular transferring employee, by force of subclause (1), (2) or (3), until whichever of the following first occurs:
 - (a) the pre-reform certified agreement ceases to be in operation in relation to the transferring employee's employment with the new employer because the new employer makes an AWA with the transferring employee (see subclause 12(2));
 - (b) the pre-reform certified agreement ceases to be in operation in relation to the transferring employee's employment with the new employer because a collective agreement comes into operation in relation to the transferring employee in relation to that employment (see subclause 3(1) of Schedule 14);
 - (c) the employer ceases to be bound by the pre-reform certified agreement under subclause (4).

New employer bound only in relation to employment of transferring employees in business being transferred

- (7) The new employer is bound by the pre-reform certified agreement, by force of subclause (1), (2) or (3), only in relation to the employment, in the business being transferred, of employees who are transferring employees in relation to the pre-reform certified agreement.

New employer bound subject to Commission order

- (8) Subclauses (1), (2), (3), (4) and (6) have effect subject to any order of the Commission under clause 14.

Old employer's rights and obligations that arose before time of transmission not affected

- (9) This clause does not affect the rights and obligations of the old employer that arose before the time of transmission.

11 Interaction rules

Transmitted certified agreement

- (1) This clause applies if subclause 10(1), (2) or (3) applies to a pre-reform certified agreement (the **transmitted certified agreement**).

Existing collective agreements

- (2) If:
- (a) the new employer is bound by a collective agreement (the **existing collective agreement**); and
 - (b) the existing collective agreement would, but for this subclause, apply, according to its terms, to a transferring employee in relation to the transmitted certified agreement when the transferring employee becomes employed by the new employer;
- the existing collective agreement does not apply to the transferring employee.
- (3) Subclause (2) ceases to apply when whichever of the following first occurs:
-

-
- (a) the transmission period ends;
 - (b) if:
 - (i) the pre-reform certified agreement is a Division 3 pre-reform certified agreement; and
 - (ii) the new employer is an excluded employer (within the meaning of Schedule 13) when the period of 5 years beginning on the reform commencement ends;the period referred to in subparagraph (ii) ends.
- (4) Subclause (3) does not apply if:
- (a) the pre-reform certified agreement is a Division 3 pre-reform certified agreement; and
 - (b) the old employer is not an employer within the meaning of subsection 4AB(1) immediately before the time of transmission; and
 - (c) the new employer is an employer within the meaning of subsection 4AB(1) at the time of transmission; and
 - (d) the transmission occurs as part of the process of the employer in relation to the business being transferred becoming an employer within the meaning of subsection 4AB(1).

Transitional industrial instruments not to apply

- (5) From the time of transmission, a transitional industrial instrument (other than the transmitted certified agreement) does not apply to the transferring employee's employment with the new employer.
- (6) Subclause (5) has effect despite section 170LY of the pre-reform Act (as applied by subclause 2(1) of Schedule 14).

12 Termination of transmitted pre-reform certified agreement

Transmitted agreement

- (1) This clause applies if subclause 10(1), (2) or (3) applies to a pre-reform certified agreement (the ***transmitted certified agreement***).

AWA

- (2) Despite subclause 3(2) of Schedule 14, the transmitted certified agreement ceases to be in operation in relation to a transferring

employee's employment with the new employer if an AWA between the new employer and the transferring employee comes into operation in relation to that employment after the time of transmission.

Note: Subclause 3(2) of Schedule 14 provides that a pre-reform certified agreement is normally only suspended while an AWA operates. The effect of subclause (2) of this clause is to terminate the operation of the transmitted certified agreement in relation to the transferring employee's employment when the AWA is made.

Modified operation of sections 170MH and 170MHA of the pre-reform Act

- (3) The transmitted certified agreement cannot be terminated under section 170MH or 170MHA of the pre-reform Act during the transmission period (even if the transmitted certified agreement has passed its nominal expiry date).

Division 2—Commission's powers

13 Application and terminology

- (1) This Division applies if:
- (a) a person is bound by a pre-reform certified agreement; and
 - (b) another person:
 - (i) becomes at a later time; or
 - (ii) is likely to become at a later time;the successor, transmittee or assignee of the whole, or a part, of the business of the person referred to in paragraph (a).
- (2) For the purposes of this Division:
- (a) the **outgoing employer** is the person referred to in paragraph (1)(a); and
 - (b) the **incoming employer** is the person first referred to in paragraph (1)(b); and
 - (c) the **business concerned** is the business, or the part of the business, to which the incoming employer becomes, or is likely to become, the successor, transmittee or assignee; and
 - (d) the **transfer time** is the time at which the incoming employer becomes, or is likely to become, the successor, transmittee or assignee of the business concerned.

14 Commission may make order

- (1) The Commission may make an order that the incoming employer:
 - (a) is not, or will not be, bound by the pre-reform certified agreement; or
 - (b) is, or will be, bound by the pre-reform certified agreement, but only to the extent specified in the order.

The order must specify the day from which the order takes effect. That day must not be before the day on which the order is made or before the transfer time.

- (2) Without limiting paragraph (1)(b), the Commission may make an order under that paragraph that the incoming employer is, or will be, bound by the pre-reform certified agreement but only for the period specified in the order.
- (3) To avoid doubt, the Commission cannot make an order under subclause (1) that would have the effect of extending the transmission period.

15 When application for order can be made

An application for an order under subclause 14(1) may be made before, at or after the transfer time.

16 Who may apply for order

- (1) Before the transfer time, an application for an order under subclause 14(1) may be made only by the outgoing employer.
- (2) At or after the transfer time, an application for an order under subclause 14(1) may be made only by:
 - (a) the incoming employer; or
 - (b) a transferring employee in relation to the pre-reform certified agreement; or
 - (c) an organisation of employees that is bound by the pre-reform certified agreement; or
 - (d) an organisation of employees that:
 - (i) is entitled, under its eligibility rules, to represent the industrial interests of a transferring employee in relation to the pre-reform certified agreement; and

- (ii) has been requested by the transferring employee to apply for the order on the transferring employee's behalf.

17 Applicant to give notice of application

The applicant for an order under subclause 14(1) must take reasonable steps to give written notice of the application to the persons who may make submissions in relation to the application (see clause 18).

18 Submissions in relation to application

- (1) Before deciding whether to make an order under subclause 14(1) in relation to the pre-reform certified agreement, the Commission must give the following an opportunity to make submissions:
 - (a) the applicant;
 - (b) before the transfer time—the persons covered by subclause (2);
 - (c) at and after the transfer time—the persons covered by subclause (3).
 - (2) For the purposes of paragraph (1)(b), this subclause covers:
 - (a) an employee of the outgoing employer:
 - (i) who is bound by the pre-reform certified agreement; and
 - (ii) who is employed in the business concerned; and
 - (b) the incoming employer; and
 - (c) an organisation of employees that is bound by the pre-reform certified agreement; and
 - (d) an organisation of employees that:
 - (i) is entitled, under its eligibility rules, to represent the industrial interests of an employee referred to in paragraph (a); and
 - (ii) has been requested by the employee to make submissions on the employee's behalf in relation to the application for the order under subclause 14(1).
 - (3) For the purposes of paragraph (1)(c), this subclause covers:
 - (a) the incoming employer; and
 - (b) a transferring employee in relation to the pre-reform certified agreement; and
-

- (c) an organisation of employees that is bound by the pre-reform certified agreement; and
- (d) an organisation of employees that:
 - (i) is entitled, under its eligibility rules, to represent the industrial interests of a transferring employee in relation to the pre-reform certified agreement; and
 - (ii) has been requested by the transferring employee to make submissions on the transferring employee's behalf in relation to the application for the order under subclause 14(1).

Part 5—Transmission of State transitional instruments

Division 1—General

19 Transmission of State transitional instrument

New employer bound by State transitional instrument

- (1) If:
 - (a) immediately before the time of transmission:
 - (i) the old employer; and
 - (ii) employees of the old employer;were bound by a State transitional instrument; and
 - (b) there is at least one transferring employee in relation to the State transitional instrument; and
 - (c) but for this clause, the new employer would not be bound by the State transitional instrument in relation to the transferring employees;

the new employer is bound by the State transitional instrument by force of this clause.

Note 1: The new employer must notify transferring employees and lodge a copy of the notice with the Employment Advocate (see clauses 28 and 29).

Note 2: See also clause 20 for the interaction between the State transitional instrument and other industrial instruments.

Period for which new employer remains bound

- (2) The new employer remains bound by the State transitional instrument, by force of this clause, until whichever of the following first occurs:
- (a) if the State transitional instrument is a preserved State agreement—the instrument ceases to be in operation under clauses 15G and 21 of Schedule 15;
 - (b) if the State transitional instrument is a notional agreement preserving State awards—the instrument ceases to be in operation at the end of the period of 3 years beginning on the reform commencement (see subclause 38A(1) of Schedule 15);
 - (c) there cease to be any transferring employees in relation to the State transitional instrument;
 - (d) the new employer ceases to be bound by the State transitional instrument in relation to all the transferring employees in relation to the instrument;
 - (e) the transmission period ends.

Note: Paragraph (d)—see subclause (3).

Period for which new employer remains bound in relation to particular transferring employee

- (3) The new employer remains bound by the State transitional instrument in relation to a particular transferring employee, by force of this clause, until whichever of the following first occurs:
- (a) if the State transitional instrument is a preserved State agreement—the instrument ceases to be in operation in relation to the transferring employee's employment with the new employer because a workplace agreement comes into operation in relation to that employment (see subclause 15G(2) of Schedule 15);
 - (b) if the State transitional instrument is a notional agreement preserving State awards—the instrument ceases to be in operation in relation to the transferring employee's employment with the new employer because a workplace agreement comes into operation in relation to that employment (see subclause 38A(2) of Schedule 15);
 - (c) if the State transitional instrument is a notional agreement preserving State awards—the instrument ceases to be in

operation in relation to the transferring employee's employment with the new employer because the employee becomes bound by an award (see subclause 38A(3) of Schedule 15);

- (d) the employer ceases to be bound by the State transitional instrument under subclause (2).

New employer bound only in relation to employment of transferring employees

- (4) The new employer is bound by the State transitional instrument by force of this clause only in relation to the employment of employees who are transferring employees in relation to the State transitional instrument.

New employer bound subject to Commission order

- (5) Subclauses (1), (2) and (3) have effect subject to any order of the Commission under clause 23.

Old employer's rights and obligations that arose before time of transmission not affected

- (6) This clause does not affect the rights and obligations of the old employer that arose before the time of transmission.

20 Interaction rules

Transmitted instrument

- (1) This clause applies if subclause 19(1) applies to a State transitional instrument (the ***transmitted State instrument***).

Collective agreement

- (2) If:
- (a) the new employer is bound by a collective agreement (the ***pre-transmission agreement***); and
 - (b) the transmitted State instrument is a preserved State agreement; and
 - (c) the pre-transmission agreement would, but for this subclause, apply, according to its terms, to a transferring employee in relation to the transmitted State instrument when the

transferring employee becomes employed by the new employer;
the pre-transmission agreement does not apply to the transferring employee.

- (3) Subclause (2) ceases to apply at the end of the transmission period.

Other transitional instruments

- (4) From the time of transmission, a transitional industrial instrument (other than the transmitted State instrument) does not apply to the transferring employee's employment with the new employer.
- (5) Subclause (4) has effect despite the following provisions:
- (a) clause 5 of Schedule 14 (pre-reform certified agreement);
 - (b) subclause 25(3) of Schedule 14 (section 170MX award).

21 Termination of preserved State agreement

Transmitted instrument

- (1) This clause applies if subclause 19(1) applies to a preserved State agreement (the *transmitted instrument*).

Modified operation of subsections 170VM(3) to (7) of the pre-reform Act

- (2) Subclause (3) applies if:
- (a) the transmitted instrument is a preserved individual State agreement; and
 - (b) section 170VM of the pre-reform Act is applied to the transmitted instrument in accordance with subclause 21(3) of Schedule 15.
- (3) The transmitted instrument cannot be terminated under subsection 170VM(3) or (6) of the pre-reform Act during the transmission period (even if the transmitted instrument has passed its nominal expiry date).

Modified operation of sections 170MH and 170MHA of the pre-reform Act

- (4) Subclause (5) applies if:
-

-
- (a) the transmitted instrument is a preserved collective State agreement; and
 - (b) sections 170MH and 170MHA of the pre-reform Act are applied to the transmitted instrument in accordance with subclause 21(2) of Schedule 15.
- (5) The transmitted instrument cannot be terminated under section 170MH or 170MHA of the pre-reform Act during the transmission period (even if the transmitted instrument has passed its nominal expiry date).

Division 2—Commission’s powers

22 Application and terminology

- (1) This Division applies if:
 - (a) a person is bound by a State transitional instrument; and
 - (b) another person:
 - (i) becomes at a later time; or
 - (ii) is likely to become at a later time;the successor, transmittee or assignee of the whole, or a part, of the business of the person referred to in paragraph (a).
- (2) For the purposes of this Division:
 - (a) the *outgoing employer* is the person referred to in paragraph (1)(a); and
 - (b) the *incoming employer* is the person first referred to in paragraph (1)(b); and
 - (c) the *business concerned* is the business, or the part of the business, to which the incoming employer becomes, or is likely to become, the successor, transmittee or assignee; and
 - (d) the *transfer time* is the time at which the incoming employer becomes, or is likely to become, the successor, transmittee or assignee of the business concerned.

23 Commission may make order

- (1) The Commission may make an order that the incoming employer:
 - (a) is not, or will not be, bound by the State transitional instrument; or

(b) is, or will be, bound by the State transitional instrument, but only to the extent specified in the order.

The order must specify the day from which the order takes effect. That day must not be before the day on which the order is made or before the transfer time.

- (2) Without limiting paragraph (1)(b), the Commission may make an order under that paragraph that the incoming employer is, or will be, bound by the State transitional instrument but only for the period specified in the order.
- (3) To avoid doubt, the Commission cannot make an order under subclause (1) that would have the effect of extending the transmission period.

24 When application for order can be made

An application for an order under subclause 23(1) may be made before, at or after the transfer time.

25 Who may apply for order

- (1) Before the transfer time, an application for an order under subclause 23(1) may be made only by the outgoing employer.
- (2) At or after the transfer time, an application for an order under subclause 23(1) may be made only by:
 - (a) the incoming employer; or
 - (b) a transferring employee in relation to the State transitional instrument; or
 - (c) an organisation of employees that is bound by the State transitional instrument; or
 - (d) an organisation of employees that:
 - (i) is entitled, under its eligibility rules, to represent the industrial interests of a transferring employee in relation to the State transitional instrument; and
 - (ii) has been requested by the transferring employee to apply for the order on the transferring employee's behalf.

26 Applicant to give notice of application

The applicant for an order under subclause 23(1) must take reasonable steps to give written notice of the application to the persons who may make submissions in relation to the application (see clause 27).

27 Submissions in relation to application

- (1) Before deciding whether to make an order under subclause 23(1) in relation to the State transitional instrument, the Commission must give the following an opportunity to make submissions:
 - (a) the applicant;
 - (b) before the transfer time—the persons covered by subclause (2);
 - (c) at and after the transfer time—the persons covered by subclause (3).
- (2) For the purposes of paragraph (1)(b), this subclause covers:
 - (a) an employee of the outgoing employer:
 - (i) who is bound by the State transitional instrument; and
 - (ii) who is employed in the business concerned; and
 - (b) the incoming employer; and
 - (c) an organisation of employees that is bound by the State transitional instrument; and
 - (d) an organisation of employees that:
 - (i) is entitled, under its eligibility rules, to represent the industrial interests of an employee referred to in paragraph (a); and
 - (ii) has been requested by the employee to make submissions on the employee's behalf in relation to the application for the order under subclause 23(1).
- (3) For the purposes of paragraph (1)(c), this subclause covers:
 - (a) the incoming employer; and
 - (b) a transferring employee in relation to the State transitional instrument; and
 - (c) an organisation of employees that is bound by the State transitional instrument; and
 - (d) an organisation of employees that:

- (i) is entitled, under its eligibility rules, to represent the industrial interests of a transferring employee in relation to the State transitional instrument; and
- (ii) has been requested by the transferring employee to make submissions on the transferring employee's behalf in relation to the application for the order under subclause 23(1).

Part 6—Notice requirements and enforcement

28 Informing transferring employees about transmission of transitional instrument

- (1) This clause applies if:
 - (a) an employer is bound by a transitional instrument (the *transmitted instrument*) in relation to a transferring employee by force of:
 - (i) clause 7 (pre-reform AWA); or
 - (ii) subclause 10(1), (2) or (3) (pre-reform certified agreement); or
 - (iii) clause 19 (State transitional instrument); and
 - (b) a person is a transferring employee in relation to the transmitted instrument.

The provision referred to in paragraph (a) is the *transmission provision*.

- (2) Within 28 days after the transferring employee starts being employed by the employer, the employer must take reasonable steps to give the transferring employee a written notice that complies with subclause (3).

Note: This is a civil remedy provision, see clause 31.

- (3) The notice must:
 - (a) identify the transmitted instrument; and
 - (b) state that the employer is bound by the transmitted instrument; and
 - (c) specify the date on which the transmission period for the transmitted instrument ends; and

- (d) state that the employer will remain bound by the transmitted instrument until the end of the transmission period unless the transmitted instrument is terminated, or otherwise ceases to be in operation, before the end of that period; and
 - (e) specify the kinds of instruments (if any) that can replace, or exclude the operation of, the transmitted instrument; and
 - (f) identify:
 - (i) any provisions of the Australian Fair Pay and Conditions Standard; or
 - (ii) any other instrument;that the employer intends to be the source for terms and conditions that will apply to the matters that are dealt with by the transmitted instrument when the transmitted instrument ceases to bind the employer; and
 - (g) identify any award or collective agreement that binds:
 - (i) the employer; and
 - (ii) employees of the employer who are not transferring employees in relation to the transmitted instrument;and that would bind the transferring employee but for the transmission provision.
- (3A) Subject to subclause (3B), if the notice under subclause (3) identifies an instrument under paragraph (3)(g), the employer must give the transferring employee a copy of the instrument together with the notice.
- Note: This is a civil remedy provision, see clause 31.
- (3B) Subclause (3A) does not apply if:
- (a) the transferring employee is able to easily access a copy of the instrument in a particular way; and
 - (b) the notice under subclause (3) tells the transferring employee that a copy of the instrument is accessible in that way.
- Note: Paragraph (a)—the copy may be available, for example, on the Internet.
- (4) Subclause (2) does not apply if:
- (a) the transmitted instrument is a pre-reform AWA and the new employer and the transferring employee become bound by an AWA within 14 days after the time of transmission; or

- (b) the transmitted instrument is not a pre-reform AWA and the new employer and the transferring employee become bound by an AWA or a collective agreement at the time of transmission or within 14 days after the time of transmission.

29 Lodging copy of notice with Employment Advocate

Only one transferring employee

- (1) If an employer:
 - (a) gives a notice under subclause 28(2) to a transferring employee in relation to a pre-reform AWA; or
 - (b) gives a notice under subclause 28(2) to the only person who is a transferring employee in relation to a pre-reform certified agreement or State transitional instrument;the employer must lodge a copy of the notice with the Employment Advocate within 14 days after the notice is given to the transferring employee. The copy must be lodged in accordance with subclause (4).

Note 1: This is a civil remedy provision, see clause 31.

Note 2: Sections 137.1 and 137.2 of the *Criminal Code* create offences for providing false or misleading information or documents.

Multiple transferring employees and notices all given on the one day

- (2) If:
 - (a) an employer gives a number of notices under subclause 28(2) to people who are transferring employees in relation to a pre-reform certified agreement or State transitional instrument; and
 - (b) all of those notices are given on the one day;the employer must lodge a copy of one of those notices with the Employment Advocate within 14 days after that notice is given. The copy must be lodged in accordance with subclause (4).

Note 1: This is a civil remedy provision, see clause 31.

Note 2: Sections 137.1 and 137.2 of the *Criminal Code* create offences for providing false or misleading information or documents.

Multiple transferring employees and notices given on different days

- (3) If:
- (a) an employer gives a number of notices under subclause 28(2) to people who are transferring employees in relation to a pre-reform certified agreement or State transitional instrument; and

- (b) the notices are given on different days;

the employer must lodge a copy of the notice, or one of the notices that was given on the earliest of those days, with the Employment Advocate within 14 days after that notice is given. The copy must be lodged in accordance with subclause (4).

Note 1: This is a civil remedy provision, see clause 31.

Note 2: Sections 137.1 and 137.2 of the *Criminal Code* create offences for providing false or misleading information or documents.

- (4) A notice is lodged with the Employment Advocate in accordance with this subclause only if it is actually received by the Employment Advocate.

Note: This means that section 29 of the *Acts Interpretation Act 1901* (to the extent that it deals with the time of service of documents) does not apply to lodgment of a notice.

30 Employment Advocate must issue receipt for lodgment

- (1) If a notice is lodged under clause 29, the Employment Advocate must issue a receipt for the lodgment.
- (2) The receipt must state that the notice was lodged under clause 29 on a particular day.
- (3) The Employment Advocate must give a copy of the receipt to the person who lodged the notice under clause 29.

31 Civil penalties

- (1) The following are *civil remedy provisions* for the purposes of this clause:
 - (a) subclauses 28(2) and (3A);
 - (b) subclauses 29(1), (2) and (3).

Schedule 1 Main amendments

Note: Division 4 of Part VIII contains other provisions relevant to civil remedies.

- (2) The Court may order a person who has contravened a civil remedy provision to pay a pecuniary penalty.

Note: Division 4 of Part VIII contains other provisions relevant to civil remedies.

- (3) The penalty cannot be more than 300 penalty units for a body corporate or 60 penalty units in other cases.
- (4) An application for an order under subclause (2) in relation to an instrument listed in the following table may be made by a person specified in the item of the table relating to that kind of instrument:

Item	Instrument	People with standing to apply for order
1	pre-reform AWA	(a) the transferring employee; or (b) an organisation of employees that is entitled, under its eligibility rules, to represent the industrial interests of the transferring employee and has been requested by the transferring employee to apply for the order on the transferring employee's behalf; or (c) a workplace inspector
2	pre-reform certified agreement	(a) a transferring employee; or (b) an organisation of employees that is bound by the agreement; or (c) an organisation of employees that is entitled, under its eligibility rules, to represent the industrial interests of a transferring employee and has been requested by the transferring employee to apply for the order on the transferring employee's behalf; or (d) a workplace inspector

Item	Instrument	People with standing to apply for order
3	notional agreement preserving State awards	(a) a transferring employee; or (b) an organisation of employees that is entitled, under its eligibility rules, to represent the industrial interests of a transferring employee; or (c) a workplace inspector
4	preserved State Agreement	(a) a transferring employee; or (b) an organisation of employees that is bound by the agreement; or (c) an organisation of employees that is entitled, under its eligibility rules, to represent the industrial interests of a transferring employee and has been requested by the transferring employee to apply for the order on the transferring employee's behalf; or (d) a workplace inspector

Part 7—Matters relating to Victoria

32 Definitions

In this Part:

employee has the same meaning as in Division 1 of Part XV of this Act.

employer has the same meaning as in Division 1 of Part XV of this Act.

employment has the same meaning as in Division 1 of Part XV of this Act, and *employed* has a corresponding meaning.

this Schedule does not include this Part.

Victorian reference Division 3 pre-reform certified agreement has the same meaning as in Part 9 of Schedule 14.

33 Additional effect of Schedule

- (1) Without affecting its operation apart from this clause, this Schedule also has the effect it would have if:
 - (a) each reference in this Schedule to an employer (within the meaning of this Schedule) included a reference to an employer (within the meaning of this Part) in Victoria; and
 - (b) each reference in this Schedule to an employee (within the meaning of this Schedule) included a reference to an employee (within the meaning of this Part) in Victoria; and
 - (c) each reference in this Schedule to employment (within the meaning of this Schedule) included a reference to the employment of an employee (within the meaning of this Part) in Victoria by an employer (within the meaning of this Part) in Victoria; and
 - (d) each reference in this Schedule to employed (within the meaning of this Schedule) included a reference to employed (within the meaning of this Part) in Victoria by an employer (within the meaning of this Part) in Victoria; and
 - (e) Part 5 of this Schedule had not been enacted.
- (2) To the extent to which this Schedule (as it has effect because of subclause (1)) applies if an employer (within the meaning of this Part) in Victoria becomes the successor, transmittee or assignee of the whole, or a part, of a business of:
 - (a) another employer (within the meaning of subsection 4AB(1)); or
 - (b) another employer (within the meaning of this Part) in Victoria;this Schedule has effect only for so long, and in so far, as the *Commonwealth Powers (Industrial Relations) Act 1996* of Victoria refers to the Parliament of the Commonwealth a matter or matters that result in the Parliament of the Commonwealth having sufficient legislative power for this Schedule so to have effect.
- (3) To the extent to which Division 2 of Part 4 of this Schedule (as it has effect because of subclause (1)) applies if an employer (within the meaning of this Part) in Victoria is likely to become the

successor, transmittee or assignee of the whole, or a part, of a business of:

- (a) another employer (within the meaning of subsection 4AB(1)); or
- (b) another employer (within the meaning of this Part) in Victoria;

that Division has effect only for so long, and in so far, as the *Commonwealth Powers (Industrial Relations) Act 1996* of Victoria refers to the Parliament of the Commonwealth a matter or matters that result in the Parliament of the Commonwealth having sufficient legislative power for that Division so to have effect.

33A Victorian reference Division 3 pre-reform certified agreements

- (1) Clause 6A, subclauses 10(2), (3) and (5), paragraph 11(3)(b) and subclause 11(4) do not apply to a Victorian reference Division 3 pre-reform certified agreement.
- (2) Division 1 of Part 4 of this Schedule applies to a Victorian reference Division 3 pre-reform certified agreement as if the agreement had been made under section 170LJ of the pre-reform Act in that section's operation in accordance with repealed Division 2 of Part XV.

Part 8—Transitional instruments and transmitted post-reform instruments

34 Relationship between transitional instruments and transmitted collective agreement

- (1) This clause applies if subsection 125(1) applies to a collective agreement (the *transmitted collective agreement*).
- (2) From the time of transmission, a transitional industrial instrument does not apply to a transferring employee's employment with the new employer.
- (3) In subclause (2):
new employer has the same meaning as in Part VIAA.

time of transmission has the same meaning as in Part VIAA.

transferring employee has the same meaning as in Part VIAA.

35 Relationship between transitional instruments and transmitted award

- (1) This clause applies if subsection 126(1) applies to an award (the *transmitted award*).
- (2) From the time of transmission, a transitional industrial instrument does not apply to the transferring employee's employment with the new employer.
- (3) Subclause (2) has effect despite the following provisions:
 - (a) clause 5 of Schedule 14 (pre-reform certified agreement);
 - (b) subclause 25(3) of Schedule 14 (section 170MX award);
 - (c) clause 15D of Schedule 15 (preserved State agreement).
- (4) In subclause (2):

new employer has the same meaning as in Part VIAA.

time of transmission has the same meaning as in Part VIAA.

transferring employee has the same meaning as in Part VIAA.

Part 9—Miscellaneous

36 Regulations

The regulations may make provision in relation to the effects that the succession, transmission or assignment of a business, or a part of a business, have on the obligation of employers and the terms and conditions of employees under transitional industrial instruments.

Schedule 1A—Establishment of Australian Fair Pay Commission

Workplace Relations Act 1996

1 After Part I

Insert:

Part IA—Australian Fair Pay Commission

Division 1—Preliminary

7F Definitions

In this Part:

AFPC means the Australian Fair Pay Commission established by section 7G.

AFPC Chair means the AFPC Chair appointed under section 7P.

AFPC Commissioner means an AFPC Commissioner appointed under section 7Y.

AFPC Secretariat means the AFPC Secretariat established under section 7ZG.

Director of the Secretariat means the Director of the Secretariat appointed under section 7ZK.

wage review means a review conducted by the AFPC to determine whether it should exercise any of its wage-setting powers.

wage-setting decision means a decision made by the AFPC in the exercise of its wage-setting powers.

wage-setting function has the meaning given by subsection 7I(1).

wage-setting powers means the powers of the AFPC under Division 2 of Part VA.

Division 2—Australian Fair Pay Commission

Subdivision A—Establishment and functions

7G Establishment

- (1) The Australian Fair Pay Commission is established by this section.
- (2) The AFPC is to consist of:
 - (a) the AFPC Chair; and
 - (b) 4 AFPC Commissioners.

7H Functions of the AFPC

The functions of the AFPC are as follows:

- (a) its wage-setting function as set out in subsection 7I(1);
- (b) any other functions conferred on the AFPC under this Act or any other Act;
- (c) any other functions conferred on the AFPC by regulations made under this Act or any other Act;
- (d) to undertake activities to promote public understanding of matters relevant to its wage-setting and other functions.

Subdivision B—AFPC’s wage-setting function

7I AFPC’s wage-setting function

The AFPC’s wage-setting function

- (1) The AFPC’s *wage-setting function* is to:
 - (a) conduct wage reviews; and
 - (b) exercise its wage-setting powers as necessary depending on the outcomes of wage reviews.

Note: The main wage-setting powers of the AFPC cover the following matters (within the meaning of Division 2 of Part VA):

- (a) adjusting the standard FMW (short for Federal Minimum Wage);
- (b) determining or adjusting special FMWs for junior employees, employees with disabilities or employees to whom training arrangements apply;

- (c) determining or adjusting basic periodic rates of pay and basic piece rates of pay payable to employees or employees of particular classifications;
 - (d) determining or adjusting casual loadings.
- (2) During the period (the *interim period*) from the commencement of this Part to the commencement of Division 2 of Part VA, the AFPC has the function of gathering information (including by undertaking or commissioning research, or consulting with any person or body) for the purpose of assisting it to perform its wage-setting function after that Division has commenced. When performing its wage-setting function, the AFPC may have regard to any information so gathered during the interim period.

7J AFPC's wage-setting parameters

The objective of the AFPC in performing its wage-setting function is to promote the economic prosperity of the people of Australia having regard to the following:

- (a) the capacity for the unemployed and low paid to obtain and remain in employment;
- (b) employment and competitiveness across the economy;
- (c) providing a safety net for the low paid;
- (d) providing minimum wages for junior employees, employees to whom training arrangements apply and employees with disabilities that ensure those employees are competitive in the labour market.

7K Wage reviews and wage-setting decisions

- (1) The AFPC may determine the following:
 - (a) the timing and frequency of wage reviews;
 - (b) the scope of particular wage reviews;
 - (c) the manner in which wage reviews are to be conducted;
 - (d) when wage-setting decisions are to come into effect.
- (2) For the purposes of performing its wage-setting function, the AFPC may inform itself in any way it thinks appropriate, including by:
 - (a) undertaking or commissioning research; or
 - (b) consulting with any other person, body or organisation; or

- (c) monitoring and evaluating the impact of its wage-setting decisions.
 - (3) Subsections (1) and (2) have effect subject to this Act and any regulations made under this Act.
 - (4) The AFPC's wage-setting decisions must:
 - (a) be in writing; and
 - (b) be expressed as decisions of the AFPC as a body; and
 - (c) include reasons for the decisions, expressed as reasons of the AFPC as a body.
- A wage-setting decision is not a legislative instrument.

7L Constitution of the AFPC for wage-setting powers

- (1) For the purposes of exercising its wage-setting powers, the AFPC must be constituted by:
 - (a) the AFPC Chair; and
 - (b) the 4 AFPC Commissioners.
- (2) However, if the AFPC Chair considers it necessary in circumstances where AFPC Commissioners are unavailable, the AFPC Chair may determine that, for the purposes of exercising its wage-setting powers in those circumstances, the AFPC is to be constituted by:
 - (a) the AFPC Chair; and
 - (b) no fewer than 2 AFPC Commissioners.

7M Publishing wage-setting decisions etc.

- (1) The AFPC must publish its wage-setting decisions.
- (2) The AFPC may, as it thinks appropriate, publish other information about wages or its wage-setting function.
- (3) Publishing under subsection (1) or (2) may be done in any way the AFPC thinks appropriate.

Subdivision C—Operation of the AFPC

7N AFPC to determine its own procedures

- (1) The AFPC may determine the procedures it will use in performing its functions.
- (2) Subsection (1) has effect subject to Subdivision B and any regulations made under subsection (3).
- (3) The regulations may prescribe procedures to be used by the AFPC for all or for specified purposes.

7O Annual report

The AFPC must, as soon as practicable after the end of each financial year, give to the Minister a report on the operation of the AFPC for presentation to the Parliament.

Subdivision D—AFPC Chair

7P Appointment

- (1) The AFPC Chair is to be appointed by the Governor-General by written instrument.
- (2) The AFPC Chair may be appointed on a full-time or part-time basis and holds office for the period specified in his or her instrument of appointment. The period must not exceed 5 years.
- (3) To be appointed as AFPC Chair, a person must have a high level of skills and experience in business or economics.

7Q Remuneration

- (1) The AFPC Chair is to be paid the remuneration that is determined by the Remuneration Tribunal. If no determination of that remuneration by the Tribunal is in operation, the AFPC Chair is to be paid the remuneration that is prescribed.
- (2) The AFPC Chair is to be paid the allowances that are prescribed.
- (3) This section has effect subject to the *Remuneration Tribunal Act 1973*.

7R Leave of absence

- (1) If the AFPC Chair is appointed on a full-time basis:
 - (a) the AFPC Chair has the recreation leave entitlements that are determined by the Remuneration Tribunal; and
 - (b) the Minister may grant the AFPC Chair leave of absence, other than recreation leave, on the terms and conditions as to remuneration or otherwise that the Minister determines.
- (2) If the AFPC Chair is appointed on a part-time basis, the Minister may grant leave of absence to the AFPC Chair on the terms and conditions that the Minister determines.

7S Engaging in other paid employment

If the AFPC Chair is appointed on a full-time basis, the AFPC Chair must not engage in paid employment outside the duties of his or her office without the Minister's approval.

7T Disclosure of interests

The AFPC Chair must give written notice to the Minister of all interests (financial or otherwise) that the AFPC Chair has or acquires and that could conflict with the proper performance of his or her duties.

7U Resignation

- (1) The AFPC Chair may resign his or her appointment by giving the Governor-General a written resignation.
- (2) The resignation takes effect on the day it is received by the Governor-General or, if a later day is specified in the resignation, on that later day.

7V Termination of appointment

- (1) The Governor-General may terminate the appointment of the AFPC Chair if:
 - (a) the AFPC Chair:
 - (i) becomes bankrupt; or

- (ii) applies to take the benefit of any law for the relief of bankrupt or insolvent debtors; or
 - (iii) compounds with his or her creditors; or
 - (iv) makes an assignment of his or her remuneration for the benefit of his or her creditors; or
 - (b) the AFPC Chair fails, without reasonable excuse, to comply with section 7T; or
 - (c) the AFPC Chair has or acquires interests (including by being an employer or employee) that the Minister considers conflict unacceptably with the proper performance of the AFPC Chair's duties; or
 - (d) if the AFPC Chair is appointed on a full-time basis:
 - (i) the AFPC Chair engages, except with the Minister's approval, in paid employment outside the duties of his or her office; or
 - (ii) the AFPC Chair is absent, except on leave of absence, for 14 consecutive days or for 28 days in any 12 months; or
 - (e) if the AFPC Chair is appointed on a part-time basis—the AFPC Chair is absent, except on leave of absence, to an extent that the Minister considers excessive.
- (2) Subject to subsections (3), (4) and (5), the Governor-General may terminate the appointment of the AFPC Chair for misbehaviour or physical or mental incapacity.
- (3) If the AFPC Chair:
- (a) is an eligible employee for the purposes of the *Superannuation Act 1976*; and
 - (b) has not reached his or her maximum retiring age within the meaning of that Act;
- his or her appointment cannot be terminated for physical or mental incapacity unless the CSS Board has given a certificate under section 54C of that Act.
- (4) If the AFPC Chair:
- (a) is a member of the superannuation scheme established by deed under the *Superannuation Act 1990*; and
 - (b) is under 60 years of age;

his or her appointment cannot be terminated for physical or mental incapacity unless the PSS Board has given a certificate under section 13 of that Act.

(5) If the AFPC Chair:

- (a) is an ordinary employer-sponsored member of PSSAP, within the meaning of the *Superannuation Act 2005*; and
- (b) is under 60 years of age;

his or her appointment cannot be terminated on the ground of physical or mental incapacity unless the Board (within the meaning of that Act) has given an approval and certificate under section 43 of that Act.

7W Other terms and conditions

The AFPC Chair holds office on the terms and conditions (if any) in relation to matters not covered by this Act that are determined by the Minister.

7X Acting AFPC Chair

- (1) The Minister may appoint a person who meets the requirements set out in subsection 7P(3) to act as the AFPC Chair:
 - (a) during a vacancy in the office of the AFPC Chair (whether or not an appointment has previously been made to the office); or
 - (b) during any period, or during all periods, when the AFPC Chair is absent from duty or from Australia, or is, for any reason, unable to perform the duties of the office.
- (2) Anything done by or in relation to a person purporting to act under an appointment is not invalid merely because:
 - (a) the occasion for the appointment had not arisen; or
 - (b) there was a defect or irregularity in connection with the appointment; or
 - (c) the appointment had ceased to have effect; or
 - (d) the occasion to act had not arisen or had ceased.

Subdivision E—AFPC Commissioners

7Y Appointment

- (1) An AFPC Commissioner is to be appointed by the Governor-General by written instrument.
- (2) An AFPC Commissioner holds office on a part-time basis for the period specified in his or her instrument of appointment. The period must not exceed 4 years.
- (3) To be appointed as an AFPC Commissioner, a person must have experience in one or more of the following areas:
 - (a) business;
 - (b) economics;
 - (c) community organisations;
 - (d) workplace relations.

7Z Remuneration

- (1) An AFPC Commissioner is to be paid the remuneration that is determined by the Remuneration Tribunal. If no determination of that remuneration by the Tribunal is in operation, an AFPC Commissioner is to be paid the remuneration that is prescribed.
- (2) An AFPC Commissioner is to be paid the allowances that are prescribed.
- (3) This section has effect subject to the *Remuneration Tribunal Act 1973*.

7ZA Leave of absence

The AFPC Chair may grant leave of absence to an AFPC Commissioner on the terms and conditions that the AFPC Chair determines.

7ZB Disclosure of interests

An AFPC Commissioner must give written notice to the Minister of all interests (financial or otherwise) that the AFPC Commissioner has or acquires and that could conflict with the proper performance of his or her duties.

7ZC Resignation

- (1) An AFPC Commissioner may resign his or her appointment by giving the Governor-General a written resignation.
- (2) The resignation takes effect on the day it is received by the Governor-General or, if a later day is specified in the resignation, on that later day.

7ZD Termination of appointment

- (1) The Governor-General may terminate the appointment of an AFPC Commissioner if:
 - (a) the AFPC Commissioner:
 - (i) becomes bankrupt; or
 - (ii) applies to take the benefit of any law for the relief of bankrupt or insolvent debtors; or
 - (iii) compounds with his or her creditors; or
 - (iv) makes an assignment of his or her remuneration for the benefit of his or her creditors; or
 - (b) the AFPC Commissioner fails, without reasonable excuse, to comply with section 7ZB; or
 - (c) the AFPC Commissioner has or acquires interests (including by being an employer or employee) that the Minister considers conflict unacceptably with the proper performance of the AFPC Commissioner's duties; or
 - (d) the AFPC Commissioner is absent, except on leave of absence, to an extent that the Minister considers excessive.
 - (2) Subject to subsections (3), (4) and (5), the Governor-General may terminate the appointment of an AFPC Commissioner for misbehaviour or physical or mental incapacity.
 - (3) If an AFPC Commissioner:
 - (a) is an eligible employee for the purposes of the *Superannuation Act 1976*; and
 - (b) has not reached his or her maximum retiring age within the meaning of that Act;his or her appointment cannot be terminated for physical or mental incapacity unless the CSS Board has given a certificate under section 54C of that Act.
-

- (4) If an AFPC Commissioner:
- (a) is a member of the superannuation scheme established by deed under the *Superannuation Act 1990*; and
 - (b) is under 60 years of age;
- his or her appointment cannot be terminated for physical or mental incapacity unless the PSS Board has given a certificate under section 13 of that Act.
- (5) If an AFPC Commissioner:
- (a) is an ordinary employer-sponsored member of PSSAP, within the meaning of the *Superannuation Act 2005*; and
 - (b) is under 60 years of age;
- his or her appointment cannot be terminated on the ground of physical or mental incapacity unless the Board (within the meaning of that Act) has given an approval and certificate under section 43 of that Act.

7ZE Other terms and conditions

An AFPC Commissioner holds office on the terms and conditions (if any) in relation to matters not covered by this Act that are determined by the Minister.

7ZF Acting AFPC Commissioners

- (1) The Minister may appoint a person who meets the requirement set out in subsection 7Y(3) to act as an AFPC Commissioner:
- (a) during a vacancy in the office of an AFPC Commissioner (whether or not an appointment has previously been made to the office); or
 - (b) during any period, or during all periods, when an AFPC Commissioner is acting as AFPC Chair, is absent from duty or from Australia, or is, for any reason, unable to perform the duties of the office.
- (2) Anything done by or in relation to a person purporting to act under an appointment is not invalid merely because:
- (a) the occasion for the appointment had not arisen; or
 - (b) there was a defect or irregularity in connection with the appointment; or
 - (c) the appointment had ceased to have effect; or

- (d) the occasion to act had not arisen or had ceased.

Division 3—AFPC Secretariat

Subdivision A—Establishment and function

7ZG Establishment

- (1) The AFPC Secretariat is established by this section.
- (2) The AFPC Secretariat is to consist of:
 - (a) the Director of the Secretariat; and
 - (b) the staff of the Secretariat.

7ZH Function

The function of the AFPC Secretariat is to assist the AFPC in the performance of the AFPC's functions.

Subdivision B—Operation of the AFPC Secretariat

7ZI AFPC Chair may give directions

- (1) The AFPC Chair may give directions to the Director of the Secretariat about the performance of the function of the AFPC Secretariat.
- (2) The Director of the Secretariat must ensure that a direction given under subsection (1) is complied with.
- (3) To avoid doubt, the AFPC Chair must not give directions under subsection (1) in relation to the performance of functions, or exercise of powers, under the *Financial Management and Accountability Act 1997* or the *Public Service Act 1999*.

7ZJ Annual report

The Director of the Secretariat must, as soon as practicable after the end of each financial year, give to the Minister a report on the operation of the AFPC Secretariat for presentation to the Parliament.

Subdivision C—The Director of the Secretariat

7ZK Appointment

- (1) The Director of the Secretariat is to be appointed by the Minister by written instrument.
- (2) The Director of the Secretariat holds office on a full-time basis for the period specified in his or her instrument of appointment. The period must not exceed 5 years.

7ZL Remuneration

- (1) The Director of the Secretariat is to be paid the remuneration that is determined by the Remuneration Tribunal. If no determination of that remuneration by the Tribunal is in operation, the Director of the Secretariat is to be paid the remuneration that is prescribed.
- (2) The Director of the Secretariat is to be paid the allowances that are prescribed.
- (3) This section has effect subject to the *Remuneration Tribunal Act 1973*.

7ZM Leave of absence

- (1) The Director of the Secretariat has the recreation leave entitlements that are determined by the Remuneration Tribunal.
- (2) The Minister may grant the Director of the Secretariat leave of absence, other than recreation leave, on the terms and conditions as to remuneration or otherwise that the Minister determines.

7ZN Engaging in other paid employment

The Director of the Secretariat must not engage in paid employment outside the duties of his or her office without the Minister's approval.

7ZO Disclosure of interests

The Director of the Secretariat must give written notice to the Minister of all interests (financial or otherwise) that the Director of

the Secretariat has or acquires and that could conflict with the proper performance of his or her duties.

7ZP Resignation

- (1) The Director of the Secretariat may resign his or her appointment by giving the Minister a written resignation.
- (2) The resignation takes effect on the day it is received by the Minister or, if a later day is specified in the resignation, on that later day.

7ZQ Termination of appointment

- (1) The Minister may terminate the appointment of the Director of the Secretariat if:
 - (a) the Director of the Secretariat:
 - (i) becomes bankrupt; or
 - (ii) applies to take the benefit of any law for the relief of bankrupt or insolvent debtors; or
 - (iii) compounds with his or her creditors; or
 - (iv) makes an assignment of his or her remuneration for the benefit of his or her creditors; or
 - (b) the Director of the Secretariat fails, without reasonable excuse, to comply with section 7ZO; or
 - (c) the Director of the Secretariat has or acquires interests that the Minister considers conflict unacceptably with the proper performance of the Director of the Secretariat's duties; or
 - (d) the Director of the Secretariat engages, except with the Minister's approval, in paid employment outside the duties of his or her office; or
 - (e) the Director of the Secretariat is absent, except on leave of absence, for 14 consecutive days or for 28 days in any 12 months.
- (2) The Minister must terminate the appointment of the Director of the Secretariat if the Minister is of the opinion that the performance of the Director of the Secretariat has been unsatisfactory for a significant period of time.

- (3) Subject to subsections (4), (5) and (6), the Minister may terminate the appointment of the Director of the Secretariat for misbehaviour or physical or mental incapacity.
- (4) If the Director of the Secretariat:
- (a) is an eligible employee for the purposes of the *Superannuation Act 1976*; and
 - (b) has not reached his or her maximum retiring age within the meaning of that Act;
- his or her appointment cannot be terminated for physical or mental incapacity unless the CSS Board has given a certificate under section 54C of that Act.
- (5) If the Director of the Secretariat:
- (a) is a member of the superannuation scheme established by deed under the *Superannuation Act 1990*; and
 - (b) is under 60 years of age;
- his or her appointment cannot be terminated for physical or mental incapacity unless the PSS Board has given a certificate under section 13 of that Act.
- (6) If the Director of the Secretariat:
- (a) is an ordinary employer-sponsored member of PSSAP, within the meaning of the *Superannuation Act 2005*; and
 - (b) is under 60 years of age;
- his or her appointment cannot be terminated on the ground of physical or mental incapacity unless the Board (within the meaning of that Act) has given an approval and certificate under section 43 of that Act.

7ZR Other terms and conditions

The Director of the Secretariat holds office on the terms and conditions (if any) in relation to matters not covered by this Act that are determined by the Minister.

7ZS Acting Director of the Secretariat

- (1) The Minister may appoint a person to act as the Director of the Secretariat:

- (a) during a vacancy in the office of the Director of the Secretariat (whether or not an appointment has previously been made to the office); or
 - (b) during any period, or during all periods, when the Director of the Secretariat is absent from duty or from Australia, or is, for any reason, unable to perform the duties of the office.
- (2) Anything done by or in relation to a person purporting to act under an appointment is not invalid merely because:
- (a) the occasion for the appointment had not arisen; or
 - (b) there was a defect or irregularity in connection with the appointment; or
 - (c) the appointment had ceased to have effect; or
 - (d) the occasion to act had not arisen or had ceased.

Subdivision D—Staff and consultants

7ZT Staff

- (1) The staff of the AFPC Secretariat are to be persons engaged under the *Public Service Act 1999*.
- (2) For the purposes of the *Public Service Act 1999*:
 - (a) the Director of the Secretariat and the staff of the AFPC Secretariat together constitute a Statutory Agency; and
 - (b) the Director of the Secretariat is the Head of that Statutory Agency.

7ZU Consultants

The Director of the Secretariat may, on behalf of the Commonwealth, engage persons having suitable qualifications and experience as consultants to the AFPC or the AFPC Secretariat. The terms and conditions of the engagement of a person are those determined by the Director of the Secretariat in writing.

Financial Management and Accountability Regulations 1997

2 Part 1 of Schedule 1 (after table item 110)

Insert:

110A	Australian Fair Pay Commission Secretariat (the <i>AFPC Secretariat</i>), comprising: (a) the Director of the AFPC Secretariat; and (b) the staff of the AFPC Secretariat; and (c) consultants engaged by the Director of the AFPC Secretariat under section 7ZU of the <i>Workplace Relations Act 1996</i> <i>See Note B</i>	Director
------	--	----------

Schedule 2—Transitional arrangements for State organisations

Workplace Relations Act 1996

1 After section 4A

Insert:

4B Schedule 17 has effect

Schedule 17 has effect.

Note: Schedule 17 is about transitionally registered associations.

2 At the end of the Act

Add:

Schedule 17—Transitionally registered associations

Note: See section 4B.

1 Definitions

(1) In this Schedule:

federal system employer has the same meaning as in the Registration and Accountability of Organisations Schedule.

industrial instrument means:

- (a) an award; or
- (b) a collective agreement; or
- (c) a preserved State agreement; or
- (d) a notional agreement preserving State awards.

notional agreement preserving State awards means an agreement that, on the reform commencement, will be taken to come into operation under clause 31 of Schedule 15 to this Act.

office, in relation to a State-registered association, has its ordinary meaning.

preserved State agreement means an agreement that, on the reform commencement, will be taken to come into operation under clause 3 or 10 of Schedule 15 to this Act.

reform commencement means the commencement of Schedule 1 to the *Workplace Relations Amendment (Work Choices) Act 2005*.

rule, in relation to State-registered association, has its ordinary meaning.

State demarcation order means a State award, to the extent that it relates to the rights of a State-registered association to represent the interests under a State or Territory industrial law of a particular class or group of employees.

State employment agreement means an agreement:

- (a) between an employer and one or more of the following:
 - (i) an employee of the employer;
 - (ii) a trade union; and
- (b) that regulates wages and conditions of employment of one or more of the employees; and
- (c) that is in force under a State or Territory industrial law; and
- (d) that prevails over an inconsistent State award.

State-registered association means a body that is:

- (a) an industrial organisation for the purposes of the *Industrial Relations Act 1996* of New South Wales; or
- (b) an organisation for the purposes of Chapter 12 of the *Industrial Relations Act 1999* of Queensland; or
- (c) an association or organisation for the purposes of the *Industrial Relations Act 1979* of Western Australia; or
- (d) a registered association for the purposes of the *Fair Work Act 1994* of South Australia; or
- (e) an organization for the purposes of the *Industrial Relations Act 1984* of Tasmania.

transitionally registered association means a State-registered association that is registered under this Schedule.

- (2) Unless the contrary intention appears, the following terms have the meaning they would have for the purposes of this Act on the reform commencement:
- (a) *employee*;
 - (b) *employer*;
 - (c) *employment*;
 - (d) *State or Territory industrial law*.

2 Application for transitional registration

- (1) A State-registered association may apply to a Registrar for transitional registration under this Schedule if:
- (b) immediately before the commencement of this Schedule, it had at least one member who was:
 - (i) an employee whose employment was subject to a State award, a State employment agreement or a State or Territory industrial law; or
 - (ii) an employer in relation to such an employee; and
 - (c) immediately before the commencement of this Schedule, it was entitled to represent the industrial interests of the member in relation to work that was subject to the State award, the State employment agreement or the State or Territory industrial law; and
 - (d) on the reform commencement, the employee will become bound by, or the employment of the employee will become subject to, a preserved State agreement or a notional agreement preserving State awards if he or she continues in that employment; and
 - (e) it is not also an organisation, or a branch of an organisation.
- (2) The application must be accompanied by:
- (a) evidence to establish the fact that the association satisfies subclause (1); and
 - (b) a copy of the current rules of the association; and
 - (c) a statement setting out:
 - (i) the address of the association; and
 - (ii) each office in the association; and
 - (iii) the name and address of each person holding office in the association.

- (3) If a Registrar is satisfied that the association satisfies subclause (1), the Registrar must, by written instrument, grant the application and record the fact that he or she is so satisfied.
- (4) An instrument under subclause (3) is not a legislative instrument.
- (5) The Registrar must give a copy of the instrument to the association.
- (6) A State-registered association is taken to be registered under this Schedule when the Registrar grants the application.

3 Application of this Act to transitionally registered associations

The provisions of this Act apply, on and after the reform commencement, in relation to a transitionally registered association:

- (a) in the same way as they apply in relation to an organisation; and
- (b) as if a transitionally registered association were a person.

4 Representation rights of transitionally registered associations of employees

- (1) Regulations made for the purposes of this subclause may make provision for the Commission to make orders in relation to the right of a transitionally registered association to represent the interests under this Act, on or after the reform commencement, of a particular class or group of employees.
- (2) Without limiting subclause (1), the regulations may specify the weight that the Commission is to give, in making such an order, to a State demarcation order.

5 Cancellation of transitional registration

Cancellation by the Federal Court

- (1) A person interested or the Minister may apply, on or after the reform commencement, to the Federal Court for an order cancelling the registration under this Schedule of a transitionally registered association on the ground that:
 - (a) the conduct of:

- (i) the association (in relation to its continued breach of an order of the Commission or an industrial instrument, or its continued failure to ensure that its members comply with and observe an order of the Commission or an industrial instrument, or in any other respect); or
 - (ii) a substantial number of the members of the association (in relation to their continued breach of an order of the Commission or an industrial instrument, or in any other respect);
- has, on or after the reform commencement, prevented or hindered the achievement of an object of this Act as in force at that time; or
- (b) the association, or a substantial number of the members of the association or of a section or class of members of the association, has engaged in industrial action that has, on or after the reform commencement, prevented, hindered or interfered with:
 - (i) the activities of a federal system employer; or
 - (ii) the provision of any public service by the Commonwealth or a State or Territory or an authority of the Commonwealth or a State or Territory; or
- (c) the association, or a substantial number of the members of the association or of a section or class of members of the association, has or have been, or is or are, engaged, on or after the reform commencement, in industrial action that has had, is having or is likely to have a substantial adverse effect on the safety, health or welfare of the community or a part of the community; or
- (d) the association, or a substantial number of the members of the association or of a section or class of members of the association, has or have failed to comply with one of the following made on or after the reform commencement:
 - (i) an injunction granted under subsection 111(12) (which deals with orders to stop industrial action); or
 - (ii) an order made under section 114A or 114B (which deal with contraventions of the strike pay provisions); or
 - (iii) an order under section 268 (which deals with contraventions of the freedom of association provisions); or

- (iv) an interim injunction granted under section 354A so far as it relates to conduct or proposed conduct that could be the subject of an injunction under a provision mentioned in subparagraphs (i) to (iii); or
 - (v) an order under section 23 of the Registration and Accountability of Organisations Schedule (which deals with contraventions of the employee associations provisions).
- (2) The Court must give the association an opportunity to be heard.
- (3) If the Court:
- (a) finds that a ground for cancellation set out in the application has been established; and
 - (b) does not consider that it would be unjust to do so having regard to the degree of gravity of the matters constituting the ground and the action (if any) that has been taken by or against the association in relation to the matters;
- the Court must cancel the registration of the association under this Schedule.
- (4) A finding of fact in proceedings under section 111, 114A, 114B or 268 commenced on or after the reform commencement, or section 23 of the Registration and Accountability of Organisations Schedule, is admissible as prima facie evidence of that fact in an application made on a ground specified in paragraph (1)(d).

Cancellation by Commission

- (5) The Commission may cancel the registration under this Schedule of a transitionally registered association:
- (a) on application by the association made under the regulations; or
 - (b) on application by a person interested or by the Minister, if the Commission has satisfied itself, as prescribed, that the association:
 - (i) was registered by mistake; or
 - (ii) is no longer a State-registered association.

Cancellation by Registrar

- (6) A Registrar may, by written instrument, cancel the registration under this Schedule of a transitionally registered association if he or she is satisfied that the association no longer exists.
- (7) An instrument under subclause (6) is not a legislative instrument.

6 End of transitional registration

The registration under this Schedule of a transitionally registered association ends:

- (a) when it is cancelled under clause 5; or
- (b) when the association becomes an organisation; or
- (c) in any other case—on the third anniversary of the commencement of this Schedule.

7 Modification of Registration and Accountability of Organisations Schedule

Regulations made for the purposes of this clause may modify how section 19 of the Registration and Accountability of Organisations Schedule applies in relation to an association that is a transitionally registered association.

Schedule 3—School-based apprentices and trainees

Workplace Relations Act 1996

1 After Part XVI

Insert:

Part XVII—School-based apprentices and trainees

Division 1—Preliminary

550 Definitions

In this Part:

additional condition means a condition under a wage instrument other than a rate of pay.

employee means an individual so far as he or she is employed, or usually employed, as described in the definition of *employer* in this section, by an employer, except on a vocational placement.

employer means:

- (a) a constitutional corporation, so far as it employs, or usually employs, an individual; or
- (b) the Commonwealth, so far as it employs, or usually employs, an individual; or
- (c) a Commonwealth authority, so far as it employs, or usually employs, an individual; or
- (d) a person or entity (which may be an unincorporated club) so far as the person or entity, in connection with constitutional trade or commerce, employs, or usually employs, an individual as:
 - (i) a flight crew officer; or
 - (ii) a maritime employee; or
 - (iii) a waterside worker; or

- (e) a body corporate incorporated in a Territory, so far as the body employs, or usually employs, an individual; or
- (f) a person or entity (which may be an unincorporated club) that carries on an activity (whether of a commercial, governmental or other nature) in a Territory in Australia, so far as the person or entity employs, or usually employs, an individual in connection with the activity carried on in the Territory.

full-time apprentice means a person employed on a full-time basis who is recognised, under the wage instrument that covers his or her employment, as an apprentice.

full-time trainee means a person employed on a full-time basis under a training arrangement who is not a full-time apprentice.

school-based apprentice means an employee:

- (a) whose employment is part of a school-based training arrangement; and
- (b) who would, if employed full-time under a training arrangement to do the same kind of work, in the same location and for the same employer, be a full-time apprentice.

school-based trainee means an employee, other than a school-based apprentice, whose employment is part of a school-based training arrangement.

school-based training arrangement means a training arrangement undertaken as part of a course of secondary education.

State or Territory training authority means a body authorised by a law or award of a State or Territory for the purpose of overseeing arrangements for the training of employees.

training arrangement means a combination of work and training that is subject to a training agreement or a training contract between the employee and employer that is registered:

- (a) with the relevant State or Territory training authority; or
- (b) under a law of a State or Territory relating to the training of employees.

wage instrument means:

- (a) an award (as defined in subsection 4(1)), but not including:

-
- (i) an order under section 120A; or
 - (ii) an award under section 170MX; or
 - (b) a law, or a provision of a law, of the Commonwealth, being a law or provision that is specified, or is of a kind specified, in regulations made for the purposes of this paragraph; or
 - (c) an instrument made under a law, or a provision of a law, of the Commonwealth, being an instrument that is specified, or is of a kind specified, in regulations made for the purposes of this paragraph; or
 - (d) a State award (as defined in subsection 4(1)); or
 - (e) a law, or a provision of a law, of a State or Territory, being a law or provision that entitles employees, or a particular class of employees, to payment of a particular rate of pay; or
 - (f) a law, or a provision of a law, of a State or Territory, being a law or provision that is specified, or is of a kind specified, in regulations made for the purposes of this paragraph; or
 - (g) an instrument made under a law, or a provision of a law, of a State or Territory, being an instrument that is specified, or is of a kind specified, in regulations made for the purposes of this paragraph.

work on-the-job, in relation to a school-based apprentice or school-based trainee, means work that contributes directly to the productive output of the employer of the school-based apprentice or school-based trainee.

Note: So, for example, time spent studying or in other off-the-job training or education would not be ***work on-the-job*** for the purposes of this Part.

Division 2—Concurrent operation of State and Territory laws

551 Concurrent operation of State and Territory laws

This Part does not apply to the exclusion of a law of a State or Territory to the extent that the law is capable of operating concurrently with this Part.

Division 3—School-based apprentices

552 Pay for school-based apprentices

Rate of pay is an hourly rate for work on-the-job

- (1) The rate of pay for a school-based apprentice is an hourly rate paid only for hours worked on-the-job and calculated using the formula:

$$\text{Full-time first-year apprentice hourly rate} \times \frac{125}{100}$$

where:

full-time first-year apprentice hourly rate means:

- (a) the hourly rate of pay specified, in the applicable wage instrument, for a full-time first-year apprentice doing the same kind of work, in the same location and for the same employer as the school-based apprentice; or
- (b) if the rate of pay specified in the applicable wage instrument is not an hourly rate—that rate converted into an hourly rate.

This section does not limit pay

- (2) To avoid doubt, this section does not operate to prevent the school-based apprentice from receiving a rate of pay more generous than the rate calculated in accordance with subsection (1).

School-based apprentices not covered by this section

- (3) This section does not apply to a school-based apprentice if:
- (a) a wage instrument covers the work of the school-based apprentice; and
 - (b) the wage instrument specifies the rate of pay for the school-based apprentice; and
 - (c) the wage instrument does so by making specific provision for school-based apprentices.

553 Additional conditions for school-based apprentices

Additional conditions adjusted as necessary

- (1) A school-based apprentice is entitled, in accordance with subsection (2), to any additional conditions (the **full-time conditions**) to which a full-time apprentice doing the same kind of work, in the same location and for the same employer would be entitled.
- (2) The school-based apprentice is entitled to the full-time conditions adjusted as necessary in proportion to the hours worked on-the-job by the school-based apprentice.
- (3) For the purposes of subsection (2), the regulations may determine, or make provision for determining, either or both of the following:
 - (a) whether particular full-time conditions should be adjusted in proportion to the hours worked on-the-job by the school-based apprentice;
 - (b) the method for adjusting particular full-time conditions in proportion to the hours worked on-the-job by the school-based apprentice.

This section does not limit additional conditions

- (4) To avoid doubt, this section does not operate to prevent the school-based apprentice from receiving conditions more generous than those provided by this section.

School-based apprentices not covered by this section

- (5) This section does not apply to a school-based apprentice if:
 - (a) a wage instrument covers the work of the school-based apprentice; and
 - (b) the wage instrument specifies the rate of pay for the school-based apprentice; and
 - (c) the wage instrument does so by making specific provision for school-based apprentices.

554 Pay for apprentices who were school-based apprentices

- (1) Subsection (2) applies for the purposes of determining the rate of pay under a wage instrument for a full-time apprentice doing the same kind of work he or she did as a school-based apprentice.
- (2) The person's time as a full-time apprentice is taken to include the period calculated using the formula:

$$\text{Time as a school-based apprentice} \times \frac{1}{2}$$

where:

time as a school-based apprentice means the time for which the person was a school-based apprentice.

Division 4—School-based trainees

555 Pay for school-based trainees

Rate of pay is an hourly rate for work on-the-job

- (1) The rate of pay for a school-based trainee is the rate as follows, paid only for hours worked on-the-job:
 - (a) for a calendar year in which the school-based trainee is enrolled in a Year up to and including Year 11—\$7.27 per hour;
 - (b) for a calendar year in which the school-based trainee is enrolled in Year 12 or a later Year—\$7.99 per hour.

This section does not limit pay

- (2) To avoid doubt, this section does not operate to prevent the school-based trainee from receiving a rate of pay more generous than the rate specified by subsection (1).

School-based trainees not covered by this section

- (3) This section does not apply to a school-based trainee if:
 - (a) a wage instrument covers the work of the school-based trainee; and

-
- (b) the wage instrument specifies the rate of pay for the school-based trainee; and
 - (c) the wage instrument does so by making specific provision for school-based trainees.

556 Additional conditions for school-based trainees

Additional conditions adjusted as necessary

- (1) A school-based trainee is entitled, in accordance with subsection (2), to any additional conditions (the **full-time conditions**) to which a full-time trainee doing the same kind of work, in the same location and for the same employer would be entitled.
- (2) The school-based trainee is entitled to the full-time conditions adjusted as necessary in proportion to the hours worked on-the-job by the school-based trainee.
- (3) For the purposes of subsection (2), the regulations may determine, or make provision for determining, either or both of the following:
 - (a) whether particular full-time conditions should be adjusted in proportion to the hours worked on-the-job by the school-based trainee;
 - (b) the method for adjusting particular full-time conditions in proportion to the hours worked on-the-job by the school-based trainee.
- (4) Subsection (2) has effect subject to section 557.

This section does not limit additional conditions

- (5) To avoid doubt, this section does not operate to prevent a school-based trainee from receiving conditions more generous than those provided by this section.

School-based trainees not covered by this section

- (6) This section does not apply to a school-based trainee if:
 - (a) a wage instrument covers the work of the school-based trainee; and
 - (b) the wage instrument specifies the rate of pay for the school-based trainee; and

- (c) the wage instrument does so by making specific provision for school-based trainees.

557 Loading in lieu of certain conditions

- (1) The employer of a school-based trainee may, with the written agreement of the school-based trainee, pay the school-based trainee a loading in lieu of paid annual leave, paid sick leave, paid personal leave and payment for public holidays.
- (2) The loading is payable for all hours worked on-the-job and is calculated using the formula:

$$\text{Hourly rate} \times \frac{20}{100}$$

where:

hourly rate means the hourly rate paid to the school-based trainee apart from this section.

Note: The loading does not compensate for work done on a public holiday. A school-based trainee who works on a public holiday would be paid the applicable hourly rate for such work.

Division 5—Enforcement

558 Enforcement

Part VIII has effect, in relation to a school-based apprentice or a school-based trainee who is entitled to be paid, or provided additional conditions, in accordance with subsection 552(1), 553(2), 555(1) or 556(2), as if the subsection were a term of an award:

- (a) that bound the employer of the school-based apprentice or school-based trainee; and
- (b) to which the employment of the school-based apprentice or school-based trainee was subject.

Schedule 3A—Redundancy pay by small business employers

Workplace Relations Act 1996

1 Paragraph 89A(2)(m)

Repeal the paragraph, substitute:

(m) redundancy pay by an employer of 15 or more employees;

2 Subsection 89A(7)

Omit “Subsection (1)”, substitute “Subject to subsection (7A), subsection (1)”.

3 After subsection 89A(7)

Insert:

(7A) In spite of subsection (7), subsection (1) excludes from an industrial dispute the matter of redundancy pay by an employer of fewer than 15 employees.

4 After subsection 89A(8)

Insert:

Interpretation—redundancy pay provisions

(8A) For the purposes of paragraph (2)(m) and subsection (7A):

(a) whether an employer employs 15 or more employees, or fewer than 15 employees, is to be worked out as at the time (the *relevant time*):

- (i) when notice of the redundancy is given by the employer or by the employee who becomes redundant; or
- (ii) when the redundancy occurs;

whichever happens first; and

(b) a reference to employees includes a reference to:

- (i) the employee who becomes redundant and any other employee who becomes redundant at the relevant time; and

- (ii) any casual employee who, at the relevant time, has been engaged by the employer on a regular and systematic basis for at least 12 months (but not including any other casual employee).

5 After Part VI

Insert:

Part VIAAA—State and Territory laws etc. about redundancy payments by small businesses

167 Certain small businesses not bound by requirement to pay redundancy pay

- (1) This section applies to a State law, a State award, a State authority order or a Territory law (each of which is an *eligible instrument*).
- (2) If an eligible instrument would, apart from this section, have the effect of requiring a relevant employer that employs fewer than 15 employees to pay redundancy pay, the eligible instrument does not have that effect.
- (3) For the purposes of subsection (2):
 - (a) whether a relevant employer employs fewer than 15 employees is to be worked out as at the time (the *relevant time*):
 - (i) when notice of the redundancy is given by the employer or by the employee who becomes redundant; or
 - (ii) when the redundancy occurs;whichever happens first; and
 - (b) a reference to employees includes a reference to:
 - (i) the employee who becomes redundant and any other employee who becomes redundant at the relevant time; and
 - (ii) any casual employee who, at the relevant time, has been engaged by the relevant employer on a regular and systematic basis for at least 12 months (but not including any other casual employee).
- (4) In this section:

relevant employer means:

- (a) in the case of a State law, a State award or a State authority order—a constitutional corporation; or
- (b) in the case of a Territory law—any employer.

State authority order means an order made, or any other thing done, by a State industrial authority.

State law means a law of a State (including any regulations or other instruments made under a law of a State), but does not include a State employment agreement.

Territory law means a law of a Territory (including any regulations or other instruments made under a law of a Territory).

6 At the end of section 170FA

Add:

- (3) In so far as an order is made for the purposes of Article 12 of that Convention, the Commission must not make an order in relation to the matter of redundancy pay by an employer of fewer than 15 employees.
- (4) For the purposes of subsection (3):
 - (a) whether an employer employs fewer than 15 employees is to be worked out as at the time (the **relevant time**):
 - (i) when notice of the redundancy is given by the employer or by the employee who becomes redundant; or
 - (ii) when the redundancy occurs;
whichever happens first; and
 - (b) a reference to employees includes a reference to:
 - (i) the employee who becomes redundant and any other employee who becomes redundant at the relevant time; and
 - (ii) any casual employee who, at the relevant time, has been engaged by the employer on a regular and systematic basis for at least 12 months (but not including any other casual employee).

7 Application

- (1) The amendments made by items 1 to 4 apply to:
-

- (a) dealing with an industrial dispute by arbitration after the commencement of this Schedule; and
 - (b) preventing or settling an industrial dispute by making an award or order after the commencement of this Schedule; and
 - (c) maintaining the settlement of an industrial dispute by varying an award or order after the commencement of this Schedule;
- whether the industrial dispute arose before or arises after the commencement of this Schedule.
- (2) The amendment made by item 5 applies to:
 - (a) an eligible instrument made after the commencement of this Schedule that has the effect mentioned in subsection 167(2) of the *Workplace Relations Act 1996* as inserted by that item; and
 - (b) an eligible instrument, made before or after the commencement of this Schedule, that is amended or varied after the commencement of this Schedule with the result that it has that effect.
 - (3) The amendment made by item 6 applies to the making of orders after the commencement of this Schedule.

8 Transitional—awards and orders of the Commission

- (1) If, during the period from the start of 26 March 2004 until the commencement of this Schedule, the Commission:
 - (a) made an award or order that had the effect of requiring an employer of fewer than 15 employees to pay redundancy pay; or
 - (b) varied an award or order, made before or during that period, with the result that it had that effect;then, from the commencement of this Schedule, the award or order ceases to have that effect.
- (2) For the purposes of paragraph (1)(a):
 - (a) whether an employer employs fewer than 15 employees is to be worked out as at the time (the *relevant time*):
 - (i) when notice of the redundancy is given by the employer or by the employee who becomes redundant; or
 - (ii) when the redundancy occurs;whichever happens first; and

- (b) a reference to employees includes a reference to:
 - (i) the employee who becomes redundant and any other employee who becomes redundant at the relevant time; and
 - (ii) any casual employee who, at the relevant time, has been engaged by the employer on a regular and systematic basis for at least 12 months (but not including any other casual employee).

9 Transitional—eligible instruments

Item applies to eligible instruments with small business redundancy pay requirements just before commencement

- (1) This item applies if, just before the commencement of this Schedule, an eligible instrument contained provisions requiring some or all relevant employers (the *affected employers*) that employ fewer than 15 employees to pay redundancy pay.

Eligible instruments that began to provide for small business redundancy pay between 26 March 2004 and commencement

- (2) If:
 - (a) the eligible instrument was made before 26 March 2004 and just before 26 March 2004 the eligible instrument did not contain provisions requiring the affected employers to pay redundancy pay; or
 - (b) the eligible instrument was made on or after 26 March 2004;then, from the commencement of this Schedule, the provisions do not have the effect of requiring any affected employers to pay redundancy pay.

Eligible instruments where Federal award suppressed a small business redundancy pay requirement that was present just before 26 March 2004

- (3) If:
 - (a) just before 26 March 2004, the eligible instrument contained provisions requiring the affected employers to pay redundancy pay; and
 - (b) only because of a Federal award, the provisions did not, just before the commencement of this Schedule, have the effect

of requiring a particular affected employer to pay redundancy pay;

then the provisions do not, at or at any time after the commencement of this Schedule, have that effect in relation to the particular affected employer.

Eligible instruments where certified agreement or AWA suppressed a small business redundancy pay requirement that was present just before 26 March 2004, and a Federal award would also have had that effect

(4) If:

- (a) just before 26 March 2004, the eligible instrument contained provisions requiring the affected employers to pay redundancy pay; and
- (b) just before the commencement of this Schedule:
 - (i) only because of a certified agreement or an AWA, the provisions did not have the effect of requiring a particular affected employer to pay redundancy pay; and
 - (ii) disregarding the certified agreement or the AWA, the provisions would still not have had that effect, and this would have been so only because of a Federal award;

then the provisions do not, at or at any time after the commencement of this Schedule, have that effect in relation to the particular affected employer.

Eligible instruments where small business redundancy pay requirement was present just before 26 March 2004 and a future Federal award starts to apply

(5) If:

- (a) just before 26 March 2004, the eligible instrument contained provisions requiring the affected employers to pay redundancy pay; and
- (b) neither subitem (3) nor subitem (4) applies; and
- (c) the eligible instrument contains the provisions from the commencement of this Schedule until a later time (the **award time**) when a particular affected employer becomes bound by a Federal award; and
- (d) the Federal award applies in relation to some or all of the particular affected employer's employees (the **affected**

employees) to whom the requirement to pay redundancy pay relates;

then, from the award time, the provisions do not have the effect of requiring the particular affected employer to pay redundancy pay in respect of the affected employees.

Definitions

(6) In this item:

eligible instrument has the meaning given by subsection 167(1) of the *Workplace Relations Act 1996* as inserted by item 5 of this Schedule.

Federal award means an award under the *Workplace Relations Act 1996*.

relevant employer has the meaning given by subsection 167(4) of the *Workplace Relations Act 1996* as inserted by item 5 of this Schedule.

10 Protection of existing entitlements

Nothing in this Schedule, or an amendment made by this Schedule, affects any entitlement to a payment that had arisen before the commencement of this Schedule.

Schedule 4—Transitional and other provisions

Part 1—Regulations for transitional etc. provisions and consequential amendments

1 Regulations may deal with transitional etc. matters

- (1) The Governor-General may make regulations dealing with matters of a transitional, saving or application nature relating to amendments made by this Act.
- (2) Despite subsection 12(2) of the *Legislative Instruments Act 2003*, regulations made under this item may be expressed to take effect from a date before the regulations are registered under that Act.
- (3) In this item:
amendments made by this Act includes amendments made by regulations under item 2.

2 Regulations may make consequential amendments of Acts

- (1) The Governor-General may make regulations amending Acts (including the *Workplace Relations Act 1996*), being amendments that are consequential on, or that otherwise relate to, amendments made by this Act.
- (2) Despite subsection 12(2) of the *Legislative Instruments Act 2003*, regulations made under this item may be expressed to take effect from a date before the regulations are registered under that Act.
- (3) For the purposes of the *Amendments Incorporation Act 1905*, amendments made by regulations for the purposes of this item are to be treated as if they had been made by an Act.

Note: This subitem ensures that the amendments can be incorporated into a reprint of the Act.

Part 2—Transitional, application and saving provisions

Division 1—Definitions used in this Part

3 Definitions

In this Part:

amended Act means the *Workplace Relations Act 1996* as amended by this Act.

reform commencement has the meaning given by subsection 4(1) of the amended Act.

Division 2—Awards

4 Operation of awards in force before commencement

(1) In this item:

award means an award within the meaning of subsection 4(1) of the *Workplace Relations Act 1996* as in force immediately before the reform commencement.

eligible entity has the same meaning as in Division 6A of Part VI of the amended Act.

employee has the meaning given by subsection 4AA(1) of the amended Act.

employer has the meaning given by subsection 4AB(1) of the amended Act.

outworker term has the same meaning as in Division 6A of Part VI of the amended Act.

(2) This item applies to an award (the *original award*) in force immediately before the reform commencement.

(3) The original award is taken to be replaced by an instrument (the *pre-reform award*) in the same terms as the original award that, on and from the reform commencement, has effect under the *Workplace Relations Act 1996* and binds the following:

- (a) each employer that was bound immediately before the reform commencement by the original award;

- (b) each organisation that was bound immediately before the reform commencement by the original award;
 - (c) each employee of an employer referred to in paragraph (a), in relation to the employee's employment by the employer, to the extent that the original award regulates work performed by the employee;
 - (d) each eligible entity that was bound immediately before the reform commencement by the original award, but only in relation to outworker terms.
- (4) To avoid doubt, the pre-reform award binds an employer or eligible entity that was bound by the original award immediately before the reform commencement, whether the employer or eligible entity was bound:
- (a) in its own right or as a member of an organisation; or
 - (b) because of the operation of paragraph 149(1)(d) or (e) of the *Workplace Relations Act 1996*, as in force immediately before the reform commencement.
- (5) To avoid doubt, if the original award bound an employer, an eligible entity or an organisation as a common rule under paragraph 149(1)(e), the pre-reform award is, to the extent that the pre-reform award binds that employer, eligible entity or organisation, subject to any conditions, exceptions or limitations to which the original award was subject because of the operation of section 141 of the *Workplace Relations Act 1996* as in force immediately before the reform commencement.

5 Transitional provision for redundancy pay—repeal of paragraph 89A(2)(m)

The repeal of paragraph 89A(2)(m) (redundancy pay) of the *Workplace Relations Act 1996*, as in force immediately before the reform commencement, does not affect any entitlement to a payment that had arisen before that day.

5A Saving provision relating to awards and orders made before 26 March 2004

If:

- (a) before the start of 26 March 2004, a term of an award or order had the effect of requiring an employer of fewer than 15 employees to pay redundancy pay (within the meaning of paragraph 513(4)(b) of the amended Act); and

- (b) that term of the award or order continued in effect until immediately before the reform commencement; and
- (c) immediately after the reform commencement, that term of the award or order:
 - (i) became a term of a pre-reform award because of the operation of item 4 of this Schedule; or
 - (ii) continued in operation as a term of a transitional award because of the operation of clause 4 of Schedule 13 to the amended Act;

section 116L of the amended Act, or clause 27 of Schedule 13 to the amended Act, as the case requires, does not affect the operation of that term of the award or order and the term continues in effect as a term of the pre-reform award or the transitional award, to the extent that the term requires the payment of redundancy pay within the meaning of paragraph 513(4)(b) of the amended Act.

6 Terms of awards that cease to have effect

To avoid doubt, the following provisions do not affect any rights accrued or liabilities incurred under an award before the reform commencement:

- (a) section 116L of the amended Act;
- (b) clause 27 of Schedule 13 to the amended Act.

Division 3—Termination of employment

7 Application to terminations that occur after the reform commencement

- (1) The amendments made by the items of Schedule 1 referred to in subitem (2) apply in relation to terminations of employment that occur after the reform commencement (whether the employment commenced before or after that commencement).
- (2) The items of Schedule 1 are as follows:
 - (a) item 81;
 - (b) items 84 to 86;
 - (c) items 88 to 92;
 - (d) items 94 to 98;
 - (e) items 106 to 110;
 - (f) items 112 to 118;

- (g) item 122;
- (h) items 124 and 125;
- (i) item 127;
- (j) items 129 and 130;
- (k) items 132 to 134;
- (l) items 136 to 138;
- (m) item 140;
- (n) items 142 to 144;
- (o) items 150 to 153;
- (p) item 159;
- (q) item 163.

8 Application of item 111

The amendment of the *Workplace Relations Act 1996* made by item 111 of Schedule 1 applies to an application under section 170CE of that Act that relates to employment commenced after the reform commencement.

9 Application of items 145 to 149

- (1) The amendments of the *Workplace Relations Act 1996* made by items 145 to 149 of Schedule 1 apply in relation to an application for an order under section 170GA of that Act that is made on or after the reform commencement.
- (2) Division 2 of Part VI of the *Workplace Relations Act 1996*, as in force immediately before the reform commencement, continues to apply, as provided by section 170GD of that Act, as in force immediately before the reform commencement, to an application for an order under section 170GA of that Act that was made, but not determined, before the reform commencement.

10 Transitional provision for termination of employment

- (1) Paragraph (a) of the definition of *daily hire employee* in subsection 170CD(1) of the *Workplace Relations Act 1996* has effect, on and after the reform commencement, as if a reference in that paragraph to an award included a reference to the following:
 - (a) a pre-reform certified agreement;
 - (b) a notional agreement preserving State awards;
 - (c) a preserved State agreement;
-

- (d) a transitional award;
 - (e) an old IR agreement;
 - (f) a pre-reform AWA;
 - (g) a common rule continued in effect by clause 82 of Schedule 13.
- (2) Subsection 170CD(3) and section 170JG of the *Workplace Relations Act 1996* have effect, on and after the reform commencement, as if a reference in those provisions to an award included a reference to the following:
- (a) a pre-reform certified agreement;
 - (b) a notional agreement preserving State awards;
 - (c) a preserved State agreement;
 - (d) a transitional award;
 - (e) an old IR agreement;
 - (f) a pre-reform AWA;
 - (g) a common rule continued in effect by clause 82 of Schedule 13.
- (3) In this item:
- notional agreement preserving State awards*** has the meaning given by Schedule 15 to the amended Act.
- old IR agreement*** has the meaning given by Schedule 14 to the amended Act.
- pre-reform AWA*** means an AWA that:
- (a) was made at any time before the reform commencement; and
 - (b) was approved under Part VID of the *Workplace Relations Act 1996* as in force at any time before that commencement; and
 - (c) was in operation immediately before that commencement.
- pre-reform certified agreement*** has the meaning given by Schedule 14 to the amended Act.
- preserved State agreement*** has the meaning given by Schedule 15 to the amended Act.
- transitional award*** has the meaning given by Schedule 13 to the amended Act.

Division 4—Miscellaneous

11 Investigations started by authorised officers

An investigation started but not completed by an authorised officer before the reform commencement for the compliance purposes referred to in section 83BH of the *Workplace Relations Act 1996* (as in force before the reform commencement) may be completed after the reform commencement by a workplace inspector.

12 Application of section 83BS to pre-reform AWAs

Section 83BS of the *Workplace Relations Act 1996* (as in force after the reform commencement) applies to the identification of a person, after the reform commencement, as being, or as having been, a party to a pre-reform AWA in the same way as it applies to the identification of a person.

13 Saving of existing inspectors' appointments

- (1) If an appointment of a person as an inspector under subsection 84(2) of the *Workplace Relations Act 1996* was in force immediately before the reform commencement, the appointment continues in force for its unexpired period, despite the repeal and substitution of subsection 84(2) of that Act, as if the person had been appointed as a workplace inspector under subsection 84(2) of the amended Act.
- (2) Subitem (1) does not prevent the Minister from revoking the appointment.

14 Repeal of Part VA

- (1) In this item:
BCII Act means the *Building and Construction Industry Improvement Act 2005*.
- (2) Division 1 of Part 2 of Chapter 7 of the BCII Act has effect as if information given to, a document produced to, or answers to questions given to, the Secretary or an assistant before the reform commencement under section 88AA of the *Workplace Relations Act 1996* had been given or produced to the ABC Commissioner under section 52 of the BCII Act.

- (3) The information, document or answers may be used for the purposes of proceedings under the BCII Act.
- (4) Despite the repeal of Part VA of the *Workplace Relations Act 1996*, the Commonwealth Ombudsman must conduct a review under section 88AI of that Act of the use of the power given by section 88AA of that Act.
- (5) The review must relate to the period starting on 13 January 2006 and ending on the reform commencement (rather than to a year to which section 88AA applies as defined in subsection 88AI(4)).
- (6) Subsections 88AI(2) and (3) of the *Workplace Relations Act 1996* apply for the purposes of that review.

15 Application of hours of work provisions of Standard to pre-reform awards

- (1) Division 3 of Part VA (hours of work) does not apply to the employment of an employee while the employee is bound by a pre-reform award in relation to the employment at any time during the period of 3 years that starts on the reform commencement.
- (2) In subitem (1):
pre-reform award has the meaning given by subsection 4(1) of the amended Act.

16 Succession, transmission or assignment of business

Part VIAA of, and Schedule 16 to, the *Workplace Relations Act 1996* apply to a succession, transmission or assignment of a business, or a part of a business, that occurs on or after the reform commencement.

17 Application of conciliation and mediation provisions relating to equal remuneration for equal work

Sections 170BDA, 170BDB and 170BDC of the *Workplace Relations Act 1996* apply only to applications for orders under Division 2 of Part VIA of that Act made on or after the reform commencement.

18 Application of parental leave

- (1) Division 5 of Part VIA of the amended Act does not apply in relation to particular employment of an employee if the employment is wholly regulated by one or more of the following:
 - (a) pre-reform certified agreement;

Schedule 4 Transitional and other provisions

Part 2 Transitional, application and saving provisions

- (b) a notional agreement preserving State awards;
 - (c) a preserved State agreement;
 - (d) an old IR agreement;
 - (e) a pre-reform AWA;
 - (f) a 170MX award;
 - (g) a transitional award.
- (2) Division 5 of Part VIA of the *Workplace Relations Act 1996*, as in force immediately before the repeal and substitution of that Division by this Act, continues to apply in relation to employment of an employee to which subitem (1) applies.
- (3) In this item:

170MX award means an award:

- (a) made under subsection 170MX(3) of the *Workplace Relations Act 1996* as in force at any time before the reform commencement; and
- (b) in operation immediately before that commencement, or made after that commencement because of Part 8 of Schedule 14 to the amended Act.

notional agreement preserving State awards has the meaning given by Schedule 15 to the amended Act.

old IR agreement has the meaning given by Schedule 14 to the amended Act.

pre-reform AWA means an AWA that:

- (a) was made at any time before the reform commencement; and
- (b) was approved under Part VID of the *Workplace Relations Act 1996* as in force at any time before that commencement; and
- (c) was in operation immediately before that commencement.

pre-reform certified agreement has the meaning given by Schedule 14 to the amended Act.

preserved State agreement has the meaning given by Schedule 15 to the amended Act.

transitional award has the meaning given by Schedule 13 to the amended Act.

19 Application of Part VC of amended Act

Part VC of the amended Act applies, according to its terms, to actions or states of affairs occurring after the commencement of the Part (even if the actions or states of affairs started to occur before that commencement).

20 Application in relation to negotiations for workplace agreements

- (1) This item applies to a matter if:
 - (a) the matter arose before the reform commencement under Division 8 of Part VIB of the *Workplace Relations Act 1996*, as in force at that time; and
 - (b) the Commission has begun to exercise its conciliation powers under section 170NA, as in force at that time, in relation to the matter.
- (1A) This item applies subject to:
 - (a) Parts 4 and 8 of Schedule 14 to the amended Act; and
 - (b) item 20A of this Schedule.
- (2) Despite the amendments made by items 71 and 168, the *Workplace Relations Act 1996* continues to apply during the transitional period in relation to the matter as if the amendments had not been made.
- (3) After the end of the transitional period, the *Workplace Relations Act 1996*, as amended by those items, applies in relation to the matter.
- (4) In this item:
transitional period means the period of 3 months commencing on the reform commencement.

20A Continuation of section 170MX proceedings under new provisions for workplace determinations

- (1) This item applies if:
 - (a) a bargaining period was terminated on the ground set out in subsection 170MW(3) or (7) of the *Workplace Relations Act 1996* before the reform commencement; and
 - (b) the Commission had not started to exercise arbitration powers in accordance with subsection 170MX(3) of the

Workplace Relations Act 1996 before the reform commencement in relation to the bargaining period; and

- (c) had this Act not amended the *Workplace Relations Act 1996*, the Commission would have been able to make an award under subsection 170MX(3) of the *Workplace Relations Act 1996* after the reform commencement in relation to the bargaining period.
- (2) Division 8 of Part VC of the amended Act applies in relation to the bargaining period (in accordance with item 19 of this Schedule) as if:
 - (a) the termination of the bargaining period were the termination of a bargaining period on the ground set out in subsection 107G(3) of the amended Act; and
 - (b) that termination happened on the reform commencement.
 - (3) A reference in this item to subsection 170MX(3) of the *Workplace Relations Act 1996* does not include a reference to that subsection as it had effect because of repealed Division 2 of Part XV of that Act.

21 Application of new offences in section 299

- (1) Subsection 299(3) of the amended Act applies to conduct engaged in after the reform commencement, whether the order contravened by the conduct was made before, on or after that commencement.
- (2) Subsection 299(5) of the amended Act applies to the publication of a statement after the reform commencement, whether the statement was made before, on or after that commencement.

22 Transitional provision—entry permits

- (1) If a permit was in force under the repealed Part IX immediately before the reform commencement:
 - (a) the permit continues in force as if it had been issued under the new Part IX; and
 - (b) the permit may be revoked or suspended under the new Part IX.
 - (2) In this item:
 - new Part IX* means Part IX of the amended Act.
 - repealed Part IX* means Part IX of the *Workplace Relations Act 1996* as in force immediately before the reform commencement.
-

23 Application provisions relating to registered organisations

- (1) The amendments made by items 273, 274, 289, 291, 292, 294, 295 and 296 of Schedule 1 apply in relation to an application for registration granted on or after the reform commencement.
- (2) The amendments made by item 297 of Schedule 1 apply in relation to conduct that relates to the formation or registration of an association on or after the reform commencement.
- (3) The amendments made by items 298 to 304 of Schedule 1 apply in relation to an application for an order cancelling the registration of an organisation made on or after the reform commencement.
- (4) The amendment made by item 309 of Schedule 1 applies in relation to an application for a determination made on or after the reform commencement.
- (5) The amendments made by items 314 to 319 of Schedule 1 apply in relation to an application made on or after the reform commencement.
- (6) The amendment made by item 322 of Schedule 1 applies in relation to an agreement that becomes binding on an amalgamated association on or after the reform commencement.
- (7) The amendment made by item 329 of Schedule 1 applies in relation to a rule imposed on or after the reform commencement.
- (8) The amendments made by items 331 and 332 of Schedule 1 apply in relation to a direction given on or after the reform commencement.
- (9) The amendments made by items 335 and 336 of Schedule 1 apply in relation to an application made on or after the reform commencement.
- (10) The amendment made by item 347 of Schedule 1 applies in relation to a disclosure made on or after the reform commencement.

24 Transitional provision relating to registered organisations

Despite the amendment made by item 306 of Schedule 1, subparagraph 30(1)(c)(v) of Schedule 1 to the amended Act does not apply for the period of 3 years after the reform commencement in relation to an organisation whose application for registration was granted before that commencement.

Schedule 5—Renumbering the Workplace Relations Act 1996

Workplace Relations Act 1996

1 Renumbering the Workplace Relations Act (other than the Schedules)

- (1) In this item:
main Act means the *Workplace Relations Act 1996*, but does not include any of the Schedules to that Act.
- (2) The Parts of the main Act are renumbered so that they bear consecutive Arabic numerals starting with “1”.
- (3) The Divisions of each Part of the main Act are renumbered so that they bear consecutive Arabic numerals starting with “1”.
- (4) The Subdivisions of each Division of each Part of the main Act are relettered so that they bear upper-case letters in alphabetical order starting with “A”.
- (5) The sections of the main Act are renumbered in a single series so that they bear consecutive Arabic numerals starting with “1”.
- (6) The subsections of each section of the main Act are renumbered so that they bear consecutive Arabic numerals enclosed in parentheses starting with “(1)”.
- (7) The paragraphs of each section or subsection, or of each definition, of the main Act are relettered so that they bear lower-case letters in alphabetical order enclosed in parentheses starting with “(a)”.
- (8) The subparagraphs of each paragraph of each section or subsection, or of each paragraph of each definition, of the main Act are renumbered so that they bear consecutive lower-case Roman numerals enclosed in parentheses starting with “(i)”.
- (9) The sub-subparagraphs of each subparagraph of each paragraph of each section or subsection, or of each subparagraph of each paragraph of each definition, of the main Act are relettered so that they bear

upper-case letters in alphabetical order in parentheses starting with “(A)”.

- (10) Subject to subitem (12), each provision of the main Act that refers to a provision that has been renumbered or relettered under this item is amended by omitting the reference and substituting a reference to the last-mentioned provision as renumbered or relettered.
- (11) Subject to subitem (12), each provision of the main Act that refers to a Schedule that has been renumbered by item 2 is amended by omitting the reference and substituting a reference to the Schedule as so renumbered.
- (12) Subitems (10) and (11) do not apply to a reference that is expressed as a reference to a provision or Schedule as in force at a time that is before the commencement of this item.

Note: Each heading to a section or subsection of the *Workplace Relations Act 1996* (not including the Schedules) that refers to a provision or Schedule that has been renumbered or relettered under this item or item 2 is (unless the reference is of a kind mentioned in subitem (12)) amended by omitting the reference and substituting a reference to the provision or Schedule as so renumbered or relettered.

2 Limited renumbering of Schedules to the Workplace Relations Act

- (1) In this item:
main Act (plus Schedules) means the *Workplace Relations Act 1996*, including the Schedules to that Act.
- (2) The Schedules to the main Act (plus Schedules) are renumbered so that they bear consecutive Arabic numerals starting with “1”.
- (3) Subject to subitem (5), each provision of the main Act (plus Schedules) that refers to a Schedule that has been renumbered under this item is amended by omitting the reference and substituting a reference to that Schedule as renumbered.
- (4) Subject to subitem (5), each provision of a Schedule to the main Act (plus Schedules) that refers to a provision that has been renumbered or relettered under item 1 is amended by omitting the reference and substituting a reference to the last-mentioned provision as so renumbered or relettered.

- (5) Subitems (3) and (4) do not apply to a reference that is expressed as a reference to a Schedule or provision as in force at a time that is before the commencement of this item.

Note: Each heading to a section or subsection, or to a clause or subclause, of a Schedule to the *Workplace Relations Act 1996* that refers to a provision or Schedule that has been renumbered under this item or item 1 is (unless the reference is of a kind mentioned in subitem (5)) amended by omitting the reference and substituting a reference to the Schedule as so renumbered.

3 References in other Acts to renumbered provisions and Schedules

- (1) Subject to subitem (2), after the commencement of this item, a reference in a provision of an Act (other than the *Workplace Relations Act 1996*) enacted before the commencement of this item (whether or not that provision has come into operation), or in an instrument or document, to a provision of, or Schedule to, the *Workplace Relations Act 1996* that has been renumbered or relettered under item 1 or 2 is to be construed as a reference to that provision or Schedule as so renumbered or relettered.

- (2) Subitem (1) does not apply to a reference that is expressed as a reference to a Schedule or provision as in force at a time that is before the commencement of this item.

Note: A reference in a heading to a section, or to a subsection, of an Act (other than the *Workplace Relations Act 1996*) enacted before the commencement of this item (whether or not that provision has come into operation), or in an instrument or a document, to a provision of, or Schedule to, the *Workplace Relations Act 1996* that has been renumbered or relettered under item 1 or 2 is (unless the reference is of a kind mentioned in subitem (2)) to be construed as a reference to that provision or Schedule as so renumbered or relettered.