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This compilation is in 2 volumes

Volume 1:	**sections 1–536**
Volume 2:	sections 537–800 Schedules Endnotes

Each volume has its own contents

This compilation includes commenced amendments made by Act No. 126, 2015

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About this compilation

This compilation

This is a compilation of the *Fair Work Act 2009* that shows the text of the law as amended and in force on 5 March 2016 (the ***compilation date***).

The notes at the end of this compilation (the ***endnotes***) include information about amending laws and the amendment history of provisions of the compiled law.

Uncommenced amendments

The effect of uncommenced amendments is not shown in the text of the compiled law. Any uncommenced amendments affecting the law are accessible on the Legislation Register (www.legislation.gov.au). The details of amendments made up to, but not commenced at, the compilation date are underlined in the endnotes. For more information on any uncommenced amendments, see the series page on the Legislation Register for the compiled law.

Application, saving and transitional provisions for provisions and amendments

If the operation of a provision or amendment of the compiled law is affected by an application, saving or transitional provision that is not included in this compilation, details are included in the endnotes.

Editorial changes

For more information about any editorial changes made in this compilation, see the endnotes.

Modifications

If the compiled law is modified by another law, the compiled law operates as modified but the modification does not amend the text of the law. Accordingly, this compilation does not show the text of the compiled law as modified. For more information on any modifications, see the series page on the Legislation Register for the compiled law.

Self-repealing provisions

If a provision of the compiled law has been repealed in accordance with a provision of the law, details are included in the endnotes.

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An Act relating to workplace relations, and for related purposes

Chapter 1—Introduction

Part 1-1—Introduction

Division 1—Preliminary

1 Short title

This Act may be cited as the *Fair Work Act 2009*.

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 and 2 and anything in this Act not elsewhere covered by this table	The day on which this Act receives the Royal Assent.	7 April 2009
2. Sections 3 to 40	A single day to be fixed by Proclamation. However, if any of the provision(s) do not commence within the period of 12 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.	26 May 2009 (*see* F2009L01818)

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Commencement information		
Column 1	**Column 2**	**Column 3**
Provision(s)	**Commencement**	**Date/Details**
3. Sections 41 to 572	A day or days to be fixed by Proclamation. A Proclamation must not specify a day that occurs before the day on which the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* receives the Royal Assent. However, if any of the provision(s) do not commence within the period of 12 months beginning on the day on which the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* receives the Royal Assent, they commence on the first day after the end of that period.	Sections 41–43, 50–54, 58, 169–281A, 300–327, 332, 333, 334–572: 1 July 2009 (*see* F2009L02563) Sections 44–49, 55–57A, 59–168, 282–299, 328–331, 333A: 1 January 2010 (*see* F2009L02563)
4. Sections 573 to 718	At the same time as the provision(s) covered by table item 2.	26 May 2009
5. Sections 719 to 800	A day or days to be fixed by Proclamation. A Proclamation must not specify a day that occurs before the day on which the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* receives the Royal Assent. However, if any of the provision(s) do not commence within the period of 12 months beginning on the day on which the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* receives the Royal Assent, they commence on the first day after the end of that period.	Sections 719–740, 769–800: 1 July 2009 (*see* F2009L02563) Sections 741–768: 1 January 2010 (*see* F2009L02563)
6. Schedule 1	At the same time as the provision(s) covered by table item 2.	26 May 2009

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

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(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.

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Division 2—Object of this Act

3 Object of this Act

The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:

(a) providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and

(b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders; and

(c) ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system; and

(d) assisting employees to balance their work and family responsibilities by providing for flexible working arrangements; and

(e) enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms; and

(f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple

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good faith bargaining obligations and clear rules governing industrial action; and

(g) acknowledging the special circumstances of small and medium-sized businesses.

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Division 3—Guide to this Act

4 Guide to this Act

Overview of this Act

(1) This Act is about workplace relations. It:
  (a) provides for terms and conditions of employment (Chapter 2); and
  (b) sets out rights and responsibilities of employees, employers and organisations in relation to that employment (Chapter 3); and
  (c) provides for compliance with, and enforcement of, this Act (Chapter 4); and
  (d) provides for the administration of this Act by establishing the Fair Work Commission and the Office of the Fair Work Ombudsman (Chapter 5); and
  (e) deals with other matters relating to the above (Chapter 6).

Overview of the rest of this Chapter

(2) The rest of this Chapter deals with:
  (a) definitions that are used in this Act (Part 1-2); and
  (b) the application of this Act (Part 1-3), including how this Act interacts with certain State and Territory laws and its geographical application.

Definitions

(3) Many of the terms in this Act are defined. The Dictionary in section 12 contains a list of every term that is defined in this Act.

Application, saving and transitional provisions for amendments

(4) Schedule 1 contains application, saving and transitional provisions relating to amendments of this Act.

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5 Terms and conditions of employment (Chapter 2)

(1) Chapter 2 provides for terms and conditions of employment of national system employees.

(2) Part 2-1 has the core provisions for the Chapter. It deals with compliance with, and interaction between, the sources of the main terms and conditions provided under this Act—the National Employment Standards, modern awards and enterprise agreements.

Note: Workplace determinations are another source of main terms and conditions. In most cases, this Act applies to a workplace determination as if it were an enterprise agreement in operation (see section 279).

Main terms and conditions

(3) Part 2-2 contains the National Employment Standards, which are minimum terms and conditions that apply to all national system employees.

(4) Part 2-3 is about modern awards. A modern award is made for a particular industry or occupation and provides additional minimum terms and conditions for those national system employees to whom it applies. A modern award can have terms that are ancillary or supplementary to the National Employment Standards.

(5) Part 2-4 is about enterprise agreements. An enterprise agreement is made at the enterprise level and provides terms and conditions for those national system employees to whom it applies. An enterprise agreement can have terms that are ancillary or supplementary to the National Employment Standards.

(6) Part 2-5 is about workplace determinations. A workplace determination provides terms and conditions for those national system employees to whom it applies. A workplace determination is made by the FWC if certain conditions are met.

(7) Part 2-8 provides for the transfer of certain modern awards, enterprise agreements, workplace determinations and other

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instruments if there is a transfer of business from one national system employer to another national system employer.

Other terms and conditions

(8) In addition, other terms and conditions of employment for national system employees include those:
  (a) provided by a national minimum wage order (see Part 2-6) or an equal remuneration order (see Part 2-7); and
  (b) provided by Part 2-9 (which deals with the frequency and method of making payments to employees, deductions from payments and high-income employees).

6 Rights and responsibilities of employees, employers, organisations etc. (Chapter 3)

(1) Chapter 3 sets out rights and responsibilities of national system employees, national system employers, organisations and others (such as independent contractors and industrial associations).

(2) Part 3-1 provides general workplace protections. It:
  (a) protects workplace rights; and
  (b) protects freedom of association and involvement in lawful industrial activities; and
  (c) provides other protections, including protection from discrimination.

(3) Part 3-2 deals with unfair dismissal of national system employees, and the granting of remedies when that happens.

(4) Part 3-3 deals mainly with industrial action by national system employees and national system employers and sets out when industrial action is protected industrial action. No action lies under any law in force in a State or Territory in relation to protected industrial action except in certain circumstances.

(5) Part 3-4 is about the rights of officials of organisations who hold entry permits to enter premises for purposes related to their representative role under this Act and under State or Territory OHS

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laws. In exercising those rights, permit holders must comply with the requirements set out in the Part.

(6) Part 3-5 allows a national system employer to stand down a national system employee without pay in certain circumstances.

(7) Part 3-6 deals with other rights and responsibilities of national system employers in relation to:
   (a) termination of employment; and
   (b) keeping records and giving payslips.

7 Compliance and enforcement (Chapter 4)

(1) Chapter 4 provides for compliance with, and enforcement of, this Act.

(2) Part 4-1 is about civil remedies. Certain provisions in this Act impose obligations on certain persons. Civil remedies may be sought in relation to contraventions of these civil remedy provisions. Part 4-1:
   (a) deals with applications for orders for contraventions of civil remedy provisions; and
   (b) sets out the orders the courts can make in relation to a contravention of a civil remedy provision.

(3) Part 4-2 is about the jurisdiction and powers of the courts in relation to matters arising under this Act.

8 Administration (Chapter 5)

(1) Chapter 5 provides for the administration of this Act by establishing the Fair Work Commission and the Office of the Fair Work Ombudsman.

(2) Part 5-1 is about the Fair Work Commission. It:
   (a) establishes and confers functions on the FWC; and
   (b) sets out how matters before the FWC are to be conducted (for example, how the FWC is to deal with applications made to it).

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(3) Part 5-2 is about the Office of the Fair Work Ombudsman. It:
  (a) establishes and confers functions on the Fair Work Ombudsman; and
  (b) confers functions and powers on Fair Work Inspectors.

9 Miscellaneous (Chapter 6)

(1) Chapter 6 is a collection of miscellaneous matters that relate to the other Chapters.

(2) Part 6-1 provides rules relating to applications for remedies under this Act. It prevents certain applications if other remedies are available and prevents multiple applications or complaints in relation to the same conduct.

(3) Part 6-2 is about dealing with disputes between national system employees and their employers under modern awards, enterprise agreements and contracts of employment.

(4) Part 6-3 extends the National Employment Standards relating to unpaid parental leave and notice of termination to non-national system employees.

(4A) Part 6-3A provides for the transfer of terms and conditions of employment that are provided for in particular State industrial instruments if there is a transfer of business from a non-national system employer that is a State public sector employer of the State to a national system employer.

(5) Part 6-4 contains provisions to give effect, or further effect, to certain international agreements relating to termination of employment.

(5A) Part 6-4A contains special provisions about TCF outworkers.

(5B) Part 6-4B allows a worker who has been bullied at work to apply to the FWC for an order to stop the bullying.

(6) Part 6-5 deals with miscellaneous matters such as delegations and regulations.

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9A Application, transitional and saving provisions for amendments (Schedules)

The Schedules contain application, transitional and saving provisions relating to amendments of this Act.

Note: Application, transitional and saving provisions relating to the enactment of this Act, and States becoming referring States, are in the Transitional Act.

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Part 1-2—Definitions

Division 1—Introduction

10 Guide to this Part

This Part is about the terms that are defined in this Act.

Division 2 has the Dictionary (see section 12). The Dictionary is a list of every term that is defined in this Act. A term will either be defined in the Dictionary itself, or in another provision of this Act. If another provision defines the term, the Dictionary will have a signpost to that definition.

Division 3 has definitions relating to the meanings of employee and employer.

Division 4 has some other definitions that apply across this Act.

11 Meanings of *employee* and *employer*

In this Part, ***employee*** and ***employer*** have their ordinary meanings.

Note: See also Division 2 of Part 6-4A (TCF contract outworkers taken to be employees in certain circumstances).

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Division 2—The Dictionary

12 The Dictionary

In this Act:

4 yearly review of modern awards: see subsection 156(1).

access period for a proposed enterprise agreement: see subsection 180(4).

accommodation arrangement: see subsections 521A(1) and (2).

action includes an omission.

adoption-related leave: see subsection 67(5).

adverse action: see section 342.

affected employees for a variation of an enterprise agreement: see subsection 207(2).

affected employer:

(a) in relation to an entry under Subdivision A of Division 2 of Part 3-4: see subsection 482(2); and

(aa) in relation to an entry under section 483A other than a designated outworker terms entry: see paragraph 483B(3)(a); and

(ab) in relation to a designated outworker terms entry under section 483A: see paragraph 483B(3)(b); and

(b) in relation to an entry in accordance with Division 3 of Part 3-4: see paragraph 495(2)(a); and

(c) in relation to a State or Territory OHS right to inspect or otherwise access an employee record: see paragraph 495(2)(b).

affected member certificate: see subsection 520(1).

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Age Discrimination Commissioner means the Age Discrimination Commissioner appointed under the *Age Discrimination Act 2004*.

agreed terms for a workplace determination: see section 274.

agreed to in relation to a termination of an enterprise agreement: see section 221.

annual rate of an employee's guaranteed annual earnings: see subsection 330(3).

annual wage review: see subsection 285(1).

anti-discrimination law: see subsection 351(3).

apparent indirectly responsible entity: see subsection 789CC(2).

applicable agreement-derived long service leave terms: see subsection 113(5).

applicable award-derived long service leave terms: see subsection 113(3).

application or complaint under another law: see subsection 732(2).

applies:

(a) in relation to a modern award: see section 47; and
(b) in relation to an enterprise agreement: see section 52; and
(c) in relation to a copied State instrument: see section 768AM.

applies to employment generally: see subsection 26(4).

appointment of a bargaining representative means an appointment of a bargaining representative under paragraph 176(1)(c) or (d) or 177(c).

appropriate safe job: see subsection 81(3).

approved by the FWC, in relation to an enterprise agreement, means approved by the FWC under section 186 or 189.

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associated entity has the meaning given by section 50AAA of the *Corporations Act 2001*.

Australian-based employee: see subsections 35(2) and (3).

Australian employer: see subsection 35(1).

Australian ship means a ship that has Australian nationality under section 29 of the *Shipping Registration Act 1981*.

authority documents: see subsection 489(3).

available parental leave period: see subsection 75(2).

award/agreement free employee means a national system employee to whom neither a modern award nor an enterprise agreement applies.

award covered employee for an enterprise agreement: see subsection 193(4).

award modernisation process means:

(a) the process of making modern awards under Part 10A of the *Workplace Relations Act 1996*, as continued by Part 2 of Schedule 5 of the Transitional Act; and

(b) the enterprise instrument modernisation process provided for by Part 2 of Schedule 6 of the Transitional Act; and

(c) the State reference public sector transitional award modernisation process provided for by Part 2 of Schedule 6A of the Transitional Act.

ballot paper: see subsection 455(2).

bargaining order: see subsection 229(1).

bargaining related workplace determination: see subsection 269(1).

bargaining representative for a proposed enterprise agreement: see sections 176 and 177.

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bargaining services: see subsection 353(3).

bargaining services fee: see subsection 353(2).

base rate of pay: see section 16.

birth-related leave: see subsection 67(4).

bullied at work: see subsection 789FD(1).

child of a person: see subsection 17(1).

civil remedy provision: see subsections 539(1) and (3).

Commissioner means a Commissioner of the FWC.

common requirements in relation to industrial action: see section 413.

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 a Territory; and

(ii) in which the Commonwealth has a controlling interest.

Commonwealth outworker entity means an entity that is an outworker entity otherwise than because of section 30F or 30Q.

Note: Sections 30F and 30Q extend the meaning of ***outworker entity*** in relation to a referring State.

Commonwealth place means a place referred to in paragraph 52(i) of the Constitution, other than the seat of government.

compassionate leave means compassionate leave to which a national system employee is entitled under section 104.

complaint about an FWC Member means a complaint referred to in paragraph 581A(1)(a) or section 641A.

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complaint handler means:

(a) the President; or

(b) a person who is authorised by the President under subsection 581A(3); or

(c) a person who is a member of a body that is authorised by the President under subsection 581A(3).

compliance powers: see section 703.

compliance purposes: see subsection 706(1).

concurrent leave: see subsection 72(5).

conduct includes an omission.

conduct of a protected action ballot: see subsection 458(5).

connected with a Territory: an arrangement for work to be performed for a person (either directly or indirectly) is ***connected with a Territory*** if one or more of the following apply:

(a) at the time the arrangement is made, one or more parties to the arrangement is in a Territory in Australia;

(b) the work is to be performed in such a Territory;

(c) the person carries on an activity (whether of a commercial, governmental or other nature) in such a Territory, and the work is reasonably likely to be performed in that Territory;

(d) the person carries on an activity (whether of a commercial, governmental or other nature) in such a Territory, and the work is to be performed in connection with that activity.

Note: 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*).

consent low-paid workplace determination: see subsection 260(2).

consistent with the Small Business Fair Dismissal Code: see subsection 388(2).

consolidation order:

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(a) in relation to a transferring employee—see subsection 768BD(1); and
(b) in relation to a non-transferring employee—see subsection 768BG(1).

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

constitutionally-covered business: see subsection 789FD(3).

constitutionally-covered entity: see subsection 338(2).

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.

continental shelf means the continental shelf (as defined in the *Seas and Submerged Lands Act 1973*) of Australia (including its external Territories).

continuous service has a meaning affected by section 22.

copied State award: see subsection 768AI(1).

copied State collective employment agreement: see subsection 768AK(4).

copied State employment agreement: see subsection 768AK(1).

copied State individual employment agreement: see subsection 768AK(5).

copied State instrument: see section 768AH.

corporate MySuper product: see subsection 23A(3).

coverage terms:

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(a) in relation to a modern award (other than a modern enterprise award): see section 143; and
(b) in relation to a modern enterprise award: see section 143A; and
(c) in relation to a State reference public sector modern award: see section 143B.

covers:
(a) in relation to a modern award: see section 48; and
(b) in relation to an enterprise agreement: see section 53; and
(c) in relation to a workplace determination: see section 277; and
(d) in relation to a copied State instrument: see section 768AN.

day of placement: see subsection 67(6).

de facto partner of a national system employee:
(a) means a person who, although not legally married to the employee, lives with the employee in a relationship as a couple on a genuine domestic basis (whether the employee and the person are of the same sex or different sexes); and
(b) includes a former de facto partner of the employee.

default fund employee: see subsection 149C(2).

default fund term: see subsection 149C(2).

Default Superannuation List: see subsection 156B(1).

defined benefit member has the meaning given by the *Superannuation Guarantee (Administration) Act 1992*.

Deputy President means a Deputy President of the FWC.

designated outworker term of a modern award, enterprise agreement, workplace determination or other instrument, means any of the following terms, so far as the term relates to outworkers in the textile, clothing or footwear industry:
(a) a term that deals with the registration of an employer or outworker entity;

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(b) a term that deals with the making and retaining of, or access to, records about work to which outworker terms of a modern award apply;
(c) a term imposing conditions under which an arrangement may be entered into by an employer or an outworker entity for the performance of work, where the work is of a kind that is often performed by outworkers;
(d) a term relating to the liability of an employer or outworker entity for work undertaken by an outworker under such an arrangement, including a term which provides for the outworker to make a claim against an employer or outworker entity;
(e) a term that requires minimum pay or other conditions, including the National Employment Standards, to be applied to an outworker who is not an employee;
(f) any other terms prescribed by the regulations.

designated outworker terms entry: see subsection 483A(5).

directly, when used in relation to TCF work: see section 17A.

Disability Discrimination Commissioner means the Disability Discrimination Commissioner appointed under the *Disability Discrimination Act 1992*.

discriminatory term of an enterprise agreement: see section 195.

dismissal remedy bargaining order application: see subsection 726(2).

dismissed: see section 386.

earnings: see subsections 332(1) and (2).

eligible community service activity: see section 109.

eligible State or Territory court means one of the following courts:
(a) a District, County or Local Court;
(b) a magistrates court;
(c) the Industrial Relations Court of South Australia;

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(ca) the Industrial Court of New South Wales;

(d) any other State or Territory court that is prescribed by the regulations.

employee is defined in the first Division of each Part (other than Part 1-1) in which the term appears.

Note 1: The definition in the Part will define ***employee*** either as a national system employee or as having its ordinary meaning. However, there may be particular provisions in the Part where a different meaning for the term is specified.

Note 2: If the term has its ordinary meaning, see further subsections 15(1), 30E(1) and 30P(1).

Note 3: See also Division 2 of Part 6-4A (TCF contract outworkers taken to be employees in certain circumstances).

employee A, in relation to a transfer of business referred to in Part 6-3A: see subsections 768BD(1) and 768BG(1).

employee claim action: see section 409 and paragraph 471(4A)(c).

employee couple: 2 national system employees are an ***employee couple*** if each of the employees is the spouse or de facto partner of the other.

employee organisation means an organisation of employees.

employee record, in relation to an employee, means:

(a) something that is an employee record, in relation to the employee, for the purposes of the *Privacy Act 1988*; or

(b) in the case of a TCF contract outworker who is taken to be an employee by Division 2 of Part 6-4A of this Act—something that would be an employee record, in relation to the outworker, for the purposes of the *Privacy Act 1988*, if the outworker were an employee for the purposes of that Act.

employee response action: see section 410 and paragraph 471(4A)(d).

employee with a disability means a national system employee who is qualified for a disability support pension as set out in section 94

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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.

employer is defined in the first Division of each Part (other than Part 1-1) in which the term appears.

Note 1: The definition in the Part will define ***employer*** either as a national system employer or as having its ordinary meaning. However, there may be particular provisions in the Part where a different meaning for the term is specified.

Note 2: If the term has its ordinary meaning, see further subsections 15(2), 30E(2) and 30P(2).

Note 3: See also Division 2 of Part 6-4A (TCF contract outworkers taken to be employees in certain circumstances).

employer MySuper product: see subsection 23A(1B).

employer organisation means an organisation of employers.

employer response action: see section 411.

employing authority: see subsection 795(6).

engages in industrial activity: see section 347.

enterprise means a business, activity, project or undertaking.

enterprise agreement means:
(a) a single-enterprise agreement; or
(b) a multi-enterprise agreement.

entry notice: see subsection 487(2).

entry permit: see section 512.

equal remuneration for work of equal or comparable value: see subsection 302(2).

equal remuneration order: see subsection 302(1).

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exclusive economic zone means the exclusive economic zone (as defined in the *Seas and Submerged Lands Act 1973*) of Australia (including its external Territories).

exemption certificate: see subsection 519(1).

exempt public sector superannuation scheme has the meaning given by the *Superannuation Industry (Supervision) Act 1993*.

Expert Panel means an Expert Panel constituted under section 620.

Expert Panel Member means an Expert Panel Member of the FWC.

extended notice of termination provisions: see subsection 759(3).

extended parental leave provisions: see subsection 744(3).

Fair Work Commission or ***FWC*** means the body continued in existence by section 575.

Fair Work Information Statement: see subsection 124(1).

Fair Work Inspector means:

(a) a person appointed as a Fair Work Inspector under section 700; or

(b) the Fair Work Ombudsman in his or her capacity as a Fair Work Inspector under section 701.

fair work instrument means:

(a) a modern award; or

(b) an enterprise agreement; or

(c) a workplace determination; or

(d) an FWC order.

Federal Circuit Court means the Federal Circuit Court of Australia.

Federal Court means the Federal Court of Australia.

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first employer, in relation to a transfer of employment: see subsection 22(7).

first stage criteria: see section 156F.

first stage test: see section 156Q.

fixed platform means an artificial island, installation or structure permanently attached to the sea-bed for the purpose of exploration for, or exploitation of, resources or for other economic purposes.

flexibility term:

(a) in relation to a modern award—see subsection 144(1); and

(b) in relation to an enterprise agreement—see subsection 202(1).

flight crew officer means a person who performs (whether with or without other duties) duties as a pilot, navigator or flight engineer of aircraft, and includes a person being trained for the performance of such duties.

franchise has the meaning given by the *Corporations Act 2001*.

Full Bench means a Full Bench of the FWC constituted under section 618.

full rate of pay: see section 18.

FWC: see ***Fair Work Commission***.

FWC Member means the President, a Vice President, a Deputy President, a Commissioner or an Expert Panel Member.

General Manager means the General Manager of the FWC.

general protections court application: see subsection 368(4).

general protections FWC application: see subsection 727(2).

general State industrial law: see subsection 26(3).

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genuinely agreed in relation to an enterprise agreement: see section 188.

genuine redundancy: see section 389.

good faith bargaining requirements: see section 228.

greenfields agreement: see subsection 172(4).

guaranteed period for a guarantee of annual earnings: see section 331.

guarantee of annual earnings: see subsection 330(1).

handle a complaint about an FWC Member means do one or more of the following acts relating to the complaint:

(a) consider the complaint;
(b) investigate the complaint;
(c) report on an investigation of the complaint;
(d) deal with a report of an investigation of the complaint;
(e) dispose of the complaint;
(f) refer the complaint to a person or body.

high income employee: see section 329.

high income threshold: see section 333.

ILO means the International Labour Organization.

immediate family of a national system employee means:

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

independent advisor for a protected action ballot means the person (if any) specified in the protected action ballot order as the independent advisor for the ballot.

independent contractor is not confined to an individual.

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indirectly, when used in relation to TCF work: see section 17A.

indirectly responsible entity, in relation to TCF work performed by a TCF outworker: see subsections 789CA(3), (4) and (5).

individual flexibility arrangement:

(a) in relation to a modern award—see subsection 144(1); and
(b) in relation to an enterprise agreement—see paragraph 202(1)(a).

industrial action: see section 19.

industrial action related workplace determination: see subsection 266(1).

industrial association means:

(a) an association of employees or independent contractors, or both, or an association of employers, that is registered or recognised as such an association (however described) under a workplace law; or
(b) an association of employees, or independent contractors, or both (whether formed formally or informally), a 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 may be); 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:

(d) a branch of such an association; and
(e) an organisation; and
(f) a branch of an organisation.

industrial body means:

(a) the FWC; or
(b) a court or commission (however described) performing or exercising, under an industrial law, functions and powers corresponding to those conferred on the FWC by this Act; or

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(c) a court or commission (however described) performing or exercising, under a workplace law, functions and powers corresponding to those conferred on the FWC by the Registered Organisations Act.

industrial law means:

(a) this Act; or

(b) the Registered Organisations Act; 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.

industry-specific redundancy scheme means redundancy or termination payment arrangements in a modern award that are described in the award as an industry-specific redundancy scheme.

inspector means a Fair Work Inspector.

interim application period: see paragraph 156N(2)(b).

involved in: see section 550.

irregularity, in relation to the conduct of a protected action ballot: see subsection 458(6).

junior employee means a national system employee who is under 21.

jury service pay: see subsection 111(6).

jury service summons: see subsection 111(7).

keeping in touch day: see subsections 79A(2) and (3).

law enforcement officer has the same meaning as in subsection 30K(1).

lawyer means a person who is admitted to the legal profession by a Supreme Court of a State or Territory.

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local government employee has the same meaning as in subsection 30K(1).

local government employer has the same meaning as in subsection 30K(1).

lock out: see subsection 19(3).

long term casual employee: a national system employee of a national system employer is a ***long term casual employee*** at a particular time if, at that time:

(a) the employee is a casual employee; and

(b) the employee has been employed by the employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months.

low-paid authorisation: see subsection 242(1).

low-paid workplace determination means:

(a) a consent low-paid workplace determination; or

(b) a special low-paid workplace determination.

made:

(a) in relation to an enterprise agreement: see section 182; and

(b) in relation to a variation of an enterprise agreement: see section 209.

magistrates court means:

(a) a court constituted by a police, stipendiary or special magistrate; or

(b) a court constituted by an industrial magistrate.

majority support determination: see subsection 236(1).

maritime employee means a person who is, or whose occupation is that of, a master as defined in subsection 14(1) of the *Navigation Act 2012*, a seafarer as so defined or a pilot as so defined.

medical certificate means a certificate signed by a medical practitioner.

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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.

membership action: see subsection 350(3).

minimum employment period: see section 383.

minimum wages objective: see subsection 284(1).

miscellaneous modern award: see subsection 163(4).

model consultation term: see subsection 205(3).

model flexibility term: see subsection 202(5).

modern award means a modern award made under Part 2-3.

modern award minimum wages: see subsection 284(3).

modern award powers: see subsection 134(2).

modern awards objective: see subsection 134(1).

modern enterprise award: see subsection 168A(2).

modern enterprise awards objective: see subsection 168B(1).

modifications includes additions, omissions and substitutions.

multi-enterprise agreement means an enterprise agreement made as referred to in subsection 172(3).

MySuper product: see subsection 23A(1).

named employer award: see subsection 312(2).

National Employment Standards: see subsection 61(3).

national minimum wage order means a national minimum wage order made in an annual wage review.

national system employee: see section 13.

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Note 1: Sections 30C and 30M extend the meaning of ***national system employee*** in relation to a referring State.

Note 2: See also Division 2 of Part 6-4A (TCF contract outworkers taken to be employees in certain circumstances).

national system employer: see section 14.

Note 1: Sections 30D and 30N extend the meaning of ***national system employer*** in relation to a referring State.

Note 2: See also Division 2 of Part 6-4A (TCF contract outworkers taken to be employees in certain circumstances).

new employer:

(a) in relation to a transfer of business referred to in Part 2-8—see subsection 311(1); and

(b) in relation to a transfer of business referred to in Part 6-3A—see subsection 768AD(1).

nominal expiry date:

(a) of an enterprise agreement approved under section 186, means the date specified in the agreement as its nominal expiry date; or

(b) of an enterprise agreement approved under section 189 (which deals with agreements that do not pass the better off overall test): see subsection 189(4); or

(c) of a workplace determination, means the date specified in the determination as its nominal expiry date; or

(d) of a copied State employment agreement: see subsection 768AO(5).

non-excluded matters: see subsection 27(2).

non-member record or document: see subsection 482(2A).

non-monetary benefits: see subsection 332(3).

non-national system employee means an employee who is not a national system employee.

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non-national system employer means an employer that is not a national system employer.

non-transferring employee:

(a) in relation to a transfer of business referred to in Part 2-8—see subsection 314(2); and

(b) in relation to a transfer of business referred to in Part 6-3A—see subsection 768BG(2).

notification time for a proposed enterprise agreement: see subsection 173(2).

notified negotiation period for a proposed single-enterprise agreement that is a greenfields agreement: see section 178B.

objectionable term means a term that:

(a) requires, has the effect of requiring, or purports to require or have the effect of requiring; or

(b) permits, has the effect of permitting, or purports to permit or have the effect of permitting;

either of the following:

(c) a contravention of Part 3-1 (which deals with general protections);

(d) the payment of a bargaining services fee.

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

office, in an industrial 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;

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(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.

Office of the Fair Work Ombudsman means the body established by section 696.

officer, of an industrial association, means:

(a) an official of the association; or

(b) a delegate or other representative of the association.

official, of an industrial association, means a person who holds an office in, or is an employee of, the association.

old employer, in relation to a transfer of business: see subsection 311(1).

old State employer: see subsection 768AD(1).

ordinary hours of work of an award/agreement free employee: see section 20.

organisation means an organisation registered under the Registered Organisations Act.

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original State agreement, in relation to a copied State employment agreement: see paragraph 768AK(1)(a).

original State award, in relation to a copied State award: see paragraph 768AI(1)(a).

outworker means:

(a) an employee who, for the purpose of the business of his or her employer, performs work at residential premises or at other premises that would not conventionally be regarded as being business premises; or

(b) an individual who, for the purpose of a contract for the provision of services, performs work:

(i) in the textile, clothing or footwear industry; and

(ii) at residential premises or at other premises that would not conventionally be regarded as being business premises.

outworker entity means any of the following entities, other than in the entity's capacity as a national system employer:

(a) a constitutional corporation;

(b) the Commonwealth;

(c) a Commonwealth authority;

(d) a body corporate incorporated in a Territory;

(e) a person so far as:

(i) the person arranges for work to be performed for the person (either directly or indirectly); and

(ii) the work is of a kind that is often performed by outworkers; and

(iii) the arrangement is connected with a Territory.

Note: Sections 30F and 30Q extend the meaning of ***outworker entity*** in relation to a referring State.

outworker terms: see subsection 140(3).

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paid agent, in relation to a matter before the FWC, means an agent (other than a bargaining representative) who charges or receives a fee to represent a person in the matter.

paid annual leave means paid annual leave to which a national system employee is entitled under section 87.

paid no safe job leave means paid no safe job leave to which a national system employee is entitled under section 81A.

paid personal/carer's leave means paid personal/carer's leave to which a national system employee is entitled under section 96.

paid work means work for financial gain or reward (whether as an employee, a self-employed person or otherwise).

partial work ban: see subsection 470(3).

part of a single enterprise: see subsection 168A(6).

passes the better off overall test:

(a) in relation to an enterprise agreement that is not a greenfields agreement: see subsection 193(1); and

(b) in relation to a greenfields agreement: see subsection 193(3).

pattern bargaining: see section 412.

peak council means a national or State council or federation that is effectively representative of a significant number of organisations (within the ordinary meaning of the term) representing employers or employees in a range of industries.

pecuniary penalty order means an order under subsection 546(1).

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

period of employment: see section 384.

permissible occasion: see sections 102 and 104.

permit holder means a person who holds an entry permit.

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permit qualification matters: see subsection 513(1).

permitted matters in relation to an enterprise agreement: see subsection 172(1).

pieceworker: see section 21.

pilot, in relation to an aircraft, includes a pilot in command, co-pilot or pilot of any other description.

post-declaration negotiating period: see subsection 269(2).

post-industrial action negotiating period: see subsection 266(3).

premises includes:

(a) any land, building, structure, mine, mine working, aircraft, ship, vessel, vehicle or place; and

(b) a part of premises (including premises referred to in paragraph (a)).

pre-parental leave position: see subsection 83(2).

prescribed State industrial authority means a State board, court, tribunal, body or official prescribed by the regulations.

President means the President of the FWC.

procedural rules means the procedural rules of the FWC made under section 609.

process or proceedings under a workplace law or workplace instrument: see subsection 341(2).

prospective award covered employee for an enterprise agreement: see subsection 193(5).

protected action ballot means a ballot conducted under Division 8 of Part 3-3.

protected action ballot agent for a protected action ballot means the person that conducts the protected action ballot.

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protected action ballot order: see subsection 437(1).

protected from unfair dismissal: see section 382.

protected industrial action: see section 408.

public holiday: see section 115.

public sector employment: see subsections 795(4) and (5).

public sector employment law: see subsection 40(3).

recognised emergency management body: see subsection 109(3).

reduction in take-home pay: see subsection 768BR(3).

re-employment time, in relation to a transferring employee covered by a transfer of business referred to in Part 6-3A: see subsection 768AE(3).

registered employee association means:

(a) an employee organisation; or

(b) an association of employees or independent contractors, or both, that is registered or recognised as such an association (however described) under a State or Territory industrial law.

Registered Organisations Act means the *Fair Work (Registered Organisations) Act 2009*.

reinstatement includes appointment by an associated entity in the circumstances provided for in an order to which subsection 391(1A) applies.

related body corporate has the meaning given by the *Corporations Act 2001*.

relevant belief: a person has a ***relevant belief*** in relation to a complaint about an FWC Member if:

(a) the person believes that if one or more of the circumstances that gave rise to the complaint were substantiated, the circumstances would justify considering:

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(i) terminating the appointment of the FWC Member in accordance with section 641; or

(ii) (other than if the FWC Member is the President) suspending the FWC Member from office in accordance with section 642; or

(b) the person believes that if one or more of the circumstances that gave rise to the complaint were substantiated, the circumstances may:

(i) adversely affect, or have adversely affected, the performance of duties by the FWC Member; or

(ii) have the capacity to adversely affect, or have adversely affected, the reputation of the FWC.

Note: Sections 641 and 642 deal with termination of appointment and suspension on the grounds of misbehaviour or incapacity.

relevant employee organisation, in relation to a greenfields agreement, means an employee organisation that is entitled to represent the industrial interests of one or more of the employees who will be covered by the agreement, in relation to work to be performed under the agreement.

responsible person, in relation to TCF work performed by a TCF outworker: see subsection 789CA(1).

risk period: see subsections 81(1) and (5).

safety net contractual entitlement means an entitlement under a contract between an employee and an employer that relates to any of the subject matters described in:

(a) subsection 61(2) (which deals with the National Employment Standards); or

(b) subsection 139(1) (which deals with modern awards).

Schedule of Approved Employer MySuper Products: see paragraph 156L(1)(a).

school age, for a child, means the age at which the child is required by a law of the State or Territory in which the child lives to attend school.

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school-based apprentice means a national system employee who is an apprentice to whom a school-based training arrangement applies.

school-based trainee means a national system employee (other than a school-based apprentice) to whom a school-based training arrangement applies.

school-based training arrangement means a training arrangement undertaken as part of a course of secondary education.

scope order: see subsection 238(1).

second employer, in relation to a transfer of employment: see subsection 22(7).

second stage test:

(a) in relation to a standard MySuper product—see subsection 156H(2); and

(b) in relation to an employer MySuper product—see section 156S.

serious breach declaration: see section 234.

serious misconduct has the meaning prescribed by the regulations.

service: see section 22.

setting modern award minimum wages: see subsection 284(4).

Sex Discrimination Commissioner means the Sex Discrimination Commissioner appointed under the *Sex Discrimination Act 1984*.

ship includes a barge, lighter, hulk or other vessel.

single enterprise: see section 168A.

single-enterprise agreement means an enterprise agreement made as referred to in subsection 172(2).

single interest employer authorisation: see subsection 248(1).

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small business employer: see section 23.

Small Business Fair Dismissal Code means the Small Business Fair Dismissal Code declared under subsection 388(1).

special low-paid workplace determination: see subsection 260(4).

spouse includes a former spouse.

standard application period: see paragraph 156N(2)(a).

standard MySuper product: see subsection 23A(1A).

State award: see section 768AJ.

State collective employment agreement: see subsection 768AL(3).

State employment agreement: see subsections 768AL(1) and (2).

State individual employment agreement: see subsection 768AL(4).

State industrial instrument means an award, an agreement (whether individual or collective), or another industrial instrument or order, that:

(a) is made under, or recognised by, a law of a State that is a State or Territory industrial law; and

(b) determines terms and conditions of employment.

State industrial law means a law of a State that is a State or Territory industrial law.

state of mind: see subsection 793(3).

State or Territory industrial law: see subsection 26(2).

State or Territory OHS law: see subsection 494(3).

State or Territory OHS right: see subsection 494(2).

State public sector employee, of a State, means:

(a) an employee of a State public sector employer of the State; or

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(b) any other non-national system employee in the State of a kind specified in the regulations;

and includes a law enforcement officer of the State but does not include a local government employee of the State.

State public sector employer, of a State, means a non-national system employer that is:

(a) the State, the Governor of the State or a Minister of the State; or

(b) a body corporate that is established for a public purpose by or under a law of the State, by the Governor of the State or by a Minister of the State; or

(c) a body corporate in which the State has a controlling interest; or

(d) a person who employs individuals for the purposes of an unincorporated body that is established for a public purpose by or under a law of the State, by the Governor of the State or by a Minister of the State; or

(e) any other employer in the State of a kind specified in the regulations;

and includes a non-national system employer of a law enforcement officer of the State but does not include a local government employer of the State.

State reference public sector employee: see subsection 168E(3).

State reference public sector employer: see subsection 168E(4).

State reference public sector modern award: see subsection 168E(2).

State reference public sector modern awards objective: see section 168F.

step-child: without limiting who is a step-child of a person, someone who is a child of the person's de facto partner is a ***step-child*** of a person, if he or she would be the person's step-child except that the person is not legally married to the de facto partner.

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superannuation fund means a superannuation fund or a superannuation scheme.

tailored MySuper product: see subsection 23A(2).

take-home pay: see subsection 768BR(2).

take-home pay order: see subsection 768BS(1).

TCF award means an instrument prescribed by the regulations for the purposes of this definition.

TCF award worker: see subsection 483A(1A).

TCF contract outworker: see subsection 789BB(2).

TCF outwork code: see section 789DA.

TCF outworker means an outworker in the textile, clothing or footwear industry.

TCF work means work in the textile, clothing or footwear industry.

termination of industrial action instrument: see subsection 266(2).

termination time, in relation to a transferring employee covered by a transfer of business referred to in Part 6-3A: see subsection 768AE(2).

territorial sea, in relation to Australia, has the meaning given by Division 1 of Part II of the *Seas and Submerged Lands Act 1973*.

Territory employer: see subsection 338(4).

test time: see subsection 193(6).

this Act includes the regulations.

trade and commerce employer: see subsection 338(3).

training arrangement means a combination of work and training that is subject to a training agreement, or a training contract, that

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takes effect under a law of a State or Territory relating to the training of employees.

transferable instrument: see subsection 312(1).

transfer of business:

(a) for a transfer of business between a national system employer and another national system employer—see subsection 311(1); and

(b) for a transfer of business between a non-national system employer that is a State public sector employer and a national system employer—see subsection 768AD(1).

transfer of employment: see subsection 22(7).

transfer of employment between associated entities: see paragraph 22(8)(a).

transfer of employment between non-associated entities: see paragraph 22(8)(b).

transferring employee:

(a) in relation to a transfer of business referred to in Part 2-8—see subsection 311(2); and

(b) in relation to a transfer of business referred to in Part 6-3A—see subsection 768AE(1).

transferring work:

(a) in relation to a transfer of business referred to in Part 2-8—see paragraph 311(1)(c); and

(b) in relation to a transfer of business referred to in Part 6-3A—see paragraph 768AD(1)(c).

Transitional Act means the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

transport arrangement: see subsections 521B(1) and (2).

unfair dismissal application: see subsection 729(2).

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unfairly dismissed: see section 385.

unlawful term of an enterprise agreement: see section 194.

unlawful termination court application: see subsection 776(4).

unlawful termination FWC application: see subsection 730(2).

unpaid amount, in relation to TCF work performed by a TCF outworker: see subsections 789CA(1) and (4).

unpaid carer's leave means unpaid carer's leave to which a national system employee is entitled under section 102.

unpaid no safe job leave means unpaid no safe job leave to which a national system employee is entitled under section 82A.

unpaid parental leave means unpaid parental leave to which a national system employee is entitled under section 70.

unpaid pre-adoption leave means unpaid pre-adoption leave to which a national system employee is entitled under section 85.

unpaid special maternity leave means unpaid special maternity leave to which a national system employee is entitled under section 80.

varying modern award minimum wages: see subsection 284(4).

Vice President means a Vice President of the FWC.

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.

voluntary emergency management activity: see subsection 109(2).

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waters above the continental shelf means any part of the area in, on or over the continental shelf.

waterside worker has the meaning given by clause 1 of Schedule 2 to the *Workplace Relations Act 1996* as in force immediately before the commencement of this section.

worker:

(a) in Part 6-4B—see subsection 789FC(2); and
(b) otherwise—has its ordinary meaning.

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

workplace determination means:

(a) a low-paid workplace determination; or
(b) an industrial action related workplace determination; or
(c) a bargaining related workplace determination.

workplace instrument means an instrument that:

(a) is made under, or recognised by, a workplace law; and
(b) concerns the relationships between employers and employees.

workplace law means:

(a) this Act; or
(b) the Registered Organisations Act; or
(c) the *Independent Contractors Act 2006*; or
(d) any other law of the Commonwealth, a State or a Territory that regulates the relationships between employers and employees (including by dealing with occupational health and safety matters).

workplace right: see subsection 341(1).

work value reasons: see subsection 156(4).

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Division 3—Definitions relating to the meanings of employee, employer etc.

13 Meaning of *national system employee*

A ***national system employee*** is an individual so far as he or she is employed, or usually employed, as described in the definition of ***national system employer*** in section 14, by a national system employer, except on a vocational placement.

Note: Sections 30C and 30M extend the meaning of ***national system employee*** in relation to a referring State.

14 Meaning of *national system employer*

(1) A ***national system employer*** is:

(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 so far as the person, 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 who carries on an activity (whether of a commercial, governmental or other nature) in a Territory in Australia, so far as the person employs, or usually employs, an individual in connection with the activity carried on in the Territory.

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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: Sections 30D and 30N extend the meaning of ***national system employer*** in relation to a referring State.

Particular employers declared not to be national system employers

(2) Despite subsection (1) and sections 30D and 30N, a particular employer is not a national system employer if:
  (a) that employer:
    (i) is a body established for a public purpose by or under a law of a State or Territory, by the Governor of a State, by the Administrator of a Territory or by a Minister of a State or Territory; or
    (ii) is a body established for a local government purpose by or under a law of a State or Territory; or
    (iii) is a wholly-owned subsidiary (within the meaning of the *Corporations Act 2001*) of, or is wholly controlled by, an employer to which subparagraph (ii) applies; and
  (b) that employer is specifically declared, by or under a law of the State or Territory, not to be a national system employer for the purposes of this Act; and
  (c) an endorsement by the Minister under paragraph (4)(a) is in force in relation to the employer.

(3) Paragraph (2)(b) does not apply to an employer that is covered by a declaration by or under such a law only because it is included in a specified class or kind of employer.

Endorsement of declarations

(4) The Minister may, in writing:
  (a) endorse, in relation to an employer, a declaration referred to in paragraph (2)(b); or
  (b) revoke or amend such an endorsement.

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(5) An endorsement, revocation or amendment under subsection (4) is a legislative instrument, but section 42 (disallowance) of the *Legislation Act 2003* does not apply to the endorsement, revocation or amendment.

Note: Part 4 of Chapter 3 (sunsetting) of the *Legislation Act 2003* does not apply to the endorsement, revocation or amendment (see regulations made for the purposes of paragraph 54(2)(b) of that Act).

Employers that cannot be declared

(6) Subsection (2) does not apply to an employer that:
  (a) generates, supplies or distributes electricity; or
  (b) supplies or distributes gas; or
  (c) provides services for the supply, distribution or release of water; or
  (d) operates a rail service or a port;

unless the employer is a body established for a local government purpose by or under a law of a State or Territory, or is a wholly-owned subsidiary (within the meaning of the *Corporations Act 2001*) of, or is wholly controlled by, such a body.

(7) Subsection (2) does not apply to an employer if the employer is an Australian university (within the meaning of the *Higher Education Support Act 2003*) that is established by or under a law of a State or Territory.

14A Transitional matters relating to employers etc. becoming, or ceasing to be, national system employers etc.

(1) The regulations may make provisions of a transitional, application or saving nature in relation to any of the following:
  (a) an employer ceasing to be a national system employer because subsection 14(2) applies to the employer;
  (b) an individual ceasing to be a national system employee because an employer ceases to be a national system employer for the reason referred to in paragraph (a);

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(c) an employer becoming a national system employer because subsection 14(2) ceases to apply to the employer;

(d) an individual becoming a national system employee because an employer becomes a national system employer for the reason referred to in paragraph (c).

(2) Without limiting subsection (1), regulations made for the purpose of that subsection may:

(a) modify provisions of this Act or the Transitional Act; or

(b) provide for the application (with or without modifications) of provisions of this Act, or the Transitional Act, to matters to which they would otherwise not apply.

15 Ordinary meanings of *employee* and *employer*

(1) A reference in this Act to an employee with its ordinary meaning:

(a) includes a reference to a person who is usually such an employee; and

(b) does not include a person on a vocational placement.

Note: Subsections 30E(1) and 30P(1) extend the meaning of ***employee*** in relation to a referring State.

(2) A reference in this Act to an employer with its ordinary meaning includes a reference to a person who is usually such an employer.

Note: Subsections 30E(2) and 30P(2) extend the meaning of ***employer*** in relation to a referring State.

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Division 4—Other definitions

16 Meaning of *base rate of pay*

General meaning

(1) The ***base rate of pay*** of a national system employee is the rate of pay payable to the employee for his or her ordinary hours of work, but not including any of the following:
  (a) incentive-based payments and bonuses;
  (b) loadings;
  (c) monetary allowances;
  (d) overtime or penalty rates;
  (e) any other separately identifiable amounts.

Meaning for pieceworkers in relation to entitlements under National Employment Standards

(2) Despite subsection (1), if one of the following paragraphs applies to a national system employee who is a pieceworker, the employee's ***base rate of pay***, in relation to entitlements under the National Employment Standards, is the base rate of pay referred to in that paragraph:
  (a) a modern award applies to the employee and specifies the employee's base rate of pay for the purposes of the National Employment Standards;
  (b) an enterprise agreement applies to the employee and specifies the employee's base rate of pay for the purposes of the National Employment Standards;
  (c) the employee is an award/agreement free employee, and the regulations prescribe, or provide for the determination of, the employee's base rate of pay for the purposes of the National Employment Standards.

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Meaning for pieceworkers for the purpose of section 206

(3) The regulations may prescribe, or provide for the determination of, the base rate of pay, for the purpose of section 206, of an employee who is a pieceworker. If the regulations do so, the employee's ***base rate of pay***, for the purpose of that section, is as prescribed by, or determined in accordance with, the regulations.

Note: Section 206 deals with an employee's base rate of pay under an enterprise agreement.

17 Meaning of *child* of a person

(1) A ***child*** of a person includes:

(a) someone who is a child of the person within the meaning of the *Family Law Act 1975*; and

(b) an adopted child or step-child of the person.

It does not matter whether the child is an adult.

(2) If, under this section, one person is a child of another person, other family relationships are also to be determined on the basis that the child is a child of that other person.

Note: For example, for the purpose of leave entitlements in relation to immediate family under Division 7 of Part 2-2 (which deals with personal/carer's leave and compassionate leave):

(a) the other person is the parent of the child, and so is a member of the child's immediate family; and

(b) the child, and any other children, of the other person are siblings, and so are members of each other's immediate family.

17A Meaning of *directly* and *indirectly* (in relation to TCF work)

(1) If there is a chain or series of 2 or more arrangements for the supply or production of goods produced by TCF work performed by a person (the ***worker***), the following provisions have effect:

(a) the work is taken to be performed ***directly*** for the person (the ***direct principal***) who employed or engaged the worker (and the direct principal is taken to have arranged for the work to be performed ***directly*** for the direct principal);

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(b) the work is taken to be performed ***indirectly*** for each other person (an ***indirect principal***) who is a party to any of the arrangements in the chain or series (and each indirect principal is taken to have arranged for the work to be performed ***indirectly*** for the indirect principal).

(2) This section does not limit the circumstances in which TCF work is performed ***directly*** or ***indirectly*** for a person (or in which a person arranges for TCF work to be performed ***directly*** or ***indirectly*** for the person).

(3) This section does not apply for the purposes of Division 2A or 2B of Part 1-3.

18 Meaning of *full rate of pay*

General meaning

(1) The ***full rate of pay*** of a national system employee is the rate of pay payable to the employee, including all the following:
  (a) incentive-based payments and bonuses;
  (b) loadings;
  (c) monetary allowances;
  (d) overtime or penalty rates;
  (e) any other separately identifiable amounts.

Meaning for pieceworkers in relation to entitlements under National Employment Standards

(2) However, if one of the following paragraphs applies to a national system employee who is a pieceworker, the employee's ***full rate of pay***, in relation to entitlements under the National Employment Standards, is the full rate of pay referred to in that paragraph:
  (a) a modern award applies to the employee and specifies the employee's full rate of pay for the purposes of the National Employment Standards;

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(b) an enterprise agreement applies to the employee and specifies the employee's full rate of pay for the purposes of the National Employment Standards;

(c) the employee is an award/agreement free employee, and the regulations prescribe, or provide for the determination of, the employee's full rate of pay for the purposes of the National Employment Standards.

19 Meaning of *industrial action*

(1) ***Industrial action*** means action of any 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.

Note: In *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v The Age Company Limited*, PR946290, the Full Bench of the Australian Industrial Relations Commission considered the nature of industrial action and noted that action will not be industrial in character if it stands completely outside the area of disputation and bargaining.

(2) However, ***industrial action*** does not include the following:

(a) action by employees that is authorised or agreed to by the employer of the employees;

(b) action by an employer that is authorised or agreed to by, or on behalf of, employees of the employer;

(c) action by an employee if:

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(i) the action was based on a reasonable concern of 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.

(3) 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.

Note: In this section, ***employee*** and ***employer*** have their ordinary meanings (see section 11).

20 Meaning of *ordinary hours of work* for award/agreement free employees

Agreed ordinary hours of work

(1) The ***ordinary hours of work*** of an award/agreement free employee are the hours agreed by the employee and his or her national system employer as the employee's ordinary hours of work.

If there is no agreement

(2) If there is no agreement about ordinary hours of work for an award/agreement free employee, the ***ordinary hours of work*** of the employee in a week are:

(a) for a full time employee—38 hours; or

(b) for an employee who is not a full-time employee—the lesser of:

(i) 38 hours; and

(ii) the employee's usual weekly hours of work.

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If the agreed hours are less than usual weekly hours

(3) If, for an award/agreement free employee who is not a full-time employee, there is an agreement under subsection (1) between the employee and his or her national system employer, but the agreed ordinary hours of work are less than the employee's usual weekly hours of work, the ***ordinary hours of work*** of the employee in a week are the lesser of:
  (a) 38 hours; and
  (b) the employee's usual weekly hours of work.

Regulations may prescribe usual weekly hours

(4) For an award/agreement free employee who is not a full-time employee and who does not have usual weekly hours of work, the regulations may prescribe, or provide for the determination of, hours that are taken to be the employee's usual weekly hours of work for the purposes of subsections (2) and (3).

21 Meaning of *pieceworker*

(1) A ***pieceworker*** is:
  (a) a national system employee to whom a modern award applies and who is defined or described in the award as a pieceworker; or
  (b) a national system employee to whom an enterprise agreement applies and who is defined or described in the agreement as a pieceworker; or
  (c) an award/agreement free employee who is in a class of employees prescribed by the regulations as pieceworkers.

Note: Sections 197 and 198 affect whether the FWC may approve an enterprise agreement covering a national system employee that includes a term that:
  (a) defines or describes the employee as a pieceworker, if the employee is covered by a modern award that is in operation and does not include such a term; or
  (b) does not define or describe the employee as a pieceworker, if the employee is covered by a modern award that is in operation and includes such a term.

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(2) Without limiting the way in which a class may be described for the purposes of paragraph (1)(c), the class may be described by reference to one or more of the following:
  (a) a particular industry or part of an industry;
  (b) a particular kind of work;
  (c) a particular type of employment.

22 Meanings of *service* and *continuous service*

General meaning

(1) A period of ***service*** by a national system employee with his or her national system employer is a period during which the employee is employed by the employer, but does not include any period (an ***excluded period***) that does not count as service because of subsection (2).

(2) The following periods do not count as service:
  (a) any period of unauthorised absence;
  (b) any period of unpaid leave or unpaid authorised absence, other than:
    (i) a period of absence under Division 8 of Part 2-2 (which deals with community service leave); or
    (ii) a period of stand down under Part 3-5, under an enterprise agreement that applies to the employee, or under the employee's contract of employment; or
    (iii) a period of leave or absence of a kind prescribed by the regulations;
  (c) any other period of a kind prescribed by the regulations.

(3) An excluded period does not break a national system employee's ***continuous service*** with his or her national system employer, but does not count towards the length of the employee's continuous service.

(3A) Regulations made for the purposes of paragraph (2)(c) may prescribe different kinds of periods for the purposes of different provisions of this Act (other than provisions to which

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subsection (4) applies). If they do so, subsection (3) applies accordingly.

Meaning for Divisions 4 and 5, and Subdivision A of Division 11, of Part 2-2

(4) For the purposes of Divisions 4 and 5, and Subdivision A of Division 11, of Part 2-2:

(a) a period of ***service*** by a national system employee with his or her national system employer is a period during which the employee is employed by the employer, but does not include:

(i) any period of unauthorised absence; or

(ii) any other period of a kind prescribed by the regulations; and

(b) a period referred to in subparagraph (a)(i) or (ii) does not break a national system employee's ***continuous service*** with his or her national system employer, but does not count towards the length of the employee's continuous service; and

(c) subsections (1), (2) and (3) do not apply.

Note: Divisions 4 and 5, and Subdivision A of Division 11, of Part 2-2 deal, respectively, with requests for flexible working arrangements, parental leave and related entitlements, and notice of termination or payment in lieu of notice.

(4A) Regulations made for the purposes of subparagraph (4)(a)(ii) may prescribe different kinds of periods for the purposes of different provisions to which subsection (4) applies. If they do so, paragraph (4)(b) applies accordingly.

When service with one employer counts as service with another employer

(5) If there is a transfer of employment (see subsection (7)) in relation to a national system employee:

(a) any period of service of the employee with the first employer counts as service of the employee with the second employer; and

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(b) the period between the termination of the employment with the first employer and the start of the employment with the second employer does not break the employee's continuous service with the second employer (taking account of the effect of paragraph (a)), but does not count towards the length of the employee's continuous service with the second employer.

Note: This subsection does not apply to a transfer of employment between non-associated entities, for the purpose of Division 6 of Part 2-2 (which deals with annual leave) or Subdivision B of Division 11 of Part 2-2 (which deals with redundancy pay), if the second employer decides not to recognise the employee's service with the first employer for the purpose of that Division or Subdivision (see subsections 91(1) and 122(1)).

(6) If the national system employee has already had the benefit of an entitlement the amount of which was calculated by reference to a period of service with the first employer, subsection (5) does not result in that period of service with the first employer being counted again when calculating the employee's entitlements of that kind as an employee of the second employer.

Note: For example:

(a) the accrued paid annual leave to which the employee is entitled as an employee of the second employer does not include any period of paid annual leave that the employee has already taken as an employee of the first employer; and

(b) if an employee receives notice of termination or payment in lieu of notice in relation to a period of service with the first employer, that period of service is not counted again in calculating the amount of notice of termination, or payment in lieu, to which the employee is entitled as an employee of the second employer.

*Meaning of **transfer of employment** etc.*

(7) There is a ***transfer of employment*** of a national system employee from one national system employer (the ***first employer***) to another national system employer (the ***second employer***) if:

(a) the following conditions are satisfied:

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(i) the employee becomes employed by the second employer not more than 3 months after the termination of the employee's employment with the first employer;

(ii) the first employer and the second employer are associated entities when the employee becomes employed by the second employer; or

(b) the following conditions are satisfied:

(i) the employee is a transferring employee in relation to a transfer of business from the first employer to the second employer;

(ii) the first employer and the second employer are not associated entities when the employee becomes employed by the second employer.

Note: Paragraph (a) applies whether or not there is a transfer of business from the first employer to the second employer.

(8) A transfer of employment:

(a) is a ***transfer of employment between associated entities*** if paragraph (7)(a) applies; and

(b) is a ***transfer of employment between non-associated entities*** if paragraph (7)(b) applies.

23 Meaning of *small business employer*

(1) A national system employer is a ***small business employer*** at a particular time if the employer employs fewer than 15 employees at that time.

(2) For the purpose of calculating the number of employees employed by the employer at a particular time:

(a) subject to paragraph (b), all employees employed by the employer at that time are to be counted; and

(b) a casual employee is not to be counted unless, at that time, he or she has been employed by the employer on a regular and systematic basis.

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(3) For the purpose of calculating the number of employees employed by the employer at a particular time, associated entities are taken to be one entity.

(4) To avoid doubt, in determining whether a national system employer is a ***small business employer*** at a particular time in relation to the dismissal of an employee, or termination of an employee's employment, the employees that are to be counted include (subject to paragraph (2)(b)):
   (a) the employee who is being dismissed or whose employment is being terminated; and
   (b) any other employee of the employer who is also being dismissed or whose employment is also being terminated.

23A Terms relating to superannuation

(1) ***MySuper product*** has the meaning given by the *Superannuation Industry (Supervision) Act 1993*.

(1A) A ***standard MySuper product*** is a MySuper product that is not an employer MySuper product.

(1B) An ***employer MySuper product*** is a tailored MySuper product or a corporate MySuper product.

(2) A ***tailored MySuper product*** is a MySuper product in relation to which section 29TB of the *Superannuation Industry (Supervision) Act 1993* is satisfied.

(3) A ***corporate MySuper product*** is a MySuper product that is offered by a superannuation fund that:
   (a) is a standard employer-sponsored fund (within the meaning of the *Superannuation Industry (Supervision) Act 1993*); and
   (b) is not a public offer superannuation fund (within the meaning of that Act); and
   (c) has:
      (i) one standard employer-sponsor (within the meaning of that Act); or

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(ii) 2 or more standard employer-sponsors (within the meaning of that Act) that are associates of each other for the purposes of that Act.

(4) A reference in this Act to a superannuation fund doing a thing in relation to a matter (for example, offering a MySuper product or making an application or submission) is a reference to the RSE licensee (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) of the fund doing that thing.

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Part 1-3—Application of this Act

Division 1—Introduction

24 Guide to this Part

This Part deals with the extent of the application of this Act.

Division 2 is about how this Act affects the operation of certain State or Territory laws.

Divisions 2A and 2B are about the extended application of this Act in States that have referred to the Parliament of the Commonwealth matters relating to this Act.

Division 3 is about the geographical application of this Act.

Division 4 deals with other matters relating to the application of this Act.

25 Meanings of *employee* and *employer*

In this Part, ***employee*** and ***employer*** have their ordinary meanings.

Note: See also Division 2 of Part 6-4A (TCF contract outworkers taken to be employees in certain circumstances). However, that Division does not apply for the purposes of Divisions 2A and 2B of this Part.

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Division 2—Interaction with State and Territory laws

26 Act excludes State or Territory industrial laws

(1) This Act is intended to apply to the exclusion of all State or Territory industrial laws so far as they would otherwise apply in relation to a national system employee or a national system employer.

(2) A ***State or Territory industrial law*** is:

(a) a general State industrial law; 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 activity, collective bargaining, industrial disputes and industrial action);

(ii) providing for the establishment or enforcement of terms and conditions of employment;

(iii) providing for the making and enforcement of agreements (including individual agreements and collective agreements), and other industrial instruments or orders, determining terms and conditions of employment;

(iv) prohibiting conduct relating to a person's membership or non-membership of an industrial association;

(v) providing for rights and remedies connected with the termination of employment;

(vi) providing for rights and remedies connected with conduct that adversely affects an employee in his or her employment; or

(c) a law of a State or Territory that applies to employment generally and deals with leave (other than long service leave or leave for victims of crime); or

(d) a law of a State or Territory providing for a court or tribunal constituted by a law of the State or Territory to make an

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order in relation to equal remuneration for work of equal or comparable value; or

(e) a law of a State or Territory 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; or

(f) a law of a State or Territory that entitles a representative of a trade union to enter premises; or

(g) an instrument made under a law described in paragraph (a), (b), (c), (d), (e) or (f), so far as the instrument is of a legislative character; or

(h) either of the following:

(i) a law that is a law of a State or Territory;

(ii) an instrument of a legislative character made under such a law;

that is prescribed by the regulations.

(3) Each of the following is a ***general State industrial law***:

(a) the *Industrial Relations Act 1996* of New South Wales;

(b) the *Industrial Relations Act 1999* of Queensland;

(c) the *Industrial Relations Act 1979* of Western Australia;

(d) the *Fair Work Act 1994* of South Australia;

(e) the *Industrial Relations Act 1984* of Tasmania.

(4) A law or an Act 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.

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27 State and Territory laws that are not excluded by section 26

(1A) Section 26 does not apply to any of the following laws:

(a) the *Anti-Discrimination Act 1977* of New South Wales;

(b) the *Equal Opportunity Act 2010* of Victoria;

(c) the *Anti-Discrimination Act 1991* of Queensland;

(d) the *Equal Opportunity Act 1984* of Western Australia;

(e) the *Equal Opportunity Act 1984* of South Australia;

(f) the *Anti-Discrimination Act 1998* of Tasmania;

(g) the *Discrimination Act 1991* of the Australian Capital Territory;

(h) the *Anti-Discrimination Act* of the Northern Territory.

(1) Section 26 does not apply to a law of a State or Territory so far as:

(b) the law is prescribed by the regulations as a law to which section 26 does not apply; or

(c) the law deals with any non-excluded matters; or

(d) the law deals with rights or remedies incidental to:

(i) any law referred to in subsection (1A); or

(ii) any matter dealt with by a law to which paragraph (b) applies; or

(iii) any non-excluded matters.

Note: Examples of incidental matters covered by paragraph (d) are entry to premises for a purpose connected with workers compensation, occupational health and safety or outworkers.

(2) The ***non-excluded matters*** are as follows:

(a) superannuation;

(b) workers compensation;

(c) occupational health and safety;

(d) matters relating to outworkers (within the ordinary meaning of the term);

(e) child labour;

(f) training arrangements, except in relation to terms and conditions of employment to the extent that those terms and

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conditions are provided for by the National Employment Standards or may be included in a modern award;

(g) long service leave, except in relation to an employee who is entitled under Division 9 of Part 2-2 to long service leave;

(h) leave for victims of crime;

(i) attendance for service on a jury, or for emergency service duties;

Note: See also section 112 for employee entitlements in relation to engaging in eligible community service activities.

(j) declaration, prescription or substitution of public holidays, except in relation to the rights and obligations of an employee or employer in relation to public holidays;

(k) the following matters relating to provision of essential services or to situations of emergency:

(i) directions to perform work (including to perform work at a particular time or place, or in a particular way);

(ii) directions not to perform work (including not to perform work at a particular time or place, or in a particular way);

(l) regulation of any of the following:

(i) employee associations;

(ii) employer associations;

(iii) members of employee associations or of employer associations;

(m) workplace surveillance;

(n) business trading hours;

(o) claims for enforcement of contracts of employment, except so far as the law in question provides for a matter to which paragraph 26(2)(e) applies;

(p) any other matters prescribed by the regulations.

28 Act excludes prescribed State and Territory laws

(1) This Act is intended to apply to the exclusion of a law of a State or Territory that is prescribed by the regulations.

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(2) However, subsection (1) applies only so far as the law of the State or Territory would otherwise apply in relation to a national system employee or a national system employer.

(3) To avoid doubt, subsection (1) has effect even if the law is covered by section 27 (so that section 26 does not apply to the law). This subsection does not limit subsection (1).

29 Interaction of modern awards and enterprise agreements with State and Territory laws

(1) A modern award or enterprise agreement prevails over a law of a State or Territory, to the extent of any inconsistency.

(2) Despite subsection (1), a term of a modern award or enterprise agreement applies subject to the following:
  (a) any law covered by subsection 27(1A);
  (b) any law of a State or Territory so far as it is covered by paragraph 27(1)(b), (c) or (d).

(3) Despite subsection (2), a term of a modern award or enterprise agreement does not apply subject to a law of a State or Territory that is prescribed by the regulations as a law to which modern awards and enterprise agreements are not subject.

30 Act may exclude State and Territory laws etc. in other cases

This Division is 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.

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Division 2A—Application of this Act in States that refer matters before 1 July 2009

30A Meaning of terms used in this Division

(1) In this Division:

amendment reference of a State means the reference by the Parliament of the State to the Parliament of the Commonwealth of the matters covered by subsection 30B(4).

excluded subject matter means any of the following matters:

(a) a matter dealt with in a law referred to in subsection 27(1A) of this Act;
(b) superannuation;
(c) workers compensation;
(d) occupational health and safety;
(e) matters relating to outworkers (within the ordinary meaning of the term);
(f) child labour;
(g) training arrangements;
(h) long service leave;
(i) leave for victims of crime;
(j) attendance for service on a jury, or for emergency service duties;
(k) declaration, prescription or substitution of public holidays;
(l) the following matters relating to provision of essential services or to situations of emergency:
  (i) directions to perform work (including to perform work at a particular time or place, or in a particular way);
  (ii) directions not to perform work (including not to perform work at a particular time or place, or in a particular way);
(m) regulation of any of the following:
  (i) employee associations;

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(ii) employer associations;
(iii) members of employee associations or of employer associations;

(n) workplace surveillance;
(o) business trading hours;
(p) claims for enforcement of contracts of employment, except so far as a law of a State provides 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;
(q) rights or remedies incidental to a matter referred to in a preceding paragraph of this definition;

except to the extent that this Act as originally enacted deals with the matter (directly or indirectly), or requires or permits instruments made or given effect under this Act so to deal with the matter.

express amendment means the direct amendment of the text of this Act (whether by the insertion, omission, repeal, substitution or relocation of words or matter), but does not include the enactment by a Commonwealth Act of a provision that has, or will have, substantive effect otherwise than as part of the text of this Act.

fundamental workplace relations principles: see subsection 30B(9).

initial reference of a State means the reference by the Parliament of the State to the Parliament of the Commonwealth of the matters covered by subsection 30B(3).

law enforcement officer means:

(a) a member of a police force or police service; or
(b) a person appointed to a position for the purpose of being trained as a member of a police force or police service; or
(c) a person who has the powers and duties of a member of a police force or police service;

and, without limiting paragraphs (a), (b) and (c), includes a police reservist, a police recruit, a police cadet, a junior constable, a

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police medical officer, a special constable, an ancillary constable or a protective services officer.

local government employee, of a State, means:

(a) an employee of a local government employer of the State; or

(b) any other employee in the State of a kind specified in the regulations.

local government employer, of a State, means an employer that is:

(a) a body corporate that is established for a local government purpose by or under a law of a State; or

(b) a body corporate in which a body to which paragraph (a) applies has, or 2 or more such bodies together have, a controlling interest; or

(c) a person who employs individuals for the purposes of an unincorporated body that is established for a local government purpose by or under a law of a State; or

(d) any other body corporate that is a local government body in the State of a kind specified in the regulations; or

(e) any other person who employs individuals for the purposes of an unincorporated body that is a local government body in the State of a kind specified in the regulations.

referral law, of a State, means the law of the State that refers matters, as mentioned in subsection 30B(1), to the Parliament of the Commonwealth.

referred provisions means the provisions of this Division to the extent to which they deal with matters that are included in the legislative powers of the Parliaments of the States.

referred subject matters means any of the following:

(a) terms and conditions of employment, including any of the following:

(i) minimum terms and conditions of employment, (including employment standards and minimum wages);

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(ii) terms and conditions of employment contained in instruments (including instruments such as awards, determinations and enterprise-level agreements);
(iii) bargaining in relation to terms and conditions of employment;
(iv) the effect of a transfer of business on terms and conditions of employment;

(b) terms and conditions under which an outworker entity may arrange for work to be performed for the entity (directly or indirectly), if the work is of a kind that is often performed by outworkers;

(c) rights and responsibilities of persons, including employees, employers, independent contractors, outworkers, outworker entities, associations of employees or associations of employers, being rights and responsibilities relating to any of the following:
(i) freedom of association in the context of workplace relations, and related protections;
(ii) protection from discrimination relating to employment;
(iii) termination of employment;
(iv) industrial action;
(v) protection from payment of fees for services related to bargaining;
(vi) sham independent contractor arrangements;
(vii) standing down employees without pay;
(viii) union rights of entry and rights of access to records;

(d) compliance with, and enforcement of, this Act;

(e) the administration of this Act;

(f) the application of this Act;

(g) matters incidental or ancillary to the operation of this Act or of instruments made or given effect under this Act;

but does not include any excluded subject matter.

referring State: see section 30B.

State public sector employee, of a State, means:

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(a) an employee of a State public sector employer of the State; or
(b) any other employee in the State of a kind specified in the regulations;

and includes a law enforcement officer to whom subsection 30E(1) applies.

State public sector employer, of a State, means an employer that is:

(a) the State, the Governor of the State or a Minister of the State; or
(b) a body corporate that is established for a public purpose by or under a law of the State, by the Governor of the State or by a Minister of the State; or
(c) a body corporate in which the State has a controlling interest; or
(d) a person who employs individuals for the purposes of an unincorporated body that is established for a public purpose by or under a law of the State, by the Governor of the State or by a Minister of the State; or
(e) any other employer in the State of a kind specified in the regulations;

and includes a holder of an office to whom subsection 30E(2) applies.

transition reference of a State means the reference by the Parliament of the State to the Parliament of the Commonwealth of the matters covered by subsection 30B(5).

(2) Words or phrases in the definition of ***excluded subject matter*** in subsection (1), or in the definition of ***referred subject matters*** in subsection (1), that are defined in this Act (other than in this Division) have, in that definition, the meanings set out in this Act as in force on 1 July 2009.

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30B Meaning of *referring State*

Reference of matters by State Parliament to Commonwealth Parliament

(1) A State is a ***referring State*** if the Parliament of the State has, before 1 July 2009, referred the matters covered by subsections (3), (4) and (5) in relation to the State to the Parliament of the Commonwealth for the purposes of paragraph 51(xxxvii) of the Constitution:

(a) if and to the extent that the matters are not otherwise included in the legislative powers of the Parliament of the Commonwealth (otherwise than by a reference under paragraph 51(xxxvii) of the Constitution); and

(b) if and to the extent that the matters are included in the legislative powers of the Parliament of the State.

This subsection has effect subject to subsection (6).

(2) A State is a ***referring State*** even if:

(a) the State's referral law provides that the reference to the Parliament of the Commonwealth of any or all of the matters covered by subsections (3), (4) and (5) is to terminate in particular circumstances; or

(b) the State's referral law provides that particular matters, or all matters, relating to State public sector employees, or State public sector employers, of the State are not included in any or all of the matters covered by subsections (3), (4) and (5); or

(c) the State's referral law provides that particular matters, or all matters, relating to local government employees, or local government employers, of the State are not included in any or all of the matters covered by subsections (3), (4) and (5).

Reference covering referred provisions

(3) This subsection covers the matters to which the referred provisions relate to the extent of making laws with respect to those matters by

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amending this Act, as originally enacted, to include the referred provisions.

Reference covering amendments

(4) This subsection covers the referred subject matters to the extent of making laws with respect to those matters by making express amendments of this Act.

Reference covering transitional matters

(5) This subsection covers making laws with respect to the transition from the regime provided for by:
  (a) the *Workplace Relations Act 1996*; or
  (b) a law of a State relating to workplace relations;
to the regime provided for by this Act.

Effect of termination of reference

(6) Despite anything to the contrary in a referral law of a State, a State ceases to be a ***referring State*** if any or all of the following occurs:
  (a) the State's initial reference terminates;
  (b) the State's amendment reference terminates, and neither of subsections (7) and (8) apply to the termination;
  (c) the State's transition reference terminates.

(7) A State does not cease to be a ***referring State*** because of the termination of its amendment reference if:
  (a) the termination is effected by the Governor of that State fixing a day by proclamation as the day on which the reference terminates; and
  (b) the day fixed is no earlier than the first day after the end of the period of 6 months beginning on the day on which the proclamation is published; and
  (c) that State's amendment reference, and the amendment reference of every other referring State (other than a referring State that has terminated its amendment reference in the

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circumstances referred to in subsection (8)), terminate on the same day.

(8) A State does not cease to be a ***referring State*** because of the termination of its amendment reference if:

(a) the termination is effected by the Governor of that State fixing a day by proclamation as the day on which the reference terminates; and

(b) the day fixed is no earlier than the first day after the end of the period of 3 months beginning on the day on which the proclamation is published; and

(c) the Governor of that State, as part of the proclamation by which the termination is to be effected, declares that, in the opinion of the Governor, this Act:

(i) is proposed to be amended (by an amendment introduced into the Parliament by a Minister); or

(ii) has been amended;

in a manner that is inconsistent with one or more of the fundamental workplace relations principles.

(9) The following are the ***fundamental workplace relations principles***:

(a) that this Act should provide for, and continue to provide for, the following:

(i) a strong, simple and enforceable safety net of minimum employment standards;

(ii) genuine rights and responsibilities to ensure fairness, choice and representation at work, including the freedom to choose whether or not to join and be represented by a union or participate in collective activities;

(iii) collective bargaining at the enterprise level with no provision for individual statutory agreements;

(iv) fair and effective remedies available through an independent umpire;

(v) protection from unfair dismissal;

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(b) that there should be, and continue to be, in connection with the operation of this Act, the following:
  (i) an independent tribunal system;
  (ii) an independent authority able to assist employers and employees within a national workplace relations system.

30C Extended meaning of *national system employee*

(1) A ***national system employee*** includes:
  (a) any individual in a State that is a referring State because of this Division so far as he or she is employed, or usually employed, as described in paragraph 30D(1)(a), except on a vocational placement; and
  (b) a law enforcement officer of the State to whom subsection 30E(1) applies.

(2) This section does not limit the operation of section 13 (which defines a national system employee).

Note: Section 30H may limit the extent to which this section extends the meaning of ***national system employee***.

30D Extended meaning of *national system employer*

(1) A ***national system employer*** includes:
  (a) any person in a State that is a referring State because of this Division so far as the person employs, or usually employs, an individual; and
  (b) a holder of an office to whom subsection 30E(2) applies.

(2) This section does not limit the operation of section 14 (which defines a national system employer).

Note: Section 30H may limit the extent to which this section extends the meaning of ***national system employer***.

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30E Extended ordinary meanings of *employee* and *employer*

(1) A reference in this Act to an employee with its ordinary meaning includes a reference to a law enforcement officer of a State that is a referring State because of this Division if the State's referral law so provides for the purposes of that law.

(2) A reference in this Act to an employer with its ordinary meaning includes a reference to a holder of an office of a State that is a referring State because of this Division if the State's referral law provides, for the purposes of that law, that the holder of the office is taken to be the employer of a law enforcement officer of the State.

(3) This section does not limit the operation of section 15 (which deals with references to employee and employer with their ordinary meanings).

Note: Section 30H may limit the extent to which this section extends the meanings of ***employee*** and ***employer***.

30F Extended meaning of *outworker entity*

(1) An ***outworker entity*** includes a person, other than in the person's capacity as a national system employer, so far as:
  (a) the person arranges for work to be performed for the person (either directly or indirectly); and
  (b) the work is of a kind that is often performed by outworkers; and
  (c) one or more of the following applies:
    (i) at the time the arrangement is made, one or more parties to the arrangement is in a State that is a referring State because of this Division;
    (ii) the work is to be performed in a State that is a referring State because of this Division;
    (iii) the person referred to in paragraph (a) carries on an activity (whether of a commercial, governmental or other nature) in a State that is a referring State because

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of this Division, and the work is reasonably likely to be performed in that State;

(iv) the person referred to in paragraph (a) carries on an activity (whether of a commercial, governmental or other nature) in a State that is a referring State because of this Division, and the work is to be performed in connection with that activity.

(2) This section does not limit the operation of the definition of ***outworker entity*** in section 12.

Note: Section 30H may limit the extent to which this section extends the meaning of ***outworker entity***.

30G General protections

(1) Part 3-1 (which deals with general protections) applies to action taken in a State that is a referring State because of this Division.

(2) This section applies despite section 337 (which limits the application of Part 3-1), and does not limit the operation of sections 338 and 339 (which set out the application of that Part).

Note: Section 30H may limit the extent to which this section extends the application of Part 3-1.

30H Division only has effect if supported by reference

A provision of this Division has effect in relation to a State that is a referring State because of this Division only to the extent that the State's referral law refers to the Parliament of the Commonwealth the matters mentioned in subsection 30B(1) that result in the Parliament of the Commonwealth having sufficient legislative power for the provision so to have effect.

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Division 2B—Application of this Act in States that refer matters after 1 July 2009 but on or before 1 January 2010

30K Meaning of terms used in this Division

(1) In this Division:

amendment reference of a State means the reference by the Parliament of the State to the Parliament of the Commonwealth of the matters covered by subsection 30L(4).

excluded subject matter means any of the following matters:

(a) a matter dealt with in a law referred to in subsection 27(1A) of this Act;
(b) superannuation;
(c) workers compensation;
(d) occupational health and safety;
(e) matters relating to outworkers (within the ordinary meaning of the term);
(f) child labour;
(g) training arrangements;
(h) long service leave;
(i) leave for victims of crime;
(j) attendance for service on a jury, or for emergency service duties;
(k) declaration, prescription or substitution of public holidays;
(l) the following matters relating to provision of essential services or to situations of emergency:
    (i) directions to perform work (including to perform work at a particular time or place, or in a particular way);
    (ii) directions not to perform work (including not to perform work at a particular time or place, or in a particular way);

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(m) regulation of any of the following:
  (i) employee associations;
  (ii) employer associations;
  (iii) members of employee associations or of employer associations;
(n) workplace surveillance;
(o) business trading hours;
(p) claims for enforcement of contracts of employment, except so far as a law of a State provides 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;
(q) rights or remedies incidental to a matter referred to in a preceding paragraph of this definition;

except to the extent that this Act as originally enacted deals with the matter (directly or indirectly), or requires or permits instruments made or given effect under this Act so to deal with the matter.

express amendment means the direct amendment of the text of this Act (whether by the insertion, omission, repeal, substitution or relocation of words or matter), but does not include the enactment by a Commonwealth Act of a provision that has, or will have, substantive effect otherwise than as part of the text of this Act.

fundamental workplace relations principles: see subsection 30L(9).

initial reference of a State means the reference by the Parliament of the State to the Parliament of the Commonwealth of the matters covered by subsection 30L(3).

law enforcement officer means:
(a) a member of a police force or police service; or
(b) a person appointed to a position for the purpose of being trained as a member of a police force or police service; or

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(c) a person who has the powers and duties of a member of a police force or police service;

and, without limiting paragraphs (a), (b) and (c), includes a police reservist, a police recruit, a police cadet, a junior constable, a police medical officer, a special constable, an ancillary constable or a protective services officer.

local government employee, of a State, means:

(a) an employee of a local government employer of the State; or

(b) any other employee in the State of a kind specified in the regulations.

local government employer, of a State, means an employer that is:

(a) a body corporate that is established for a local government purpose by or under a law of a State; or

(b) a body corporate in which a body to which paragraph (a) applies has, or 2 or more such bodies together have, a controlling interest; or

(c) a person who employs individuals for the purposes of an unincorporated body that is established for a local government purpose by or under a law of a State; or

(d) any other body corporate that is a local government body in the State of a kind specified in the regulations; or

(e) any other person who employs individuals for the purposes of an unincorporated body that is a local government body in the State of a kind specified in the regulations.

referral law, of a State, means the law of the State that refers matters, as mentioned in subsection 30L(1), to the Parliament of the Commonwealth.

referred provisions means the provisions of this Division to the extent to which they deal with matters that are included in the legislative powers of the Parliaments of the States.

referred subject matters means any of the following:

(a) terms and conditions of employment, including any of the following:

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(i) minimum terms and conditions of employment, (including employment standards and minimum wages);
(ii) terms and conditions of employment contained in instruments (including instruments such as awards, determinations and enterprise-level agreements);
(iii) bargaining in relation to terms and conditions of employment;
(iv) the effect of a transfer of business on terms and conditions of employment;

(b) terms and conditions under which an outworker entity may arrange for work to be performed for the entity (directly or indirectly), if the work is of a kind that is often performed by outworkers;

(c) rights and responsibilities of persons, including employees, employers, independent contractors, outworkers, outworker entities, associations of employees or associations of employers, being rights and responsibilities relating to any of the following:
(i) freedom of association in the context of workplace relations, and related protections;
(ii) protection from discrimination relating to employment;
(iii) termination of employment;
(iv) industrial action;
(v) protection from payment of fees for services related to bargaining;
(vi) sham independent contractor arrangements;
(vii) standing down employees without pay;
(viii) union rights of entry and rights of access to records;

(d) compliance with, and enforcement of, this Act;

(e) the administration of this Act;

(f) the application of this Act;

(g) matters incidental or ancillary to the operation of this Act or of instruments made or given effect under this Act;

but does not include any excluded subject matter.

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referring State: see section 30L.

State public sector employee, of a State, means:

(a) an employee of a State public sector employer of the State; or

(b) any other employee in the State of a kind specified in the regulations;

and includes a law enforcement officer of the State.

State public sector employer, of a State, means an employer that is:

(a) the State, the Governor of the State or a Minister of the State; or

(b) a body corporate that is established for a public purpose by or under a law of the State, by the Governor of the State or by a Minister of the State; or

(c) a body corporate in which the State has a controlling interest; or

(d) a person who employs individuals for the purposes of an unincorporated body that is established for a public purpose by or under a law of the State, by the Governor of the State or by a Minister of the State; or

(e) any other employer in the State of a kind specified in the regulations;

and includes a holder of an office of the State whom the State's referral law provides is to be taken, for the purposes of this Act, to be an employer of law enforcement officers of the State.

transition reference of a State means the reference by the Parliament of the State to the Parliament of the Commonwealth of the matters covered by subsection 30L(5).

(2) Words or phrases in the definition of ***excluded subject matter*** in subsection (1), or in the definition of ***referred subject matters*** in subsection (1), that are defined in this Act (other than in this Division) have, in that definition, the meanings set out in this Act as in force on 1 July 2009.

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30L Meaning of *referring State*

Reference of matters by State Parliament to Commonwealth Parliament

(1) A State is a ***referring State*** if the Parliament of the State has, after 1 July 2009 but on or before 1 January 2010, referred the matters covered by subsections (3), (4) and (5) in relation to the State to the Parliament of the Commonwealth for the purposes of paragraph 51(xxxvii) of the Constitution:

(a) if and to the extent that the matters are not otherwise included in the legislative powers of the Parliament of the Commonwealth (otherwise than by a reference under paragraph 51(xxxvii) of the Constitution); and

(b) if and to the extent that the matters are included in the legislative powers of the Parliament of the State.

This subsection has effect subject to subsection (6).

(2) A State is a ***referring State*** even if:

(a) the State's referral law provides that the reference to the Parliament of the Commonwealth of any or all of the matters covered by subsections (3), (4) and (5) is to terminate in particular circumstances; or

(b) the State's referral law provides that particular matters, or all matters, relating to State public sector employees, or State public sector employers, of the State are not included in any or all of the matters covered by subsections (3), (4) and (5); or

(c) the State's referral law provides that particular matters, or all matters, relating to local government employees, or local government employers, of the State are not included in any or all of the matters covered by subsections (3), (4) and (5).

Reference covering referred provisions

(3) This subsection covers the matters to which the referred provisions relate to the extent of making laws with respect to those matters by amending this Act, as originally enacted, and as subsequently

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amended by amendments enacted at any time before the State's referral law commenced, to include the referred provisions.

Reference covering amendments

(4) This subsection covers the referred subject matters to the extent of making laws with respect to those matters by making express amendments of this Act.

Reference covering transitional matters

(5) This subsection covers making laws with respect to the transition from the regime provided for by:
   (a) the *Workplace Relations Act 1996* (as it continues to apply because of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*); or
   (b) a law of a State relating to workplace relations or industrial relations;

   to the regime provided for by this Act.

Effect of termination of reference

(6) Despite anything to the contrary in a referral law of a State, a State ceases to be a ***referring State*** if any or all of the following occurs:
   (a) the State's initial reference terminates;
   (b) the State's amendment reference terminates, and neither of subsections (7) and (8) apply to the termination;
   (c) the State's transition reference terminates.

(7) A State does not cease to be a ***referring State*** because of the termination of its amendment reference if:
   (a) the termination is effected by the Governor of that State fixing a day by proclamation as the day on which the reference terminates; and
   (b) the day fixed is no earlier than the first day after the end of the period of 6 months beginning on the day on which the proclamation is published; and

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(c) that State's amendment reference, and the amendment reference of every other referring State (other than a referring State that has terminated its amendment reference in the circumstances referred to in subsection (8)), terminate on the same day.

(8) A State does not cease to be a ***referring State*** because of the termination of its amendment reference if:

(a) the termination is effected by the Governor of that State fixing a day by proclamation as the day on which the reference terminates; and

(b) the day fixed is no earlier than the first day after the end of the period of 3 months beginning on the day on which the proclamation is published; and

(c) the Governor of that State, as part of the proclamation by which the termination is to be effected, declares that, in the opinion of the Governor, this Act:

(i) is proposed to be amended (by an amendment introduced into the Parliament by a Minister); or

(ii) has been amended;

in a manner that is inconsistent with one or more of the fundamental workplace relations principles.

(9) The following are the ***fundamental workplace relations principles***:

(a) that this Act should provide for, and continue to provide for, the following:

(i) a strong, simple and enforceable safety net of minimum employment standards;

(ii) genuine rights and responsibilities to ensure fairness, choice and representation at work, including the freedom to choose whether or not to join and be represented by a union or participate in collective activities;

(iii) collective bargaining at the enterprise level with no provision for individual statutory agreements;

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(iv) fair and effective remedies available through an independent umpire;

(v) protection from unfair dismissal;

(b) that there should be, and continue to be, in connection with the operation of this Act, the following:

(i) an independent tribunal system;

(ii) an independent authority able to assist employers and employees within a national workplace relations system.

30M Extended meaning of *national system employee*

(1) A ***national system employee*** includes:

(a) any individual in a State that is a referring State because of this Division so far as he or she is employed, or usually employed, as described in paragraph 30N(1)(a), except on a vocational placement; and

(b) a law enforcement officer of the State to whom subsection 30P(1) applies.

(2) This section does not limit the operation of section 13 (which defines a national system employee).

Note: Section 30S may limit the extent to which this section extends the meaning of ***national system employee***.

30N Extended meaning of *national system employer*

(1) A ***national system employer*** includes:

(a) any person in a State that is a referring State because of this Division so far as the person employs, or usually employs, an individual; and

(b) a holder of an office to whom subsection 30P(2) applies.

(2) This section does not limit the operation of section 14 (which defines a national system employer).

Note: Section 30S may limit the extent to which this section extends the meaning of ***national system employer***.

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30P Extended ordinary meanings of *employee* and *employer*

(1) A reference in this Act to an employee with its ordinary meaning includes a reference to a law enforcement officer of a referring State if the State's referral law so provides for the purposes of that law.

(2) A reference in this Act to an employer with its ordinary meaning includes a reference to a holder of an office of a State if the State's referral law provides, for the purposes of that law, that the holder of the office is taken to be the employer of a law enforcement officer of the State.

(3) This section does not limit the operation of section 15 (which deals with references to employee and employer with their ordinary meanings).

Note: Section 30S may limit the extent to which this section extends the meanings of ***employee*** and ***employer***.

30Q Extended meaning of *outworker entity*

(1) An ***outworker entity*** includes a person, other than in the person's capacity as a national system employer, so far as:
  (a) the person arranges for work to be performed for the person (either directly or indirectly); and
  (b) the work is of a kind that is often performed by outworkers; and
  (c) one or more of the following applies:
    (i) at the time the arrangement is made, one or more parties to the arrangement is in a State that is a referring State because of this Division;
    (ii) the work is to be performed in a State that is a referring State because of this Division;
    (iii) the person referred to in paragraph (a) carries on an activity (whether of a commercial, governmental or other nature) in a State that is a referring State because

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of this Division, and the work is reasonably likely to be performed in that State;

(iv) the person referred to in paragraph (a) carries on an activity (whether of a commercial, governmental or other nature) in a State that is a referring State because of this Division, and the work is to be performed in connection with that activity.

(2) This section does not limit the operation of the definition of ***outworker entity*** in section 12.

Note: Section 30S may limit the extent to which this section extends the meaning of ***outworker entity***.

30R General protections

(1) Part 3-1 (which deals with general protections) applies to action taken in a State that is a referring State because of this Division.

(2) This section applies despite section 337 (which limits the application of Part 3-1), and does not limit the operation of sections 338 and 339 (which set out the application of that Part).

Note: Section 30S may limit the extent to which this section extends the application of Part 3-1.

30S Division only has effect if supported by reference

A provision of this Division has effect in relation to a State that is a referring State because of this Division only to the extent that the State's referral law refers to the Parliament of the Commonwealth the matters mentioned in subsection 30L(1) that result in the Parliament of the Commonwealth having sufficient legislative power for the provision so to have effect.

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Division 3—Geographical application of this Act

31 Exclusion of persons etc. 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 *Legislation 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.

32 Regulations may modify application of this Act in certain parts of Australia

If the regulations prescribe modifications of this Act for its application in relation to all or part of any one or more of the following areas:

(a) all the waters of the sea on the landward side of the outer limits of the territorial sea of Australia, including:

(i) such waters within the limits of a State or Territory; and

(ii) the airspace over, and the seabed and sub-soil beneath, such waters;

(b) the Territory of Christmas Island;

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(c) the Territory of Cocos (Keeling) Islands;

then this Act has effect as so modified in relation to any such area or part.

Note: This Act would, in the absence of any such regulations, apply in relation to these areas in the same way as it applies in relation to the rest of Australia.

33 Extension of this Act to the exclusive economic zone and the continental shelf

Extension to Australian ships etc.

(1) Without limiting subsection (3), this Act extends to or in relation to:

(a) any Australian ship in the exclusive economic zone or in the waters above the continental shelf; and

(b) any fixed platform in the exclusive economic zone or in the waters above the continental shelf; and

(c) any ship, in the exclusive economic zone or in the waters above the continental shelf, that:

(i) supplies, services or otherwise operates in connection with a fixed platform in the exclusive economic zone or in the waters above the continental shelf; and

(ii) operates to and from an Australian port; and

(d) any ship, in the exclusive economic zone or in the waters above the continental shelf, that:

(i) is operated or chartered by an Australian employer; and

(ii) uses Australia as a base.

(2) For the purposes of extending this Act in accordance with paragraph (1)(d):

(a) any reference in a provision of this Act to an employer is taken to include a reference to an Australian employer; and

(b) any reference in a provision of this Act to an employee is taken to include a reference to an employee of an Australian employer.

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Extensions prescribed by regulations

(3) Without limiting subsection (1), if the regulations prescribe further extensions of this Act, or specified provisions of this Act, to or in relation to the exclusive economic zone or to the waters above the continental shelf, then this Act extends accordingly.

Modifications relating to extended application

(4) Despite subsections (1) and (3), if the regulations prescribe modifications of this Act, or specified provisions of this Act, for its operation under subsection (1) or (3) in relation to one or both of the following:
   (a) all or part of the exclusive economic zone;
   (b) all or part of the continental shelf;

   then, so far as this Act would, apart from this subsection, extend to the zone or part, or to the continental shelf or part, it has effect as so modified.

(5) For the purposes of subsection (4), the regulations may prescribe different modifications in relation to different parts of the exclusive economic zone or continental shelf.

34 Extension of this Act beyond the exclusive economic zone and the continental shelf

Extension to Australian ships etc.

(1) Without limiting subsection (3), this Act extends to or in relation to:
   (a) any Australian ship outside the outer limits of the exclusive economic zone and the continental shelf; and
   (b) any ship, outside the outer limits of the exclusive economic zone and the continental shelf, that:
      (i) is operated or chartered by an Australian employer; and
      (ii) uses Australia as a base.

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(2) For the purposes of extending this Act in accordance with paragraph (1)(b):
  (a) any reference in a provision of this Act to an employer is taken to include a reference to an Australian employer; and
  (b) any reference in a provision of this Act to an employee is taken to include a reference to an employee of an Australian employer.

Extensions prescribed by regulations

(3) Without limiting subsection (1), if the regulations prescribe further extensions of this Act, or specified provisions of this Act, in relation to all or part of the area outside the outer limits of the exclusive economic zone and the continental shelf, then this Act, or the specified provisions, extend accordingly to:
  (a) any Australian employer; and
  (b) any Australian-based employee.

(3A) For the purposes of extending this Act in accordance with subsection (3):
  (a) any reference in a provision of this Act to an employer is taken to include a reference to:
    (i) an Australian employer; and
    (ii) an employer of an Australian-based employee; and
  (b) any reference in a provision of this Act to an employee is taken to include a reference to:
    (i) an employee of an Australian employer; and
    (ii) an Australian-based employee.

Modified application in the area outside the outer limits of the exclusive economic zone and the continental shelf

(4) Despite subsections (1) and (3), if the regulations prescribe modifications of this Act, or specified provisions of this Act, for their operation under subsection (1) or (3) in relation to all or part of the area outside the outer limits of the exclusive economic zone

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and the continental shelf, then this Act, or the specified provisions, have effect as so modified in relation to the area or part.

(5) For the purposes of subsection (4), the regulations may prescribe different modifications in relation to different parts of the area outside the outer limits of the exclusive economic zone and the continental shelf.

35 Meanings of *Australian employer* and *Australian-based employee*

(1) An ***Australian employer*** is an employer that:
  (a) is a trading corporation formed within the limits of the Commonwealth (within the meaning of paragraph 51(xx) of the Constitution); or
  (b) is a financial corporation formed within the limits of the Commonwealth (within the meaning of paragraph 51(xx) of the Constitution); or
  (c) is the Commonwealth; or
  (d) is a Commonwealth authority; or
  (e) is a body corporate incorporated in a Territory; or
  (f) carries on in Australia, in the exclusive economic zone or in the waters above the continental shelf an activity (whether of a commercial, governmental or other nature), and whose central management and control is in Australia; or
  (g) is prescribed by the regulations.

(2) An ***Australian-based employee*** is an employee:
  (a) whose primary place of work is in Australia; or
  (b) who is employed by an Australian employer (whether the employee is located in Australia or elsewhere); or
  (c) who is prescribed by the regulations.

(3) However, paragraph (2)(b) does not apply to an employee who is engaged outside Australia and the external Territories to perform duties outside Australia and the external Territories.

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35A Regulations excluding application of Act

(1) Regulations made for the purposes of section 32 or subsection 33(4) or 34(4) may exclude the application of the whole of this Act in relation to all or a part of an area referred to in section 32 or subsection 33(4) or 34(4) (as the case may be).

(2) If subsection (1) applies, this Act has effect as if it did not apply in relation to that area or that part of that area.

36 Geographical application of offences

Division 14 (Standard geographical jurisdiction) of the *Criminal Code* does not apply in relation to an offence against this Act.

Note: The extended geographical application that this Division gives to this Act will apply to the offences in this Act.

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Division 4—Miscellaneous

37 Act binds Crown

(1) This Act binds the Crown in each of its capacities.

(2) However, this Act does not make the Crown liable to be prosecuted for an offence.

38 Act not to apply so as to exceed Commonwealth power

(1) Unless the contrary intention appears, if a provision of this Act:
  (a) would, apart from this section, have an application (an ***invalid application***) in relation to:
    (i) one or more particular persons, things, matters, places, circumstances or cases; or
    (ii) one or more classes (however defined or determined) of persons, things, matters, places, circumstances or cases;
  because of which the provision exceeds the Commonwealth's legislative power; and
  (b) also has at least one application (a ***valid application***) in relation to:
    (i) one or more particular persons, things, matters, places, circumstances or cases; or
    (ii) one or more classes (however defined or determined) of persons, things, matters, places, circumstances or cases;
  that, if it were the provision's only application, would be within the Commonwealth's legislative power;
  it is the Parliament's intention that the provision is not to have the invalid application, but is to have every valid application.

(2) Despite subsection (1), the provision is not to have a particular valid application if:
  (a) apart from this section, it is clear, taking into account the provision's context and the purpose or object underlying this Act, that the provision was intended to have that valid

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application only if every invalid application, or a particular invalid application, of the provision had also been within the Commonwealth's legislative power; or

(b) the provision's operation in relation to that valid application would be different in a substantial respect from what would have been its operation in relation to that valid application if every invalid application of the provision had been within the Commonwealth's legislative power.

(3) Subsection (2) does not limit the cases where a contrary intention may be taken to appear for the purposes of subsection (1).

(4) This section applies to a provision of this Act, whether enacted before, at or after the commencement of this section.

39 Acquisition of property

This Act, or any instrument made under this Act, does not apply to the extent that the operation of this Act or the instrument would result in an acquisition of property (within the meaning of paragraph 51(xxxi) of the Constitution) from a person otherwise than on just terms (within the meaning of that paragraph).

40 Interaction between fair work instruments and public sector employment laws

Generally, public sector employment laws prevail

(1) A public sector employment law prevails over a fair work instrument that deals with public sector employment, to the extent of any inconsistency.

When fair work instruments or their terms prevail

(2) However, a fair work instrument, or a term of a fair work instrument, that deals with public sector employment prevails over a public sector employment law, to the extent of any inconsistency, if:

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(a) the instrument or term is prescribed by the regulations for the purposes of that particular law; or
(b) the instrument or term (other than an FWC order or a term of an FWC order) is included in a class of instruments or terms that are prescribed by the regulations for the purposes of that particular law.

*Meaning of **public sector employment law***

(3) A ***public sector employment law*** is a law of the Commonwealth (other than this Act) or a Territory, or a term of an instrument made under such a law, that deals with public sector employment.

Laws that fair work instruments never prevail over

(4) Subsection (2) does not apply to any provisions of the following that are public sector employment laws:
(a) the *Safety, Rehabilitation and Compensation Act 1988*;
(b) the *Superannuation Act 1976*;
(c) the *Superannuation Act 1990*;
(d) the *Superannuation Act 2005*;
(e) the *Superannuation (Productivity Benefit) Act 1988*;
(f) an instrument made under a law referred to in any of the above paragraphs.

Relationship with section 29

(5) This section prevails over section 29, to the extent of any inconsistency.

40A Application of the *Acts Interpretation Act 1901*

(1) The *Acts Interpretation Act 1901*, as in force on 25 June 2009, applies to this Act.

(2) Amendments of the *Acts Interpretation Act 1901* made after that day do not apply to this Act.

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Chapter 2—Terms and conditions of employment

Part 2-1—Core provisions for this Chapter

Division 1—Introduction

41 Guide to this Part

This Part has the core provisions for this Chapter, which deals with terms and conditions of employment of national system employees. The main terms and conditions come from the National Employment Standards, modern awards, enterprise agreements and workplace determinations.

The National Employment Standards (Part 2-2) are minimum terms and conditions that apply to all national system employees.

A modern award (see Part 2-3), an enterprise agreement (see Part 2-4) or a workplace determination (see Part 2-5) provides terms and conditions for those national system employees to whom the award, agreement or determination applies. Only one of those instruments can apply to an employee at a particular time.

Division 2 has the provisions to enforce the National Employment Standards, modern awards and enterprise agreements. It also sets out when a modern award or enterprise agreement applies to a person and the significance of that for this Act.

Note: In most cases, this Act applies to a workplace determination as if it were an enterprise agreement in operation (see section 279). For the rules about workplace determinations, see Part 2-5.

Division 3 deals with the interaction between the National Employment Standards, modern awards and enterprise agreements.

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42 Meanings of *employee* and *employer*

In this Part, ***employee*** means a national system employee, and ***employer*** means a national system employer.

Note: See also Division 2 of Part 6-4A (TCF contract outworkers taken to be employees in certain circumstances).

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Division 2—Core provisions for this Chapter

Subdivision A—Terms and conditions of employment provided under this Act

43 Terms and conditions of employment provided under this Act

Main terms and conditions

(1) The main terms and conditions of employment of an employee that are provided under this Act are those set out in:
  (a) the National Employment Standards (see Part 2-2); and
  (b) a modern award (see Part 2-3), an enterprise agreement (see Part 2-4) or a workplace determination (see Part 2-5) that applies to the employee.

Note 1: The situations in which a workplace determination, rather than a modern award or enterprise agreement, provides an employee's terms and conditions of employment are limited. In most cases, this Act applies to a workplace determination as if it were an enterprise agreement in operation (see section 279). See Part 2-5 generally for the rules on workplace determinations.

Note 2: Part 2-8 provides for the transfer of certain modern awards, enterprise agreements and workplace determinations if there is a transfer of business from an employee's employer to another employer.

Note 3: Copied State instruments provide the main terms and conditions of employment for an employee to whom the instrument applies. See Part 6-3A generally for the rules about those instruments.

Other terms and conditions

(2) In addition, other terms and conditions of employment include:
  (a) those terms and conditions arising from:
    (i) a national minimum wage order (see Part 2-6); or
    (ii) an equal remuneration order (see Part 2-7); and
  (b) those terms and conditions provided by Part 2-9.

Note: Part 2-9 deals with miscellaneous terms and conditions of employment, such as payment of wages.

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Subdivision B—Terms and conditions of employment provided by the National Employment Standards

44 Contravening the National Employment Standards

(1) An employer must not contravene a provision of the National Employment Standards.

Note: This subsection is a civil remedy provision (see Part 4-1).

(2) However, an order cannot be made under Division 2 of Part 4-1 in relation to a contravention (or alleged contravention) of subsection 65(5) or 76(4).

Note 1: Subsections 65(5) and 76(4) state that an employer may refuse a request for flexible working arrangements, or an application to extend unpaid parental leave, only on reasonable business grounds.

Note 2: Modern awards and enterprise agreements include terms about settling disputes in relation to the National Employment Standards (other than disputes as to whether an employer had reasonable business grounds under subsection 65(5) or 76(4)).

Subdivision C—Terms and conditions of employment provided by a modern award

45 Contravening a modern award

A person must not contravene a term of a modern award.

Note 1: This section is a civil remedy provision (see Part 4-1).

Note 2: A person does not contravene a term of a modern award unless the award applies to the person: see subsection 46(1).

46 The significance of a modern award applying to a person

(1) A modern award does not impose obligations on a person, and a person does not contravene a term of a modern award, unless the award applies to the person.

(2) A modern award does not give a person an entitlement unless the award applies to the person.

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Note: Subsection (2) does not affect the ability of outworker terms in a modern award to be enforced under Part 4-1 in relation to outworkers who are not employees.

47 When a modern award *applies* to an employer, employee, organisation or outworker entity

*When a modern award **applies** to an employee, employer, organisation or outworker entity*

(1) A modern award ***applies*** to an employee, employer, organisation or outworker entity if:

(a) the modern award covers the employee, employer, organisation or outworker entity; and

(b) the modern award is in operation; and

(c) no other provision of this Act provides, or has the effect, that the modern award does not apply to the employee, employer, organisation or outworker entity.

Note 1: Section 57 provides that a modern award does not apply to an employee (or to an employer, or an employee organisation, in relation to the employee) in relation to particular employment at a time when an enterprise agreement applies to the employee in relation to that employment.

Note 2: In a modern award, coverage of an outworker entity must be expressed to relate only to outworker terms: see subsection 143(4).

Modern awards do not apply to high income employees

(2) However, a modern award does not apply to an employee (or to an employer, or an employee organisation, in relation to the employee) at a time when the employee is a high income employee.

Modern awards apply to employees in relation to particular employment

(3) A reference in this Act to a modern award applying to an employee is a reference to the award applying to the employee in relation to particular employment.

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48 When a modern award *covers* an employer, employee, organisation or outworker entity

*When a modern award **covers** an employee, employer, organisation or outworker entity*

(1) A modern award ***covers*** an employee, employer, organisation or outworker entity if the award is expressed to cover the employee, employer, organisation or outworker entity.

Note: In a modern award, coverage of an outworker entity must be expressed to relate only to outworker terms: see subsection 143(4).

Effect of other provisions of this Act, FWC orders or court orders on coverage

(2) A modern award also ***covers*** an employee, employer, organisation or outworker entity if any of the following provides, or has the effect, that the award covers the employee, employer, organisation or outworker entity:
   (a) a provision of this Act or of the Registered Organisations Act;
   (b) an FWC order made under a provision of this Act;
   (c) an order of a court.

(3) Despite subsections (1) and (2), a modern award does not ***cover*** an employee, employer, organisation or outworker entity if any of the following provides, or has the effect, that the award does not cover the employee, employer or organisation or outworker entity:
   (a) a provision of this Act;
   (b) an FWC order made under a provision of this Act;
   (c) an order of a court.

Modern awards that have ceased to operate

(4) Despite subsections (1) and (2), a modern award that has ceased to operate does not ***cover*** an employee, employer, organisation or outworker entity.

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Modern awards cover employees in relation to particular employment

(5) A reference to a modern award covering an employee is a reference to the award covering the employee in relation to particular employment.

49 When a modern award is in operation

When a modern award comes into operation

(1) A modern award comes into operation:
  (a) on 1 July in the next financial year after it is made; or
  (b) if it is made on 1 July in a financial year—on that day.

(2) However, if the FWC specifies another day as the day on which the modern award comes into operation, it comes into operation on that other day. The FWC must not specify another day unless it is satisfied that it is appropriate to do so.

(3) The specified day must not be earlier than the day on which the modern award is made.

Note: For when a State reference public sector modern award comes into operation, see section 168J.

When a determination revoking a modern award comes into operation

(4) A determination revoking a modern award comes into operation on the day specified in the determination.

(5) The specified day must not be earlier than the day on which the determination is made.

Modern awards and revocation determinations take effect from first full pay period

(6) A modern award, or a determination revoking a modern award, does not take effect in relation to a particular employee until the

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start of the employee's first full pay period that starts on or after the day the award or determination comes into operation.

Modern awards operate until revoked

(7) A modern award continues in operation until it is revoked.

Subdivision D—Terms and conditions of employment provided by an enterprise agreement

50 Contravening an enterprise agreement

A person must not contravene a term of an enterprise agreement.

Note 1: This section is a civil remedy provision (see Part 4-1).

Note 2: A person does not contravene a term of an enterprise agreement unless the agreement applies to the person: see subsection 51(1).

51 The significance of an enterprise agreement applying to a person

(1) An enterprise agreement does not impose obligations on a person, and a person does not contravene a term of an enterprise agreement, unless the agreement applies to the person.

(2) An enterprise agreement does not give a person an entitlement unless the agreement applies to the person.

52 When an enterprise agreement *applies* to an employer, employee or employee organisation

When an enterprise agreement applies to an employee, employer or organisation

(1) An enterprise agreement ***applies*** to an employee, employer or employee organisation if:
  (a) the agreement is in operation; and
  (b) the agreement covers the employee, employer or organisation; and

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(c) no other provision of this Act provides, or has the effect, that the agreement does not apply to the employee, employer or organisation.

Enterprise agreements apply to employees in relation to particular employment

(2) A reference in this Act to an enterprise agreement applying to an employee is a reference to the agreement applying to the employee in relation to particular employment.

53 When an enterprise agreement *covers* an employer, employee or employee organisation

Employees and employers

(1) An enterprise agreement ***covers*** an employee or employer if the agreement is expressed to cover (however described) the employee or the employer.

Employee organisations

(2) An enterprise agreement ***covers*** an employee organisation:
   (a) for an enterprise agreement that is not a greenfields agreement—if the FWC has noted in its decision to approve the agreement that the agreement covers the organisation (see subsection 201(2)); or
   (b) for a greenfields agreement—if the agreement is made by the organisation.

Effect of provisions of this Act, FWC orders and court orders on coverage

(3) An enterprise agreement also ***covers*** an employee, employer or employee organisation if any of the following provides, or has the effect, that the agreement covers the employee, employer or organisation:
   (a) a provision of this Act or of the Registered Organisations Act;

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(b) an FWC order made under a provision of this Act;
(c) an order of a court.

(4) Despite subsections (1), (2) and (3), an enterprise agreement does not ***cover*** an employee, employer or employee organisation if any of the following provides, or has the effect, that the agreement does not cover the employee, employer or organisation:
(a) another provision of this Act;
(b) an FWC order made under another provision of this Act;
(c) an order of a court.

Enterprise agreements that have ceased to operate

(5) Despite subsections (1), (2) and (3), an enterprise agreement that has ceased to operate does not ***cover*** an employee, employer or employee organisation.

Enterprise agreements cover employees in relation to particular employment

(6) A reference in this Act to an enterprise agreement covering an employee is a reference to the agreement covering the employee in relation to particular employment.

54 When an enterprise agreement is in operation

(1) An enterprise agreement approved by the FWC operates from:
(a) 7 days after the agreement is approved; or
(b) if a later day is specified in the agreement—that later day.

(2) An enterprise agreement ceases to operate on the earlier of the following days:
(a) the day on which a termination of the agreement comes into operation under section 224 or 227;
(b) the day on which section 58 first has the effect that there is no employee to whom the agreement applies.

Note: Section 58 deals with when an enterprise agreement ceases to apply to an employee.

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(3) An enterprise agreement that has ceased to operate can never operate again.

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Division 3—Interaction between the National Employment Standards, modern awards and enterprise agreements

Subdivision A—Interaction between the National Employment Standards and a modern award or an enterprise agreement

55 Interaction between the National Employment Standards and a modern award or enterprise agreement

National Employment Standards must not be excluded

(1) A modern award or enterprise agreement must not exclude the National Employment Standards or any provision of the National Employment Standards.

Terms expressly permitted by Part 2-2 or regulations may be included

(2) A modern award or enterprise agreement may include any terms that the award or agreement is expressly permitted to include:
  (a) by a provision of Part 2-2 (which deals with the National Employment Standards); or
  (b) by regulations made for the purposes of section 127.

Note: In determining what is permitted to be included in a modern award or enterprise agreement by a provision referred to in paragraph (a), any regulations made for the purpose of section 127 that expressly prohibit certain terms must be taken into account.

(3) The National Employment Standards have effect subject to terms included in a modern award or enterprise agreement as referred to in subsection (2).

Note: See also the note to section 63 (which deals with the effect of averaging arrangements).

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Ancillary and supplementary terms may be included

(4) A modern award or enterprise agreement may also include the following kinds of terms:

(a) terms that are ancillary or incidental to the operation of an entitlement of an employee under the National Employment Standards;

(b) terms that supplement the National Employment Standards;

but only to the extent that the effect of those terms is not detrimental to an employee in any respect, when compared to the National Employment Standards.

Note 1: Ancillary or incidental terms permitted by paragraph (a) include (for example) terms:

(a) under which, instead of taking paid annual leave at the rate of pay required by section 90, an employee may take twice as much leave at half that rate of pay; or

(b) that specify when payment under section 90 for paid annual leave must be made.

Note 2: Supplementary terms permitted by paragraph (b) include (for example) terms:

(a) that increase the amount of paid annual leave to which an employee is entitled beyond the number of weeks that applies under section 87; or

(b) that provide for an employee to be paid for taking a period of paid annual leave or paid/personal carer's leave at a rate of pay that is higher than the employee's base rate of pay (which is the rate required by sections 90 and 99).

Note 3: Terms that would not be permitted by paragraph (a) or (b) include (for example) terms requiring an employee to give more notice of the taking of unpaid parental leave than is required by section 74.

Enterprise agreements may include terms that have the same effect as provisions of the National Employment Standards

(5) An enterprise agreement may include terms that have the same (or substantially the same) effect as provisions of the National Employment Standards, whether or not ancillary or supplementary terms are included as referred to in subsection (4).

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Effect of terms that give an employee the same entitlement as under the National Employment Standards

(6) To avoid doubt, if a modern award includes terms permitted by subsection (4), or an enterprise agreement includes terms permitted by subsection (4) or (5), then, to the extent that the terms give an employee an entitlement (the ***award or agreement entitlement***) that is the same as an entitlement (the ***NES entitlement***) of the employee under the National Employment Standards:

(a) those terms operate in parallel with the employee's NES entitlement, but not so as to give the employee a double benefit; and

(b) the provisions of the National Employment Standards relating to the NES entitlement apply, as a minimum standard, to the award or agreement entitlement.

Note: For example, if the award or agreement entitlement is to 6 weeks of paid annual leave per year, the provisions of the National Employment Standards relating to the accrual and taking of paid annual leave will apply, as a minimum standard, to 4 weeks of that leave.

Terms permitted by subsection (4) or (5) do not contravene subsection (1)

(7) To the extent that a term of a modern award or enterprise agreement is permitted by subsection (4) or (5), the term does not contravene subsection (1).

Note: A term of a modern award has no effect to the extent that it contravenes this section (see section 56). An enterprise agreement that includes a term that contravenes this section must not be approved (see section 186) and a term of an enterprise agreement has no effect to the extent that it contravenes this section (see section 56).

56 Terms of a modern award or enterprise agreement contravening section 55 have no effect

A term of a modern award or enterprise agreement has no effect to the extent that it contravenes section 55.

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Subdivision B—Interaction between modern awards and enterprise agreements

57 Interaction between modern awards and enterprise agreements

(1) A modern award does not apply to an employee in relation to particular employment at a time when an enterprise agreement applies to the employee in relation to that employment.

(2) If a modern award does not apply to an employee in relation to particular employment because of subsection (1), the award does not apply to an employer, or an employee organisation, in relation to the employee.

57A Designated outworker terms of a modern award continue to apply

(1) This section applies if, at a particular time:
  (a) an enterprise agreement applies to an employer; and
  (b) a modern award covers the employer (whether the modern award covers the employer in the employer's capacity as an employer or an outworker entity); and
  (c) the modern award includes one or more designated outworker terms.

(2) Despite section 57, the designated outworker terms of the modern award apply at that time to the following:
  (a) the employer;
  (b) each employee who is both:
    (i) a person to whom the enterprise agreement applies; and
    (ii) a person who is covered by the modern award;
  (c) each employee organisation that is covered by the modern award.

(3) To avoid doubt:

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(a) designated outworker terms of a modern award can apply to an employer under subsection (2) even if none of the employees of the employer is an outworker; and

(b) to the extent to which designated outworker terms of a modern award apply to an employer, an employee or an employee organisation because of subsection (2), the modern award applies to the employer, employee or organisation.

Subdivision C—Interaction between one or more enterprise agreements

58 Only one enterprise agreement can apply to an employee

Only one enterprise agreement can apply to an employee

(1) Only one enterprise agreement can apply to an employee at a particular time.

General rule—later agreement does not apply until earlier agreement passes its nominal expiry date

(2) If:

(a) an enterprise agreement (the ***earlier agreement***) applies to an employee in relation to particular employment; and

(b) another enterprise agreement (the ***later agreement***) that covers the employee in relation to the same employment comes into operation; and

(c) subsection (3) (which deals with a single-enterprise agreement replacing a multi-enterprise agreement) does not apply;

then:

(d) if the earlier agreement has not passed its nominal expiry date:

(i) the later agreement cannot apply to the employee in relation to that employment until the earlier agreement passes its nominal expiry date; and

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(ii) the earlier agreement ceases to apply to the employee in relation to that employment when the earlier agreement passes its nominal expiry date, and can never so apply again; or

(e) if the earlier agreement has passed its nominal expiry date—the earlier agreement ceases to apply to the employee when the later agreement comes into operation, and can never so apply again.

Special rule—single-enterprise agreement replaces multi-enterprise agreement

(3) Despite subsection (2), if:

(a) a multi-enterprise agreement applies to an employee in relation to particular employment; and

(b) a single-enterprise agreement that covers the employee in relation to the same employment comes into operation;

the multi-enterprise agreement ceases to apply to the employee in relation to that employment when the single-enterprise agreement comes into operation, and can never so apply again.

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Part 2-2—The National Employment Standards

Division 1—Introduction

59 Guide to this Part

This Part contains the National Employment Standards.

Division 2 identifies the National Employment Standards, the detail of which is set out in Divisions 3 to 12.

Division 13 contains miscellaneous provisions relating to the National Employment Standards.

The National Employment Standards are minimum standards that apply to the employment of national system employees. Part 2-1 (which deals with the core provisions for this Chapter) contains the obligation for employers to comply with the National Employment Standards (see section 44).

The National Employment Standards also underpin what can be included in modern awards and enterprise agreements. Part 2-1 provides that the National Employment Standards cannot be excluded by modern awards or enterprise agreements, and contains other provisions about the interaction between the National Employment Standards and modern awards or enterprise agreements (see sections 55 and 56).

Divisions 2 and 3 of Part 6-3 extend the operation of the parental leave and notice of termination provisions of the National Employment Standards to employees who are not national system employees.

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60 Meanings of *employee* and *employer*

In this Part, ***employee*** means a national system employee, and ***employer*** means a national system employer.

Note: See also Division 2 of Part 6-4A (TCF contract outworkers taken to be employees in certain circumstances).

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Division 2—The National Employment Standards

61 The National Employment Standards are minimum standards applying to employment of employees

(1) This Part sets minimum standards that apply to the employment of employees which cannot be displaced, even if an enterprise agreement includes terms of the kind referred to in subsection 55(5).

Note: Subsection 55(5) allows enterprise agreements to include terms that have the same (or substantially the same) effect as provisions of the National Employment Standards.

(2) The minimum standards relate to the following matters:

(a) maximum weekly hours (Division 3);
(b) requests for flexible working arrangements (Division 4);
(c) parental leave and related entitlements (Division 5);
(d) annual leave (Division 6);
(e) personal/carer's leave and compassionate leave (Division 7);
(f) community service leave (Division 8);
(g) long service leave (Division 9);
(h) public holidays (Division 10);
(i) notice of termination and redundancy pay (Division 11);
(j) Fair Work Information Statement (Division 12).

(3) Divisions 3 to 12 constitute the ***National Employment Standards***.

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Division 3—Maximum weekly hours

62 Maximum weekly hours

Maximum weekly hours of work

(1) An employer must not request or require an employee to work more than the following number of hours in a week unless the additional hours are reasonable:
  (a) for a full-time employee—38 hours; or
  (b) for an employee who is not a full-time employee—the lesser of:
    (i) 38 hours; and
    (ii) the employee's ordinary hours of work in a week.

Employee may refuse to work unreasonable additional hours

(2) The employee may refuse to work additional hours (beyond those referred to in paragraph (1)(a) or (b)) if they are unreasonable.

Determining whether additional hours are reasonable

(3) In determining whether additional hours are reasonable or unreasonable for the purposes of subsections (1) and (2), the following must be taken into account:
  (a) any risk to employee health and safety from working the additional hours;
  (b) the employee's personal circumstances, including family responsibilities;
  (c) the needs of the workplace or enterprise in which the employee is employed;
  (d) whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of, working additional hours;

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(e) any notice given by the employer of any request or requirement to work the additional hours;

(f) any notice given by the employee of his or her intention to refuse to work the additional hours;

(g) the usual patterns of work in the industry, or the part of an industry, in which the employee works;

(h) the nature of the employee's role, and the employee's level of responsibility;

(i) whether the additional hours are in accordance with averaging terms included under section 63 in a modern award or enterprise agreement that applies to the employee, or with an averaging arrangement agreed to by the employer and employee under section 64;

(j) any other relevant matter.

Authorised leave or absence treated as hours worked

(4) For the purposes of subsection (1), the hours an employee works in a week are taken to include any hours of leave, or absence, whether paid or unpaid, that the employee takes in the week and that are authorised:

(a) by the employee's employer; or

(b) by or under a term or condition of the employee's employment; or

(c) by or under a law of the Commonwealth, a State or a Territory, or an instrument in force under such a law.

63 Modern awards and enterprise agreements may provide for averaging of hours of work

(1) A modern award or enterprise agreement may include terms providing for the averaging of hours of work over a specified period. The average weekly hours over the period must not exceed:

(a) for a full-time employee—38 hours; or

(b) for an employee who is not a full-time employee—the lesser of:

(i) 38 hours; and

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(ii) the employee's ordinary hours of work in a week.

(2) The terms of a modern award or enterprise agreement may provide for average weekly hours that exceed the hours referred to in paragraph (1)(a) or (b) if the excess hours are reasonable for the purposes of subsection 62(1).

Note: Hours in excess of the hours referred to in paragraph (1)(a) or (b) that are worked in a week in accordance with averaging terms in a modern award or enterprise agreement (whether the terms comply with subsection (1) or (2)) will be treated as additional hours for the purposes of section 62. The averaging terms will be relevant in determining whether the additional hours are reasonable (see paragraph 62(3)(i)).

64 Averaging of hours of work for award/agreement free employees

(1) An employer and an award/agreement free employee may agree in writing to an averaging arrangement under which hours of work over a specified period of not more than 26 weeks are averaged. The average weekly hours over the specified period must not exceed:

(a) for a full-time employee—38 hours; or

(b) for an employee who is not a full-time employee—the lesser of:

(i) 38 hours; and

(ii) the employee's ordinary hours of work in a week.

(2) The agreed averaging arrangement may provide for average weekly hours that exceed the hours referred to in paragraph (1)(a) or (b) if the excess hours are reasonable for the purposes of subsection 62(1).

Note: Hours in excess of the hours referred to in paragraph (1)(a) or (b) that are worked in a week in accordance with an agreed averaging arrangement (whether the arrangement complies with subsection (1) or (2)) will be treated as additional hours for the purposes of section 62. The averaging arrangement will be relevant in determining whether the additional hours are reasonable (see paragraph 62(3)(i)).

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Division 4—Requests for flexible working arrangements

65 Requests for flexible working arrangements

Employee may request change in working arrangements

(1) If:

(a) any of the circumstances referred to in subsection (1A) apply to an employee; and

(b) the employee would like to change his or her working arrangements because of those circumstances;

then the employee may request the employer for a change in working arrangements relating to those circumstances.

Note: Examples of changes in working arrangements include changes in hours of work, changes in patterns of work and changes in location of work.

(1A) The following are the circumstances:

(a) the employee is the parent, or has responsibility for the care, of a child who is of school age or younger;

(b) the employee is a carer (within the meaning of the *Carer Recognition Act 2010*);

(c) the employee has a disability;

(d) the employee is 55 or older;

(e) the employee is experiencing violence from a member of the employee's family;

(f) the employee provides 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 the member is experiencing violence from the member's family.

(1B) To avoid doubt, and without limiting subsection (1), an employee who:

(a) is a parent, or has responsibility for the care, of a child; and

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(b) is returning to work after taking leave in relation to the birth or adoption of the child;

may request to work part-time to assist the employee to care for the child.

(2) The employee is not entitled to make the request unless:

(a) for an employee other than a casual employee—the employee has completed at least 12 months of continuous service with the employer immediately before making the request; or

(b) for a casual employee—the employee:

(i) is a long term casual employee of the employer immediately before making the request; and

(ii) has a reasonable expectation of continuing employment by the employer on a regular and systematic basis.

Formal requirements

(3) The request must:

(a) be in writing; and

(b) set out details of the change sought and of the reasons for the change.

Agreeing to the request

(4) The employer must give the employee a written response to the request within 21 days, stating whether the employer grants or refuses the request.

(5) The employer may refuse the request only on reasonable business grounds.

(5A) Without limiting what are reasonable business grounds for the purposes of subsection (5), reasonable business grounds include the following:

(a) that the new working arrangements requested by the employee would be too costly for the employer;

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(b) that there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested by the employee;

(c) that it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested by the employee;

(d) that the new working arrangements requested by the employee would be likely to result in a significant loss in efficiency or productivity;

(e) that the new working arrangements requested by the employee would be likely to have a significant negative impact on customer service.

(6) If the employer refuses the request, the written response under subsection (4) must include details of the reasons for the refusal.

66 State and Territory laws that are not excluded

This Act is not intended to apply to the exclusion of laws of a State or Territory that provide employee entitlements in relation to flexible working arrangements, to the extent that those entitlements are more beneficial to employees than the entitlements under this Division.

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Division 5—Parental leave and related entitlements

Subdivision A—General

67 General rule—employee must have completed at least 12 months of service

Employees other than casual employees

(1) An employee, other than a casual employee, is not entitled to leave under this Division (other than unpaid pre-adoption leave or unpaid no safe job leave) unless the employee has, or will have, completed at least 12 months of continuous service with the employer immediately before the date that applies under subsection (3).

Casual employees

(2) A casual employee, is not entitled to leave (other than unpaid pre-adoption leave or unpaid no safe job leave) under this Division unless:

(a) the employee is, or will be, a long term casual employee of the employer immediately before the date that applies under subsection (3); and

(b) but for:

(i) the birth or expected birth of the child; or

(ii) the placement or the expected placement of the child; or

(iii) if the employee is taking a period of unpaid parental leave that starts under subsection 71(6) or paragraph 72(3)(b) or 72(4)(b)—the taking of the leave;

the employee would have a reasonable expectation of continuing employment by the employer on a regular and systematic basis.

Date at which employee must have completed 12 months of service

(3) For the purpose of subsections (1) and (2), the date that applies is:

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(a) unless paragraph (b) or (c) applies:
  (i) if the leave is birth-related leave—the date of birth, or the expected date of birth, of the child; or
  (ii) if the leave is adoption-related leave—the day of placement, or the expected day of placement, of the child; or
(b) for an employee taking a period of unpaid parental leave that is to start within 12 months after the birth or placement of the child under subsection 71(6)—the date on which the employee's period of leave is to start; or
(c) for a member of an employee couple taking a period of unpaid parental leave that is to start under paragraph 72(3)(b) or 72(4)(b) after the period of unpaid parental leave of the other member of the employee couple—the date on which the employee's period of leave is to start.

Meaning of ***birth-related leave***

(4) ***Birth-related leave*** means leave of either of the following kinds:
(a) unpaid parental leave taken in association with the birth of a child (see section 70);
(b) unpaid special maternity leave (see section 80).

Meaning of ***adoption-related leave***

(5) ***Adoption-related leave*** means leave of either of the following kinds:
(a) unpaid parental leave taken in association with the placement of a child for adoption (see section 70);
(b) unpaid pre-adoption leave (see section 85).

Meaning of ***day of placement***

(6) The ***day of placement***, in relation to the adoption of a child by an employee, means the earlier of the following days:
(a) the day on which the employee first takes custody of the child for the adoption;

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(b) the day on which the employee starts any travel that is reasonably necessary to take custody of the child for the adoption.

68 General rule for adoption-related leave—child must be under 16 etc.

An employee is not entitled to adoption-related leave unless the child that is, or is to be, placed with the employee for adoption:

(a) is, or will be, under 16 as at the day of placement, or the expected day of placement, of the child; and

(b) has not, or will not have, lived continuously with the employee for a period of 6 months or more as at the day of placement, or the expected day of placement, of the child; and

(c) is not (otherwise than because of the adoption) a child of the employee or the employee's spouse or de facto partner.

69 Transfer of employment situations in which employee is entitled to continue on leave etc.

(1) If:

(a) there is a transfer of employment in relation to an employee; and

(b) the employee has already started a period of leave under this Division when his or her employment with the first employer ends;

the employee is entitled to continue on that leave for the rest of that period.

(2) If:

(a) there is a transfer of employment in relation to an employee; and

(b) the employee has, in relation to the first employer, already taken a step that is required or permitted by a provision of this Division in relation to taking a period of leave;

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the employee is taken to have taken the step in relation to the second employer.

Note: Steps covered by this subsection include (for example) giving the first employer notice under subsection 74(1), confirmation or advice under subsection 74(4) or evidence under subsection 74(5).

Subdivision B—Parental leave

70 Entitlement to unpaid parental leave

An employee is entitled to 12 months of unpaid parental leave if:

(a) the leave is associated with:

(i) the birth of a child of the employee or the employee's spouse or de facto partner; or

(ii) the placement of a child with the employee for adoption; and

(b) the employee has or will have a responsibility for the care of the child.

Note: Entitlement is also affected by:

(a) section 67 (which deals with length of the employee's service); and

(b) for pregnancy and birth—subsection 77A(3) (which applies if the pregnancy ends other than by the child being born alive, or if the child dies after birth); and

(c) for adoption—section 68 (which deals with the age etc. of the adopted child).

71 The period of leave—other than for members of an employee couple who each intend to take leave

Application of this section

(1) This section applies to an employee who intends to take unpaid parental leave if:

(a) the employee is not a member of an employee couple; or

(b) the employee is a member of an employee couple, but the other member of the couple does not intend to take unpaid parental leave.

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Leave must be taken in single continuous period

(2) The employee must take the leave in a single continuous period.

Note 1: An employee may take a form of paid leave at the same time as he or she is on unpaid parental leave (see section 79).

Note 2: Periods of unpaid parental leave can include keeping in touch days on which an employee performs work (see section 79A).

(3) If the leave is birth-related leave for a female employee who is pregnant with, or gives birth to, the child, the period of leave may start:

(a) up to 6 weeks before the expected date of birth of the child; or

(b) earlier, if the employer and employee so agree;

but must not start later than the date of birth of the child.

Note 1: If the employee is not fit for work, she may be entitled to:

(a) paid personal leave under Subdivision A of Division 7; or

(b) unpaid special maternity leave under section 80.

Note 2: If it is inadvisable for the employee to continue in her present position, she may be entitled:

(a) to be transferred to an appropriate safe job under section 81; or

(b) to paid no safe job leave under section 81A; or

(c) to unpaid no safe job leave under section 82A.

Note 3: Section 344 prohibits the exertion of undue influence or undue pressure on the employee in relation to a decision by the employee whether to agree as mentioned in paragraph (3)(b) of this section.

(4) If the leave is birth-related leave but subsection (3) does not apply, the period of leave must start on the date of birth of the child.

When adoption-related leave must start

(5) If the leave is adoption-related leave, the period of leave must start on the day of placement of the child.

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Leave may start later for employees whose spouse or de facto partner is not an employee

(6) Despite subsections (3) to (5), the period of leave may start at any time within 12 months after the date of birth or day of placement of the child if:

(a) the employee has a spouse or de facto partner who is not an employee; and

(b) the spouse or de facto partner has a responsibility for the care of the child for the period between the date of birth or day of placement of the child and the start date of the leave.

Note: An employee whose leave starts under subsection (6) is still entitled under section 76 to request an extension of the period of leave beyond his or her available parental leave period. However, the period of leave may not be extended beyond 24 months after the date of birth or day of placement of the child (see subsection 76(7)).

72 The period of leave—members of an employee couple who each intend to take leave

Application of this section

(1) This section applies to an employee couple if each of the employees intends to take unpaid parental leave.

Leave must be taken in single continuous period

(2) Each employee must take the leave in a single continuous period.

Note 1: An employee may take a form of paid leave at the same time as he or she is on unpaid parental leave (see section 79).

Note 2: Periods of unpaid parental leave can include keeping in touch days on which an employee performs work (see section 79A).

When birth-related leave must start

(3) If the leave is birth-related leave:

(a) one employee's period of leave must start first, in accordance with the following rules:

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(i) if the member of the employee couple whose period of leave starts first is a female employee who is pregnant with, or gives birth to, the child—the period of leave may start up to 6 weeks before the expected date of birth of the child, or earlier if the employer and employee so agree, but must not start later than the date of birth of the child;

(ii) if subparagraph (i) does not apply—the period of leave must start on the date of birth of the child; and

(b) the other employee's period of leave must start immediately after the end of the first employee's period of leave (or that period as extended under section 75 or 76).

When adoption-related leave must start

(4) If the leave is adoption-related leave:

(a) one employee's period of leave must start on the day of placement of the child; and

(b) the other employee's period of leave must start immediately after the end of the first employee's period of leave (or that period as extended under section 75 or 76).

Limited entitlement to take concurrent leave

(5) If one of the employees takes a period (the ***first employee's period of leave***) of unpaid parental leave in accordance with paragraph (3)(a) or (4)(a), the other employee may take a period of unpaid parental leave (the ***concurrent leave***) during the first employee's period of leave, if the concurrent leave complies with the following requirements:

(a) the concurrent leave must not be longer than 8 weeks in total;

(b) the concurrent leave may be taken in separate periods, but, unless the employer agrees, each period must not be shorter than 2 weeks;

(c) unless the employer agrees, the concurrent leave must not start before:

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(i) if the leave is birth-related leave—the date of birth of the child; or

(ii) if the leave is adoption-related leave—the day of placement of the child.

(6) Concurrent leave taken by an employee:

(a) is an exception to the rule that the employee must take his or her leave in a single continuous period (see subsection (2)); and

(b) is an exception to the rules about when the employee's period of unpaid parental leave must start (see subsection (3) or (4)).

Note: The concurrent leave is unpaid parental leave and so comes out of the employee's entitlement to 12 months of unpaid parental leave under section 70.

73 Pregnant employee may be required to take unpaid parental leave within 6 weeks before the birth

Employer may ask employee to provide a medical certificate

(1) If a pregnant employee who is entitled to unpaid parental leave (whether or not she has complied with section 74) continues to work during the 6 week period before the expected date of birth of the child, the employer may ask the employee to give the employer a medical certificate containing the following statements (as applicable):

(a) a statement of whether the employee is fit for work;

(b) if the employee is fit for work—a statement of whether it is inadvisable for the employee to continue in her present position during a stated period because of:

(i) illness, or risks, arising out of the employee's pregnancy; or

(ii) hazards connected with the position.

Note: Personal information given to an employer under this subsection may be regulated under the *Privacy Act 1988*.

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Employer may require employee to take unpaid parental leave

(2) The employer may require the employee to take a period of unpaid parental leave (the ***period of leave***) as soon as practicable if:
  (a) the employee does not give the employer the requested certificate within 7 days after the request; or
  (b) within 7 days after the request, the employee gives the employer a medical certificate stating that the employee is not fit for work; or
  (c) the following subparagraphs are satisfied:
    (i) within 7 days after the request, the employee gives the employer a medical certificate stating that the employee is fit for work, but that it is inadvisable for the employee to continue in her present position for a stated period for a reason referred to in subparagraph (1)(b)(i) or (ii);
    (ii) the employee has not complied with the notice and evidence requirements of section 74 for taking unpaid parental leave.

Note: If the medical certificate contains a statement as referred to in subparagraph (c)(i) and the employee has complied with the notice and evidence requirements of section 74, then the employee is entitled to be transferred to a safe job (see section 81) or to paid no safe job leave (see section 81A).

When the period of leave must end

(3) The period of leave must not end later than the earlier of the following:
  (a) the end of the pregnancy;
  (b) if the employee has given the employer notice of the taking of a period of leave connected with the birth of the child (whether it is unpaid parental leave or some other kind of leave)—the start date of that leave.

Special rules about the period of leave

(4) The period of leave:

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(a) is an exception to the rule that the employee must take her unpaid parental leave in a single continuous period (see subsection 71(2) or 72(2)); and

(b) is an exception to the rules about when the employee's period of unpaid parental leave must start (see subsections 71(3) and (6), or subsection 72(3)).

Note: The period of leave is unpaid parental leave and so comes out of the employee's entitlement to 12 months of unpaid parental leave under section 70.

(5) The employee is not required to comply with section 74 in relation to the period of leave.

74 Notice and evidence requirements

Notice

(1) An employee must give his or her employer written notice of the taking of unpaid parental leave under section 71 or 72 by the employee.

(2) The employee must give the notice to the employer:

(a) at least:

(i) 10 weeks before starting the leave, unless subparagraph (ii) applies; or

(ii) if the leave is to be taken in separate periods of concurrent leave (see paragraph 72(5)(b)) and the leave is not the first of those periods of concurrent leave—4 weeks before starting the period of concurrent leave; or

(b) if that is not practicable—as soon as practicable (which may be a time after the leave has started).

(3) The notice must specify the intended start and end dates of the leave.

Confirmation or change of intended start and end dates

(4) At least 4 weeks before the intended start date specified in the notice given under subsection (1), the employee must:

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(a) confirm the intended start and end dates of the leave; or
(b) advise the employer of any changes to the intended start and end dates of the leave;

unless it is not practicable to do so.

(4A) Subsection (4) does not apply to a notice for a period of concurrent leave referred to in subparagraph (2)(a)(ii).

Evidence

(5) An employee who has given his or her employer notice of the taking of unpaid parental leave must, if required by the employer, give the employer evidence that would satisfy a reasonable person:
(a) if the leave is birth-related leave—of the date of birth, or the expected date of birth, of the child; or
(b) if the leave is adoption-related leave:
(i) of the day of placement, or the expected day of placement, of the child; and
(ii) that the child is, or will be, under 16 as at the day of placement, or the expected day of placement, of the child.

(6) Without limiting subsection (5), an employer may require the evidence referred to in paragraph (5)(a) to be a medical certificate.

Compliance

(7) An employee is not entitled to take unpaid parental leave under section 71 or 72 unless the employee complies with this section.

Note: Personal information given to an employer under this section may be regulated under the *Privacy Act 1988*.

75 Extending period of unpaid parental leave—extending to use more of available parental leave period

Application of this section

(1) This section applies if:

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(a) an employee has, in accordance with section 74, given notice of the taking of a period of unpaid parental leave (the ***original leave period***); and
(b) the original leave period is less than the employee's available parental leave period; and
(c) the original leave period has started.

(2) The employee's ***available parental leave period*** is 12 months, less any periods of the following kinds:
(a) a period of concurrent leave that the employee has taken in accordance with subsection 72(5);
(b) a period of unpaid parental leave that the employee has been required to take under subsection 73(2) or 82(2);
(c) a period by which the employee's entitlement to unpaid parental leave is reduced under paragraph 76(6)(c).

First extension by giving notice to employer

(3) The employee may extend the period of unpaid parental leave by giving his or her employer written notice of the extension at least 4 weeks before the end date of the original leave period. The notice must specify the new end date for the leave.

(4) Only one extension is permitted under subsection (3).

Further extensions by agreement with employer

(5) If the employer agrees, the employee may further extend the period of unpaid parental leave one or more times.

No entitlement to extension beyond available parental leave period

(6) The employee is not entitled under this section to extend the period of unpaid parental leave beyond the employee's available parental leave period.

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76 Extending period of unpaid parental leave—extending for up to 12 months beyond available parental leave period

Employee may request further period of leave

(1) An employee who takes unpaid parental leave for his or her available parental leave period may request his or her employer to agree to an extension of unpaid parental leave for the employee for a further period of up to 12 months immediately following the end of the available parental leave period.

Note: Extended periods of unpaid parental leave can include keeping in touch days on which an employee performs work (see section 79A).

Making the request

(2) The request must be in writing, and must be given to the employer at least 4 weeks before the end of the available parental leave period.

Agreeing to the requested extension

(3) The employer must give the employee a written response to the request stating whether the employer grants or refuses the request. The response must be given as soon as practicable, and not later than 21 days, after the request is made.

(4) The employer may refuse the request only on reasonable business grounds.

(5) If the employer refuses the request, the written response under subsection (3) must include details of the reasons for the refusal.

Discussion

(5A) The employer must not refuse the request unless the employer has given the employee a reasonable opportunity to discuss the request.

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Special rules for employee couples

(6) The following paragraphs apply in relation to a member of an employee couple extending a period of unpaid parental leave in relation to a child under this section:

(a) the request must specify any amount of unpaid parental leave that the other member of the employee couple has taken, or will have taken, in relation to the child before the extension starts;

(b) the period of the extension cannot exceed 12 months, less any period of unpaid parental leave that the other member of the employee couple has taken, or will have taken, in relation to the child before the extension starts;

(c) the amount of unpaid parental leave to which the other member of the employee couple is entitled under section 70 in relation to the child is reduced by the period of the extension.

No extension beyond 24 months after birth or placement

(7) Despite any other provision of this Division, the employee is not entitled to extend the period of unpaid parental leave beyond 24 months after the date of birth or day of placement of the child.

77 Reducing period of unpaid parental leave

If the employer agrees, an employee whose period of unpaid parental leave has started may reduce the period of unpaid parental leave he or she takes.

77A Pregnancy ends (other than by birth of a living child) or child born alive dies

Application of this section

(1) This section applies to unpaid parental leave, if:

(a) the leave is birth-related leave; and

(b) either:

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(i) the pregnancy ends other than by the child being born alive; or

(ii) the child dies after being born.

Cancellation of leave

(2) Before the leave starts:

(a) the employee may give the employer written notice cancelling the leave; or

(b) the employer may give the employee written notice cancelling the leave.

Example: Subsections (2) and (3) do not apply if:

(a) the child dies after being born; and

(b) the employee is the female employee who gave birth to the child.

This is because in this case the leave must not start later than the date of birth of the child (see subsection 71(3)).

(3) If the employee or employer does so, the employee is not entitled to unpaid parental leave in relation to the child.

Note: If the employee is the female employee who was pregnant with the child and the employee is not fit for work, she may be entitled to:

(a) paid personal leave under Subdivision A of Division 7; or

(b) unpaid special maternity leave under section 80.

Return to work

(4) The employee may give the employer written notice that the employee wishes to return to work:

(a) after the start of the period of leave, but before its end; and

(b) within 4 weeks after the employer receives the notice.

(5) The employer:

(a) may give the employee written notice requiring the employee to return to work on a specified day; and

(b) must do so if the employee gives the employer written notice under subsection (4);

unless the leave has not started and the employer cancels it under subsection (2).

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(6) The specified day must be after the start of the period of leave, and:
  (a) if subsection (4) applies—within 4 weeks after the employer receives the notice under that subsection; or
  (b) otherwise—at least 6 weeks after the notice is given to the employee under subsection (5).

(7) The employee's entitlement to unpaid parental leave in relation to the child ends immediately before the specified day.

Interaction with section 77

(8) This section does not limit section 77 (which deals with the employee ending the period of unpaid parental leave with the agreement of the employer).

78 Employee who ceases to have responsibility for care of child

(1) This section applies to an employee who has taken unpaid parental leave in relation to a child if the employee ceases to have any responsibility for the care of the child.

(1A) However, this section does not apply if section 77A applies to the unpaid parental leave (because the unpaid parental leave is birth-related leave and either the pregnancy ends other than by the child being born alive or the child dies after being born).

(2) The employer may give the employee written notice requiring the employee to return to work on a specified day.

(3) The specified day:
  (a) must be at least 4 weeks after the notice is given to the employee; and
  (b) if the leave is birth-related leave taken by a female employee who has given birth—must not be earlier than 6 weeks after the date of birth of the child.

(4) The employee's entitlement to unpaid parental leave in relation to the child ends immediately before the specified day.

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79 Interaction with paid leave

(1) This Subdivision (except for subsections (2) and (3)) does not prevent an employee from taking any other kind of paid leave while he or she is taking unpaid parental leave. If the employee does so, the taking of that other paid leave does not break the continuity of the period of unpaid parental leave.

Note: For example, if the employee has paid annual leave available, he or she may (with the employer's agreement) take some or all of that paid annual leave at the same time as the unpaid parental leave.

(2) An employee is not entitled to take paid personal/carer's leave or compassionate leave while he or she is taking unpaid parental leave.

(3) An employee is not entitled to any payment under Division 8 (which deals with community service leave) in relation to activities the employee engages in while taking unpaid parental leave.

79A Keeping in touch days

(1) This Subdivision does not prevent an employee from performing work for his or her employer on a keeping in touch day while he or she is taking unpaid parental leave. If the employee does so, the performance of that work does not break the continuity of the period of unpaid parental leave.

(2) A day on which the employee performs work for the employer during the period of leave is a ***keeping in touch day*** if:

(a) the purpose of performing the work is to enable the employee to keep in touch with his or her employment in order to facilitate a return to that employment after the end of the period of leave; and

(b) both the employee and the employer consent to the employee performing work for the employer on that day; and

(c) the day is not within:

(i) if the employee suggested or requested that he or she perform work for the employer on that day—14 days

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after the date of birth, or day of placement, of the child to which the period of leave relates; or

(ii) otherwise—42 days after the date of birth, or day of placement, of the child; and

(d) the employee has not already performed work for the employer or another entity on 10 days during the period of leave that were keeping in touch days.

The duration of the work the employee performs on that day is not relevant for the purposes of this subsection.

Note: The employer will be obliged, under the relevant contract of employment or industrial instrument, to pay the employee for performing work on a keeping in touch day.

(3) The employee's decision whether to give the consent mentioned in paragraph (2)(b) is taken, for the purposes of section 344 (which deals with undue influence or pressure), to be a decision to make, or not make, an arrangement under the National Employment Standards.

(4) For the purposes of paragraph (2)(d), treat as 2 separate periods of unpaid parental leave:

(a) a period of unpaid parental leave taken during the employee's available parental leave period; and

(b) a period of unpaid parental leave taken as an extension of the leave referred to in paragraph (a) for a further period immediately following the end of the available parental leave period.

Note: Performance of work on keeping in touch days is also dealt with, for the purposes of parental leave pay, in sections 49 and 50 of the *Paid Parental Leave Act 2010*.

79B Unpaid parental leave not extended by paid leave or keeping in touch days

If, during a period of unpaid parental leave, an employee:

(a) takes paid leave; or

(b) performs work for his or her employer on a keeping in touch day;

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taking that leave or performing that work does not have the effect of extending the period of unpaid parental leave.

Subdivision C—Other entitlements

80 Unpaid special maternity leave

Entitlement to unpaid special maternity leave

(1) A female employee is entitled to a period of unpaid special maternity leave if she is not fit for work during that period because:
  (a) she has a pregnancy-related illness; or
  (b) she has been pregnant, and the pregnancy ends within 28 weeks of the expected date of birth of the child otherwise than by the birth of a living child.

Note 1: Entitlement is also affected by section 67 (which deals with the length of the employee's service).

Note 2: If a female employee has an entitlement to paid personal/carer's leave (see section 96), she may take that leave instead of taking unpaid special maternity leave under this section.

Notice and evidence

(2) An employee must give her employer notice of the taking of unpaid special maternity leave by the employee.

(3) The notice:
  (a) must be given to the employer as soon as practicable (which may be a time after the leave has started); and
  (b) must advise the employer of the period, or expected period, of the leave.

(4) An employee who has given her employer notice of the taking of unpaid special maternity leave must, if required by the employer, give the employer evidence that would satisfy a reasonable person that the leave is taken for a reason specified in subsection (1).

(5) Without limiting subsection (4), an employer may require the evidence referred to in that subsection to be a medical certificate.

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(6) An employee is not entitled to take unpaid special maternity leave unless the employee complies with subsections (2) to (4).

Note: Personal information given to an employer under this section may be regulated under the *Privacy Act 1988*.

81 Transfer to a safe job

(1) This section applies to a pregnant employee if she gives her employer evidence that would satisfy a reasonable person that she is fit for work, but that it is inadvisable for her to continue in her present position during a stated period (the ***risk period***) because of:

(a) illness, or risks, arising out of her pregnancy; or

(b) hazards connected with that position.

Note: Personal information given to an employer under this subsection may be regulated under the *Privacy Act 1988*.

(2) If there is an appropriate safe job available, then the employer must transfer the employee to that job for the risk period, with no other change to the employee's terms and conditions of employment.

Note: If there is no appropriate safe job available, then the employee may be entitled to paid no safe job leave under section 81A or unpaid no safe job leave under 82A.

(3) An ***appropriate safe job*** is a safe job that has:

(a) the same ordinary hours of work as the employee's present position; or

(b) a different number of ordinary hours agreed to by the employee.

(4) If the employee is transferred to an appropriate safe job for the risk period, the employer must pay the employee for the safe job at the employee's full rate of pay (for the position she was in before the transfer) for the hours that she works in the risk period.

(5) If the employee's pregnancy ends before the end of the risk period, the ***risk period*** ends when the pregnancy ends.

(6) Without limiting subsection (1), an employer may require the evidence to be a medical certificate.

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81A Paid no safe job leave

(1) If:
  (a) section 81 applies to a pregnant employee but there is no appropriate safe job available; and
  (b) the employee is entitled to unpaid parental leave; and
  (c) the employee has complied with the notice and evidence requirements of section 74 for taking unpaid parental leave;

then the employee is entitled to paid no safe job leave for the risk period.

(2) If the employee takes paid no safe job leave for the risk period, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the risk period.

82 Employee on paid no safe job leave may be asked to provide a further medical certificate

Employer may ask employee to provide a medical certificate

(1) If an employee is on paid no safe job leave during the 6 week period before the expected date of birth of the child, the employer may ask the employee to give the employer a medical certificate stating whether the employee is fit for work.

Note: Personal information given to an employer under this subsection may be regulated under the *Privacy Act 1988*.

Employer may require employee to take unpaid parental leave

(2) The employer may require the employee to take a period of unpaid parental leave (the ***period of leave***) as soon as practicable if:
  (a) the employee does not give the employer the requested certificate within 7 days after the request; or
  (b) within 7 days after the request, the employee gives the employer a certificate stating that the employee is not fit for work.

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Entitlement to paid no safe job leave ends

(3) When the period of leave starts, the employee's entitlement to paid no safe job leave ends.

When the period of leave must end etc.

(4) Subsections 73(3), (4) and (5) apply to the period of leave.

82A Unpaid no safe job leave

(1) If:
  (a) section 81 applies to a pregnant employee but there is no appropriate safe job available; and
  (b) the employee is not entitled to unpaid parental leave; and
  (c) if required by the employer—the employee has given the employer evidence that would satisfy a reasonable person of the pregnancy;

then the employee is entitled to unpaid no safe job leave for the risk period.

(2) Without limiting subsection (1), an employer may require the evidence referred to in paragraph (1)(c) to be a medical certificate.

83 Consultation with employee on unpaid parental leave

(1) If:
  (a) an employee is on unpaid parental leave; and
  (b) the employee's employer makes a decision that will have a significant effect on the status, pay or location of the employee's pre-parental leave position;

the employer must take all reasonable steps to give the employee information about, and an opportunity to discuss, the effect of the decision on that position.

(2) The employee's ***pre-parental leave position*** is:
  (a) unless paragraph (b) applies, the position the employee held before starting the unpaid parental leave; or

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(b) if, before starting the unpaid parental leave, the employee:
  (i) was transferred to a safe job because of her pregnancy; or
  (ii) reduced her working hours due to her pregnancy;
the position the employee held immediately before that transfer or reduction.

84 Return to work guarantee

On ending unpaid parental leave, an employee is entitled to return to:
(a) the employee's pre-parental leave position; or
(b) if that position no longer exists—an available position for which the employee is qualified and suited nearest in status and pay to the pre-parental leave position.

84A Replacement employees

Before an employer engages an employee to perform the work of another employee who is going to take, or is taking, unpaid parental leave, the employer must notify the replacement employee:
(a) that the engagement to perform that work is temporary; and
(b) of the rights:
  (i) the employer; and
  (ii) the employee taking unpaid parental leave;
have under subsections 77A(2) and (3) (which provide a right to cancel the leave if the pregnancy ends other than by the birth of a living child or if the child dies after birth); and
(c) of the rights the employee taking unpaid parental leave has under:
  (i) subsections 77A(4) to (6) (which provide a right to end the leave early if the pregnancy ends other than by the birth of a living child or if the child dies after birth); and
  (ii) section 84 (which deals with the return to work guarantee); and

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(d) of the effect of section 78 (which provides the employer with a right to require the employee taking unpaid parental leave to return to work if the employee ceases to have any responsibility for the care of the child).

85 Unpaid pre-adoption leave

Entitlement to unpaid pre-adoption leave

(1) An employee is entitled to up to 2 days of unpaid pre-adoption leave to attend any interviews or examinations required in order to obtain approval for the employee's adoption of a child.

Note: Entitlement is also affected by section 68 (which deals with the age etc. of the adopted child).

(2) However, an employee is not entitled to take a period of unpaid pre-adoption leave if:
   (a) the employee could instead take some other form of leave; and
   (b) the employer directs the employee to take that other form of leave.

(3) An employee who is entitled to a period of unpaid pre-adoption leave is entitled to take the leave as:
   (a) a single continuous period of up to 2 days; or
   (b) any separate periods to which the employee and the employer agree.

Notice and evidence

(4) An employee must give his or her employer notice of the taking of unpaid pre-adoption leave by the employee.

(5) The notice:
   (a) must be given to the employer as soon as practicable (which may be a time after the leave has started); and
   (b) must advise the employer of the period, or expected period, of the leave.

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(6) An employee who has given his or her employer notice of the taking of unpaid pre-adoption leave must, if required by the employer, give the employer evidence that would satisfy a reasonable person that the leave is taken to attend an interview or examination as referred to in subsection (1).

(7) An employee is not entitled to take unpaid pre-adoption leave unless the employee complies with subsections (4) to (6).

Note: Personal information given to an employer under this section may be regulated under the *Privacy Act 1988*.

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Division 6—Annual leave

86 Division applies to employees other than casual employees

This Division applies to employees, other than casual employees.

87 Entitlement to annual leave

Amount of leave

(1) For each year of service with his or her employer, an employee is entitled to:
  (a) 4 weeks of paid annual leave; or
  (b) 5 weeks of paid annual leave, if:
    (i) a modern award applies to the employee and defines or describes the employee as a shiftworker for the purposes of the National Employment Standards; or
    (ii) an enterprise agreement applies to the employee and defines or describes the employee as a shiftworker for the purposes of the National Employment Standards; or
    (iii) the employee qualifies for the shiftworker annual leave entitlement under subsection (3) (this relates to award/agreement free employees).

Note: Section 196 affects whether the FWC may approve an enterprise agreement covering an employee, if the employee is covered by a modern award that is in operation and defines or describes the employee as a shiftworker for the purposes of the National Employment Standards.

Accrual of leave

(2) An employee's entitlement to paid annual leave accrues progressively during a year of service according to the employee's ordinary hours of work, and accumulates from year to year.

Note: If an employee's employment ends during what would otherwise have been a year of service, the employee accrues paid annual leave up to when the employment ends.

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Award/agreement free employees who qualify for the shiftworker entitlement

(3) An award/agreement free employee qualifies for the shiftworker annual leave entitlement if:
  (a) the employee:
    (i) is employed in an enterprise 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) the employee is in a class of employees prescribed by the regulations as shiftworkers for the purposes of the National Employment Standards.

(4) However, an employee referred to in subsection (3) does not qualify for the shiftworker annual leave entitlement if the employee is in a class of employees prescribed by the regulations as not being qualified for that entitlement.

(5) Without limiting the way in which a class may be described for the purposes of paragraph (3)(b) or subsection (4), the class may be described by reference to one or more of the following:
  (a) a particular industry or part of an industry;
  (b) a particular kind of work;
  (c) a particular type of employment.

88 Taking paid annual leave

(1) Paid annual leave may be taken for a period agreed between an employee and his or her employer.

(2) The employer must not unreasonably refuse to agree to a request by the employee to take paid annual leave.

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89 Employee not taken to be on paid annual leave at certain times

Public holidays

(1) If the period during which an employee takes paid annual leave includes a day or part-day that is a public holiday in the place where the employee is based for work purposes, the employee is taken not to be on paid annual leave on that public holiday.

Other periods of leave

(2) If the period during which an employee takes paid annual leave includes a period of any other leave (other than unpaid parental leave) under this Part, or a period of absence from employment under Division 8 (which deals with community service leave), the employee is taken not to be on paid annual leave for the period of that other leave or absence.

90 Payment for annual leave

(1) If, in accordance with this Division, an employee takes a period of paid annual leave, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period.

(2) If, when the employment of an employee ends, the employee has a period of untaken paid annual leave, the employer must pay the employee the amount that would have been payable to the employee had the employee taken that period of leave.

91 Transfer of employment situations that affect entitlement to payment for period of untaken paid annual leave

Transfer of employment situation in which employer may decide not to recognise employee's service with first employer

(1) Subsection 22(5) does not apply (for the purpose of this Division) to a transfer of employment between non-associated entities in relation to an employee, if the second employer decides not to

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recognise the employee's service with the first employer (for the purpose of this Division).

Employee is not entitled to payment for untaken annual leave if service with first employer counts as service with second employer

(2) If subsection 22(5) applies (for the purpose of this Division) to a transfer of employment in relation to an employee, the employee is not entitled to be paid an amount under subsection 90(2) for a period of untaken paid annual leave.

Note: Subsection 22(5) provides that, generally, if there is a transfer of employment, service with the first employer counts as service with the second employer.

92 Paid annual leave must not be cashed out except in accordance with permitted cashing out terms

Paid annual leave must not be cashed out, except in accordance with:

(a) cashing out terms included in a modern award or enterprise agreement under section 93, or

(b) an agreement between an employer and an award/agreement free employee under subsection 94(1).

93 Modern awards and enterprise agreements may include terms relating to cashing out and taking paid annual leave

Terms about cashing out paid annual leave

(1) A modern award or enterprise agreement may include terms providing for the cashing out of paid annual leave by an employee.

(2) The terms must require that:

(a) paid annual leave must not be cashed out if the cashing out would result in the employee's remaining accrued entitlement to paid annual leave being less than 4 weeks; and

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(b) each cashing out of a particular amount of paid annual leave must be by a separate agreement in writing between the employer and the employee; and

(c) the employee must be paid at least the full amount that would have been payable to the employee had the employee taken the leave that the employee has forgone.

Terms about requirements to take paid annual leave

(3) A modern award or enterprise agreement may include terms requiring an employee, or allowing for an employee to be required, to take paid annual leave in particular circumstances, but only if the requirement is reasonable.

Terms about taking paid annual leave

(4) A modern award or enterprise agreement may include terms otherwise dealing with the taking of paid annual leave.

94 Cashing out and taking paid annual leave for award/agreement free employees

Agreements to cash out paid annual leave

(1) An employer and an award/agreement free employee may agree to the employee cashing out a particular amount of the employee's accrued paid annual leave.

(2) The employer and the employee must not agree to the employee cashing out an amount of paid annual leave if the agreement would result in the employee's remaining accrued entitlement to paid annual leave being less than 4 weeks.

(3) Each agreement to cash out a particular amount of paid annual leave must be a separate agreement in writing.

(4) The employer must pay the employee at least the full amount that would have been payable to the employee had the employee taken the leave that the employee has forgone.

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Requirements to take paid annual leave

(5) An employer may require an award/agreement free employee to take a period of paid annual leave, but only if the requirement is reasonable.

Note: A requirement to take paid annual leave may be reasonable if, for example:

(a) the employee has accrued an excessive amount of paid annual leave; or

(b) the employer's enterprise is being shut down for a period (for example, between Christmas and New Year).

Agreements about taking paid annual leave

(6) An employer and an award/agreement free employee may agree on when and how paid annual leave may be taken by the employee.

Note: Matters that could be agreed include, for example, the following:

(a) that paid annual leave may be taken in advance of accrual;

(b) that paid annual leave must be taken within a fixed period of time after it is accrued;

(c) the form of application for paid annual leave;

(d) that a specified period of notice must be given before taking paid annual leave.

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Division 7—Personal/carer's leave and compassionate leave

Subdivision A—Paid personal/carer's leave

95 Subdivision applies to employees other than casual employees

This Subdivision applies to employees, other than casual employees.

96 Entitlement to paid personal/carer's leave

Amount of leave

(1) For each year of service with his or her employer, an employee is entitled to 10 days of paid personal/carer's leave.

Accrual of leave

(2) An employee's entitlement to paid personal/carer's leave accrues progressively during a year of service according to the employee's ordinary hours of work, and accumulates from year to year.

97 Taking paid personal/carer's leave

An employee may take paid personal/carer's leave if the leave is taken:

(a) because the employee is not fit for work because of a personal illness, or personal injury, affecting the employee; or

(b) 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 personal injury, affecting the member; or

(ii) an unexpected emergency affecting the member.

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Note 1: The notice and evidence requirements of section 107 must be complied with.

Note 2: If a female employee has an entitlement to paid personal/carer's leave, she may take that leave instead of taking unpaid special maternity leave under section 80.

98 Employee taken not to be on paid personal/carer's leave on public holiday

If the period during which an employee takes paid personal/carer's leave includes a day or part-day that is a public holiday in the place where the employee is based for work purposes, the employee is taken not to be on paid personal/carer's leave on that public holiday.

99 Payment for paid personal/carer's leave

If, in accordance with this Subdivision, an employee takes a period of paid personal/carer's leave, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period.

100 Paid personal/carer's leave must not be cashed out except in accordance with permitted cashing out terms

Paid personal/carer's leave must not be cashed out, except in accordance with cashing out terms included in a modern award or enterprise agreement under section 101.

101 Modern awards and enterprise agreements may include terms relating to cashing out paid personal/carer's leave

(1) A modern award or enterprise agreement may include terms providing for the cashing out of paid personal/carer's leave by an employee.

(2) The terms must require that:

(a) paid personal/carer's leave must not be cashed out if the cashing out would result in the employee's remaining

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accrued entitlement to paid personal/carer's leave being less than 15 days; and

(b) each cashing out of a particular amount of paid personal/carer's leave must be by a separate agreement in writing between the employer and the employee; and

(c) the employee must be paid at least the full amount that would have been payable to the employee had the employee taken the leave that the employee has forgone.

Subdivision B—Unpaid carer's leave

102 Entitlement to unpaid carer's leave

An employee is entitled to 2 days of 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 because of:

(a) a personal illness, or personal injury, affecting the member; or

(b) an unexpected emergency affecting the member.

103 Taking unpaid carer's leave

(1) An employee may take unpaid carer's leave for a particular permissible occasion if the leave is taken to provide care or support as referred to in section 102.

(2) An employee may take unpaid carer's leave for a particular permissible occasion as:

(a) a single continuous period of up to 2 days; or

(b) any separate periods to which the employee and his or her employer agree.

(3) An employee cannot take unpaid carer's leave during a particular period if the employee could instead take paid personal/carer's leave.

Note: The notice and evidence requirements of section 107 must be complied with.

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Subdivision C—Compassionate leave

104 Entitlement to compassionate leave

An employee is entitled to 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.

105 Taking compassionate leave

(1) An employee may take compassionate leave for a particular permissible occasion if the leave is taken:

(a) to spend time with the member of the employee's immediate family or household who has contracted or developed the personal illness, or sustained the personal injury, referred to in section 104; or

(b) after the death of the member of the employee's immediate family or household referred to in section 104.

(2) An employee may take compassionate leave for a particular permissible occasion as:

(a) a single continuous 2 day period; or

(b) 2 separate periods of 1 day each; or

(c) any separate periods to which the employee and his or her employer agree.

(3) If the permissible occasion is the contraction or development of a personal illness, or the sustaining of a personal injury, the employee may take the compassionate leave for that occasion at any time while the illness or injury persists.

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Note: The notice and evidence requirements of section 107 must be complied with.

106 Payment for compassionate leave (other than for casual employees)

If, in accordance with this Subdivision, an employee, other than a casual employee, takes a period of compassionate leave, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period.

Note: For casual employees, compassionate leave is unpaid leave.

Subdivision D—Notice and evidence requirements

107 Notice and evidence requirements

Notice

(1) An employee must give his or her employer notice of the taking of leave under this Division by the employee.

(2) The notice:
  (a) must be given to the employer as soon as practicable (which may be a time after the leave has started); and
  (b) must advise the employer of the period, or expected period, of the leave.

Evidence

(3) An employee who has given his or her employer notice of the taking of leave under this Division must, if required by the employer, give the employer evidence that would satisfy a reasonable person that:
  (a) if it is paid personal/carer's leave—the leave is taken for a reason specified in section 97; or
  (b) if it is unpaid carer's leave—the leave is taken for a permissible occasion in circumstances specified in subsection 103(1); or

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(c) if it is compassionate leave—the leave is taken for a permissible occasion in circumstances specified in subsection 105(1).

Compliance

(4) An employee is not entitled to take leave under this Division unless the employee complies with this section.

Modern awards and enterprise agreements may include evidence requirements

(5) A modern award or enterprise agreement may include terms relating to the kind of evidence that an employee must provide in order to be entitled to paid personal/carer's leave, unpaid carer's leave or compassionate leave.

Note: Personal information given to an employer under this section may be regulated under the *Privacy Act 1988*.

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Division 8—Community service leave

108 Entitlement to be absent from employment for engaging in eligible community service activity

An employee who engages in an eligible community service activity is entitled to be absent from his or her employment for a period if:

(a) the period consists of one or more of the following:
  (i) time when the employee engages in the activity;
  (ii) reasonable travelling time associated with the activity;
  (iii) reasonable rest time immediately following the activity; and

(b) unless the activity is jury service—the employee's absence is reasonable in all the circumstances.

109 Meaning of *eligible community service activity*

General

(1) Each of the following is an ***eligible community service activity***:

(a) jury service (including attendance for jury selection) that is required by or under a law of the Commonwealth, a State or a Territory; or

(b) a voluntary emergency management activity (see subsection (2)); or

(c) an activity prescribed in regulations made for the purpose of subsection (4).

Voluntary emergency management activities

(2) An employee engages in a ***voluntary emergency management activity*** if, and only if:

(a) the employee engages in an activity that involves dealing with an emergency or natural disaster; and

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(b) the employee engages in the activity on a voluntary basis (whether or not the employee directly or indirectly takes or agrees to take an honorarium, gratuity or similar payment wholly or partly for engaging in the activity); and

(c) the employee is a member of, or has a member-like association with, a recognised emergency management body; and

(d) either:

(i) the employee was requested by or on behalf of the body to engage in the activity; or

(ii) no such request was made, but it would be reasonable to expect that, if the circumstances had permitted the making of such a request, it is likely that such a request would have been made.

(3) A ***recognised emergency management body*** is:

(a) a body, or part of a body, that has a role or function under a plan that:

(i) is for coping with emergencies and/or disasters; and

(ii) is prepared by the Commonwealth, a State or a Territory; or

(b) a fire-fighting, civil defence or rescue body, or part of such a body; or

(c) any other body, or part of a body, a substantial purpose of which involves:

(i) securing the safety of persons or animals in an emergency or natural disaster; or

(ii) protecting property in an emergency or natural disaster; or

(iii) otherwise responding to an emergency or natural disaster; or

(d) a body, or part of a body, prescribed by the regulations;

but does not include a body that was established, or is continued in existence, for the purpose, or for purposes that include the purpose, of entitling one or more employees to be absent from their employment under this Division.

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Regulations may prescribe other activities

(4) The regulations may prescribe an activity that is of a community service nature as an eligible community service activity.

110 Notice and evidence requirements

Notice

(1) An employee who wants an absence from his or her employment to be covered by this Division must give his or her employer notice of the absence.

(2) The notice:
  (a) must be given to the employer as soon as practicable (which may be a time after the absence has started); and
  (b) must advise the employer of the period, or expected period, of the absence.

Evidence

(3) An employee who has given his or her employer notice of an absence under subsection (1) must, if required by the employer, give the employer evidence that would satisfy a reasonable person that the absence is because the employee has been or will be engaging in an eligible community service activity.

Compliance

(4) An employee's absence from his or her employment is not covered by this Division unless the employee complies with this section.

Note: Personal information given to an employer under this section may be regulated under the *Privacy Act 1988*.

111 Payment to employees (other than casuals) on jury service

Application of this section

(1) This section applies if:

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(a) in accordance with this Division, an employee is absent from his or her employment for a period because of jury service; and
(b) the employee is not a casual employee.

Employee to be paid base rate of pay

(2) Subject to subsections (3), (4) and (5), the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period.

Evidence

(3) The employer may require the employee to give the employer evidence that would satisfy a reasonable person:
(a) that the employee has taken all necessary steps to obtain any amount of jury service pay to which the employee is entitled; and
(b) of the total amount (even if it is a nil amount) of jury service pay that has been paid, or is payable, to the employee for the period.

Note: Personal information given to an employer under this subsection may be regulated under the *Privacy Act 1988*.

(4) If, in accordance with subsection (3), the employer requires the employee to give the employer the evidence referred to in that subsection:
(a) the employee is not entitled to payment under subsection (2) unless the employee provides the evidence; and
(b) if the employee provides the evidence—the amount payable to the employee under subsection (2) is reduced by the total amount of jury service pay that has been paid, or is payable, to the employee, as disclosed in the evidence.

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Payment only required for first 10 days of absence

(5) If an employee is absent because of jury service in relation to a particular jury service summons for a period, or a number of periods, of more than 10 days in total:

(a) the employer is only required to pay the employee for the first 10 days of absence; and

(b) the evidence provided in response to a requirement under subsection (3) need only relate to the first 10 days of absence; and

(c) the reference in subsection (4) to the total amount of jury service pay as disclosed in evidence is a reference to the total amount so disclosed for the first 10 days of absence.

*Meaning of **jury service pay***

(6) ***Jury service pay*** means an amount paid in relation to jury service under a law of the Commonwealth, a State or a Territory, other than an amount that is, or that is in the nature of, an expense-related allowance.

*Meaning of **jury service summons***

(7) ***Jury service summons*** means a summons or other instruction (however described) that requires a person to attend for, or perform, jury service.

112 State and Territory laws that are not excluded

(1) This Act is not intended to apply to the exclusion of laws of a State or Territory that provide employee entitlements in relation to engaging in eligible community service activities, to the extent that those entitlements are more beneficial to employees than the entitlements under this Division.

Note: For example, this Act would not apply to the exclusion of a State or Territory law providing for a casual employee to be paid jury service pay.

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(2) If the community service activity is an activity prescribed in regulations made for the purpose of subsection 109(4), subsection (1) of this section has effect subject to any provision to the contrary in the regulations.

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Division 9—Long service leave

113 Entitlement to long service leave

Entitlement in accordance with applicable award-derived long service leave terms

(1) If there are applicable award-derived long service leave terms (see subsection (3)) in relation to an employee, the employee is entitled to long service leave in accordance with those terms.

Note: This Act does not exclude State and Territory laws that deal with long service leave, except in relation to employees who are entitled to long service leave under this Division (see paragraph 27(2)(g)), and except as provided in subsection 113A(3).

(2) However, subsection (1) does not apply if:

(a) a workplace agreement, or an AWA, that came into operation before the commencement of this Part applies to the employee; or

(b) one of the following kinds of instrument that came into operation before the commencement of this Part applies to the employee and expressly deals with long service leave:

(i) an enterprise agreement;

(ii) a preserved State agreement;

(iii) a workplace determination;

(iv) a pre-reform certified agreement;

(v) a pre-reform AWA;

(vi) a section 170MX award;

(vii) an old IR agreement.

Note: If there ceases to be any agreement or instrument of a kind referred to in paragraph (a) or (b) that applies to the employee, the employee will, at that time, become entitled under subsection (1) to long service leave in accordance with applicable award-derived long service leave terms.

(3) ***Applicable award-derived long service leave terms***, in relation to an employee, are:

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(a) terms of an award, or a State reference transitional award, that (disregarding the effect of any instrument of a kind referred to in subsection (2)):
  (i) would have applied to the employee at the test time (see subsection (3A)) if the employee had, at that time, been in his or her current circumstances of employment; and
  (ii) would have entitled the employee to long service leave; and
(b) any terms of the award, or the State reference transitional award, that are ancillary or incidental to the terms referred to in paragraph (a).

(3A) For the purpose of subparagraph (3)(a)(i), the test time is:
(a) immediately before the commencement of this Part; or
(b) if the employee is a Division 2B State reference employee (as defined in Schedule 2 to the Transitional Act)—immediately before the Division 2B referral commencement (as defined in that Schedule).

Entitlement in accordance with applicable agreement-derived long service leave terms

(4) If there are applicable agreement-derived long service leave terms (see subsection (5)) in relation to an employee, the employee is entitled to long service leave in accordance with those terms.

(5) There are ***applicable agreement-derived long service leave terms***, in relation to an employee if:
(a) an order under subsection (6) is in operation in relation to terms of an instrument; and
(b) those terms of the instrument would have applied to the employee immediately before the commencement of this Part if the employee had, at that time, been in his or her current circumstances of employment; and
(c) there are no applicable award-derived long service leave terms in relation to the employee.

(6) If the FWC is satisfied that:

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(a) any of the following instruments that was in operation immediately before the commencement of this Part contained terms entitling employees to long service leave:
  (i) an enterprise agreement;
  (ii) a collective agreement;
  (iii) a pre-reform certified agreement;
  (iv) an old IR agreement; and
(b) those terms constituted a long service leave scheme that was applying in more than one State or Territory; and
(c) the scheme, considered on an overall basis, is no less beneficial to the employees than the long service leave entitlements that would otherwise apply in relation to the employees under State and Territory laws;

the FWC may, on application by, or on behalf of, a person to whom the instrument applies, make an order that those terms of the instrument (and any terms that are ancillary or incidental to those terms) are applicable agreement-derived long service leave terms.

References to instruments

(7) References in this section to a kind of instrument (other than an enterprise agreement) are references to a transitional instrument of that kind, as continued in existence by Schedule 3 to the Transitional Act.

113A Enterprise agreements may contain terms discounting service under prior agreements etc. in certain circumstances

(1) This section applies if:
  (a) an instrument (the ***first instrument***) of one of the following kinds that came into operation before the commencement of this Part applies to an employee on or after the commencement of this Part:
    (i) an enterprise agreement;
    (ii) a workplace agreement;
    (iii) a workplace determination;

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(iv) a preserved State agreement;
(v) an AWA;
(vi) a pre-reform certified agreement;
(vii) a pre-reform AWA;
(viii) an old IR agreement;
(ix) a section 170MX award; and

(b) the instrument states that the employee is not entitled to long service leave; and

(c) the instrument ceases, for whatever reason, to apply to the employee; and

(d) immediately after the first instrument ceases to apply, an enterprise agreement (the ***replacement agreement***) starts to apply to the employee.

(2) The replacement agreement may include terms to the effect that an employee's service with the employer during a specified period (the ***excluded period***) (being some or all of the period when the first instrument applied to the employee) does not count as service for the purpose of determining whether the employee is qualified for long service leave, or the amount of long service leave to which the employee is entitled, under this Division or under a law of a State or Territory.

(3) If the replacement agreement includes terms as permitted by subsection (2), the excluded period does not count, and never again counts, as service for the purpose of determining whether the employee is qualified for long service leave, or the amount of long service leave to which the employee is entitled, under this Division or under a law of a State or Territory, unless a later agreement provides otherwise. This subsection has effect despite sections 27 and 29.

(4) References in this section to a kind of instrument (other than an enterprise agreement) are references to a transitional instrument of that kind, as continued in existence by Schedule 3 to the Transitional Act.

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Division 10—Public holidays

114 Entitlement to be absent from employment on public holiday

Employee entitled to be absent on public holiday

(1) An employee is entitled to be absent from his or her employment on a day or part-day that is a public holiday in the place where the employee is based for work purposes.

Reasonable requests to work on public holidays

(2) However, an employer may request an employee to work on a public holiday if the request is reasonable.

(3) If an employer requests an employee to work on a public holiday, the employee may refuse the request if:
  (a) the request is not reasonable; or
  (b) the refusal is reasonable.

(4) In determining whether a request, or a refusal of a request, to work on a public holiday is reasonable, the following must be taken into account:
  (a) the nature of the employer's workplace or enterprise (including its operational requirements), and the nature of the work performed by the employee;
  (b) the employee's personal circumstances, including family responsibilities;
  (c) whether the employee could reasonably expect that the employer might request work on the public holiday;
  (d) whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of, work on the public holiday;
  (e) the type of employment of the employee (for example, whether full-time, part-time, casual or shiftwork);

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(f) the amount of notice in advance of the public holiday given by the employer when making the request;

(g) in relation to the refusal of a request—the amount of notice in advance of the public holiday given by the employee when refusing the request;

(h) any other relevant matter.

115 Meaning of *public holiday*

The public holidays

(1) The following are ***public holidays***:

(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) the Queen's birthday holiday (on the day on which it is celebrated in a State or Territory or a region of a State or Territory);

(vii) 25 December (Christmas Day);

(viii) 26 December (Boxing Day);

(b) any other day, or part-day, declared or prescribed by or under a law of a State or Territory to be observed generally within the State or Territory, or a region of the State or Territory, as a public holiday, other than a day or part-day, or a kind of day or part-day, that is excluded by the regulations from counting as a public holiday.

Substituted public holidays under State or Territory laws

(2) If, under (or in accordance with a procedure under) a law of a State or Territory, a day or part-day is substituted for a day or part-day that would otherwise be a public holiday because of subsection (1), then the substituted day or part-day is the ***public holiday***.

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Substituted public holidays under modern awards and enterprise agreements

(3) A modern award or enterprise agreement may include terms providing for an employer and employee to agree on the substitution of a day or part-day for a day or part-day that would otherwise be a public holiday because of subsection (1) or (2).

Substituted public holidays for award/agreement free employees

(4) An employer and an award/agreement free employee may agree on the substitution of a day or part-day for a day or part-day that would otherwise be a public holiday because of subsection (1) or (2).

Note: This Act does not exclude State and Territory laws that deal with the declaration, prescription or substitution of public holidays, but it does exclude State and Territory laws that relate to the rights and obligations of an employee or employer in relation to public holidays (see paragraph 27(2)(j)).

116 Payment for absence on public holiday

If, in accordance with this Division, an employee is absent from his or her employment on a day or part-day that is a public holiday, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work on the day or part-day.

Note: If the employee does not have ordinary hours of work on the public holiday, the employee is not entitled to payment under this section. For example, the employee is not entitled to payment if the employee is a casual employee who is not rostered on for the public holiday, or is a part-time employee whose part-time hours do not include the day of the week on which the public holiday occurs.

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Division 11—Notice of termination and redundancy pay

Subdivision A—Notice of termination or payment in lieu of notice

117 Requirement for notice of termination or payment in lieu

Notice specifying day of termination

(1) An employer must not terminate an employee's employment unless the employer has given the employee written notice of the day of the termination (which cannot be before the day the notice is given).

Note 1: Section 123 describes situations in which this section does not apply.

Note 2: Sections 28A and 29 of the *Acts Interpretation Act 1901* provide how a notice may be given. In particular, the notice may be given to an employee by:
(a) delivering it personally; or
(b) leaving it at the employee's last known address; or
(c) sending it by pre-paid post to the employee's last known address.

Amount of notice or payment in lieu of notice

(2) The employer must not terminate the employee's employment unless:
(a) the time between giving the notice and the day of the termination is at least the period (the ***minimum period of notice***) worked out under subsection (3); or
(b) the employer has paid to the employee (or to another person on the employee's behalf) payment in lieu of notice of at least the amount the employer would have been liable to pay to the employee (or to another person on the employee's behalf) at the full rate of pay for the hours the employee would have worked had the employment continued until the end of the minimum period of notice.

(3) Work out the minimum period of notice as follows:

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(a) first, work out the period using the following table:

Period		
	Employee's period of continuous service with the employer at the end of the day the notice is given	**Period**
1	Not more than 1 year	1 week
2	More than 1 year but not more than 3 years	2 weeks
3	More than 3 years but not more than 5 years	3 weeks
4	More than 5 years	4 weeks

(b) then increase the period by 1 week if the employee is over 45 years old and has completed at least 2 years of continuous service with the employer at the end of the day the notice is given.

118 Modern awards and enterprise agreements may provide for notice of termination by employees

A modern award or enterprise agreement may include terms specifying the period of notice an employee must give in order to terminate his or her employment.

Subdivision B—Redundancy pay

119 Redundancy pay

Entitlement to redundancy pay

(1) An employee is entitled to be paid redundancy pay by the employer if the employee's employment is terminated:
  (a) at the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour; or
  (b) because of the insolvency or bankruptcy of the employer.

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Note: Sections 121, 122 and 123 describe situations in which the employee does not have this entitlement.

Amount of redundancy pay

(2) The amount of the redundancy pay equals the total amount payable to the employee for the redundancy pay period worked out using the following table at the employee's base rate of pay for his or her ordinary hours of work:

Redundancy pay period

	Employee's period of continuous service with the employer on termination	**Redundancy pay period**
1	At least 1 year but less than 2 years	4 weeks
2	At least 2 years but less than 3 years	6 weeks
3	At least 3 years but less than 4 years	7 weeks
4	At least 4 years but less than 5 years	8 weeks
5	At least 5 years but less than 6 years	10 weeks
6	At least 6 years but less than 7 years	11 weeks
7	At least 7 years but less than 8 years	13 weeks
8	At least 8 years but less than 9 years	14 weeks
9	At least 9 years but less than 10 years	16 weeks
10	At least 10 years	12 weeks

120 Variation of redundancy pay for other employment or incapacity to pay

(1) This section applies if:
  (a) an employee is entitled to be paid an amount of redundancy pay by the employer because of section 119; and
  (b) the employer:
    (i) obtains other acceptable employment for the employee; or
    (ii) cannot pay the amount.

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(2) On application by the employer, the FWC may determine that the amount of redundancy pay is reduced to a specified amount (which may be nil) that the FWC considers appropriate.

(3) The amount of redundancy pay to which the employee is entitled under section 119 is the reduced amount specified in the determination.

121 Exclusions from obligation to pay redundancy pay

(1) Section 119 does not apply to the termination of an employee's employment if, immediately before the time of the termination, or at the time when the person was given notice of the termination as described in subsection 117(1) (whichever happened first):
   (a) the employee's period of continuous service with the employer is less than 12 months; or
   (b) the employer is a small business employer.

(2) A modern award may include a term specifying other situations in which section 119 does not apply to the termination of an employee's employment.

(3) If a modern award that is in operation includes such a term (the ***award term***), an enterprise agreement may:
   (a) incorporate the award term by reference (and as in force from time to time) into the enterprise agreement; and
   (b) provide that the incorporated term covers some or all of the employees who are also covered by the award term.

122 Transfer of employment situations that affect the obligation to pay redundancy pay

Transfer of employment situation in which employer may decide not to recognise employee's service with first employer

(1) Subsection 22(5) does not apply (for the purpose of this Subdivision) to a transfer of employment between non-associated entities in relation to an employee if the second employer decides

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not to recognise the employee's service with the first employer (for the purpose of this Subdivision).

Employee is not entitled to redundancy pay if service with first employer counts as service with second employer

(2) If subsection 22(5) applies (for the purpose of this Subdivision) to a transfer of employment in relation to an employee, the employee is not entitled to redundancy pay under section 119 in relation to the termination of his or her employment with the first employer.

Note: Subsection 22(5) provides that, generally, if there is a transfer of employment, service with the first employer counts as service with the second employer.

Employee not entitled to redundancy pay if refuses employment in certain circumstances

(3) An employee is not entitled to redundancy pay under section 119 in relation to the termination of his or her employment with an employer (the ***first employer***) if:

(a) the employee rejects an offer of employment made by another employer (the ***second employer***) that:

(i) is on terms and conditions substantially similar to, and, considered on an overall basis, no less favourable than, the employee's terms and conditions of employment with the first employer immediately before the termination; and

(ii) recognises the employee's service with the first employer, for the purpose of this Subdivision; and

(b) had the employee accepted the offer, there would have been a transfer of employment in relation to the employee.

(4) If the FWC is satisfied that subsection (3) operates unfairly to the employee, the FWC may order the first employer to pay the employee a specified amount of redundancy pay (not exceeding the amount that would be payable but for subsection (3)) that the FWC considers appropriate. The first employer must pay the employee that amount of redundancy pay.

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Subdivision C—Limits on scope of this Division

123 Limits on scope of this Division

Employees not covered by this Division

(1) This Division does not apply to any of the following employees:
  (a) an employee employed for a specified period of time, for a specified task, or for the duration of a specified season;
  (b) an employee whose employment is terminated because of serious misconduct;
  (c) a casual employee;
  (d) an employee (other than an apprentice) to whom a training arrangement applies and whose employment is for a specified period of time or is, for any reason, limited to the duration of the training arrangement;
  (e) an employee prescribed by the regulations as an employee to whom this Division does not apply.

(2) Paragraph (1)(a) does not prevent this Division from applying to an employee if a substantial reason for employing the employee as described in that paragraph was to avoid the application of this Division.

Other employees not covered by notice of termination provisions

(3) Subdivision A does not apply to:
  (b) a daily hire employee working in the building and construction industry (including working in connection with the erection, repair, renovation, maintenance, ornamentation or demolition of buildings or structures); or
  (c) a daily hire employee working in the meat industry in connection with the slaughter of livestock; or
  (d) a weekly hire employee working in connection with the meat industry and whose termination of employment is determined solely by seasonal factors; or

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(e) an employee prescribed by the regulations as an employee to whom that Subdivision does not apply.

Other employees not covered by redundancy pay provisions

(4) Subdivision B does not apply to:

(a) an employee who is an apprentice; or

(b) an employee to whom an industry-specific redundancy scheme in a modern award applies; or

(c) an employee to whom a redundancy scheme in an enterprise agreement applies if:

(i) the scheme is an industry-specific redundancy scheme that is incorporated by reference (and as in force from time to time) into the enterprise agreement from a modern award that is in operation; and

(ii) the employee is covered by the industry-specific redundancy scheme in the modern award; or

(d) an employee prescribed by the regulations as an employee to whom that Subdivision does not apply.

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Division 12—Fair Work Information Statement

124 Fair Work Ombudsman to prepare and publish Fair Work Information Statement

(1) The Fair Work Ombudsman must prepare a ***Fair Work Information Statement***. The Fair Work Ombudsman must publish the Statement in the *Gazette*.

Note: If the Fair Work Ombudsman changes the Statement, the Fair Work Ombudsman must publish the new version of the Statement in the *Gazette*.

(2) The Statement must contain information about the following:
- (a) the National Employment Standards;
- (b) modern awards;
- (c) agreement-making under this Act;
- (d) the right to freedom of association;
- (e) the role of the FWC and the Fair Work Ombudsman;
- (f) termination of employment;
- (g) individual flexibility arrangements;
- (h) right of entry (including the protection of personal information by privacy laws).

(3) The Fair Work Information Statement is not a legislative instrument.

(4) The regulations may prescribe other matters relating to the content or form of the Statement, or the manner in which employers may give the Statement to employees.

125 Giving new employees the Fair Work Information Statement

(1) An employer must give each employee the Fair Work Information Statement before, or as soon as practicable after, the employee starts employment.

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(2) Subsection (1) does not require the employer to give the employee the Statement more than once in any 12 months.

Note: This is relevant if the employer employs the employee more than once in the 12 months.

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Division 13—Miscellaneous

126 Modern awards and enterprise agreements may provide for school-based apprentices and trainees to be paid loadings in lieu

A modern award or enterprise agreement may provide for school-based apprentices or school-based trainees to be paid loadings in lieu of any of the following:

(a) paid annual leave;

(b) paid personal/carer's leave;

(c) paid absence under Division 10 (which deals with public holidays).

Note: Section 199 affects whether the FWC may approve an enterprise agreement covering an employee who is a school-based apprentice or school-based trainee, if the employee is covered by a modern award that is in operation and provides for the employee to be paid loadings in lieu of paid annual leave, paid personal/carer's leave or paid absence under Division 10.

127 Regulations about what modern awards and enterprise agreements can do

The regulations may:

(a) permit modern awards or enterprise agreements or both to include terms that would or might otherwise be contrary to this Part or section 55 (which deals with the interaction between the National Employment Standards and a modern award or enterprise agreement); or

(b) prohibit modern awards or enterprise agreements or both from including terms that would or might otherwise be permitted by a provision of this Part or section 55.

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128 Relationship between National Employment Standards and agreements etc. permitted by this Part for award/agreement free employees

The National Employment Standards have effect subject to:

(a) an agreement between an employer and an award/agreement free employee or a requirement made by an employer of an award/agreement free employee, that is expressly permitted by a provision of this Part; or

(b) an agreement between an employer and an award/agreement free employee that is expressly permitted by regulations made for the purpose of section 129.

Note 1: In determining what matters are permitted to be agreed or required under paragraph (a), any regulations made for the purpose of section 129 that expressly prohibit certain agreements or requirements must be taken into account.

Note 2: See also the note to section 64 (which deals with the effect of averaging arrangements).

129 Regulations about what can be agreed to etc. in relation to award/agreement free employees

The regulations may:

(a) permit employers, and award/agreement free employees, to agree on matters that would or might otherwise be contrary to this Part; or

(b) prohibit employers and award/agreement free employees from agreeing on matters, or prohibit employers from making requirements of such employees, that would or might otherwise be permitted by a provision of this Part.

130 Restriction on taking or accruing leave or absence while receiving workers' compensation

(1) An employee is not entitled to take or accrue any leave or absence (whether paid or unpaid) under this Part during a period (a ***compensation period***) when the employee is absent from work because of a personal illness, or a personal injury, for which the

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employee is receiving compensation payable under a law (a ***compensation law***) of the Commonwealth, a State or a Territory that is about workers' compensation.

(2) Subsection (1) does not prevent an employee from taking or accruing leave during a compensation period if the taking or accruing of the leave is permitted by a compensation law.

(3) Subsection (1) does not prevent an employee from taking unpaid parental leave during a compensation period.

131 Relationship with other Commonwealth laws

This Part establishes minimum standards and so is intended to supplement, and not to override, entitlements under other laws of the Commonwealth.

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Part 2-3—Modern awards

Division 1—Introduction

132 Guide to this Part

This Part provides for the FWC to make, vary and revoke modern awards. Modern awards may set minimum terms and conditions for national system employees in particular industries or occupations. Modern awards can have terms that are ancillary or supplementary to the National Employment Standards (see Part 2-1).

Division 2 provides for the modern awards objective. This requires the FWC to ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account certain social and economic factors. Division 2 also contains special provisions about modern award minimum wages.

Division 3 deals with the terms of modern awards.

Division 4 provides for the FWC to conduct 4 yearly reviews of modern awards (other than in relation to default fund terms of modern awards).

Division 4A provides for the FWC to conduct 4 yearly reviews of default fund terms of modern awards.

It also sets out the process for making the Schedule of Approved Employer MySuper products in a 4 yearly review, and amending the schedule after it is made to include other employer MySuper products. If an employer MySuper product is on the schedule, an employer covered by a modern award can make contributions, for the benefit of a default fund employee, to a superannuation fund that offers the product (see subsection 149D(1A)).

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Division 5 provides for the FWC to exercise modern award powers outside the system of 4 yearly reviews in certain circumstances.

Division 6 contains some general provisions relating to modern award powers.

Division 7 contains additional provisions relating to modern enterprise awards.

Division 8 contains additional provisions relating to State reference public sector modern awards.

The obligation to comply with a modern award is in section 45 (in Part 2-1).

In relation to minimum wages in modern awards, the FWC has powers both under this Part and under Part 2-6 (which deals with minimum wages). The following is a summary of the FWC's powers under the 2 Parts:

(a) the initial making of a modern award setting modern award minimum wages can only occur under this Part;

(b) the main power to vary modern award minimum wages is in annual wage reviews under Part 2-6;

(c) modern award minimum wages can also be varied under this Part, but only for work value reasons or in other limited circumstances;

(d) modern award minimum wages can be set (otherwise than in the initial making of a modern award) or revoked either under this Part or in annual wage reviews under Part 2-6.

133 Meanings of *employee* and *employer*

In this Part, ***employee*** means a national system employee, and ***employer*** means a national system employer.

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Section 133

Note: See also Division 2 of Part 6-4A (TCF contract outworkers taken to be employees in certain circumstances).

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Division 2—Overarching provisions

134 The modern awards objective

What is the modern awards objective?

(1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

(a) relative living standards and the needs of the low paid; and

(b) the need to encourage collective bargaining; and

(c) the need to promote social inclusion through increased workforce participation; and

(d) the need to promote flexible modern work practices and the efficient and productive performance of work; and

(da) the need to provide additional remuneration for:

(i) employees working overtime; or

(ii) employees working unsocial, irregular or unpredictable hours; or

(iii) employees working on weekends or public holidays; or

(iv) employees working shifts; and

(e) the principle of equal remuneration for work of equal or comparable value; and

(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and

(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

This is the ***modern awards objective***.

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When does the modern awards objective apply?

(2) The modern awards objective applies to the performance or exercise of the FWC's ***modern award powers***, which are:
  (a) the FWC's functions or powers under this Part; and
  (b) the FWC's functions or powers under Part 2-6, so far as they relate to modern award minimum wages.

Note: The FWC must also take into account the objects of this Act and any other applicable provisions. For example, if the FWC is setting, varying or revoking modern award minimum wages, the minimum wages objective also applies (see section 284).

135 Special provisions relating to modern award minimum wages

(1) Modern award minimum wages cannot be varied under this Part except as follows:
  (a) modern award minimum wages can be varied if the FWC is satisfied that the variation is justified by work value reasons (see subsections 156(3) and 157(2));
  (b) modern award minimum wages can be varied under section 160 (which deals with variation to remove ambiguities or correct errors) or section 161 (which deals with variation on referral by the Australian Human Rights Commission).

Note 1: The main power to vary modern award minimum wages is in annual wage reviews under Part 2-6. Modern award minimum wages can also be set or revoked in annual wage reviews.

Note 2: For the meanings of ***modern award minimum wages***, and ***setting*** and ***varying*** such wages, see section 284.

(2) In exercising its powers under this Part to set, vary or revoke modern award minimum wages, the FWC must take into account the rate of the national minimum wage as currently set in a national minimum wage order.

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Division 3—Terms of modern awards

Subdivision A—Preliminary

136 What can be included in modern awards

Terms that may or must be included

(1) A modern award must only include terms that are permitted or required by:
  (a) Subdivision B (which deals with terms that may be included in modern awards); or
  (b) Subdivision C (which deals with terms that must be included in modern awards); or
  (c) section 55 (which deals with interaction between the National Employment Standards and a modern award or enterprise agreement); or
  (d) Part 2-2 (which deals with the National Employment Standards).

Note 1: Subsection 55(4) permits inclusion of terms that are ancillary or incidental to, or that supplement, the National Employment Standards.

Note 2: Part 2-2 includes a number of provisions permitting inclusion of terms about particular matters.

Terms that must not be included

(2) A modern award must not include terms that contravene:
  (a) Subdivision D (which deals with terms that must not be included in modern awards); or
  (b) section 55 (which deals with the interaction between the National Employment Standards and a modern award or enterprise agreement).

Note: The provisions referred to in subsection (2) limit the terms that can be included in modern awards under the provisions referred to in subsection (1).

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137 Terms that contravene section 136 have no effect

A term of a modern award has no effect to the extent that it contravenes section 136.

138 Achieving the modern awards objective

A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.

Subdivision B—Terms that may be included in modern awards

139 Terms that may be included in modern awards—general

(1) A modern award may include terms about any of the following matters:

(a) minimum wages (including wage rates for junior employees, employees with a disability and employees to whom training arrangements apply), and:

(i) skill-based classifications and career structures; and

(ii) incentive-based payments, piece rates and bonuses;

(b) type of employment, such as full-time employment, casual employment, regular part-time employment and shift work, and the facilitation of flexible working arrangements, particularly for employees with family responsibilities;

(c) arrangements for when work is performed, including hours of work, rostering, notice periods, rest breaks and variations to working hours;

(d) overtime rates;

(e) penalty rates, including for any of the following:

(i) employees working unsocial, irregular or unpredictable hours;

(ii) employees working on weekends or public holidays;

(iii) shift workers;

(f) annualised wage arrangements that:

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(i) have regard to the patterns of work in an occupation, industry or enterprise; and
(ii) provide an alternative to the separate payment of wages and other monetary entitlements; and
(iii) include appropriate safeguards to ensure that individual employees are not disadvantaged;

(g) allowances, including for any of the following:
(i) expenses incurred in the course of employment;
(ii) responsibilities or skills that are not taken into account in rates of pay;
(iii) disabilities associated with the performance of particular tasks or work in particular conditions or locations;

(h) leave, leave loadings and arrangements for taking leave;

(i) superannuation;

(j) procedures for consultation, representation and dispute settlement.

(2) Any allowance included in a modern award must be separately and clearly identified in the award.

140 Outworker terms

(1) A modern award may include either or both of the following:
(a) terms relating to the conditions under which an employer may employ employees who are outworkers;
(b) terms relating to the conditions under which an outworker entity may arrange for work to be performed for the entity (either directly or indirectly), if the work is of a kind that is often performed by outworkers.

Note: A person who is an employer may also be an outworker entity (see the definition of ***outworker entity*** in section 12).

(2) Without limiting subsection (1), terms referred to in that subsection may include terms relating to the pay or conditions of outworkers.

(3) The following terms of a modern award are ***outworker terms***:
(a) terms referred to in subsection (1);

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(b) terms that are incidental to terms referred to in subsection (1), included in the modern award under subsection 142(1);

(c) machinery terms in relation to terms referred to in subsection (1), included in the modern award under subsection 142(2).

141 Industry-specific redundancy schemes

When can a modern award include an industry-specific redundancy scheme?

(1) A modern award may include an industry-specific redundancy scheme if the scheme was included in the award:

(a) in the award modernisation process; or

(b) in accordance with subsection (2).

Note: An employee to whom an industry-specific redundancy scheme in a modern award applies is not entitled to the redundancy entitlements in Subdivision B of Division 11 of Part 2-2.

Coverage of industry-specific redundancy schemes must not be extended

(2) If:

(a) a modern award includes an industry-specific redundancy scheme; and

(b) the FWC is making or varying another modern award under Division 4 or 5 so that it (rather than the modern award referred to in paragraph (a)) will cover some or all of the classes of employees who are covered by the scheme;

the FWC may include the scheme in that other modern award. However, the FWC must not extend the coverage of the scheme to classes of employees that it did not previously cover.

Varying industry-specific redundancy schemes

(3) The FWC may only vary an industry-specific redundancy scheme in a modern award under Division 4 or 5:

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(a) by varying the amount of any redundancy payment in the scheme; or
(b) in accordance with a provision of Subdivision B of Division 5 (which deals with varying modern awards in some limited situations).

(4) In varying an industry-specific redundancy scheme as referred to in subsection (3), the FWC:
(a) must not extend the coverage of the scheme to classes of employees that it did not previously cover; and
(b) must retain the industry-specific character of the scheme.

Omitting industry-specific redundancy schemes

(5) The FWC may vary a modern award under Division 4 or 5 by omitting an industry-specific redundancy scheme from the award.

142 Incidental and machinery terms

Incidental terms

(1) A modern award may include terms that are:
(a) incidental to a term that is permitted or required to be in the modern award; and
(b) essential for the purpose of making a particular term operate in a practical way.

Machinery terms

(2) A modern award may include machinery terms, including formal matters (such as a title, date or table of contents).

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Subdivision C—Terms that must be included in modern awards

143 Coverage terms of modern awards other than modern enterprise awards and State reference public sector modern awards

Coverage terms must be included

(1) A modern award must include terms (***coverage terms***) setting out the employers, employees, organisations and outworker entities that are covered by the award, in accordance with this section.

Employers and employees

(2) A modern award must be expressed to cover:
  (a) specified employers; and
  (b) specified employees of employers covered by the modern award.

Organisations

(3) A modern award may be expressed to cover one or more specified organisations, in relation to all or specified employees or employers that are covered by the award.

Outworker entities

(4) A modern award may be expressed to cover, but only in relation to outworker terms included in the award, specified outworker entities.

How coverage is expressed

(5) For the purposes of subsections (2) to (4):
  (a) employers may be specified by name or by inclusion in a specified class or specified classes; and

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(b) employees must be specified by inclusion in a specified class or specified classes; and
(c) organisations must be specified by name; and
(d) outworker entities may be specified by name or by inclusion in a specified class or specified classes.

(6) Without limiting the way in which a class may be described for the purposes of subsection (5), the class may be described by reference to a particular industry or part of an industry, or particular kinds of work.

Employees not traditionally covered by awards etc.

(7) A modern award must not be expressed to cover classes of employees:
(a) who, because of the nature or seniority of their role, have traditionally not been covered by awards (whether made under laws of the Commonwealth or the States); or
(b) who perform work that is not of a similar nature to work that has traditionally been regulated by such awards.

Note: For example, in some industries, managerial employees have traditionally not been covered by awards.

Modern enterprise awards

(8) A modern award (other than a modern enterprise award) must be expressed not to cover employees who are covered by a modern enterprise award, or an enterprise instrument (within the meaning of the Transitional Act), or employers in relation to those employees.

(9) This section does not apply to modern enterprise awards.

State reference public sector modern awards

(10) A modern award (other than a State reference public sector modern award) must be expressed not to cover employees who are covered by a State reference public sector modern award, or a State

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reference public sector transitional award (within the meaning of the Transitional Act), or employers in relation to those employees.

(11) This section does not apply to State reference public sector modern awards.

143A Coverage terms of modern enterprise awards

Coverage terms must be included

(1) A modern enterprise award must include terms (***coverage terms***) setting out, in accordance with this section:
  (a) the enterprise or enterprises to which the modern enterprise award relates; and
  (b) the employers, employees and organisations that are covered by the modern enterprise award.

Enterprises

(2) A modern enterprise award must be expressed to relate:
  (a) to a single enterprise (or a part of a single enterprise) only; or
  (b) to one or more enterprises, but only if the employers all carry on similar business activities under the same franchise and are:
    (i) franchisees of the same franchisor; or
    (ii) related bodies corporate of the same franchisor; or
    (iii) any combination of the above.

Employers and employees

(3) A modern enterprise award must be expressed to cover:
  (a) a specified employer that carries on, or specified employers that carry on, the enterprise or enterprises referred to in subsection (2); and
  (b) specified employees of employers covered by the modern enterprise award.

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Organisations

(4) A modern enterprise award may be expressed to cover one or more specified organisations, in relation to:
  (a) all or specified employees covered by the award; or
  (b) the employer, or all or specified employers, covered by the award.

Outworker entities

(5) A modern enterprise award must not be expressed to cover outworker entities.

How coverage etc. is expressed

(6) For the purposes of subsection (2), an enterprise must be specified:
  (a) if paragraph (2)(a) applies to the enterprise—by name; or
  (b) if paragraph (2)(b) applies to the enterprise—by name, or by the name of the franchise.

(7) For the purposes of subsections (3) and (4):
  (a) an employer or 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.

Employees not traditionally covered by awards etc.

(8) A modern enterprise award must not be expressed to cover classes of employees:
  (a) who, because of the nature or seniority of their role, have traditionally not been covered by awards (whether made under laws of the Commonwealth or the States); or
  (b) who perform work that is not of a similar nature to work that has traditionally been regulated by such awards.

Note: For example, in some industries, managerial employees have traditionally not been covered by awards.

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143B Coverage terms of State reference public sector modern awards

Coverage terms must be included

(1) A State reference public sector modern award must include terms (***coverage terms***) setting out, in accordance with this section, the employers, employees and organisations that are covered by the modern award.

Employers and employees

(2) The coverage terms must be such that:
   (a) the only employers that are expressed to be covered by the modern award are one or more specified State reference public sector employers; and
   (b) the only employees who are expressed to be covered by the modern award are specified State reference public sector employees of those employers.

Organisations

(3) A State reference public sector modern award may be expressed to cover one or more specified organisations, in relation to:
   (a) all or specified employees covered by the modern award; or
   (b) the employer, or all or specified employers, covered by the modern award.

Outworker entities

(4) A State reference public sector modern award must not be expressed to cover outworker entities.

How coverage etc. is expressed

(5) For the purposes of this section:
   (a) an employer or employers may be specified by name or by inclusion in a specified class or specified classes; and

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(b) employees must be specified by inclusion in a specified class or specified classes; and
(c) organisations must be specified by name.

144 Flexibility terms

Flexibility terms must be included

(1) A modern award must include a term (a ***flexibility term***) enabling an employee and his or her employer to agree on an arrangement (an ***individual flexibility arrangement***) varying the effect of the award in relation to the employee and the employer, in order to meet the genuine needs of the employee and employer.

Effect of individual flexibility arrangements

(2) If an employee and employer agree to an individual flexibility arrangement under a flexibility term in a modern award:
(a) the modern award has effect in relation to the employee and the employer as if it were varied by the flexibility arrangement; and
(b) the arrangement is taken, for the purposes of this Act, to be a term of the modern award.

(3) To avoid doubt, the individual flexibility arrangement does not change the effect the modern award has in relation to the employer and any other employee.

Requirements for flexibility terms

(4) The flexibility term must:
(a) identify the terms of the modern award the effect of which may be varied by an individual flexibility arrangement; and
(b) require that the employee and the employer genuinely agree to any individual flexibility arrangement; and
(c) require the employer to ensure that any individual flexibility arrangement must result in the employee being better off

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overall than the employee would have been if no individual flexibility arrangement were agreed to; and

(d) set out how any flexibility arrangement may be terminated by the employee or the employer; and

(e) require the employer to ensure that any individual flexibility arrangement must be in writing and signed:

(i) in all cases—by the employee and the employer; and

(ii) if the employee is under 18—by a parent or guardian of the employee; and

(f) require the employer to ensure that a copy of any individual flexibility arrangement must be given to the employee.

(5) Except as required by subparagraph (4)(e)(ii), the flexibility term must not require that any individual flexibility arrangement agreed to by an employer and employee under the term must be approved, or consented to, by another person.

145 Effect of individual flexibility arrangement that does not meet requirements of flexibility term

Application of this section

(1) This section applies if:

(a) an employee and employer agree to an arrangement that purports to be an individual flexibility arrangement under a flexibility term in a modern award; and

(b) the arrangement does not meet a requirement set out in section 144.

Note: A failure to meet such a requirement may be a contravention of a provision of Part 3-1 (which deals with general protections).

Arrangement has effect as if it were an individual flexibility arrangement

(2) The arrangement has effect as if it were an individual flexibility arrangement.

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Employer contravenes flexibility term in specified circumstances

(3) If subsection 144(4) requires the employer to ensure that the arrangement meets the requirement, the employer contravenes the flexibility term of the award.

Flexibility arrangement may be terminated by agreement or notice

(4) The flexibility term is taken to provide (in addition to any other means of termination of the arrangement that the term provides) that the arrangement can be terminated:
   (a) by either the employee, or the employer, giving written notice of not more than 28 days; or
   (b) by the employee and the employer at any time if they agree, in writing, to the termination.

145A Consultation about changes to rosters or hours of work

(1) Without limiting paragraph 139(1)(j), a modern award must include a term that:
   (a) requires the employer to consult employees about a change to their regular roster or ordinary hours of work; and
   (b) allows for the representation of those employees for the purposes of that consultation.

(2) The term must require the employer:
   (a) to provide information to the employees about the change; and
   (b) to invite the employees to give their views about the impact of the change (including any impact in relation to their family or caring responsibilities); and
   (c) to consider any views about the impact of the change that are given by the employees.

146 Terms about settling disputes

Without limiting paragraph 139(1)(j), a modern award must include a term that provides a procedure for settling disputes:

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(a) about any matters arising under the award; and
(b) in relation to the National Employment Standards.

Note: The FWC or a person must not settle a dispute about whether an employer had reasonable business grounds under subsection 65(5) or 76(4) (see subsections 739(2) and 740(2)).

147 Ordinary hours of work

A modern award must include terms specifying, or providing for the determination of, the ordinary hours of work for each classification of employee covered by the award and each type of employment permitted by the award.

Note: An employee's ordinary hours of work are significant in determining the employee's entitlements under the National Employment Standards.

148 Base and full rates of pay for pieceworkers

If a modern award defines or describes employees covered by the award as pieceworkers, the award must include terms specifying, or providing for the determination of, base and full rates of pay for those employees for the purposes of the National Employment Standards.

Note: An employee's base and full rates of pay are significant in determining the employee's entitlements under the National Employment Standards.

149 Automatic variation of allowances

If a modern award includes allowances that the FWC considers are of a kind that should be varied when wage rates in the award are varied, the award must include terms providing for the automatic variation of those allowances when wage rates in the award are varied.

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149B Term requiring avoidance of liability to pay superannuation guarantee charge

A modern award must include a term that requires an employer covered by the award to make contributions to a superannuation fund for the benefit of an employee covered by the award so as to avoid liability to pay superannuation guarantee charge under the *Superannuation Guarantee Charge Act 1992* in relation to the employee.

149C Default fund terms

(1) A modern award must include a default fund term that complies with section 149D.

(2) A ***default fund term*** is a term of a modern award that requires, permits or prohibits an employer covered by the award to make contributions to a superannuation fund for the benefit of an employee (a ***default fund employee***) who:

(a) is covered by the award; and

(b) has no chosen fund (within the meaning of the *Superannuation Guarantee (Administration) Act 1992*).

149D Default fund term must provide for contributions to be made to certain funds

Specified superannuation fund offering standard MySuper product

(1) A default fund term of a modern award must require an employer covered by the award to make contributions, for the benefit of a default fund employee, to a superannuation fund that:

(a) offers a standard MySuper product; and

(b) is specified in the default fund term of the award in relation to that product;

if:

(c) the employer will be liable to pay superannuation guarantee charge under the *Superannuation Guarantee Charge Act 1992* in relation to the employee if the employer does not

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make contributions to a superannuation fund for the benefit of the employee; and

(d) the employer is not making contributions to a superannuation fund referred to in subsection (1A), (2), (3), (4) or (5) for the benefit of the employee.

Note: If a superannuation fund is specified in the default fund term of a modern award in relation to a standard MySuper product and, in addition to offering the standard MySuper product, the fund offers a tailored MySuper product that a default fund employee is entitled to hold, then any contributions made by the employer to the fund for the benefit of that employee will be paid into the tailored MySuper product instead of the standard MySuper product (see section 29WB of the *Superannuation Industry (Supervision) Act 1993*).

Superannuation funds offering employer MySuper products on the schedule

(1A) A default fund term of a modern award must permit an employer covered by the award to make contributions, for the benefit of a default fund employee, to a superannuation fund that offers an employer MySuper product that:

(a) relates to the employer; and

(b) is on the Schedule of Approved Employer MySuper Products.

Note: The Schedule of Approved Employer MySuper Products is made during a 4 yearly review of default fund terms of modern awards under Division 4A of Part 2-3.

Defined Benefits Scheme

(2) A default fund term of a modern award must permit an employer covered by the award to make contributions, for the benefit of a default fund employee, to a superannuation fund in relation to which a default fund employee is a defined benefit member.

Exempt public sector superannuation scheme

(3) A default fund term of a modern award must permit an employer covered by the award to make contributions, for the benefit of a

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default fund employee, to a superannuation fund that is an exempt public sector superannuation scheme.

State public sector superannuation scheme

(4) A default fund term of a modern award must permit an employer covered by the award to make contributions, for the benefit of a default fund employee, to a superannuation fund that:
   (a) is a public sector superannuation scheme (within the meaning of the *Superannuation Industry (Supervision) Act 1993*); and
   (b) a law of a State requires the employer to make contributions to for the benefit of the employee.

Transitionally authorised superannuation fund

(5) A default fund term of a modern award must permit an employer covered by the award to make contributions, for the benefit of a default fund employee, to a superannuation fund in relation to which a transitional authorisation is in operation under section 156K.

Subdivision D—Terms that must not be included in modern awards

150 Objectionable terms

A modern award must not include an objectionable term.

151 Terms about payments and deductions for benefit of employer etc.

A modern award must not include a term that has no effect because of subsection 326(1) (which deals with unreasonable payments and deductions for the benefit of an employer) or subsection 326(3) (which deals with unreasonable requirements to spend an amount).

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152 Terms about right of entry

A modern award must not include terms that require or authorise an official of an organisation to enter premises:

(a) to hold discussions with, or interview, an employee; or

(b) to inspect any work, process or object.

153 Terms that are discriminatory

Discriminatory terms must not be included

(1) A modern award must not include terms that discriminate against an employee because of, or for reasons including, the employee's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

Certain terms are not discriminatory

(2) A term of a modern award does not discriminate against an employee:

(a) if the reason for the discrimination is the inherent requirements of the particular position held by the employee; or

(b) merely because it discriminates, in relation to employment of the employee as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed:

(i) in good faith; and

(ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.

(3) A term of a modern award does not discriminate against an employee merely because it provides for minimum wages 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

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(c) all employees to whom training arrangements apply, or a class of employees to whom training arrangements apply.

154 Terms that contain State-based differences

General rule—State-based difference terms must not be included

(1) A modern award must not include terms and conditions of employment (***State-based difference terms***) that:
  (a) are determined by reference to State or Territory boundaries; or
  (b) are expressed to operate in one or more, but not every, State and Territory.

When State-based difference terms may be included

(2) However, a modern award may include State-based difference terms if the terms were included in the award:
  (a) in the award modernisation process; or
  (b) in accordance with subsection (3);

but only for up to 5 years starting on the day on which the first modern award that included those terms came into operation.

(3) If:
  (a) a modern award includes State-based difference terms as permitted under subsection (2); and
  (b) the FWC is making or varying another modern award so that it (rather than the modern award referred to in paragraph (a)) will cover some or all of the classes of employees who are covered by those terms;

the FWC may include those terms in that other modern award. However, the FWC must not extend the coverage of those terms to classes of employees that they did not previously cover.

155 Terms dealing with long service leave

A modern award must not include terms dealing with long service leave.

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Division 4—4 yearly reviews of modern awards

156 4 yearly reviews of modern awards to be conducted

Timing of 4 yearly reviews

(1) The FWC must conduct a ***4 yearly review of modern awards*** starting as soon as practicable after each 4th anniversary of the commencement of this Part.

Note 1: The FWC must be constituted by a Full Bench to conduct 4 yearly reviews of modern awards, and to make determinations and modern awards in those reviews (see subsections 616(1), (2) and (3)).

Note 2: The President may give directions about the conduct of 4 yearly reviews of modern awards (see section 582).

What has to be done in a 4 yearly review?

(2) In a 4 yearly review of modern awards, the FWC:
- (a) must review all modern awards; and
- (b) may make:
  - (i) one or more determinations varying modern awards; and
  - (ii) one or more modern awards; and
  - (iii) one or more determinations revoking modern awards; and
- (c) must not review, or make a determination to vary, a default fund term of a modern award.

Note 1: Special criteria apply to changing coverage of modern awards or revoking modern awards (see sections 163 and 164).

Note 2: For reviews of default fund terms of modern awards, see Division 4A.

Variation of modern award minimum wages must be justified by work value reasons

(3) In a 4 yearly review of modern awards, the FWC may make a determination varying modern award minimum wages only if the

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FWC is satisfied that the variation of modern award minimum wages is justified by work value reasons.

(4) ***Work value reasons*** are reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:

(a) the nature of the work;

(b) the level of skill or responsibility involved in doing the work;

(c) the conditions under which the work is done.

Each modern award to be reviewed in its own right

(5) A 4 yearly review of modern awards must be such that each modern award is reviewed in its own right. However, this does not prevent the FWC from reviewing 2 or more modern awards at the same time.

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Division 4A—4 yearly reviews of default fund terms of modern awards

Subdivision A—4 yearly reviews of default fund terms

156A 4 yearly reviews of default fund terms

Timing of 4 yearly reviews

(1) The FWC must conduct a 4 yearly review of default fund terms of modern awards starting as soon as practicable after each 4th anniversary of the commencement of this Part.

Note: The President may give directions about the conduct of those reviews (see section 582).

Two stages of the 4 yearly reviews

(2) There are 2 stages of the 4 yearly review.

First stage—the Default Superannuation List

(3) In the first stage, the FWC must make the Default Superannuation List for the purposes of the review.

Note: In the first stage, the FWC must be constituted by an Expert Panel for the purposes of making the list and determining applications to include standard MySuper products on the list (see paragraphs 617(4)(a) and (b)).

Second stage—reviewing and varying default fund terms

(4) In the second stage, the FWC:
  (a) must review the default fund term of each modern award; and
  (b) must make a determination varying the term in accordance with section 156H; and
  (c) if section 156J applies—must make a determination varying the term in accordance with that section.

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Note: For the second stage, the FWC must be constituted by a Full Bench (see subsections 616(2A) and (3A)).

The Schedule of Approved Employer MySuper Products

(5) In the 4 yearly review, the FWC must also make the Schedule of Approved Employer MySuper Products.

Note: The FWC must be constituted by an Expert Panel for the purposes of making the schedule and determining applications to include employer MySuper products on the schedule (see paragraphs 617(4)(c) and (d)).

Subdivision B—The first stage of the 4 yearly review

156B Making the Default Superannuation List

(1) In the 4 yearly review, the FWC must make and publish the ***Default Superannuation List***.

(2) The Default Superannuation List must specify each standard MySuper product that the FWC has determined under section 156E is to be included on the list.

(3) The Default Superannuation List must not specify any other product.

156C Applications to list a standard MySuper product

(1) Before making the Default Superannuation List, the FWC must publish a notice that invites superannuation funds that offer a standard MySuper product to apply to the FWC to have the product included on the list.

(2) The notice must specify the period in which an application may be made.

(3) After the notice is published, a superannuation fund that offers a standard MySuper product may make a written application to have the product included on the list.

(4) The application must:

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(a) be made in the period specified in the notice; and
(b) be accompanied by any fees that are prescribed by the regulations; and
(c) provide information relating to the first stage criteria.

(5) The FWC must publish any application made under subsection (3).

(6) However, if an application includes information that is claimed by the superannuation fund to be confidential or commercially sensitive, and the FWC is satisfied that the information is confidential or commercially sensitive:
(a) the FWC may decide not to publish the information; and
(b) if it does so, it must instead publish a summary of the information which contains sufficient detail to allow a reasonable understanding of the substance of the information (without disclosing anything that is confidential or commercially sensitive).

(7) A reference in this Act (other than in this section) in relation to an application made under subsection (3) includes a reference to a summary referred to in paragraph (6)(b).

156D Submissions on applications to list a standard MySuper product

(1) The FWC must ensure that all persons and bodies have a reasonable opportunity to make written submissions to the FWC in relation to an application made under subsection 156C(3).

(2) If:
(a) a person or body makes a written submission in relation to an application made under subsection 156C(3); and
(b) the person or body has an interest in relation to:
(i) the superannuation fund that made the application; or
(ii) if the person or body refers to another superannuation fund in the submission—that superannuation fund;

then the person or body must disclose that interest in the submission.

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(3) The FWC must publish any submission that is made.

156E Determining applications to list a standard MySuper product

(1) If an application is made under subsection 156C(3) to have a standard MySuper product included on the Default Superannuation List, the FWC must make a determination about whether to include the product on the list.

(2) The FWC must not determine that the product is to be included on the list unless, taking into account:
   (a) the information provided in the application; and
   (b) the first stage criteria; and
   (c) any submissions that were made in relation to the application;

   the FWC is satisfied that including the product on the list would be in the best interests of default fund employees to whom modern awards apply or a particular class of those employees.

156F First stage criteria

The ***first stage criteria*** are as follows:
   (a) the appropriateness of the MySuper product's long term investment return target and risk profile;
   (b) the superannuation fund's expected ability to deliver on the MySuper product's long term investment return target, given its risk profile;
   (c) the appropriateness of the fees and costs associated with the MySuper product, given:
      (i) its stated long term investment return target and risk profile; and
      (ii) the quality and timeliness of services provided;
   (d) the net returns on contributions invested in the MySuper product;
   (e) whether the superannuation fund's governance practices are consistent with meeting the best interests of members of the

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fund, including whether there are mechanisms in place to deal with conflict of interest;

(f) the appropriateness of any insurance offered in relation to the MySuper product;

(g) the quality of advice given to a member of the superannuation fund relating to the member's existing interest in the fund and products offered by the fund;

(h) the administrative efficiency of the superannuation fund;

(i) any other matters the FWC considers relevant.

Subdivision C—Second stage of the 4 yearly review

156G Review of the default fund term of modern awards

(1) As soon as practicable after the Default Superannuation List is made, the FWC must review the default fund term of each modern award.

(2) The FWC must ensure that the following persons have a reasonable opportunity to make written submissions (including submissions requesting that a particular superannuation fund be specified in the term in relation to a standard MySuper product) to the FWC in relation to the default fund term of the award:

(a) an employee and employer that are covered by the modern award;

(b) an organisation that is entitled to represent the industrial interests of one or more employees or employers that are covered by the award;

(c) if the award includes an outworker term—an organisation that is entitled to represent the industrial interests of one or more outworkers to whom the outworker term relates.

(3) If:

(a) a person or body (whether or not a person referred to in subsection (2)) makes a written submission in relation to the default fund term of a modern award; and

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(b) the person or body refers to a particular superannuation fund in the submission; and

(c) the person or body has an interest in relation to that superannuation fund;

then the person or body must disclose that interest in the submission.

(4) The FWC must publish any submission that is made.

156H Default fund term must specify certain superannuation funds

(1) After reviewing the default fund term of a modern award, the FWC must make a determination varying the term:

(a) to remove every superannuation fund that is specified in the term; and

(b) to specify at least 2, but no more than 15, superannuation funds in relation to standard MySuper products that satisfy the second stage test.

Note: See subsection (3) for when the default fund term may specify more than 15 superannuation funds.

(2) A standard MySuper product satisfies the ***second stage test*** if:

(a) it is on the Default Superannuation List; and

(b) the FWC is satisfied that specifying a superannuation fund in relation to the product in the default fund term of the modern award would be in the best interests of the default fund employees to whom the modern award applies, taking into account:

(i) any submissions that were made in relation to the default fund term of the award; and

(ii) any other matter the FWC considers relevant.

(3) The default fund term may specify more than 15 superannuation funds in relation to standard MySuper products that satisfy the second stage test if, taking into account the range of occupations of employees covered by the modern award, the FWC is satisfied it is warranted.

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156J Variation to comply with section 149D

If, at the time of the 4 yearly review, the default fund term of a modern award does not comply with section 149D, the FWC must make a determination varying the term so that it does.

156K Transitional authorisation for certain superannuation funds

(1) The FWC may make a transitional authorisation in relation to a superannuation fund (other than a superannuation fund referred to in subsection 149D(1), (1A), (2), (3) or (4)) if, at the time of the 4 yearly review, the FWC is satisfied that it is appropriate to make the authorisation.

(2) The transitional authorisation comes into operation on the day it is made and ceases to be in operation on the day specified in the authorisation.

Subdivision D—The Schedule of Approved Employer MySuper Products

156L The Schedule of Approved Employer MySuper Products

(1) In the 4 yearly review, the FWC must:
  (a) make and publish the ***Schedule of Approved Employer MySuper Products***; and
  (b) revoke any previous Schedule of Approved Employer MySuper Products.

Note: If an employer MySuper product is on the schedule, an employer covered by a modern award can make contributions, for the benefit of a default fund employee, to a superannuation fund that offers the product (see subsection 149D(1A)).

(2) When the schedule is made, it must specify any employer MySuper product that the FWC has determined under section 156P is to be included on the schedule.

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(3) After the schedule is made, it must be amended to specify any employer MySuper product that the FWC has determined under section 156P is to be included on the schedule.

Note: The FWC must be constituted by an Expert Panel for the purposes of amending the schedule (see paragraph 617(5)(b)).

(4) If the schedule is amended as referred to in subsection (3), the FWC must publish the schedule as amended.

(5) The schedule must not specify any other product.

156M FWC to invite applications to include employer MySuper products on schedule

(1) Before making the schedule, the FWC must publish a notice that invites:

(a) superannuation funds that offer an employer MySuper product; and

(b) employers to which an employer MySuper product relates;

to apply to the FWC to have the product included on the schedule.

(2) The notice must specify the period in which an application may be made.

156N Making applications to include employer MySuper products on schedule

(1) The following may apply to the FWC to have an employer MySuper product included on the schedule:

(a) a superannuation fund that offers the product;

(b) an employer to which the product relates.

(2) The application must be made:

(a) in the period (the ***standard application period***) specified in the notice under section 156M; or

(b) in the period (the ***interim application period***) that:

(i) starts immediately after the schedule is made under paragraph 156L(1)(a); and

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(ii) ends immediately before the next 4th anniversary of the commencement of this Part.

Note: Paragraph (2)(a) deals with applications that are made in a 4 yearly review of default fund terms, and paragraph (2)(b) deals with applications that are made outside a 4 yearly review.

(3) The application must also:
  (a) be accompanied by any fees that are prescribed by the regulations; and
  (b) provide information relating to the first stage criteria.

(4) The FWC must publish any application made under subsection (1).

(5) However, if an application includes information that is claimed by the applicant to be confidential or commercially sensitive, and the FWC is satisfied that the information is confidential or commercially sensitive:
  (a) the FWC may decide not to publish the information; and
  (b) if it does so, it must instead publish a summary of the information which contains sufficient detail to allow a reasonable understanding of the substance of the information (without disclosing anything that is confidential or commercially sensitive).

(6) A reference in this Act (other than in this section) in relation to an application made under subsection (1) includes a reference to a summary referred to in paragraph (5)(b).

(7) Only one application in relation to an employer MySuper product may be made under subsection (1) in the period that:
  (a) starts at the start of the standard application period; and
  (b) ends at the end of the interim application period.

156P FWC to determine applications

(1) If an application is made under subsection 156N(1) to have an employer MySuper product included on the schedule, the FWC must make a determination about whether to include the product on the schedule.

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Note: The FWC must be constituted by an Expert Panel for the purposes of making this determination (see paragraphs 617(4)(d) and (5)(a)).

(2) The FWC must not determine that the product is to be included on the schedule unless the product satisfies the first stage test and the second stage test.

156Q The first stage test

An employer MySuper product satisfies the ***first stage test*** if the FWC is satisfied that including the product on the Schedule of Approved Employer MySuper Products would be in the best interests of default fund employees, or a particular class of those employees, taking into account:

(a) the information provided in the application; and

(b) the first stage criteria; and

(c) any submissions that were made in relation to whether the product satisfies the first stage test.

156R Submissions about the first stage test

(1) The FWC must ensure that all persons and bodies have a reasonable opportunity to make written submissions to the FWC about whether an employer MySuper product satisfies the first stage test.

(2) If:

(a) a person or body makes a written submission in relation to whether an employer MySuper product satisfies the first stage test; and

(b) the person or body has an interest in relation to:

(i) the superannuation fund that offers the product; or

(ii) if the person or body refers to another superannuation fund in the submission—that superannuation fund;

then the person or body must disclose that interest in the submission.

(3) The FWC must publish any submission that is made.

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156S The second stage test

An employer MySuper product satisfies the ***second stage test*** if the FWC is satisfied that including the product on the Schedule of Approved Employer MySuper Products would be in the best interests of default fund employees of an employer to which the product relates, or a particular class of those employees, taking into account:

(a) any submissions that were made in relation to whether the product satisfies the second stage test; and

(b) any other matter the FWC considers relevant.

156T Submissions about the second stage test

(1) The FWC must ensure that the following persons have a reasonable opportunity to make written submissions to the FWC about whether an employer MySuper product satisfies the second stage test:

(a) an employee of an employer to which the product relates;

(b) an employer to which the product relates;

(c) an organisation that is entitled to represent the industrial interests of a person referred to in paragraph (a) or (b).

(2) If:

(a) a person or body (whether or not a person referred to in subsection (1)) makes a written submission in relation to whether an employer MySuper product satisfies the second stage test; and

(b) the person or body has an interest in relation to:

(i) the superannuation fund that offers the product; or

(ii) if the person or body refers to another superannuation fund in the submission—that superannuation fund;

then the person or body must disclose that interest in the submission.

(3) The FWC must publish any submission that is made.

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Subdivision E—Publishing documents under this Division

156U Publishing documents under this Division

If the FWC is required by this Division to publish a document, the FWC must publish the document on its website or by any other means that the FWC considers appropriate.

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Division 5—Exercising modern award powers outside 4 yearly reviews and annual wage reviews

Subdivision A—Exercise of powers if necessary to achieve modern awards objective

157 FWC may vary etc. modern awards if necessary to achieve modern awards objective

(1) The FWC may:

(a) make a determination varying a modern award, otherwise than to vary modern award minimum wages or to vary a default fund term of the award; or

(b) make a modern award; or

(c) make a determination revoking a modern award;

if the FWC is satisfied that making the determination or modern award outside the system of 4 yearly reviews of modern awards is necessary to achieve the modern awards objective.

Note 1: The FWC must be constituted by a Full Bench to make a modern award (see subsection 616(1)).

Note 2: Special criteria apply to changing coverage of modern awards or revoking modern awards (see sections 163 and 164).

Note 3: If the FWC is setting modern award minimum wages, the minimum wages objective also applies (see section 284).

(2) The FWC may make a determination varying modern award minimum wages if the FWC is satisfied that:

(a) the variation of modern award minimum wages is justified by work value reasons; and

(b) making the determination outside the system of annual wage reviews and the system of 4 yearly reviews of modern awards is necessary to achieve the modern awards objective.

Note: As the FWC is varying modern award minimum wages, the minimum wages objective also applies (see section 284).

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(3) The FWC may make a determination or modern award under this section:
  (a) on its own initiative; or
  (b) on application under section 158.

158 Applications to vary, revoke or make modern award

(1) The following table sets out who may apply for the making of a determination varying or revoking a modern award, or for the making of a modern award, under section 157:

Who may make an application?

Item	Column 1 This kind of application …	Column 2 may be made by …
1	an application to vary, omit or include terms (other than outworker terms or coverage terms) in a modern award	(a) an employer, employee or organisation that is covered by the modern award; or (b) an organisation that is entitled to represent the industrial interests of one or more employers or employees that are covered by the modern award.
2	an application to vary, omit or include outworker terms in a modern award	(a) an employer, employee or outworker entity that is or would be covered by the outworker terms; or (b) an organisation that is entitled to represent the industrial interests of one or more outworkers to whom the outworker terms relate or would relate.
3	an application to vary or include coverage terms in a modern award to increase the range of employers, employees or organisations that are covered by the award	(a) an employer, employee or organisation that would become covered by the modern award; or (b) an organisation that is entitled to represent the industrial interests of one or more employers or

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Section 158

Who may make an application?		
Item	**Column 1** **This kind of application …**	**Column 2** **may be made by …**
		employees that would become covered by the modern award.
4	an application to vary or include coverage terms in a modern award to increase the range of outworker entities that are covered by outworker terms	(a) an outworker entity that would become covered by the outworker terms; or (b) an organisation that is entitled to represent the industrial interests of one or more outworkers who would become outworkers to whom the outworker terms relate.
5	an application to vary or omit coverage terms in a modern award to reduce the range of employers, employees or organisations that are covered by the award	(a) an employer, employee or organisation that would stop being covered by the modern award; or (b) an organisation that is entitled to represent the industrial interests of one or more employers or employees that would stop being covered by the modern award.
6	an application to vary or omit coverage terms in a modern award to reduce the range of outworker entities that are covered by outworker terms	(a) an outworker entity that would stop being covered by the outworker terms; or (b) an organisation that is entitled to represent the industrial interests of one or more outworkers who would stop being outworkers to whom the outworker terms relate.
7	an application for the making of a modern award	(a) an employee or employer that would be covered by the modern award; or (b) an organisation that is entitled to represent the industrial interests of one or more employers or

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Who may make an application?		
Item	**Column 1** **This kind of application …**	**Column 2** **may be made by …**
		employees that would be covered by the modern award.
8	an application to revoke a modern award	(a) an employer, employee or organisation that is covered by the modern award; or (b) an organisation that is entitled to represent the industrial interests of one or more employers or employees that are covered by the modern award.

Note: The FWC may dismiss an application to vary, revoke or make a modern award in certain circumstances (see section 587).

(2) Subject to the requirements of the table about who can make what kind of application, an applicant may make applications for 2 or more related things at the same time.

Note: For example, an applicant may apply for the making of a modern award and for the related revocation of an existing modern award.

Subdivision B—Other situations

159 Variation of modern award to update or omit name of employer, organisation or outworker entity

(1) The FWC may make a determination varying a modern award:

(a) to reflect a change in the name of an employer, organisation or outworker entity; or

(b) to omit the name of an organisation, employer or outworker entity from the modern award, if:

(i) the registration of the organisation has been cancelled under the *Workplace Relations Act 1996*; or

(ii) the employer, organisation or outworker entity has ceased to exist; or

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(c) if the modern award is a named employer award and the named employer is the old employer in a transfer of business—to reflect the transfer of business to the new employer.

(2) The FWC may make a determination under this section:

(a) in any case—on its own initiative; or

(b) if paragraph (1)(a) or (b) applies—on application by the employer, organisation or outworker entity referred to in that paragraph; or

(c) if paragraph (1)(c) applies—on application by:

(i) the old employer or the new employer; or

(ii) a transferring employee who was covered by the modern award as an employee of the old employer; or

(iii) an organisation that is entitled to represent the industrial interests of the old employer, the new employer, or one or more employees referred to in subparagraph (ii).

159A Variation of default fund term of modern award

(1) The FWC may make a determination varying the default fund term of a modern award in relation to a superannuation fund specified in the term in relation to a standard MySuper product (the ***specified product***) in the following circumstances:

(a) to reflect a change in the name of the fund or the specified product;

(b) if the fund has ceased to exist—to omit the name of the fund and the specified product;

(c) if the specified product has ceased to exist and no other MySuper product is specified in relation to the fund—to omit the name of the fund and the specified product;

(d) if the specified product has ceased to exist and another MySuper product is specified in relation to the fund—to omit the name of the specified product;

(e) if the Australian Prudential Regulation Authority gives the FWC notice under subsection 29U(4) of the *Superannuation*

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Industry (Supervision) Act 1993 that the fund no longer offers the specified product and no other MySuper product is specified in relation to the fund—to omit the name of the fund and the specified product;

(f) if the Australian Prudential Regulation Authority gives the FWC notice under subsection 29U(4) of the *Superannuation Industry (Supervision) Act 1993* that the fund no longer offers the specified product and another MySuper product is specified in relation to the fund—to omit the name of the specified product.

(2) The FWC may make a determination under this section:

(a) in any case—on its own initiative; or

(b) on application by an employee, employer, organisation or outworker entity covered by the modern award.

160 Variation of modern award to remove ambiguity or uncertainty or correct error

(1) The FWC may make a determination varying a modern award to remove an ambiguity or uncertainty or to correct an error.

(2) The FWC may make the determination:

(a) on its own initiative; or

(b) on application by an employer, employee, organisation or outworker entity that is covered by the modern award; or

(c) on application by an organisation that is entitled to represent the industrial interests of one or more employers or employees that are covered by the modern award; or

(d) if the modern award includes outworker terms—on application by an organisation that is entitled to represent the industrial interests of one or more outworkers to whom the outworker terms relate.

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161 Variation of modern award on referral by Australian Human Rights Commission

(1) The FWC must review a modern award if the award is referred to it under section 46PW of the *Australian Human Rights Commission Act 1986* (which deals with discriminatory industrial instruments).

(2) The following are entitled to make submissions to the FWC for consideration in the review:

(a) if the referral relates to action that would be unlawful under Part 4 of the *Age Discrimination Act 2004*—the Age Discrimination Commissioner;

(b) if the referral relates to action that would be unlawful under Part 2 of the *Disability Discrimination Act 1992*—the Disability Discrimination Commissioner;

(c) if the referral relates to action that would be unlawful under Part II of the *Sex Discrimination Act 1984*—the Sex Discrimination Commissioner.

(3) If the FWC considers that the modern award reviewed requires a person to do an act that would be unlawful under any of the Acts referred to in subsection (2) (but for the fact that the act would be done in direct compliance with the modern award), the FWC must make a determination varying the modern award so that it no longer requires the person to do an act that would be so unlawful.

Note: Special criteria apply to changing coverage of modern awards (see section 163).

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Division 6—General provisions relating to modern award powers

162 General

This Division contains some specific provisions relevant to the exercise of modern award powers. For other provisions relevant to the exercise of modern award powers, see the general provisions about the FWC's processes in Part 5-1.

Note: Relevant provisions of Part 5-1 include the following:

(a) section 582 (which deals with the President's power to give directions);

(b) section 590 (which deals with the FWC's discretion to inform itself as it considers appropriate, including by commissioning research);

(c) section 596 (which deals with being represented in a matter before the FWC);

(d) section 601 (which deals with writing and publication requirements).

163 Special criteria relating to changing coverage of modern awards

Special rule about reducing coverage

(1) The FWC must not make a determination varying a modern award so that certain employers or employees stop being covered by the award unless the FWC is satisfied that they will instead become covered by another modern award (other than the miscellaneous modern award) that is appropriate for them.

Special rule about making a modern award

(2) The FWC must not make a modern award covering certain employers or employees unless the FWC has considered whether it should, instead, make a determination varying an existing modern award to cover them.

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Special rule about covering organisations

(3) The FWC must not make a modern award, or make a determination varying a modern award, so that an organisation becomes covered by the award, unless the organisation is entitled to represent the industrial interests of one or more employers or employees who are or will be covered by the award.

The miscellaneous modern award

(4) The ***miscellaneous modern award*** is the modern award that is expressed to cover employees who are not covered by any other modern award.

164 Special criteria for revoking modern awards

The FWC must not make a determination revoking a modern award unless the FWC is satisfied that:

(a) the award is obsolete or no longer capable of operating; or

(b) all the employees covered by the award are covered by a different modern award (other than the miscellaneous modern award) that is appropriate for them, or will be so covered when the revocation comes into operation.

165 When variation determinations come into operation, other than determinations setting, varying or revoking modern award minimum wages

Determinations come into operation on specified day

(1) A determination under this Part that varies a modern award (other than a determination that sets, varies or revokes modern award minimum wages) comes into operation on the day specified in the determination.

Note 1: For when a modern award, or a revocation of a modern award, comes into operation, see section 49.

Note: For when a determination under this Part setting, varying or revoking modern award minimum wages comes into operation, see section 166.

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(2) The specified day must not be earlier than the day on which the determination is made, unless:
   (a) the determination is made under section 160 (which deals with variation to remove ambiguities or correct errors); and
   (b) the FWC is satisfied that there are exceptional circumstances that justify specifying an earlier day.

Determinations take effect from first full pay period

(3) The determination does not take effect in relation to a particular employee until the start of the employee's first full pay period that starts on or after the day the determination comes into operation.

166 When variation determinations setting, varying or revoking modern award minimum wages come into operation

Determinations generally come into operation on 1 July

(1) A determination under this Part that sets, varies or revokes modern award minimum wages comes into operation:
   (a) on 1 July in the next financial year after it is made; or
   (b) if it is made on 1 July in a financial year—on that day.

Note: Modern award minimum wages can also be set, varied or revoked by determinations made in annual wage reviews. For when those determinations come into operation, see section 286.

FWC may specify another day of operation if appropriate

(2) However, if the FWC specifies another day in the determination as the day on which it comes into operation, the determination comes into operation on that other day. The FWC must not specify another day unless it is satisfied that it is appropriate to do so.

(3) The specified day must not be earlier than the day on which the determination is made, unless:
   (a) the determination is made under section 160 (which deals with variation to remove ambiguities or correct errors); and

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(b) the FWC is satisfied that there are exceptional circumstances that justify specifying an earlier day.

Determinations may take effect in stages

(4) The FWC may specify in the determination that changes to modern award minimum wages made by the determination take effect in stages if the FWC is satisfied that it is appropriate to do so.

Determinations take effect from first full pay period

(5) A change to modern award minimum wages made by the determination does not take effect in relation to a particular employee until the start of the employee's first full pay period that starts on or after:

(a) unless paragraph (b) applies—the day the determination comes into operation; or

(b) if the determination takes effect in stages under subsection (4)—the day the change to modern award minimum wages is specified to take effect.

167 Special rules relating to retrospective variations of awards

Application of this section

(1) This section applies if a determination varying a modern award has a retrospective effect because it comes into operation under subsection 165(2) or 166(3) on a day before the day on which the determination is made.

No effect on past approval of enterprise agreement or variation

(2) If, before the determination was made, an enterprise agreement or a variation of an enterprise agreement was approved by the FWC, the validity of the approval is not affected by the retrospective effect of the determination.

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No creation of liability to pay pecuniary penalty for past conduct

(3) If:

(a) a person engaged in conduct before the determination was made; and

(b) but for the retrospective effect of the determination, the conduct would not have contravened a term of the modern award or an enterprise agreement;

a court must not order the person to pay a pecuniary penalty under Division 2 of Part 4-1 in relation to the conduct, on the grounds that the conduct contravened a term of the modern award or enterprise agreement.

Note 1: This subsection does not affect the powers of a court to make other kinds of orders under Division 2 of Part 4-1.

Note 2: A determination varying a modern award could result in a contravention of a term of an enterprise agreement because of the effect of subsection 206(2).

168 Varied modern award must be published

(1) If the FWC makes a determination under this Part or Part 2-6 (which deals with minimum wages) varying a modern award, the FWC must publish the award as varied as soon as practicable.

(2) The publication may be on the FWC's website or by any other means that the FWC considers appropriate.

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Division 7—Additional provisions relating to modern enterprise awards

168A Modern enterprise awards

(1) This Division contains additional provisions that relate to modern enterprise awards. The provisions in this Division have effect despite anything else in this Part.

(2) A ***modern enterprise award*** is a modern award that is expressed to relate to:
  (a) a single enterprise (or a part of a single enterprise) only; or
  (b) one or more enterprises, if the employers all carry on similar business activities under the same franchise and are:
    (i) franchisees of the same franchisor; or
    (ii) related bodies corporate of the same franchisor; or
    (iii) any combination of the above.

(3) A ***single enterprise*** 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.

(4) For the purposes of subsection (3), 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.

(5) For the purposes of subsection (3), if 2 or more related bodies corporate each carry on a single enterprise:
  (a) the bodies corporate are taken to be one employer; and

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(b) the single enterprises are taken to be one single enterprise.

Note: However, a modern enterprise award could just relate to a part of that single enterprise.

(6) A ***part of a single enterprise*** includes, for example:
(a) a geographically distinct part of the single enterprise; or
(b) a distinct operational or organisational unit within the single enterprise.

168B The modern enterprise awards objective

What is the modern enterprise awards objective?

(1) The FWC must recognise that modern enterprise awards may provide terms and conditions tailored to reflect employment arrangements that have been developed in relation to the relevant enterprises. This is the ***modern enterprise awards objective***.

When does the modern enterprise awards objective apply?

(2) The modern enterprise awards objective applies to the performance of the FWC's functions or powers under this Act, so far as they relate to modern enterprise awards.

References to the modern awards objective

(3) A reference to the modern awards objective in this Act, other than section 134, is taken to include a reference to the modern enterprise awards objective.

168C Rules about making and revoking modern enterprise awards

Making modern enterprise awards

(1) The FWC must not, under this Part:
(a) make a modern enterprise award; or
(b) make a determination varying a modern award so that it becomes a modern enterprise award.

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Note: Modern enterprise awards can be made only in accordance with the enterprise instrument modernisation process provided for by Part 2 of Schedule 6 of the Transitional Act.

Revoking modern enterprise awards

(2) The FWC may make a determination revoking a modern enterprise award only on application under section 158.

(3) The FWC must not make a determination revoking a modern enterprise award unless the FWC is satisfied that:
  (a) the award is obsolete or no longer capable of operating; or
  (b) all the employees covered by the award will, when the revocation comes into operation, be covered by a different modern award (other than the miscellaneous modern award or a modern enterprise award) that is appropriate for them.

(4) In deciding whether to make a determination revoking a modern enterprise award the FWC must take into account the following:
  (a) the circumstances that led to the making of the modern enterprise award;
  (b) the content of the modern award referred to in paragraph (3)(b);
  (c) the terms and conditions of employment applying in the industry in which the persons covered by the modern enterprise award operate, and the extent to which those terms and conditions are reflected in the modern enterprise award;
  (d) the extent to which the modern enterprise award provides enterprise-specific terms and conditions of employment;
  (e) the likely impact on the persons covered by the modern enterprise award, and the persons covered by the modern award referred to in paragraph (3)(b), of a decision to revoke, or not revoke, the modern enterprise award, including any impact on the ongoing viability or competitiveness of any enterprise carried on by those persons;
  (f) the views of the persons covered by the modern enterprise award;
  (g) any other matter prescribed by the regulations.

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168D Rules about changing coverage of modern enterprise awards

(1) The FWC must not make a determination varying a modern enterprise award so as to extend the coverage of the modern enterprise award so that it ceases to be a modern enterprise award.

(2) In deciding whether to make a determination varying the coverage of a modern enterprise award in some other way, the FWC must take into account the following:

(a) the circumstances that led to the making of the modern enterprise award;

(b) whether there is a modern award (other than the miscellaneous modern award or a modern enterprise award) that would, but for the modern enterprise award, cover the persons covered, or proposed to be covered, by the modern enterprise award;

(c) the content of the modern award referred to in paragraph (b);

(d) the terms and conditions of employment applying in the industry in which the persons covered, or proposed to be covered, by the modern award operate, and the extent to which those terms and conditions are reflected in the modern enterprise award;

(e) the extent to which the modern enterprise award provides enterprise-specific terms and conditions of employment;

(f) the likely impact on the persons covered, or proposed to be covered, by the modern enterprise award, and the persons covered by the modern award referred to in paragraph (b), of a decision to make, or not make, the variation, including any impact on the ongoing viability or competitiveness of any enterprise carried on by those persons;

(g) the views of the persons covered, or proposed to be covered, by the modern enterprise award;

(h) any other matter prescribed by the regulations.

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Division 8—Additional provisions relating to State reference public sector modern awards

168E State reference public sector modern awards

(1) This Division contains additional provisions that relate to State reference public sector modern awards. The provisions in this Division have effect despite anything else in this Part.

(2) A ***State reference public sector modern award*** is a modern award in relation to which the following conditions are satisfied:
  (a) the only employers that are expressed to be covered by the modern award are one or more specified State reference public sector employers;
  (b) the only employees who are expressed to be covered by the modern award are specified State reference public sector employees of those employers.

(3) A ***State reference public sector employee*** is an employee:
  (a) who is a national system employee only because of section 30C or 30M; and
  (b) who is a State public sector employee as defined in section 30A or 30K.

(4) A ***State reference public sector employer*** is an employer:
  (a) that is a national system employer only because of section 30D or 30N; and
  (b) that is a State public sector employer as defined in section 30A or 30K.

168F The State reference public sector modern awards objective

The State reference public sector modern awards objective

(1) The FWC must recognise:

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(a) the need to facilitate arrangements for State reference public sector employers and State reference public sector employees that are appropriately adapted to the effective administration of a State; and

(b) that State reference public sector modern awards may provide terms and conditions tailored to reflect employment arrangements that have been developed in relation to State reference public sector employers and State reference public sector employees.

This is the ***State reference public sector modern awards objective***.

When does the State reference public sector modern awards objective apply?

(2) The State reference public sector modern awards objective applies to the performance of the FWC's functions or powers under this Act, so far as they relate to State reference public sector modern awards.

References to the modern awards objective

(3) A reference to the modern awards objective in this Act, other than section 134, is taken to include a reference to the State reference public sector modern awards objective.

168G Making State reference public sector modern awards on application

(1) The FWC may make a State reference public sector modern award (the ***proposed award***) only on application under section 158 by:

(a) a State reference public sector employer; or

(b) an organisation that is entitled to represent the industrial interests of a State reference public sector employer or of a State reference public sector employee.

(2) The application must specify the employers, employees and organisations (the ***proposed parties***) proposed to be covered by the proposed award.

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(3) The FWC must consider the application, and must make a State reference public sector modern award covering the proposed parties if the FWC is satisfied that:
  (a) the employers and organisations that are proposed parties have agreed to the making of the application; and
  (b) either:
    (i) none of the employers and employees that are proposed parties are already covered by a State reference public sector modern award; or
    (ii) if there are employers and employees that are proposed parties and that are already covered by a State reference public sector modern award (the ***current award***)—it is appropriate (in accordance with section 168L) to vary the coverage of the current award so that the employers or employees cease to be covered by the current award.

(4) The FWC must not make a State reference public sector modern award otherwise than in accordance with this Division or in accordance with Part 2 of Schedule 6A to the Transitional Act.

168H State reference public sector modern awards may contain State-based differences

Section 154 (which deals with terms that contain State-based differences) does not apply in relation to State reference public sector modern awards.

168J When State reference public sector modern awards come into operation

Section 49 does not apply for the purpose of determining when a State reference public sector modern award comes into operation. Instead, the modern award comes into operation on the day on which it is expressed to commence, being a day that is not earlier than the day on which the modern award is made.

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168K Rules about revoking State reference public sector modern awards

(1) The FWC may make a determination revoking a State reference public sector modern award only on application under section 158 by:
  (a) a State reference public sector employer; or
  (b) an organisation that is entitled to represent the industrial interests of a State reference public sector employer or of a State reference public sector employee.

(2) The FWC must not make a determination revoking a State reference public sector modern award unless the FWC is satisfied that:
  (a) the modern award is obsolete or no longer capable of operating; or
  (b) all the employees covered by the modern award will, when the revocation comes into operation, be covered by a different modern award (other than the miscellaneous modern award) that is appropriate for them.

(3) In deciding whether to revoke a State reference public sector modern award, the FWC must take into account the following:
  (a) the circumstances that led to the making of the modern award;
  (b) the terms and conditions of employment applying in the industry or occupation in which the persons covered by the modern award operate, and the extent to which those terms and conditions are reflected in the modern award;
  (c) the extent to which the modern award facilitates arrangements, and provides terms and conditions of employment, referred to in paragraphs 168F(1)(a) and (b);
  (d) the likely impact on the persons covered by the modern award of a decision to revoke, or not to revoke, the modern award;
  (e) the views of the persons covered by the modern award;
  (f) any other matter prescribed by the regulations.

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168L Rules about varying coverage of State reference public sector modern awards

(1) The FWC may make a determination varying the coverage of a State reference public sector modern award only on application under section 158 by:
  (a) a State reference public sector employer; or
  (b) an organisation that is entitled to represent the industrial interests of a State reference public sector employer or of a State reference public sector employee.

(2) The FWC must not make a determination varying the coverage of a State reference public sector modern award so that it ceases to be a State reference public sector modern award.

(3) In deciding whether to make a determination varying the coverage of a State reference public sector modern award in some other way, the FWC must take into account the following:
  (a) the circumstances that led to the making of the modern award;
  (b) the terms and conditions of employment applying in the industry or occupation in which the persons covered, or proposed to be covered, by the modern award operate, and the extent to which those terms and conditions are reflected in the modern award;
  (c) the likely impact on the persons covered, or proposed to be covered, by the modern award of a decision to make, or not make, the variation;
  (d) if the variation would result in the modern award covering one or more additional classes of employers or employees—whether it is appropriate for that modern award to cover those classes of employers or employees, as well as the classes of employers and employees that it already covers;
  (e) the views of the persons covered, or proposed to be covered, by the modern award;
  (f) any other matter prescribed by the regulations.

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Part 2-4—Enterprise agreements

Division 1—Introduction

169 Guide to this Part

This Part is about enterprise agreements. An enterprise agreement is made at the enterprise level and provides terms and conditions for those national system employees to whom it applies. An enterprise agreement can have terms that are ancillary or supplementary to the National Employment Standards.

Division 2 deals with the making of enterprise agreements about permitted matters. An enterprise agreement (including a greenfields agreement) may be a single-enterprise agreement or a multi-enterprise agreement.

Division 3 deals with the right of employees to be represented by a bargaining representative during bargaining for a proposed enterprise agreement. It also sets out the persons who are bargaining representatives for such agreements.

Subdivision A of Division 4 deals with the approval of proposed enterprise agreements by employees and sets out when an enterprise agreement is made.

Subdivision B of Division 4 deals with the approval of enterprise agreements by the FWC. The remaining Subdivisions of the Division deal with certain approval requirements, including in relation to genuine agreement by employees and the better off overall test.

Division 5 deals with the mandatory terms of enterprise agreements relating to individual flexibility arrangements and consultation requirements.

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Division 6 deals with the base rate of pay under an enterprise agreement.

Division 7 deals with the variation and termination of enterprise agreements.

Division 8 provides for the FWC to facilitate bargaining by making bargaining orders, serious breach declarations, majority support determinations and scope orders. It also permits bargaining representatives to apply for the FWC to deal with bargaining disputes.

Division 9 provides for the making of low-paid authorisations in relation to proposed multi-enterprise agreements. The effect of such an authorisation is that specified employers are subject to certain rules that would not otherwise apply (for example, bargaining orders that would not usually be available for multi-enterprise agreements will be available). It also permits the FWC to assist the bargaining representatives for such agreements.

Division 10 deals with single interest employer authorisations. The effect of such an authorisation is that the employers specified in the authorisation are single interest employers in relation to a proposed enterprise agreement.

Division 11 deals with other matters relating to enterprise agreements.

170 Meanings of *employee* and *employer*

In this Part, ***employee*** means a national system employee, and ***employer*** means a national system employer.

Note: See also Division 2 of Part 6-4A (TCF contract outworkers taken to be employees in certain circumstances).

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171 Objects of this Part

The objects of this Part are:

(a) to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits; and

(b) to enable the FWC to facilitate good faith bargaining and the making of enterprise agreements, including through:

(i) making bargaining orders; and

(ii) dealing with disputes where the bargaining representatives request assistance; and

(iii) ensuring that applications to the FWC for approval of enterprise agreements are dealt with without delay.

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Division 2—Employers and employees may make enterprise agreements

172 Making an enterprise agreement

Enterprise agreements may be made about permitted matters

(1) An agreement (an ***enterprise agreement***) that is about one or more of the following matters (the ***permitted matters***) may be made in accordance with this Part:

(a) matters pertaining to the relationship between an employer that will be covered by the agreement and that employer's employees who will be covered by the agreement;

(b) matters pertaining to the relationship between the employer or employers, and the employee organisation or employee organisations, that will be covered by the agreement;

(c) deductions from wages for any purpose authorised by an employee who will be covered by the agreement;

(d) how the agreement will operate.

Note 1: For when an enterprise agreement ***covers*** an employer, employee or employee organisation, see section 53.

Note 2: An employee organisation that was a bargaining representative for a proposed enterprise agreement that is not a greenfields agreement will be covered by the agreement if the organisation notifies the FWC under section 183 that it wants to be covered.

Single-enterprise agreements

(2) An employer, or 2 or more employers that are single interest employers, may make an enterprise agreement (a ***single-enterprise agreement***):

(a) with the employees who are employed at the time the agreement is made and who will be covered by the agreement; or

(b) with one or more relevant employee organisations if:

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(i) the agreement relates to a genuine new enterprise that the employer or employers are establishing or propose to establish; and

(ii) the employer or employers have not employed any of the persons who will be necessary for the normal conduct of that enterprise and will be covered by the agreement.

Note: The expression genuine new enterprise includes a genuine new business, activity, project or undertaking (see the definition of ***enterprise*** in section 12).

Multi-enterprise agreements

(3) Two or more employers that are not all single interest employers may make an enterprise agreement (a ***multi-enterprise agreement***):

(a) with the employees who are employed at the time the agreement is made and who will be covered by the agreement; or

(b) with one or more relevant employee organisations if:

(i) the agreement relates to a genuine new enterprise that the employers are establishing or propose to establish; and

(ii) the employers have not employed any of the persons who will be necessary for the normal conduct of that enterprise and will be covered by the agreement.

Note: The expression genuine new enterprise includes a genuine new business, activity, project or undertaking (see the definition of ***enterprise*** in section 12).

Greenfields agreements

(4) A single-enterprise agreement made as referred to in paragraph (2)(b), or a multi-enterprise agreement made as referred to in paragraph (3)(b), is a ***greenfields agreement***.

Single interest employers

(5) Two or more employers are ***single interest employers*** if:

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(a) the employers are engaged in a joint venture or common enterprise; or
(b) the employers are related bodies corporate; or
(c) the employers are specified in a single interest employer authorisation that is in operation in relation to the proposed enterprise agreement concerned.

Requirement that there be at least 2 employees

(6) An enterprise agreement cannot be made with a single employee.

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Division 3—Bargaining and representation during bargaining

173 Notice of employee representational rights

Employer to notify each employee of representational rights

(1) An employer that will be covered by a proposed enterprise agreement that is not a greenfields agreement must take all reasonable steps to give notice of the right to be represented by a bargaining representative to each employee who:
  (a) will be covered by the agreement; and
  (b) is employed at the notification time for the agreement.

Note: For the content of the notice, see section 174.

Notification time

(2) The ***notification time*** for a proposed enterprise agreement is the time when:
  (a) the employer agrees to bargain, or initiates bargaining, for the agreement; or
  (b) a majority support determination in relation to the agreement comes into operation; or
  (c) a scope order in relation to the agreement comes into operation; or
  (d) a low-paid authorisation in relation to the agreement that specifies the employer comes into operation.

Note: The employer cannot request employees to approve the agreement under section 181 until 21 days after the last notice is given (see subsection 181(2)).

When notice must be given

(3) The employer must give the notice as soon as practicable, and not later than 14 days, after the notification time for the agreement.

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Notice need not be given in certain circumstances

(4) An employer is not required to give a notice to an employee under subsection (1) in relation to a proposed enterprise agreement if the employer has already given the employee a notice under that subsection within a reasonable period before the notification time for the agreement.

How notices are given

(5) The regulations may prescribe how notices under subsection (1) may be given.

174 Content and form of notice of employee representational rights

Application of this section

(1) This section applies if an employer that will be covered by a proposed enterprise agreement is required to give a notice under subsection 173(1) to an employee.

Notice requirements

(1A) The notice must:
- (a) contain the content prescribed by the regulations; and
- (b) not contain any other content; and
- (c) be in the form prescribed by the regulations.

(1B) When prescribing the content of the notice for the purposes of paragraph (1A)(a), the regulations must ensure that the notice complies with this section.

Content of notice—employee may appoint a bargaining representative

(2) The notice must specify that the employee may appoint a bargaining representative to represent the employee:
- (a) in bargaining for the agreement; and

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(b) in a matter before the FWC that relates to bargaining for the agreement.

Content of notice—default bargaining representative

(3) If subsection (4) does not apply, the notice must explain that:
(a) if the employee is a member of an employee organisation that is entitled to represent the industrial interests of the employee in relation to work that will be performed under the agreement; and
(b) the employee does not appoint another person as his or her bargaining representative for the agreement;
the organisation will be the bargaining representative of the employee.

Content of notice—bargaining representative if a low-paid authorisation is in operation

(4) If a low-paid authorisation in relation to the agreement that specifies the employer is in operation, the notice must explain the effect of paragraph 176(1)(b) and subsection 176(2) (which deal with bargaining representatives for such agreements).

Content of notice—copy of instrument of appointment to be given

(5) The notice must explain the effect of paragraph 178(2)(a) (which deals with giving a copy of an instrument of appointment of a bargaining representative to an employee's employer).

176 Bargaining representatives for proposed enterprise agreements that are not greenfields agreements

Bargaining representatives

(1) The following paragraphs set out the persons who are ***bargaining representatives*** for a proposed enterprise agreement that is not a greenfields agreement:

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(a) an employer that will be covered by the agreement is a bargaining representative for the agreement;

(b) an employee organisation is a bargaining representative of an employee who will be covered by the agreement if:

(i) the employee is a member of the organisation; and

(ii) in the case where the agreement is a multi-enterprise agreement in relation to which a low-paid authorisation is in operation—the organisation applied for the authorisation;

unless the employee has appointed another person under paragraph (c) as his or her bargaining representative for the agreement, or has revoked the status of the organisation as his or her bargaining representative for the agreement under subsection 178A(2); or

(c) a person is a bargaining representative of an employee who will be covered by the agreement if the employee appoints, in writing, the person as his or her bargaining representative for the agreement;

(d) a person is a bargaining representative of an employer that will be covered by the agreement if the employer appoints, in writing, the person as his or her bargaining representative for the agreement.

Bargaining representatives for a proposed multi-enterprise agreement if a low-paid authorisation is in operation

(2) If:

(a) the proposed enterprise agreement is a multi-enterprise agreement in relation to which a low-paid authorisation is in operation; and

(b) an employee organisation applied for the authorisation; and

(c) but for this subsection, the organisation would not be a bargaining representative of an employee who will be covered by the agreement;

the organisation is taken to be a ***bargaining representative*** of such an employee unless:

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(d) the employee is a member of another employee organisation that also applied for the authorisation; or

(e) the employee has appointed another person under paragraph (1)(c) as his or her bargaining representative for the agreement; or

(f) the employee has revoked the status of the organisation as his or her bargaining representative for the agreement under subsection 178A(2).

(3) Despite subsections (1) and (2):

(a) an employee organisation; or

(b) an official of an employee organisation (whether acting in that capacity or otherwise);

cannot be a bargaining representative of an employee unless the organisation is entitled to represent the industrial interests of the employee in relation to work that will be performed under the agreement.

Employee may appoint himself or herself

(4) To avoid doubt and despite subsection (3), an employee who will be covered by the agreement may appoint, under paragraph (1)(c), himself or herself as his or her bargaining representative for the agreement.

Note: Section 228 sets out the good faith bargaining requirements. Applications may be made for bargaining orders that require bargaining representatives to meet the good faith bargaining requirements (see section 229).

177 Bargaining representatives for proposed enterprise agreements that are greenfields agreements

The following paragraphs set out the persons who are ***bargaining representatives*** for a proposed single-enterprise agreement that is a greenfields agreement:

(a) an employer that will be covered by the agreement;

(b) an employee organisation:

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(i) that is entitled to represent the industrial interests of one or more of the employees who will be covered by the agreement, in relation to work to be performed under the agreement; and

(ii) with which the employer agrees to bargain for the agreement;

(c) a person who is a bargaining representative of an employer that will be covered by the agreement if the employer appoints, in writing, the person as his or her bargaining representative for the agreement.

178 Appointment of bargaining representatives—other matters

When appointment of a bargaining representative comes into force

(1) An appointment of a bargaining representative comes into force on the day specified in the instrument of appointment.

Copies of instruments of appointment must be given

(2) A copy of an instrument of appointment of a bargaining representative for a proposed enterprise agreement must:

(a) for an appointment made by an employee who will be covered by the agreement—be given to the employee's employer; and

(b) for an appointment made by an employer that will be covered by a proposed enterprise agreement that is not a greenfields agreement—be given, on request, to a bargaining representative of an employee who will be covered by the agreement; and

(c) for an appointment made by an employer that will be covered by a proposed single-enterprise agreement that is a greenfields agreement—be given, on request, to an employee organisation that is a bargaining representative for the agreement.

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Regulations may prescribe matters relating to qualifications and appointment

(3) The regulations may prescribe matters relating to the qualifications or appointment of bargaining representatives.

178A Revocation of appointment of bargaining representatives etc.

(1) The appointment of a bargaining representative for an enterprise agreement may be revoked by written instrument.

(2) If a person would, apart from this subsection, be a bargaining representative of an employee for an enterprise agreement because of the operation of paragraph 176(1)(b) or subsection 176(2) (which deal with employee organisations), the employee may, by written instrument, revoke the person's status as the employee's bargaining representative for the agreement.

(3) A copy of an instrument under subsection (1) or (2):
   (a) for an instrument made by an employee who will be covered by the agreement—must be given to the employee's employer; and
   (b) for an instrument made by an employer that will be covered by a proposed enterprise agreement, other than a single-enterprise agreement that is a greenfields agreement—must be given to the bargaining representative and, on request, to a bargaining representative of an employee who will be covered by the agreement.

(3A) A copy of an instrument under subsection (1) made by an employer that will be covered by a proposed single-enterprise agreement that is a greenfields agreement must be given to the bargaining representative and, on request, to an employee organisation that is a bargaining representative for the agreement.

(4) The regulations may prescribe matters relating to the content or form of the instrument of revocation, or the manner in which the copy of the instrument may be given.

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178B Notified negotiation period for a proposed single-enterprise agreement that is a greenfields agreement

(1) If a proposed single-enterprise agreement is a greenfields agreement, an employer that is a bargaining representative for the agreement may give written notice:

(a) to each employee organisation that is a bargaining representative for the agreement; and

(b) stating that the period of 6 months beginning on a specified day is the ***notified negotiation period*** for the agreement.

(2) The specified day must be later than:

(a) if only one employee organisation is a bargaining representative for the agreement—the day on which the employer gave the notice to the organisation; or

(b) if 2 or more employee organisations are bargaining representatives for the agreement—the last day on which the employer gave the notice to any of those organisations.

Multiple employers—agreement to giving of notice

(3) If 2 or more employers are bargaining representatives for the agreement, the notice has no effect unless the other employer or employers agree to the giving of the notice.

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Division 4—Approval of enterprise agreements

Subdivision A—Pre-approval steps and applications for the FWC's approval

180 Employees must be given a copy of a proposed enterprise agreement etc.

Pre-approval requirements

(1) Before an employer requests under subsection 181(1) that employees approve a proposed enterprise agreement by voting for the agreement, the employer must comply with the requirements set out in this section.

Employees must be given copy of the agreement etc.

(2) The employer must take all reasonable steps to ensure that:
  (a) during the access period for the agreement, the employees (the ***relevant employees***) employed at the time who will be covered by the agreement are given a copy of the following materials:
    (i) the written text of the agreement;
    (ii) any other material incorporated by reference in the agreement; or
  (b) the relevant employees have access, throughout the access period for the agreement, to a copy of those materials.

(3) The employer must take all reasonable steps to notify the relevant employees of the following by the start of the access period for the agreement:
  (a) the time and place at which the vote will occur;
  (b) the voting method that will be used.

(4) The ***access period*** for a proposed enterprise agreement is the 7-day period ending immediately before the start of the voting process referred to in subsection 181(1).

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Terms of the agreement must be explained to employees etc.

(5) The employer must take all reasonable steps to ensure that:
  (a) the terms of the agreement, and the effect of those terms, are explained to the relevant employees; and
  (b) the explanation is provided in an appropriate manner taking into account the particular circumstances and needs of the relevant employees.

(6) Without limiting paragraph (5)(b), the following are examples of the kinds of employees whose circumstances and needs are to be taken into account for the purposes of complying with that paragraph:
  (a) employees from culturally and linguistically diverse backgrounds;
  (b) young employees;
  (c) employees who did not have a bargaining representative for the agreement.

181 Employers may request employees to approve a proposed enterprise agreement

(1) An employer that will be covered by a proposed enterprise agreement may request the employees employed at the time who will be covered by the agreement to approve the agreement by voting for it.

(2) The request must not be made until at least 21 days after the day on which the last notice under subsection 173(1) (which deals with giving notice of employee representational rights) in relation to the agreement is given.

(3) Without limiting subsection (1), the employer may request that the employees vote by ballot or by an electronic method.

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182 When an enterprise agreement is made

Single-enterprise agreement that is not a greenfields agreement

(1) If the employees of the employer, or each employer, that will be covered by a proposed single-enterprise agreement that is not a greenfields agreement have been asked to approve the agreement under subsection 181(1), the agreement is ***made*** when a majority of those employees who cast a valid vote approve the agreement.

Multi-enterprise agreement that is not a greenfields agreement

(2) If:
  (a) a proposed enterprise agreement is a multi-enterprise agreement; and
  (b) the employees of each of the employers that will be covered by the agreement have been asked to approve the agreement under subsection 181(1); and
  (c) those employees have voted on whether or not to approve the agreement; and
  (d) a majority of the employees of at least one of those employers who cast a valid vote have approved the agreement;

the agreement is ***made*** immediately after the end of the voting process referred to in subsection 181(1).

Greenfields agreement

(3) A greenfields agreement is ***made*** when it has been signed by each employer and each relevant employee organisation that the agreement is expressed to cover (which need not be all of the relevant employee organisations for the agreement).

(4) If:
  (a) a proposed single-enterprise agreement is a greenfields agreement that has not been made under subsection (3); and
  (b) there has been a notified negotiation period for the agreement; and

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(c) the notified negotiation period has ended; and

(d) the employer or employers that were bargaining representatives for the agreement (the ***relevant employer or employers***) gave each of the employee organisations that were bargaining representatives for the agreement a reasonable opportunity to sign the agreement; and

(e) the relevant employer or employers apply to the FWC for approval of the agreement;

the agreement is taken to have been ***made***:

(f) by the relevant employer or employers with each of the employee organisations that were bargaining representatives for the agreement; and

(g) when the application is made to the FWC for approval of the agreement.

Note: See also section 185A (material that must accompany an application).

183 Entitlement of an employee organisation to have an enterprise agreement cover it

(1) After an enterprise agreement that is not a greenfields agreement is made, an employee organisation that was a bargaining representative for the proposed enterprise agreement concerned may give the FWC a written notice stating that the organisation wants the enterprise agreement to cover it.

(2) The notice must be given to the FWC, and a copy given to each employer covered by the enterprise agreement, before the FWC approves the agreement.

Note: The FWC must note in its decision to approve the enterprise agreement that the agreement covers the employee organisation (see subsection 201(2)).

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184 Multi-enterprise agreement to be varied if not all employees approve the agreement

Application of this section

(1) This section applies if:
  (a) a multi-enterprise agreement is made; and
  (b) the agreement was not approved by the employees of all of the employers that made a request under subsection 181(1) in relation to the agreement.

Variation of agreement

(2) Before a bargaining representative applies under section 185 for approval of the agreement, the bargaining representative must vary the agreement so that the agreement is expressed to cover only the following:
  (a) each employer whose employees approved the agreement;
  (b) the employees of each of those employers.

(3) The bargaining representative who varies the agreement as referred to in subsection (2) must give written notice of the variation to all the other bargaining representatives for the agreement.

(4) The notice must specify the employers and employees that the agreement as varied covers.

(5) Subsection (3) does not require the bargaining representative to give a notice to a person if the bargaining representative does not know, or could not reasonably be expected to know, that the person is a bargaining representative for the agreement.

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185 Bargaining representative must apply for the FWC's approval of an enterprise agreement

Application for approval

(1) If an enterprise agreement is made, a bargaining representative for the agreement must apply to the FWC for approval of the agreement.

(1A) Despite subsection (1), if the agreement is a multi-enterprise agreement that is a greenfields agreement, the application must be made by:
  (a) an employer covered by the agreement; or
  (b) a relevant employee organisation that is covered by the agreement.

Material to accompany the application

(2) The application must be accompanied by:
  (a) a signed copy of the agreement; and
  (b) any declarations that are required by the procedural rules to accompany the application.

When the application must be made

(3) If the agreement is not a greenfields agreement, the application must be made:
  (a) within 14 days after the agreement is made; or
  (b) if in all the circumstances the FWC considers it fair to extend that period—within such further period as the FWC allows.

(4) If the agreement is a greenfields agreement, the application must be made within 14 days after the agreement is made.

Signature requirements

(5) The regulations may prescribe requirements relating to the signing of enterprise agreements.

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Single-enterprise agreements that are greenfields agreements

(6) This section does not apply to an agreement made under subsection 182(4).

185A Material that must accompany an application under subsection 182(4) for approval of a greenfields agreement

An application under subsection 182(4) for approval of an agreement must be accompanied by:

(a) a copy of the agreement; and

(b) any declarations that are required by the procedural rules to accompany the application.

Subdivision B—Approval of enterprise agreements by the FWC

186 When the FWC must approve an enterprise agreement—general requirements

Basic rule

(1) If an application for the approval of an enterprise agreement is made under subsection 182(4) or section 185, the FWC must approve the agreement under this section if the requirements set out in this section and section 187 are met.

Note: The FWC may approve an enterprise agreement under this section with undertakings (see section 190).

Requirements relating to the safety net etc.

(2) The FWC must be satisfied that:

(a) if the agreement is not a greenfields agreement—the agreement has been genuinely agreed to by the employees covered by the agreement; and

(b) if the agreement is a multi-enterprise agreement:

(i) the agreement has been genuinely agreed to by each employer covered by the agreement; and

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(ii) no person coerced, or threatened to coerce, any of the employers to make the agreement; and

(c) the terms of the agreement do not contravene section 55 (which deals with the interaction between the National Employment Standards and enterprise agreements etc.); and

(d) the agreement passes the better off overall test.

Note 1: For when an enterprise agreement has been genuinely agreed to by employees, see section 188.

Note 2: The FWC may approve an enterprise agreement that does not pass the better off overall test if approval would not be contrary to the public interest (see section 189).

Note 3: The terms of an enterprise agreement may supplement the National Employment Standards (see paragraph 55(4)(b)).

Requirement that the group of employees covered by the agreement is fairly chosen

(3) The FWC must be satisfied that the group of employees covered by the agreement was fairly chosen.

(3A) If the agreement does not cover all of the employees of the employer or employers covered by the agreement, the FWC must, in deciding whether the group of employees covered was fairly chosen, take into account whether the group is geographically, operationally or organisationally distinct.

Requirement that there be no unlawful terms

(4) The FWC must be satisfied that the agreement does not include any unlawful terms (see Subdivision D of this Division).

Requirement that there be no designated outworker terms

(4A) The FWC must be satisfied that the agreement does not include any designated outworker terms.

Requirement for a nominal expiry date etc.

(5) The FWC must be satisfied that:

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(a) the agreement specifies a date as its nominal expiry date; and
(b) the date will not be more than 4 years after the day on which the FWC approves the agreement.

Requirement for a term about settling disputes

(6) The FWC must be satisfied that the agreement includes a term:
(a) that provides a procedure that requires or allows the FWC, or another person who is independent of the employers, employees or employee organisations covered by the agreement, to settle disputes:
(i) about any matters arising under the agreement; and
(ii) in relation to the National Employment Standards; and
(b) that allows for the representation of employees covered by the agreement for the purposes of that procedure.

Note 1: The FWC or a person must not settle a dispute about whether an employer had reasonable business grounds under subsection 65(5) or 76(4) (see subsections 739(2) and 740(2)).

Note 2: However, this does not prevent the FWC from dealing with a dispute relating to a term of an enterprise agreement that has the same (or substantially the same) effect as subsection 65(5) or 76(4).

187 When the FWC must approve an enterprise agreement—additional requirements

Additional requirements

(1) This section sets out additional requirements that must be met before the FWC approves an enterprise agreement under section 186.

Requirement that approval not be inconsistent with good faith bargaining etc.

(2) The FWC must be satisfied that approving the agreement would not be inconsistent with or undermine good faith bargaining by one or more bargaining representatives for a proposed enterprise

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agreement, or an enterprise agreement, in relation to which a scope order is in operation.

Requirement relating to notice of variation of agreement

(3) If a bargaining representative is required to vary the agreement as referred to in subsection 184(2), the FWC must be satisfied that the bargaining representative has complied with that subsection and subsection 184(3) (which deals with giving notice of the variation).

Requirements relating to particular kinds of employees

(4) The FWC must be satisfied as referred to in any provisions of Subdivision E of this Division that apply in relation to the agreement.

Note: Subdivision E of this Division deals with approval requirements relating to particular kinds of employees.

Requirements relating to greenfields agreements

(5) If the agreement is a greenfields agreement, the FWC must be satisfied that:

(a) the relevant employee organisations that will be covered by the agreement are (taken as a group) entitled to represent the industrial interests of a majority of the employees who will be covered by the agreement, in relation to work to be performed under the agreement; and

(b) it is in the public interest to approve the agreement.

(6) If an agreement is made under subsection 182(4) (which deals with a single-enterprise agreement that is a greenfields agreement), the FWC must be satisfied that the agreement, considered on an overall basis, provides for pay and conditions that are consistent with the prevailing pay and conditions within the relevant industry for equivalent work.

Note: In considering the prevailing pay and conditions within the relevant industry for equivalent work, the FWC may have regard to the prevailing pay and conditions in the relevant geographical area.

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188 When employees have genuinely agreed to an enterprise agreement

An enterprise agreement has been ***genuinely agreed*** to by the employees covered by the agreement if the FWC is satisfied that:

(a) the employer, or each of the employers, covered by the agreement complied with the following provisions in relation to the agreement:

(i) subsections 180(2), (3) and (5) (which deal with pre-approval steps);

(ii) subsection 181(2) (which requires that employees not be requested to approve an enterprise agreement until 21 days after the last notice of employee representational rights is given); and

(b) the agreement was made in accordance with whichever of subsection 182(1) or (2) applies (those subsections deal with the making of different kinds of enterprise agreements by employee vote); and

(c) there are no other reasonable grounds for believing that the agreement has not been genuinely agreed to by the employees.

189 FWC may approve an enterprise agreement that does not pass better off overall test—public interest test

Application of this section

(1) This section applies if:

(a) the FWC is not required to approve an enterprise agreement under section 186; and

(b) the only reason for this is that the FWC is not satisfied that the agreement passes the better off overall test.

Approval of agreement if not contrary to the public interest

(2) The FWC may approve the agreement under this section if the FWC is satisfied that, because of exceptional circumstances, the

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approval of the agreement would not be contrary to the public interest.

Note: The FWC may approve an enterprise agreement under this section with undertakings (see section 190).

(3) An example of a case in which the FWC may be satisfied of the matter referred to in subsection (2) is where the agreement is part of a reasonable strategy to deal with a short-term crisis in, and to assist in the revival of, the enterprise of an employer covered by the agreement.

Nominal expiry date

(4) The ***nominal expiry date*** of an enterprise agreement approved by the FWC under this section is the earlier of the following:
  (a) the date specified in the agreement as the nominal expiry date of the agreement;
  (b) 2 years after the day on which the FWC approved the agreement.

190 FWC may approve an enterprise agreement with undertakings

Application of this section

(1) This section applies if:
  (a) an application for the approval of an enterprise agreement has been made under subsection 182(4) or section 185; and
  (b) the FWC has a concern that the agreement does not meet the requirements set out in sections 186 and 187.

Approval of agreement with undertakings

(2) The FWC may approve the agreement under section 186 if the FWC is satisfied that an undertaking accepted by the FWC under subsection (3) of this section meets the concern.

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Undertakings

(3) The FWC may only accept a written undertaking from one or more employers covered by the agreement if the FWC is satisfied that the effect of accepting the undertaking is not likely to:
  (a) cause financial detriment to any employee covered by the agreement; or
  (b) result in substantial changes to the agreement.

FWC must seek views of bargaining representatives

(4) The FWC must not accept an undertaking under subsection (3) unless the FWC has sought the views of each person who the FWC knows is a bargaining representative for the agreement.

Signature requirements

(5) The undertaking must meet any requirements relating to the signing of undertakings that are prescribed by the regulations.

191 Effect of undertakings

(1) If:
  (a) the FWC approves an enterprise agreement after accepting an undertaking under subsection 190(3) in relation to the agreement; and
  (b) the agreement covers a single employer;

the undertaking is taken to be a term of the agreement, as the agreement applies to the employer.

(2) If:
  (a) the FWC approves an enterprise agreement after accepting an undertaking under subsection 190(3) in relation to the agreement; and
  (b) the agreement covers 2 or more employers;

the undertaking is taken to be a term of the agreement, as the agreement applies to each employer that gave the undertaking.

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192 When the FWC may refuse to approve an enterprise agreement

(1) If an application for the approval of an enterprise agreement is made under subsection 182(4) or section 185, the FWC may refuse to approve the agreement if the FWC considers that compliance with the terms of the agreement may result in:

(a) a person committing an offence against a law of the Commonwealth; or

(b) a person being liable to pay a pecuniary penalty in relation to a contravention of a law of the Commonwealth.

(2) Subsection (1) has effect despite sections 186 and 189 (which deal with the approval of enterprise agreements).

(3) If the FWC refuses to approve an enterprise agreement under this section, the FWC may refer the agreement to any person or body the FWC considers appropriate.

Subdivision C—Better off overall test

193 Passing the better off overall test

When a non-greenfields agreement passes the better off overall test

(1) An enterprise agreement that is not a greenfields agreement ***passes the better off overall test*** under this section if the FWC is satisfied, as at the test time, that each award covered employee, and each prospective award covered employee, for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee.

FWC must disregard individual flexibility arrangement

(2) If, under the flexibility term in the relevant modern award, an individual flexibility arrangement has been agreed to by an award covered employee and his or her employer, the FWC must disregard the individual flexibility arrangement for the purposes of determining whether the agreement passes the better off overall test.

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When a greenfields agreement passes the better off overall test

(3) A greenfields agreement ***passes the better off overall test*** under this section if the FWC is satisfied, as at the test time, that each prospective award covered employee for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee.

Award covered employee

(4) An ***award covered employee*** for an enterprise agreement is an employee who:
  (a) is covered by the agreement; and
  (b) at the test time, is covered by a modern award (the ***relevant modern award***) that:
    (i) is in operation; and
    (ii) covers the employee in relation to the work that he or she is to perform under the agreement; and
    (iii) covers his or her employer.

Prospective award covered employee

(5) A ***prospective award covered employee*** for an enterprise agreement is a person who, if he or she were an employee at the test time of an employer covered by the agreement:
  (a) would be covered by the agreement; and
  (b) would be covered by a modern award (the ***relevant modern award***) that:
    (i) is in operation; and
    (ii) would cover the person in relation to the work that he or she would perform under the agreement; and
    (iii) covers the employer.

Test time

(6) The ***test time*** is the time the application for approval of the agreement by the FWC was made under subsection 182(4) or section 185.

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FWC may assume employee better off overall in certain circumstances

(7) For the purposes of determining whether an enterprise agreement passes the better off overall test, if a class of employees to which a particular employee belongs would be better off if the agreement applied to that class than if the relevant modern award applied to that class, the FWC is entitled to assume, in the absence of evidence to the contrary, that the employee would be better off overall if the agreement applied to the employee.

Subdivision D—Unlawful terms

194 Meaning of *unlawful term*

A term of an enterprise agreement is an ***unlawful term*** if it is:

(a) a discriminatory term; or

(b) an objectionable term; or

(ba) a term that provides a method by which an employee or employer may elect (unilaterally or otherwise) not to be covered by the agreement; or

(c) if a particular employee would be protected from unfair dismissal under Part 3-2 after completing a period of employment of at least the minimum employment period—a term that confers an entitlement or remedy in relation to a termination of the employee's employment that is unfair (however described) before the employee has completed that period; or

(d) a term that excludes the application to, or in relation to, a person of a provision of Part 3-2 (which deals with unfair dismissal), or modifies the application of such a provision in a way that is detrimental to, or in relation to, a person; or

(e) a term that is inconsistent with a provision of Part 3-3 (which deals with industrial action); or

(f) a term that provides for an entitlement:

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(i) to enter premises for a purpose referred to in section 481 (which deals with investigation of suspected contraventions); or

(ii) to enter premises to hold discussions of a kind referred to in section 484;

other than in accordance with Part 3-4 (which deals with right of entry); or

(g) a term that provides for the exercise of a State or Territory OHS right other than in accordance with Part 3-4 (which deals with right of entry); or

(h) a term that has the effect of requiring or permitting contributions, for the benefit of an employee (the ***relevant employee***) covered by the agreement who is a default fund employee, to be made to a superannuation fund or scheme that is specified in the agreement but does not satisfy one of the following:

(i) it is a fund that offers a MySuper product;

(ii) it is a fund or scheme of which the relevant employee, and each other default fund employee in relation to whom contributions are made to the fund or scheme by the same employer as the relevant employee, is a defined benefit member;

(iii) it is an exempt public sector superannuation scheme.

195 Meaning of *discriminatory term*

Discriminatory term

(1) A term of an enterprise agreement is a ***discriminatory term*** to the extent that it discriminates against an employee covered by the agreement because of, or for reasons including, the employee's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

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Certain terms are not discriminatory terms

(2) A term of an enterprise agreement does not discriminate against an employee:
  (a) if the reason for the discrimination is the inherent requirements of the particular position concerned; or
  (b) merely because it discriminates, in relation to employment of the employee as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed:
    (i) in good faith; and
    (ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.

(3) A term of an enterprise agreement does not discriminate against an employee merely because it provides for wages 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.

Subdivision E—Approval requirements relating to particular kinds of employees

196 Shiftworkers

Application of this section

(1) This section applies if:
  (a) an employee is covered by an enterprise agreement; and
  (b) a modern award that is in operation and covers the employee defines or describes the employee as a shiftworker for the purposes of the National Employment Standards.

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Shiftworkers and the National Employment Standards

(2) The FWC must be satisfied that the agreement defines or describes the employee as a shiftworker for the purposes of the National Employment Standards.

Note: Section 87 provides an employee with an entitlement to 5 weeks of paid annual leave if an enterprise agreement that applies to the employee defines or describes the employee as a shiftworker for the purposes of the National Employment Standards.

197 Pieceworkers—enterprise agreement includes pieceworker term

Application of this section

(1) This section applies if:
  (a) an enterprise agreement that covers an employee includes a term that defines or describes the employee as a pieceworker; and
  (b) a modern award that is in operation and covers the employee does not include such a term.

No detriment test

(2) The FWC must be satisfied that the effect of including such a term in the agreement is not detrimental to the employee in relation to the entitlements of the employee under the National Employment Standards.

198 Pieceworkers—enterprise agreement does not include a pieceworker term

Application of this section

(1) This section applies if:
  (a) an enterprise agreement that covers an employee does not include a term that defines or describes the employee as a pieceworker; and

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(b) a modern award that is in operation and covers the employee includes such a term.

No detriment test

(2) The FWC must be satisfied that the effect of not including such a term in the agreement is not detrimental to the employee in relation to the entitlements of the employee under the National Employment Standards.

199 School-based apprentices and school-based trainees

Application of this section

(1) This section applies if:
  (a) an employee who is a school-based apprentice or a school-based trainee is covered by an enterprise agreement; and
  (b) the agreement provides for the employee to be paid loadings (the ***agreement loadings***) in lieu of any of the following:
    (i) paid annual leave;
    (ii) paid personal/carer's leave;
    (iii) paid absence under Division 10 of Part 2-2 (which deals with public holidays); and
  (c) a modern award that is in operation and covers the employee provides for the employee to be paid loadings (the ***award loadings***) in lieu of leave or absence of that kind.

No detriment test

(2) The FWC must be satisfied that the amount or rate (as the case may be) of the agreement loadings is not detrimental to the employee when compared to the amount or rate of the award loadings.

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200 Outworkers

Application of this section

(1) This section applies if:
  (a) an employee who is an outworker is covered by an enterprise agreement; and
  (b) a modern award that is in operation and covers the employee includes outworker terms.

Agreement must include outworker terms etc.

(2) The FWC must be satisfied that:
  (a) the agreement includes terms of that kind; and
  (b) those terms of the agreement are not detrimental to the employee in any respect when compared to the outworker terms of the modern award.

Subdivision F—Other matters

201 Approval decision to note certain matters

Approval decision to note model terms included in an enterprise agreement

(1) If:
  (a) the FWC approves an enterprise agreement; and
  (b) either or both of the following apply:
    (i) the model flexibility term is taken, under subsection 202(4), to be a term of the agreement;
    (ii) the model consultation term is taken, under subsection 205(2), to be a term of the agreement;

the FWC must note in its decision to approve the agreement that those terms are so included in the agreement.

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Approval decision to note that an enterprise agreement covers an employee organisation

(2) If:

(a) an employee organisation has given a notice under subsection 183(1) that the organisation wants the enterprise agreement to cover it; and

(b) the FWC approves the agreement;

the FWC must note in its decision to approve the agreement that the agreement covers the organisation.

(2A) If:

(a) an agreement is made under subsection 182(4) (which deals with a single-enterprise agreement that is a greenfields agreement); and

(b) the FWC approves the agreement;

the FWC must note in its decision to approve the agreement that the agreement covers each employee organisation that was a bargaining representative for the agreement.

Approval decision to note undertakings

(3) If the FWC approves an enterprise agreement after accepting an undertaking under subsection 190(3) in relation to the agreement, the FWC must note in its decision to approve the agreement that the undertaking is taken to be a term of the agreement.

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Division 5—Mandatory terms of enterprise agreements

202 Enterprise agreements to include a flexibility term etc.

Flexibility term must be included in an enterprise agreement

(1) An enterprise agreement must include a term (a ***flexibility term***) that:
  (a) enables an employee and his or her employer to agree to an arrangement (an ***individual flexibility arrangement***) varying the effect of the agreement in relation to the employee and the employer, in order to meet the genuine needs of the employee and employer; and
  (b) complies with section 203.

Effect of an individual flexibility arrangement

(2) If an employee and employer agree to an individual flexibility arrangement under a flexibility term in an enterprise agreement:
  (a) the agreement has effect in relation to the employee and the employer as if it were varied by the arrangement; and
  (b) the arrangement is taken to be a term of the agreement.

(3) To avoid doubt, the individual flexibility arrangement:
  (a) does not change the effect the agreement has in relation to the employer and any other employee; and
  (b) does not have any effect other than as a term of the agreement.

Model flexibility term

(4) If an enterprise agreement does not include a flexibility term, the model flexibility term is taken to be a term of the agreement.

(5) The regulations must prescribe the ***model flexibility term*** for enterprise agreements.

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203 Requirements to be met by a flexibility term

Flexibility term must meet requirements

(1) A flexibility term in an enterprise agreement must meet the requirements set out in this section.

Requirements relating to content

(2) The flexibility term must:
  (a) set out the terms of the enterprise agreement the effect of which may be varied by an individual flexibility arrangement agreed to under the flexibility term; and
  (b) require the employer to ensure that any individual flexibility arrangement agreed to under the flexibility term:
    (i) must be about matters that would be permitted matters if the arrangement were an enterprise agreement; and
    (ii) must not include a term that would be an unlawful term if the arrangement were an enterprise agreement.

(2A) If, in accordance with this Part, the enterprise agreement includes terms that would be outworker terms if they were included in a modern award, the flexibility term must not allow the effect of those outworker terms to be varied.

Requirement for genuine agreement

(3) The flexibility term must require that any individual flexibility arrangement is genuinely agreed to by the employer and the employee.

Requirement that the employee be better off overall

(4) The flexibility term must require the employer to ensure that any individual flexibility arrangement agreed to under the term must result in the employee being better off overall than the employee would have been if no individual flexibility arrangement were agreed to.

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Requirement relating to approval or consent of another person

(5) Except as required by subparagraph (7)(a)(ii), the employer must ensure that the flexibility term does not require that any individual flexibility arrangement agreed to by an employer and employee under the term be approved, or consented to, by another person.

Requirement relating to termination of individual flexibility arrangements

(6) The flexibility term must require the employer to ensure that any individual flexibility arrangement agreed to under the term must be able to be terminated:
  (a) by either the employee, or the employer, giving written notice of not more than 28 days; or
  (b) by the employee and the employer at any time if they agree, in writing, to the termination.

Other requirements

(7) The flexibility term must require the employer to ensure that:
  (a) any individual flexibility arrangement agreed to under the term must be in writing and signed:
    (i) in all cases—by the employee and the employer; and
    (ii) if the employee is under 18—by a parent or guardian of the employee; and
  (b) a copy of any individual flexibility arrangement agreed to under the term must be given to the employee within 14 days after it is agreed to.

204 Effect of arrangement that does not meet requirements of flexibility term

Application of this section

(1) This section applies if:

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(a) an employee and employer agree to an arrangement that purports to be an individual flexibility arrangement under a flexibility term in an enterprise agreement; and

(b) the arrangement does not meet a requirement set out in section 203.

Note: A failure to meet such a requirement may be a contravention of a provision of Part 3-1 (which deals with general protections).

Arrangement has effect as if it were an individual flexibility arrangement

(2) The arrangement has effect as if it were an individual flexibility arrangement.

Employer contravenes flexibility term in specified circumstances

(3) If section 203 requires the employer to ensure that the arrangement meets the requirement, the employer contravenes the flexibility term of the agreement.

Requirement relating to termination of arrangement

(4) If the arrangement does not provide that the arrangement is able to be terminated:

(a) by either the employee, or the employer, giving written notice of not more than 28 days; or

(b) by the employee and the employer at any time if they agree, in writing, to the termination;

the arrangement is taken to provide that the arrangement is able to be so terminated.

205 Enterprise agreements to include a consultation term etc.

Consultation term must be included in an enterprise agreement

(1) An enterprise agreement must include a term (a ***consultation term***) that:

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(a) requires the employer or employers to which the agreement applies to consult the employees to whom the agreement applies about:
  (i) a major workplace change that is likely to have a significant effect on the employees; or
  (ii) a change to their regular roster or ordinary hours of work; and
(b) allows for the representation of those employees for the purposes of that consultation.

(1A) For a change to the employees' regular roster or ordinary hours of work, the term must require the employer:
(a) to provide information to the employees about the change; and
(b) to invite the employees to give their views about the impact of the change (including any impact in relation to their family or caring responsibilities); and
(c) to consider any views given by the employees about the impact of the change.

Model consultation term

(2) If an enterprise agreement does not include a consultation term, the model consultation term is taken to be a term of the agreement.

(3) The regulations must prescribe the ***model consultation term*** for enterprise agreements.

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Division 6—Base rate of pay under enterprise agreements

206 Base rate of pay under an enterprise agreement must not be less than the modern award rate or the national minimum wage order rate etc.

If an employee is covered by a modern award that is in operation

(1) If:
  (a) an enterprise agreement applies to an employee; and
  (b) a modern award that is in operation covers the employee;

the base rate of pay payable to the employee under the agreement (the ***agreement rate***) must not be less than the base rate of pay that would be payable to the employee under the modern award (the ***award rate***) if the modern award applied to the employee.

(2) If the agreement rate is less than the award rate, the agreement has effect in relation to the employee as if the agreement rate were equal to the award rate.

If an employer is required to pay an employee the national minimum wage etc.

(3) If:
  (a) an enterprise agreement applies to an employee; and
  (b) the employee is not covered by a modern award that is in operation; and
  (c) a national minimum wage order would, but for the agreement applying to the employee, require the employee's employer to pay the employee a base rate of pay (the ***employee's order rate***) that at least equals the national minimum wage, or a special national minimum wage, set by the order;

the base rate of pay payable to the employee under the enterprise agreement (the ***agreement rate***) must not be less than the employee's order rate.

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(4) If the agreement rate is less than the employee's order rate, the agreement has effect in relation to the employee as if the agreement rate were equal to the employee's order rate.

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Division 7—Variation and termination of enterprise agreements

Subdivision A—Variation of enterprise agreements by employers and employees

207 Variation of an enterprise agreement may be made by employers and employees

Variation by employers and employees

(1) The following may jointly make a variation of an enterprise agreement:
  (a) if the agreement covers a single employer—the employer and:
    (i) the employees employed at the time who are covered by the agreement; and
    (ii) the employees employed at the time who will be covered by the agreement if the variation is approved by the FWC;
  (b) if the agreement covers 2 or more employers—all of those employers and:
    (i) the employees employed at the time who are covered by the agreement; and
    (ii) the employees employed at the time who will be covered by the agreement if the variation is approved by the FWC.

Note: For when a variation of an enterprise agreement is ***made***, see section 209.

(2) The employees referred to in paragraphs (1)(a) and (b) are the ***affected employees*** for the variation.

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Variation has no effect unless approved by the FWC

(3) A variation of an enterprise agreement has no effect unless it is approved by the FWC under section 211.

Limitation—greenfields agreement

(4) Subsection (1) applies to a greenfields agreement only if one or more of the persons who will be necessary for the normal conduct of the enterprise concerned and are covered by the agreement have been employed.

208 Employers may request employees to approve a proposed variation of an enterprise agreement

(1) An employer covered by an enterprise agreement may request the affected employees for a proposed variation of the agreement to approve the proposed variation by voting for it.

(2) Without limiting subsection (1), the employer may request that the affected employees vote by ballot or by an electronic method.

209 When a variation of an enterprise agreement is made

Single-enterprise agreement

(1) If the affected employees of an employer, or each employer, covered by a single-enterprise agreement have been asked to approve a proposed variation under subsection 208(1), the variation is ***made*** when a majority of the affected employees who cast a valid vote approve the variation.

Multi-enterprise agreement

(2) If the affected employees of each employer covered by a multi-enterprise agreement have been asked to approve a proposed variation under subsection 208(1), the variation is ***made*** when a majority of the affected employees of each individual employer who cast a valid vote have approved the variation.

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210 Application for the FWC's approval of a variation of an enterprise agreement

Application for approval

(1) If a variation of an enterprise agreement has been made, a person covered by the agreement must apply to the FWC for approval of the variation.

Material to accompany the application

(2) The application must be accompanied by:
  (a) a signed copy of the variation; and
  (b) a copy of the agreement as proposed to be varied; and
  (c) any declarations that are required by the procedural rules to accompany the application.

When the application must be made

(3) The application must be made:
  (a) within 14 days after the variation is made; or
  (b) if in all the circumstances the FWC considers it fair to extend that period—within such further period as the FWC allows.

Signature requirements

(4) The regulations may prescribe requirements relating to the signing of variations of enterprise agreements.

211 When the FWC must approve a variation of an enterprise agreement

Approval of variation by the FWC

(1) If an application for the approval of a variation of an enterprise agreement is made under section 210, the FWC must approve the variation if:

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(a) the FWC is satisfied that had an application been made under subsection 182(4) or section 185 for the approval of the agreement as proposed to be varied, the FWC would have been required to approve the agreement under section 186; and

(b) the FWC is satisfied that the agreement as proposed to be varied would not specify a date as its nominal expiry date which is more than 4 years after the day on which the FWC approved the agreement;

unless the FWC is satisfied that there are serious public interest grounds for not approving the variation.

Note: The FWC may approve a variation under this section with undertakings (see section 212).

Modification of approval requirements

(2) For the purposes of the FWC deciding whether it is satisfied of the matter referred to in paragraph (1)(a), the FWC must:

(a) take into account subsections (3) and (4) and any regulations made for the purposes of subsection (6); and

(b) comply with subsection (5); and

(c) disregard sections 190 and 191 (which deal with the approval of enterprise agreements with undertakings).

(3) The following provisions:

(a) section 180 (which deals with pre-approval steps);

(b) subsection 186(2) (which deals with the FWC's approval of enterprise agreements);

(c) section 188 (which deals with genuine agreement);

have effect as if:

(d) references in sections 180 and 188 to the proposed enterprise agreement, or the enterprise agreement, were references to the proposed variation, or the variation, of the enterprise agreement (as the case may be); and

(e) references in those provisions to the employees employed at the time who will be covered by the proposed enterprise agreement, or the employees covered by the enterprise

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agreement, were references to the affected employees for the variation; and

(f) references in section 180 to subsection 181(1) were references to subsection 208(1); and

(g) the words "if the agreement is not a greenfields agreement—" in paragraph 186(2)(a) were omitted; and

(h) paragraph 186(2)(b) were omitted; and

(ha) references in paragraphs 186(2)(c) and (d) to the agreement were references to the enterprise agreement as proposed to be varied; and

(hb) subparagraph 188(a)(ii) were omitted; and

(j) the words "182(1) or (2)" in paragraph 188(b) were omitted and the words "209(1) or (2)" were substituted.

(4) Section 193 (which deals with passing the better off overall test) has effect as if:

(a) the words "that is not a greenfields agreement" in subsection (1) were omitted; and

(b) subsection (3) were omitted; and

(c) the words "the agreement" in subsection (6) were omitted and the words "the variation of the enterprise agreement" were substituted; and

(d) the reference in subsection (6) to subsection 182(4) or section 185 were a reference to section 210.

(5) For the purposes of determining whether an enterprise agreement as proposed to be varied passes the better off overall test, the FWC must disregard any individual flexibility arrangement that has been agreed to by an award covered employee and his or her employer under the flexibility term in the agreement.

Regulations may prescribe additional modifications

(6) The regulations may provide that, for the purposes of the FWC deciding whether it is satisfied of the matter referred to in paragraph (1)(a), specified provisions of this Part have effect with such modifications as are prescribed by the regulations.

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212 FWC may approve a variation of an enterprise agreement with undertakings

Application of this section

(1) This section applies if:
  (a) an application for the approval of a variation of an enterprise agreement has been made under section 210; and
  (b) the FWC has a concern that the variation does not meet the requirements set out in section 211.

Approval of agreement with undertakings

(2) The FWC may approve the variation under section 211 if the FWC is satisfied that an undertaking accepted by the FWC under subsection (3) of this section meets the concern.

Undertakings

(3) The FWC may only accept a written undertaking from one or more employers covered by the agreement if the FWC is satisfied that the effect of accepting the undertaking is not likely to:
  (a) cause financial detriment to any affected employee for the variation; or
  (b) result in substantial changes to the variation.

Signature requirements

(4) An undertaking must meet any requirements relating to the signing of undertakings that are prescribed by the regulations.

213 Effect of undertakings

(1) If:
  (a) the FWC approves a variation of an enterprise agreement after accepting an undertaking under subsection 212(3) in relation to the variation; and
  (b) the agreement covers a single employer;

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the undertaking is taken to be a term of the agreement, as the agreement applies to the employer.

(2) If:
  (a) the FWC approves a variation of an enterprise agreement after accepting an undertaking under subsection 212(3) in relation to the variation; and
  (b) the agreement covers 2 or more employers;

the undertaking is taken to be a term of the agreement, as the agreement applies to each employer that gave the undertaking.

214 When the FWC may refuse to approve a variation of an enterprise agreement

(1) If an application for the approval of a variation of an enterprise agreement is made under section 210, the FWC may refuse to approve the variation if the FWC considers that compliance with the terms of the agreement as proposed to be varied may result in:
  (a) a person committing an offence against a law of the Commonwealth; or
  (b) a person being liable to pay a pecuniary penalty in relation to a contravention of a law of the Commonwealth.

(2) Subsection (1) has effect despite section 211 (which deals with the approval of variations of enterprise agreements).

(3) If the FWC refuses to approve a variation of an enterprise agreement under this section, the FWC may refer the agreement as proposed to be varied to any person or body the FWC considers appropriate.

215 Approval decision to note undertakings

If the FWC approves a variation of an enterprise agreement after accepting an undertaking under subsection 212(3) in relation to the variation, the FWC must note in its decision to approve the variation that the undertaking is taken to be a term of the agreement.

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216 When variation comes into operation

If a variation of an enterprise agreement is approved under section 211, the variation operates from the day specified in the decision to approve the variation.

Subdivision B—Variations of enterprise agreements where there is ambiguity, uncertainty or discrimination

217 Variation of an enterprise agreement to remove an ambiguity or uncertainty

(1) The FWC may vary an enterprise agreement to remove an ambiguity or uncertainty on application by any of the following:
  (a) one or more of the employers covered by the agreement;
  (b) an employee covered by the agreement;
  (c) an employee organisation covered by the agreement.

(2) If the FWC varies the enterprise agreement, the variation operates from the day specified in the decision to vary the agreement.

217A FWC may deal with certain disputes about variations

(1) This section applies if a variation of an enterprise agreement is proposed.

(2) An employer or employee organisation covered by the enterprise agreement or an affected employee for the variation may apply to the FWC for the FWC to deal with a dispute about the proposed variation if the employer and the affected employees are unable to resolve the dispute.

(3) The FWC must not arbitrate (however described) the dispute.

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218 Variation of an enterprise agreement on referral by Australian Human Rights Commission

Review of an enterprise agreement

(1) The FWC must review an enterprise agreement if the agreement is referred to it under section 46PW of the *Australian Human Rights Commission Act 1986* (which deals with discriminatory industrial instruments).

(2) The following are entitled to make submissions to the FWC for consideration in the review:
   (a) if the referral relates to action that would be unlawful under Part 4 of the *Age Discrimination Act 2004*—the Age Discrimination Commissioner;
   (b) if the referral relates to action that would be unlawful under Part 2 of the *Disability Discrimination Act 1992*—the Disability Discrimination Commissioner;
   (c) if the referral relates to action that would be unlawful under Part II of the *Sex Discrimination Act 1984*—the Sex Discrimination Commissioner.

Variation of an enterprise agreement

(3) If the FWC considers that the agreement reviewed requires a person to do an act that would be unlawful under any of the Acts referred to in subsection (2) (but for the fact that the act would be done in direct compliance with the agreement), the FWC must vary the agreement so that it no longer requires the person to do an act that would be so unlawful.

(4) If the agreement is varied under subsection (3), the variation operates from the day specified in the decision to vary the agreement.

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Subdivision C—Termination of enterprise agreements by employers and employees

219 Employers and employees may agree to terminate an enterprise agreement

Termination by employers and employees

(1) The following may jointly agree to terminate an enterprise agreement:
  (a) if the agreement covers a single employer—the employer and the employees covered by the agreement; or
  (b) if the agreement covers 2 or more employers—all of the employers and the employees covered by the agreement.

Note: For when a termination of an enterprise agreement is ***agreed to***, see section 221.

Termination has no effect unless approved by the FWC

(2) A termination of an enterprise agreement has no effect unless it is approved by the FWC under section 223.

Limitation—greenfields agreement

(3) Subsection (1) applies to a greenfields agreement only if one or more of the persons who will be necessary for the normal conduct of the enterprise concerned and are covered by the agreement have been employed.

220 Employers may request employees to approve a proposed termination of an enterprise agreement

(1) An employer covered by an enterprise agreement may request the employees covered by the agreement to approve a proposed termination of the agreement by voting for it.

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(2) Before making the request, the employer must:
  (a) take all reasonable steps to notify the employees of the following:
    (i) the time and place at which the vote will occur;
    (ii) the voting method that will be used; and
  (b) give the employees a reasonable opportunity to decide whether they want to approve the proposed termination.

(3) Without limiting subsection (1), the employer may request that the employees vote by ballot or by an electronic method.

221 When termination of an enterprise agreement is agreed to

Single-enterprise agreement

(1) If the employees of an employer, or each employer, covered by a single-enterprise agreement have been asked to approve a proposed termination of the agreement under subsection 220(1), the termination is ***agreed to*** when a majority of the employees who cast a valid vote approve the termination.

Multi-enterprise agreement

(2) If the employees of each employer covered by a multi-enterprise agreement have been asked to approve a proposed termination of the agreement under subsection 220(1), the termination is ***agreed to*** when a majority of the employees of each individual employer who cast a valid vote have approved the termination.

222 Application for the FWC's approval of a termination of an enterprise agreement

Application for approval

(1) If a termination of an enterprise agreement has been agreed to, a person covered by the agreement must apply to the FWC for approval of the termination.

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Material to accompany the application

(2) The application must be accompanied by any declarations that are required by the procedural rules to accompany the application.

When the application must be made

(3) The application must be made:
  (a) within 14 days after the termination is agreed to; or
  (b) if in all the circumstances the FWC considers it fair to extend that period—within such further period as the FWC allows.

223 When the FWC must approve a termination of an enterprise agreement

If an application for the approval of a termination of an enterprise agreement is made under section 222, the FWC must approve the termination if:
  (a) the FWC is satisfied that each employer covered by the agreement complied with subsection 220(2) (which deals with giving employees a reasonable opportunity to decide etc.) in relation to the agreement; and
  (b) the FWC is satisfied that the termination was agreed to in accordance with whichever of subsection 221(1) or (2) applies (those subsections deal with agreement to the termination of different kinds of enterprise agreements by employee vote); and
  (c) the FWC is satisfied that there are no other reasonable grounds for believing that the employees have not agreed to the termination; and
  (d) the FWC considers that it is appropriate to approve the termination taking into account the views of the employee organisation or employee organisations (if any) covered by the agreement.

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224 When termination comes into operation

If a termination of an enterprise agreement is approved under section 223, the termination operates from the day specified in the decision to approve the termination.

Subdivision D—Termination of enterprise agreements after nominal expiry date

225 Application for termination of an enterprise agreement after its nominal expiry date

If an enterprise agreement has passed its nominal expiry date, any of the following may apply to the FWC for the termination of the agreement:

(a) one or more of the employers covered by the agreement;

(b) an employee covered by the agreement;

(c) an employee organisation covered by the agreement.

226 When the FWC must terminate an enterprise agreement

If an application for the termination of an enterprise agreement is made under section 225, the FWC must terminate the agreement if:

(a) the FWC is satisfied that it is not contrary to the public interest to do so; and

(b) the FWC considers that it is appropriate to terminate the agreement taking into account all the circumstances including:

(i) the views of the employees, each employer, and each employee organisation (if any), covered by the agreement; and

(ii) the circumstances of those employees, employers and organisations including the likely effect that the termination will have on each of them.

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227 When termination comes into operation

If an enterprise agreement is terminated under section 226, the termination operates from the day specified in the decision to terminate the agreement.

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Division 8—FWC's general role in facilitating bargaining

Subdivision A—Bargaining orders

228 Bargaining representatives must meet the good faith bargaining requirements

(1) The following are the ***good faith bargaining requirements*** that a bargaining representative for a proposed enterprise agreement must meet:

(a) attending, and participating in, meetings at reasonable times;

(b) disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;

(c) responding to proposals made by other bargaining representatives for the agreement in a timely manner;

(d) giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative's responses to those proposals;

(e) refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining;

(f) recognising and bargaining with the other bargaining representatives for the agreement.

Note: See also section 255A (limitations relating to greenfields agreements).

(2) The good faith bargaining requirements do not require:

(a) a bargaining representative to make concessions during bargaining for the agreement; or

(b) a bargaining representative to reach agreement on the terms that are to be included in the agreement.

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229 Applications for bargaining orders

Persons who may apply for a bargaining order

(1) A bargaining representative for a proposed enterprise agreement may apply to the FWC for an order (a ***bargaining order***) under section 230 in relation to the agreement.

Note: See also section 255A (limitations relating to greenfields agreements).

Multi-enterprise agreements

(2) An application for a bargaining order must not be made in relation to a proposed multi-enterprise agreement unless a low-paid authorisation is in operation in relation to the agreement.

Timing of applications

(3) The application may only be made at whichever of the following times applies:

(a) if one or more enterprise agreements apply to an employee, or employees, who will be covered by the proposed enterprise agreement:

(i) not more than 90 days before the nominal expiry date of the enterprise agreement, or the latest nominal expiry date of those enterprise agreements (as the case may be); or

(ii) after an employer that will be covered by the proposed enterprise agreement has requested under subsection 181(1) that employees approve the agreement, but before the agreement is so approved;

(b) otherwise—at any time.

Note: An employer cannot request employees to approve the agreement under subsection 181(1) until 21 days after the last notice of employee representational rights is given.

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Prerequisites for making an application

(4) The bargaining representative may only apply for the bargaining order if the bargaining representative:
  (a) has concerns that:
    (i) one or more of the bargaining representatives for the agreement have not met, or are not meeting, the good faith bargaining requirements; or
    (ii) the bargaining process is not proceeding efficiently or fairly because there are multiple bargaining representatives for the agreement; and
  (b) has given a written notice setting out those concerns to the relevant bargaining representatives; and
  (c) has given the relevant bargaining representatives a reasonable time within which to respond to those concerns; and
  (d) considers that the relevant bargaining representatives have not responded appropriately to those concerns.

Non-compliance with notice requirements may be permitted

(5) The FWC may consider the application even if it does not comply with paragraph (4)(b) or (c) if the FWC is satisfied that it is appropriate in all the circumstances to do so.

230 When the FWC may make a bargaining order

Bargaining orders

(1) The FWC may make a bargaining order under this section in relation to a proposed enterprise agreement if:
  (a) an application for the order has been made; and
  (b) the requirements of this section are met in relation to the agreement; and
  (c) the FWC is satisfied that it is reasonable in all the circumstances to make the order.

Note: See also section 255A (limitations relating to greenfields agreements).

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Agreement to bargain or certain instruments in operation

(2) The FWC must be satisfied in all cases that one of the following applies:
  (a) the employer or employers have agreed to bargain, or have initiated bargaining, for the agreement;
  (b) a majority support determination in relation to the agreement is in operation;
  (c) a scope order in relation to the agreement is in operation;
  (d) all of the employers are specified in a low-paid authorisation that is in operation in relation to the agreement.

Good faith bargaining requirements not met

(3) The FWC must in all cases be satisfied:
  (a) that:
    (i) one or more of the relevant bargaining representatives for the agreement have not met, or are not meeting, the good faith bargaining requirements; or
    (ii) the bargaining process is not proceeding efficiently or fairly because there are multiple bargaining representatives for the agreement; and
  (b) that the applicant has complied with the requirements of subsection 229(4) (which deals with notifying relevant bargaining representatives of concerns), unless subsection 229(5) permitted the applicant to make the application without complying with those requirements.

Bargaining order must be in accordance with section 231

(4) The bargaining order must be in accordance with section 231 (which deals with what a bargaining order must specify).

231 What a bargaining order must specify

(1) A bargaining order in relation to a proposed enterprise agreement must specify all or any of the following:

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(a) the actions to be taken by, and requirements imposed upon, the bargaining representatives for the agreement, for the purpose of ensuring that they meet the good faith bargaining requirements;

(b) requirements imposed upon those bargaining representatives not to take action that would constitute capricious or unfair conduct that undermines freedom of association or collective bargaining;

(c) the actions to be taken by those bargaining representatives to deal with the effects of such capricious or unfair conduct;

(d) such matters, actions or requirements as the FWC considers appropriate, taking into account subparagraph 230(3)(a)(ii) (which deals with multiple bargaining representatives), for the purpose of promoting the efficient or fair conduct of bargaining for the agreement.

(2) The kinds of bargaining orders that the FWC may make in relation to a proposed enterprise agreement include the following:

(a) an order excluding a bargaining representative for the agreement from bargaining;

(b) an order requiring some or all of the bargaining representatives of the employees who will be covered by the agreement to meet and appoint one of the bargaining representatives to represent the bargaining representatives in bargaining;

(c) an order that an employer not terminate the employment of an employee, if the termination would constitute, or relate to, a failure by a bargaining representative to meet the good faith bargaining requirement referred to in paragraph 228(1)(e) (which deals with capricious or unfair conduct that undermines freedom of association or collective bargaining);

(d) an order to reinstate an employee whose employment has been terminated if the termination constitutes, or relates to, a failure by a bargaining representative to meet the good faith bargaining requirement referred to in paragraph 228(1)(e) (which deals with capricious or unfair conduct that undermines freedom of association or collective bargaining).

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(3) The regulations may:
  (a) specify the factors the FWC may or must take into account in deciding whether or not to make a bargaining order for reinstatement of an employee; and
  (b) provide for the FWC to take action and make orders in connection with, and to deal with matters relating to, a bargaining order of that kind.

232 Operation of a bargaining order

A bargaining order in relation to a proposed enterprise agreement:
  (a) comes into operation on the day on which it is made; and
  (b) ceases to be in operation at the earliest of the following:
    (i) if the order is revoked—the time specified in the instrument of revocation;
    (ii) when the agreement is approved by the FWC;
    (iii) when a workplace determination that covers the employees that would have been covered by the agreement comes into operation;
    (iv) when the bargaining representatives for the agreement agree that bargaining has ceased.

Note: See also section 255A (limitations relating to greenfields agreements).

233 Contravening a bargaining order

A person to whom a bargaining order applies must not contravene a term of the order.

Note: This section is a civil remedy provision (see Part 4-1).

Subdivision B—Serious breach declarations

234 Applications for serious breach declarations

A bargaining representative for a proposed enterprise agreement may apply to the FWC for a declaration (a ***serious breach declaration***) under section 235 in relation to the agreement.

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Note 1: The consequence of a serious breach declaration being made in relation to the agreement is that the FWC may, in certain circumstances, make a bargaining related workplace determination under section 269 in relation to the agreement.

Note 2: See also section 255A (limitations relating to greenfields agreements).

235 When the FWC may make a serious breach declaration

Serious breach declaration

(1) The FWC may make a serious breach declaration in relation to a proposed enterprise agreement if:
  (a) an application for the declaration has been made; and
  (b) the FWC is satisfied of the matters set out in subsection (2).

Note: See also section 255A (limitations relating to greenfields agreements).

Matters of which the FWC must be satisfied before making a serious breach declaration

(2) The FWC must be satisfied that:
  (a) one or more bargaining representatives for the agreement has contravened one or more bargaining orders in relation to the agreement; and
  (b) the contravention or contraventions:
    (i) are serious and sustained; and
    (ii) have significantly undermined bargaining for the agreement; and
  (c) the other bargaining representatives for the agreement (the ***designated bargaining representatives***) have exhausted all other reasonable alternatives to reach agreement on the terms that should be included in the agreement; and
  (d) agreement on the terms that should be included in the agreement will not be reached in the foreseeable future; and
  (e) it is reasonable in all the circumstances to make the declaration, taking into account the views of all the bargaining representatives for the agreement.

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Factors the FWC must take into account in deciding whether reasonable alternatives exhausted

(3) In deciding whether or not the designated bargaining representatives have exhausted all other reasonable alternatives to reach agreement on the terms that should be included in the agreement, the FWC may take into account any matter the FWC considers relevant, including the following:
   (a) whether the FWC has provided assistance under section 240 in relation to the agreement;
   (b) whether a designated bargaining representative has applied to a court for an order under Part 4-1 in relation to the contravention or contraventions referred to in paragraph (2)(a) of this section; and
   (c) any findings or orders made by the court in relation to such an application.

What declaration must specify

(4) The declaration must specify:
   (a) the proposed enterprise agreement to which the declaration relates; and
   (b) any other matter prescribed by the procedural rules.

Operation of declaration

(5) The declaration:
   (a) comes into operation on the day on which it is made; and
   (b) ceases to be in operation when each employer specified in the declaration is covered by an enterprise agreement or a workplace determination.

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Subdivision C—Majority support determinations and scope orders

236 Majority support determinations

(1) A bargaining representative of an employee who will be covered by a proposed single-enterprise agreement may apply to the FWC for a determination (a ***majority support determination***) that a majority of the employees who will be covered by the agreement want to bargain with the employer, or employers, that will be covered by the agreement.

(2) The application must specify:
  (a) the employer, or employers, that will be covered by the agreement; and
  (b) the employees who will be covered by the agreement.

237 When the FWC must make a majority support determination

Majority support determination

(1) The FWC must make a majority support determination in relation to a proposed single-enterprise agreement if:
  (a) an application for the determination has been made; and
  (b) the FWC is satisfied of the matters set out in subsection (2) in relation to the agreement.

Matters of which the FWC must be satisfied before making a majority support determination

(2) The FWC must be satisfied that:
  (a) a majority of the employees:
    (i) who are employed by the employer or employers at a time determined by the FWC; and
    (ii) who will be covered by the agreement;
  want to bargain; and

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(b) the employer, or employers, that will be covered by the agreement have not yet agreed to bargain, or initiated bargaining, for the agreement; and

(c) that the group of employees who will be covered by the agreement was fairly chosen; and

(d) it is reasonable in all the circumstances to make the determination.

(3) For the purposes of paragraph (2)(a), the FWC may work out whether a majority of employees want to bargain using any method the FWC considers appropriate.

(3A) If the agreement will not cover all of the employees of the employer or employers covered by the agreement, the FWC must, in deciding for the purposes of paragraph (2)(c) whether the group of employees who will be covered was fairly chosen, take into account whether the group is geographically, operationally or organisationally distinct.

Operation of determination

(4) The determination comes into operation on the day on which it is made.

238 Scope orders

Bargaining representatives may apply for scope orders

(1) A bargaining representative for a proposed single-enterprise agreement (other than a greenfields agreement) may apply to the FWC for an order (a ***scope order***) under this section if:

(a) the bargaining representative has concerns that bargaining for the agreement is not proceeding efficiently or fairly; and

(b) the reason for this is that the bargaining representative considers that the agreement will not cover appropriate employees, or will cover employees that it is not appropriate for the agreement to cover.

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No scope order if a single interest employer authorisation is in operation

(2) Despite subsection (1), the bargaining representative must not apply for the scope order if a single interest employer authorisation is in operation in relation to the agreement.

Bargaining representative to give notice of concerns

(3) The bargaining representative may only apply for the scope order if the bargaining representative:
   (a) has taken all reasonable steps to give a written notice setting out the concerns referred to in subsection (1) to the relevant bargaining representatives for the agreement; and
   (b) has given the relevant bargaining representatives a reasonable time within which to respond to those concerns; and
   (c) considers that the relevant bargaining representatives have not responded appropriately.

When the FWC may make scope order

(4) The FWC may make the scope order if the FWC is satisfied:
   (a) that the bargaining representative who made the application has met, or is meeting, the good faith bargaining requirements; and
   (b) that making the order will promote the fair and efficient conduct of bargaining; and
   (c) that the group of employees who will be covered by the agreement proposed to be specified in the scope order was fairly chosen; and
   (d) it is reasonable in all the circumstances to make the order.

Matters which the FWC must take into account

(4A) If the agreement proposed to be specified in the scope order will not cover all of the employees of the employer or employers covered by the agreement, the FWC must, in deciding for the purposes of paragraph (4)(c) whether the group of employees who

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will be covered was fairly chosen, take into account whether the group is geographically, operationally or organisationally distinct.

Scope order must specify employer and employees to be covered

(5) The scope order must specify, in relation to a proposed single-enterprise agreement:
  (a) the employer, or employers, that will be covered by the agreement; and
  (b) the employees who will be covered by the agreement.

Scope order must be in accordance with this section etc.

(6) The scope order:
  (a) must be in accordance with this section; and
  (b) may relate to more than one proposed single-enterprise agreement.

Orders etc. that the FWC may make

(7) If the FWC makes the scope order, the FWC may also:
  (a) amend any existing bargaining orders; and
  (b) make or vary such other orders (such as protected action ballot orders), determinations or other instruments made by the FWC, or take such other actions, as the FWC considers appropriate.

239 Operation of a scope order

A scope order in relation to a proposed single-enterprise agreement:
  (a) comes into operation on the day on which it is made; and
  (b) ceases to be in operation at the earliest of the following:
    (i) if the order is revoked—the time specified in the instrument of revocation;
    (ii) when the agreement is approved by the FWC;

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(iii) when a workplace determination that covers the employees that would have been covered by the agreement comes into operation;

(iv) when the bargaining representatives for the agreement agree that bargaining has ceased.

Subdivision D—FWC may deal with a bargaining dispute on request

240 Application for the FWC to deal with a bargaining dispute

Bargaining representative may apply for the FWC to deal with a dispute

(1) A bargaining representative for a proposed enterprise agreement may apply to the FWC for the FWC to deal with a dispute about the agreement if the bargaining representatives for the agreement are unable to resolve the dispute.

Note: See also section 255A (limitations relating to greenfields agreements).

(2) If the proposed enterprise agreement is:

(a) a single-enterprise agreement; or

(b) a multi-enterprise agreement in relation to which a low-paid authorisation is in operation;

the application may be made by one bargaining representative, whether or not the other bargaining representatives for the agreement have agreed to the making of the application.

(3) If subsection (2) does not apply, a bargaining representative may only make the application if all of the bargaining representatives for the agreement have agreed to the making of the application.

(4) If the bargaining representatives have agreed that the FWC may arbitrate (however described) the dispute, the FWC may do so.

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Division 9—Low-paid bargaining

241 Objects of this Division

The objects of this Division are:

(a) to assist and encourage low-paid employees and their employers, who have not historically had the benefits of collective bargaining, to make an enterprise agreement that meets their needs; and

(b) to assist low-paid employees and their employers to identify improvements to productivity and service delivery through bargaining for an enterprise agreement that covers 2 or more employers, while taking into account the specific needs of individual enterprises; and

(c) to address constraints on the ability of low-paid employees and their employers to bargain at the enterprise level, including constraints relating to a lack of skills, resources, bargaining strength or previous bargaining experience; and

(d) to enable the FWC to provide assistance to low-paid employees and their employers to facilitate bargaining for enterprise agreements.

Note: A low-paid workplace determination may be made in specified circumstances under Division 2 of Part 2-5 if the bargaining representatives for a proposed enterprise agreement in relation to which a low-paid authorisation is in operation are unable to reach agreement.

242 Low-paid authorisations

(1) The following persons may apply to the FWC for an authorisation (a ***low-paid authorisation***) under section 243 in relation to a proposed multi-enterprise agreement:

(a) a bargaining representative for the agreement;

(b) an employee organisation that is entitled to represent the industrial interests of an employee in relation to work to be performed under the agreement.

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Note: The effect of a low-paid authorisation is that the employers specified in it are subject to certain rules in relation to the agreement that would not otherwise apply (such as in relation to the availability of bargaining orders, see subsection 229(2)).

(2) The application must specify:
  (a) the employers that will be covered by the agreement; and
  (b) the employees who will be covered by the agreement.

(3) An application under this section must not be made in relation to a proposed greenfields agreement.

243 When the FWC must make a low-paid authorisation

Low-paid authorisation

(1) The FWC must make a low-paid authorisation in relation to a proposed multi-enterprise agreement if:
  (a) an application for the authorisation has been made; and
  (b) the FWC is satisfied that it is in the public interest to make the authorisation, taking into account the matters specified in subsections (2) and (3).

FWC must take into account historical and current matters relating to collective bargaining

(2) In deciding whether or not to make the authorisation, the FWC must take into account the following:
  (a) whether granting the authorisation would assist low-paid employees who have not had access to collective bargaining or who face substantial difficulty bargaining at the enterprise level;
  (b) the history of bargaining in the industry in which the employees who will be covered by the agreement work;
  (c) the relative bargaining strength of the employers and employees who will be covered by the agreement;
  (d) the current terms and conditions of employment of the employees who will be covered by the agreement, as compared to relevant industry and community standards;

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(e) the degree of commonality in the nature of the enterprises to which the agreement relates, and the terms and conditions of employment in those enterprises.

FWC must take into account matters relating to the likely success of collective bargaining

(3) In deciding whether or not to make the authorisation, the FWC must also take into account the following:

(a) whether granting the authorisation would assist in identifying improvements to productivity and service delivery at the enterprises to which the agreement relates;

(b) the extent to which the likely number of bargaining representatives for the agreement would be consistent with a manageable collective bargaining process;

(c) the views of the employers and employees who will be covered by the agreement;

(d) the extent to which the terms and conditions of employment of the employees who will be covered by the agreement is controlled, directed or influenced by a person other than the employer, or employers, that will be covered by the agreement;

(e) the extent to which the applicant for the authorisation is prepared to consider and respond reasonably to claims, or responses to claims, that may be made by a particular employer named in the application, if that employer later proposes to bargain for an agreement that:

(i) would cover that employer; and

(ii) would not cover the other employers specified in the application.

What authorisation must specify etc.

(4) The authorisation must specify:

(a) the employers that will be covered by the agreement (which may be some or all of the employers specified in the application); and

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(b) the employees who will be covered by the agreement (which may be some or all of the employees specified in the application); and
(c) any other matter prescribed by the procedural rules.

Operation of authorisation

(5) The authorisation comes into operation on the day on which it is made.

244 Variation of low-paid authorisations—general

Variation to remove employer

(1) An employer specified in a low-paid authorisation may apply to the FWC for a variation of the authorisation to remove the employer's name from the authorisation.

(2) If an application is made under subsection (1), the FWC must vary the authorisation to remove the employer's name if the FWC is satisfied that, because of a change in the employer's circumstances, it is no longer appropriate for the employer to be specified in the authorisation.

Variation to add employer

(3) The following may apply to the FWC for a variation of a low-paid authorisation to add the name of an employer that is not specified in the authorisation:
(a) the employer;
(b) a bargaining representative of an employee who will be covered by the proposed multi-enterprise agreement to which the authorisation relates;
(c) an employee organisation that is entitled to represent the industrial interests of an employee in relation to work to be performed under that agreement.

(4) If an application is made under subsection (3), the FWC must vary the authorisation to add the employer's name if the FWC is

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satisfied that it is in the public interest to do so, taking into account the matters specified in subsections 243(2) and (3).

245 Variation of low-paid authorisations—enterprise agreement etc. comes into operation

The FWC is taken to have varied a low-paid authorisation to remove an employer's name when an enterprise agreement, or a workplace determination, that covers the employer comes into operation.

246 FWC's assistance for the low-paid

Application of this section

(1) This section applies if a low-paid authorisation is in operation in relation to a proposed multi-enterprise agreement.

FWC's assistance

(2) The FWC may, on its own initiative, provide to the bargaining representatives for the agreement such assistance:
   (a) that the FWC considers appropriate to facilitate bargaining for the agreement; and
   (b) that the FWC could provide if it were dealing with a dispute.

Note: This section does not empower the FWC to arbitrate, because subsection 595(3) provides that the FWC may arbitrate only if expressly authorised to do so.

FWC may direct a person to attend a conference

(3) Without limiting subsection (2), the FWC may provide assistance by directing a person who is not an employer specified in the authorisation to attend a conference at a specified time and place if the FWC is satisfied that the person exercises such a degree of control over the terms and conditions of the employees who will be covered by the agreement that the participation of the person in bargaining is necessary for the agreement to be made.

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(4) Subsection (3) does not limit the FWC's powers under Subdivision B of Division 3 of Part 5-1.

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Division 10—Single interest employer authorisations

Subdivision A—Declaration that employers may bargain together for a proposed enterprise agreement

247 Ministerial declaration that employers may bargain together for a proposed enterprise agreement

Application for declaration

(1) Two or more employers that will be covered by a proposed enterprise agreement may apply to the Minister for a declaration under subsection (3).

Note: Employers named in a declaration may apply for a single interest employer authorisation (see Subdivision B of this Division).

(2) The application must specify the employers (the ***relevant employers***) that will be covered by the agreement.

Declaration by the Minister

(3) If an application is made under subsection (1), the Minister may declare, in writing, that the relevant employers may bargain together for the agreement.

(4) In deciding whether or not to make the declaration, the Minister must take into account the following matters:
   (a) the history of bargaining of each of the relevant employers, including whether they have previously bargained together;
   (b) the interests that the relevant employers have in common, and the extent to which those interests are relevant to whether they should be permitted to bargain together;
   (c) whether the relevant employers are governed by a common regulatory regime;
   (d) whether it would be more appropriate for each of the relevant employers to make a separate enterprise agreement with its employees;

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(e) the extent to which the relevant employers operate collaboratively rather than competitively;

(f) whether the relevant employers are substantially funded, directly or indirectly, by the Commonwealth, a State or a Territory;

(g) any other matter the Minister considers relevant.

(5) If the Minister decides to make the declaration, the relevant employers must be specified in the declaration.

(6) A declaration under subsection (3) is not a legislative instrument.

Subdivision B—Single interest employer authorisations

248 Single interest employer authorisations

(1) Two or more employers may apply to the FWC for an authorisation (a ***single interest employer authorisation***) under section 249 in relation to a proposed enterprise agreement.

Note: The effect of a single interest employer authorisation is that the employers are single interest employers in relation to the agreement (see paragraph 172(5)(c)).

(2) The application must specify the following:

(a) the employers that will be covered by the agreement;

(b) the employees who will be covered by the agreement;

(c) the person (if any) nominated by the employers to make applications under this Act if the authorisation is made.

249 When the FWC must make a single interest employer authorisation

Single interest employer authorisation

(1) The FWC must make a single interest employer authorisation in relation to a proposed enterprise agreement if:

(a) an application for the authorisation has been made; and

(b) the FWC is satisfied that:

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(i) the employers that will be covered by the agreement have agreed to bargain together; and

(ii) no person coerced, or threatened to coerce, any of the employers to agree to bargain together; and

(c) the requirements of either subsection (2) (which deals with franchisees) or (3) (which deals with employers that may bargain together for a proposed enterprise agreement) are met.

Franchisees

(2) The requirements of this subsection are met if the FWC is satisfied that the employers carry on similar business activities under the same franchise and are:

(a) franchisees of the same franchisor; or

(b) related bodies corporate of the same franchisor; or

(c) any combination of the above.

Employers that may bargain together for the agreement

(3) The requirements of this subsection are met if the FWC is satisfied that all of the employers are specified in a declaration made under section 247 in relation to the agreement.

Operation of authorisation

(4) The authorisation:

(a) comes into operation on the day on which it is made; and

(b) ceases to be in operation at the earlier of the following:

(i) the day on which the enterprise agreement to which the authorisation relates is made;

(ii) 12 months after the day on which the authorisation is made or, if the period is extended under section 252, at the end of that period.

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250 What a single interest employer authorisation must specify

What authorisation must specify

(1) A single interest employer authorisation in relation to a proposed enterprise agreement must specify the following:
  (a) the employers that will be covered by the agreement;
  (b) the employees who will be covered by the agreement;
  (c) the person (if any) nominated by the employers to make applications under this Act if the authorisation is made;
  (d) any other matter prescribed by the procedural rules.

Authorisation may relate to only some of employers or employees

(2) If the FWC is satisfied of the matters specified in subsection 249(2) or (3) (which deal with franchisees and employers that may bargain together for a proposed enterprise agreement) in relation to only some of the employers that will be covered by the agreement, the FWC may make a single interest employer authorisation specifying those employers and their employees only.

251 Variation of single interest employer authorisations

Variation to remove employer

(1) An employer specified in a single interest employer authorisation in relation to a proposed enterprise agreement may apply to the FWC for a variation of the authorisation to remove the employer's name from the authorisation.

(2) If an application is made under subsection (1), the FWC must vary the authorisation to remove the employer's name if the FWC is satisfied that, because of a change in the employer's circumstances, it is no longer appropriate for the employer to be specified in the authorisation.

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Variation to add employer

(3) An employer that is not specified in a single interest employer authorisation may apply to the FWC for a variation of the authorisation to add the employer's name to the authorisation.

(4) If an application is made under subsection (3), the FWC must vary the authorisation to add the employer's name if the FWC is satisfied that:
   (a) each employer specified in the authorisation has agreed to the employer's name being added; and
   (b) no person coerced, or threatened to coerce, the employer to make the application; and
   (c) the requirements of subsection 249(2) or (3) (which deal with franchisees and employers that may bargain together for a proposed enterprise agreement) are met.

252 Variation to extend period single interest employer authorisation is in operation

(1) A bargaining representative for a proposed enterprise agreement to which a single interest employer authorisation relates may apply to the FWC to vary the authorisation to extend the period for which the authorisation is in operation.

(2) The FWC may vary the authorisation to extend the period if the FWC is satisfied that:
   (a) there are reasonable prospects that the agreement will be made if the authorisation is in operation for a longer period; and
   (b) it is appropriate in all the circumstances to extend the period.

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Division 11—Other matters

253 Terms of an enterprise agreement that are of no effect

(1) A term of an enterprise agreement has no effect to the extent that:
  (a) it is not a term about a permitted matter; or
  (b) it is an unlawful term; or
  (c) it is a designated outworker term.

Note 1: A term of an enterprise agreement has no effect to the extent that it contravenes section 55 (see section 56).

Note 2: A term of an enterprise agreement permitting or requiring deductions or payments to be made has no effect if it benefits the employer and is unreasonable in the circumstances (see section 326).

(2) However, if an enterprise agreement includes a term that has no effect because of subsection (1), or section 56 or 326, the inclusion of the term does not prevent the agreement from being an enterprise agreement.

254 Applications by bargaining representatives

Application of this section

(1) This section applies if a provision of this Part permits an application to be made by a bargaining representative of an employer that will be covered by a proposed enterprise agreement.

Persons who may make applications

(2) If the agreement will cover more than one employer, the application may be made by:
  (a) in the case of a proposed enterprise agreement in relation to which a single interest employer authorisation is in operation—the person (if any) specified in the authorisation as the person who may make applications under this Act; or
  (b) in any case—a bargaining representative of an employer that will be covered by the agreement, on behalf of one or more

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other such bargaining representatives, if those other bargaining representatives have agreed to the application being made on their behalf.

255 Part does not empower the FWC to make certain orders

(1) This Part does not empower the FWC to make an order that requires, or has the effect of requiring:

(a) particular content to be included or not included in a proposed enterprise agreement; or

(b) an employer to request under subsection 181(1) that employees approve a proposed enterprise agreement; or

(c) an employee to approve, or not approve, a proposed enterprise agreement; or

(d) an employer to give a notice under section 178B; or

(e) an employer to specify a particular day in a notice under section 178B; or

(f) an employer to agree to the giving of a notice under section 178B.

(2) Despite paragraph (1)(a), the FWC may make an order that particular content be included or not included in a proposed enterprise agreement if the order is made in the course of arbitration undertaken when dealing with a dispute under section 240.

Note: The FWC may only arbitrate a dispute under section 240 if arbitration has been agreed to by the bargaining representatives for the agreement (see subsection 240(4)).

255A Limitations relating to greenfields agreements

(1) If:

(a) a proposed single-enterprise agreement is a greenfields agreement; and

(b) there has been a notified negotiation period for the agreement; and

(c) the notified negotiation period has ended;

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then:

(d) the following provisions do not apply in relation to the agreement at any time after the end of the notified negotiation period:

(i) section 228 (which deals with good faith bargaining requirements);

(ii) sections 229 and 230 (which deal with bargaining orders);

(iii) sections 234 and 235 (which deal with serious breach declarations);

(iv) section 240 (which deals with bargaining disputes); and

(e) a bargaining order that relates to the agreement ceases to have effect at the end of the notified negotiation period.

(2) Paragraph (1)(e) has effect despite anything in section 232 (which deals with the operation of bargaining orders).

256 Prospective employers and employees

A reference to an employer, or an employee, in relation to a greenfields agreement, includes a reference to a person who may become an employer or employee.

256A How employees, employers and employee organisations are to be described

(1) This section applies if a provision of this Part requires or permits an instrument of any kind to specify the employers, employees or employee organisations covered, or who will be covered, by an enterprise agreement or other instrument.

(2) The employees may be specified by class or by name.

(3) The employers and employee organisations must be specified by name.

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(4) Without limiting the way in which a class may be described for the purposes of subsection (2), the class may be described by reference to one or more of the following:
   (a) a particular industry or part of an industry;
   (b) a particular kind of work;
   (c) a particular type of employment;
   (d) a particular classification, job level or grade.

257 Enterprise agreements may incorporate material in force from time to time etc.

Despite section 46AA of the *Acts Interpretation Act 1901*, an enterprise agreement may incorporate material contained in an instrument or other writing:
   (a) as in force at a particular time; or
   (b) as in force from time to time.

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Part 2-5—Workplace determinations

Division 1—Introduction

258 Guide to this Part

This Part is about workplace determinations, which provide terms and conditions for those national system employees to whom they apply.

Division 2 deals with low-paid workplace determinations. Bargaining representatives for a proposed multi-enterprise agreement may apply to the FWC for such a determination if they are unable to reach agreement on the terms that should be included in the agreement.

Division 3 deals with industrial action related workplace determinations. The FWC must make such a determination if:

(a) a termination of industrial action instrument is made in relation to a proposed enterprise agreement; and

(b) after the end of the post-industrial action negotiating period, the bargaining representatives for the agreement have not settled the matters that were at issue during bargaining for the agreement.

Division 4 deals with bargaining related workplace determinations. The FWC must make such a determination if:

(a) a serious breach declaration is made in relation to a proposed enterprise agreement; and

(b) after the end of the post-declaration negotiating period, the bargaining representatives for the agreement have not settled

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the matters that were at issue during bargaining for the agreement.

Division 5 sets out the core terms, mandatory terms and agreed terms of workplace determinations. It also sets out the factors that the FWC must take into account in deciding the terms of a workplace determination.

Division 6 deals with the operation, coverage and interaction etc. of workplace determinations. It also provides that, subject to certain exceptions, this Act applies to a workplace determination that is in operation as if it were an enterprise agreement that is in operation.

Division 7 deals with contraventions of workplace determinations and other matters relating to applications by bargaining representatives.

259 Meanings of *employee* and *employer*

In this Part, ***employee*** means a national system employee, and ***employer*** means a national system employer.

Note: See also Division 2 of Part 6-4A (TCF contract outworkers taken to be employees in certain circumstances).

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Division 2—Low-paid workplace determinations

260 Applications for low-paid workplace determinations

Application of this section

(1) This section applies if:
  (a) a low-paid authorisation is in operation in relation to a proposed multi-enterprise agreement; and
  (b) one or more of the bargaining representatives for the agreement are unable to reach agreement on the terms that should be included in the agreement.

Consent low-paid workplace determination

(2) The following bargaining representatives for the agreement may jointly apply to the FWC for a determination (a ***consent low-paid workplace determination***) under section 261:
  (a) one or more bargaining representatives of one or more of the employers that would have been covered by the agreement;
  (b) the bargaining representative or representatives of the employees of those employers.

(3) An application for a consent low-paid workplace determination must specify the following:
  (a) the bargaining representatives making the application;
  (b) the terms that those bargaining representatives have, at the time of the application, agreed should be included in the agreement;
  (c) the matters at issue at the time of the application;
  (d) the employers that have consented to being covered by the determination;
  (e) those employers' employees who will be covered by the determination;
  (f) each employee organisation (if any) that is a bargaining representative of those employees.

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Special low-paid workplace determination

(4) A bargaining representative for the agreement may apply to the FWC for a determination (a ***special low-paid workplace determination***) under section 262.

(5) An application for a special low-paid workplace determination must specify the following:
  (a) the terms that the bargaining representatives concerned have, at the time of the application, agreed should be included in the agreement;
  (b) the matters at issue at the time of the application;
  (c) the employers that will be covered by the determination;
  (d) the employees who will be covered by the determination;
  (e) each employee organisation (if any) that is a bargaining representative of those employees.

261 When the FWC must make a consent low-paid workplace determination

The FWC must make a consent low-paid workplace determination if:
  (a) an application for the determination has been made; and
  (b) the FWC is satisfied that the bargaining representatives who made the application have made all reasonable efforts to agree on the terms that should be included in the agreement; and
  (c) there is no reasonable prospect of agreement being reached.

Note: The FWC must be constituted by a Full Bench to make a consent low-paid workplace determination (see subsection 616(4)).

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262 When the FWC must make a special low-paid workplace determination—general requirements

Special low-paid workplace determination

(1) The FWC must make a special low-paid workplace determination under this section if:
  (a) an application for the determination has been made; and
  (b) the requirements set out in this section and section 263 are met.

Note: The FWC must be constituted by a Full Bench to make a special low-paid workplace determination (see subsection 616(4)).

Genuinely unable to reach agreement etc.

(2) The FWC must be satisfied that:
  (a) the bargaining representatives for the proposed multi-enterprise agreement concerned are genuinely unable to reach agreement on the terms that should be included in the agreement; and
  (b) there is no reasonable prospect of agreement being reached.

Minimum safety net

(3) The FWC must be satisfied that, at the time of the application, the terms and conditions of the employees who will be covered by the determination were substantially equivalent to the minimum safety net of terms and conditions provided by modern awards together with the National Employment Standards.

Promotion of future bargaining for an enterprise agreement etc.

(4) The FWC must be satisfied that the making of the determination will promote:
  (a) bargaining in the future for an enterprise agreement or agreements that will cover the employers and employees who will be covered by the workplace determination; and

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(b) productivity and efficiency in the enterprise or enterprises concerned.

Public interest

(5) The FWC must be satisfied that it is in the public interest to make the determination.

263 When the FWC must make a special low-paid workplace determination—additional requirements

Additional requirements

(1) This section sets out additional requirements that must be met before the FWC makes a special low-paid determination (the ***relevant determination***) under section 262.

No employer is specified in an application for a consent low-paid workplace determination

(2) The FWC must be satisfied that no employer that will be covered by the relevant determination is specified in an application for a consent low-paid workplace determination that was made by bargaining representatives for the proposed multi-enterprise agreement concerned before or after the application for the relevant determination was made.

No employer is, or has previously been, covered by an enterprise agreement or workplace determination

(3) The FWC must be satisfied that no employer that will be covered by the relevant determination is, or has previously been, covered by an enterprise agreement, or another workplace determination, in relation to the work to be performed by the employees who will be covered by the relevant determination.

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264 Terms etc. of a low-paid workplace determination

Basic rule

(1) A low-paid workplace determination must comply with subsection (4) and include:
  (a) the terms set out in subsections (2) and (3); and
  (b) the core terms set out in section 272; and
  (c) the mandatory terms set out in section 273.

Note: For the factors that the FWC must take into account in deciding the terms of the determination, see section 275.

Agreed terms

(2) The determination must include the agreed terms (see subsection 274(1)) for the determination.

Terms dealing with the matters at issue

(3) The determination must include the terms that the FWC considers deal with the matters at issue specified in the application for the determination.

Coverage

(4) The determination must be expressed to cover the employers, employees and employee organisations (if any) that were specified in the application for the determination.

265 No other terms

A low-paid workplace determination must not include any terms other than those required by subsection 264(1).

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Division 3—Industrial action related workplace determinations

266 When the FWC must make an industrial action related workplace determination

Industrial action related workplace determination

(1) If:
  (a) a termination of industrial action instrument has been made in relation to a proposed enterprise agreement; and
  (b) the post-industrial action negotiating period ends; and
  (c) the bargaining representatives for the agreement have not settled all of the matters that were at issue during bargaining for the agreement;

the FWC must make a determination (an ***industrial action related workplace determination***) as quickly as possible after the end of that period.

Note: The FWC must be constituted by a Full Bench to make an industrial action related workplace determination (see subsection 616(4)).

Termination of industrial action instrument

(2) A ***termination of industrial action instrument*** in relation to a proposed enterprise agreement is:
  (a) an order under section 423 or 424 terminating protected industrial action for the agreement; or
  (b) a declaration under section 431 terminating protected industrial action for the agreement.

Post-industrial action negotiating period

(3) The ***post-industrial action negotiating period*** is the period that:
  (a) starts on the day on which the termination of industrial action instrument is made; and
  (b) ends:

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(i) 21 days after that day; or
(ii) if the FWC extends that period under subsection (4)—42 days after that day.

(4) The FWC must extend the period referred to in subparagraph (3)(b)(i) if:
(a) all of the bargaining representatives for the agreement jointly apply to the FWC for the extension within 21 days after the termination of industrial action instrument was made; and
(b) those bargaining representatives have not settled all of the matters that were at issue during bargaining for the agreement.

267 Terms etc. of an industrial action related workplace determination

Basic rule

(1) An industrial action related workplace determination must comply with subsection (4) and include:
(a) the terms set out in subsections (2) and (3); and
(b) the core terms set out in section 272; and
(c) the mandatory terms set out in section 273.

Note: For the factors that the FWC must take into account in deciding the terms of the determination, see section 275.

Agreed terms

(2) The determination must include the agreed terms (see subsection 274(2)) for the determination.

Terms dealing with the matters at issue

(3) The determination must include the terms that the FWC considers deal with the matters that were still at issue at the end of the post-industrial action negotiating period.

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Coverage

(4) The determination must be expressed to cover:
  (a) each employer that would have been covered by the proposed enterprise agreement concerned; and
  (b) the employees who would have been covered by that agreement; and
  (c) each employee organisation (if any) that was a bargaining representative of those employees.

268 No other terms

An industrial action related workplace determination must not include any terms other than those required by subsection 267(1).

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Division 4—Bargaining related workplace determinations

269 When the FWC must make a bargaining related workplace determination

Bargaining related workplace determination

(1) If:
  (a) a serious breach declaration has been made in relation to a proposed enterprise agreement; and
  (b) the post-declaration negotiating period ends; and
  (c) the bargaining representatives for the agreement have not settled all of the matters that were at issue during bargaining for the agreement;

the FWC must make a determination (a ***bargaining related workplace determination***) as quickly as possible after the end of that period.

Note 1: A serious breach declaration may be made in relation to a proposed single-enterprise agreement or a proposed multi-enterprise agreement in relation to which a low-paid authorisation is in operation (see sections 229 and 235).

Note 2: The FWC must be constituted by a Full Bench to make a bargaining related workplace determination (see subsection 616(4)).

Note 3: See also section 271A (limitations relating to greenfields agreements).

Post-declaration negotiating period

(2) The ***post-declaration negotiating period*** is the period that:
  (a) starts on the day on which the serious breach declaration is made; and
  (b) ends:
    (i) 21 days after that day; or
    (ii) if the FWC extends that period under subsection (3)—42 days after that day.

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(3) The FWC must extend the period referred to in subparagraph (2)(b)(i) if:
  (a) all of the bargaining representatives for the agreement jointly apply to the FWC for the extension within 21 days after the serious breach declaration was made; and
  (b) those bargaining representatives have not settled all of the matters that were at issue during bargaining for the agreement.

270 Terms etc. of a bargaining related workplace determination

Basic rule

(1) A bargaining related workplace determination must comply with whichever of subsection (4), (5) or (6) applies and include:
  (a) the terms set out in this section; and
  (b) the core terms set out in section 272; and
  (c) the mandatory terms set out in section 273.

Note: For the factors that the FWC must take into account in deciding the terms of the determination, see section 275.

Agreed terms

(2) The determination must include the agreed terms (see subsection 274(3)) for the determination.

Terms dealing with the matters at issue

(3) The determination must include the terms that the FWC considers deal with the matters that were still at issue at the end of the post-declaration negotiating period.

Coverage—single-enterprise agreement

(4) If the serious breach declaration referred to in paragraph 269(1)(a) was made in relation to a proposed single-enterprise agreement, the determination must be expressed to cover:

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(a) each employer that would have been covered by the agreement; and
(b) the employees who would have been covered by that agreement; and
(c) each employee organisation (if any) that was a bargaining representative of those employees.

Coverage—multi-enterprise agreement

(5) If:
(a) the serious breach declaration referred to in paragraph 269(1)(a) was made in relation to a proposed multi-enterprise agreement in relation to which a low-paid authorisation is in operation; and
(b) the bargaining representatives for the agreement that contravened a bargaining order as referred to in subsection 235(2) were bargaining representatives of one or more employers that would have been covered by the agreement;

the determination must be expressed to cover:
(c) each of those employers; and
(d) their employees who would have been covered by the agreement; and
(e) each employee organisation (if any) that was a bargaining representative of those employees.

(6) If:
(a) the serious breach declaration referred to in paragraph 269(1)(a) was made in relation to a proposed multi-enterprise agreement in relation to which a low-paid authorisation is in operation; and
(b) the bargaining representatives for the agreement that contravened a bargaining order as referred to in subsection 235(2) were bargaining representatives of one or more employees who would have been covered by the agreement;

the determination must be expressed to cover:

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(c) the employers of those employees if they are employers that would have been covered by the agreement; and
(d) all of their employees who would have been covered by the agreement; and
(e) each employee organisation (if any) that was a bargaining representative of those employees.

271 No other terms

A bargaining related workplace determination must not include any terms other than those required by subsection 270(1).

271A Limitations relating to greenfields agreements

If:
(a) a proposed single-enterprise agreement is a greenfields agreement; and
(b) there has been a notified negotiation period for the agreement; and
(c) the notified negotiation period has ended;

section 269 (which deals with bargaining related workplace determinations) does not apply in relation to the agreement at any time after the end of the notified negotiation period.

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Division 5—Core terms, mandatory terms and agreed terms of workplace determinations etc.

272 Core terms of workplace determinations

Core terms

(1) This section sets out the core terms that a workplace determination must include.

Nominal expiry date

(2) The determination must include a term specifying a date as the determination's nominal expiry date, which must not be more than 4 years after the date on which the determination comes into operation.

Permitted matters etc.

(3) The determination must not include:
  (a) any terms that would not be about permitted matters if the determination were an enterprise agreement; or
  (b) a term that would be an unlawful term if the determination were an enterprise agreement; or
  (c) any designated outworker terms.

Better off overall test

(4) The determination must include terms such that the determination would, if the determination were an enterprise agreement, pass the better off overall test under section 193.

Safety net requirements

(5) The determination must not include a term that would, if the determination were an enterprise agreement, mean that the FWC could not approve the agreement:

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(a) because the term would contravene section 55 (which deals with the interaction between the National Employment Standards and enterprise agreements etc.); or
(b) because of the operation of Subdivision E of Division 4 of Part 2-4 (which deals with approval requirements relating to particular kinds of employees).

273 Mandatory terms of workplace determinations

Mandatory terms

(1) This section sets out the mandatory terms that a workplace determination must include.

Term about settling disputes

(2) The determination must include a term that provides a procedure for settling disputes:
(a) about any matters arising under the determination; and
(b) in relation to the National Employment Standards.

(3) Subsection (2) does not apply to the determination if the FWC is satisfied that an agreed term for the determination would, if the determination were an enterprise agreement, satisfy paragraphs 186(6)(a) and (b) (which deal with terms in enterprise agreements about settling disputes).

Flexibility term

(4) The determination must include the model flexibility term unless the FWC is satisfied that an agreed term for the determination would, if the determination were an enterprise agreement, satisfy paragraph 202(1)(a) and section 203 (which deal with flexibility terms in enterprise agreements).

Consultation term

(5) The determination must include the model consultation term unless the FWC is satisfied that an agreed term for the determination

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would, if the determination were an enterprise agreement, satisfy subsection 205(1) (which deals with terms about consultation in enterprise agreements).

274 Agreed terms for workplace determinations

Agreed term for a low-paid workplace determination

(1) An ***agreed term*** for a low-paid workplace determination is a term that the application for the determination specifies as a term that the bargaining representatives concerned had, at the time of the application, agreed should be included in the proposed multi-enterprise agreement concerned.

Note: The determination must include an agreed term (see subsection 264(2)).

Agreed term for an industrial action related workplace determination

(2) An ***agreed term*** for an industrial action related workplace determination is a term that the bargaining representatives for the proposed enterprise agreement concerned had, at the end of the post-industrial action negotiating period, agreed should be included in the agreement.

Note: The determination must include an agreed term (see subsection 267(2)).

Agreed term for a bargaining related workplace determination

(3) An ***agreed term*** for a bargaining related workplace determination is a term that the bargaining representatives for the proposed enterprise agreement concerned had, at the end of the post-declaration negotiating period, agreed should be included in the agreement.

Note: The determination must include an agreed term (see subsection 270(2)).

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275 Factors the FWC must take into account in deciding terms of a workplace determination

The factors that the FWC must take into account in deciding which terms to include in a workplace determination include the following:

(a) the merits of the case;

(b) for a low-paid workplace determination—the interests of the employers and employees who will be covered by the determination, including ensuring that the employers are able to remain competitive;

(c) for a workplace determination other than a low-paid workplace determination—the interests of the employers and employees who will be covered by the determination;

(d) the public interest;

(e) how productivity might be improved in the enterprise or enterprises concerned;

(f) the extent to which the conduct of the bargaining representatives for the proposed enterprise agreement concerned was reasonable during bargaining for the agreement;

(g) the extent to which the bargaining representatives for the proposed enterprise agreement concerned have complied with the good faith bargaining requirements;

(h) incentives to continue to bargain at a later time.

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Division 6—Operation, coverage and interaction etc. of workplace determinations

276 When a workplace determination operates etc.

(1) A workplace determination operates from the day on which it is made.

(2) A workplace determination ceases to operate on the earlier of the following days:

(a) the day on which a termination of the determination comes into operation under section 224 or 227 as applied to the determination by section 279 (which deals with the application of this Act to workplace determinations);

(b) the day on which section 278 first has the effect that there is no employee to whom the agreement applies.

Note: Section 278 deals with when a workplace determination ceases to apply to an employee.

(3) A workplace determination that has ceased to operate can never operate again.

277 Employers, employees and employee organisations covered by a workplace determination

Employers, employees and employee organisations

(1) A workplace determination ***covers*** an employer, employee or employee organisation if the determination is expressed to cover the employer, employee or organisation.

Effect of provisions of this Act, FWC orders and court orders on coverage

(2) A workplace determination also ***covers*** an employer, employee or employee organisation if any of the following provides, or has the

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effect, that the determination covers the employer, employee or organisation:

(a) a provision of this Act;

(b) an FWC order made under a provision of this Act;

(c) an order of a court.

(3) Despite subsections (1) and (2), a workplace determination does not ***cover*** an employer, employee or employee organisation if any of the following provides, or has the effect, that the determination does not cover the employer, employee or organisation:

(a) another provision of this Act;

(b) an FWC order made under another provision of this Act;

(c) an order of a court.

Workplace determinations that have ceased to operate

(4) Despite subsections (1) and (2), a workplace determination that has ceased to operate does not ***cover*** an employer, employee or employee organisation.

Workplace determinations cover employees in relation to particular employment

(5) A reference in this Act to a workplace determination covering an employee is a reference to the determination covering the employee in relation to particular employment.

278 Interaction of a workplace determination with enterprise agreements etc.

Interaction with an enterprise agreement

(1) If:

(a) a workplace determination applies to an employee in relation to particular employment; and

(b) an enterprise agreement that covers the employee in relation to the same employment comes into operation;

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the determination ceases to apply to the employee in relation to that employment, and can never so apply again.

Interaction with another workplace determination

(2) If:

(a) a workplace determination (the ***earlier determination***) applies to an employee in relation to particular employment; and

(b) another workplace determination (the ***later determination***) that covers the employee in relation to the same employment comes into operation;

the earlier determination ceases to apply to the employee in relation to that employment when the later determination comes into operation, and can never so apply again.

279 Act applies to a workplace determination as if it were an enterprise agreement

(1) This Act applies to a workplace determination that is in operation as if it were an enterprise agreement that is in operation.

(2) However, the following provisions do not apply to the determination:

(a) section 50 (which deals with contraventions of enterprise agreements);

(b) section 53 (which deals with the coverage of enterprise agreements);

(c) section 54 (which deals with the operation of enterprise agreements);

(d) section 58 (which deals with the interaction between one or more enterprise agreements);

(e) section 183 (which deals with the entitlement of employee organisations to be covered by enterprise agreements);

(f) the provisions of Subdivisions A and B of Division 7 of Part 2-4 (which deal with the variation of enterprise agreements) other than section 218 (which deals with

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variation of an enterprise agreement on referral by the Australian Human Rights Commission).

(3) In addition, Subdivision C of Division 7 of Part 2-4 (which deals with the termination of enterprise agreements by employers and employees) only applies to a workplace determination after the determination has passed its nominal expiry date.

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Division 7—Other matters

280 Contravening a workplace determination

A person must not contravene a term of a workplace determination.

Note 1: This section is a civil remedy provision (see Part 4-1).

Note 2: A person does not contravene a term of a workplace determination unless the determination applies to the person: see subsections 51(1) and 279(1).

281 Applications by bargaining representatives

Application of this section

(1) This section applies if a provision of this Part permits an application to be made by a bargaining representative of an employer that would have been covered by a proposed enterprise agreement.

Persons who may make applications

(2) If the agreement would have covered more than one employer, the application may be made by:
   (a) in the case of a proposed enterprise agreement in relation to which a single interest employer authorisation is in operation—the person (if any) specified in the authorisation as the person who may make applications under this Act; or
   (b) in any case—a bargaining representative of an employer that would have been covered by the agreement, on behalf of one or more other such bargaining representatives, if those other bargaining representatives have agreed to the application being made on their behalf.

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281A How employees, employers and employee organisations are to be described

(1) This section applies if a provision of this Part requires or permits an instrument of any kind to specify the employers, employees or employee organisations covered, or who will be covered, by a workplace determination or other instrument.

(2) The employees may be specified by class or by name.

(3) The employers and employee organisations must be specified by name.

(4) Without limiting the way in which a class may be described for the purposes of subsection (2), the class may be described by reference to one or more of the following:

(a) a particular industry or part of an industry;

(b) a particular kind of work;

(c) a particular type of employment;

(d) a particular classification, job level or grade.

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Part 2-6—Minimum wages

Division 1—Introduction

282 Guide to this Part

This Part provides for the FWC (constituted by an Expert Panel) to set and vary minimum wages for national system employees. For employees covered by modern awards, minimum wages are specified in the modern award. For award/agreement free employees, minimum wages are specified in the national minimum wage order.

Division 2 provides for the minimum wages objective. This requires the FWC to establish and maintain a safety net of fair minimum wages, taking into account certain social and economic factors.

Division 3 provides for the FWC (constituted by an Expert Panel) to conduct annual wage reviews. In an annual wage review, the FWC may set or vary minimum wages in modern awards, and must make a national minimum wage order. Minimum wages in modern awards can also be set, or varied (in limited circumstances), under Part 2-3 (which deals with modern awards).

Division 4 provides for national minimum wage orders and requires employers to comply with them. The orders set the national minimum wage, as well as special national minimum wages for junior employees, employees to whom training arrangements apply and employees with a disability. The orders also set the casual loading for award/agreement free employees.

National minimum wages and special national minimum wages apply to award/agreement free employees. However, they are also relevant to other employees as follows:

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(a) in setting or varying modern award minimum wages, the FWC must take the national minimum wage into account (see subsection 135(2) (in Part 2-3) and subsection 285(3) (in this Part));

(b) for an employee who is not covered by a modern award and to whom an enterprise agreement applies, the employee's base rate of pay under the agreement must not be less than the relevant national minimum wage or special national minimum wage (see subsection 206(3) (in Part 2-4)).

For an employee who is covered by a modern award and to whom an enterprise agreement applies, the employee's base rate of pay under the agreement must not be less than the base rate of pay that would have been payable to the employee if the award applied (see subsection 206(1) (in Part 2-4)).

283 Meanings of *employee* and *employer*

In this Part, ***employee*** means a national system employee, and ***employer*** means a national system employer.

Note: See also Division 2 of Part 6-4A (TCF contract outworkers taken to be employees in certain circumstances).

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Division 2—Overarching provisions

284 The minimum wages objective

What is the minimum wages objective?

(1) The FWC must establish and maintain a safety net of fair minimum wages, taking into account:
  (a) the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth; and
  (b) promoting social inclusion through increased workforce participation; and
  (c) relative living standards and the needs of the low paid; and
  (d) the principle of equal remuneration for work of equal or comparable value; and
  (e) providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability.

This is the ***minimum wages objective***.

When does the minimum wages objective apply?

(2) The minimum wages objective applies to the performance or exercise of:
  (a) the FWC's functions or powers under this Part; and
  (b) the FWC's functions or powers under Part 2-3, so far as they relate to setting, varying or revoking modern award minimum wages.

Note: The FWC must also take into account the objects of this Act and any other applicable provisions. For example, if the FWC is setting, varying or revoking modern award minimum wages, the modern awards objective also applies (see section 134).

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*Meaning of **modern award minimum wages***

(3) ***Modern award minimum wages*** are the rates of minimum wages in modern awards, including:

(a) wage rates for junior employees, employees to whom training arrangements apply and employees with a disability; and

(b) casual loadings; and

(c) piece rates.

*Meaning of **setting** and **varying** modern award minimum wages*

(4) ***Setting*** modern award minimum wages is the initial setting of one or more new modern award minimum wages in a modern award, either in the award as originally made or by a later variation of the award. ***Varying*** modern award minimum wages is varying the current rate of one or more modern award minimum wages.

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Division 3—Annual wage reviews

Subdivision A—Main provisions

285 Annual wage reviews to be conducted

(1) The FWC must conduct and complete an ***annual wage review*** in each financial year.

Note 1: The FWC must be constituted by an Expert Panel to conduct annual wage reviews, and to make determinations and orders in those reviews (see section 617).

Note 2: The President may give directions about the conduct of annual wage reviews (see section 582).

(2) In an annual wage review, the FWC:
  (a) must review:
    (i) modern award minimum wages; and
    (ii) the national minimum wage order; and
  (b) may make one or more determinations varying modern awards to set, vary or revoke modern award minimum wages; and
  (c) must make a national minimum wage order.

Note: For provisions about national minimum wage orders, see Division 4.

(3) In exercising its power in an annual wage review to make determinations referred to in paragraph (2)(b), the FWC must take into account the rate of the national minimum wage that it proposes to set in the review.

286 When annual wage review determinations varying modern awards come into operation

Determinations generally come into operation on 1 July

(1) A determination (a ***variation determination***) varying one or more modern awards to set, vary or revoke modern award minimum

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wages that is made in an annual wage review comes into operation on 1 July in the next financial year.

Later operation of determinations in exceptional circumstances

(2) If the FWC is satisfied that there are exceptional circumstances justifying why a variation determination should not come into operation until a later day, the FWC may specify that later day as the day on which it comes into operation. However, the determination must be limited just to the particular situation to which the exceptional circumstances relate.

Note: This may mean that the FWC needs to make more than one determination, if different circumstances apply to different employees.

(3) If a later day is so specified, the variation determination comes into operation on that later day.

Effect of determinations cannot be deferred

(4) The FWC cannot provide for the effect of a variation determination on modern award minimum wages to be deferred to a day that is later than the day on which the determination comes into operation.

Determinations take effect from first full pay period

(5) A variation determination does not take effect in relation to a particular employee until the start of the employee's first full pay period that starts on or after the day the determination comes into operation.

287 When national minimum wage orders come into operation etc.

Orders come into operation on 1 July

(1) A national minimum wage order that is made in an annual wage review comes into operation on 1 July in the next financial year (the ***year of operation***).

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Setting of different wages or loadings only permitted in exceptional circumstances

(2) The national minimum wage or the casual loading for award/agreement free employees set by the order must be the same for all employees, unless:
   (a) the FWC is satisfied that there are exceptional circumstances justifying setting different wages or loadings; and
   (b) the setting of different wages or loadings is limited just to the extent necessary because of the particular situation to which the exceptional circumstances relate.

(3) A special national minimum wage set by the order for a specified class of employees must be the same for all employees in that class, unless:
   (a) the FWC is satisfied that there are exceptional circumstances justifying setting different wages; and
   (b) the setting of different wages is limited just to the extent necessary because of the particular situation to which the exceptional circumstances relate.

Adjustments taking effect during year of operation only permitted in exceptional circumstances

(4) The order may provide that an adjustment of the national minimum wage, the casual loading for award/agreement free employees, or a special national minimum wage, set by the order takes effect (whether for some or all employees to whom that wage or loading applies) on a specified day in the year of operation that is later than 1 July, but only if:
   (a) the FWC is satisfied that there are exceptional circumstances justifying the adjustment taking effect on that day; and
   (b) the adjustment is limited just to the particular situation to which the exceptional circumstances relate.

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When orders take effect

(5) The order takes effect in relation to a particular employee from the start of the employee's first full pay period that starts on or after 1 July in the year of operation. However, an adjustment referred to in subsection (4) takes effect in relation to a particular employee from the start of the employee's first full pay period that starts on or after the day specified as referred to in that subsection.

Subdivision B—Provisions about conduct of annual wage reviews

288 General

This Subdivision contains some specific provisions relevant to the conduct of annual wage reviews. For other provisions relevant to the conduct of annual wage reviews, see the general provisions about the FWC's processes in Part 5-1.

Note: Relevant provisions of Part 5-1 include the following:

(a) section 582 (which deals with the President's power to give directions);

(b) section 590 (which deals with the FWC's discretion to inform itself as it considers appropriate, including by commissioning research);

(c) section 596 (which deals with being represented in a matter before the FWC);

(d) section 601 (which deals with writing and publication requirements).

289 Everyone to have a reasonable opportunity to make and comment on submissions

(1) The FWC must, in relation to each annual wage review, ensure that all persons and bodies have a reasonable opportunity to make written submissions to the FWC for consideration in the review.

(2) The FWC must publish all submissions made to the FWC for consideration in the review.

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(3) However, if a submission made by a person or body includes information that is claimed by the person or body to be confidential or commercially sensitive, and the FWC is satisfied that the information is confidential or commercially sensitive, the FWC:
  (a) may decide not to publish the information; and
  (b) may instead publish:
    (i) a summary of the information which contains sufficient detail to allow a reasonable understanding of the substance of the information (without disclosing anything that is confidential or commercially sensitive); or
    (ii) if the FWC considers that it is not practicable to prepare a summary that would comply with subparagraph (i)—a statement that confidential or commercially sensitive information in the submission has not been published.

(4) A reference in this Act (other than in this section) to a submission under this section includes a reference to a summary or statement referred to in paragraph (3)(b).

(5) The FWC must ensure that all persons and bodies have a reasonable opportunity to make comments to the FWC, for consideration in the review, on the material published under subsections (2) and (3).

(6) The publishing of material under subsections (2) and (3) may be on the FWC's website or by any other means that the FWC considers appropriate.

290 President may direct investigations and reports

(1) The President may give a direction under section 582 requiring that a matter be investigated, and that a report about the matter be prepared, for consideration in an annual wage review.

(2) The direction:
  (a) may be given to:
    (i) an Expert Panel; or

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(ii) an Expert Panel Member; or

(iii) a Full Bench that includes one or more Expert Panel Members; and

(b) must require the report to be given to the Expert Panel that is constituted to conduct the annual wage review, unless the direction is given to that Expert Panel.

291 Research must be published

(1) If the FWC undertakes or commissions research for the purposes of an annual wage review, the FWC must publish the research so that submissions can be made addressing issues covered by the research.

(2) The publication may be on the FWC's website or by any other means that the FWC considers appropriate.

292 Varied wage rates must be published

(1) If the FWC makes one or more determinations varying modern award minimum wages in an annual wage review, the FWC must publish the rates of those wages as so varied:

(a) for wages in a modern award (other than a modern enterprise award or a State reference public sector modern award)—before 1 July in the next financial year; and

(b) for wages in a modern enterprise award or a State reference public sector modern award—as soon as practicable.

Note: The FWC must also publish the modern award as varied (see section 168).

(2) The publication may be on the FWC's website or by any other means that the FWC considers appropriate.

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Division 4—National minimum wage orders

293 Contravening a national minimum wage order

An employer must not contravene a term of a national minimum wage order.

Note: This section is a civil remedy provision (see Part 4-1).

294 Content of national minimum wage order—main provisions

Setting minimum wages and the casual loading

(1) A national minimum wage order:
  (a) must set the national minimum wage; and
  (b) must set special national minimum wages for all award/agreement free employees in the following classes:
    (i) junior employees;
    (ii) employees to whom training arrangements apply;
    (iii) employees with a disability; and
  (c) must set the casual loading for award/agreement free employees.

Note: A national minimum wage order must be made in each annual wage review (see section 285).

Requiring employers to pay minimum wages and the casual loading

(2) The order:
  (a) must require employers to pay employees to whom the national minimum wage applies a base rate of pay that at least equals the national minimum wage; and
  (b) must require employers to pay to employees to whom a special national minimum wage applies a base rate of pay that at least equals that special national minimum wage; and
  (c) must require employers to pay, to award/agreement free employees who are casual employees, a casual loading that at

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least equals the casual loading for award/agreement free employees (as applied to the employees' base rates of pay).

What employees does the national minimum wage apply to?

(3) The national minimum wage applies to all award/agreement free employees who are not:
  (a) junior employees; or
  (b) employees to whom training arrangements apply; or
  (c) employees with a disability.

What employees does a special national minimum wage apply to?

(4) A special national minimum wage applies to the employees to whom it is expressed in the order to apply. Those employees must be:
  (a) all junior employees who are award/agreement free employees, or a specified class of those employees; or
  (b) all employees to whom training arrangements apply and who are award/agreement free employees, or a specified class of those employees; or
  (c) all employees with a disability who are award/agreement free employees, or a specified class of those employees.

295 Content of national minimum wage order—other matters

Expressing minimum wages and the casual loading

(1) In a national minimum wage order:
  (a) the national minimum wage, and the special national minimum wages, set by the order must be expressed in a way that produces a monetary amount per hour; and
  (b) the casual loading for award/agreement free employees must be expressed as a percentage.

Note: The means by which the national minimum wage or a special national minimum wage may be expressed include:
  (a) a monetary amount per hour; or
  (b) a monetary amount for a specified number of hours; or

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(c) a method for calculating a monetary amount per hour.

Terms about how the order applies

(2) The order may also include terms about how the order, or any of the requirements in it, applies.

296 Variation of national minimum wage order to remove ambiguity or uncertainty or correct error

Permitted variations

(1) The FWC may make a determination varying a national minimum wage order to remove an ambiguity or uncertainty or to correct an error.

Note: The FWC must be constituted by an Expert Panel to vary a national minimum wage order (see section 617).

(2) If the FWC varies a national minimum wage order, the FWC must, as soon as practicable, publish the order as varied on its website or by any other means that the FWC considers appropriate.

No other variation or revocation permitted

(3) A national minimum wage order:
(a) cannot be varied except as referred to in subsection (1); and
(b) cannot be revoked.

297 When determinations varying national minimum wage orders come into operation

Determinations come into operation on specified day

(1) A determination varying a national minimum wage order under section 296 comes into operation on the day specified in the determination.

Note: For when a national minimum wage order comes into operation, see section 287.

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(2) The specified day must not be earlier than the day on which the determination is made, unless the FWC is satisfied that there are exceptional circumstances that justify specifying an earlier day.

Determinations take effect from first full pay period

(3) The determination does not take effect in relation to a particular employee until the start of the employee's first full pay period that starts on or after the day the determination comes into operation.

298 Special rule about retrospective variations of national minimum wage orders

Application of this section

(1) This section applies if a determination varying a national minimum wage order has a retrospective effect because it comes into operation under subsection 297(2) on a day before the day on which the determination is made.

No creation of liability to pay pecuniary penalty for past conduct

(2) If:
  (a) a person engaged in conduct before the determination was made; and
  (b) but for the retrospective effect of the determination, the conduct would not have contravened a term of the national minimum wage order or an enterprise agreement;

a court must not order the person to pay a pecuniary penalty under Division 2 of Part 4-1 in relation to the conduct, on the grounds that the conduct contravened a term of the national minimum wage order or enterprise agreement.

Note 1: This subsection does not affect the powers of a court to make other kinds of orders under Division 2 of Part 4-1.

Note 2: A determination varying a national minimum wage order could result in a contravention of a term of an enterprise agreement because of the effect of subsection 206(4).

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299 When a national minimum wage order is in operation

A national minimum wage order continues in operation until the next national minimum wage order comes into operation.

Note: For when a national minimum wage order comes into operation, see section 287.

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Part 2-7—Equal remuneration

Division 1—Introduction

300 Guide to this Part

This Part allows the FWC to make orders to ensure that there will be equal remuneration for men and women workers for work of equal or comparable value.

301 Meanings of *employee* and *employer*

In this Part, ***employee*** means a national system employee, and ***employer*** means a national system employer.

Note: See also Division 2 of Part 6-4A (TCF contract outworkers taken to be employees in certain circumstances).

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Division 2—Equal remuneration orders

302 FWC may make an order requiring equal remuneration

Power to make an equal remuneration order

(1) The FWC may make any order (an ***equal remuneration order***) it considers appropriate to ensure that, for employees to whom the order will apply, there will be equal remuneration for work of equal or comparable value.

Meaning of ***equal remuneration for work of equal or comparable value***

(2) ***Equal remuneration for work of equal or comparable value*** means equal remuneration for men and women workers for work of equal or comparable value.

Who may apply for an equal remuneration order

(3) The FWC may make the equal remuneration order only on application by any of the following:
  (a) an employee to whom the order will apply;
  (b) an employee organisation that is entitled to represent the industrial interests of an employee to whom the order will apply;
  (c) the Sex Discrimination Commissioner.

FWC must take into account orders and determinations made in annual wage reviews

(4) In deciding whether to make an equal remuneration order, the FWC must take into account:
  (a) orders and determinations made by the FWC in annual wage reviews; and
  (b) the reasons for those orders and determinations.

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Note: The FWC must be constituted by an Expert Panel in annual wage reviews (see section 617).

Restriction on power to make an equal remuneration order

(5) However, the FWC may make the equal remuneration order only if it is satisfied that, for the employees to whom the order will apply, there is not equal remuneration for work of equal or comparable value.

303 Equal remuneration order may increase, but must not reduce, rates of remuneration

(1) Without limiting subsection 302(1), an equal remuneration order may provide for such increases in rates of remuneration as the FWC considers appropriate to ensure that, for employees to whom the order will apply, there will be equal remuneration for work of equal or comparable value.

(2) An equal remuneration order must not provide for a reduction in an employee's rate of remuneration.

304 Equal remuneration order may implement equal remuneration in stages

An equal remuneration order may implement equal remuneration for work of equal or comparable value in stages (as provided in the order) if the FWC considers that it is not feasible to implement equal remuneration for work of equal or comparable value when the order comes into operation.

305 Contravening an equal remuneration order

An employer must not contravene a term of an equal remuneration order.

Note: This section is a civil remedy provision (see Part 4-1).

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306 Inconsistency with modern awards, enterprise agreements and orders of the FWC

A term of a modern award, an enterprise agreement or an FWC order has no effect in relation to an employee to the extent that it is less beneficial to the employee than a term of an equal remuneration order that applies to the employee.

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Part 2-8—Transfer of business

Division 1—Introduction

307 Guide to this Part

This Part provides for the transfer of enterprise agreements, certain modern awards and certain other instruments if there is a transfer of business from one national system employer to another national system employer. (For a transfer of business from a non-national system employer that is a State public sector employer to a national system employer, see Part 6-3A.)

Division 2 describes when a transfer of business occurs and defines the following key concepts: ***old employer***, ***new employer***, ***transferring work***, ***transferring employee*** and ***transferable instrument***.

Division 2 also sets out the circumstances in which enterprise agreements, certain modern awards and certain other instruments that covered the old employer and the transferring employees (including high income employees) cover the new employer, the transferring employees and certain non-transferring employees and organisations.

Division 3 provides for the FWC to make orders in relation to a transfer of business.

308 Meanings of *employee* and *employer*

In this Part, ***employee*** means a national system employee, and ***employer*** means a national system employer.

Note: See also Division 2 of Part 6-4A (TCF contract outworkers taken to be employees in certain circumstances).

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309 Object of this Part

The object of this Part is to provide a balance between:

(a) the protection of employees' terms and conditions of employment under enterprise agreements, certain modern awards and certain other instruments; and

(b) the interests of employers in running their enterprises efficiently;

if there is a transfer of business from one employer to another employer.

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Division 2—Transfer of instruments

310 Application of this Division

This Division provides for the transfer of rights and obligations under enterprise agreements, certain modern awards and certain other instruments if there is a transfer of business from an old employer to a new employer.

311 When does a transfer of business occur

*Meanings of **transfer of business**, **old employer**, **new employer** and **transferring work***

(1) There is a ***transfer of business*** from an employer (the ***old employer***) to another employer (the ***new employer***) if the following requirements are satisfied:
   (a) the employment of an employee of the old employer has terminated;
   (b) within 3 months after the termination, the employee becomes employed by the new employer;
   (c) the work (the ***transferring work***) the employee performs for the new employer is the same, or substantially the same, as the work the employee performed for the old employer;
   (d) there is a connection between the old employer and the new employer as described in any of subsections (3) to (6).

*Meaning of **transferring employee***

(2) An employee in relation to whom the requirements in paragraphs (1)(a), (b) and (c) are satisfied is a ***transferring employee*** in relation to the transfer of business.

Transfer of assets from old employer to new employer

(3) There is a connection between the old employer and the new employer if, in accordance with an arrangement between:

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(a) the old employer or an associated entity of the old employer; and
(b) the new employer or an associated entity of the new employer;

the new employer, or the associated entity of the new employer, owns or has the beneficial use of some or all of the assets (whether tangible or intangible):

(c) that the old employer, or the associated entity of the old employer, owned or had the beneficial use of; and
(d) that relate to, or are used in connection with, the transferring work.

Old employer outsources work to new employer

(4) There is a connection between the old employer and the new employer if the transferring work is performed by one or more transferring employees, as employees of the new employer, because the old employer, or an associated entity of the old employer, has outsourced the transferring work to the new employer or an associated entity of the new employer.

New employer ceases to outsource work to old employer

(5) There is a connection between the old employer and the new employer if:

(a) the transferring work had been performed by one or more transferring employees, as employees of the old employer, because the new employer, or an associated entity of the new employer, had outsourced the transferring work to the old employer or an associated entity of the old employer; and
(b) the transferring work is performed by those transferring employees, as employees of the new employer, because the new employer, or the associated entity of the new employer, has ceased to outsource the work to the old employer or the associated entity of the old employer.

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New employer is associated entity of old employer

(6) There is a connection between the old employer and the new employer if the new employer is an associated entity of the old employer when the transferring employee becomes employed by the new employer.

312 Instruments that may transfer

*Meaning of **transferable instrument***

(1) Each of the following is a ***transferable instrument***:
  (a) an enterprise agreement that has been approved by the FWC;
  (b) a workplace determination;
  (c) a named employer award.

*Meaning of **named employer award***

(2) Each of the following is a ***named employer award***:
  (a) a modern award (including a modern enterprise award) that is expressed to cover one or more named employers;
  (b) a modern enterprise award that is expressed to cover one or more specified classes of employers (other than a modern enterprise award that is expressed to relate to one or more enterprises as described in paragraph 168A(2)(b)).

Note: Paragraph 168A(2)(b) deals with employers that carry on similar business activities under the same franchise.

313 Transferring employees and new employer covered by transferable instrument

(1) If a transferable instrument covered the old employer and a transferring employee immediately before the termination of the transferring employee's employment with the old employer, then:
  (a) the transferable instrument covers the new employer and the transferring employee in relation to the transferring work after the time (the ***transfer time***) the transferring employee becomes employed by the new employer; and

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(b) while the transferable instrument covers the new employer and the transferring employee in relation to the transferring work, no other enterprise agreement or named employer award that covers the new employer at the transfer time covers the transferring employee in relation to that work.

(2) To avoid doubt, a transferable instrument that covers the new employer and a transferring employee under paragraph (1)(a) includes any individual flexibility arrangement that had effect as a term of the transferable instrument immediately before the termination of the transferring employee's employment with the old employer.

(3) This section has effect subject to any FWC order under subsection 318(1).

314 New non-transferring employees of new employer may be covered by transferable instrument

(1) If:

(a) a transferable instrument covers the new employer because of paragraph 313(1)(a); and

(b) after the transferable instrument starts to cover the new employer, the new employer employs a non-transferring employee; and

(c) the non-transferring employee performs the transferring work; and

(d) at the time the non-transferring employee is employed, no other enterprise agreement or modern award covers the new employer and the non-transferring employee in relation to that work;

then the transferable instrument covers the new employer and the non-transferring employee in relation to that work.

(2) A ***non-transferring employee*** of a new employer, in relation to a transfer of business, is an employee of the new employer who is not a transferring employee.

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(3) This section has effect subject to any FWC order under subsection 319(1).

315 Organisations covered by transferable instrument

Employer organisation covered by named employer award

(1) If:
  (a) a named employer award covers the new employer because of paragraph 313(1)(a); and
  (b) the named employer award covered an employer organisation in relation to the old employer immediately before the termination of a transferring employee's employment with the old employer;

then the named employer award covers the employer organisation in relation to the new employer.

Employee organisation covered by named employer award

(2) If:
  (a) a named employer award covers the new employer and a transferring employee because of paragraph 313(1)(a); and
  (b) the named employer award covered an employee organisation in relation to the transferring employee immediately before the termination of the transferring employee's employment with the old employer;

then the named employer award covers the employee organisation in relation to:
  (c) the transferring employee; and
  (d) any non-transferring employee of the new employer who:
    (i) is covered by the named employer award because of a provision of this Part or an FWC order; and
    (ii) performs the same work as the transferring employee.

Employee organisation covered by enterprise agreement

(3) To avoid doubt, if:

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(a) an enterprise agreement covers a transferring employee or a non-transferring employee because of a provision of this Part or an FWC order; and

(b) the enterprise agreement covered an employee organisation immediately before the termination of the transferring employee's employment with the old employer;

then the enterprise agreement covers the employee organisation.

316 Transferring employees who are high income employees

(1) This section applies if:

(a) the old employer had given a guarantee of annual earnings for a guaranteed period to a transferring employee; and

(b) the transferring employee was a high income employee immediately before the termination of the transferring employee's employment with the old employer; and

(c) some of the guaranteed period occurs after the time (the ***transfer time***) the transferring employee becomes employed by the new employer; and

(d) an enterprise agreement does not apply to the transferring employee in relation to the transferring work at the transfer time.

(2) The guarantee of annual earnings has effect after the transfer time (except as provided in this section) as if it had been given to the transferring employee by the new employer.

(3) The new employer is not required to comply with the guarantee of annual earnings in relation to any part of the guaranteed period before the transfer time.

(4) The new employer is not required to comply with the guarantee of annual earnings to the extent that it requires the new employer to pay an amount of earnings to the transferring employee, in relation to the part of the guaranteed period after the transfer time, at a rate that is more than the annual rate of the guarantee of annual earnings.

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(5) If:

(a) the transferring employee is entitled to non-monetary benefits under the guarantee of annual earnings after the transfer time; and

(b) it is not practicable for the new employer to provide those benefits to the transferring employee;

then the guarantee of annual earnings is taken to be varied so that, instead of the entitlement to those benefits, the transferring employee is entitled to an amount of money that is equivalent to the agreed money value of those benefits.

(6) This section does not affect the rights and obligations of the old employer that arose before the transfer time in relation to the guarantee of annual earnings.

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Division 3—Powers of the FWC

317 FWC may make orders in relation to a transfer of business

This Division provides for the FWC to make certain orders if there is, or is likely to be, a transfer of business from an old employer to a new employer.

318 Orders relating to instruments covering new employer and transferring employees

Orders that the FWC may make

(1) The FWC may make the following orders:
  (a) an order that a transferable instrument that would, or would be likely to, cover the new employer and a transferring employee because of paragraph 313(1)(a) does not, or will not, cover the new employer and the transferring employee;
  (b) an order that an enterprise agreement or a named employer award that covers the new employer covers, or will cover, the transferring employee.

Who may apply for an order

(2) The FWC may make the order only on application by any of the following:
  (a) the new employer or a person who is likely to be the new employer;
  (b) a transferring employee, or an employee who is likely to be a transferring employee;
  (c) if the application relates to an enterprise agreement—an employee organisation that is, or is likely to be, covered by the agreement;
  (d) if the application relates to a named employer award—an employee organisation that is entitled to represent the

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industrial interests of an employee referred to in paragraph (b).

Matters that the FWC must take into account

(3) In deciding whether to make the order, the FWC must take into account the following:
  (a) the views of:
    (i) the new employer or a person who is likely to be the new employer; and
    (ii) the employees who would be affected by the order;
  (b) whether any employees would be disadvantaged by the order in relation to their terms and conditions of employment;
  (c) if the order relates to an enterprise agreement—the nominal expiry date of the agreement;
  (d) whether the transferable instrument would have a negative impact on the productivity of the new employer's workplace;
  (e) whether the new employer would incur significant economic disadvantage as a result of the transferable instrument covering the new employer;
  (f) the degree of business synergy between the transferable instrument and any workplace instrument that already covers the new employer;
  (g) the public interest.

Restriction on when order may come into operation

(4) The order must not come into operation in relation to a particular transferring employee before the later of the following:
  (a) the time when the transferring employee becomes employed by the new employer;
  (b) the day on which the order is made.

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319 Orders relating to instruments covering new employer and non-transferring employees

Orders that the FWC may make

(1) The FWC may make the following orders:

(a) an order that a transferable instrument that would, or would be likely to, cover the new employer and a non-transferring employee because of subsection 314(1) does not, or will not, cover the non-transferring employee;

(b) an order that a transferable instrument that covers, or is likely to cover, the new employer, because of a provision of this Part, covers, or will cover, a non-transferring employee who performs, or is likely to perform, the transferring work for the new employer;

(c) an order that an enterprise agreement or a modern award that covers the new employer does not, or will not, cover a non-transferring employee who performs, or is likely to perform, the transferring work for the new employer.

Note: Orders may be made under paragraphs (1)(b) and (c) in relation to a non-transferring employee who performs, or is likely to perform, the transferring work for the new employer, whether or not the non-transferring employee became employed by the new employer before or after the transferable instrument referred to in paragraph (1)(b) started to cover the new employer.

Who may apply for an order

(2) The FWC may make the order only on application by any of the following:

(a) the new employer or a person who is likely to be the new employer;

(b) a non-transferring employee who performs, or is likely to perform, the transferring work for the new employer;

(c) if the application relates to an enterprise agreement—an employee organisation that is, or is likely to be, covered by the agreement;

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(d) if the application relates to a named employer award—an employee organisation that is entitled to represent the industrial interests of an employee referred to in paragraph (b).

Matters that the FWC must take into account

(3) In deciding whether to make the order, the FWC must take into account the following:

(a) the views of:

(i) the new employer or a person who is likely to be the new employer; and

(ii) the employees who would be affected by the order;

(b) whether any employees would be disadvantaged by the order in relation to their terms and conditions of employment;

(c) if the order relates to an enterprise agreement—the nominal expiry date of the agreement;

(d) whether the transferable instrument would have a negative impact on the productivity of the new employer's workplace;

(e) whether the new employer would incur significant economic disadvantage as a result of the transferable instrument covering the new employer;

(f) the degree of business synergy between the transferable instrument and any workplace instrument that already covers the new employer;

(g) the public interest.

Restriction on when order may come into operation

(4) The order must not come into operation in relation to a particular non-transferring employee before the later of the following:

(a) the time when the non-transferring employee starts to perform the transferring work for the new employer;

(b) the day on which the order is made.

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320 Variation of transferable instruments

Application of this section

(1) This section applies in relation to a transferable instrument that covers, or is likely to cover, the new employer because of a provision of this Part.

Power to vary transferable instrument

(2) The FWC may vary the transferable instrument:
  (a) to remove terms that the FWC is satisfied are not, or will not be, capable of meaningful operation because of the transfer of business to the new employer; or
  (b) to remove an ambiguity or uncertainty about how a term of the instrument operates if:
    (i) the ambiguity or uncertainty has arisen, or will arise, because of the transfer of business to the new employer; and
    (ii) the FWC is satisfied that the variation will remove the ambiguity or uncertainty; or
  (c) to enable the transferable instrument to operate in a way that is better aligned to the working arrangements of the new employer's enterprise.

Who may apply for a variation

(3) The FWC may make the variation only on application by:
  (a) a person who is, or is likely to be, covered by the transferable instrument; or
  (b) if the application is to vary a named employer award—an employee organisation that is entitled to represent the industrial interests of an employee who is, or is likely to be, covered by the named employer award.

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Matters that the FWC must take into account

(4) In deciding whether to make the variation, the FWC must take into account the following:
  (a) the views of:
    (i) the new employer or a person who is likely to be the new employer; and
    (ii) the employees who would be affected by the transferable instrument as varied;
  (b) whether any employees would be disadvantaged by the transferable instrument as varied in relation to their terms and conditions of employment;
  (c) if the transferable instrument is an enterprise agreement—the nominal expiry date of the agreement;
  (d) whether the transferable instrument, without the variation, would have a negative impact on the productivity of the new employer's workplace;
  (e) whether the new employer would incur significant economic disadvantage as a result of the transferable instrument, without the variation;
  (f) the degree of business synergy between the transferable instrument, without the variation, and any workplace instrument that already covers the new employer;
  (g) the public interest.

Restriction on when variation may come into operation

(5) A variation of a transferable instrument under subsection (2) must not come into operation before the later of the following:
  (a) the time when the transferable instrument starts to cover the new employer;
  (b) the day on which the variation is made.

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Part 2-9—Other terms and conditions of employment

Division 1—Introduction

321 Guide to this Part

This Part deals with other terms and conditions of employment.

Division 2 is about the frequency and methods of payment of amounts payable to national system employees in relation to the performance of work, and the circumstances in which a national system employer may make deductions from such amounts.

Division 3 is about the guarantee of annual earnings that may be given to a national system employee whose earnings exceed the high income threshold. Modern awards do not apply to such an employee.

322 Meanings of *employee* and *employer*

In this Part, ***employee*** means a national system employee, and ***employer*** means a national system employer.

Note: See also Division 2 of Part 6-4A (TCF contract outworkers taken to be employees in certain circumstances).

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Division 2—Payment of wages

323 Method and frequency of payment

(1) An employer must pay an employee amounts payable to the employee in relation to the performance of work:
  (a) in full (except as provided by section 324); and
  (b) in money by one, or a combination, of the methods referred to in subsection (2); and
  (c) at least monthly.

Note 1: This subsection is a civil remedy provision (see Part 4-1).

Note 2: Amounts referred to in this subsection include the following if they become payable during a relevant period:
  (a) incentive-based payments and bonuses;
  (b) loadings;
  (c) monetary allowances;
  (d) overtime or penalty rates;
  (e) leave payments.

(2) The methods are as follows:
  (a) cash;
  (b) cheque, money order, postal order or similar order, payable to the employee;
  (c) the use of an electronic funds transfer system to credit an account held by the employee;
  (d) a method authorised under a modern award or an enterprise agreement.

(3) Despite paragraph (1)(b), if a modern award or an enterprise agreement specifies a particular method by which the money must be paid, then the employer must pay the money by that method.

Note: This subsection is a civil remedy provision (see Part 4-1).

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324 Permitted deductions

(1) An employer may deduct an amount from an amount payable to an employee in accordance with subsection 323(1) if:
  (a) the deduction is authorised in writing by the employee and is principally for the employee's benefit; or
  (b) the deduction is authorised by the employee in accordance with an enterprise agreement; or
  (c) the deduction is authorised by or under a modern award or an FWC order; or
  (d) the deduction is authorised by or under a law of the Commonwealth, a State or a Territory, or an order of a court.

Note 1: A deduction in accordance with a salary sacrifice or other arrangement, under which an employee chooses to:
  (a) forgo an amount payable to the employee in relation to the performance of work; but
  (b) receive some other form of benefit or remuneration;
will be permitted if it is made in accordance with this section and the other provisions of this Division.

Note 2: Certain terms of modern awards, enterprise agreements and contracts of employment relating to deductions have no effect (see section 326). A deduction made in accordance with such a term will not be authorised for the purposes of this section.

(2) An authorisation for the purposes of paragraph (1)(a):
  (a) must specify the amount of the deduction; and
  (b) may be withdrawn in writing by the employee at any time.

(3) Any variation in the amount of the deduction must be authorised in writing by the employee.

325 Unreasonable requirements to spend amount

(1) An employer must not directly or indirectly require an employee to spend any part of an amount payable to the employee in relation to the performance of work if the requirement is unreasonable in the circumstances.

Note: This subsection is a civil remedy provision (see Part 4-1).

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(2) The regulations may prescribe circumstances in which a requirement referred to in subsection (1) is or is not reasonable.

326 Certain terms have no effect

Unreasonable payments and deductions for benefit of employer

(1) A term of a modern award, an enterprise agreement or a contract of employment has no effect to the extent that the term:
   (a) permits, or has the effect of permitting, an employer to deduct an amount from an amount that is payable to an employee in relation to the performance of work; or
   (b) requires, or has the effect of requiring, an employee to make a payment to an employer or another person;

   if either of the following apply:
   (c) the deduction or payment is:
      (i) directly or indirectly for the benefit of the employer, or a party related to the employer; and
      (ii) unreasonable in the circumstances;
   (d) if the employee is under 18—the deduction or payment is not agreed to in writing by a parent or guardian of the employee.

(2) The regulations may prescribe circumstances in which a deduction or payment referred to in subsection (1) is or is not reasonable.

Unreasonable requirements to spend an amount

(3) A term of a modern award, an enterprise agreement or a contract of employment has no effect to the extent that the term:
   (a) permits, or has the effect of permitting, an employer to make a requirement that would contravene subsection 325(1); or
   (b) directly or indirectly requires an employee to spend an amount, if the requirement would contravene subsection 325(1) if it had been made by an employer.

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327 Things given or provided, and amounts required to be spent, in contravention of this Division

In proceedings for recovery of an amount payable to an employee in relation to the performance of work:

(a) anything given or provided by the employer contrary to paragraph 323(1)(b) and subsection 323(3) is taken never to have been given or provided to the employee; and

(b) any amount that the employee has been required to spend contrary to subsection 325(1), or in accordance with a term to which subsection 326(3) applies, is taken never to have been paid to the employee.

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Division 3—Guarantee of annual earnings

328 Employer obligations in relation to guarantee of annual earnings

Employer must comply with guarantee

(1) An employer that has given a guarantee of annual earnings to an employee must (subject to any reductions arising from circumstances in which the employer is required or entitled to reduce the employee's earnings) comply with the guarantee during any period during which the employee:
  (a) is a high income employee of the employer; and
  (b) is covered by a modern award that is in operation.

Note 1: Examples of circumstances in which the employer is required or entitled to reduce the employee's earnings are unpaid leave or absence, and periods of industrial action (see Division 9 of Part 3-3).

Note 2: This subsection is a civil remedy provision (see Part 4-1).

Employer must comply with guarantee for period before termination

(2) If:
  (a) the employment of a high income employee is terminated before the end of the guaranteed period; and
  (b) either or both of the following apply:
    (i) the employer terminates the employment;
    (ii) the employee becomes a transferring employee in relation to a transfer of business from the employer to a new employer, and the guarantee of annual earnings has effect under subsection 316(2) as if it had been given to the employee by the new employer; and
  (c) the employee is covered by a modern award that is in operation at the time of the termination;

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the employer must pay earnings to the employee in relation to the part of the guaranteed period before the termination at the annual rate of the guarantee of annual earnings.

Note: This subsection is a civil remedy provision (see Part 4-1).

Employer must give notice of consequences

(3) Before or at the time of giving a guarantee of annual earnings to an employee covered by a modern award that is in operation, an employer must notify the employee in writing that a modern award will not apply to the employee during any period during which the annual rate of the guarantee of annual earnings exceeds the high income threshold.

Note: This subsection is a civil remedy provision (see Part 4-1).

329 High income employee

(1) A full-time employee is a ***high income employee*** of an employer at a time if:
   (a) the employee has a guarantee of annual earnings for the guaranteed period; and
   (b) the time occurs during the period; and
   (c) the annual rate of the guarantee of annual earnings exceeds the high income threshold at that time.

(2) An employee other than a full-time employee is a ***high-income employee*** of an employer at a time if:
   (a) the employee has a guarantee of annual earnings for the guaranteed period; and
   (b) the time occurs during the period; and
   (c) the annual rate of the guarantee of annual earnings would have exceeded the high income threshold at that time if the employee were employed on a full-time basis at the same rate of earnings.

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(3) To avoid doubt, the employee does not have a guarantee of annual earnings for the guaranteed period if the employer revokes the guarantee of annual earnings with the employee's agreement.

330 Guarantee of annual earnings and annual rate of guarantee

(1) An undertaking given by an employer to an employee is a ***guarantee of annual earnings*** if:
  (a) the employee is covered by a modern award that is in operation; and
  (b) the undertaking is an undertaking in writing to pay the employee an amount of earnings in relation to the performance of work during a period of 12 months or more; and
  (c) the employee agrees to accept the undertaking, and agrees with the amount of the earnings; and
  (d) the undertaking and the employee's agreement are given before the start of the period, and within 14 days after:
    (i) the day the employee is employed; or
    (ii) a day on which the employer and employee agree to vary the terms and conditions of the employee's employment; and
  (e) an enterprise agreement does not apply to the employee's employment at the start of the period.

(2) However, if:
  (a) an employee is employed for a period shorter than 12 months; or
  (b) an employee will perform duties of a particular kind for a period shorter than 12 months;

  the undertaking may be given for that shorter period.

(3) The ***annual rate*** of the guarantee of annual earnings is the annual rate of the earnings covered by the undertaking.

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331 Guaranteed period

The ***guaranteed period*** for a guarantee of annual earnings is the period that:

(a) starts at the start of the period of the undertaking that is the guarantee of annual earnings; and

(b) ends at the earliest of the following:

(i) the end of that period;

(ii) an enterprise agreement starting to apply to the employment of the employee;

(iii) the employer revoking the guarantee of annual earnings with the employee's agreement.

332 Earnings

(1) An employee's ***earnings*** include:

(a) the employee's wages; and

(b) amounts applied or dealt with in any way on the employee's behalf or as the employee directs; and

(c) the agreed money value of non-monetary benefits; and

(d) amounts or benefits prescribed by the regulations.

(2) However, an employee's ***earnings*** do not include the following:

(a) payments the amount of which cannot be determined in advance;

(b) reimbursements;

(c) contributions to a superannuation fund to the extent that they are contributions to which subsection (4) applies;

(d) amounts prescribed by the regulations.

Note: Some examples of payments covered by paragraph (a) are commissions, incentive-based payments and bonuses, and overtime (unless the overtime is guaranteed).

(3) ***Non-monetary benefits*** are benefits other than an entitlement to a payment of money:

(a) to which the employee is entitled in return for the performance of work; and

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(b) for which a reasonable money value has been agreed by the employee and the employer;

but does not include a benefit prescribed by the regulations.

(4) This subsection applies to contributions that the employer makes to a superannuation fund to the extent that one or more of the following applies:

(a) the employer would have been liable to pay superannuation guarantee charge under the *Superannuation Guarantee Charge Act 1992* in relation to the person if the amounts had not been so contributed;

(b) the employer is required to contribute to the fund for the employee's benefit in relation to a defined benefit interest (within the meaning of section 291-175 of the *Income Tax Assessment Act 1997*) of the employee;

(c) the employer is required to contribute to the fund for the employee's benefit under a law of the Commonwealth, a State or a Territory.

333 High income threshold

(1) Subject to this section, the ***high income threshold*** is the amount prescribed by, or worked out in the manner prescribed by, the regulations.

(2) A regulation made for the purposes of subsection (1) has no effect to the extent that it would have the effect of reducing the amount of the high income threshold.

(3) If:

(a) in prescribing a manner in which the high income threshold is worked out, regulations made for the purposes of subsection (1) specify a particular matter or state of affairs; and

(b) as a result of a change in the matter or state of affairs, the amount of the high income threshold worked out in that manner would, but for this subsection, be less than it was on the last occasion on which this subsection did not apply;

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the ***high income threshold*** is the amount that it would be if the change had not occurred.

333A Prospective employees

If:

(a) an employer, or a person who may become an employer, gives to another person an undertaking that would have been a guarantee of annual earnings if the other person had been the employer's or person's employee; and

(b) the other person subsequently becomes the employer's or person's employee; and

(c) the undertaking relates to the work that the other person performs for the employer or person;

this Division applies in relation to the undertaking, after the other person becomes the employer's or person's employee, as if the other person had been the employer's or person's employee at the time the undertaking was given.

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Chapter 3—Rights and responsibilities of employees, employers, organisations etc.

Part 3-1—General protections

Division 1—Introduction

334 Guide to this Part

This Part provides general workplace protections.

Division 2 sets out the circumstances in which this Part applies.

Division 3 protects workplace rights, and the exercise of those rights.

Division 4 protects freedom of association and involvement in lawful industrial activities.

Division 5 provides other protections, including protection from discrimination.

Division 6 deals with sham arrangements.

Division 7 sets out rules for the purposes of establishing contraventions of this Part.

Division 8 deals with compliance. In most cases, a general protections dispute that involves dismissal will be dealt with by a court only if the dispute has not been resolved by the FWC.

335 Meanings of *employee* and *employer*

In this Part, ***employee*** and ***employer*** have their ordinary meanings.

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Note: See also Division 2 of Part 6-4A (TCF contract outworkers taken to be employees in certain circumstances).

336 Objects of this Part

(1) The objects of this Part are as follows:
  (a) to protect workplace rights;
  (b) to protect freedom of association by ensuring that persons are:
    (i) free to become, or not become, members of industrial associations; and
    (ii) free to be represented, or not represented, by industrial associations; and
    (iii) free to participate, or not participate, in lawful industrial activities;
  (c) to provide protection from workplace discrimination;
  (d) to provide effective relief for persons who have been discriminated against, victimised or otherwise adversely affected as a result of contraventions of this Part.

(2) The protections referred to in subsection (1) are provided to a person (whether an employee, an employer or otherwise).

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Division 2—Application of this Part

337 Application of this Part

This Part applies only to the extent provided by this Division.

Note: Sections 30G and 30R extend the operation of this Part in a referring State.

338 Action to which this Part applies

(1) This Part applies to the following action:

(a) action taken by a constitutionally-covered entity;

(b) action that affects, is capable of affecting or is taken with intent to affect the activities, functions, relationships or business of a constitutionally-covered entity;

(c) action that consists of advising, encouraging or inciting, or action taken with intent to coerce, a constitutionally-covered entity:

(i) to take, or not take, particular action in relation to another person; or

(ii) to threaten to take, or not take, particular action in relation to another person;

(d) action taken in a Territory or a Commonwealth place;

(e) action taken by:

(i) a trade and commerce employer; or

(ii) a Territory employer;

that affects, is capable of affecting or is taken with intent to affect an employee of the employer;

(f) action taken by an employee of:

(i) a trade and commerce employer; or

(ii) a Territory employer;

that affects, is capable of affecting or is taken with intent to affect the employee's employer.

(2) Each of the following is a ***constitutionally-covered entity***:

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(a) a constitutional corporation;
(b) the Commonwealth;
(c) a Commonwealth authority;
(d) a body corporate incorporated in a Territory;
(e) an organisation.

(3) A ***trade and commerce employer*** is a national system employer within the meaning of paragraph 14(d).

(4) A ***Territory employer*** is a national system employer within the meaning of paragraph 14(f).

339 Additional effect of this Part

In addition to the effect provided by section 338, this Part also has the effect it would have if any one or more of the following applied:

(a) a reference to an employer in one or more provisions of this Part were a reference to a national system employer;
(b) a reference to an employee in one or more provisions of this Part were a reference to a national system employee;
(c) a reference to an industrial association in one or more provisions of this Part were a reference to an organisation, or another association of employees or employers, a purpose of which is the protection and promotion of the interests of national system employees or national system employers in matters concerning employment;
(d) a reference to an officer of an industrial association in one or more provisions of this Part were a reference to an officer of an organisation;
(e) a reference to a person, another person or a third person in one or more provisions of this Part were a reference to a constitutionally-covered entity;
(f) a reference to a workplace law in one or more provisions of this Part were a reference to a workplace law of the Commonwealth;

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(g) a reference to a workplace instrument in one or more provisions of this Part were a reference to a workplace instrument made under, or recognised by, a law of the Commonwealth;

(h) a reference to an industrial body in one or more provisions of this Part were a reference to an industrial body performing functions or exercising powers under a law of the Commonwealth.

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Division 3—Workplace rights

340 Protection

(1) A person must not take adverse action against another person:
  (a) because the other person:
    (i) has a workplace right; or
    (ii) has, or has not, exercised a workplace right; or
    (iii) proposes or proposes not to, or has at any time proposed or proposed not to, exercise a workplace right; or
  (b) to prevent the exercise of a workplace right by the other person.

Note: This subsection is a civil remedy provision (see Part 4-1).

(2) A person must not take adverse action against another person (the ***second person***) because a third person has exercised, or proposes or has at any time proposed to exercise, a workplace right for the second person's benefit, or for the benefit of a class of persons to which the second person belongs.

Note: This subsection is a civil remedy provision (see Part 4-1).

341 Meaning of *workplace right*

Meaning of ***workplace right***

(1) A person has a ***workplace right*** if the person:
  (a) is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body; or
  (b) is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument; or
  (c) is able to make a complaint or inquiry:
    (i) to a person or body having the capacity under a workplace law to seek compliance with that law or a workplace instrument; or

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(ii) if the person is an employee—in relation to his or her employment.

Meaning of ***process or proceedings under a workplace law or workplace instrument***

(2) Each of the following is a ***process or proceedings under a workplace law or workplace instrument***:

(a) a conference conducted or hearing held by the FWC;

(b) court proceedings under a workplace law or workplace instrument;

(c) protected industrial action;

(d) a protected action ballot;

(e) making, varying or terminating an enterprise agreement;

(f) appointing, or terminating the appointment of, a bargaining representative;

(g) making or terminating an individual flexibility arrangement under a modern award or enterprise agreement;

(h) agreeing to cash out paid annual leave or paid personal/carer's leave;

(i) making a request under Division 4 of Part 2-2 (which deals with requests for flexible working arrangements);

(j) dispute settlement for which provision is made by, or under, a workplace law or workplace instrument;

(k) any other process or proceedings under a workplace law or workplace instrument.

Prospective employees taken to have workplace rights

(3) A prospective employee is taken to have the workplace rights he or she would have if he or she were employed in the prospective employment by the prospective employer.

Note: Among other things, the effect of this subsection would be to prevent a prospective employer making an offer of employment conditional on entering an individual flexibility arrangement.

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Exceptions relating to prospective employees

(4) Despite subsection (3), a prospective employer does not contravene subsection 340(1) if the prospective employer makes an offer of employment conditional on the prospective employee accepting a guarantee of annual earnings.

(5) Despite paragraph (1)(a), a prospective employer does not contravene subsection 340(1) if the prospective employer refuses to employ a prospective employee because the prospective employee would be entitled to the benefit of Part 2-8 or 6-3A (which deal with transfer of business).

342 Meaning of *adverse action*

(1) The following table sets out circumstances in which a person takes ***adverse action*** against another person.

Meaning of *adverse action*

Item	Column 1 ***Adverse action* is taken by ...**	Column 2 **if ...**
1	an employer against an employee	the employer: (a) dismisses the employee; or (b) injures the employee in his or her employment; or (c) alters the position of the employee to the employee's prejudice; or (d) discriminates between the employee and other employees of the employer.
2	a prospective employer against a prospective employee	the prospective employer: (a) refuses to employ the prospective employee; or (b) discriminates against the prospective employee in the terms or conditions on which the prospective employer offers to employ the prospective employee.

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Meaning of *adverse action*

Item	Column 1 ***Adverse action* is taken by ...**	Column 2 **if ...**
3	a person (the ***principal***) who has entered into a contract for services with an independent contractor against the independent contractor, or a person employed or engaged by the independent contractor	the principal: (a) terminates the contract; or (b) injures the independent contractor in relation to the terms and conditions of the contract; or (c) alters the position of the independent contractor to the independent contractor's prejudice; or (d) refuses to make use of, or agree to make use of, services offered by the independent contractor; or (e) refuses to supply, or agree to supply, goods or services to the independent contractor.
4	a person (the ***principal***) proposing to enter into a contract for services with an independent contractor against the independent contractor, or a person employed or engaged by the independent contractor	the principal: (a) refuses to engage the independent contractor; or (b) discriminates against the independent contractor in the terms or conditions on which the principal offers to engage the independent contractor; or (c) refuses to make use of, or agree to make use of, services offered by the independent contractor; or (d) refuses to supply, or agree to supply, goods or services to the independent contractor.
5	an employee against his or her employer	the employee: (a) ceases work in the service of the employer; or (b) takes industrial action against the employer.
6	an independent contractor	the independent contractor:

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Meaning of *adverse action*		
Item	**Column 1** ***Adverse action* is taken by ...**	**Column 2** **if ...**
	against a person who has entered into a contract for services with the independent contractor	(a) ceases work under the contract; or (b) takes industrial action against the person.
7	an industrial association, or an officer or member of an industrial association, against a person	the industrial association, or the officer or member of the industrial association: (a) organises or takes industrial action against the person; or (b) takes action that has the effect, directly or indirectly, of prejudicing the person in the person's employment or prospective employment; or (c) if the person is an independent contractor—takes action that has the effect, directly or indirectly, of prejudicing the independent contractor in relation to a contract for services; or (d) if the person is a member of the association—imposes a penalty, forfeiture or disability of any kind on the member (other than in relation to money legally owed to the association by the member).

(2) ***Adverse action*** includes:
  (a) threatening to take action covered by the table in subsection (1); and
  (b) organising such action.

(3) ***Adverse action*** does not include action that is authorised by or under:
  (a) this Act or any other law of the Commonwealth; or
  (b) a law of a State or Territory prescribed by the regulations.

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(4) Without limiting subsection (3), ***adverse action*** does not include an employer standing down an employee who is:
  (a) engaged in protected industrial action; and
  (b) employed under a contract of employment that provides for the employer to stand down the employee in the circumstances.

343 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, to:
  (a) exercise or not exercise, or propose to exercise or not exercise, a workplace right; or
  (b) exercise, or propose to exercise, a workplace right in a particular way.

Note: This subsection is a civil remedy provision (see Part 4-1).

(2) Subsection (1) does not apply to protected industrial action.

344 Undue influence or pressure

An employer must not exert undue influence or undue pressure on an employee in relation to a decision by the employee to:
  (a) make, or not make, an agreement or arrangement under the National Employment Standards; or
  (b) make, or not make, an agreement or arrangement under a term of a modern award or enterprise agreement that is permitted to be included in the award or agreement under subsection 55(2); or
  (c) agree to, or terminate, an individual flexibility arrangement; or
  (d) accept a guarantee of annual earnings; or
  (e) agree, or not agree, to a deduction from amounts payable to the employee in relation to the performance of work.

Note 1: This section is a civil remedy provision (see Part 4-1).

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Note 2: This section can apply to decisions whether to consent to performing work on keeping in touch days (see subsection 79A(3)).

345 Misrepresentations

(1) A person must not knowingly or recklessly make a false or misleading representation about:

(a) the workplace rights of another person; or

(b) the exercise, or the effect of the exercise, of a workplace right by another person.

Note: This subsection is a civil remedy provision (see Part 4-1).

(2) Subsection (1) does not apply if the person to whom the representation is made would not be expected to rely on it.

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Division 4—Industrial activities

346 Protection

A person must not take adverse action against another person because the other person:

(a) is or is not, or was or was not, an officer or member of an industrial association; or

(b) engages, or has at any time engaged or proposed to engage, in industrial activity within the meaning of paragraph 347(a) or (b); or

(c) does not engage, or has at any time not engaged or proposed to not engage, in industrial activity within the meaning of paragraphs 347(c) to (g).

Note: This section is a civil remedy provision (see Part 4-1).

347 Meaning of *engages in industrial activity*

A person ***engages in industrial activity*** if the person:

(a) becomes or does not become, or remains or ceases to be, an officer or member of an industrial association; or

(b) does, or does not:

(i) become involved in establishing an industrial association; or

(ii) organise or promote a lawful activity for, or on behalf of, an industrial association; or

(iii) encourage, or participate in, a lawful activity organised or promoted by an industrial association; or

(iv) comply with a lawful request made by, or requirement of, an industrial association; or

(v) represent or advance the views, claims or interests of an industrial association; or

(vi) pay a fee (however described) to an industrial association, or to someone in lieu of an industrial association; or

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(vii) seek to be represented by an industrial association; or

(c) organises or promotes an unlawful activity for, or on behalf of, an industrial association; or

(d) encourages, or participates in, an unlawful activity organised or promoted by an industrial association; or

(e) complies with an unlawful request made by, or requirement of, an industrial association; or

(f) takes part in industrial action; or

(g) makes a payment:

(i) that, because of Division 9 of Part 3-3 (which deals with payments relating to periods of industrial action), an employer must not pay; or

(ii) to which an employee is not entitled because of that Division.

348 Coercion

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, to engage in industrial activity.

Note: This section is a civil remedy provision (see Part 4-1).

349 Misrepresentations

(1) A person must not knowingly or recklessly make a false or misleading representation about either of the following:

(a) another person's obligation to engage in industrial activity;

(b) another person's obligation to disclose whether he or she, or a third person:

(i) is or is not, or was or was not, an officer or member of an industrial association; or

(ii) is or is not engaging, or has or has not engaged, in industrial activity.

Note: This subsection is a civil remedy provision (see Part 4-1).

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(2) Subsection (1) does not apply if the person to whom the representation is made would not be expected to rely on it.

350 Inducements—membership action

(1) An employer must not induce an employee to take, or propose to take, membership action.

Note: This subsection is a civil remedy provision (see Part 4-1).

(2) A person who has entered into a contract for services with an independent contractor must not induce the independent contractor to take, or propose to take, membership action.

Note: This subsection is a civil remedy provision (see Part 4-1).

(3) A person takes ***membership action*** if the person becomes, does not become, remains or ceases to be, an officer or member of an industrial association.

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Division 5—Other protections

351 Discrimination

(1) An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

Note: This subsection is a civil remedy provision (see Part 4-1).

(2) However, subsection (1) does not apply to action that is:
- (a) not unlawful under any anti-discrimination law in force in the place where the action is taken; or
- (b) taken because of the inherent requirements of the particular position concerned; or
- (c) if the action is taken against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed—taken:
  - (i) in good faith; and
  - (ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.

(3) Each of the following is an ***anti-discrimination law***:
- (aa) the *Age Discrimination Act 2004*;
- (ab) the *Disability Discrimination Act 1992*;
- (ac) the *Racial Discrimination Act 1975*;
- (ad) the *Sex Discrimination Act 1984*;
- (a) the *Anti-Discrimination Act 1977* of New South Wales;
- (b) the *Equal Opportunity Act 2010* of Victoria;
- (c) the *Anti-Discrimination Act 1991* of Queensland;
- (d) the *Equal Opportunity Act 1984* of Western Australia;
- (e) the *Equal Opportunity Act 1984* of South Australia;
- (f) the *Anti-Discrimination Act 1998* of Tasmania;

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(g) the *Discrimination Act 1991* of the Australian Capital Territory;
(h) the *Anti-Discrimination Act* of the Northern Territory.

352 Temporary absence—illness or injury

An employer must not dismiss an employee because the employee is temporarily absent from work because of illness or injury of a kind prescribed by the regulations.

Note: This section is a civil remedy provision (see Part 4-1).

353 Bargaining services fees

(1) An industrial association, or an officer or member of an industrial association, must not:
(a) demand; or
(b) purport to demand; or
(c) do anything that would:
(i) have the effect of demanding; or
(ii) purport to have the effect of demanding;
payment of a bargaining services fee.

Note: This subsection is a civil remedy provision (see Part 4-1).

(2) A ***bargaining services fee*** is a fee (however described) payable:
(a) to an industrial association; or
(b) to someone in lieu of an industrial association;
wholly or partly for the provision, or purported provision, of bargaining services, but does not include membership fees.

(3) ***Bargaining services*** are services provided by, or on behalf of, an industrial association in relation to an enterprise agreement, or a proposed enterprise agreement (including in relation to bargaining for, or the making, approval, operation, variation or termination of, the enterprise agreement, or proposed enterprise agreement).

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Exception for fees payable under contract

(4) Subsection (1) does not apply if the fee is payable to the industrial association under a contract for the provision of bargaining services.

354 Coverage by particular instruments

(1) A person must not discriminate against an employer because:
  (a) employees of the employer are covered, or not covered, by:
    (i) provisions of the National Employment Standards; or
    (ii) a particular type of workplace instrument (including a particular kind of workplace instrument within a type of workplace instrument); or
    (iii) an enterprise agreement that does, or does not, cover an employee organisation, or a particular employee organisation; or
  (b) it is proposed that employees of the employer be covered, or not be covered, by:
    (i) a particular type of workplace instrument (including a particular kind of workplace instrument within a type of workplace instrument); or
    (ii) an enterprise agreement that does, or does not, cover an employee organisation, or a particular employee organisation.

Note: This subsection is a civil remedy provision (see Part 4-1).

(2) Subsection (1) does not apply to protected industrial action.

355 Coercion—allocation of duties etc. to particular person

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, to:
  (a) employ, or not employ, a particular person; or
  (b) engage, or not engage, a particular independent contractor; or

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(c) allocate, or not allocate, particular duties or responsibilities to a particular employee or independent contractor; or

(d) designate a particular employee or independent contractor as having, or not having, particular duties or responsibilities.

Note: This section is a civil remedy provision (see Part 4-1).

356 Objectionable terms

A term of a workplace instrument, or an agreement or arrangement (whether written or unwritten), has no effect to the extent that it is an objectionable term.

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Division 6—Sham arrangements

357 Misrepresenting employment as independent contracting arrangement

(1) A person (the ***employer***) that employs, or proposes to employ, an individual must not represent to the individual that the contract of employment under which the individual is, or would be, employed by the employer is a contract for services under which the individual performs, or would perform, work as an independent contractor.

Note: This subsection is a civil remedy provision (see Part 4-1).

(2) Subsection (1) does not apply if the employer proves that, when the representation was made, the employer:

(a) did not know; and

(b) was not reckless as to whether;

the contract was a contract of employment rather than a contract for services.

358 Dismissing to engage as independent contractor

An employer must not dismiss, or threaten to dismiss, an individual who:

(a) is an employee of the employer; and

(b) performs particular work for the employer;

in order to engage the individual as an independent contractor to perform the same, or substantially the same, work under a contract for services.

Note: This section is a civil remedy provision (see Part 4-1).

359 Misrepresentation to engage as independent contractor

A person (the ***employer***) that employs, or has at any time employed, an individual to perform particular work must not make a statement that the employer knows is false in order to persuade or

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influence the individual to enter into a contract for services under which the individual will perform, as an independent contractor, the same, or substantially the same, work for the employer.

Note: This section is a civil remedy provision (see Part 4-1).

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Division 7—Ancillary rules

360 Multiple reasons for action

For the purposes of this Part, a person takes action for a particular reason if the reasons for the action include that reason.

361 Reason for action to be presumed unless proved otherwise

(1) If:
  (a) in an application in relation to a contravention of this Part, it is alleged that a person took, or is taking, action for a particular reason or with a particular intent; and
  (b) taking that action for that reason or with that intent would constitute a contravention of this Part;

it is presumed that the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise.

(2) Subsection (1) does not apply in relation to orders for an interim injunction.

362 Advising, encouraging, inciting or coercing action

(1) If:
  (a) for a particular reason (the ***first person's reason***), a person advises, encourages or incites, or takes any action with intent to coerce, a second person to take action; and
  (b) the action, if taken by the second person for the first person's reason, would contravene a provision of this Part;

the first person is taken to have contravened the provision.

(2) Subsection (1) does not limit section 550.

363 Actions of industrial associations

(1) For the purposes of this Part, each of the following is taken to be action of an industrial association:

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(a) action taken by the committee of management of the industrial association;
(b) action taken by an officer or agent of the industrial association acting in that capacity;
(c) action taken by a member, or group of members, of the industrial association if the action 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) action taken by 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;
(e) if the industrial association is an unincorporated industrial association that does not have a committee of management—action taken by a member, or group of members, of the industrial association.

(2) Paragraphs (1)(c) and (d) do not apply if:
  (a) the 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 all reasonable steps to prevent the action.

(3) If, for the purposes of this Part, it is necessary to establish the state of mind of an industrial association in relation to particular action, it is enough to show:
  (a) that the action was taken by a person, or a group, referred to in paragraphs (1)(a) to (e); and
  (b) that the person, or a person in the group, had that state of mind.

(4) Subsections (1) to (3) have effect despite subsections 793(1) and (2) (which deal with liabilities of bodies corporate).

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364 Unincorporated industrial associations

Person includes unincorporated industrial association

(1) For the purposes of this Part, a reference to a person includes a reference to an unincorporated industrial association.

Liability for contraventions by unincorporated industrial associations

(2) A contravention of this Part that would otherwise be committed by an unincorporated industrial association is taken to have been committed by each member, officer or agent of the industrial association who:
   (a) took, or took part in, the relevant action; and
   (b) did so with the relevant state of mind.

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Division 8—Compliance

Subdivision A—Contraventions involving dismissal

365 Application for the FWC to deal with a dismissal dispute

If:

(a) a person has been dismissed; and

(b) the person, or an industrial association that is entitled to represent the industrial interests of the person, alleges that the person was dismissed in contravention of this Part;

the person, or the industrial association, may apply to the FWC for the FWC to deal with the dispute.

366 Time for application

(1) An application under section 365 must be made:

(a) within 21 days after the dismissal took effect; or

(b) within such further period as the FWC allows under subsection (2).

(2) The FWC may allow a further period if the FWC is satisfied that there are exceptional circumstances, taking into account:

(a) the reason for the delay; and

(b) any action taken by the person to dispute the dismissal; and

(c) prejudice to the employer (including prejudice caused by the delay); and

(d) the merits of the application; and

(e) fairness as between the person and other persons in a like position.

367 Application fees

(1) The application must be accompanied by any fee prescribed by the regulations.

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(2) The regulations may prescribe:
  (a) a fee for making an application to the FWC under section 365; and
  (b) a method for indexing the fee; and
  (c) the circumstances in which all or part of the fee may be waived or refunded.

368 Dealing with a dismissal dispute (other than by arbitration)

(1) If an application is made under section 365, the FWC must deal with the dispute (other than by arbitration).

Note: The FWC may deal with a dispute by mediation or conciliation, or by making a recommendation or expressing an opinion (see subsection 595(2)). One of the recommendations that the FWC might make is that an application be made under Part 3-2 (which deals with unfair dismissal) in relation to the dispute.

(2) Any conference conducted for the purposes of dealing with the dispute (other than by arbitration) must be conducted in private, despite subsection 592(3).

Note: For conferences, see section 592.

(3) If the FWC is satisfied that all reasonable attempts to resolve the dispute (other than by arbitration) have been, or are likely to be, unsuccessful, then:
  (a) the FWC must issue a certificate to that effect; and
  (b) if the FWC considers, taking into account all the materials before it, that arbitration under section 369, or a general protections court application, in relation to the dispute would not have a reasonable prospect of success, the FWC must advise the parties accordingly.

(4) A ***general protections court application*** is an application to a court under Division 2 of Part 4-1 for orders in relation to a contravention of this Part.

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369 Dealing with a dismissal dispute by arbitration

(1) This section applies if:
  (a) the FWC issues a certificate under paragraph 368(3)(a) in relation to the dispute; and
  (b) the parties notify the FWC that they agree to the FWC arbitrating the dispute; and
  (c) the notification:
    (i) is given to the FWC within 14 days after the day the certificate is issued, or within such period as the FWC allows on an application made during or after those 14 days; and
    (ii) complies with any requirements prescribed by the procedural rules; and
  (d) sections 726, 728, 729, 730, 731 and 732 do not apply.

Note: Sections 726, 728, 729, 730, 731 and 732 prevent multiple applications or complaints of a kind referred to in those sections from being made in relation to the same dispute. A notification can only be made under this section where there is no such other application or complaint in relation to the dispute at the time the notification is made. Generally, once a notification is made no such application or complaint can be made in relation to the dispute (see section 727).

(2) The FWC may deal with the dispute by arbitration, including by making one or more of the following orders:
  (a) an order for reinstatement of the person;
  (b) an order for the payment of compensation to the person;
  (c) an order for payment of an amount to the person for remuneration lost;
  (d) an order to maintain the continuity of the person's employment;
  (e) an order to maintain the period of the person's continuous service with the employer.

(3) A person to whom an order under subsection (2) applies must not contravene a term of the order.

Note: This subsection is a civil remedy provision (see Part 4-1).

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370 Taking a dismissal dispute to court

A person who is entitled to apply under section 365 for the FWC to deal with a dispute must not make a general protections court application in relation to the dispute unless:

(a) both of the following apply:

(i) the FWC has issued a certificate under paragraph 368(3)(a) in relation to the dispute;

(ii) the general protections court application is made within 14 days after the day the certificate is issued, or within such period as the court allows on an application made during or after those 14 days; or

(b) the general protections court application includes an application for an interim injunction.

Note 1: Generally, if the parties notify the FWC that they agree to the FWC arbitrating the dispute (see subsection 369(1)), a general protections court application cannot be made in relation to the dispute (see sections 727 and 728).

Note 2: For the purposes of subparagraph (a)(ii), in *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298, the Industrial Relations Court of Australia set down principles relating to the exercise of its discretion under a similarly worded provision of the *Industrial Relations Act 1988*.

Subdivision B—Other contraventions

372 Application for the FWC to deal with a non-dismissal dispute

If:

(a) a person alleges a contravention of this Part; and

(b) the person is not entitled to apply to the FWC under section 365 for the FWC to deal with the dispute;

the person may apply to the FWC under this section for the FWC to deal with the dispute.

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373 Application fees

(1) The application must be accompanied by any fee prescribed by the regulations.

(2) The regulations may prescribe:
  (a) a fee for making an application to the FWC under section 372; and
  (b) a method for indexing the fee; and
  (c) the circumstances in which all or part of the fee may be waived or refunded.

374 Conferences

(1) If:
  (a) an application is made under section 372; and
  (b) the parties to the dispute agree to participate;

the FWC must conduct a conference to deal with the dispute.

Note 1: For conferences, see section 592.

Note 2: The FWC may deal with a dispute by mediation or conciliation, or by making a recommendation or expressing an opinion (see subsection 595(2)).

(2) Despite subsection 592(3), the FWC must conduct the conference in private.

375 Advice on general protections court application

If the FWC considers, taking into account all the materials before it, that a general protections court application in relation to the dispute would not have a reasonable prospect of success, it must advise the parties accordingly.

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Subdivision C—Appeals and costs orders

375A Appeal rights

(1) Despite subsection 604(2), the FWC must not grant permission to appeal from a decision made by the FWC under subsection 369(2) (which is about arbitration of a dismissal dispute) unless the FWC considers that it is in the public interest to do so.

(2) Despite subsection 604(1), an appeal from a decision made by the FWC in relation to a matter arising under subsection 369(2) can only, to the extent that it is an appeal on a question of fact, be made on the ground that the decision involved a significant error of fact.

375B Costs orders against parties

(1) The FWC may make an order for costs against a party (the ***first party***) to a dispute for costs incurred by the other party to the dispute if:
   (a) an application for the FWC to deal with the dispute has been made under section 365; and
   (b) the FWC is satisfied that the first party caused those costs to be incurred because of an unreasonable act or omission of the first party in connection with the conduct or continuation of the dispute.

(2) The FWC may make an order under subsection (1) only if the other party to the dispute has applied for it in accordance with section 377.

(3) This section does not limit the FWC's power to order costs under section 611.

376 Costs orders against lawyers and paid agents

(1) This section applies if:
   (a) an application for the FWC to deal with a dispute has been made under section 365 or 372; and

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(b) a person who is a party to the dispute has engaged a lawyer or paid agent (the ***representative***) to represent the person in the dispute; and

(c) under section 596, the person is required to seek the FWC's permission to be represented by the representative.

(2) The FWC may make an order for costs against the representative for costs incurred by the other party to the dispute if the FWC is satisfied that the representative caused those costs to be incurred because:

(a) the representative encouraged the person to start, continue or respond to the dispute and it should have been reasonably apparent that the person had no reasonable prospect of success in the dispute; or

(b) of an unreasonable act or omission of the representative in connection with the conduct or continuation of the dispute.

(3) The FWC may make an order under this section only if the other party to the dispute has applied for it in accordance with section 377.

(4) This section does not limit the FWC's power to order costs under section 611.

377 Applications for costs orders

An application for an order for costs in relation to an application under section 365 or 372 must be made within 14 days after the FWC finishes dealing with the dispute.

377A Schedule of costs

(1) A schedule of costs may be prescribed in relation to items of expenditure likely to be incurred in relation to matters that can be covered by an order under section 611, 375B or 376 in relation to an application under section 365, including expenses arising from the representation of a party by a person or organisation other than on a legal professional basis.

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(2) If a schedule of costs is prescribed for the purposes of subsection (1), then, in awarding costs under section 611, 375B or 376 in relation to an application under section 365, the FWC:
   (a) is not limited to the items of expenditure appearing in the schedule; but
   (b) if an item does appear in the schedule—must not award costs in relation to that item at a rate or of an amount that exceeds the rate or amount appearing in the schedule.

378 Contravening costs orders

A person to whom an order for costs made under section 375B or 376 applies must not contravene a term of the order.

Note: This section is a civil remedy provision (see Part 4-1).

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Part 3-2—Unfair dismissal

Division 1—Introduction

379 Guide to this Part

This Part is about the unfair dismissal of national system employees, and the granting of remedies for unfair dismissal.

Division 2 sets out when a person is protected from unfair dismissal.

Division 3 sets out the elements that make up an unfair dismissal.

Division 4 sets out the remedies the FWC can grant for unfair dismissal.

Division 5 is about the procedural aspects of getting remedies for unfair dismissal.

380 Meanings of *employee* and *employer*

In this Part, ***employee*** means a national system employee, and ***employer*** means a national system employer.

Note: See also Division 2 of Part 6-4A (TCF contract outworkers taken to be employees in certain circumstances).

381 Object of this Part

(1) The object of this Part is:
  (a) to establish a framework for dealing with unfair dismissal that balances:
    (i) the needs of business (including small business); and
    (ii) the needs of employees; and
  (b) to establish procedures for dealing with unfair dismissal that:

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(i) are quick, flexible and informal; and

(ii) address the needs of employers and employees; and

(c) to provide remedies if a dismissal is found to be unfair, with an emphasis on reinstatement.

(2) The procedures and remedies referred to in paragraphs (1)(b) and (c), and the manner of deciding on and working out such remedies, are intended to ensure that a "fair go all round" is accorded to both the employer and employee concerned.

Note: The expression "fair go all round" was used by Sheldon J in *in re Loty and Holloway v Australian Workers' Union* [1971] AR (NSW) 95.

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Division 2—Protection from unfair dismissal

382 When a person is protected from unfair dismissal

A person is ***protected from unfair dismissal*** at a time if, at that time:

(a) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and

(b) one or more of the following apply:

(i) a modern award covers the person;

(ii) an enterprise agreement applies to the person in relation to the employment;

(iii) the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold.

383 Meaning of *minimum employment period*

The ***minimum employment period*** is:

(a) if the employer is not a small business employer—6 months ending at the earlier of the following times:

(i) the time when the person is given notice of the dismissal;

(ii) immediately before the dismissal; or

(b) if the employer is a small business employer—one year ending at that time.

384 Period of employment

(1) An employee's ***period of employment*** with an employer at a particular time is the period of continuous service the employee has completed with the employer at that time as an employee.

(2) However:

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(a) a period of service as a casual employee does not count towards the employee's period of employment unless:
  (i) the employment as a casual employee was on a regular and systematic basis; and
  (ii) during the period of service as a casual employee, the employee had a reasonable expectation of continuing employment by the employer on a regular and systematic basis; and

(b) if:
  (i) the employee is a transferring employee in relation to a transfer of business from an old employer to a new employer; and
  (ii) the old employer and the new employer are not associated entities when the employee becomes employed by the new employer; and
  (iii) the new employer informed the employee in writing before the new employment started that a period of service with the old employer would not be recognised;

the period of service with the old employer does not count towards the employee's period of employment with the new employer.

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Division 3—What is an unfair dismissal

385 What is an unfair dismissal

A person has been ***unfairly dismissed*** if the FWC is satisfied that:

(a) the person has been dismissed; and

(b) the dismissal was harsh, unjust or unreasonable; and

(c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and

(d) the dismissal was not a case of genuine redundancy.

Note: For the definition of ***consistent with the Small Business Fair Dismissal Code***: see section 388.

386 Meaning of *dismissed*

(1) A person has been ***dismissed*** if:

(a) the person's employment with his or her employer has been terminated on the employer's initiative; or

(b) the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer.

(2) However, a person has not been ***dismissed*** if:

(a) the person was employed under a contract of employment for a specified period of time, for a specified task, or for the duration of a specified season, and the employment has terminated at the end of the period, on completion of the task, or at the end of the season; or

(b) the person was an employee:

(i) to whom a training arrangement applied; and

(ii) whose employment was for a specified period of time or was, for any reason, limited to the duration of the training arrangement;

and the employment has terminated at the end of the training arrangement; or

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(c) the person was demoted in employment but:
  (i) the demotion does not involve a significant reduction in his or her remuneration or duties; and
  (ii) he or she remains employed with the employer that effected the demotion.

(3) Subsection (2) does not apply to a person employed under a contract of a kind referred to in paragraph (2)(a) if a substantial purpose of the employment of the person under a contract of that kind is, or was at the time of the person's employment, to avoid the employer's obligations under this Part.

387 Criteria for considering harshness etc.

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:

(a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and
(b) whether the person was notified of that reason; and
(c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
(d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
(e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and
(f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
(g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
(h) any other matters that the FWC considers relevant.

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388 The Small Business Fair Dismissal Code

(1) The Minister may, by legislative instrument, declare a Small Business Fair Dismissal Code.

(2) A person's dismissal was ***consistent with the Small Business Fair Dismissal Code*** if:
   (a) immediately before the time of the dismissal or at the time the person was given notice of the dismissal (whichever happened first), the person's employer was a small business employer; and
   (b) the employer complied with the Small Business Fair Dismissal Code in relation to the dismissal.

389 Meaning of *genuine redundancy*

(1) A person's dismissal was a case of ***genuine redundancy*** if:
   (a) the person's employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and
   (b) the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.

(2) A person's dismissal was not a case of ***genuine redundancy*** if it would have been reasonable in all the circumstances for the person to be redeployed within:
   (a) the employer's enterprise; or
   (b) the enterprise of an associated entity of the employer.

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Division 4—Remedies for unfair dismissal

390 When the FWC may order remedy for unfair dismissal

(1) Subject to subsection (3), the FWC may order a person's reinstatement, or the payment of compensation to a person, if:
  (a) the FWC is satisfied that the person was protected from unfair dismissal (see Division 2) at the time of being dismissed; and
  (b) the person has been unfairly dismissed (see Division 3).

(2) The FWC may make the order only if the person has made an application under section 394.

(3) The FWC must not order the payment of compensation to the person unless:
  (a) the FWC is satisfied that reinstatement of the person is inappropriate; and
  (b) the FWC considers an order for payment of compensation is appropriate in all the circumstances of the case.

Note: Division 5 deals with procedural matters such as applications for remedies.

391 Remedy—reinstatement etc.

Reinstatement

(1) An order for a person's reinstatement must be an order that the person's employer at the time of the dismissal reinstate the person by:
  (a) reappointing the person to the position in which the person was employed immediately before the dismissal; or
  (b) appointing the person to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal.

(1A) If:

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(a) the position in which the person was employed immediately before the dismissal is no longer a position with the person's employer at the time of the dismissal; and

(b) that position, or an equivalent position, is a position with an associated entity of the employer;

the order under subsection (1) may be an order to the associated entity to:

(c) appoint the person to the position in which the person was employed immediately before the dismissal; or

(d) appoint the person to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal.

Order to maintain continuity

(2) If the FWC makes an order under subsection (1) and considers it appropriate to do so, the FWC may also make any order that the FWC considers appropriate to maintain the following:

(a) the continuity of the person's employment;

(b) the period of the person's continuous service with the employer, or (if subsection (1A) applies) the associated entity.

Order to restore lost pay

(3) If the FWC makes an order under subsection (1) and considers it appropriate to do so, the FWC may also make any order that the FWC considers appropriate to cause the employer to pay to the person an amount for the remuneration lost, or likely to have been lost, by the person because of the dismissal.

(4) In determining an amount for the purposes of an order under subsection (3), the FWC must take into account:

(a) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for reinstatement; and

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(b) the amount of any remuneration reasonably likely to be so earned by the person during the period between the making of the order for reinstatement and the actual reinstatement.

392 Remedy—compensation

Compensation

(1) An order for the payment of compensation to a person must be an order that the person's employer at the time of the dismissal pay compensation to the person in lieu of reinstatement.

Criteria for deciding amounts

(2) In determining an amount for the purposes of an order under subsection (1), the FWC must take into account all the circumstances of the case including:

(a) the effect of the order on the viability of the employer's enterprise; and

(b) the length of the person's service with the employer; and

(c) the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed; and

(d) the efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal; and

(e) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation; and

(f) the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation; and

(g) any other matter that the FWC considers relevant.

Misconduct reduces amount

(3) If the FWC is satisfied that misconduct of a person contributed to the employer's decision to dismiss the person, the FWC must

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reduce the amount it would otherwise order under subsection (1) by an appropriate amount on account of the misconduct.

Shock, distress etc. disregarded

(4) The amount ordered by the FWC to be paid to a person under subsection (1) must not include a component by way of compensation for shock, distress or humiliation, or other analogous hurt, caused to the person by the manner of the person's dismissal.

Compensation cap

(5) The amount ordered by the FWC to be paid to a person under subsection (1) must not exceed the lesser of:
  (a) the amount worked out under subsection (6); and
  (b) half the amount of the high income threshold immediately before the dismissal.

(6) The amount is the total of the following amounts:
  (a) the total amount of remuneration:
    (i) received by the person; or
    (ii) to which the person was entitled;

  (whichever is higher) for any period of employment with the employer during the 26 weeks immediately before the dismissal; 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.

393 Monetary orders may be in instalments

To avoid doubt, an order by the FWC under subsection 391(3) or 392(1) may permit the employer concerned to pay the amount required in instalments specified in the order.

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Division 5—Procedural matters

394 Application for unfair dismissal remedy

(1) A person who has been dismissed may apply to the FWC for an order under Division 4 granting a remedy.

Note 1: Division 4 sets out when the FWC may order a remedy for unfair dismissal.

Note 2: For application fees, see section 395.

Note 3: Part 6-1 may prevent an application being made under this Part in relation to a dismissal if an application or complaint has been made in relation to the dismissal other than under this Part.

(2) The application must be made:
  (a) within 21 days after the dismissal took effect; or
  (b) within such further period as the FWC allows under subsection (3).

(3) The FWC may allow a further period for the application to be made by a person under subsection (1) if the FWC is satisfied that there are exceptional circumstances, taking into account:
  (a) the reason for the delay; and
  (b) whether the person first became aware of the dismissal after it had taken effect; and
  (c) any action taken by the person to dispute the dismissal; and
  (d) prejudice to the employer (including prejudice caused by the delay); and
  (e) the merits of the application; and
  (f) fairness as between the person and other persons in a similar position.

395 Application fees

(1) An application to the FWC under this Division must be accompanied by any fee prescribed by the regulations.

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(2) The regulations may prescribe:
  (a) a fee for making an application to the FWC under this Division; and
  (b) a method for indexing the fee; and
  (c) the circumstances in which all or part of the fee may be waived or refunded.

396 Initial matters to be considered before merits

The FWC must decide the following matters relating to an application for an order under Division 4 before considering the merits of the application:
  (a) whether the application was made within the period required in subsection 394(2);
  (b) whether the person was protected from unfair dismissal;
  (c) whether the dismissal was consistent with the Small Business Fair Dismissal Code;
  (d) whether the dismissal was a case of genuine redundancy.

397 Matters involving contested facts

The FWC must conduct a conference or hold a hearing in relation to a matter arising under this Part if, and to the extent that, the matter involves facts the existence of which is in dispute.

398 Conferences

(1) This section applies in relation to a matter arising under this Part if the FWC conducts a conference in relation to the matter.

(2) Despite subsection 592(3), the FWC must conduct the conference in private.

(3) The FWC must take into account any difference in the circumstances of the parties to the matter in:
  (a) considering the application; and
  (b) informing itself in relation to the application.

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(4) The FWC must take into account the wishes of the parties to the matter as to the way in which the FWC:
  (a) considers the application; and
  (b) informs itself in relation to the application.

399 Hearings

(1) The FWC must not hold a hearing in relation to a matter arising under this Part unless the FWC considers it appropriate to do so, taking into account:
  (a) the views of the parties to the matter; and
  (b) whether a hearing would be the most effective and efficient way to resolve the matter.

(2) If the FWC holds a hearing in relation to a matter arising under this Part, it may decide not to hold the hearing in relation to parts of the matter.

(3) The FWC may decide at any time (including before, during or after conducting a conference in relation to a matter) to hold a hearing in relation to the matter.

399A Dismissing applications

(1) The FWC may, subject to subsection (2), dismiss an application for an order under Division 4 if the FWC is satisfied that the applicant has unreasonably:
  (a) failed to attend a conference conducted by the FWC, or a hearing held by the FWC, in relation to the application; or
  (b) failed to comply with a direction or order of the FWC relating to the application; or
  (c) failed to discontinue the application after a settlement agreement has been concluded.

Note 1: For another power of the FWC to dismiss applications for orders under Division 4, see section 587.

Note 2: The FWC may make an order for costs if the applicant's failure causes the other party to the matter to incur costs (see section 400A).

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(2) The FWC may exercise its power under subsection (1) on application by the employer.

(3) This section does not limit when the FWC may dismiss an application.

400 Appeal rights

(1) Despite subsection 604(2), the FWC must not grant permission to appeal from a decision made by the FWC under this Part unless the FWC considers that it is in the public interest to do so.

(2) Despite subsection 604(1), an appeal from a decision made by the FWC in relation to a matter arising under this Part can only, to the extent that it is an appeal on a question of fact, be made on the ground that the decision involved a significant error of fact.

400A Costs orders against parties

(1) The FWC may make an order for costs against a party to a matter arising under this Part (the ***first party***) for costs incurred by the other party to the matter if the FWC is satisfied that the first party caused those costs to be incurred because of an unreasonable act or omission of the first party in connection with the conduct or continuation of the matter.

(2) The FWC may make an order under subsection (1) only if the other party to the matter has applied for it in accordance with section 402.

(3) This section does not limit the FWC's power to order costs under section 611.

401 Costs orders against lawyers and paid agents

(1) This section applies if:

(a) an application for an unfair dismissal remedy has been made under section 394; and

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(b) a person who is a party to the matter has engaged a lawyer or paid agent (the ***representative***) to represent the person in the matter; and

(c) under section 596, the person is required to seek the FWC's permission to be represented by the representative.

(1A) The FWC may make an order for costs against the representative for costs incurred by the other party to the matter if the FWC is satisfied that the representative caused those costs to be incurred because:

(a) the representative encouraged the person to start, continue or respond to the matter and it should have been reasonably apparent that the person had no reasonable prospect of success in the matter; or

(b) of an unreasonable act or omission of the representative in connection with the conduct or continuation of the matter.

(2) The FWC may make an order under this section only if the other party to the matter has applied for it in accordance with section 402.

(3) This section does not limit the FWC's power to order costs under section 611.

402 Applications for costs orders

An application for an order for costs under section 611 in relation to a matter arising under this Part, or for costs under section 400A or 401, must be made within 14 days after:

(a) the FWC determines the matter; or

(b) the matter is discontinued.

403 Schedule of costs

(1) A schedule of costs may be prescribed in relation to items of expenditure likely to be incurred in relation to matters that can be covered by an order:

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(a) under section 611 in relation to a matter arising under this Part; or

(b) under section 400A or 401;

including expenses arising from the representation of a party by a person or organisation other than on a legal professional basis.

(2) If a schedule of costs is prescribed for the purposes of subsection (1), then, in awarding costs under section 611 in relation to a matter arising under this Part, or awarding costs under section 400A or 401, the FWC:

(a) is not limited to the items of expenditure appearing in the schedule; but

(b) if an item does appear in the schedule—must not award costs in relation to that item at a rate or of an amount that exceeds the rate or amount appearing in the schedule.

404 Security for costs

The procedural rules may provide for the furnishing of security for the payment of costs in relation to matters arising under this Part.

405 Contravening orders under this Part

A person to whom an order under this Part applies must not contravene a term of the order.

Note: This section is a civil remedy provision (see Part 4-1).

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Part 3-3—Industrial action

Division 1—Introduction

406 Guide to this Part

This Part deals mainly with industrial action by national system employees and national system employers.

Division 2 sets out when industrial action for a proposed enterprise agreement is protected industrial action. No action lies under any law in force in a State or Territory in relation to protected industrial action except in certain circumstances.

Division 3 provides that industrial action must not be organised or engaged in by certain persons before the nominal expiry date of an enterprise agreement or workplace determination has passed.

Division 4 provides for the FWC to make orders, in certain circumstances, that industrial action stop, not occur or not be organised for a specified period.

Division 5 deals with injunctions against industrial action if a bargaining representative of an employee who will be covered by a proposed enterprise agreement is engaging in pattern bargaining.

Division 6 provides for the FWC to make orders suspending or terminating protected industrial action for a proposed enterprise agreement in certain circumstances. If the FWC makes such an order, the action will no longer be protected industrial action.

Division 7 provides for the Minister to make a declaration terminating protected industrial action for a proposed enterprise agreement in certain circumstances. If the Minister makes such an order, the action will no longer be protected industrial action.

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Division 8 establishes the process that will allow employees to choose, by means of a fair and democratic secret ballot, whether to authorise protected industrial action for a proposed enterprise agreement.

Division 9 sets out restrictions about payments to employees relating to periods of industrial action.

Division 10 deals with the making of applications under this Part.

407 Meanings of *employee* and *employer*

In this Part, ***employee*** means a national system employee, and ***employer*** means a national system employer.

Note: See also Division 2 of Part 6-4A (TCF contract outworkers taken to be employees in certain circumstances).

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Division 2—Protected industrial action

Subdivision A—What is protected industrial action

408 Protected industrial action

Industrial action is ***protected industrial action*** for a proposed enterprise agreement if it is one of the following:

(a) employee claim action for the agreement (see section 409);

(b) employee response action for the agreement (see section 410);

(c) employer response action for the agreement (see section 411).

409 Employee claim action

Employee claim action

(1) ***Employee claim action*** for a proposed enterprise agreement is industrial action that:

(a) is organised or engaged in for the purpose of supporting or advancing claims in relation to the agreement that are only about, or are reasonably believed to only be about, permitted matters; and

(b) is organised or engaged in, against an employer that will be covered by the agreement, by:

(i) a bargaining representative of an employee who will be covered by the agreement; or

(ii) an employee who is included in a group or groups of employees specified in a protected action ballot order for the industrial action; and

(c) meets the common requirements set out in Subdivision B; and

(d) meets the additional requirements set out in this section.

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Protected action ballot is necessary

(2) The industrial action must be authorised by a protected action ballot (see Division 8 of this Part).

Unlawful terms

(3) The industrial action must not be in support of, or to advance, claims to include unlawful terms in the agreement.

Industrial action must not be part of pattern bargaining

(4) A bargaining representative of an employee who will be covered by the agreement must not be engaging in pattern bargaining in relation to the agreement.

Industrial action must not relate to a demarcation dispute etc.

(5) The industrial action must not, if it is being organised or engaged in by a bargaining representative, relate to a significant extent to a demarcation dispute or contravene an FWC order that relates to a significant extent to a demarcation dispute.

Notice requirements after suspension order must be met

(6) If section 429 (which deals with employee claim action without a further protected action ballot after a period of suspension) applies in relation to the industrial action, the notice requirements of section 430 must be met.

Officer of an employee organisation

(7) If an employee organisation is a bargaining representative of an employee who will be covered by the agreement, the reference to a bargaining representative of the employee in subparagraph (1)(b)(i) of this section includes a reference to an officer of the organisation.

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410 Employee response action

Employee response action

(1) ***Employee response action*** for a proposed enterprise agreement means industrial action that:
  (a) is organised or engaged in as a response to industrial action by an employer; and
  (b) is organised or engaged in, against an employer that will be covered by the agreement, by:
    (i) a bargaining representative of an employee who will be covered by the agreement; or
    (ii) an employee who will be covered by the agreement; and
  (c) meets the common requirements set out in Subdivision B; and
  (d) meets the additional requirements set out in this section.

Industrial action must not relate to a demarcation dispute etc.

(2) The industrial action must not, if it is being organised or engaged in by a bargaining representative, relate to a significant extent to a demarcation dispute or contravene an FWC order that relates to a significant extent to a demarcation dispute.

Officer of an employee organisation

(3) If an employee organisation is a bargaining representative of an employee who will be covered by the agreement, the reference to a bargaining representative of the employee in subparagraph (1)(b)(i) includes a reference to an officer of the organisation.

411 Employer response action

Employer response action for a proposed enterprise agreement means industrial action that:
  (a) is organised or engaged in as a response to industrial action by:

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(i) a bargaining representative of an employee who will be covered by the agreement; or
(ii) an employee who will be covered by the agreement; and
(b) is organised or engaged in by an employer that will be covered by the agreement against one or more employees that will be covered by the agreement; and
(c) meets the common requirements set out in Subdivision B.

412 Pattern bargaining

Pattern bargaining

(1) A course of conduct by a person is ***pattern bargaining*** if:
(a) the person is a bargaining representative for 2 or more proposed enterprise agreements; and
(b) the course of conduct involves seeking common terms to be included in 2 or more of the agreements; and
(c) the course of conduct relates to 2 or more employers.

Exception—genuinely trying to reach an agreement

(2) The course of conduct, to the extent that it relates to a particular employer, is not pattern bargaining if the bargaining representative is genuinely trying to reach an agreement with that employer.

(3) For the purposes of subsection (2), the factors relevant to working out whether a bargaining representative is genuinely trying to reach an agreement with a particular employer, include the following:
(a) whether the bargaining representative is demonstrating a preparedness to bargain for the agreement taking into account the individual circumstances of that employer, including in relation to the nominal expiry date of the agreement;
(b) whether the bargaining representative is bargaining in a manner consistent with the terms of the agreement being determined as far as possible by agreement between that employer and its employees;

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(c) whether the bargaining representative is meeting the good faith bargaining requirements.

(4) If a person seeks to rely on subsection (2), the person has the burden of proving that the subsection applies.

Genuinely trying to reach an agreement

(5) This section does not affect, and is not affected by, the meaning of the expression "genuinely trying to reach an agreement", or any variant of the expression, as used elsewhere in this Act.

Subdivision B—Common requirements for industrial action to be protected industrial action

413 Common requirements that apply for industrial action to be protected industrial action

Common requirements

(1) This section sets out the ***common requirements*** for industrial action to be protected industrial action for a proposed enterprise agreement.

Type of proposed enterprise agreement

(2) The industrial action must not relate to a proposed enterprise agreement that is a greenfields agreement or multi-enterprise agreement.

Genuinely trying to reach an agreement

(3) The following persons must be genuinely trying to reach an agreement:

(a) if the person organising or engaging in the industrial action is a bargaining representative for the agreement—the bargaining representative;

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(b) if the person organising or engaging in the industrial action is an employee who will be covered by the agreement—the bargaining representative of the employee.

Notice requirements

(4) The notice requirements set out in section 414 must have been met in relation to the industrial action.

Compliance with orders

(5) The following persons must not have contravened any orders that apply to them and that relate to, or relate to industrial action relating to, the agreement or a matter that arose during bargaining for the agreement:
   (a) if the person organising or engaging in the industrial action is a bargaining representative for the agreement—the bargaining representative;
   (b) if the person organising or engaging in the industrial action is an employee who will be covered by the agreement—the employee and the bargaining representative of the employee.

No industrial action before an enterprise agreement etc. passes its nominal expiry date

(6) The person organising or engaging in the industrial action must not contravene section 417 (which deals with industrial action before the nominal expiry date of an enterprise agreement etc.) by organising or engaging in the industrial action.

No suspension or termination order is in operation etc.

(7) None of the following must be in operation:
   (a) an order under Division 6 of this Part suspending or terminating industrial action in relation to the agreement;
   (b) a Ministerial declaration under subsection 431(1) terminating industrial action in relation to the agreement;
   (c) a serious breach declaration in relation to the agreement.

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414 Notice requirements for industrial action

Notice requirements—employee claim action

(1) Before a person engages in employee claim action for a proposed enterprise agreement, a bargaining representative of an employee who will be covered by the agreement must give written notice of the action to the employer of the employee.

(2) The period of notice must be at least:
  (a) 3 working days; or
  (b) if a protected action ballot order for the employee claim action specifies a longer period of notice for the purposes of this paragraph—that period of notice.

Notice of employee claim action not to be given until ballot results declared

(3) A notice under subsection (1) must not be given until after the results of the protected action ballot for the employee claim action have been declared.

Notice requirements—employee response action

(4) Before a person engages in employee response action for a proposed enterprise agreement, a bargaining representative of an employee who will be covered by the agreement must give written notice of the action to the employer of the employee.

Notice requirements—employer response action

(5) Before an employer engages in employer response action for a proposed enterprise agreement, the employer must:
  (a) give written notice of the action to each bargaining representative of an employee who will be covered by the agreement; and
  (b) take all reasonable steps to notify the employees who will be covered by the agreement of the action.

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Notice requirements—content

(6) A notice given under this section must specify the nature of the action and the day on which it will start.

Subdivision C—Significance of industrial action being protected industrial action

415 Immunity provision

(1) No action lies under any law (whether written or unwritten) in force in a State or Territory in relation to any industrial action that is protected industrial 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) However, subsection (1) does not prevent an action for defamation being brought in relation to anything that occurred in the course of industrial action.

416 Employer response action—employer may refuse to make payments to employees

If an employer engages in employer response action against employees, the employer may refuse to make payments to the employees in relation to the period of the action.

Note: If an employee engages in protected industrial action against his or her employer, the employer must not make a payment to an employee in relation to certain periods of action (see Subdivision A of Division 9 of this Part).

416A Employer response action does not affect continuity of employment

Employer response action for a proposed enterprise agreement does not affect the continuity of employment of the employees who

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will be covered by the agreement, for such purposes as are prescribed by the regulations.

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Division 3—No industrial action before nominal expiry date of enterprise agreement etc.

417 Industrial action must not be organised or engaged in before nominal expiry date of enterprise agreement etc.

No industrial action

(1) A person referred to in subsection (2) must not organise or engage in industrial action from the day on which:
   (a) an enterprise agreement is approved by the FWC until its nominal expiry date has passed; or
   (b) a workplace determination comes into operation until its nominal expiry date has passed;

   whether or not the industrial action relates to a matter dealt with in the agreement or determination.

   Note: This subsection is a civil remedy provision (see Part 4-1).

(2) The persons are:
   (a) an employer, employee, or employee organisation, who is covered by the agreement or determination; or
   (b) an officer of an employee organisation that is covered by the agreement or determination, acting in that capacity.

Injunctions and other orders

(3) If a person contravenes subsection (1), the Federal Court or Federal Circuit Court may do either or both of the following:
   (a) grant an injunction under this subsection;
   (b) make any other order under subsection 545(1);

   that the court considers necessary to stop, or remedy the effects of, the contravention.

(4) The court may grant an injunction under subsection (3) only on application by a person referred to in column 2 of item 14 of the table in subsection 539(2).

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(5) Despite subsection 545(4), the court may make any other order under subsection 545(1) only on application by a person referred to in column 2 of item 14 of the table in subsection 539(2).

Note: Section 539 deals with applications for orders in relation to contraventions of civil remedy provisions.

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Division 4—FWC orders stopping etc. industrial action

418 FWC must order that industrial action by employees or employers stop etc.

(1) If it appears to the FWC that industrial action by one or more employees or employers that is not, or would not be, protected industrial action:
  (a) is happening; or
  (b) is threatened, impending or probable; or
  (c) is being organised;
the FWC must make an order that the industrial action stop, not occur or not be organised (as the case may be) for a period (the ***stop period***) specified in the order.

Note: For interim orders, see section 420.

(2) The FWC may make the order:
  (a) on its own initiative; or
  (b) on application by either of the following:
    (i) a person who is affected (whether directly or indirectly), or who is likely to be affected (whether directly or indirectly), by the industrial action;
    (ii) an organisation of which a person referred to in subparagraph (i) is a member.

(3) In making the order, the FWC does not have to specify the particular industrial action.

(4) If the FWC is required to make an order under subsection (1) in relation to industrial action and a protected action ballot authorised the industrial action:
  (a) some or all of which has not been taken before the beginning of the stop period specified in the order; or
  (b) which has not ended before the beginning of that stop period; or
  (c) beyond that stop period;

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the FWC may state in the order whether or not the industrial action may be engaged in after the end of that stop period without another protected action ballot.

419 FWC must order that industrial action by non-national system employees or non-national system employers stop etc.

Stop orders etc.

(1) If it appears to the FWC that industrial action by one or more non-national system employees or non-national system employers:
  (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 FWC must make an order that the industrial action stop, not occur or not be organised (as the case may be) for a period specified in the order.

Note: For interim orders, see section 420.

(2) The FWC may make the order:
  (a) on its own initiative; or
  (b) on application by either of the following:
    (i) a person who is affected (whether directly or indirectly), or who is likely to be affected (whether directly or indirectly), by the industrial action;
    (ii) an organisation of which a person referred to in subparagraph (i) is a member.

(3) In making the order, the FWC does not have to specify the particular industrial action.

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420 Interim orders etc.

Application must be determined within 2 days

(1) As far as practicable, the FWC must determine an application for an order under section 418 or 419 within 2 days after the application is made.

Interim orders

(2) If the FWC is unable to determine the application within that period, the FWC must, within that period, make an interim order that the industrial action to which the application relates stop, not occur or not be organised (as the case may be).

(3) However, the FWC must not make the interim order if the FWC is satisfied that it would be contrary to the public interest to do so.

(4) In making the interim order, the FWC does not have to specify the particular industrial action.

(5) An interim order continues in operation until the application is determined.

421 Contravening an order etc.

Contravening orders

(1) A person to whom an order under section 418, 419 or 420 applies must not contravene a term of the order.

Note: This subsection is a civil remedy provision (see Part 4-1).

(2) However, a person is not required to comply with an order if:
   (a) the order is an order under section 418, or an order under section 420 that relates to an application for an order under section 418; and
   (b) the industrial action to which the order relates is, or would be, protected industrial action.

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Injunctions

(3) The Federal Court or Federal Circuit Court may grant an injunction, under this subsection, on such terms as the court considers appropriate if:

(a) a person referred to in column 2 of item 15 of the table in subsection 539(2) has applied for the injunction; and

(b) the court is satisfied that another person to whom the order applies has contravened, or proposes to contravene, a term of the order.

Note: Section 539 deals with applications for orders in relation to contraventions of civil remedy provisions.

No other orders

(4) Section 545 (which deals with orders that a court can make if a person has contravened etc. a civil remedy provision) does not apply to a contravention of a term of the order.

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Division 5—Injunction against industrial action if pattern bargaining is being engaged in

422 Injunction against industrial action if a bargaining representative is engaging in pattern bargaining

(1) The Federal Court or Federal Circuit Court may grant an injunction on such terms as the court considers appropriate if:
  (a) a person has applied for the injunction; and
  (b) the requirement set out in subsection (2) is met.

(2) The court is satisfied that:
  (a) employee claim action for a proposed enterprise agreement is being engaged in, or is threatened, impending or probable; and
  (b) a bargaining representative of an employee who will be covered by the agreement is engaging in pattern bargaining in relation to the agreement.

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Division 6—Suspension or termination of protected industrial action by the FWC

423 FWC may suspend or terminate protected industrial action—significant economic harm etc.

Suspension or termination of protected industrial action

(1) The FWC may make an order suspending or terminating protected industrial action for a proposed enterprise agreement that is being engaged in if the requirements set out in this section are met.

Requirement—significant economic harm

(2) If the protected industrial action is employee claim action, the FWC must be satisfied that the action is causing, or is threatening to cause, significant economic harm to:
   (a) the employer, or any of the employers, that will be covered by the agreement; and
   (b) any of the employees who will be covered by the agreement.

(3) If the protected industrial action is:
   (a) employee response action; or
   (b) employer response action;

   the FWC must be satisfied that the action is causing, or is threatening to cause, significant economic harm to any of the employees who will be covered by the agreement.

(4) For the purposes of subsections (2) and (3), the factors relevant to working out whether protected industrial action is causing, or is threatening to cause, significant economic harm to a person referred to in those subsections, include the following:
   (a) the source, nature and degree of harm suffered or likely to be suffered;
   (b) the likelihood that the harm will continue to be caused or will be caused;

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(c) the capacity of the person to bear the harm;
(d) the views of the person and the bargaining representatives for the agreement;
(e) whether the bargaining representatives for the agreement have met the good faith bargaining requirements and have not contravened any bargaining orders in relation to the agreement;
(f) if the FWC is considering terminating the protected industrial action:
  (i) whether the bargaining representatives for the agreement are genuinely unable to reach agreement on the terms that should be included in the agreement; and
  (ii) whether there is no reasonable prospect of agreement being reached;
(g) the objective of promoting and facilitating bargaining for the agreement.

Requirement—harm is imminent

(5) If the protected industrial action is threatening to cause significant economic harm as referred to in subsection (2) or (3), the FWC must be satisfied that the harm is imminent.

Requirement—protracted action etc.

(6) The FWC must be satisfied that:
(a) the protected industrial action has been engaged in for a protracted period of time; and
(b) the dispute will not be resolved in the reasonably foreseeable future.

Order may be made on own initiative or on application

(7) The FWC may make the order:
(a) on its own initiative; or
(b) on application by any of the following:
  (i) a bargaining representative for the agreement;

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(ii) the Minister;

(iia) if the industrial action is being engaged in in a State that is a referring State as defined in section 30B or 30L—the Minister of the State who has responsibility for workplace relations matters in the State;

(iib) if the industrial action is being engaged in in a Territory—the Minister of the Territory who has responsibility for workplace relations matters in the Territory;

(iii) a person prescribed by the regulations.

424 FWC must suspend or terminate protected industrial action—endangering life etc.

Suspension or termination of protected industrial action

(1) The FWC must make an order suspending or terminating protected industrial action for a proposed enterprise agreement that:

(a) is being engaged in; or

(b) is threatened, impending or probable;

if the FWC is satisfied that the protected industrial action has threatened, is threatening, or would threaten:

(c) to endanger the life, the personal safety or health, or the welfare, of the population or of part of it; or

(d) to cause significant damage to the Australian economy or an important part of it.

(2) The FWC may make the order:

(a) on its own initiative; or

(b) on application by any of the following:

(i) a bargaining representative for the agreement;

(ii) the Minister;

(iia) if the industrial action is being engaged in, or is threatened, impending or probable, in a State that is a referring State as defined in section 30B or 30L—the

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Minister of the State who has responsibility for workplace relations matters in the State;

(iib) if the industrial action is being engaged in, or is threatened, impending or probable, in a Territory—the Minister of the Territory who has responsibility for workplace relations matters in the Territory;

(iii) a person prescribed by the regulations.

Application must be determined within 5 days

(3) If an application for an order under this section is made, the FWC must, as far as practicable, determine the application within 5 days after it is made.

Interim orders

(4) If the FWC is unable to determine the application within that period, the FWC must, within that period, make an interim order suspending the protected industrial action to which the application relates until the application is determined.

(5) An interim order continues in operation until the application is determined.

425 FWC must suspend protected industrial action—cooling off

(1) The FWC must make an order suspending protected industrial action for a proposed enterprise agreement that is being engaged in if the FWC is satisfied that the suspension is appropriate taking into account the following matters:

(a) whether the suspension would be beneficial to the bargaining representatives for the agreement because it would assist in resolving the matters at issue;

(b) the duration of the protected industrial action;

(c) whether the suspension would be contrary to the public interest or inconsistent with the objects of this Act;

(d) any other matters that the FWC considers relevant.

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(2) The FWC may make the order only on application by:
  (a) a bargaining representative for the agreement; or
  (b) a person prescribed by the regulations.

426 FWC must suspend protected industrial action—significant harm to a third party

Suspension of protected industrial action

(1) The FWC must make an order suspending protected industrial action for a proposed enterprise agreement that is being engaged in if the requirements set out in this section are met.

Requirement—adverse effect on employers or employees

(2) The FWC must be satisfied that the protected industrial action is adversely affecting:
  (a) the employer, or any of the employers, that will be covered by the agreement; or
  (b) any of the employees who will be covered by the agreement.

Requirement—significant harm to a third party

(3) The FWC must be satisfied that the protected industrial action is threatening to cause significant harm to any person other than:
  (a) a bargaining representative for the agreement; or
  (b) an employee who will be covered by the agreement.

(4) For the purposes of subsection (3), the FWC may take into account any matters it considers relevant including the extent to which the protected industrial action threatens to:
  (a) damage the ongoing viability of an enterprise carried on by the person; or
  (b) disrupt the supply of goods or services to an enterprise carried on by the person; or
  (c) reduce the person's capacity to fulfil a contractual obligation; or

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(d) cause other economic loss to the person.

Requirement—suspension is appropriate

(5) The FWC must be satisfied that the suspension is appropriate taking into account the following:
  (a) whether the suspension would be contrary to the public interest or inconsistent with the objects of this Act;
  (b) any other matters that the FWC considers relevant.

Order may only be made on application by certain persons

(6) The FWC may make the order only on application by:
  (a) an organisation, person or body directly affected by the protected industrial action other than:
    (i) a bargaining representative for the agreement; or
    (ii) an employee who will be covered by the agreement; or
  (b) the Minister; or
  (ba) if the industrial action is being engaged in in a State that is a referring State as defined in section 30B or 30L—the Minister of the State who has responsibility for workplace relations matters in the State; or
  (bb) if the industrial action is being engaged in in a Territory—the Minister of the Territory who has responsibility for workplace relations matters in the Territory; or
  (c) a person prescribed by the regulations.

427 FWC must specify the period of suspension

Application of this section

(1) This section applies if the FWC is required or permitted by this Division to make an order suspending protected industrial action.

Suspension period

(2) The FWC must specify, in the order, the period for which the protected industrial action is suspended.

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Notice period

(3) The FWC may specify, in the order, a longer period of notice of up to 7 working days for the purposes of paragraph 430(2)(b) if the FWC is satisfied that there are exceptional circumstances justifying that longer period of notice.

428 Extension of a period of suspension

(1) The FWC may make an order extending the period of suspension specified in an order (the ***suspension order***) suspending protected industrial action for a proposed enterprise agreement if:
   (a) the person who applied, or a person who could have applied, for the suspension order, applies for the extension; and
   (b) the FWC has not previously made an order under this section in relation to the suspension order; and
   (c) the FWC is satisfied that the extension is appropriate taking into account any matters the FWC considers relevant including the matters specified in the provision under which the suspension order was made.

(2) If the FWC is permitted to make an order under this section:
   (a) the FWC must specify, in the order, the period of extension; and
   (b) the FWC may specify, in the order, a longer period of notice of up to 7 working days for the purposes of paragraph 430(2)(b) if the FWC is satisfied that there are exceptional circumstances justifying that longer period of notice.

429 Employee claim action without a further protected action ballot after a period of suspension etc.

Application of this section

(1) This section applies in relation to employee claim action for a proposed enterprise agreement if:

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(a) an order suspending the employee claim action has been made; and

(b) a protected action ballot authorised the employee claim action:

(i) some or all of which had not been taken before the beginning of the period (the ***suspension period***) of suspension specified in the order; or

(ii) which had not ended before the beginning of the suspension period; or

(iii) beyond the suspension period; and

(c) the suspension period (including any extension under section 428) ends, or the order is revoked before the end of that period.

Further protected action ballot not required to engage in employee claim action

(2) A person may engage in the employee claim action without another protected action ballot.

(3) For the purposes of working out when the employee claim action may be engaged in, the suspension period (including any dates authorised by the protected action ballot as dates on which employee claim action is to be engaged in) must be disregarded.

(4) Nothing in this section authorises employee claim action that is different in type or duration from the employee claim action that was authorised by the protected action ballot.

430 Notice of employee claim action engaged in after a period of suspension etc.

(1) Before a person engages in employee claim action for a proposed enterprise agreement as permitted by subsection 429(2), a bargaining representative of an employee who will be covered by the agreement must give written notice of the action to the employer of the employee.

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Section 430

(2) The period of notice must be at least:
  (a) 3 working days; or
  (b) if, under subsection 427(3) or paragraph 428(2)(b), the FWC specified, for the purposes of this paragraph, a longer period of notice in an order relating to the employee claim action—that period of notice.

(3) The notice must state the nature of the employee claim action and the day on which it will start.

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Division 7—Ministerial declarations

431 Ministerial declaration terminating industrial action

(1) The Minister may make a declaration, in writing, terminating protected industrial action for a proposed enterprise agreement if the Minister is satisfied that:
  (a) the industrial action is being engaged in, or is threatened, impending or probable; and
  (b) 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 a part of it; or
    (ii) to cause significant damage to the Australian economy or an important part of it.

(2) The declaration comes into operation on the day that it is made.

(3) A declaration under subsection (1) is not a legislative instrument.

432 Informing people of declaration

(1) This section applies if the Minister makes a declaration under subsection 431(1).

(2) The declaration must be published in the *Gazette*.

(3) The Minister must inform the FWC of the making of the declaration.

(4) The Minister must, as soon as practicable, take all reasonable steps to ensure that the bargaining representatives for the proposed enterprise agreement concerned are made aware:
  (a) of the making of the declaration; and
  (b) of the effect of Part 2-5 (which deals with workplace determinations).

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433 Ministerial directions to remove or reduce threat

(1) If a declaration under subsection 431(1) is in operation in relation to a proposed enterprise agreement, the Minister may give directions, in writing, requiring the following persons to take, or refrain from taking, specified actions:

(a) specified bargaining representatives for the agreement;

(b) specified employees who will be covered by the agreement.

(2) The Minister may only give directions that the Minister is satisfied are reasonably directed to removing or reducing the threat referred to in paragraph 431(1)(b).

(3) A direction under subsection (1) is not a legislative instrument.

434 Contravening a Ministerial direction

A person to whom a direction under subsection 433(1) applies must not contravene the direction.

Note: This section is a civil remedy provision (see Part 4-1).

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Division 8—Protected action ballots

Subdivision A—Introduction

435 Guide to this Division

This Division establishes the process that will allow employees to choose, by means of a fair and democratic secret ballot, whether to authorise protected industrial action for a proposed enterprise agreement.

Subdivision B provides for the FWC to make a protected action ballot order, on application by a bargaining representative of an employee who will be covered by a proposed enterprise agreement, requiring a protected action ballot to be conducted.

Subdivision C deals with the conduct of a protected action ballot.

Subdivision D deals with the effect of a protected action ballot.

Subdivision E deals with compliance matters in relation to a protected action ballot.

Subdivision F deals with the liability for the costs of a protected action ballot.

Subdivision G deals with records and other miscellaneous matters.

436 Object of this Division

The object of this Division is to establish a fair, simple and democratic process to allow a bargaining representative to determine whether employees wish to engage in particular protected industrial action for a proposed enterprise agreement.

Note: Under Division 2, industrial action by employees for a proposed enterprise agreement (other than employee response action) is not

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protected industrial action unless it has been authorised in advance by a protected action ballot.

Subdivision B—Protected action ballot orders

437 Application for a protected action ballot order

Who may apply for a protected action ballot order

(1) A bargaining representative of an employee who will be covered by a proposed enterprise agreement, or 2 or more such bargaining representatives (acting jointly), may apply to the FWC for an order (a ***protected action ballot order***) requiring a protected action ballot to be conducted to determine whether employees wish to engage in particular protected industrial action for the agreement.

(2) Subsection (1) does not apply if the proposed enterprise agreement is:
  (a) a greenfields agreement; or
  (b) a multi-enterprise agreement.

(2A) Subsection (1) does not apply unless there has been a notification time in relation to the proposed enterprise agreement.

Note: For ***notification time***, see subsection 173(2). Protected industrial action cannot be taken until after bargaining has commenced (including where the scope of the proposed enterprise agreement is the only matter in dispute).

Matters to be specified in application

(3) The application must specify:
  (a) the group or groups of employees who are to be balloted; and
  (b) the question or questions to be put to the employees who are to be balloted, including the nature of the proposed industrial action.

(4) If the applicant wishes a person other than the Australian Electoral Commission to be the protected action ballot agent for the

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protected action ballot, the application must specify the name of the person.

Note: The protected action ballot agent will be the Australian Electoral Commission unless the FWC specifies another person in the protected action ballot order as the protected action ballot agent (see subsection 443(4)).

(5) A group of employees specified under paragraph (3)(a) is taken to include only employees who:
  (a) will be covered by the proposed enterprise agreement; and
  (b) either:
    (i) are represented by a bargaining representative who is an applicant for the protected action ballot order; or
    (ii) are bargaining representatives for themselves but are members of an employee organisation that is an applicant for the protected action ballot order.

Documents to accompany application

(6) The application must be accompanied by any documents and other information prescribed by the regulations.

438 Restriction on when application may be made

(1) If one or more enterprise agreements cover the employees who will be covered by the proposed enterprise agreement, an application for a protected action ballot order must not be made earlier than 30 days before the nominal expiry date of the enterprise agreement, or the latest nominal expiry date of those enterprise agreements (as the case may be).

(2) To avoid doubt, making an application for a protected action ballot order does not constitute organising industrial action.

439 Joint applications

Without limiting section 609, the procedural rules may provide for the following:

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(a) how a provision of this Act that applies in relation to an applicant for a protected action ballot order is to apply in relation to joint applicants for such an order;
(b) the joinder, with the consent of each existing applicant, of one or more bargaining representatives to an application for a protected action ballot order;
(c) the withdrawal of one or more applicants from a joint application for a protected action ballot order.

440 Notice of application

Within 24 hours after making an application for a protected action ballot order, the applicant must give a copy of the application to the employer of the employees who are to be balloted, and:
(a) if the application specifies a person that the applicant wishes to be the protected action ballot agent—that person; or
(b) otherwise—the Australian Electoral Commission.

441 Application to be determined within 2 days after it is made

(1) The FWC must, as far as practicable, determine an application for a protected action ballot order within 2 working days after the application is made.

(2) However, the FWC must not determine the application unless it is satisfied that each applicant has complied with section 440.

442 Dealing with multiple applications together

The FWC may deal with 2 or more applications for a protected action ballot order at the same time if:
(a) the applications relate to industrial action by:
(i) employees of the same employer; or
(ii) employees at the same workplace; and
(b) the FWC is satisfied that dealing with the applications at the same time will not unreasonably delay the determination of any of the applications.

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443 When the FWC must make a protected action ballot order

(1) The FWC must make a protected action ballot order in relation to a proposed enterprise agreement if:
  (a) an application has been made under section 437; and
  (b) the FWC is satisfied that each applicant has been, and is, genuinely trying to reach an agreement with the employer of the employees who are to be balloted.

(2) The FWC must not make a protected action ballot order in relation to a proposed enterprise agreement except in the circumstances referred to in subsection (1).

(3) A protected action ballot order must specify the following:
  (a) the name of each applicant for the order;
  (b) the group or groups of employees who are to be balloted;
  (c) the date by which voting in the protected action ballot closes;
  (d) the question or questions to be put to the employees who are to be balloted, including the nature of the proposed industrial action.

(3A) For the purposes of paragraph (3)(c), the FWC must specify a date that will enable the protected action ballot to be conducted as expeditiously as practicable.

(4) If the FWC decides that a person other than the Australian Electoral Commission is to be the protected action ballot agent for the protected action ballot, the protected action ballot order must also specify:
  (a) the person that the FWC decides, under subsection 444(1), is to be the protected action ballot agent; and
  (b) the person (if any) that the FWC decides, under subsection 444(3), is to be the independent advisor for the ballot.

(5) If the FWC is satisfied, in relation to the proposed industrial action that is the subject of the protected action ballot, that there are exceptional circumstances justifying the period of written notice

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referred to in paragraph 414(2)(a) being longer than 3 working days, the protected action ballot order may specify a longer period of up to 7 working days.

Note: Under subsection 414(1), before a person engages in employee claim action for a proposed enterprise agreement, a bargaining representative of an employee who will be covered by the agreement must give written notice of the action to the employer of the employee.

444 FWC may decide on ballot agent other than the Australian Electoral Commission and independent advisor

Alternative ballot agent

(1) The FWC may decide that a person other than the Australian Electoral Commission is to be the protected action ballot agent for a protected action ballot only if:
  (a) the person is specified in the application for the protected action ballot order as the person the applicant wishes to be the protected action ballot agent; and
  (b) the FWC is satisfied that:
    (i) the person is a fit and proper person to conduct the ballot; and
    (ii) any other requirements prescribed by the regulations are met.

(2) The regulations may prescribe:
  (a) conditions that a person must meet in order to satisfy the FWC that the person is a fit and proper person to conduct a protected action ballot; and
  (b) factors that the FWC must take into account in determining whether a person is a fit and proper person to conduct a protected action ballot.

Independent advisor

(3) The FWC may decide that a person (the ***other person***) is to be the independent advisor for a protected action ballot if:

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(a) the FWC has decided that a person other than the Australian Electoral Commission is to be the protected action ballot agent for the ballot; and
(b) the FWC considers it appropriate that there be an independent advisor for the ballot; and
(c) the FWC is satisfied that:
  (i) the other person is sufficiently independent of each applicant for the protected action ballot order; and
  (ii) any other requirements prescribed by the regulations are met.

445 Notice of protected action ballot order

As soon as practicable after making a protected action ballot order, the FWC must give a copy of the order to:
(a) each applicant for the order; and
(b) the employer of the employees who are to be balloted; and
(c) the protected action ballot agent for the protected action ballot.

446 Protected action ballot order may require 2 or more protected action ballots to be held at the same time

(1) This section applies if:
  (a) the FWC has made a protected action ballot order; and
  (b) the FWC proposes to make another protected action ballot order or orders; and
  (c) the orders would require a protected action ballot to be held in relation to industrial action by employees of the same employer or employees at the same workplace.

(2) The FWC may make, or vary, the protected action ballot orders so as to require the protected action ballots to be held at the same time if the FWC is satisfied:
  (a) that the level of disruption of the employer's enterprise, or at the workplace, could be reduced if the ballots were held at the same time; and

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(b) that requiring the ballots to be held at the same time will not unreasonably delay either ballot.

447 Variation of protected action ballot order

(1) An applicant for a protected action ballot order may apply to the FWC to vary the order.

(2) The protected action ballot agent for a protected action ballot may apply to the FWC to vary the protected action ballot order to change the date by which voting in the ballot closes.

(3) An application may be made under subsection (1) or (2):
  (a) at any time before the date by which voting in the protected action ballot closes; or
  (b) if the ballot has not been held before that date and the FWC consents—after that time.

(4) If an application is made under subsection (1) or (2), the FWC may vary the protected action ballot order.

448 Revocation of protected action ballot order

(1) An applicant for a protected action ballot order may apply to the FWC, at any time before voting in the protected action ballot closes, to revoke the order.

(2) If an application to revoke a protected action ballot order is made, the FWC must revoke the order.

Subdivision C—Conduct of protected action ballot

449 Protected action ballot to be conducted by Australian Electoral Commission or other specified ballot agent

(1) A protected action ballot must be conducted by:
  (a) if a person is specified in the protected action ballot order as the protected action ballot agent for the ballot—that person; or

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(b) otherwise—the Australian Electoral Commission.

(2) The protected action ballot agent must conduct the protected action ballot expeditiously and in accordance with the following:
(a) the protected action ballot order;
(b) the timetable for the ballot;
(c) this Subdivision;
(d) any directions given by the FWC;
(e) any procedures prescribed by the regulations.

450 Directions for conduct of protected action ballot

(1) This section applies if the protected action ballot agent is not the Australian Electoral Commission.

(2) The FWC must give the protected action ballot agent written directions in relation to the following matters relating to the protected action ballot:
(a) the development of a timetable;
(b) the voting method, or methods, to be used (which cannot be a method involving a show of hands);
(c) the compilation of the roll of voters;
(d) the addition of names to, or removal of names from, the roll of voters;
(e) any other matter in relation to the conduct of the ballot that the FWC considers appropriate.

Note 1: For the purposes of paragraph (2)(b), examples of voting methods are attendance voting, electronic voting and postal voting.

Note 2: A protected action ballot agent must not contravene a term of a direction given by the FWC in relation to a protected action ballot (see subsection 463(2)).

(3) A direction given under subsection (2) may require the protected action ballot agent to comply with a provision of this Subdivision (other than subsection 454(5)) in relation to a particular matter.

Note: Subsection 454(5) provides for the Australian Electoral Commission to vary the roll of voters on its own initiative.

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(4) To enable the roll of voters to be compiled, the FWC may direct, in writing, either or both of the following:
  (a) the employer of the employees who are to be balloted;
  (b) the applicant for the protected action ballot order;

to give to the FWC or the protected action ballot agent:
  (c) the names of the employees included in the group or groups of employees specified in the protected action ballot order; and
  (d) any other information that it is reasonable for the FWC or the protected action ballot agent to require to assist in compiling the roll of voters.

451 Timetable for protected action ballot

(1) This section applies if:
  (a) the protected action ballot agent is the Australian Electoral Commission; or
  (b) the FWC has directed the protected action ballot agent to comply with this section.

Note: If this section does not apply, the protected action ballot agent must comply with directions given by the FWC in relation to the matters dealt with by this section (see section 450).

(2) As soon as practicable after receiving a copy of the protected action ballot order, the protected action ballot agent must, in consultation with each applicant for the order and the employer of the employees who are to be balloted:
  (a) develop a timetable for the conduct of the protected action ballot; and
  (b) determine the voting method, or methods, to be used for the ballot (which cannot be a method involving a show of hands).

Note: For the purposes of paragraph (2)(b), examples of voting methods are attendance voting, electronic voting and postal voting.

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452 Compilation of roll of voters

(1) This section applies if:
  (a) the protected action ballot agent is the Australian Electoral Commission; or
  (b) the FWC has directed the protected action ballot agent to comply with this section.

Note: If this section does not apply, the protected action ballot agent must comply with directions given by the FWC in relation to the matters dealt with by this section (see section 450).

(2) As soon as practicable after receiving a copy of the protected action ballot order, the protected action ballot agent must compile the roll of voters for the protected action ballot.

(3) For the purpose of compiling the roll of voters, the protected action ballot agent may direct, in writing, the employer of the employees who are to be balloted, or the applicant for the order (or both), to give to the ballot agent:
  (a) the names of the employees included in the group or groups of employees specified in the protected action ballot order; and
  (b) any other information that it is reasonable for the protected action ballot agent to require to assist in compiling the roll of voters.

453 Who is eligible to be included on the roll of voters

An employee is eligible to be included on the roll of voters for the protected action ballot only if:
  (a) the employee will be covered by the proposed enterprise agreement to which the ballot relates; and
  (b) the employee is included in a group of employees specified in the order and either:
    (i) is represented by a bargaining representative who was an applicant for the order; or

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(ii) is the bargaining representative for himself or herself but is a member of an employee organisation that was an applicant for the order.

454 Variation of roll of voters

Variation by protected action ballot agent on request

(1) Subsections (2) to (4) apply if:
  (a) the protected action ballot agent is the Australian Electoral Commission; or
  (b) the FWC has directed the protected action ballot agent to comply with those subsections.

Note: If subsections (2) to (4) do not apply, the protected action ballot agent must comply with directions given by the FWC in relation to the matters dealt with by those subsections (see section 450).

Adding names to the roll of voters

(2) The protected action ballot agent must include an employee's name on the roll of voters for the protected action ballot if:
  (a) the protected action ballot agent is requested to do so by:
    (i) an applicant for the protected action ballot order; or
    (ii) the employee; or
    (iii) the employee's employer; and
  (b) the protected action ballot agent is satisfied that the employee is eligible to be included on the roll of voters; and
  (c) the request is made before the end of the working day before the day on which voting in the ballot starts.

Removing names from the roll of voters

(3) The protected action ballot agent must remove an employee's name from the roll of voters for the protected action ballot if:
  (a) the protected action ballot agent is requested to do so by:
    (i) an applicant for the protected action ballot order; or
    (ii) the employee; or

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(iii) the employee's employer; and

(b) the protected action ballot agent is satisfied that the employee is not eligible to be included on the roll of voters; and

(c) the request is made before the end of the working day before the day on which voting in the ballot starts.

(4) The protected action ballot agent must remove a person's name from the roll of voters for the protected action ballot if:

(a) the person (the ***former employee***) is no longer employed by the employer (the ***former employer***) of the employees who are to be balloted; and

(b) the protected action ballot agent is requested to do so by:

(i) an applicant for the protected action ballot order; or

(ii) the former employee; or

(iii) the former employer; and

(c) the request is made before the end of the working day before the day on which voting in the ballot starts.

Variation by Australian Electoral Commission on its own initiative

(5) If the protected action ballot agent is the Australian Electoral Commission, the Commission may, on its own initiative and before the end of the working day before the day on which voting in the ballot starts:

(a) include an employee's name on the roll of voters for the protected action ballot if the Commission is satisfied that the employee is eligible to be included on the roll of voters; or

(b) remove an employee's name from the roll of voters for the protected action ballot if the Commission is satisfied that the employee is not eligible to be included on the roll of voters; or

(c) remove a person's name from the roll of voters for the protected action ballot if the person is no longer employed by the employer of the employees who are to be balloted.

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455 Protected action ballot papers

(1) The ballot paper for the protected action ballot must:
  (a) if a form is prescribed by the regulations—be in that form; and
  (b) include any information prescribed by the regulations.

(2) ***Ballot paper*** means:
  (a) for a voting method that is not an electronic voting method—a paper ballot paper; and
  (b) for an electronic voting method—an electronic ballot paper.

456 Who may vote in protected action ballot

An employee may vote in the protected action ballot only if the employee's name is on the roll of voters for the ballot.

457 Results of protected action ballot

(1) As soon as practicable after voting in the protected action ballot closes, the protected action ballot agent must, in writing:
  (a) make a declaration of the results of the ballot; and
  (b) inform the following persons of the results:
    (i) each applicant for the protected action ballot order;
    (ii) the employer of the employees who were balloted;
    (iii) the FWC.

(2) The FWC must publish the results of the protected action ballot, on its website or by any other means that the FWC considers appropriate, as soon as practicable after it is informed of them.

458 Report about conduct of protected action ballot

Protected action ballot conducted by the Australian Electoral Commission

(1) If:

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(a) the protected action ballot agent is the Australian Electoral Commission; and

(b) the Commission:

(i) receives any complaints about the conduct of the protected action ballot; or

(ii) becomes aware of any irregularities in relation to the conduct of the ballot;

the Commission must prepare a written report about the conduct of the ballot and give it to the FWC.

Protected action ballot conducted by person other than the Australian Electoral Commission

(2) If:

(a) the protected action ballot agent is not the Australian Electoral Commission; and

(b) the protected action ballot agent or the independent advisor (if any) for the protected action ballot:

(i) receives any complaints about the conduct of the ballot; or

(ii) becomes aware of any irregularities in relation to the conduct of the ballot;

the protected action ballot agent or the independent advisor (as the case may be) must prepare a report about the conduct of the ballot and give it to the FWC.

Note: This subsection is a civil remedy provision (see Part 4-1).

(3) If:

(a) the protected action ballot agent is not the Australian Electoral Commission; and

(b) the FWC:

(i) receives any complaints about the conduct of the protected action ballot; or

(ii) becomes aware of any irregularities in relation to the conduct of the ballot;

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the FWC must, in writing, direct the protected action ballot agent or the independent advisor (if any) for the ballot (or both) to prepare a report about the conduct of the ballot and give it to the FWC.

(4) A report under subsection (2) or (3) must be prepared in accordance with the regulations.

*Meaning of **conduct** of a protected action ballot*

(5) ***Conduct*** of a protected action ballot includes, but is not limited to, the compilation of the roll of voters for the ballot.

*Meaning of **irregularity** in relation to the conduct of a protected action ballot*

(6) An ***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 employees entitled to vote in the ballot, and by no other persons is, or is attempted to be, prevented or hindered.

Subdivision D—Effect of protected action ballot

459 Circumstances in which industrial action is authorised by protected action ballot

(1) Industrial action by employees is authorised by a protected action ballot if:
  (a) the action was the subject of the ballot; and
  (b) at least 50% of the employees on the roll of voters for the ballot voted in the ballot; and
  (c) more than 50% of the valid votes were votes approving the action; and
  (d) the action commences:
    (i) during the 30-day period starting on the date of the declaration of the results of the ballot; or

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(ii) if the FWC has extended that period under subsection (3)—during the extended period.

Note: Under Division 2, industrial action by employees for a proposed enterprise agreement (other than employee response action) is not protected industrial action unless it has been authorised in advance by a protected action ballot.

(2) If:

(a) the nature of the proposed industrial action specified in the question or questions put to the employees in the protected action ballot included periods of industrial action of a particular duration; and

(b) the question or questions did not specify that consecutive periods of that industrial action may be organised or engaged in;

then only the first period in a series of consecutive periods of that industrial action is the subject of the ballot for the purposes of paragraph (1)(a).

(3) The FWC may extend the 30-day period referred to in subparagraph (1)(d)(i) by up to 30 days if:

(a) an applicant for the protected action ballot order applies to the FWC for the period to be extended; and

(b) the period has not previously been extended.

460 Immunity for persons who act in good faith on protected action ballot results

(1) This section applies if:

(a) the results of a protected action ballot, as declared by the protected action ballot agent for the ballot, purported to authorise particular industrial action; and

(b) an organisation or a person, acting in good faith on the declared ballot results, organised or engaged in that industrial action; and

(c) either:

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(i) it later becomes clear that that industrial action was not authorised by the ballot; or

(ii) the decision to make the protected action ballot order is quashed or varied on appeal, or on review by the FWC, after the industrial action is organised or engaged in.

(2) No action lies against the organisation or person under any law (whether written or unwritten) in force in a State or a Territory in relation to the industrial action unless the action involved:

(a) personal injury; or

(b) intentional or reckless destruction of, or damage to, property; or

(c) the unlawful taking, keeping or use of property.

(3) This section does not prevent an action for defamation being brought in relation to anything that occurred in the course of the industrial action.

461 Validity of protected action ballot etc. not affected by technical breaches

A technical breach of a provision of this Division does not affect the validity of any of the following:

(a) a protected action ballot order;

(b) an order, direction or decision of the FWC in relation to a protected action ballot order or a protected action ballot;

(c) a direction or decision of the protected action ballot agent in relation to a protected action ballot order or a protected action ballot;

(d) a protected action ballot;

(e) the conduct of a protected action ballot;

(f) the declaration of the results of a protected action ballot.

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Subdivision E—Compliance

462 Interferences etc. with protected action ballot

General

(1) A person (the ***first person***) must not do any of the following in relation to a protected action ballot:
  (a) hinder or obstruct the holding of the ballot;
  (b) use any form of intimidation to prevent a person entitled to vote in the ballot from voting, or to influence the vote of such a person;
  (c) threaten, offer or suggest, or use, cause or inflict, any violence, injury, punishment, damage, loss or disadvantage because of, or to induce:
    (i) any vote or omission to vote; or
    (ii) any support of, or opposition to, voting in a particular manner;
  (d) offer an advantage (whether financial or otherwise) to a person entitled to vote in the ballot because of or to induce:
    (i) any vote or omission to vote; or
    (ii) any support of, or opposition to, voting in a particular manner;
  (e) counsel or advise a person entitled to vote to refrain from voting;
  (f) impersonate another person to obtain a ballot paper to which the first person is not entitled, or impersonate another person for the purpose of voting;
  (g) do an act that results in a ballot paper or envelope being destroyed, defaced, altered, taken or otherwise interfered with;
  (h) fraudulently put a paper ballot paper or other paper:
    (i) into a repository that serves to receive or hold paper ballot papers; or
    (ii) into the post;

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(ha) fraudulently deliver or send an electronic ballot paper or other document to a repository that serves to receive or hold electronic ballot papers;

(i) fraudulently deliver or send a ballot paper or other paper to a person receiving ballot papers for the purposes of the ballot;

(j) record a vote that the first person is not entitled to record;

(k) record more than one vote;

(l) forge a ballot paper or envelope, or utter a ballot paper or envelope that the first person knows to be forged;

(m) provide a ballot paper without authority;

(n) obtain or have possession of a ballot paper to which the first person is not entitled;

(o) request, require or induce another person:

(i) to show a ballot paper to the first person; or

(ii) to permit the first person to see a ballot paper in such a manner that the first person can see the vote;

while the vote is being made, or after the vote has been made, on the ballot paper;

(p) do an act that results in a repository that serves to receive or hold ballot papers being destroyed, taken, opened or otherwise interfered with.

Note: This subsection is a civil remedy provision (see Part 4-1).

*Meaning of **utter***

(2) A person is taken to ***utter*** a forged document if the person:

(a) uses or deals with it; or

(b) attempts to use or deal with it; or

(c) attempts to induce another person to use, deal with, act upon, or accept it.

Obligations of person performing functions or exercising powers for the purposes of a protected action ballot

(3) A person (the ***first person***) who is performing functions or exercising powers for the purposes of a protected action ballot

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must not show to another person, or permit another person to have access to, a ballot paper used in the ballot, except in the course of performing those functions or exercising those powers.

Note: This subsection is a civil remedy provision (see Part 4-1).

463 Contravening a protected action ballot order etc.

(1) A person must not contravene:
  (a) a term of a protected action ballot order; or
  (b) a term of an order made by the FWC in relation to a protected action ballot order or a protected action ballot.

Note: This subsection is a civil remedy provision (see Part 4-1).

(2) A person must not contravene a direction given by the FWC, or a protected action ballot agent, in relation to a protected action ballot order or a protected action ballot.

Note: This subsection is a civil remedy provision (see Part 4-1).

(3) However, an order cannot be made under Division 2 of Part 4-1 in relation to a contravention (or alleged contravention) of subsection (1) or (2) by the Australian Electoral Commission.

Subdivision F—Liability for costs of protected action ballot

464 Costs of protected action ballot conducted by the Australian Electoral Commission

(1) This section applies if the protected action ballot agent for a protected action ballot is the Australian Electoral Commission.

(2) The Commonwealth is liable for the costs incurred by the Australian Electoral Commission in relation to the protected action ballot, whether or not the ballot is completed.

(3) However, except as provided by regulations made for the purposes of subsection 466(1), the Commonwealth is not liable for any costs incurred by the Australian Electoral Commission in relation to

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legal challenges to matters connected with the protected action ballot.

465 Costs of protected action ballot conducted by protected action ballot agent other than the Australian Electoral Commission

(1) This section applies if the protected action ballot agent for a protected action ballot is not the Australian Electoral Commission.

(2) The applicant for the protected action ballot order is liable for the costs of conducting the protected action ballot, whether or not the ballot is completed.

(3) If the application for the protected action ballot order was made by joint applicants, each applicant is jointly and severally liable for the costs of conducting the protected action ballot, whether or not the ballot is completed.

(4) The ***costs of conducting a protected action ballot*** are:
  (a) if the protected action ballot agent is an applicant for the protected action ballot order—the costs incurred by the applicant in relation to the ballot; or
  (b) otherwise—the amount the protected action ballot agent charges to the applicant or applicants in relation to the ballot.

(5) However, the ***costs of conducting a protected action ballot*** do not include any costs incurred by the protected action ballot agent in relation to legal challenges to matters connected with the ballot.

466 Costs of legal challenges

(1) The regulations may provide for who is liable for costs incurred in relation to legal challenges to matters connected with a protected action ballot.

(2) Regulations made for the purposes of subsection (1) may also provide for a person who is liable for costs referred to in that

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subsection to be indemnified by another person for some or all of those costs.

Subdivision G—Miscellaneous

467 Information about employees on roll of voters not to be disclosed

(1) A person who:

(a) is the protected action ballot agent for a protected action ballot (other than the Australian Electoral Commission); or

(b) is the independent advisor for a protected action ballot; or

(c) acquires information from, or on behalf of, a person referred to in paragraph (a) or (b) in the course of performing functions or exercising powers for the purposes of the ballot;

must not disclose to any other person information about an employee who is on the roll of voters for the ballot if the information will identify whether or not the employee is a member of an employee organisation.

Note: This subsection is a civil remedy provision (see Part 4-1).

(2) Subsection (1) does not apply if:

(a) the disclosure is made in the course of performing functions or exercising powers for the purposes of the protected action ballot; or

(b) the disclosure is required or authorised by or under a law; or

(c) the employee has consented, in writing, to the disclosure.

Note 1: Personal information given to the FWC, the Australian Electoral Commission or another protected action ballot agent under this Division may be regulated under the *Privacy Act 1988*.

Note 2: The President of the FWC may, in certain circumstances, disclose, or authorise the disclosure of, information acquired by the FWC or a member of the staff of the FWC, in the course of performing functions or exercising powers as the FWC (see section 655).

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468 Records

(1) The protected action ballot agent for a protected action ballot must keep the following ballot material:
  (a) the roll of voters for the ballot;
  (b) the ballot papers, envelopes and other documents and records relating to the ballot;
  (c) any other material prescribed by the regulations.

(2) The ballot material must be kept for one year after the day on which the protected action ballot closed.

(3) The protected action ballot agent must comply with any requirements prescribed by the regulations relating to how the ballot material is to be kept.

469 Regulations

The regulations may provide for the following matters:
  (a) the requirements that must be satisfied for a person (other than the Australian Electoral Commission) to be:
    (i) the protected action ballot agent for a protected action ballot; or
    (ii) the independent advisor for a protected action ballot;
  (b) the procedures to be followed in relation to the conduct of a protected action ballot;
  (c) the form and content of the ballot paper for a protected action ballot;
  (d) the qualifications, appointment, powers and duties of scrutineers for a protected action ballot;
  (e) the preparation of reports under subsection 458(2) or (3);
  (f) the records that the protected action ballot agent must keep in relation to a protected action ballot and how those records are to be kept.

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Division 9—Payments relating to periods of industrial action

Subdivision A—Protected industrial action

470 Payments not to be made relating to certain periods of industrial action

(1) If an employee engaged, or engages, in protected industrial action against an employer on a day, the employer must not make a payment to an employee in relation to the total duration of the industrial action on that day.

Note: This subsection is a civil remedy provision (see Part 4-1).

(2) However, this section does not apply to a partial work ban.

Note: For payments relating to periods of partial work bans, see section 471.

(3) A ***partial work ban*** is industrial action that is not:
- (a) a failure or refusal by an employee to attend for work; or
- (b) a failure or refusal by an employee who attends for work to perform any work at all; or
- (c) an overtime ban.

(4) If the industrial action is, or includes, an overtime ban, this section does not apply, in relation to a period of overtime to which the ban applies, unless:
- (a) the employer requested or required the employee to work the period of overtime; and
- (b) the employee refused to work the period of overtime; and
- (c) the refusal was a contravention of the employee's obligations under a modern award, enterprise agreement or contract of employment.

(5) If:
- (a) the industrial action is, or includes, an overtime ban; and

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(b) this section applies in relation to a period of overtime to which the ban applies;

then for the purposes of this section, the total duration of the industrial action is, or includes, the period of overtime to which the ban applies.

471 Payments relating to partial work bans

Employer gives notice of reduction in payments

(1) If:

(a) an employee engaged, or engages, in protected industrial action against an employer on a day; and

(b) the industrial action is a partial work ban; and

(c) the employer gives to the employee a written notice stating that, because of the ban, the employee's payments will be reduced by a proportion specified in the notice;

then the employee's payments are reduced in accordance with subsection (2) in relation to the period (the ***industrial action period***) referred to in subsection (5).

(2) The employee's payments in relation to the industrial action period are reduced:

(a) by the proportion specified in the notice; or

(b) if the FWC has ordered a different proportion under section 472—by the proportion specified in the order;

and the modern award, enterprise agreement or contract of employment that applies to the employee's employment has effect accordingly.

(3) The regulations may prescribe how the proportion referred to in paragraph (2)(a) is to be worked out.

Employer gives notice of non-payment

(4) If:

(a) an employee engaged, or engages, in protected industrial action against an employer on a day; and

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(b) the industrial action is a partial work ban; and

(c) the employer gives to the employee a written notice stating that, because of the ban:

(i) the employee will not be entitled to any payments; and

(ii) the employer refuses to accept the performance of any work by the employee until the employee is prepared to perform all of his or her normal duties;

then the employee is not entitled to any payments in relation to the period (the ***industrial action period***) referred to in subsection (5).

(4A) If:

(a) an employer has given an employee a notice under paragraph (4)(c); and

(b) the employee fails or refuses to attend for work, or fails or refuses to perform any work at all if he or she attends for work, during the industrial action period;

then:

(c) the failure or refusal is ***employee claim action***, even if it does not satisfy subsections 409(2) and 413(4), if the related industrial action referred to in paragraph (4)(a) is employee claim action; or

(d) the failure or refusal is ***employee response action***, even if it does not satisfy subsection 413(4), if the related industrial action referred to in paragraph (4)(a) is employee response action.

The industrial action period

(5) The ***industrial action period*** is the period:

(a) starting at the later of:

(i) the start of the first day on which the employee implemented the partial work ban; or

(ii) the start of the next day, after the day on which the notice was given, on which the employee performs work; and

(b) ending at the end of the day on which the ban ceases.

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Form and content of notice

(6) The regulations may prescribe requirements relating to one or both of the following:
  (a) the form of a notice given under paragraph (1)(c) or (4)(c);
  (b) the content of such a notice.

Manner of giving notice

(7) Without limiting paragraph (1)(c) or (4)(c), the employer is taken to have given a notice in accordance with that paragraph to the employee if the employer:
  (a) has taken all reasonable steps to ensure that the employee, and the employee's bargaining representative (if any), receives the notice; and
  (b) has complied with any requirements, relating to the giving of the notice, prescribed by the regulations.

Employer does not give notice

(8) If:
  (a) an employee engaged, or engages, in protected industrial action against an employer on a day; and
  (b) the industrial action is a partial work ban; and
  (c) the employer does not give the employee a notice in accordance with paragraph (1)(c) or (4)(c);

then the employee's payments for the day are not to be reduced because of the ban.

472 Orders by the FWC relating to certain partial work bans

(1) The FWC may make an order varying the proportion by which an employee's payments are reduced.

(2) The FWC may make the order only if a person has applied for it under subsection (4).

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(3) In considering making such an order, the FWC must take into account:
   (a) whether the proportion specified in the notice given under paragraph 471(1)(c) was reasonable having regard to the nature and extent of the partial work ban to which the notice relates; and
   (b) fairness between the parties taking into consideration all the circumstances of the case.

(4) An employee, or the employee's bargaining representative, may apply to the FWC for an order under subsection (2) if a notice has been given under paragraph 471(1)(c) stating that the employee's payments will be reduced.

473 Accepting or seeking payments relating to periods of industrial action

(1) An employee must not:
   (a) accept a payment from an employer if the employer would contravene section 470 by making the payment; or
   (b) ask the employer to make such a payment.

Note 1: This subsection is a civil remedy provision (see Part 4-1).

Note 2: Acts of coercion, or misrepresentations, relating to such payments may also contravene section 348 or 349.

(2) An employee organisation, or an officer or member of an employee organisation, must not ask an employer to make a payment to an employee if the employer would contravene section 470 by making the payment.

Note 1: This subsection is a civil remedy provision (see Part 4-1).

Note 2: Acts of coercion, or misrepresentations, relating to such payments may also contravene section 348 or 349.

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Subdivision B—Industrial action that is not protected industrial action

474 Payments not to be made relating to certain periods of industrial action

(1) If an employee engaged, or engages, in industrial action that is not protected industrial action against an employer on a day, 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 at least 4 hours—the total duration of the industrial action on that day; or
  (b) otherwise—4 hours of that day.

Note: This subsection is a civil remedy provision (see Part 4-1).

(2) However, if the industrial action is, or includes, an overtime ban, this section does not apply, in relation to a period of overtime to which the ban applies, unless:
  (a) the employer requested or required the employee to work the period of overtime; and
  (b) the employee refused to work the period of overtime; and
  (c) the refusal was a contravention of the employee's obligations under a modern award, enterprise agreement or contract of employment.

Note: An employee is able to refuse to work additional hours if they are unreasonable (see subsection 62(2)). There may be other circumstances in which an employee can lawfully refuse to work additional hours.

(2A) If:
  (a) the industrial action is, or includes, an overtime ban; and
  (b) this section applies in relation to a period of overtime to which the ban applies;

then, for the purposes of this section:
  (c) the total duration of the industrial action is, or includes, the period of overtime to which the ban applies; and

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(d) if paragraph (1)(b) applies—the period of 4 hours mentioned in that paragraph includes the period of overtime to which the ban applies.

(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 one 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 that is not protected 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.

475 Accepting or seeking payments relating to periods of industrial action

(1) An employee must not:

(a) accept a payment from an employer if the employer would contravene section 474 by making the payment; or

(b) ask the employer to make such a payment.

Note 1: This subsection is a civil remedy provision (see Part 4-1).

Note 2: Acts of coercion, or misrepresentations, relating to such payments may also contravene section 348 or 349.

(2) An employee organisation, or an officer or member of an employee organisation, must not ask an employer to make a payment to an employee if the employer would contravene section 474 by making the payment.

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Note 1: This subsection is a civil remedy provision (see Part 4-1).

Note 2: Acts of coercion, or misrepresentations, relating to such payments may also contravene section 348 or 349.

Subdivision C—Miscellaneous

476 Other responses to industrial action unaffected

If an employee engaged, or engages, in industrial action against an employer, this Division does not affect any right of the employer, under this Act or otherwise, to do anything in response to the industrial action that does not involve payments to the employee.

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Division 10—Other matters

477 Applications by bargaining representatives

Application of this section

(1) This section applies if a provision of this Part permits an application to be made by a bargaining representative of an employer that will be covered by a proposed single-enterprise agreement.

Persons who may make applications

(2) If the agreement will cover more than one employer, the application may be made by:
   (a) in the case of a proposed single-enterprise agreement in relation to which a single interest employer authorisation is in operation—the person (if any) specified in the authorisation as the person who may make applications under this Act; or
   (b) in any case—a bargaining representative of an employer that will be covered by the agreement, on behalf of one or more other such bargaining representatives, if those other bargaining representatives have agreed to the application being made on their behalf.

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Part 3-4—Right of entry

Division 1—Introduction

478 Guide to this Part

This Part is about the rights of officials of organisations who hold entry permits to enter premises for purposes related to their representative role under this Act and under State or Territory OHS laws.

Division 2 allows permit holders to enter premises to investigate suspected contraventions of this Act and fair work instruments. The Division makes special provision in relation to TCF award workers. Division 2 also allows permit holders to enter premises to hold discussions with certain employees and TCF award workers. In exercising rights under Division 2, permit holders must comply with the requirements set out in the Division.

Division 3 sets out requirements for exercising rights under State or Territory OHS laws.

Division 4 prohibits certain action in relation to the operation of this Part.

Division 5 sets out powers of the FWC in relation to the operation of this Part.

Division 6 deals with entry permits, entry notices and certificates.

Division 7 deals with accommodation and transport arrangements in remote areas.

479 Meanings of *employee* and *employer*

In this Part, ***employee*** and ***employer*** have their ordinary meanings.

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480 Object of this Part

The object of this Part is to establish a framework for officials of organisations to enter premises that balances:

(a) the right of organisations to represent their members in the workplace, hold discussions with potential members and investigate suspected contraventions of:

(i) this Act and fair work instruments; and

(ii) State or Territory OHS laws; and

(b) the right of employees and TCF award workers to receive, at work, information and representation from officials of organisations; and

(c) the right of occupiers of premises and employers to go about their business without undue inconvenience.

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Division 2—Entry rights under this Act

Subdivision A—Entry to investigate suspected contravention

481 Entry to investigate suspected contravention

(1) A permit holder may enter premises and exercise a right under section 482 or 483 for the purpose of investigating a suspected contravention of this Act, or a term of a fair work instrument, that relates to, or affects, a member of the permit holder's organisation:

(a) whose industrial interests the organisation is entitled to represent; and

(b) who performs work on the premises.

Note 1: Particulars of the suspected contravention must be specified in an entry notice or exemption certificate (see subsections 518(2) and 519(2)).

Note 2: The FWC may issue an affected member certificate if it is satisfied that a member referred to in this subsection is on the premises (see subsection 520(1)).

Note 3: A permit holder, or the organisation to which the permit holder belongs, may be subject to an order by the FWC under section 508 if rights under this Subdivision are misused.

Note 4: A person must not refuse or unduly delay entry by a permit holder, or intentionally hinder or obstruct a permit holder, exercising rights under this Subdivision (see sections 501 and 502).

(2) The fair work instrument must apply or have applied to the member.

(3) The permit holder must reasonably suspect that the contravention has occurred, or is occurring. The burden of proving that the suspicion is reasonable lies on the person asserting that fact.

Note: A permit holder who seeks to exercise rights under this Part without reasonably suspecting that a contravention has occurred, or is occurring, is liable to be penalised under subsection 503(1) (which deals with misrepresentations about things authorised by this Part).

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482 Rights that may be exercised while on premises

Rights that may be exercised while on premises

(1) While on the premises, the permit holder may do the following:
  (a) inspect any work, process or object relevant to the suspected contravention;
  (b) interview any person about the suspected contravention:
    (i) who agrees to be interviewed; and
    (ii) whose industrial interests the permit holder's organisation is entitled to represent;
  (c) require the occupier or an affected employer to allow the permit holder to inspect, and make copies of, any record or document (other than a non-member record or document) that is directly relevant to the suspected contravention and that:
    (i) is kept on the premises; or
    (ii) is accessible from a computer that is kept on the premises.

Note 1: The use or disclosure of information or documents obtained under this section is strictly controlled (see section 504).

Note 2: The use or disclosure of personal information obtained under this section is regulated under the *Privacy Act 1988*.

(1A) However, an occupier or affected employer is not required under paragraph (1)(c) to allow the permit holder to inspect, or make copies of, a record or document if to do so would contravene a law of the Commonwealth or a law of a State or Territory.

*Meaning of **affected employer***

(2) A person is an ***affected employer***, in relation to an entry onto premises under this Subdivision, if:
  (a) the person employs a member of the permit holder's organisation whose industrial interests the organisation is entitled to represent; and
  (b) the member performs work on the premises; and

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(c) the suspected contravention relates to, or affects, the member.

*Meaning of **non-member record or document***

(2A) A ***non-member record or document*** is a record or document 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 substantially relate to the employment of a person who is a member of the permit holder's organisation;

but does not include a record or document that relates only to a person or persons who are not members of the permit holder's organisation if the person or persons have consented in writing to the record or document being inspected or copied by the permit holder.

Occupier and affected employer must not contravene requirement

(3) An occupier or affected employer must not contravene a requirement under paragraph (1)(c).

Note: This subsection is a civil remedy provision (see Part 4-1).

483 Later access to record or document

Later access to record or document

(1) The permit holder may, by written notice, require an affected employer to produce, or provide access to, a record or document (other than a non-member record or document) that is directly relevant to the suspected contravention on a later day or days specified in the notice.

(1A) However, an affected employer is not required under subsection (1) to produce, or provide access to, a record or document if to do so would contravene a law of the Commonwealth or a law of a State or Territory.

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Other rules relating to notices

(2) The day or days specified in the notice must not be earlier than 14 days after the notice is given.

(3) The notice may be given:
  (a) while the permit holder is on the premises; or
  (b) within 5 days after the entry.

Affected employer must not contravene requirement

(4) An affected employer must not contravene a requirement under subsection (1).

Note: This subsection is a civil remedy provision (see Part 4-1).

Where record or document may be inspected or copied

(5) The permit holder may inspect, and make copies of, the record or document at:
  (a) the premises; or
  (b) if another place is agreed upon by the permit holder and the affected employer—that other place.

Note 1: The use or disclosure of information or documents obtained under this section is strictly controlled (see section 504).

Note 2: The use or disclosure of personal information obtained under this section is regulated under the *Privacy Act 1988*.

483AA Application to the FWC for access to non-member records

(1) The permit holder may apply to the FWC for an order allowing the permit holder to do either or both of the following:
  (a) require the occupier or an affected employer to allow the permit holder to inspect, and make copies of, specified non-member records or documents (or parts of such records or documents) under paragraph 482(1)(c);
  (b) require an affected employer to produce, or provide access to, specified non-member records or documents (or parts of such records or documents) under subsection 483(1).

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(2) The FWC may make the order if it is satisfied that the order is necessary to investigate the suspected contravention. Before doing so, the FWC must have regard to any conditions imposed on the permit holder's entry permit.

(3) If the FWC makes the order, this Subdivision has effect accordingly.

(4) An application for an order under this section:
  (a) must be in accordance with the regulations; and
  (b) must set out the reason for the application.

Subdivision AA—Entry to investigate suspected contravention relating to TCF award workers

483A Entry to investigate suspected contravention relating to TCF award workers

(1) Subject to subsection (6), a permit holder may enter premises and exercise a right under section 483B or 483C for the purpose of investigating a suspected contravention of:
  (a) this Act, or a term of a fair work instrument, that relates to, or affects, a TCF award worker:
    (i) whose industrial interests the permit holder's organisation is entitled to represent; and
    (ii) who performs work on the premises; or
  (b) a designated outworker term that is in an instrument that relates to TCF award workers whose industrial interests the permit holder's organisation is entitled to represent.

Note 1: Particulars of the suspected contravention must be specified in an entry notice, unless the entry is a designated outworker terms entry (see subsection 518(2)).

Note 2: A permit holder, or the organisation to which the permit holder belongs, may be subject to an order by the FWC under section 508 if rights under this Subdivision are misused.

Note 3: A person must not refuse or unduly delay entry by a permit holder, or intentionally hinder or obstruct a permit holder, exercising rights under this Subdivision (see sections 501 and 502).

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(1A) A ***TCF award worker*** is:

(a) an employee whose work is covered by a TCF award; or

(b) an individual who, for the purpose of a contract for the provision of services, performs work that is covered by a TCF award.

(2) The permit holder must reasonably suspect that the contravention has occurred, or is occurring.

(3) The burden of proving that the suspicion is reasonable lies on the person asserting that fact.

(4) Subsections (2) and (3) do not apply in relation to a designated outworker terms entry.

(5) A ***designated outworker terms entry*** is an entry under paragraph (1)(b) for the purpose of investigating a suspected contravention of a designated outworker term.

(6) Particular premises of a person cannot be entered under paragraph (1)(a) if:

(a) the person is accredited (however described) by a person or body specified by name in the regulations; and

(b) the accreditation is in writing and is in force; and

(c) the premises are identified in the accreditation as being the principal place of business of the accredited person.

Note: The fact that this subsection may result in certain premises not being able to be entered under paragraph (1)(a) for the purpose of investigating a particular suspected contravention does not:

(a) prevent the premises being entered for that purpose under Subdivision A; or

(b) prevent the premises being entered under paragraph (1)(b) of this section.

(7) Before the Governor-General makes a regulation specifying a particular person or body for the purposes of paragraph (6)(a), the Minister must be satisfied that the person or body:

(a) has aims that are consistent with the objects of Part 6-4A; and

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(b) has the endorsement of:
  (i) at least one employee organisation that is entitled to represent the industrial interests of TCF award workers; and
  (ii) at least one employer organisation that is entitled to represent the industrial interests of persons who employ or engage TCF award workers.

483B Rights that may be exercised while on premises

Rights that may be exercised while on premises

(1) While on the premises, the permit holder may do the following:
  (a) inspect any work, process or object relevant to the suspected contravention;
  (b) interview any person about the suspected contravention:
    (i) who agrees to be interviewed; and
    (ii) whose industrial interests the permit holder's organisation is entitled to represent;
  (c) require the occupier or an affected employer to allow the permit holder to inspect, and make copies of, any record or document that is directly relevant to the suspected contravention and that:
    (i) is kept on the premises; or
    (ii) is accessible from a computer that is kept on the premises.

Note 1: The use or disclosure of information or documents obtained under this section is strictly controlled (see section 504).

Note 2: The use or disclosure of personal information obtained under this section is regulated under the *Privacy Act 1988*.

(2) However, an occupier or affected employer is not required under paragraph (1)(c) to allow the permit holder to inspect, or make copies of, a record or document if to do so would contravene a law of the Commonwealth or a law of a State or Territory.

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*Meaning of **affected employer***

(3) A person is an ***affected employer***:
  (a) in relation to an entry onto premises under section 483A other than a designated outworker terms entry, if:
    (i) the person employs or engages a TCF award worker whose industrial interests the permit holder's organisation is entitled to represent; and
    (ii) the TCF award worker performs work on the premises; and
    (iii) the suspected contravention relates to, or affects, the TCF award worker; or
  (b) in relation to a designated outworker terms entry under section 483A, if the person is covered by a TCF award.

Occupier and affected employer must not contravene requirement

(4) An occupier or affected employer must not contravene a requirement under paragraph (1)(c).

Note: This subsection is a civil remedy provision (see Part 4-1).

483C Later access to record or document

Later access to record or document

(1) The permit holder may, by written notice, require the occupier or an affected employer to produce, or provide access to, a record or document that is directly relevant to the suspected contravention on a later day or days specified in the notice.

(2) However, an occupier or affected employer is not required under subsection (1) to produce, or provide access to, a record or document if to do so would contravene a law of the Commonwealth or a law of a State or Territory.

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Other rules relating to notices

(3) The day or days specified in the notice must not be earlier than 14 days after the notice is given.

(4) The notice may be given:
  (a) while the permit holder is on the premises; or
  (b) within 5 days after the entry.

Occupier and affected employer must not contravene requirement

(5) An occupier or affected employer must not contravene a requirement under subsection (1).

Note: This subsection is a civil remedy provision (see Part 4-1).

Where record or document may be inspected or copied

(6) The permit holder may inspect, and make copies of, the record or document at:
  (a) the premises; or
  (b) if another place is agreed upon by the permit holder and the occupier or affected employer—that other place.

Note 1: The use or disclosure of information or documents obtained under this section is strictly controlled (see section 504).

Note 2: The use or disclosure of personal information obtained under this section is regulated under the *Privacy Act 1988*.

483D Entry onto other premises to access records and documents

(1) A permit holder who may enter premises under paragraph 483A(1)(a) for the purpose of investigating a suspected contravention may enter other premises and exercise a right under subsection (2) or section 483E if the permit holder reasonably suspects that records or documents that are directly relevant to the suspected contravention:
  (a) are kept on the other premises; or
  (b) are accessible from a computer that is kept on the other premises.

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Note: Particulars of the suspected contravention must be specified in an entry notice (see subsection 518(2)).

Rights that may be exercised while on premises

(2) While on the other premises, the permit holder may require the occupier to allow the permit holder to inspect, and make copies of, any such record or document.

Note 1: The use or disclosure of information or documents obtained under this section is strictly controlled (see section 504).

Note 2: The use or disclosure of personal information obtained under this section is regulated under the *Privacy Act 1988*.

(3) However, an occupier is not required under subsection (2) to allow the permit holder to inspect, or make copies of, a record or document if to do so would contravene a law of the Commonwealth or a law of a State or Territory.

Occupier must not contravene requirement

(4) An occupier must not contravene a requirement under subsection (2).

Note: This subsection is a civil remedy provision (see Part 4-1).

483E Later access to record or document—other premises

Later access to record or document

(1) The permit holder may, by written notice, require the occupier of the other premises to produce, or provide access to, a record or document that is directly relevant to the suspected contravention on a later day or days specified in the notice.

(2) However, an occupier is not required under subsection (1) to produce, or provide access to, a record or document if to do so would contravene a law of the Commonwealth or a law of a State or Territory.

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Other rules relating to notices

(3) The day or days specified in the notice must not be earlier than 14 days after the notice is given.

(4) The notice may be given:
  (a) while the permit holder is on the other premises; or
  (b) within 5 days after the entry.

Occupier must not contravene requirement

(5) An occupier must not contravene a requirement under subsection (1).

Note: This subsection is a civil remedy provision (see Part 4-1).

Where record or document may be inspected or copied

(6) The permit holder may inspect, and make copies of, the record or document at:
  (a) the other premises; or
  (b) if another place is agreed upon by the permit holder and the occupier—that other place.

Note 1: The use or disclosure of information or documents obtained under this section is strictly controlled (see section 504).

Note 2: The use or disclosure of personal information obtained under this section is regulated under the *Privacy Act 1988*.

Subdivision B—Entry to hold discussions

484 Entry to hold discussions

A permit holder may enter premises for the purposes of holding discussions with one or more employees or TCF award workers:
  (a) who perform work on the premises; and
  (b) whose industrial interests the permit holder's organisation is entitled to represent; and
  (c) who wish to participate in those discussions.

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Note 1: A permit holder, or the organisation to which the permit holder belongs, may be subject to an order by the FWC under section 508 if rights under this Subdivision are misused.

Note 2: A person must not refuse or unduly delay entry by a permit holder, or intentionally hinder or obstruct a permit holder, exercising rights under this Subdivision (see sections 501 and 502).

Note 3: Under paragraph 487(1)(b), the permit holder must give the occupier of the premises notice for the entry. Having given that notice, the permit holder may hold discussions with any person on the premises described in this section.

Subdivision C—Requirements for permit holders

486 Permit holder must not contravene this Subdivision

Subdivisions A, AA and B do not authorise a permit holder to enter or remain on premises, or exercise any other right, if he or she contravenes this Subdivision, or regulations prescribed under section 521, in exercising that right.

487 Giving entry notice or exemption certificate

Entry under Subdivision A or B

(1) Unless the FWC has issued an exemption certificate for the entry, the permit holder must:
   (a) before entering premises under Subdivision A—give the occupier of the premises and any affected employer an entry notice for the entry; and
   (b) before entering premises under Subdivision B—give the occupier of the premises an entry notice for the entry.

(2) An ***entry notice*** for an entry is a notice that complies with section 518.

(3) An entry notice for an entry under Subdivision A or B must be given during working hours at least 24 hours, but not more than 14 days, before the entry.

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(4) If the FWC has issued an exemption certificate for the entry, the permit holder must, either before or as soon as practicable after entering the premises, give a copy of the certificate to:
   (a) the occupier of the premises or another person who apparently represents the occupier; and
   (b) any affected employer or another person who apparently represents the employer;

   if the occupier, employer or other person is present at the premises.

Entry under Subdivision AA

(5) If the permit holder enters premises under Subdivision AA, the permit holder must, either before or as soon as practicable after entering the premises, give an entry notice for the entry to the occupier of the premises or another person who apparently represents the occupier if the occupier or other person is present at the premises.

488 Contravening entry permit conditions

The permit holder must not contravene a condition imposed on the entry permit.

489 Producing authority documents

(1) If the permit holder has entered premises under Subdivision A or AA, the permit holder must produce his or her authority documents for inspection by the occupier of the premises, or an affected employer:
   (a) on request; and
   (b) before making a requirement under:
      (i) paragraph 482(1)(c) or 483B(1)(c), or subsection 483D(2); or
      (ii) subsection 483(1), 483C(1) or 483E(1).

Note: Paragraphs 482(1)(c) and 483B(1)(c) and subsection 483D(2) deal with access to records and documents while the permit holder is on the premises. Subsections 483(1), 483C(1) and 483E(1) deal with access to records and documents at later times.

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(2) If the permit holder has entered premises under Subdivision B, the permit holder must produce his or her authority documents for inspection by the occupier of the premises on request.

(3) ***Authority documents***, for an entry under Subdivision A, AA or B, means:
  (a) the permit holder's entry permit; and
  (b) either:
    (i) a copy of the entry notice for the entry; or
    (ii) if the FWC has issued an exemption certificate for the entry—the certificate.

490 When right may be exercised

(1) The permit holder may exercise a right under Subdivision A, AA or B only during working hours.

(2) The permit holder may hold discussions under section 484 only during mealtimes or other breaks.

(3) The permit holder may only enter premises under Subdivision A, AA or B on a day specified in the entry notice or exemption certificate for the entry.

491 Occupational health and safety requirements

The permit holder must comply with any reasonable request by the occupier of the premises for the permit holder to comply with an occupational health and safety requirement that applies to the premises.

Note: The FWC may deal with a dispute about whether the request is reasonable (see subsection 505(1)).

492 Location of interviews and discussions

(1) The permit holder must conduct interviews or hold discussions in the rooms or areas of the premises agreed with the occupier of the premises.

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(2) Subsection (3) applies if the permit holder and the occupier cannot agree on the room or area of the premises in which the permit holder is to conduct an interview or hold discussions.

(3) The permit holder may conduct the interview or hold the discussions in any room or area:
   (a) in which one or more of the persons who may be interviewed or participate in the discussions ordinarily take meal or other breaks; and
   (b) that is provided by the occupier for the purpose of taking meal or other breaks.

Note 1: The permit holder may be subject to an order by the FWC under section 508 if rights under this section are misused.

Note 2: A person must not intentionally hinder or obstruct a permit holder exercising rights under this section (see section 502).

492A Route to location of interview and discussions

(1) The permit holder must comply with any reasonable request by the occupier of the premises to take a particular route to reach a room or area of the premises determined under section 492.

Note: The FWC may deal with a dispute about whether the request is reasonable (see subsection 505(1)).

(2) A request under subsection (1) is not unreasonable only because the route is not that which the permit holder would have chosen.

(3) The regulations may prescribe circumstances in which a request under subsection (1) is or is not reasonable.

493 Residential premises

The permit holder must not enter any part of premises that is used mainly for residential purposes.

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Division 3—State or Territory OHS rights

494 Official must be permit holder to exercise State or Territory OHS right

Official must be permit holder

(1) An official of an organisation must not exercise a State or Territory OHS right unless the official is a permit holder.

Note: This subsection is a civil remedy provision (see Part 4-1).

*Meaning of **State or Territory OHS right***

(2) A right to enter premises, or to inspect or otherwise access an employee record of an employee that is on premises, is a ***State or Territory OHS right*** if the right is conferred by a State or Territory OHS law, and:

(a) the premises are occupied or otherwise controlled by any of the following:

(i) a constitutional corporation;

(ii) a body corporate incorporated in a Territory;

(iii) the Commonwealth;

(iv) a Commonwealth authority; 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, action taken, or activity undertaken or controlled, by any of the following in its capacity as an employer:

(i) a constitutional corporation;

(ii) a body corporate incorporated in a Territory;

(iii) the Commonwealth;

(iv) a Commonwealth authority; or

(e) the right relates to requirements to be met, action taken, or activity undertaken or controlled, by an employee of, or an

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independent contractor providing services for, any of the following:

(i) a constitutional corporation;

(ii) a body corporate incorporated in a Territory;

(iii) the Commonwealth;

(iv) a Commonwealth authority; or

(f) the exercise of the right will have a direct effect on any of the following in its capacity as an employer:

(i) a constitutional corporation;

(ii) a body corporate incorporated in a Territory;

(iii) the Commonwealth;

(iv) a Commonwealth authority; or

(g) the exercise of the right will have a direct effect on a person who is employed by, or who is an independent contractor providing services for, any of the following:

(i) a constitutional corporation;

(ii) a body corporate incorporated in a Territory;

(iii) the Commonwealth;

(iv) a Commonwealth authority.

Meaning of ***State or Territory OHS law***

(3) A ***State or Territory OHS law*** is a law of a State or a Territory prescribed by the regulations.

495 Giving notice of entry

(1) A permit holder must not exercise a State or Territory OHS right to inspect or otherwise access an employee record of an employee, unless:

(a) he or she has given the occupier of the premises, and any affected employer, a written notice setting out his or her intention to exercise the right, and reasons for doing so; and

(b) the notice is given at least 24 hours before exercising the right.

Note: This subsection is a civil remedy provision (see Part 4-1).

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*Meaning of **affected employer***

(2) A person is an ***affected employer***:

(a) in relation to an entry onto premises in accordance with this Division—if one or more of the person's employees perform work on the premises; and

(b) in relation to a right to inspect or otherwise access an employee record in accordance with this Division—if the person employs the employee to whom the record relates.

496 Contravening entry permit conditions

In exercising a State or Territory OHS right, a permit holder must not contravene a condition imposed on his or her entry permit.

Note: This section is a civil remedy provision (see Part 4-1).

497 Producing entry permit

A permit holder must not exercise a State or Territory OHS right unless the permit holder produces his or her entry permit for inspection when requested to do so by the occupier of the premises or an affected employer.

Note: This section is a civil remedy provision (see Part 4-1).

498 When right may be exercised

A permit holder may exercise a State or Territory OHS right only during working hours.

Note: This section is a civil remedy provision (see Part 4-1).

499 Occupational health and safety requirements

A permit holder must not exercise a State or Territory OHS right unless he or she complies with any reasonable request by the occupier of the premises to comply with an occupational health and safety requirement that applies to the premises.

Note 1: This section is a civil remedy provision (see Part 4-1).

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Note 2: The FWC may deal with a dispute about whether the request is reasonable (see subsection 505(1)).

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Division 4—Prohibitions

500 Permit holder must not hinder or obstruct

A permit holder exercising, or seeking to exercise, rights in accordance with this Part must not intentionally hinder or obstruct any person, or otherwise act in an improper manner.

Note 1: This section is a civil remedy provision (see Part 4-1).

Note 2: A permit holder, or the organisation to which the permit holder belongs, may also be subject to an order by the FWC under section 508 if rights under this Part are misused.

Note 3: A person must not intentionally hinder or obstruct a permit holder, exercising rights under this Part (see section 502).

501 Person must not refuse or delay entry

A person must not refuse or unduly delay entry onto premises by a permit holder who is entitled to enter the premises in accordance with this Part.

Note: This section is a civil remedy provision (see Part 4-1).

502 Person must not hinder or obstruct permit holder

(1) A person must not intentionally hinder or obstruct a permit holder exercising rights in accordance with this Part.

Note: This subsection is a civil remedy provision (see Part 4-1).

(2) To avoid doubt, a failure to agree on a place as referred to in paragraph 483(5)(b), 483C(6)(b) or 483E(6)(b) does not constitute hindering or obstructing a permit holder.

(3) Without limiting subsection (1), that subsection extends to hindering or obstructing that occurs after an entry notice is given but before a permit holder enters premises.

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503 Misrepresentations about things authorised by this Part

(1) A person must not take action:
  (a) with the intention of giving the impression; or
  (b) reckless as to whether the impression is given;
that the doing of a thing is authorised by this Part if it is not so authorised.

Note: This subsection is a civil remedy provision (see Part 4-1).

(2) Subsection (1) does not apply if the person reasonably believes that the doing of the thing is authorised.

504 Unauthorised use or disclosure of information or documents

A person must not use or disclose information or a document obtained under section 482, 483, 483B, 483C, 483D or 483E in the investigation of a suspected contravention for a purpose that is not related to the investigation or rectifying the suspected contravention, unless:
  (a) the person reasonably believes that the use or disclosure is necessary to lessen or prevent:
    (i) a serious and imminent threat to an individual's life, health or safety; or
    (ii) a serious threat to public health or public safety; or
  (b) the person has reason to suspect that unlawful activity has been, is being or may be engaged in, and uses or discloses the information or document as a necessary part of an investigation of the matter or in reporting concerns to relevant persons or authorities; or
  (c) the use or disclosure is required or authorised by or under law; or
  (d) the person reasonably believes that the use or disclosure is reasonably necessary for one or more of the following by, or on behalf of, an enforcement body (within the meaning of the *Privacy Act 1988*):
    (i) the prevention, detection, investigation, prosecution or punishment of criminal offences, breaches of a law

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imposing a penalty or sanction or breaches of a prescribed law;

(ii) the enforcement of laws relating to the confiscation of the proceeds of crime;

(iii) the protection of the public revenue;

(iv) the prevention, detection, investigation or remedying of seriously improper conduct or prescribed conduct;

(v) the preparation for, or conduct of, proceedings before any court or tribunal, or implementation of the orders of a court or tribunal; or

(e) if the information is, or the document contains, personal information (within the meaning of the *Privacy Act 1988*)—the use or disclosure is made with the consent of the individual to whom the information relates.

Note: This section is a civil remedy provision (see Part 4-1).

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Division 5—Powers of the FWC

Subdivision A—Dealing with disputes

505 FWC may deal with a dispute about the operation of this Part

(1) The FWC may deal with a dispute about the operation of this Part, including a dispute about:

(a) whether a request under section 491, 492A or 499 is reasonable; or

(b) when a right of the kind referred to in section 490 may be exercised by a permit holder on premises of a kind mentioned in subsection 521C(1) or 521D(1), despite that section; or

(c) whether accommodation is reasonably available as mentioned in subsection 521C(1) or premises reasonably accessible as mentioned in subsection 521D(1); or

(d) whether providing accommodation or transport, or causing accommodation or transport to be provided, would cause the occupier of premises undue inconvenience as mentioned in paragraph 521C(2)(a) or 521D(2)(a); or

(e) whether a request to provide accommodation or transport is made within a reasonable period as mentioned in paragraph 521C(2)(c) or 521D(2)(c).

Note 1: Sections 491 and 499 deal with requests for permit holders to comply with occupational health and safety requirements.

Note 2: Section 492A deals with requests for a permit holder to take a particular route to a room or area in which an interview is to be conducted or discussions held.

Note 3: Section 490 deals with when rights under Subdivision A, AA or B of Division 2 of this Part may be exercised.

Note 4: Sections 521C and 521D deal with accommodation in and transport to remote areas for the purpose of exercising rights under this Part.

(2) The FWC may deal with the dispute by arbitration, including by making one or more of the following orders:

(a) an order imposing conditions on an entry permit;

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(b) an order suspending an entry permit;
(c) an order revoking an entry permit;
(d) an order about the future issue of entry permits to one or more persons;
(e) any other order it considers appropriate.

Note: The FWC may also deal with a dispute by mediation or conciliation, or by making a recommendation or expressing an opinion (see subsection 595(2)).

(3) The FWC may deal with the dispute:
(a) on its own initiative; or
(b) on application by any of the following to whom the dispute relates:
(i) a permit holder;
(ii) a permit holder's organisation;
(iii) an employer;
(iv) an occupier of premises.

(4) In dealing with the dispute, the FWC must take into account fairness between the parties concerned.

(5) In dealing with the dispute, the FWC must not confer rights on a permit holder that are additional to, or inconsistent with, rights exercisable in accordance with Division 2, 3 or 7 of this Part, unless the dispute is about:
(a) whether a request under section 491, 492A or 499 is reasonable; or
(b) when a right of the kind referred to in section 490 may be exercised by the permit holder on premises of a kind mentioned in subsection 521C(1) or 521D(1), despite that section; or
(c) whether accommodation is reasonably available as mentioned in subsection 521C(1) or premises reasonably accessible as mentioned in subsection 521D(1); or
(d) whether providing accommodation or transport, or causing accommodation or transport to be provided, would cause the

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occupier of premises undue inconvenience as mentioned in paragraph 521C(2)(a) or 521D(2)(a); or

(e) whether a request to provide accommodation or transport is made within a reasonable period as mentioned in paragraph 521C(2)(c) or 521D(2)(c).

505A FWC may deal with a dispute about frequency of entry to hold discussions

(1) This section applies if:

(a) a permit holder or permit holders of an organisation enter premises under section 484 for the purposes of holding discussions with one or more employees or TCF award workers; and

(b) an employer of the employees or the TCF award workers, or occupier of the premises, disputes the frequency with which the permit holder or permit holders of the organisation enter the premises.

(2) The FWC may deal with a dispute about the frequency with which a permit holder or permit holders of an organisation enter premises under section 484.

(3) The FWC may deal with the dispute by arbitration, including by making one or more of the following orders:

(a) an order imposing conditions on an entry permit;

(b) an order suspending an entry permit;

(c) an order revoking an entry permit;

(d) an order about the future issue of entry permits to one or more persons;

(e) any other order it considers appropriate.

Note: The FWC may also deal with a dispute by mediation or conciliation, or by making a recommendation or expressing an opinion (see subsection 595(2)).

(4) However, the FWC may only make an order under subsection (3) if the FWC is satisfied that the frequency of entry by the permit

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holder or permit holders of the organisation would require an unreasonable diversion of the occupier's critical resources.

(5) The FWC may deal with the dispute:
  (a) on its own initiative; or
  (b) on application by any of the following to whom the dispute relates:
    (i) a permit holder;
    (ii) a permit holder's organisation;
    (iii) an employer;
    (iv) an occupier of premises.

(6) In dealing with the dispute, the FWC must take into account fairness between the parties concerned.

506 Contravening order made to deal with dispute

A person must not contravene a term of an order under subsection 505(2) or subsection 505A(3).

Note: This section is a civil remedy provision (see Part 4-1).

Subdivision B—Taking action against permit holder

507 FWC may take action against permit holder

(1) The FWC may, on application by an inspector or a person prescribed by the regulations, take the following action against a permit holder:
  (a) impose conditions on any entry permit issued to the permit holder;
  (b) suspend any entry permit issued to the permit holder;
  (c) revoke any entry permit issued to the permit holder.

(2) In deciding whether to take action under subsection (1), the FWC must take into account the permit qualification matters.

Note: For ***permit qualification matters***, see subsection 513(1).

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Subdivision C—Restricting rights of organisations and officials where misuse of rights

508 FWC may restrict rights if organisation or official has misused rights

(1) The FWC may restrict the rights that are exercisable under this Part by an organisation, or officials of an organisation, if the FWC is satisfied that the organisation, or an official of the organisation, has misused those rights.

Note: Only a Vice President, Deputy President or Full Bench may take action under this subsection (see subsections 612(2) and 615(1)).

(2) The action that the FWC may take under subsection (1) includes the following:
  (a) imposing conditions on entry permits;
  (b) suspending entry permits;
  (c) revoking entry permits;
  (d) requiring some or all of the entry permits that might in future be issued in relation to the organisation to be issued subject to specified conditions;
  (e) banning, for a specified period, the issue of entry permits in relation to the organisation, either generally or to specified persons;
  (f) making any order it considers appropriate.

(3) The FWC may take action under subsection (1):
  (a) on its own initiative; or
  (b) on application by an inspector.

(4) Without limiting subsection (1), an official misuses rights exercisable under this Part if:
  (a) the official exercises those rights repeatedly with the intention or with the effect of hindering, obstructing or otherwise harassing an occupier or employer; or
  (b) in exercising a right under Subdivision B of Division 2 of this Part, the official encourages a person to become a

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member of an organisation and does so in a way that is unduly disruptive:

(i) because the exercise of the right is excessive in the circumstances; or

(ii) for some other reason.

509 Contravening order made for misuse of rights

A person must not contravene a term of an order under subsection 508(1).

Note: This section is a civil remedy provision (see Part 4-1).

Subdivision D—When the FWC must revoke or suspend entry permits

510 When the FWC must revoke or suspend entry permits

When the FWC must revoke or suspend entry permits

(1) The FWC must, under this subsection, revoke or suspend each entry permit held by a permit holder if it is satisfied that any of the following has happened since the first of those permits was issued:

(a) the permit holder was found, in proceedings under this Act, to have contravened subsection 503(1) (which deals with misrepresentations about things authorised by this Part);

(b) the permit holder has contravened section 504 (which deals with unauthorised use or disclosure of information or documents);

(c) the Information Commissioner has, under paragraph 52(1)(b) of the *Privacy Act 1988*, found substantiated a complaint relating to action taken by the permit holder in relation to information or documents obtained under section 482, 483, 483B, 483C, 483D or 483E;

(d) the permit holder, or another person, was ordered to pay a pecuniary penalty under this Act in relation to a contravention of this Part by the permit holder;

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(e) a court, or other person or body, under a State or Territory industrial law:
  (i) cancelled or suspended a right of entry for industrial purposes that the permit holder had under that law; or
  (ii) disqualified the permit holder from exercising, or applying for, a right of entry for industrial purposes under that law;

(f) the permit holder has, in exercising a right of entry under a State or Territory OHS law, taken action that was not authorised by that law.

(2) Despite subsection (1), the FWC is not required to suspend or revoke an entry permit under paragraph (1)(d) or (f) if the FWC is satisfied that the suspension or revocation would be harsh or unreasonable in the circumstances.

(3) Subsection (1) does not apply in relation to a circumstance referred to in a paragraph of that subsection if the FWC took the circumstance into account when taking action under that subsection on a previous occasion.

Minimum suspension period

(4) A suspension under subsection (1) must be for a period that is at least as long as the period (the ***minimum suspension period***) specified in whichever of the following paragraphs applies:
  (a) if the FWC has not previously taken action under subsection (1) against the permit holder—3 months;
  (b) if the FWC has taken action under subsection (1) against the permit holder on only one occasion—12 months;
  (c) if the FWC has taken action under subsection (1) against the permit holder on more than one occasion—5 years.

Banning issue of future entry permits

(5) If the FWC takes action under subsection (1), it must also ban the issue of any further entry permit to the permit holder for a specified period (the ***ban period***).

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(6) The ban period must:
  (a) begin when the action is taken under subsection (1); and
  (b) be no shorter than the minimum suspension period.

Subdivision E—General rules for suspending entry permits

511 General rules for suspending entry permits

If the FWC suspends an entry permit, the suspension:
  (a) must be for a specified period; and
  (b) does not prevent the revocation of, or the imposition of conditions on, the entry permit during the suspension period; and
  (c) does not alter the time at which the entry permit would otherwise expire.

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Division 6—Entry permits, entry notices and certificates

Subdivision A—Entry permits

512 FWC may issue entry permits

The FWC may, on application by an organisation, issue a permit (an ***entry permit***) to an official of the organisation if the FWC is satisfied that the official is a fit and proper person to hold the entry permit.

513 Considering application

(1) In deciding whether the official is a fit and proper person, the FWC must take into account the following ***permit qualification 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 relation to action taken by the official;

(e) whether a permit issued to the official under this Part, or under a similar law of the Commonwealth (no matter when in force), 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 a State or Territory OHS law, has:

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(i) 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; or

(ii) disqualified the official from exercising, or applying for, a right of entry for industrial or occupational health and safety purposes under that law;

(g) any other matters that the FWC considers relevant.

(2) Despite paragraph 85ZZH(c) of the *Crimes Act 1914*, Division 3 of Part VIIC of that Act applies in relation to the disclosure of information to or by, or the taking into account of information by, the FWC for the purpose of making a decision under this Part.

Note: Division 3 of 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.

514 When the FWC must not issue permit

The FWC must not issue an entry permit to an official at a time when a suspension or disqualification, imposed by a court or other person or body:

(a) applies to the official's exercise of; or

(b) 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 a State or Territory OHS law.

515 Conditions on entry permit

(1) The FWC may impose conditions on an entry permit when it is issued.

(2) In deciding whether to impose conditions under subsection (1), the FWC must take into account the permit qualification matters.

(3) The FWC must record on an entry permit any conditions that have been imposed on its use (whether under subsection (1) or any other provision of this Part).

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(4) If the FWC imposes a condition on an entry permit after it has been issued, the permit ceases to be in force until the FWC records the condition on the permit.

(5) To avoid doubt, a permit holder does not contravene an FWC order merely because the permit holder contravenes a condition imposed on his or her permit by order (whether the condition is imposed at the time the entry permit is issued or at any later time).

516 Expiry of entry permit

(1) Unless it is revoked, an entry permit expires at the earlier of the following times:
   (a) at the end of the period of 3 years beginning on the day it is issued, or that period as extended under subsection (2);
   (b) when the permit holder ceases to be an official of the organisation that applied for the permit.

(2) The FWC may extend the period of 3 years referred to in paragraph (1)(a) by a specified period if:
   (a) the organisation that applied for the permit (the ***old permit***) has applied for another entry permit for the permit holder; and
   (b) the application was made at least 1 month before the old permit would otherwise have expired under that paragraph; and
   (c) the FWC is satisfied that the old permit is likely to expire before the FWC determines the application.

(3) The period specified must not be longer than the period that the FWC considers necessary for it to determine the application.

(4) The FWC must not extend the period under subsection (2) if:
   (a) the FWC has requested or required the organisation or permit holder to provide copies of records or documents, or to provide any other information, in relation to the application; and

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(b) the organisation or permit holder has not complied with the request or requirement; and
(c) the FWC is satisfied that the organisation or permit holder does not have a reasonable excuse.

517 Return of entry permits to the FWC

When permit holder must return entry permit to the FWC

(1) A permit holder must return an entry permit to the FWC within 7 days of any of the following things happening:
(a) the permit is revoked or suspended;
(b) conditions are imposed on the permit after it is issued;
(c) the permit expires.

Note: This subsection is a civil remedy provision (see Part 4-1).

FWC to return entry permit to permit holder after suspension

(2) After the end of a suspension period, the FWC must return the entry permit to the permit holder if:
(a) the permit holder, or the permit holder's organisation, applies to the FWC for the return of the entry permit; and
(b) the entry permit has not expired.

Subdivision B—Entry notices

518 Entry notice requirements

Requirements for all entry notices

(1) An entry notice must specify the following:
(a) the premises that are proposed to be entered;
(b) the day of the entry;
(c) the organisation of which the permit holder for the entry is an official.

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Requirements for entry notice for entry to investigate suspected contravention

(2) An entry notice given for an entry under section 481, 483A or 483D must:

(a) specify that section as the provision that authorises the entry; and

(b) unless the entry is a designated outworker terms entry under section 483A—specify the particulars of the suspected contravention, or contraventions; and

(c) for an entry under section 481—contain a declaration by the permit holder for the entry that the permit holder's organisation is entitled to represent the industrial interests of a member, who performs work on the premises, and:

(i) to whom the suspected contravention or contraventions relate; or

(ii) who is affected by the suspected contravention or contraventions; and

(ca) for an entry under section 483A other than a designated outworker terms entry—contain a declaration by the permit holder for the entry that the permit holder's organisation is entitled to represent the industrial interests of a TCF award worker, who performs work on the premises, and:

(i) to whom the suspected contravention or contraventions relate; or

(ii) who is affected by the suspected contravention or contraventions; and

(cb) for a designated outworker terms entry under section 483A—contain a declaration by the permit holder for the entry that the permit holder's organisation is entitled to represent the industrial interests of TCF award workers; and

(cc) for an entry under section 483D—contain a declaration by the permit holder for the entry that the permit holder's organisation is entitled to represent the industrial interests of a TCF award worker:

(i) to whom the suspected contravention or contraventions relate; or

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(ii) who is affected by the suspected contravention or contraventions; and

(d) specify the provision of the organisation's rules that entitles the organisation to represent the member or TCF award worker.

Requirements for entry notice for entry to hold discussions

(3) An entry notice given for an entry under section 484 (which deals with entry to hold discussions) must:

(a) specify that section as the provision that authorises the entry; and

(b) contain a declaration by the permit holder for the entry that the permit holder's organisation is entitled to represent the industrial interests of an employee or TCF award worker who performs work on the premises; and

(c) specify the provision of the organisation's rules that entitles the organisation to represent the employee or TCF award worker.

Note: See section 503 (which deals with misrepresentations about things authorised by this Part).

Subdivision C—Exemption certificates

519 Exemption certificates

(1) The FWC must issue a certificate (an ***exemption certificate***) to an organisation for an entry under section 481 (which deals with entry to investigate suspected contraventions) if:

(a) the organisation has applied for the certificate; and

(b) the FWC reasonably believes that advance notice of the entry given by an entry notice might result in the destruction, concealment or alteration of relevant evidence.

(2) An exemption certificate must specify the following:

(a) the premises to which it relates;

(b) the organisation to which it relates;

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(c) the day or days on which the entry may occur;
(d) particulars of the suspected contravention, or contraventions, to which the entry relates;
(e) section 481 as the provision that authorises the entry.

Subdivision D—Affected member certificates

520 Affected member certificates

(1) The FWC must, on application by an organisation, issue a certificate (an ***affected member certificate***) to the organisation if the FWC is satisfied that:
  (a) a member of the organisation performs work on particular premises; and
  (b) the organisation is entitled to represent the industrial interests of the member; and
  (c) a suspected contravention of a kind referred to in subsection 481(1) relates to, or affects, the member.

(2) An affected member certificate must state the following:
  (a) the premises to which it relates;
  (b) the organisation to which it relates;
  (c) particulars of the suspected contravention, or contraventions, to which it relates;
  (d) that the FWC is satisfied of the matters referred to in paragraphs (1)(a), (b) and (c).

(3) An affected member certificate must not reveal the identity of the member or members to whom it relates.

Subdivision E—Miscellaneous

521 Regulations dealing with instruments under this Part

The regulations may provide for, and in relation to, the following:
(a) the form of entry permits, entry notices, exemption certificates and affected member certificates;

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(b) additional information to be included on, or given with, entry permits, entry notices, exemption certificates and affected member certificates;

(c) the manner in which entry permits, entry notices, exemption certificates and affected member certificates are to be given;

(d) any other matter in relation to entry permits, entry notices, exemption certificates and affected member certificates.

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Division 7—Accommodation and transport arrangements in remote areas

521A Meaning of *accommodation arrangement*

(1) If:
  (a) an occupier of premises enters into an arrangement with an organisation; and
  (b) under the terms of the arrangement, a permit holder is provided with accommodation for the purpose of assisting him or her to exercise rights under this Part;

the arrangement is an ***accommodation arrangement***.

(2) If:
  (a) an occupier of premises enters into an arrangement with a permit holder; and
  (b) under the terms of the arrangement, the permit holder is provided with accommodation for the purpose of assisting him or her to exercise rights under this Part;

the arrangement is an ***accommodation arrangement***.

521B Meaning of *transport arrangement*

(1) If:
  (a) an occupier of premises enters into an arrangement with an organisation; and
  (b) under the terms of the arrangement, a permit holder is provided with transport for the purpose of assisting him or her to exercise rights under this Part;

the arrangement is a ***transport arrangement***.

(2) If:
  (a) an occupier of premises enters into an arrangement with a permit holder; and

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(b) under the terms of the arrangement, the permit holder is provided with transport for the purpose of assisting him or her to exercise rights under this Part;

the arrangement is a ***transport arrangement***.

521C Accommodation arrangements for remote areas

This section applies only in remote areas

(1) This section applies if rights under this Part are to be exercised by a permit holder on premises that are located in a place where accommodation is not reasonably available to the permit holder unless the occupier of the premises on which the rights are to be exercised provides the accommodation, or causes it to be provided.

Where parties cannot agree on an accommodation arrangement

(2) If all of the following are satisfied:

(a) to provide accommodation, or cause accommodation to be provided, to the permit holder would not cause the occupier undue inconvenience;

(b) the permit holder, or the organisation of which the permit holder is an official, requests the occupier to provide, or cause to be provided, accommodation for the purpose of assisting the permit holder to exercise rights under this Part on the premises;

(c) the request is made within a reasonable period before accommodation is required;

(d) the permit holder, and the organisation of which the permit holder is an official, have been unable to enter into an accommodation arrangement with the occupier by consent;

the occupier must enter into an accommodation arrangement for the purpose of assisting the permit holder to exercise rights under this Part.

Note: The FWC may deal with disputes about whether accommodation is reasonably available, whether providing accommodation or causing it to be provided would cause the occupier undue inconvenience and

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whether a request to provide accommodation is made within a reasonable period (see subsection 505(1)).

Costs

(3) If an accommodation arrangement is entered into under subsection (2), the occupier must not charge an organisation or a permit holder a fee for accommodation under the arrangement that is more than is necessary to cover the cost to the occupier of providing the accommodation, or causing it to be provided.

Note: This subsection is a civil remedy provision (see Part 4-1).

FWC's powers if rights misused whilst in accommodation

(4) For the purposes of this Part, the FWC may treat the conduct of the permit holder whilst in accommodation under an accommodation arrangement to which the occupier is a party, whether entered into under subsection (2) or by consent, as conduct engaged in as part of the exercise of rights by the permit holder under this Part.

521D Transport arrangements for remote areas

This section applies only in remote areas

(1) This section applies if rights under this Part are to be exercised by a permit holder on premises that are located in a place that is not reasonably accessible to the permit holder unless the occupier of the premises on which the rights are to be exercised provides transport, or causes it to be provided.

Where parties cannot agree on transport arrangement

(2) If all of the following are satisfied:
   (a) to provide transport to the premises for the permit holder, or cause that transport to be provided, would not cause the occupier undue inconvenience;
   (b) the permit holder, or the organisation of which the permit holder is an official, requests the occupier to provide, or cause to be provided, transport to the premises for the

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purpose of assisting the permit holder to exercise rights under this Part;

(c) the request is made within a reasonable period before transport is required;

(d) the permit holder, and the organisation of which the permit holder is an official, have been unable to enter into a transport arrangement with the occupier by consent;

the occupier must enter into a transport arrangement for the purpose of assisting the permit holder to exercise rights under this Part.

Note: The FWC may deal with disputes about whether premises are reasonably accessible, whether providing transport or causing it to be provided would cause the occupier undue inconvenience and whether a request to provide transport is made within a reasonable period (see subsection 505(1)).

Costs

(3) If a transport arrangement is entered into under subsection (2), the occupier must not charge an organisation or a permit holder a fee for transport under the arrangement that is more than is necessary to cover the cost to the occupier of providing the transport, or causing it to be provided.

Note: This subsection is a civil remedy provision (see Part 4-1).

FWC's powers if rights misused whilst in transport

(4) For the purposes of this Part, the FWC may treat the conduct of the permit holder whilst in transport under a transport arrangement to which the occupier is a party, whether entered into under subsection (2) or by consent, as conduct engaged in as part of the exercise of rights by the permit holder under this Part.

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Part 3-5—Stand down

Division 1—Introduction

522 Guide to this Part

This Part provides for a national system employer to stand down a national system employee without pay in certain circumstances.

Division 2 sets out the circumstances in which an employer may stand down an employee without pay.

Division 3 provides for the FWC to deal with disputes about the operation of this Part.

523 Meanings of *employee* and *employer*

In this Part, ***employee*** means a national system employee, and ***employer*** means a national system employer.

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Division 2—Circumstances allowing stand down

524 Employer may stand down employees in certain circumstances

(1) An employer may, under this subsection, stand down an employee during a period in which the employee cannot usefully be employed because of one of the following circumstances:

(a) industrial action (other than industrial action organised or engaged in by the employer);

(b) a breakdown of machinery or equipment, if the employer cannot reasonably be held responsible for the breakdown;

(c) a stoppage of work for any cause for which the employer cannot reasonably be held responsible.

(2) However, an employer may not stand down an employee under subsection (1) during a period in which the employee cannot usefully be employed because of a circumstance referred to in that subsection if:

(a) an enterprise agreement, or a contract of employment, applies to the employer and the employee; and

(b) the agreement or contract provides for the employer to stand down the employee during that period if the employee cannot usefully be employed during that period because of that circumstance.

Note 1: If an employer may not stand down an employee under subsection (1), the employer may be able to stand down the employee in accordance with the enterprise agreement or the contract of employment.

Note 2: An enterprise agreement or a contract of employment may also include terms that impose additional requirements that an employer must meet before standing down an employee (for example requirements relating to consultation or notice).

(3) If an employer stands down an employee during a period under subsection (1), the employer is not required to make payments to the employee for that period.

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525 Employee not stood down during a period of authorised leave or absence

An employee is not taken to be stood down under subsection 524(1) during a period when the employee:

(a) is taking paid or unpaid leave that is authorised by the employer; or

(b) is otherwise authorised to be absent from his or her employment.

Note: An employee may take paid or unpaid leave (for example, annual leave) during all or part of a period during which the employee would otherwise be stood down under subsection 524(1).

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Division 3—Dealing with disputes

526 FWC may deal with a dispute about the operation of this Part

(1) The FWC may deal with a dispute about the operation of this Part.

(2) The FWC may deal with the dispute by arbitration.

Note: The FWC may also deal with a dispute by mediation or conciliation, or by making a recommendation or expressing an opinion (see subsection 595(2)).

(3) The FWC may deal with the dispute only on application by any of the following:

(a) an employee who has been, or is going to be, stood down under subsection 524(1) (or purportedly under subsection 524(1));

(b) an employee in relation to whom the following requirements are satisfied:

(i) the employee has made a request to take leave to avoid being stood down under subsection 524(1) (or purportedly under subsection 524(1));

(ii) the employee's employer has authorised the leave;

(c) an employee organisation that is entitled to represent the industrial interests of an employee referred to in paragraph (a) or (b);

(d) an inspector.

(4) In dealing with the dispute, the FWC must take into account fairness between the parties concerned.

527 Contravening an FWC order dealing with a dispute about the operation of this Part

A person must not contravene a term of an FWC order dealing with a dispute about the operation of this Part.

Note: This section is a civil remedy provision (see Part 4-1).

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Part 3-6—Other rights and responsibilities

Division 1—Introduction

528 Guide to this Part

This Part deals with other rights and responsibilities.

Division 2 is about the obligations of a national system employer if a decision is made to dismiss 15 or more employees for reasons of an economic, technological, structural or similar nature.

Subdivision A of Division 2 deals with notifying the Chief Executive Officer of the Commonwealth Services Delivery Agency (Centrelink) about the proposed dismissals.

Subdivision B of Division 2 provides for the FWC to make orders if the employer fails to notify and consult relevant industrial associations.

Subdivision C of Division 2 provides that that Division does not apply in relation to certain employees.

Division 3 is about the obligations of national system employers to make and keep employee records in relation to each of their employees and to give pay slips to each of their employees.

529 Meanings of *employee* and *employer*

In this Part, ***employee*** means a national system employee, and ***employer*** means a national system employer.

Note: See also Division 2 of Part 6-4A (TCF contract outworkers taken to be employees in certain circumstances).

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Division 2—Notification and consultation relating to certain dismissals

Subdivision A—Requirement to notify Centrelink

530 Employer to notify Centrelink of certain proposed dismissals

(1) If an employer decides to dismiss 15 or more employees for reasons of an economic, technological, structural or similar nature, or for reasons including such reasons, the employer must give a written notice about the proposed dismissals to the Chief Executive Officer of the Commonwealth Services Delivery Agency (Centrelink).

(2) The notice must be in the form (if any) prescribed by the regulations and set out:
  (a) the reasons for the dismissals; and
  (b) the number and categories of employees likely to be affected; and
  (c) the time when, or the period over which, the employer intends to carry out the dismissals.

(3) The notice must be given:
  (a) as soon as practicable after making the decision; and
  (b) before dismissing an employee in accordance with the decision.

(4) The employer must not dismiss an employee in accordance with the decision unless the employer has complied with this section.

Note: This subsection is a civil remedy provision (see Part 4-1).

(5) The orders that may be made under subsection 545(1) in relation to a contravention of subsection (4) of this section:
  (a) include an order requiring the employer not to dismiss the employees in accordance with the decision, except as permitted by the order; but

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(b) do not include an order granting an injunction.

Subdivision B—Failure to notify or consult registered employee associations

531 FWC may make orders where failure to notify or consult registered employee associations about dismissals

(1) The FWC may make an order under subsection 532(1) if it is satisfied that:

(a) an employer has decided to dismiss 15 or more employees for reasons of an economic, technological, structural or similar nature, or for reasons including such reasons; and

(b) the employer has not complied with subsection (2) (which deals with notifying relevant registered employee associations) or subsection (3) (which deals with consulting relevant registered employee associations); and

(c) the employer could reasonably be expected to have known, when he or she made the decision, that one or more of the employees were members of a registered employee association.

Notifying relevant registered employee associations

(2) An employer complies with this subsection if:

(a) the employer notifies each registered employee association of which any of the employees was a member, and that was entitled to represent the industrial interests of that member, of the following:

(i) the proposed dismissals and the reasons for them;

(ii) the number and categories of employees likely to be affected;

(iii) the time when, or the period over which, the employer intends to carry out the dismissals; and

(b) the notice is given:

(i) as soon as practicable after making the decision; and

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(ii) before dismissing an employee in accordance with the decision.

Consulting relevant registered employee associations

(3) An employer complies with this subsection if:

(a) the employer gives each registered employee association of which any of the employees was a member, and that was entitled to represent the industrial interests of that member, an opportunity to consult the employer on:

(i) measures to avert or minimise the proposed dismissals; and

(ii) measures (such as finding alternative employment) to mitigate the adverse effects of the proposed dismissals; and

(b) the opportunity is given:

(i) as soon as practicable after making the decision; and

(ii) before dismissing an employee in accordance with the decision.

532 Orders that the FWC may make

(1) The FWC may make whatever orders it considers appropriate, in the public interest, to put:

(a) the employees; and

(b) each registered employee association referred to in paragraph 531(2)(a) or (3)(a);

in the same position (as nearly as can be done) as if the employer had complied with subsections 531(2) and (3).

(2) The FWC must not, under subsection (1), make orders for any of the following:

(a) reinstatement of an employee;

(b) withdrawal of a notice of dismissal if the notice period has not expired;

(c) payment of an amount in lieu of reinstatement;

(d) payment of severance pay;

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(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.

533 Application for an FWC order

The FWC may make the order only on application by:

(a) one of the employees; or

(b) a registered employee association referred to in paragraph 531(2)(a) or (3)(a); or

(c) any other registered employee association that is entitled to represent the industrial interests of one of the employees.

Subdivision C—Limits on scope of this Division

534 Limits on scope of this Division

(1) This Division does not apply in relation to any of the following employees:

(a) an employee employed for a specified period of time, for a specified task, or for the duration of a specified season;

(b) an employee who is dismissed because of serious misconduct;

(c) a casual employee;

(d) an employee (other than an apprentice) to whom a training arrangement applies and whose employment is for a specified period of time or is, for any reason, limited to the duration of the training arrangement;

(e) a daily hire employee working in the building and construction industry (including working in connection with

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the erection, repair, renovation, maintenance, ornamentation or demolition of buildings or structures);

(f) a daily hire employee working in the meat industry in connection with the slaughter of livestock;

(g) a weekly hire employee working in connection with the meat industry and whose dismissal is determined solely by seasonal factors;

(h) an employee prescribed by the regulations as an employee in relation to whom this Division does not apply.

(2) Paragraph (1)(a) does not prevent this Division from applying in relation to an employee if a substantial reason for employing the employee as described in that paragraph was to avoid the application of this Division.

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Division 3—Employer obligations in relation to employee records and pay slips

535 Employer obligations in relation to employee records

(1) An employer must make, and keep for 7 years, employee records of the kind prescribed by the regulations in relation to each of its employees.

Note: This subsection is a civil remedy provision (see Part 4-1).

(2) The records must:

(a) if a form is prescribed by the regulations—be in that form; and

(b) include any information prescribed by the regulations.

Note: This subsection is a civil remedy provision (see Part 4-1).

(3) The regulations may provide for the inspection of those records.

536 Employer obligations in relation to pay slips

(1) An employer must give a pay slip to each of its employees within one working day of paying an amount to the employee in relation to the performance of work.

Note 1: This subsection is a civil remedy provision (see Part 4-1).

Note 2: Section 80 of the *Paid Parental Leave Act 2010* requires an employer to give information to an employee to whom the employer pays an instalment under that Act.

(2) The pay slip must:

(a) if a form is prescribed by the regulations—be in that form; and

(b) include any information prescribed by the regulations.

Note: This subsection is a civil remedy provision (see Part 4-1).

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