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Schedules

Endnotes

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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 1 January 2024 (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 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 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 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If a provision of the compiled law has been repealed in accordance with a provision of the law, details are included in the endnotes.

Contents

Chapter 2—Terms and conditions of employment	1
Part 2-5—Workplace determinations	1
Division 1—Introduction	1
258 Guide to this Part	1
259 Meanings of <i>employee</i> and <i>employer</i>	2
Division 3—Industrial action related workplace determinations	3
266 When the FWC must make an industrial action related workplace determination.....	3
267 Terms etc. of an industrial action related workplace determination	4
268 No other terms	5
Division 4—Intractable bargaining workplace determinations	6
269 When the FWC must make an intractable bargaining workplace determination.....	6
270 Terms etc. of an intractable bargaining workplace determination	6
271 No other terms	7
Division 5—Core terms, mandatory terms and agreed terms of workplace determinations etc.	8
272 Core terms of workplace determinations	8
273 Mandatory terms of workplace determinations	9
274 Agreed terms for workplace determinations.....	10
275 Factors the FWC must take into account in deciding terms of a workplace determination.....	11
Division 6—Operation, coverage and interaction etc. of workplace determinations	12
276 When a workplace determination operates etc.	12
277 Employers, employees and employee organisations covered by a workplace determination.....	12
278 Interaction of a workplace determination with enterprise agreements etc.....	13
279 Act applies to a workplace determination as if it were an enterprise agreement.....	14
Division 7—Other matters	16
280 Contravening a workplace determination.....	16

281	Applications by bargaining representatives	16
281AA	Entitlement for volunteer bodies to make submissions	16
281A	How employees, employers and employee organisations are to be described	17
Part 2-6—Minimum wages		18
Division 1—Introduction		18
282	Guide to this Part	18
283	Meanings of <i>employee</i> and <i>employer</i>	19
Division 2—Overarching provisions		20
284	The minimum wages objective	20
Division 3—Annual wage reviews		22
Subdivision A—Main provisions		22
285	Annual wage reviews to be conducted	22
286	When annual wage review determinations varying modern awards come into operation	22
287	When national minimum wage orders come into operation etc.....	23
Subdivision B—Provisions about conduct of annual wage reviews		25
288	General.....	25
289	Everyone to have a reasonable opportunity to make and comment on submissions	25
290	President may direct investigations and reports	26
291	Research must be published.....	27
292	Varied wage rates must be published	27
Division 4—National minimum wage orders		28
293	Contravening a national minimum wage order.....	28
294	Content of national minimum wage order—main provisions	28
295	Content of national minimum wage order—other matters	29
296	Variation of national minimum wage order to remove ambiguity or uncertainty or correct error.....	30
297	When determinations varying national minimum wage orders come into operation	30
298	Special rule about retrospective variations of national minimum wage orders	31
299	When a national minimum wage order is in operation.....	32

Part 2-7—Equal remuneration	33
Division 1—Introduction	33
300 Guide to this Part	33
301 Meanings of <i>employee</i> and <i>employer</i>	33
Division 2—Equal remuneration orders	34
302 FWC may make an order requiring equal remuneration	34
303 Equal remuneration order may increase, but must not reduce, rates of remuneration	36
304 Equal remuneration order may implement equal remuneration in stages	36
305 Contravening an equal remuneration order	36
306 Inconsistency with modern awards, enterprise agreements and orders of the FWC.....	36
Part 2-7A—Regulated labour hire arrangement orders	37
Division 1—Introduction	37
306A Guide to this Part	37
306B Meanings of <i>employee</i> and <i>employer</i>	37
306C Meaning of <i>regulated host</i>	37
306D References to kinds of work and work performed for a person etc.	38
Division 2—Regulated labour hire arrangement orders	40
Subdivision A—Making regulated labour hire arrangement orders	40
306E FWC may make a regulated labour hire arrangement order.....	40
306EA Regulated labour hire arrangement order may cover additional arrangements.....	44
306EB Application of regulated labour hire arrangement order to new covered employment instrument	46
306EC Notification requirements in relation to new covered employment instrument	47
306ED Varying regulated labour hire arrangement order to cover new employers	48
306EE Notifying tenderers etc. of regulated labour hire arrangement order	51

Subdivision B—Obligations of employers and regulated hosts etc. when a regulated labour hire arrangement order is in force	52
306F Protected rate of pay payable to employees if a regulated labour hire arrangement order is in force.....	52
306G Exceptions from requirement to pay protected rate of pay.....	55
306H Obligations of regulated hosts covered by a regulated labour hire arrangement order.....	56
Subdivision C—Short-term arrangements	57
306J Determination altering exemption period for short-term arrangements	57
306K Determination of recurring extended exemption period.....	57
306L Making and effect of determinations under this Subdivision	58
Subdivision D—Alternative protected rate of pay orders	60
306M Making an alternative protected rate of pay order.....	60
306N Effect of alternative protected rate of pay order	63
Subdivision E—Termination payments	64
306NA Determining amounts of payments relating to termination of employment	64
Division 3—Dealing with disputes	67
306P Disputes about the operation of this Part	67
306Q Dealing with disputes by arbitration.....	68
306R Application fees	70
Division 4—Anti-avoidance	71
306S Preventing making of regulated labour hire arrangement orders	71
306SA Avoidance of application of regulated labour hire arrangement orders	71
306T Short-term arrangements—engaging other employees.....	72
306U Short-term arrangements—entering into other labour hire agreements	73
306V Engaging independent contractors.....	73
Division 5—Other matters	75
306W Guidelines	75
Part 2-8—Transfer of business	76
Division 1—Introduction	76
307 Guide to this Part	76
308 Meanings of <i>employee</i> and <i>employer</i>	76

309	Object of this Part	77
Division 2—Transfer of instruments		78
310	Application of this Division.....	78
311	When does a transfer of business occur.....	78
312	Instruments that may transfer	80
313	Transferring employees and new employer covered by transferable instrument	80
314	New non-transferring employees of new employer may be covered by transferable instrument.....	81
315	Organisations covered by transferable instrument.....	82
316	Transferring employees who are high income employees.....	83
Division 3—Powers of the FWC		85
317	FWC may make orders in relation to a transfer of business	85
318	Orders relating to instruments covering new employer and transferring employees.....	85
319	Orders relating to instruments covering new employer and non-transferring employees	87
320	Variation of transferable instruments	89
Part 2-9—Other terms and conditions of employment		91
Division 1—Introduction		91
321	Guide to this Part	91
322	Meanings of <i>employee</i> and <i>employer</i>	92
Division 2—Payment of wages etc.		93
323	Method and frequency of payment	93
324	Permitted deductions.....	94
325	Unreasonable requirements to spend or pay amount	95
326	Certain terms have no effect	96
327	Things given or provided, and amounts required to be spent or paid, in contravention of this Division	97
Division 3—Guarantee of annual earnings		98
328	Employer obligations in relation to guarantee of annual earnings	98
329	High income employee	99
330	Guarantee of annual earnings and annual rate of guarantee	100
331	Guaranteed period.....	101
332	Earnings	101
333	High income threshold.....	102
333A	Prospective employees.....	103

Division 4—Prohibiting pay secrecy	104
333B Employees not subject to pay secrecy	104
333C Pay secrecy terms to have no effect.....	105
333D Prohibition on pay secrecy terms.....	105
Division 5—Fixed term contracts	106
Subdivision A—Limitations on fixed term contracts	106
333E Limitations	106
333F Exceptions to limitations	108
333G Effect of entering prohibited fixed term contract	109
333H Anti-avoidance.....	110
Subdivision B—Other matters	111
333J Fixed Term Contract Information Statement.....	111
333K Giving new employees the Fixed Term Contract Information Statement	111
333L Disputes about the operation of this Division.....	111
Chapter 3—Rights and responsibilities of employees, employers, organisations etc.	113
Part 3-1—General protections	113
Division 1—Introduction	113
334 Guide to this Part	113
335 Meanings of <i>employee</i> and <i>employer</i>	114
336 Objects of this Part.....	114
Division 2—Application of this Part	115
337 Application of this Part	115
338 Action to which this Part applies	115
339 Additional effect of this Part.....	116
Division 3—Workplace rights	118
340 Protection	118
341 Meaning of <i>workplace right</i>	118
342 Meaning of <i>adverse action</i>	120
343 Coercion.....	123
344 Undue influence or pressure	123
345 Misrepresentations.....	124
Division 4—Industrial activities	125
346 Protection	125

347	Meaning of <i>engages in industrial activity</i>	125
348	Coercion.....	126
349	Misrepresentations.....	126
350	Inducements—membership action	127
350A	Protection for workplace delegates.....	127
350C	Workplace delegates and their rights.....	128
Division 5—Other protections		130
351	Discrimination	130
352	Temporary absence—illness or injury.....	131
353	Bargaining services fees	131
354	Coverage by particular instruments	132
355	Coercion—allocation of duties etc. to particular person	132
356	Objectionable terms	133
Division 6—Sham arrangements		134
357	Misrepresenting employment as independent contracting arrangement	134
358	Dismissing to engage as independent contractor.....	134
359	Misrepresentation to engage as independent contractor	134
Division 7—Ancillary rules		136
360	Multiple reasons for action	136
361	Reason for action to be presumed unless proved otherwise	136
362	Advising, encouraging, inciting or coercing action.....	136
363	Actions of industrial associations	136
364	Unincorporated industrial associations.....	138
Division 8—Compliance		139
Subdivision A—Contraventions involving dismissal		139
365	Application for the FWC to deal with a dismissal dispute	139
366	Time for application.....	139
367	Application fees	139
368	Dealing with a dismissal dispute (other than by arbitration).....	140
369	Dealing with a dismissal dispute by arbitration.....	141
370	Taking a dismissal dispute to court.....	142
Subdivision B—Other contraventions		142
372	Application for the FWC to deal with a non-dismissal dispute.....	142
373	Application fees	143
374	Conferences	143
375	Advice on general protections court application	143

Subdivision C—Appeals and costs orders	144
375A Appeal rights.....	144
375B Costs orders against parties.....	144
376 Costs orders against lawyers and paid agents	144
377 Applications for costs orders	145
377A Schedule of costs	145
378 Contravening costs orders.....	146
Part 3-2—Unfair dismissal	147
Division 1—Introduction	147
379 Guide to this Part	147
380 Meanings of <i>employee</i> and <i>employer</i>	147
381 Object of this Part	147
Division 2—Protection from unfair dismissal	149
382 When a person is protected from unfair dismissal.....	149
383 Meaning of <i>minimum employment period</i>	149
384 Period of employment.....	149
Division 3—What is an unfair dismissal	151
385 What is an unfair dismissal	151
386 Meaning of <i>dismissed</i>	151
387 Criteria for considering harshness etc.....	152
388 The Small Business Fair Dismissal Code.....	153
389 Meaning of <i>genuine redundancy</i>	153
Division 4—Remedies for unfair dismissal	154
390 When the FWC may order remedy for unfair dismissal	154
391 Remedy—reinstatement etc.	154
392 Remedy—compensation.....	156
393 Monetary orders may be in instalments.....	157
Division 5—Procedural matters	158
394 Application for unfair dismissal remedy	158
395 Application fees	158
396 Initial matters to be considered before merits.....	159
397 Matters involving contested facts	159
398 Conferences	159
399 Hearings	160
399A Dismissing applications	160
400 Appeal rights.....	161
400A Costs orders against parties.....	161

401	Costs orders against lawyers and paid agents	161
402	Applications for costs orders	162
403	Schedule of costs	162
404	Security for costs	163
405	Contravening orders under this Part	163
Part 3-3—Industrial action		164
Division 1—Introduction		164
406	Guide to this Part	164
407	Meanings of <i>employee</i> and <i>employer</i>	165
Division 2—Protected industrial action		166
Subdivision A—What is protected industrial action		166
408	Protected industrial action	166
409	Employee claim action.....	166
410	Employee response action	168
411	Employer response action.....	169
412	Pattern bargaining	169
Subdivision B—Common requirements for industrial action to be protected industrial action		171
413	Common requirements that apply for industrial action to be protected industrial action.....	171
414	Notice requirements for industrial action	172
Subdivision C—Significance of industrial action being protected industrial action		174
415	Immunity provision.....	174
416	Employer response action—employer may refuse to make payments to employees	174
416A	Employer response action does not affect continuity of employment	174
Division 3—No industrial action before nominal expiry date of enterprise agreement etc.		175
417	Industrial action must not be organised or engaged in before nominal expiry date of enterprise agreement etc.	175
Division 4—FWC orders stopping etc. industrial action		177
418	FWC must order that industrial action by employees or employers stop etc.	177
419	FWC must order that industrial action by non-national system employees or non-national system employers stop etc.....	178

420	Interim orders etc.	179
421	Contravening an order etc.	179
Division 5—Injunction against industrial action if pattern bargaining is being engaged in		181
422	Injunction against industrial action if a bargaining representative is engaging in pattern bargaining	181
Division 6—Suspension or termination of protected industrial action by the FWC		182
423	FWC may suspend or terminate protected industrial action—significant economic harm etc.	182
424	FWC must suspend or terminate protected industrial action—endangering life etc.	184
425	FWC must suspend protected industrial action—cooling off.....	185
426	FWC must suspend protected industrial action—significant harm to a third party.....	186
427	FWC must specify the period of suspension	187
428	Extension of a period of suspension	188
429	Employee claim action without a further protected action ballot after a period of suspension etc.	188
430	Notice of employee claim action engaged in after a period of suspension etc.	189
Division 7—Ministerial declarations		191
431	Ministerial declaration terminating industrial action.....	191
432	Informing people of declaration	191
433	Ministerial directions to remove or reduce threat.....	192
434	Contravening a Ministerial direction	192
Division 8—Protected action ballots		193
Subdivision A—Introduction		193
435	Guide to this Division	193
436	Object of this Division.....	193
Subdivision B—Protected action ballot orders		194
437	Application for a protected action ballot order.....	194
437A	Application for a protected action ballot order—multi-enterprise agreements.....	195
438	Restriction on when application may be made	196
439	Joint applications	196
440	Notice of application.....	197
441	Application to be determined within 2 days after it is made	197

442	Dealing with multiple applications together	197
443	When the FWC must make a protected action ballot order	197
444	Ballot agent and independent advisor	199
445	Notice of protected action ballot order	200
446	Protected action ballot order may require 2 or more protected action ballots to be held at the same time	200
447	Variation of protected action ballot order	201
448	Revocation of protected action ballot order	202
Subdivision BA—FWC must conduct conferences		202
448A	FWC must conduct conferences	202
Subdivision C—Conduct of protected action ballot		203
449	Conduct of protected action ballot	203
450	Directions for conduct of protected action ballot	203
451	Timetable for protected action ballot	204
452	Compilation of roll of voters	205
453	Who is eligible to be included on the roll of voters	205
454	Variation of roll of voters	206
455	Protected action ballot papers	208
456	Who may vote in protected action ballot	208
457	Results of protected action ballot	208
458	Report about conduct of protected action ballot	209
Subdivision D—Effect of protected action ballot		210
459	Circumstances in which industrial action is authorised by protected action ballot	210
460	Immunity for persons who act in good faith on protected action ballot results	211
461	Validity of protected action ballot etc. not affected by technical breaches	212
Subdivision E—Compliance		213
462	Interferences etc. with protected action ballot	213
463	Contravening a protected action ballot order etc.	215
Subdivision F—Liability for costs of protected action ballot		215
464	Costs of protected action ballot conducted by the Australian Electoral Commission	215
465	Costs of protected action ballot conducted by protected action ballot agent other than the Australian Electoral Commission	216
466	Costs of legal challenges	216

Subdivision G—Miscellaneous	217
467 Information about employees on roll of voters not to be disclosed.....	217
468 Records	218
468A Eligible protected action ballot agents.....	218
469 Regulations	219
Division 9—Payments relating to periods of industrial action	220
Subdivision A—Protected industrial action	220
470 Payments not to be made relating to certain periods of industrial action.....	220
471 Payments relating to partial work bans.....	221
472 Orders by the FWC relating to certain partial work bans	223
473 Accepting or seeking payments relating to periods of industrial action.....	224
Subdivision B—Industrial action that is not protected industrial action	225
474 Payments not to be made relating to certain periods of industrial action.....	225
475 Accepting or seeking payments relating to periods of industrial action.....	226
Subdivision C—Miscellaneous	227
476 Other responses to industrial action unaffected.....	227
Division 10—Other matters	228
477 Applications by bargaining representatives.....	228
Part 3-4—Right of entry	229
Division 1—Introduction	229
478 Guide to this Part	229
479 Meanings of <i>employee</i> and <i>employer</i>	229
480 Object of this Part	230
Division 2—Entry rights under this Act	231
Subdivision A—Entry to investigate suspected contravention	231
481 Entry to investigate suspected contravention.....	231
482 Rights that may be exercised while on premises	232
483 Later access to record or document	233
483AA Application to the FWC for access to non-member records.....	234

Subdivision AA—Entry to investigate suspected contravention relating to TCF award workers	235
483A Entry to investigate suspected contravention relating to TCF award workers.....	235
483B Rights that may be exercised while on premises	237
483C Later access to record or document	238
483D Entry onto other premises to access records and documents.....	239
483E Later access to record or document—other premises	240
Subdivision B—Entry to hold discussions	241
484 Entry to hold discussions	241
Subdivision C—Requirements for permit holders	242
486 Permit holder must not contravene this Subdivision	242
487 Giving entry notice or exemption certificate	242
488 Contravening entry permit conditions	243
489 Producing authority documents	243
490 When right may be exercised.....	244
491 Occupational health and safety requirements	244
492 Location of interviews and discussions	244
492A Route to location of interview and discussions	245
493 Residential premises	245
Division 3—State or Territory OHS rights	246
494 Official must be permit holder to exercise State or Territory OHS right.....	246
495 Giving notice of entry	248
496 Contravening entry permit conditions	249
497 Producing entry permit	249
498 When right may be exercised.....	249
499 Occupational health and safety requirements	249
Division 4—Prohibitions	250
500 Permit holder must not hinder or obstruct	250
501 Person must not refuse or delay entry.....	250
502 Person must not hinder or obstruct permit holder.....	250
503 Misrepresentations about things authorised by this Part	251
504 Unauthorised use or disclosure of information or documents	251
Division 5—Powers of the FWC	253
Subdivision A—Dealing with disputes	253
505 FWC may deal with a dispute about the operation of this Part	253

505A	FWC may deal with a dispute about frequency of entry to hold discussions	255
506	Contravening order made to deal with dispute	256
Subdivision B—Taking action against permit holder		256
507	FWC may take action against permit holder	256
Subdivision C—Restricting rights of organisations and officials where misuse of rights		257
508	FWC may restrict rights if organisation or official has misused rights	257
509	Contravening order made for misuse of rights	258
Subdivision D—When the FWC must revoke or suspend entry permits		258
510	When the FWC must revoke or suspend entry permits	258
Subdivision E—General rules for suspending entry permits		260
511	General rules for suspending entry permits	260
Division 6—Entry permits, entry notices and certificates		261
Subdivision A—Entry permits		261
512	FWC may issue entry permits	261
513	Considering application	261
514	When the FWC must not issue permit	262
515	Conditions on entry permit	262
516	Expiry of entry permit	263
517	Return of entry permits to the FWC	264
Subdivision B—Entry notices		264
518	Entry notice requirements	264
Subdivision C—Exemption certificates		266
519	Exemption certificates	266
Subdivision D—Affected member certificates		267
520	Affected member certificates	267
Subdivision E—Miscellaneous		267
521	Regulations dealing with instruments under this Part	267
Division 7—Accommodation and transport arrangements in remote areas		269
521A	Meaning of <i>accommodation arrangement</i>	269
521B	Meaning of <i>transport arrangement</i>	269
521C	Accommodation arrangements for remote areas	270
521D	Transport arrangements for remote areas	271

Part 3-5—Stand down	273
Division 1—Introduction	273
522 Guide to this Part	273
523 Meanings of <i>employee</i> and <i>employer</i>	273
Division 2—Circumstances allowing stand down	274
524 Employer may stand down employees in certain circumstances.....	274
525 Employee not stood down during a period of authorised leave or absence	275
Division 3—Dealing with disputes	276
526 FWC may deal with a dispute about the operation of this Part	276
527 Contravening an FWC order dealing with a dispute about the operation of this Part.....	276
Part 3-5A—Prohibiting sexual harassment in connection with work	277
Division 1—Introduction	277
527A Guide to this Part	277
527B Meaning of employee and employer	277
527C Object of this Part	277
527CA Concurrent operation of State and Territory laws	278
Division 2—Prohibiting sexual harassment in connection with work	280
527D Prohibiting sexual harassment in connection with work	280
527E Vicarious liability etc.....	281
Division 3—Dealing with sexual harassment disputes	282
Subdivision A—Applying for the FWC to deal with sexual harassment disputes	282
527F Application for the FWC to deal with a sexual harassment dispute.....	282
527G Time for application.....	283
527H Application fees	284
Subdivision B—Stop sexual harassment orders	284
527J Stop sexual harassment orders	284
527K Contravening a stop sexual harassment order.....	286
527L Actions under work health and safety laws permitted	286

527M	This Subdivision is not to prejudice Australia's defence, national security etc.	286
527N	Declarations by the Chief of the Defence Force.....	287
527P	Declarations by the Director-General of Security	287
527Q	Declarations by the Director-General of ASIS.....	287
Subdivision C—Dealing with sexual harassment disputes in other ways		288
527R	Dealing with a sexual harassment dispute (other than by arbitration)	288
527S	Dealing with a sexual harassment dispute by arbitration	288
527T	Limitation on taking a sexual harassment dispute to court.....	290
Part 3-6—Other rights and responsibilities		292
Division 1—Introduction		292
528	Guide to this Part	292
529	Meanings of <i>employee</i> and <i>employer</i>	292
Division 2—Notification and consultation relating to certain dismissals		294
Subdivision A—Requirement to notify Centrelink		294
530	Employer to notify Centrelink of certain proposed dismissals.....	294
Subdivision B—Failure to notify or consult registered employee associations		295
531	FWC may make orders where failure to notify or consult registered employee associations about dismissals	295
532	Orders that the FWC may make	296
533	Application for an FWC order	297
Subdivision C—Limits on scope of this Division		297
534	Limits on scope of this Division	297
Division 3—Employer obligations in relation to employee records and pay slips		299
535	Employer obligations in relation to employee records	299
536	Employer obligations in relation to pay slips	299
Division 4—Employer obligations in relation to advertising rates of pay		301
536AA	Employer obligations in relation to advertising rates of pay	301

Part 3-7—Corrupting benefits	302
Division 1—Introduction	302
536A Guide to this Part	302
536B Meanings of employee and employer.....	302
536C Concurrent operation of State and Territory laws	302
536CA Dishonesty	303
Division 2—Giving, receiving or soliciting corrupting benefits	304
536D Giving, receiving or soliciting a corrupting benefit.....	304
536E Meaning of registered organisations officer or employee	306
Division 3—Cash or in kind payments to employee organisations etc.	308
536F Giving a cash or in kind payment	308
536G Receiving or soliciting a cash or in kind payment.....	310
536H Implied freedom of political communication	311
Chapter 4—Compliance and enforcement	312
Part 4-1—Civil remedies	312
Division 1—Introduction	312
537 Guide to this Part	312
538 Meanings of <i>employee</i> and <i>employer</i>	313
Division 2—Orders	314
Subdivision A—Applications for orders	314
539 Applications for orders in relation to contraventions of civil remedy provisions.....	314
540 Limitations on who may apply for orders etc.	337
541 Applications for orders in relation to safety net contractual entitlements.....	339
542 Entitlements under contracts.....	339
543 Applications for orders in relation to statutory entitlements derived from contracts	340
544 Time limit on applications	340
Subdivision B—Orders	341
545 Orders that can be made by particular courts	341
545A Orders relating to casual loading amounts.....	342
546 Pecuniary penalty orders.....	344
547 Interest up to judgment	345

Division 3—Small claims procedure	347
548 Plaintiffs may choose small claims procedure.....	347
Division 4—General provisions relating to civil remedies	351
549 Contravening a civil remedy provision is not an offence	351
550 Involvement in contravention treated in same way as actual contravention	351
551 Civil evidence and procedure rules for proceedings relating to civil remedy provisions.....	351
552 Civil proceedings after criminal proceedings	352
553 Criminal proceedings during civil proceedings	352
554 Criminal proceedings after civil proceedings	352
555 Evidence given in proceedings for pecuniary penalty not admissible in criminal proceedings.....	352
556 Civil double jeopardy.....	353
557 Course of conduct	353
557A Serious contravention of civil remedy provisions	355
557B Liability of bodies corporate for serious contravention.....	357
557C Presumption where records not provided	357
558 Regulations dealing with infringement notices	359
Division 4A—Responsibility of responsible franchisor entities and holding companies for certain contraventions	360
558A Meaning of <i>franchisee entity</i> and <i>responsible franchisor entity</i>	360
558B Responsibility of responsible franchisor entities and holding companies for certain contraventions	360
558C Right of responsible franchisor entity or holding company to recover	364
Division 5—Unclaimed money	366
559 Unclaimed money	366
Part 4-2—Jurisdiction and powers of courts	368
Division 1—Introduction	368
560 Guide to this Part	368
561 Meanings of <i>employee</i> and <i>employer</i>	368
Division 2—Jurisdiction and powers of the Federal Court	369
562 Conferring jurisdiction on the Federal Court.....	369
563 Exercising jurisdiction in the Fair Work Division of the Federal Court	369
564 No limitation on Federal Court’s powers	370

565	Appeals from eligible State or Territory courts	370
Division 3—Jurisdiction and powers of the Federal Circuit and Family Court of Australia (Division 2)		372
566	Conferring jurisdiction on the Federal Circuit and Family Court of Australia (Division 2).....	372
567	Exercising jurisdiction in the Fair Work Division of the Federal Circuit and Family Court of Australia (Division 2).....	372
568	No limitation on powers of the Federal Circuit and Family Court of Australia (Division 2).....	372
Division 4—Miscellaneous		374
569	Minister’s entitlement to intervene	374
569A	State or Territory Minister’s entitlement to intervene	374
570	Costs only if proceedings instituted vexatiously etc.....	375
571	No imprisonment for failure to pay pecuniary penalty	375
572	Regulations dealing with matters relating to court proceedings	375
Chapter 5—Administration		376
Part 5-1—The Fair Work Commission		376
Division 1—Introduction		376
573	Guide to this Part	376
574	Meanings of <i>employee</i> and <i>employer</i>	377
Division 2—Establishment and functions of the Fair Work Commission		378
Subdivision A—Establishment and functions of the Fair Work Commission		378
575	Establishment of the Fair Work Commission.....	378
576	Functions of the FWC.....	378
577	Performance of functions etc. by the FWC.....	380
578	Matters the FWC must take into account in performing functions etc.	380
579	FWC has privileges and immunities of the Crown.....	381
580	Protection of FWC Members.....	381
Subdivision B—Functions and powers of the President		381
581	Functions of the President.....	381
581A	Dealing with a complaint about an FWC Member	381
581B	Code of Conduct	383
582	Directions by the President.....	384

583	President not subject to direction.....	385
584	Delegation of functions and powers of the President	385
Subdivision C—Protection of persons involved in handling etc. complaints about FWC Members		385
584B	Protection of persons involved in handling etc. complaints about FWC Members	385
Division 3—Conduct of matters before the FWC		387
Subdivision A—Applications to the FWC		387
585	Applications in accordance with procedural rules.....	387
586	Correcting and amending applications and documents etc.....	387
587	Dismissing applications	387
588	Discontinuing applications	388
Subdivision B—Conduct of matters before the FWC		388
589	Procedural and interim decisions	388
590	Powers of the FWC to inform itself.....	388
591	FWC not bound by rules of evidence and procedure.....	389
592	Conferences	389
593	Hearings	390
594	Confidential evidence	391
595	FWC’s power to deal with disputes	391
Subdivision C—Representation by lawyers and paid agents and Minister’s entitlement to make submissions		392
596	Representation by lawyers and paid agents	392
597	Minister’s entitlement to make submissions.....	393
597A	State or Territory Minister’s entitlement to make submissions	393
Subdivision D—Decisions of the FWC		394
598	Decisions of the FWC.....	394
599	FWC not required to decide an application in terms applied for.....	394
600	Determining matters in the absence of a person	395
601	Writing and publication requirements for the FWC’s decisions.....	395
602	Correcting obvious errors etc. in relation to the FWC’s decisions.....	396
602A	Validation of approval of enterprise agreement	396
602B	Validation of approval of variation of enterprise agreement.....	397
603	Varying and revoking the FWC’s decisions	398

Subdivision E—Appeals, reviews and referring questions of law	399
604 Appeal of decisions.....	399
605 Minister’s entitlement to apply for review of a decision	399
606 Staying decisions that are appealed or reviewed	400
607 Process for appealing or reviewing decisions.....	401
608 Referring questions of law to the Federal Court.....	401
Subdivision F—Miscellaneous	402
609 Procedural rules	402
610 Regulations dealing with any FWC matters	403
611 Costs	403
Division 4—Organisation of the FWC	404
Subdivision A—Functions etc. to be performed by a single FWC Member, a Full Bench or an Expert Panel	404
612 FWC’s functions etc. may generally be performed by single FWC Member	404
613 Appeal of decisions.....	404
614 Review of decisions by a Full Bench.....	405
615 The President may direct a Full Bench to perform function etc.....	405
615A When the President must direct a Full Bench to perform function etc.	406
615B Transfer to a Full Bench from an FWC Member.....	407
615C Transfer to the President from an FWC Member or a Full Bench	407
616 FWC’s functions etc. that must be performed by a Full Bench	408
617 FWC’s functions etc. that must be performed by an Expert Panel.....	409
617AA Full Bench and Expert Panel with identical membership.....	412
617A President may direct investigations and reports	413
617B Research must be published.....	413
Subdivision B—Constitution of the FWC by a single FWC Member, a Full Bench or an Expert Panel	414
618 Constitution and decision-making of a Full Bench	414
619 Seniority of FWC Members.....	414
620 Constitution and decision-making of an Expert Panel.....	415
621 Reconstitution of the FWC when single FWC Member becomes unavailable.....	418

622	Reconstitution of the FWC when FWC Member of a Full Bench or an Expert Panel becomes unavailable	418
623	When new FWC Members begin to deal with matters	420
624	FWC's decisions not invalid when improperly constituted.....	420
Subdivision C—Delegation of the FWC's functions and powers		420
625	Delegation by the President of functions and powers of the FWC.....	420
Division 5—FWC Members		422
Subdivision A—Appointment of FWC Members		422
626	Appointment of FWC Members	422
627	Qualifications for appointment of FWC Members	422
628	Basis of appointment of FWC Members	424
629	Period of appointment of FWC Members.....	425
Subdivision B—Terms and conditions of FWC Members		426
629A	Status of the President.....	426
630	Appointment of a Judge not to affect tenure etc.	426
631	Dual federal and State appointments of Deputy Presidents or Commissioners	426
632	Dual federal and Territory appointments of Deputy Presidents or Commissioners.....	427
633	Outside work of FWC Members.....	427
634	Oath or affirmation of office.....	427
635	Remuneration of the President.....	428
636	Application of Judges' Pensions Act to the President	428
637	Remuneration of FWC Members other than the President.....	429
638	Remuneration of Deputy Presidents or Commissioners performing duties on a part-time basis	430
639	Leave of absence of FWC Members other than the President.....	431
640	Disclosure of interests by FWC Members other than the President.....	431
641	Termination of appointment on grounds of misbehaviour or incapacity	432
641A	Minister may handle complaints about FWC Members	432
641B	Modified application of the <i>Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012</i>	433
642	Suspension on grounds of misbehaviour or incapacity	440
643	Termination of appointment for bankruptcy, etc.	441
644	Termination of appointment for outside work	441
645	Resignation of FWC Members	442

646	Other terms and conditions of FWC Members.....	442
647	Appointment of acting President and Vice President	442
648	Appointment of acting Deputy Presidents and Commissioners	443
Division 6—Cooperation with the States		445
649	President to cooperate with prescribed State industrial authorities.....	445
650	Provision of administrative support.....	445
Division 7—Seals and additional powers and functions of the President and the General Manager		446
651	Seals	446
652	Annual report	447
653	Reports about making enterprise agreements, individual flexibility arrangements etc.	447
653A	Arrangements with the Federal Court and the Federal Circuit and Family Court of Australia (Division 2).....	449
654	President must provide certain information etc. to the Minister and Fair Work Ombudsman	449
655	Disclosure of information by the FWC.....	449
Division 8—General Manager, staff and consultants		451
Subdivision A—Functions of the General Manager		451
656	Establishment.....	451
657	Functions and powers of the General Manager	451
658	Directions from the President	451
659	General Manager not otherwise subject to direction	452
Subdivision B—Appointment and terms and conditions of the General Manager		452
660	Appointment of the General Manager	452
661	Remuneration of the General Manager.....	452
662	Leave of absence of the General Manager.....	453
663	Outside work of the General Manager.....	453
664	Disclosure of interests to the President.....	453
665	Resignation of the General Manager	453
666	Termination of appointment of the General Manager	454
667	Other terms and conditions of the General Manager	454
668	Appointment of acting General Manager	454
669	Minister to consult the President	455

Subdivision C—Staff and consultants	455
670 Staff.....	455
671 Delegation by General Manager to staff.....	455
672 Persons assisting the FWC.....	456
673 Consultants	456
Subdivision D—Application of the finance law	456
673A Application of the finance law.....	456
Division 9—Offences relating to the Fair Work Commission	458
674 Offences in relation to the FWC	458
675 Contravening an FWC order.....	460
676 Intimidation etc.	461
677 Offences in relation to attending before the FWC.....	461
678 False or misleading evidence.....	462

Chapter 2—Terms and conditions of employment

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 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 intractable bargaining workplace determinations. The FWC must make such a determination if:

- (a) an intractable bargaining declaration is made in relation to a proposed enterprise agreement; and
- (b) the bargaining representatives for the agreement have not settled 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.

Section 259

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 other matters relating to workplace determinations.

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).

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:

Section 267

- (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.

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).

Division 4—Intractable bargaining workplace determinations

269 When the FWC must make an intractable bargaining workplace determination

If an intractable bargaining declaration has been made in relation to a proposed enterprise agreement, the FWC must make a determination (an *intractable bargaining workplace determination*) as quickly as possible:

- (a) if there is a post-declaration negotiating period for the declaration under section 235A—after the end of that period; or
- (b) otherwise—after making the declaration.

Note: The FWC must be constituted by a Full Bench to make an intractable bargaining workplace determination (see subsection 616(4)).

270 Terms etc. of an intractable bargaining workplace determination

Basic rule

- (1) An intractable bargaining workplace determination must comply with subsection (4) 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:
- (a) if there is a post-declaration negotiating period under section 235A for the declaration concerned—after the end of that period; or
 - (b) otherwise—after making the declaration.

Coverage

- (4) The determination must be expressed to cover:
- (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.

271 No other terms

An intractable bargaining workplace determination must not include any terms other than those required by subsection 270(1).

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:

- (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

Section 274

would, if the determination were an enterprise agreement, satisfy subsection 205(1) (which deals with terms about consultation in enterprise agreements).

Delegates' rights term

- (6) The determination must include a delegates' rights term for the workplace delegates to whom the determination applies.

Note: *Delegates' rights term* is defined in section 12.

- (7) The delegates' rights term must not be less favourable than the delegates' rights term in any modern award that covers a workplace delegate to whom the determination applies.

274 Agreed terms for workplace determinations

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 an intractable bargaining workplace determination

- (3) An **agreed term** for an intractable bargaining workplace determination is a term that the bargaining representatives for the proposed enterprise agreement concerned had, at whichever of the following times applies, agreed should be included in the agreement:
- (a) if there is a post-declaration negotiating period for the intractable bargaining declaration to which the determination relates—at the end of the post-declaration negotiating period;

- (b) otherwise—at the time the intractable bargaining declaration was made.

Note: The determination must include an agreed term (see subsection 270(2)).

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;
- (c) the interests of the employers and employees who will be covered by the determination;
- (ca) the significance, to those employers and employees, of any arrangements or benefits in an enterprise agreement that, immediately before the determination is made, applies to any of the employers in respect of any of the employees;
- (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.

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 subsection 278(1) or (2) first has the effect that there is no employee to whom the determination applies.

Note: Subsections 278(1) and (2) deal 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

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 earlier enterprise agreement

- (1A) If:
- (a) an enterprise agreement applies to an employee in relation to particular employment; and
 - (b) a workplace determination that covers the employee in relation to the same employment comes into operation;

Section 279

the enterprise agreement ceases to apply to the employee in relation to that employment, and can never so apply again.

Interaction with a later 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;
- 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, AA, AB, AC, AD, AE and B of Division 7 of Part 2-4 (which deal with the variation of enterprise agreements) other than section 218 (which deals with 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.

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.

281AA Entitlement for volunteer bodies to make submissions

- (1) A body covered by subsection (2) is entitled to make a submission for consideration in relation to a matter before the FWC if:

- (a) the matter arises under this Part; and
 - (b) the matter affects, or could affect, the volunteers of a designated emergency management body.
- (2) The bodies are as follows:
 - (a) a body corporate that:
 - (i) has a history of representing the interests of the designated emergency management body's volunteers; and
 - (ii) is not prescribed by the regulations for the purposes of this subparagraph;
 - (b) any other body that is prescribed by the regulations for the purposes of this paragraph.
- (3) Subsection (1) applies whether or not the FWC holds a hearing in relation to the matter.

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.

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:

- (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).

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
 - (aa) the need to achieve gender equality, including by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and addressing gender pay gaps; and
 - (b) promoting social inclusion through increased workforce participation; and
 - (c) relative living standards and the needs of the low paid; 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).

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.

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

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*).

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.

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.

Section 290

- (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

- (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.

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

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

- (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.

- (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).

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.

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).

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.

Note: The FWC must be constituted by an Expert Panel for the purposes of making an equal remuneration order (see subsections 617(7) and (10)).

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.

When the FWC may make an equal remuneration order

- (3) The FWC may make the equal remuneration order:
- (a) on its own initiative; or
 - (b) on application by any of the following:
 - (i) an employee to whom the order will apply;
 - (ii) an employee organisation that is entitled to represent the industrial interests of an employee to whom the order will apply;
 - (iii) the Sex Discrimination Commissioner.

Gender equity considerations

- (3A) For the purposes of this Act, in deciding whether there is equal remuneration for work of equal or comparable value, the FWC may take into account:

- (a) comparisons within and between occupations and industries to establish whether the work has been undervalued on the basis of gender; or
 - (b) whether historically the work has been undervalued on the basis of gender; or
 - (c) any fair work instrument or State industrial instrument.
- (3B) If the FWC takes into account a comparison for the purposes of paragraph (3A)(a), the comparison:
 - (a) is not limited to similar work; and
 - (b) does not need to be a comparison with an historically male-dominated occupation or industry.
- (3C) If the FWC takes into account a matter referred to in paragraph (3A)(a) or (b), the FWC is not required to find discrimination on the basis of gender to establish the work has been undervalued as referred to in that paragraph.

FWC must take into account orders and determinations made in annual wage reviews

- (4) For the purposes of this Act, in deciding whether there is equal remuneration for work of equal or comparable value, 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.

Note: The FWC must be constituted by an Expert Panel in annual wage reviews (see section 617).

- (4A) Nothing in this section limits the considerations the FWC may take into account in deciding whether there is equal remuneration for work of equal or comparable value.

Requirement to make an equal remuneration order

- (5) If an application for an equal remuneration order is made as mentioned in paragraph (3)(b), the FWC must make the equal remuneration order if it is satisfied that, for the employees to whom

Section 303

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).

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.

Part 2-7A—Regulated labour hire arrangement orders

Division 1—Introduction

306A Guide to this Part

This Part is about regulated labour hire arrangement orders.

Division 2 deals with the making of regulated labour hire arrangement orders by the FWC and sets out the obligations of employers and regulated hosts covered by those orders.

Division 2 also deals with the making of alternative protected rate of pay orders by the FWC, the continued application of regulated labour hire arrangement orders in particular circumstances, and certain payments relating to termination of employment.

Division 3 deals with disputes about the operation of this Part.

Division 4 is about anti-avoidance.

Division 5 requires the FWC to make written guidelines in relation to the operation of this Part.

306B 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).

306C Meaning of *regulated host*

A *regulated host* is:

Section 306D

- (a) a constitutional corporation; or
- (b) the Commonwealth; or
- (c) a Commonwealth authority; or
- (d) a person, so far as work is performed for the person in connection with constitutional trade or commerce, and the work is of a kind that would ordinarily be performed by:
 - (i) a flight crew officer; or
 - (ii) a maritime employee; or
 - (iii) a waterside worker; or
- (e) a body corporate incorporated in a Territory; 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 work is performed for the person in connection with the activity carried on in the Territory; or
- (g) a person, so far as work is performed for the person in a Territory in Australia; or
- (h) any person in a State that is a referring State because of Division 2A or 2B of Part 1-3.

Note: In this context, *Australia* includes Norfolk Island, the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands (see the definition of *Australia* in section 12).

306D References to kinds of work and work performed for a person etc.

- (1) A reference in this Part to work of a kind includes a reference to work that is substantially of that kind.
- (2) A reference in this Part to work performed for a person includes a reference to work performed wholly or principally for the benefit of:
 - (a) the person; or
 - (b) an enterprise carried on by the person; or
 - (c) a joint venture or common enterprise engaged in by the person and one or more other persons.

- (3) To avoid doubt, in determining for the purposes of this Part whether work is or is to be performed for a person by an employee of an employer, it does not matter whether there is or will be any agreement between the person and the employer relating to the performance of the work.

Division 2—Regulated labour hire arrangement orders

Subdivision A—Making regulated labour hire arrangement orders

306E FWC may make a regulated labour hire arrangement order

Regulated labour hire arrangement order

- (1) The FWC must, on application by a person mentioned in subsection (7), make an order (a ***regulated labour hire arrangement order***) if the FWC is satisfied that:
- (a) an employer supplies or will supply, either directly or indirectly, one or more employees of the employer to perform work for a regulated host; and
 - (b) a covered employment instrument that applies to the regulated host would apply to the employees if the regulated host were to employ the employees to perform work of that kind; and
 - (c) the regulated host is not a small business employer.

Note: The FWC may make other decisions under this Part which relate to regulated labour hire arrangement orders: see Subdivisions C (short-term arrangements) and D (alternative protected rate of pay orders) of this Division, and Division 3 (dealing with disputes).

- (1A) Despite subsection (1), the FWC must not make the order unless it is satisfied that the performance of the work is not or will not be for the provision of a service, rather than the supply of labour, having regard to the matters in subsection (7A).
- (2) Despite subsection (1), the FWC must not make the order if the FWC is satisfied that it is not fair and reasonable in all the circumstances to do so, having regard to any matters in subsection (8) in relation to which submissions have been made.
- (3) For the purposes of paragraph (1)(a), it does not matter:

- (a) whether the supply is the result of an agreement, or one or more agreements; or
- (b) if there are one or more agreements relating to the supply—whether an agreement is between:
 - (i) the regulated host and the employer; or
 - (ii) the regulated host and a person other than the employer; or
 - (iii) the employer and a person other than the regulated host; or
 - (iv) any 2 persons who are neither the regulated host nor the employer; or
- (c) whether the regulated host and employer are related bodies corporate.

Note: If related bodies corporate with different corporate branding do not provide labour to each other, a regulated labour hire arrangement order cannot be made because labour is not supplied in the way mentioned in paragraph (1)(a).

- (4) For the purposes of paragraph (1)(b), in determining whether a covered employment instrument would apply to the employees, it does not matter on what basis the employees are or would be employed.

Regulated employee and host employment instrument

- (5) An employee referred to in paragraph (1)(a) is a **regulated employee**.
- (6) The covered employment instrument referred to in paragraph (1)(b) is a **host employment instrument**.

Who may apply for an order

- (7) The following persons may apply for the order:
 - (a) a regulated employee;
 - (b) an employee of the regulated host;

Section 306E

- (c) an employee organisation that is entitled to represent the industrial interests of an employee mentioned in paragraph (a) or (b);
- (d) the regulated host.

Matters that must be considered in relation to whether work is for the provision of a service

- (7A) For the purposes of subsection (1A), the matters are as follows:
- (a) the involvement of the employer in matters relating to the performance of the work;
 - (b) the extent to which, in practice, the employer or a person acting on behalf of the employer directs, supervises or controls (or will direct, supervise or control) the regulated employees when they perform the work, including by managing rosters, assigning tasks or reviewing the quality of the work;
 - (c) the extent to which the regulated employees use or will use systems, plant or structures of the employer to perform the work;
 - (d) the extent to which either the employer or another person is or will be subject to industry or professional standards or responsibilities in relation to the regulated employees;
 - (e) the extent to which the work is of a specialist or expert nature.

Matters to be considered if submissions are made

- (8) For the purposes of subsection (2), the matters are as follows:
- (a) the pay arrangements that apply to employees of the regulated host (or related bodies corporate of the regulated host) and the regulated employees, including in relation to:
 - (i) whether the host employment instrument applies only to a particular class or group of employees; and
 - (ii) whether, in practice, the host employment instrument has ever applied to an employee at a classification, job

- level or grade that would be applicable to the regulated employees; and
- (iii) the rate of pay that would be payable to the regulated employees if the order were made;
- (c) the history of industrial arrangements applying to the regulated host and the employer;
- (d) the relationship between the regulated host and the employer, including whether they are related bodies corporate or engaged in a joint venture or common enterprise;
- (da) if the performance of the work is or will be wholly or principally for the benefit of a joint venture or common enterprise engaged in by the regulated host and one or more other persons:
- (i) the nature of the regulated host's interests in the joint venture or common enterprise; and
- (ii) the pay arrangements that apply to employees of any of the other persons engaged in the joint venture or common enterprise (or related bodies corporate of those other persons);
- (e) the terms and nature of the arrangement under which the work will be performed, including:
- (i) the period for which the arrangement operates or will operate; and
- (ii) the location of the work being performed or to be performed under the arrangement; and
- (iii) the industry in which the regulated host and the employer operate; and
- (iv) the number of employees of the employer performing work, or who are to perform work, for the regulated host under the arrangement;
- (f) any other matter the FWC considers relevant.

What an order must specify

- (9) A regulated labour hire arrangement order must specify:
- (a) the regulated host covered by the order; and

Section 306EA

- (b) the employer covered by the order under this section; and
- (c) the regulated employees covered by the order under this section; and
- (d) the host employment instrument covered by the order; and
- (e) the day the order comes into force, which must be:
 - (i) if the order is made before 1 November 2024—that day or a later day; or
 - (ii) otherwise—the day the order is made or a later day.

Note: For paragraphs (b) and (c), additional employers and regulated employees of those employers may be covered by the order under section 306EA.

What an order may specify

- (10) A regulated labour hire arrangement order may specify when the order ceases to be in force.

Note: For variation and revocation of a regulated labour hire arrangement order, see section 603.

306EA Regulated labour hire arrangement order may cover additional arrangements

Determination that application covers additional employers and employees

- (1) If an application for a regulated labour hire arrangement order is made in relation to a regulated host, an employer and one or more employees of the employer, the FWC may determine that the application is taken to also relate to:
 - (a) one or more other employers (each of which is an **additional employer**) that the FWC is satisfied supply or will supply, in the manner referred to in paragraph 306E(1)(a), one or more employees to perform work, for the regulated host, of the kind in relation to which the application was made; and
 - (b) the employees referred to in paragraph (a) of this subsection (each of whom is an **additional regulated employee**).

Note: The employees referred to in paragraph (a) of this subsection are **regulated employees** (see subsection 306E(5)).

- (2) The FWC may make the determination:
- (a) on its own initiative; or
 - (b) on application by any of the following:
 - (i) the applicant for the order or any other person who could have applied for the order (see subsection 306E(7));
 - (ii) the employer mentioned in paragraph 306E(1)(a);
 - (iii) an employer that supplies or will supply employees as referred to in paragraph (1)(a) of this section;
 - (iv) a person who is such an employee;
 - (v) an employee organisation that is entitled to represent the industrial interests of such an employee.
- (3) If the FWC makes such a determination, the FWC must seek the views of the following before deciding whether to make the regulated labour hire arrangement order:
- (a) the additional regulated employees;
 - (b) employee organisations that are entitled to represent the industrial interests of the additional regulated employees;
 - (c) the additional employers.

Additional employers and employees in regulated labour hire arrangement order

- (4) Subject to subsections (5) and (6), if the FWC makes a determination under subsection (1) in relation to an application for a regulated labour hire arrangement order, the FWC may specify in the regulated labour hire arrangement order (if made) that, in addition to the persons referred to in paragraphs 306E(9)(b) and (c), the order also covers:
- (a) any or all of the additional employers; and
 - (b) additional regulated employees of those employers.
- (5) The FWC must not specify an additional employer or additional regulated employees of the employer under subsection (4) unless:

Section 306EB

- (a) the FWC is satisfied of the matters mentioned in subsection 306E(1) in relation to the additional employer and the additional regulated employees; and
 - (b) the FWC is satisfied that the covered employment instrument that would apply to the additional regulated employees, as referred to in paragraph 306E(1)(b), is the host employment instrument covered by the order; and
 - (c) the FWC is satisfied that the performance of the work by the additional regulated employees is not or will not be for the provision of a service, rather than the supply of labour, having regard to the matters in subsection 306E(7A) in relation to the additional employer and the additional regulated employees.
- (6) The FWC must not specify an additional employer or additional regulated employees of the employer under subsection (4) if the FWC is satisfied that it is not fair and reasonable in all the circumstances to do so, having regard to:
- (a) the views (if any) of persons referred to in subsection (3); and
 - (b) any matters mentioned in subsection 306E(8) in relation to which submissions are made, to the extent the submissions relate to the additional employer and the additional regulated employees.

306EB Application of regulated labour hire arrangement order to new covered employment instrument

- (1) This section applies if:
- (a) a regulated labour hire arrangement order is in force; and
 - (b) the host employment instrument covered by the order ceases to apply to the regulated host covered by the order, or to a class of employees of the regulated host covered by the order, in connection with another covered employment instrument (the *new instrument*) starting to apply to the regulated host or those employees; and

- (c) the new instrument would apply to the regulated employees covered by the order if the regulated host were to employ the employees to perform work of a kind to which the order relates.
- (2) From the time the new instrument starts to apply to the regulated host or the class of employees mentioned in paragraph (1)(b), the order has effect (and may be dealt with) as if the new instrument were the host employment instrument covered by the order.
- (3) For the purposes of paragraph (1)(c), in determining whether a covered employment instrument would apply to the employees, it does not matter on what basis the employees are or would be employed.

306EC Notification requirements in relation to new covered employment instrument

Notification by regulated host

- (1) If a regulated labour hire arrangement order in force covers a regulated host and an event mentioned in subsection (2) occurs, the regulated host must, as soon as practicable after the event occurs, give written notice to any employers covered by the order of:
 - (a) the event; and
 - (b) the effect that the event will have or would have in relation to the order.
- Note: This subsection is a civil remedy provision (see Part 4-1).
- (2) The events are the following:
 - (a) approval, by employees, of a covered employment instrument that will, if it comes into operation, become the host employment instrument covered by the order because of section 306EB;
 - (b) any other approval or making of a covered employment instrument that will, if it comes into operation, become the host employment instrument covered by the order because of

Section 306ED

section 306EB, other than an approval by the FWC of an enterprise agreement (see subsection (3) of this section).

Notification by FWC

- (3) If the FWC approves an enterprise agreement that, because of section 306EB, will become the host employment instrument covered by a regulated labour hire arrangement order, the FWC must, as soon as practicable after the approval, give written notice to any employers covered by the order of:
- (a) the approval of the enterprise agreement; and
 - (b) the effect of the approval in relation to the order.

306ED Varying regulated labour hire arrangement order to cover new employers

- (1) This section applies if:
- (a) a regulated labour hire arrangement order that covers a regulated host and one or more employers, and relates to a kind of work, is in force or has been made but is not yet in force; and
 - (b) one or more other employers (each of which is a ***new employer***) start or will start to supply employees (each of whom is a ***relevant regulated employee***) to perform work of that kind for the regulated host, in a manner referred to in paragraph 306E(1)(a); and
 - (c) the new employers are not covered by any regulated labour hire arrangement order (whether in force, or made but not yet in force) that covers or will cover the relevant regulated employees in relation to the performance of that work; and
 - (d) the FWC did not make a determination under subsection 306EA(1) in relation to the new employers and the application for the regulated labour hire arrangement order.

Note: The employees referred to in paragraph (b) of this subsection are ***regulated employees*** (see subsection 306E(5)).

Regulated host must make application

- (2) As soon as practicable after the regulated host becomes aware of the circumstances referred to in paragraph (1)(b), the regulated host must apply to the FWC for an order under this section varying the regulated labour hire arrangement order to cover the new employers and the relevant regulated employees of those employers.

Note: This subsection is a civil remedy provision (see Part 4-1).

- (3) Section 588 (discontinuing applications) does not apply in relation to the application unless the circumstances referred to in paragraph (1)(b) of this section no longer exist.
- (4) As soon as possible after the application is made, the regulated host must give written notice of the following to each of the new employers:
- (a) that the application has been made;
 - (b) the effect of subsection (11) in relation to the application.

Note: This subsection is a civil remedy provision (see Part 4-1).

FWC must decide whether to make variation order

- (5) The FWC must:
- (a) decide whether to make an order under this section varying the regulated labour hire arrangement order in accordance with subsection (6) or (7) to cover:
 - (i) any or all of the new employers; and
 - (ii) relevant regulated employees of those employers; and
 - (b) take all reasonable steps to make the decision before the time any of those employees start to perform the work referred to in paragraph (1)(b).
- (6) The FWC must vary the regulated labour hire arrangement order to cover a new employer and the relevant regulated employees of the employer if the regulated host and the new employer notify the FWC that the regulated host and the new employer agree to the making of the variation.

Section 306ED

- (7) Subject to subsections (8) and (9), the FWC must also vary the regulated labour hire arrangement order to cover a new employer and the relevant regulated employees of the employer if the FWC is satisfied of the matters referred to in subsection 306E(1) in relation to the regulated host, the new employer and the relevant regulated employees.
- (8) The FWC must not vary the regulated labour hire arrangement order in accordance with subsection (7) unless the FWC is satisfied that the performance of the work by the relevant regulated employees is not or will not be for the provision of a service, rather than the supply of labour, having regard to the matters referred to in subsection 306E(7A) in relation to the new employer and the relevant regulated employees.
- (9) The FWC must not vary the regulated labour hire arrangement order in accordance with subsection (7) if the FWC is satisfied that it is not fair and reasonable in all the circumstances to make the variation, having regard to any matters referred to in subsection 306E(8) in relation to which submissions have been made in respect of the variation.

When variation order comes into force

- (10) An order under this section comes into force on a day specified in the order.

Interim arrangements before FWC decides application

- (11) If the FWC does not decide whether to make an order under this section by the time referred to in paragraph (5)(b), the regulated labour hire arrangement order is taken (so long as it is in force) to cover the new employers and the relevant regulated employees from the time the application for the order under this section is made until:
 - (a) if the FWC decides not to make an order under this section—the time the FWC makes that decision; or
 - (b) if the FWC decides to make an order under this section—the time that order comes into force.

306EE Notifying tenderers etc. of regulated labour hire arrangement order

- (1) This section applies if:
- (a) a regulated host is covered by a regulated labour hire arrangement order that is in force or has been made but is not yet in force; and
 - (b) a tender process is conducted:
 - (i) by or on behalf of the regulated host; or
 - (ii) for the purposes of a joint venture or common enterprise engaged in by the regulated host and one or more other persons.
- (2) If it could reasonably be expected that one or more employers would, as a result of the tender process, become covered by the regulated labour hire arrangement order because of section 306ED, the regulated host must ensure that, from the start of the tender process, all prospective tenderers are advised, in writing, that if one or more tenderers are successful in the process:
- (a) one or more employers could become covered by the regulated labour hire arrangement order; and
 - (b) the employers could be required to pay employees of the employers who perform work for the regulated host, in accordance with this Part, in connection with the work.
- Note: This subsection is a civil remedy provision (see Part 4-1).
- (3) If the regulated host is required to apply to the FWC in relation to one or more employers under subsection 306ED(2) as a result of the tender process, the regulated host must, as soon as practicable after the end of the tender process, advise the successful tenderer or tenderers in that process (whether or not they are the employers), in writing, of the following:
- (a) that the regulated host is required to make the application;
 - (b) the effect of subsection 306ED(11) in relation to the application;
 - (c) that if the FWC decides to vary the order under section 306ED to cover those employers, and the order is in

Section 306F

force or comes into force, the employers will be required to pay employees of the employers who perform work for the regulated host, in accordance with this Part, in connection with the work.

Note: This subsection is a civil remedy provision (see Part 4-1).

Subdivision B—Obligations of employers and regulated hosts etc. when a regulated labour hire arrangement order is in force

306F Protected rate of pay payable to employees if a regulated labour hire arrangement order is in force

Application of section

- (1) This section applies if a regulated labour hire arrangement order is in force that covers a regulated host, an employer and a regulated employee of the employer.

Employer must not pay less than protected rate of pay

- (2) The employer must pay the regulated employee at no less than the protected rate of pay for the employee in connection with the work performed by the employee for the regulated host.

Note: This subsection is a civil remedy provision (see Part 4-1).

Exceptions

- (3) The employer does not contravene subsection (2) if the employer pays the regulated employee at less than the protected rate of pay because:
 - (a) the regulated host provides information to the employer under section 306H (which deals with information about the protected rate of pay); and
 - (b) the employer reasonably relies on the information for the purposes of working out the protected rate of pay for the regulated employee; and

- (c) the information is incorrect in a material particular.
- (3A) The employer does not contravene subsection (2) if:
- (a) the regulated labour hire arrangement order covers the employer because of the operation of subsection 306ED(11); and
 - (b) the employer pays the regulated employee at less than the protected rate of pay because the employer has not been either:
 - (i) notified that the regulated host has made an application under subsection 306ED(2) (which deals with certain variation orders); or
 - (ii) for an employer who was a successful tenderer in a tender process—advised under subsection 306EE(2) or (3) (which deal with notifying tenderers) in relation to the regulated labour hire arrangement order.

Meaning of protected rate of pay

- (4) Unless subsection (5) applies, the ***protected rate of pay*** for the regulated employee is the full rate of pay that would be payable to the employee if the host employment instrument covered by the regulated labour hire arrangement order were to apply to the employee.
- (5) If the regulated employee is a casual employee, and there is no covered employment instrument that applies to the regulated host that provides for work of that kind to be performed by casual employees, the ***protected rate of pay*** for the regulated employee is the full rate of pay that would be payable to the employee if:
 - (a) the employee were an employee other than a casual employee and the host employment instrument covered by the regulated labour hire arrangement order were to apply to the employee; and
 - (b) the base rate of pay that would be payable to the employee, in the circumstances referred to in paragraph (a), were increased by 25%.

Section 306F

- (6) Despite subsections (4) and (5), if the employer is a national system employer only because of section 30D or 30N, the ***protected rate of pay*** for the regulated employee does not include any amount that relates to an excluded subject matter within the meaning of subsection 30A(1) or 30K(1).

Note: Sections 30D and 30N extend the meaning of ***national system employer***.

- (7) If the regulated employee is a pieceworker and paragraph 16(2)(b) would apply to the employee were the host employment instrument to apply to the employee, the base rate of pay that would be payable to the employee for the purposes of subsection (5) of this section is taken to be the base rate of pay that would be referred to in that paragraph.
- (8) If the regulated employee is a pieceworker and paragraph 18(2)(b) would apply to the employee were the host employment instrument to apply to the employee, the full rate of pay that would be payable to the employee for the purposes of subsections (4) and (5) of this section is taken to be the full rate of pay that would be referred to in that paragraph.
- (9) To avoid doubt, this section does not require that a regulated employee referred to in subsection (5) be taken to be an employee other than a casual employee for the purposes of determining entitlements to kinds of leave, or any other purpose, except determining the protected rate of pay for the regulated employee.

Requirement to pay no less than protected rate of pay applies despite other fair work instruments etc.

- (10) Subsection (2) applies despite any provision of:
- (a) a fair work instrument (other than an instrument made by the FWC under this Part) that applies to the regulated employee; or
 - (b) a covered employment instrument (other than a fair work instrument) that applies to the regulated employee; or
 - (c) the regulated employee's contract of employment;

that provides for a rate of pay for the regulated employee that is less than the protected rate of pay for the regulated employee.

Note: See also section 306N (effect of alternative protected rate of pay order) and subsection 306Q(6) (effect of arbitrated protected rate of pay order).

306G Exceptions from requirement to pay protected rate of pay

Training arrangements

- (1) Section 306F does not apply to a regulated employee if a training arrangement applies to the employee in respect of the work performed for the regulated host.

Certain short-term arrangements

- (2) Section 306F does not apply to a regulated employee if:
- (a) no determination for the purposes of paragraph 306J(2)(a) (no exemption period) that applies to the employee in respect of the work performed for the regulated host is in force; and
 - (b) the employee performs, or is to perform, the work for the regulated host during:
 - (i) if neither subparagraph (ii) nor (iii) applies—a period of no longer than 3 months; or
 - (ii) if a determination in force under section 306J specifies a period as the exemption period for the regulated host, the employer and the work—a period of no longer than the period specified; or
 - (iii) if subparagraph (ii) does not apply and the work commences during a recurring extended exemption period for work of the kind performed by the employee for the regulated host—a period of no longer than the remainder of the extended exemption period, or a period of no longer than 3 months, whichever ends later.
- (3) However, if the regulated employee does in fact perform the work for longer than the maximum period applicable under paragraph (2)(b), as a result of a variation to or the making of one

Section 306H

or more agreements, section 306F applies to the regulated employee on and after the day the agreements are varied or made.

306H Obligations of regulated hosts covered by a regulated labour hire arrangement order

Application of this section

- (1) This section applies to a regulated host and an employer if the regulated host and employer are covered by a regulated labour hire arrangement order that is in force.

Ability to request information regarding protected rate of pay

- (2) If the employer reasonably considers that the employer does not have all of the information needed regarding what is the protected rate of pay for one or more regulated employees of the employer covered by the order, the employer may request, in writing, that the regulated host provide the employer with specified information needed.
- (3) The regulated host must comply with the request:
- (a) as soon as reasonably practicable; and
 - (b) in any event, within such a period as would reasonably enable the employer to comply with its obligations under section 306F (protected rate of pay payable to employees if a regulated labour hire arrangement order is in force) in relation to the employees.

Note: This subsection is a civil remedy provision (see Part 4-1).

Manner of complying with request

- (4) The regulated host may comply with the request by:
- (a) providing the employer with the information requested; or
 - (b) providing information, for each relevant pay period of the employees, setting out the protected rate of pay for each employee for the period.

Subdivision C—Short-term arrangements

306J Determination altering exemption period for short-term arrangements

- (1) This section applies if:
 - (a) a regulated labour hire arrangement order is in force that covers a regulated host, an employer and one or more regulated employees of the employer performing work for the regulated host; or
 - (b) a regulated labour hire arrangement order has been made but is not yet in force that covers a regulated host, an employer and one or more regulated employees of the employer performing work for the regulated host; or
 - (c) an application for a regulated labour hire arrangement order that would cover a regulated host, an employer and one or more regulated employees of the employer performing work for the regulated host has been made to the FWC under section 306E but has not been finally determined.
- (2) The FWC may determine that, in relation to the regulated host, the employer and work to be performed by one or more regulated employees of the employer:
 - (a) there is no exemption period for the purposes of section 306G; or
 - (b) a specified period of less than 3 months is the exemption period for the purposes of that section; or
 - (c) a specified period of more than 3 months is the exemption period for the purposes of that section.

Note: The exemption period is used in determining whether the exception to pay the protected rate of pay in the case of short-term arrangements in subsection 306G(2) applies.

306K Determination of recurring extended exemption period

- (1) This section applies if:
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Section 306L

- (a) a regulated labour hire arrangement order is in force that covers a regulated host, one or more employers and one or more regulated employees performing work for the regulated host; or
 - (b) a regulated labour hire arrangement order has been made but is not yet in force that covers a regulated host, one or more employers and one or more regulated employees performing work for the regulated host; or
 - (c) an application for a regulated labour hire arrangement order that would cover a regulated host, one or more employers and one or more regulated employees performing work for the regulated host has been made to the FWC under section 306E but has not been finally determined.
- (2) The FWC may determine that a specified period of more than 3 months, starting on a specified day of the year in specified consecutive years, is a ***recurring extended exemption period*** for the regulated host in relation to a specified kind of work to which the regulated labour hire arrangement order relates.

306L Making and effect of determinations under this Subdivision

Who may apply for determination

- (1) The FWC may make a determination under this Subdivision only on application by:
- (a) the regulated host, an employer covered by the regulated labour hire arrangement order or a regulated employee covered by the order who is performing or is to perform work for the regulated host; or
 - (b) an organisation entitled to represent the industrial interests of any of those persons.

Time for making determination

- (2) The FWC must decide whether or not to make the determination as quickly as possible after the application is made.

Requirements for making determination

- (3) Before deciding whether or not to make the determination, the FWC must seek the views of any person or organisation that, apart from the applicant, could have applied for the determination under subsection (1).
- (4) The FWC may make the determination only if satisfied that there are exceptional circumstances that justify making it, having regard to:
 - (a) whether the purpose of the proposed exemption period or recurring extended exemption period relates to satisfying a seasonal or short-term need for workers; and
 - (b) the industry in which the work is performed or is to be performed; and
 - (c) the circumstances of:
 - (i) the regulated host; and
 - (ii) any relevant employers covered by the regulated labour hire arrangement order; and
 - (d) the views (if any) of any persons or organisations mentioned in subsection (1); and
 - (e) for a determination made for the purposes of paragraph 306J(2)(c)—the principle that the longer the period to be specified in the determination, the greater the justification required; and
 - (f) for a determination that a period is a recurring extended exemption period for a regulated host for a kind of work—the principle that the longer the period to be specified in the determination, and the greater the number of recurrences of that period to be specified, the greater the justification required; and
 - (g) any other matter the FWC considers relevant.

When determination comes into force

- (5) The determination comes into force on the later of the day the regulated labour hire arrangement order comes into force, and the following:

Section 306M

- (a) for a determination under section 306J that there is no exemption period for the purposes of section 306G—the day it is made;
- (b) for a determination under section 306J that there is an exemption period of more than, or less than, 3 months for the purposes of section 306G—the day it is made or a later day specified in the determination;
- (c) for a determination under section 306K (which deals with recurring extended exemption periods)—the day it is made or a later day specified in the determination.

Subdivision D—Alternative protected rate of pay orders

306M Making an alternative protected rate of pay order

Application of this section

- (1) This section applies if:
 - (a) a regulated labour hire arrangement order is in force that covers a regulated host, an employer and a regulated employee of the employer performing work for the regulated host; or
 - (b) a regulated labour hire arrangement order has been made but is not yet in force that covers a regulated host, an employer and a regulated employee of the employer performing work for the regulated host; or
 - (c) an application for a regulated labour hire arrangement order that would cover a regulated host, an employer and a regulated employee of the employer performing work for the regulated host has been made to the FWC under section 306E but has not been finally determined.

Alternative protected rate of pay order

- (2) The FWC may make an order (an ***alternative protected rate of pay order***) specifying:

- (a) how the rate of pay at which the employer must pay the regulated employee in connection with the work is to be worked out; and
- (b) that the employer must pay the rate of pay worked out in that way to the regulated employee in connection with the work.

Rate of pay

- (3) The rate of pay for the purposes of paragraph (2)(a) must be the protected rate of pay for the regulated employee that would apply if the references in section 306F to the host employment instrument covered by the regulated labour hire arrangement order were instead references to a specified covered employment instrument that:
 - (a) applies to a related body corporate of the regulated host and would apply to a person employed by the related body corporate to perform work of that kind; or
 - (b) applies to the regulated host and would apply to a person employed by the regulated host to perform work of that kind in circumstances that do not apply in relation to the employee.

Who may apply

- (4) The FWC may make an alternative protected rate of pay order only on application by the employee, the employer, the regulated host or an organisation entitled to represent the industrial interests of any of those persons.

Time for making

- (5) The FWC must decide whether or not to make the order as quickly as possible after the application is made.

Criteria for making etc.

- (6) The FWC must not make the order unless satisfied that:
 - (a) it would be unreasonable for the requirement in section 306F, that the employer pay the regulated employee at no less than

Section 306M

- the protected rate of pay, to apply in connection with that work (including, for example, because the rate would be insufficient or would be excessive); and
- (b) there is a covered employment instrument of the kind referred to in paragraph (3)(a) or (b).
- (7) Before deciding whether to make the order, the FWC must seek the views of the following:
- (a) the employer;
 - (b) the regulated host;
 - (c) the employer to which a covered employment instrument to be specified in the order for the purposes of subsection (3) applies (if not the regulated host);
 - (d) the employee;
 - (e) employees to whom the covered employment instrument to be specified in the order for the purposes of subsection (3) applies;
 - (f) organisations entitled to represent the industrial interests of any of the persons referred to in paragraphs (a) to (e).
- (8) In deciding whether to make the order, the FWC must have regard to:
- (a) whether the host employment instrument covered by the regulated labour hire arrangement order applies only to a particular class or group of employees; and
 - (b) whether, in practice, the host employment instrument has ever applied to an employee at a classification, job level or grade that would be applicable to the regulated employee; and
 - (c) the views (if any) of any persons or organisations mentioned in subsection (7);
 - (d) the rate of pay that would be payable to the regulated employee in connection with the work if the order were made; and
 - (e) any other matter the FWC considers relevant.

Exception for short-term arrangements

- (9) In making an order under this section, the FWC must ensure that, if an exception in section 306G would apply to the requirement to pay the regulated employee at no less than the protected rate of pay, the exception also applies in relation to the requirement to pay the employee at the rate worked out under the alternative protected rate of pay order.

306N Effect of alternative protected rate of pay order

When alternative protected rate of pay order comes into force

- (1) An alternative protected rate of pay order comes into force:
- (a) if the order is made before the regulated labour hire arrangement order to which the order relates comes into force:
 - (i) on the day the regulated labour hire arrangement order comes into force; or
 - (ii) on a later day specified in the alternative protected rate of pay order; or
 - (b) otherwise—on the day the alternative protected rate of pay order is made, or on a later day specified in the order.

Effect of alternative protected rate of pay order

- (2) If:
- (a) a regulated labour hire arrangement order is in force that covers a regulated host, an employer and work performed by a regulated employee of the employer; and
 - (b) an alternative protected rate of pay order is made in relation to the regulated labour hire arrangement order;
- then:
- (c) the alternative protected rate of pay order applies in relation to so much of the work as is performed during the period that the alternative protected rate of pay order is in force; and

Section 306NA

- (d) during that period, the alternative protected rate of pay order has effect despite section 306F (protected rate of pay payable to employees if a regulated labour hire arrangement order is in force), and despite any provision of the following that provides for a lower rate of pay than that worked out in accordance with the order:
 - (i) a fair work instrument that applies to the regulated employee;
 - (ii) a covered employment instrument (other than a fair work instrument) that applies to the regulated employee;
 - (iii) the regulated employee's contract of employment.

Person must not contravene an alternative protected rate of pay order

- (3) A person must not contravene a term of an alternative protected rate of pay order.

Note: This subsection is a civil remedy provision (see Part 4-1).

Subdivision E—Termination payments

306NA Determining amounts of payments relating to termination of employment

Application of this section

- (1) This section applies if:
 - (a) a regulated employee's employment is or is to be terminated; and
 - (b) the employee is or has been covered by a regulated labour hire arrangement order.

Determining amounts of payments relating to termination of employment

- (2) Subject to subsection (5), if an amount that the employee's employer is required to pay to the employee (or to a person on the employee's behalf) in relation to the termination of the

employment is to be determined wholly or partly on the basis of a rate of pay in relation to the employee, the rate of pay for the purposes of determining the amount is:

- (a) if the employee is covered by subsection (3) in relation to the amount—the applicable rate of pay that results from the operation of this Part; or
 - (b) in any other case—the applicable rate of pay to which the employee is entitled apart from the operation of this Part.
- (3) This subsection covers the employee in relation to the amount if:
- (a) immediately before the termination of the employment occurs or is to occur, the employee is or will be covered by a regulated labour hire arrangement order in force in relation to work performed by the employee for a regulated host; and
 - (b) the termination of the employment occurs or is to occur during a period in which the employee is performing work for the regulated host, including a period when the employee is taking paid or unpaid leave, or is absent, in connection with that work and the leave or absence is authorised:
 - (i) by the employee's employer; or
 - (ii) by or under a term or condition of the employee's employment; or
 - (iii) by or under a law of the Commonwealth, a State or a Territory, or an instrument in force under such a law; and
 - (c) the rate of pay mentioned in paragraph (2)(a) is higher than the rate mentioned in paragraph (2)(b); and
 - (d) unless the amount is a payment in lieu of notice of termination—the employee has not performed work for any other regulated host in relation to the employee's employment with the employer.
- (4) If the performance of the work for the regulated host relates to a joint venture or common enterprise engaged in by the regulated host and one or more other persons, then for the purposes of paragraph (3)(d), disregard any work that is taken to be performed

Section 306NA

for those other persons because of the operation of paragraph 306D(2)(c).

Excluded subject matters

- (5) If the employer is a national system employer only because of section 30D or 30N, nothing in this Part, including the determination of any rate of pay under or in accordance with this Part, affects any amount:
- (a) that the employer is required to pay to the employee (or to a person on the employee's behalf) in relation to the termination of the employment; and
 - (b) which relates to an excluded subject matter within the meaning of subsection 30A(1) or 30K(1).

Interaction with fair work instruments etc.

- (6) This section applies despite:
- (a) a fair work instrument that applies to the employee; or
 - (b) a covered employment instrument (other than a fair work instrument) that applies to the employee; or
 - (c) the employee's contract of employment.

Division 3—Dealing with disputes

306P Disputes about the operation of this Part

When this Division applies to a dispute

- (1) This Division applies to a dispute about the operation of this Part if:
 - (a) a regulated labour hire arrangement order is in force that covers a regulated host, an employer and a regulated employee of the employer performing work for the regulated host; or
 - (b) a regulated labour hire arrangement order has been made but is not yet in force that covers a regulated host, an employer and a regulated employee of the employer performing work for the regulated host.
- (2) Without limiting subsection (1), this Division applies to a dispute about:
 - (a) what the protected rate of pay for a regulated employee is; or
 - (b) whether a regulated employee has been, or is being, paid less than the protected rate of pay for the employee.

Parties must attempt to resolve dispute at workplace level

- (3) In the first instance, the parties to the dispute must attempt to resolve the dispute at the workplace level by discussions between the parties.
- (4) If discussions at the workplace level do not resolve the dispute, a party to the dispute may apply to the FWC to resolve the dispute.

How the FWC deals with dispute

- (5) If a party to the dispute makes an application under subsection (4):
 - (a) the FWC must first deal with the dispute by means other than arbitration, unless there are exceptional circumstances; and

Section 306Q

- (b) the FWC may deal with the dispute by arbitration in accordance with section 306Q.

Note: For the purposes of paragraph (a), the FWC may deal with the dispute as it considers appropriate, including by mediation, conciliation, making a recommendation or expressing an opinion (see subsection 595(2)).

Representatives

- (6) The employer, employee or regulated host may appoint a person or organisation that is entitled to represent the industrial interests of the employer, employee or regulated host to provide the employer, employee or regulated host (as the case may be) with support or representation for the purposes of:
- (a) resolving the dispute; or
 - (b) the FWC dealing with the dispute.

Note: A person may be represented by a lawyer or paid agent in a matter before the FWC only with the permission of the FWC (see section 596).

Joinder of other employees to disputes

- (7) Without limiting section 609, the procedural rules may provide for the joinder, as parties to a dispute in relation to which an employee has made an application under subsection (4), of any other employees who have a dispute about the operation of this Part with the same regulated host or employer.

306Q Dealing with disputes by arbitration

- (1) The FWC may deal with the dispute by arbitration, including by making an order (an ***arbitrated protected rate of pay order***) determining:
- (a) how the rate of pay at which the employer must pay the employee in connection with the work is to be worked out; and
 - (b) that the employer must pay the rate of pay worked out in that way to the employee in connection with the work.

- (2) If the employer is a national system employer only because of section 30D or 30N, the rate of pay for the purposes of paragraph (1)(a) of this section must not include any amount that relates to an excluded subject matter within the meaning of subsection 30A(1) or 30K(1).

Note: Sections 30D and 30N extend the meaning of *national system employer*.

- (3) The FWC must not make an arbitrated protected rate of pay order unless the FWC considers that it would be fair and reasonable to make the order.
- (4) If the parties have notified the FWC, in writing, that they agree to the FWC arbitrating the dispute, an arbitrated protected rate of pay order made in relation to the dispute may apply in relation to work performed at any time on or after the day the regulated labour hire arrangement order comes into force.
- (5) If the parties have not notified the FWC that they agree to the FWC arbitrating the dispute, an arbitrated protected rate of pay order made in relation to the dispute may apply only in relation to work performed on or after:
- (a) if the arbitrated protected rate of pay order is made before the regulated labour hire arrangement order to which the order relates comes into force—the day the regulated labour hire arrangement order comes into force; or
 - (b) otherwise—the day the arbitrated protected rate of pay order is made.

Effect of arbitrated protected rate of pay order

- (6) If the FWC makes an arbitrated protected rate of pay order in relation to the dispute, the order has effect, in relation to so much of the work as is performed during the period to which the order applies, despite the following:
- (a) section 306F (protected rate of pay payable to employees if a regulated labour hire arrangement order is in force);

Section 306R

- (b) any provision of the following that provides for a lower rate of pay than that worked out in accordance with the order:
 - (i) a fair work instrument that applies to the employee;
 - (ii) a covered employment instrument (other than a fair work instrument) that applies to the employee;
 - (iii) the employee's contract of employment.
- (7) A person must not contravene a term of an arbitrated protected rate of pay order.

Note: This subsection is a civil remedy provision (see Part 4-1).
- (8) In making an order under this section, the FWC must ensure that, if an exception in section 306G would apply to the requirement to pay the regulated employee at no less than the protected rate of pay, the exception also applies in relation to the requirement to pay the employee at the rate worked out under the arbitrated protected rate of pay order.

306R Application fees

- (1) An application under subsection 306P(4) 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 that subsection; 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.

Division 4—Anti-avoidance

306S Preventing making of regulated labour hire arrangement orders

- (1) A person contravenes this section if:
- (a) the person is an employer or a regulated host; and
 - (b) the person, either alone or with one or more other persons:
 - (i) enters into a scheme; or
 - (ii) begins to carry out a scheme; or
 - (iii) carries out a scheme; and
 - (c) the person does so for the sole or dominant purpose of preventing the FWC from making a regulated labour hire arrangement order in relation to any person or persons (whether or not those persons are the same persons mentioned in paragraph (b)); and
 - (d) as a result of that scheme or part of that scheme, the FWC is prevented from making the order.

Note: This section is a civil remedy provision (see Part 4-1).

- (2) In this section:

scheme means:

- (a) any agreement, arrangement, understanding, promise or undertaking, whether express or implied and whether or not enforceable, or intended to be enforceable, by legal proceedings; or
- (b) any scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise.

306SA Avoidance of application of regulated labour hire arrangement orders

- (1) A person contravenes this section if:
- (a) the person is an employer or a regulated host; and

Section 306T

- (b) the person, either alone or with one or more other persons:
 - (i) enters into a scheme; or
 - (ii) begins to carry out a scheme; or
 - (iii) carries out a scheme; and
- (c) the person does so for the sole or dominant purpose of avoiding the application of a regulated labour hire arrangement order that has been made (whether or not the order is yet in force), in relation to any person or persons (whether or not those persons are the same persons mentioned in paragraph (b)); and
- (d) as a result of that scheme or part of that scheme, a person avoids the application of the regulated labour hire arrangement order.

Note: This section is a civil remedy provision (see Part 4-1).

(2) In this section:

scheme means:

- (a) any agreement, arrangement, understanding, promise or undertaking, whether express or implied and whether or not enforceable, or intended to be enforceable, by legal proceedings; or
- (b) any scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise.

306T Short-term arrangements—engaging other employees

An employer covered by a regulated labour hire arrangement order contravenes this section if:

- (a) the employer is not required to pay a regulated employee at a rate determined under or in accordance with this Part because of the operation of subsection 306G(2) (including as it applies because of subsection 306M(9) or 306Q(8)); and
- (b) the employer engages another person to perform the same, or substantially the same, work as that performed by the employee for the regulated host; and

- (c) it could reasonably be concluded that the purpose, or one of the purposes, of engaging the other person is to achieve the result that the employer is not required to pay a regulated employee at a rate determined under or in accordance with this Part.

Note: This section is a civil remedy provision (see Part 4-1).

306U Short-term arrangements—entering into other labour hire agreements

A regulated host covered by a regulated labour hire arrangement order contravenes this section if:

- (a) an employer covered by the regulated labour hire arrangement order is not required to pay a regulated employee at a rate determined under or in accordance with this Part because of the operation of subsection 306G(2) (including as it applies because of subsection 306M(9) or 306Q(8)); and
- (b) the regulated host enters into an agreement that has the result that another person is to perform the same, or substantially the same, work as that performed by the regulated employee for the regulated host; and
- (c) it could reasonably be concluded that the purpose, or one of the purposes, of engaging the other person is to achieve the result that the employer is not required to pay a regulated employee at a rate determined under or in accordance with this Part.

Note: This section is a civil remedy provision (see Part 4-1).

306V Engaging independent contractors

An employer covered by a regulated labour hire arrangement order contravenes this section if:

- (a) the employer dismisses an employee who performs, or is to perform, work for a regulated host covered by the order; and

Section 306V

- (b) the employer engages another person as an independent contractor, under a contract for services, to perform that work, or work of that kind, for the regulated host; and
- (c) a result of the employer dismissing the employee and engaging the independent contractor is that the employer is not required to pay a person at a rate determined under or in accordance with this Part; and
- (d) it could reasonably be concluded that the employer dismissed the employee and engaged the independent contractor for the purpose, or purposes including the purpose, of achieving that result.

Note: This section is a civil remedy provision (see Part 4-1).

Division 5—Other matters

306W Guidelines

- (1) The FWC may make written guidelines in relation to the operation of this Part.
- (2) Guidelines made under subsection (1) are not a legislative instrument.
- (3) The FWC must ensure that guidelines under subsection (1) are in force:
 - (a) by 1 November 2024; and
 - (b) at all times on and after that day.

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).

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.

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:

- (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.

Section 312

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

- (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.

Section 315

- (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:

- (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.

Section 316

- (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.

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

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.

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;

- (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.

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.

Section 320

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.

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.

Division 4 is about the disclosure of remuneration and other matters relevant to remuneration outcomes. Terms of contracts of employment, and other instruments, that purport to prohibit such disclosures are prohibited.

Division 5 is about fixed term contracts.

A contract of employment must not include a term that provides the contract will terminate at the end of an identifiable period if:

- (a) the period is greater than 2 years; or
- (b) the contract can be renewed so that the employee is employed for more than 2 years; or
- (c) in certain circumstances, the employee is employed under consecutive contracts.

Section 322

However, such a term may be included in some circumstances, including where a modern award permits the term.

The Fair Work Ombudsman must prepare a Fixed Term Contract Information Statement, which must be given to certain current and prospective employees.

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).

Division 2—Payment of wages etc.

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).

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.

- (1A) However, an employer must not deduct an amount under paragraph (1)(a) if the deduction is:
- (a) directly or indirectly for the benefit of the employer or a party related to the employer; and
 - (b) for an amount that may be varied from time to time;
- unless the deduction, if it were a deduction referred to in subsection 326(1), would be a deduction made in circumstances prescribed under subsection 326(2) to be reasonable.
- (2) An authorisation for the purposes of paragraph (1)(a):
- (a) must specify:
 - (i) for a single deduction—the amount of the deduction; or

- (ii) for multiple or ongoing deductions—whether the deductions are for a specified amount or amounts, or for amounts as varied from time to time; and
 - (aa) must include any information prescribed by the regulations; and
 - (b) may be withdrawn in writing by the employee at any time.
- (3) Any variation in a specified amount of a deduction must be authorised in writing by the employee.

325 Unreasonable requirements to spend or pay amount

- (1) An employer must not directly or indirectly require an employee to spend, or pay to the employer or another person, an amount of the employee's money or the whole or any part of an amount payable to the employee in relation to the performance of work, if:
- (a) the requirement is unreasonable in the circumstances; and
 - (b) for a payment—the payment is directly or indirectly for the benefit of the employer or a party related to the employer.

Note: This subsection is a civil remedy provision (see Part 4-1).

- (1A) An employer (the *prospective employer*) must not directly or indirectly require another person (the *prospective employee*) to spend, or pay to the prospective employer or any other person, an amount of the prospective employee's money if:
- (a) the requirement is in connection with employment or potential employment of the prospective employee by the prospective employer; and
 - (b) the requirement is unreasonable in the circumstances; and
 - (c) the payment is directly or indirectly for the benefit of the prospective employer or a party related to the prospective employer.

Note: This subsection is a civil remedy provision (see Part 4-1).

- (2) The regulations may prescribe circumstances in which a requirement referred to in subsection (1) or (1A) is or is not reasonable.

326 Certain terms have no effect

Unreasonable 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 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, if the deduction is:
 - (a) directly or indirectly for the benefit of the employer or a party related to the employer; and
 - (b) unreasonable in the circumstances.
- (2) The regulations may prescribe circumstances in which a deduction referred to in subsection (1) is or is not reasonable.

Unreasonable requirements to spend or pay 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 or pay an amount, if the requirement would contravene subsection 325(1) if it had been made by an employer.

Deductions or payments in relation to employees under 18

- (4) 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 the employee is under 18 and the deduction or payment is not agreed to in writing by a parent or guardian of the employee.

327 Things given or provided, and amounts required to be spent or paid, 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 or pay contrary to subsection 325(1), or in accordance with a term to which subsection 326(3) applies, is taken to be a deduction, from an amount payable to the employee, made by the employer otherwise than in accordance with section 324.

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;

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.

- (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.

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

Section 333

- (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;

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.

Division 4—Prohibiting pay secrecy

333B Employees not subject to pay secrecy

- (1) An employee may disclose, or not disclose, any of the following information to any other person:
- (a) the employee's remuneration;
 - (b) any terms and conditions of the employee's employment that are reasonably necessary to determine remuneration outcomes.

Example: A condition of an employee's employment that may be reasonably necessary to determine remuneration outcomes includes the number of hours that the employee works.

- (2) An employee may ask any other employee (whether employed by the same employer or a different employer) about any of the following information:
- (a) the other employee's remuneration;
 - (b) any terms and conditions of the other employee's employment that are reasonably necessary to determine remuneration outcomes.
- (3) For the avoidance of doubt:
- (a) each of the rights in subsections (1) and (2) is a workplace right within the meaning of Part 3-1; and
 - (b) a person is not prevented from exercising any of those workplace rights because the person, or another person, is no longer an employee of an employer.

Note 1: The general protections provisions in Part 3-1 also prohibit the taking of adverse action by an employer against an employee because of a workplace right of the employee under this Division.

Note 2: See subsection 341(3) for the extension of workplace rights to prospective employees.

333C Pay secrecy terms to have no effect

A term of a fair work instrument or a contract of employment has no effect to the extent that the term would be inconsistent with subsection 333B(1) or (2) (about employee rights relating to pay secrecy).

333D Prohibition on pay secrecy terms

An employer contravenes this section if:

- (a) the employer enters into a contract of employment or other written agreement with an employee; and
- (b) the contract or agreement includes a term that is inconsistent with subsection 333B(1) or (2) (about employee rights relating to pay secrecy).

Note: This section is a civil remedy provision (see Part 4-1).

Division 5—Fixed term contracts

Subdivision A—Limitations on fixed term contracts

333E Limitations

- (1) A person contravenes this subsection if:
- (a) the person enters into a contract of employment with an employee; and
 - (b) the contract includes a term that provides the contract will terminate at the end of an identifiable period (whether or not the contract also includes other terms that provide for circumstances in which it may be terminated before the end of that period); and
 - (c) the employee is not a casual employee of the employer; and
 - (d) subsection (2), (3) or (4) applies.

Note 1: This subsection is a civil remedy provision (see Part 4-1).

Note 2: A contract referred to in this subsection includes (and is not limited to) a contract of employment for a specified period of time, for a specified task or for the duration of a specified season.

Employment for more than 2 years

- (2) This subsection applies if the identifiable period is greater than 2 years.

Renewable contracts

- (3) This subsection applies if:
- (a) the sum of the identifiable period and any other period for which the contract may be extended or renewed is greater than 2 years; or
 - (b) the contract provides for an option or right to extend or renew the contract more than once.

Consecutive contracts

- (4) This subsection applies if the contract comes into effect after another contract (the ***previous contract***) of employment between the person and the employee in circumstances referred to in subsection (5).
- (5) The circumstances for the purposes of subsection (4) are:
- (a) the previous contract included a term that provided that the contract would terminate at the end of an identifiable period (whether or not the contract also includes other terms that provide for circumstances in which it may be terminated before the end of that period); and
 - (b) the previous contract was for the employee to perform the same, or substantially similar, work for the person as the employee is required to perform under the contract referred to in paragraph (1)(a) (the ***current contract***); and
 - (c) there is substantial continuity of the employment relationship between the person and employee during the period between the previous contract terminating and the current contract coming into effect; and
 - (d) any of the following apply:
 - (i) the sum of the period for which the previous contract was in effect and the identifiable period referred to in paragraph (1)(b) for the current contract is greater than 2 years;
 - (ii) the current contract contains an option for renewal or extension;
 - (iia) the previous contract contained an option for extension that has been exercised;
 - (iii) the previous contract came into effect after another contract (the ***initial contract***) that satisfies the requirements of paragraphs (a) and (b) of this subsection and there was substantial continuity of the employment relationship between the person and the employee during the period between the initial contract

Section 333F

terminating and the previous contract coming into effect.

333F Exceptions to limitations

- (1) Subsection 333E(1) does not apply in relation to a contract of employment entered into by a person and an employee if:
- (a) the employee is engaged under the contract to perform only a distinct and identifiable task involving specialised skills; or
 - (b) the employee is engaged under the contract in relation to a training arrangement; or
 - (c) the employee is engaged under the contract to undertake essential work during a peak demand period; or
 - (d) the employee is engaged under the contract to undertake work during emergency circumstances or during a temporary absence of another employee; or
 - (e) in the year the contract is entered into the amount of the employee's earnings under the contract is above the high income threshold for that year; or
 - (f) the contract relates to a position for the performance of work that:
 - (i) is funded in whole or in part by government funding or funding of a kind prescribed by the regulations for the purposes of this subparagraph; and
 - (ii) the funding is payable for a period of more than 2 years; and
 - (iii) there are no reasonable prospects that the funding will be renewed after the end of that period; or
 - (g) the contract relates to a governance position that has a time limit under the governing rules of a corporation or association of persons; or
 - (h) a modern award that covers the employee includes terms that permit any of the circumstances mentioned in subsections 333E(2) to (4) to occur; or
 - (i) the contract is of a kind prescribed by the regulations for the purposes of this paragraph.

- (2) For the purposes of paragraph (1)(e), if under the terms of the contract either of the following apply:
 - (a) the employee is required to work fewer hours than a full-time employee for a year;
 - (b) the employee is required to work for only part of a year; the high income threshold for that year is taken, for the purposes of that paragraph, to be the amount, or the amount worked out using a method, prescribed by the regulations for the purposes of this subsection.
- (3) For the purposes of subsection (2), in determining whether an award/agreement free employee has worked fewer hours than a full-time employee, regard may be had to the following:
 - (a) the hours of work of any other full-time employees or part-time employees of the employer employed in the same position as (or in a position that is comparable to) the position of the employee;
 - (b) the definition of *ordinary hours of work* in subsection 20(2).

Evidential burden

- (4) If, in proceedings for a civil penalty order against a person for a contravention of subsection 333E(1), the person wishes to rely on an exception in this section, then the person bears an evidential burden in relation to that matter.

333G Effect of entering prohibited fixed term contract

- (1) If a person enters into a contract of employment with an employee in contravention of subsection 333E(1):
 - (a) the term of the contract that provides that the contract will terminate at the end of an identifiable period is taken to have no effect; and
 - (b) the contravention is taken not to affect the validity of any other term of the contract.
- (2) Subsection (1) of this section has effect for the purposes of all of the following:

Section 333H

- (a) this Act and any other law of the Commonwealth;
- (b) a law of a State or Territory;
- (c) any fair work instrument that applies to the employee;
- (d) a copied State instrument;
- (e) the employee's contract of employment.

Note 1: One effect of subsection (1) of this section is that Division 11 of Part 2-2 (notice of termination and redundancy pay) may apply to the employee because the employee is not covered by paragraph 123(1)(a) (which deals with the application of that Division).

Note 2: Another effect of subsection (1) of this section is that Part 3-2 (unfair dismissal) may apply to the employee because the employee is not covered by paragraph 386(2)(a) (which affects the meaning of *dismissed*).

333H Anti-avoidance

- (1) A person must not do any of the following in order to avoid any right or prohibition under this Division:
 - (a) terminate an employee's employment for a period;
 - (b) delay re-engaging an employee for a period;
 - (ba) not re-engage an employee and instead engage another person to perform the same, or substantially similar, work for the person as the employee had performed for the person;
 - (c) change the nature of the work or tasks the employee is required to perform for the person;
 - (d) otherwise alter an employment relationship.

Note: The general protections provisions in Part 3-1 also prohibit the taking of adverse action by an employer against an employee (which includes an employee on a fixed term contract) because of a workplace right of the employee under this Division.

- (2) For the purposes of subsection (1), a person takes action for a particular reason if the reasons for the action include that reason.

Subdivision B—Other matters

333J Fixed Term Contract Information Statement

- (1) The Fair Work Ombudsman must prepare a ***Fixed Term Contract Information Statement*** and publish the Statement in the Gazette.
- (2) The Statement must include information about:
 - (a) Subdivision A of this Division (limitations on fixed term contracts); and
 - (b) section 333L (disputes about the operation of this Division).

333K Giving new employees the Fixed Term Contract Information Statement

If a person enters into a contract of employment that includes a term that provides the contract will terminate at the end of an identifiable period (whether or not the contract also includes other terms that provide for circumstances in which it may be terminated before the end of that period), the person must, before, or as soon as practicable after, the contract is entered into, give the employee the Fixed Term Contract Information Statement.

Note: This subsection is a civil remedy provision (see Part 4-1).

333L Disputes about the operation of this Division

Application of this section

- (1) This section applies to a dispute between an employer and employee about the operation of this Division.

Resolving disputes

- (2) In the first instance, the parties to the dispute must attempt to resolve the dispute at the workplace level, by discussions between the parties.

Section 333L

FWC may deal with disputes

- (3) If discussions at the workplace level do not resolve the dispute, a party to the dispute may refer the dispute to the FWC.
- (4) If a dispute is referred under subsection (3):
 - (a) the FWC must deal with the dispute; and
 - (b) if the parties notify the FWC that they agree to the FWC arbitrating the dispute—the FWC may deal with the dispute by arbitration.

Note: For the purposes of paragraph (a), the FWC may deal with the dispute as it considers appropriate, including by mediation, conciliation, making a recommendation or expressing an opinion (see subsection 595(2)).

Representatives

- (5) The employer or employee to the dispute may appoint a person or industrial association to provide the employer or employee (as the case may be) with support or representation for the purposes of:
 - (a) resolving the dispute; or
 - (b) referring the dispute to the FWC; or
 - (c) the FWC dealing with the dispute.

Note: A person may be represented by a lawyer or paid agent in a matter before the FWC only with the permission of the FWC (see section 596).

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, involvement in lawful industrial activities, and the exercise of workplace delegates' rights.

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.

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).

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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Section 339

- (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;

- (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.

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

- (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.

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 <i>adverse action</i>		
Item	Column 1 <i>Adverse action is taken by ...</i>	Column 2 <i>if ...</i>
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.

Meaning of adverse action

Item	Column 1 <i>Adverse action is taken by ...</i>	Column 2 <i>if ...</i>
3	a person (the <i>principal</i>) 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 <i>principal</i>) 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.

Meaning of *adverse action*

Item	Column 1 <i>Adverse action is taken by ...</i>	Column 2 <i>if ...</i>
6	an independent contractor against a person who has entered into a contract for services with the independent contractor	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.

- (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).

Section 345

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.

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

Section 348

- (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).

- (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.

350A Protection for workplace delegates

- (1) The employer of a workplace delegate must not:
- (a) unreasonably fail or refuse to deal with the workplace delegate; or
 - (b) knowingly or recklessly make a false or misleading representation to the workplace delegate; or
 - (c) unreasonably hinder, obstruct or prevent the exercise of the rights of the workplace delegate under this Act or a fair work instrument.

Note: This subsection is a civil remedy provision (see Part 4-1).

- (2) To avoid doubt, subsection (1) applies only in relation to the workplace delegate acting in that capacity.
- (3) The burden of proving that the conduct of the employer is not unreasonable as mentioned in subsection (1) lies on the employer.

Section 350C

Exception—conduct required by law

- (4) Subsection (1) does not apply in relation to conduct required by or under a law of the Commonwealth or a State or a Territory.

350C Workplace delegates and their rights

Meaning of workplace delegate

- (1) A **workplace delegate** is a person appointed or elected, in accordance with the rules of an employee organisation, to be a delegate or representative (however described) for members of the organisation who work in a particular enterprise.

Rights of workplace delegates

- (2) The workplace delegate is entitled to represent the industrial interests of those members, and any other persons eligible to be such members, including in disputes with their employer.

Note: This section does not create any obligation on a person to be represented by a workplace delegate.

- (3) The workplace delegate is entitled to:
- (a) reasonable communication with those members, and any other persons eligible to be such members, in relation to their industrial interests; and
 - (b) for the purpose of representing those interests:
 - (i) reasonable access to the workplace and workplace facilities where the enterprise is being carried on; and
 - (ii) unless the employer of the workplace delegate is a small business employer—reasonable access to paid time, during normal working hours, for the purposes of related training.
- (4) The employer of the workplace delegate is taken to have afforded the workplace delegate the rights mentioned in subsection (3) if the employer has complied with the delegates' rights term in the fair work instrument that applies to the workplace delegate.

- (5) Otherwise, in determining what is reasonable for the purposes of subsection (3), regard must be had to the following:
- (a) the size and nature of the enterprise;
 - (b) the resources of the employer of the workplace delegate;
 - (c) the facilities available at the enterprise.

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, breastfeeding, gender identity, intersex status, age, physical or mental disability, marital status, family or carer's responsibilities, subjection to family and domestic violence, 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;
- (g) the *Discrimination Act 1991* of the Australian Capital Territory;
- (h) the *Anti-Discrimination Act 1992* (NT).

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).

Section 354

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

- (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.

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

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).

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.

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.

Section 368

- (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.

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).

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.

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.

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

- (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.

Section 378

- (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).

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:

Section 381

- (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.

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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Section 384

- (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 as a regular casual employee; 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.

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

- (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.

Note: For the purposes of paragraph (a), the following conduct can amount to a valid reason for the dismissal:

- (a) the person sexually harasses another person; and
- (b) the person does so in connection with the person's employment.

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.

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:

- (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

- (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

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.

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.

- (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.

Section 399

- (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).

- (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

Section 402

- (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:

- (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).

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.

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).

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.

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.
- (6A) Each bargaining representative who applied for a protected action ballot order for the protected action ballot for the industrial action must not have contravened any order made under section 448A (which is about mediation and conciliation conferences) that related to the protected action ballot order.

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

Section 410

bargaining representative of the employee in subparagraph (1)(b)(i) of this section includes a reference to an officer of the organisation.

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

- (1) **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:
 - (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; and
 - (d) meets the additional requirements set out in this section.

Protected action ballots

- (2) Subsection (3) applies if the industrial action is organised or engaged in by an employer in response to industrial action that is authorised by a protected action ballot.
- (3) The employer mentioned in subsection (2), and any bargaining representative of the employer for the proposed enterprise agreement, must not have contravened any order made under section 448A (which is about mediation and conciliation conferences) that related to the protected action ballot order for the protected action ballot.

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

Section 412

- (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;
 - (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 a cooperative workplace 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;
 - (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

Section 414

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) an intractable bargaining declaration in relation to the agreement.

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) subject to paragraph (b):

- (i) if subparagraph (ii) of this paragraph does not apply—3 working days; or
- (ii) if the proposed enterprise agreement is a multi-enterprise agreement—120 hours; 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.

Note: For a proposed cooperative workplace agreement, see subsection 413(2).

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.

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 will be covered by the agreement, for such purposes as are prescribed by the regulations.

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.
- (2A) If the person is an employer or employee covered by an enterprise agreement because of a variation approved or made by the FWC under section 216AB, 216BA, 216CB or 216DC, the reference in paragraph (1)(a) to the day the enterprise agreement is approved by the FWC is taken to be a reference to the day the variation starts to operate in accordance with section 216AF, 216BC, 216CE or 216DF (as the case may be).

Section 417

Injunctions and other orders

- (3) If a person contravenes subsection (1), the Federal Court or Federal Circuit and Family Court of Australia (Division 2) 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).
- (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.

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;

Section 419

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.

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.

Section 421

Injunctions

- (3) The Federal Court or Federal Circuit and Family Court of Australia (Division 2) 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.

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 and Family Court of Australia (Division 2) 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.

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;

- (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;

Section 424

- (ii) the Minister;
- (ia) 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;
- (ib) 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;
 - (ia) 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

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.

- (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

- (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.

Section 428

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:

- (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.

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.

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).

Section 433

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).

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

Section 437

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 cooperative workplace 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; and
 - (c) the name of the person or entity that the applicant wishes to be the protected action ballot agent for the protected action ballot.

Section 437A

Note: The protected action ballot agent for the ballot must be an eligible protected action ballot agent unless there are exceptional circumstances: see section 444.

- (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.

**437A Application for a protected action ballot order—
multi-enterprise agreements**

- (1) This section applies if:
- (a) an application is made under section 437 for a protected action ballot order in relation to a multi-enterprise agreement; and
 - (b) the group or groups of employees specified in the application under paragraph 437(3)(a) include employees of different employers.

Note: An application cannot be made under section 437 in relation to a cooperative workplace agreement: see paragraph 437(2)(b).

- (2) This Subdivision (other than paragraph 440(b)) has effect as if the application were multiple applications, one in relation to each employer, with each application being identical apart from only specifying under paragraph 437(3)(a) the group or groups of employees mentioned in paragraph (1)(b) of this section to the

Section 438

extent that the group or groups consist of employees of the relevant employer.

Example: A proposed multi-enterprise agreement will cover 3 employers: A, B and C. An application for a protected action ballot order is made under section 437 and specifies the employees of A and B as the groups of employees who are to be balloted. Under subsection (2) of this section:

- (a) an application is taken to have been made specifying the employees of A; and
- (b) a separate application is taken to have been made specifying the employees of B.

Subject to section 442, the FWC must deal with each of these 2 applications separately under section 443 and must make separate protected action ballot orders in relation to the employees of each employer (if the requirements of section 443 are satisfied in relation to the employer).

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:

- (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:

- (a) the employer of the employees who are to be balloted; and
- (b) the person or entity that the application specifies as being the person or entity that the applicant wishes to be the protected action ballot agent for the protected action ballot.

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.

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

Section 443

- (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;
 - (e) the person or entity that the FWC decides, under subsection 444(1A), is to be the protected action ballot agent for the protected action ballot;
 - (f) the person (if any) that the FWC decides, under subsection 444(3), is to be the independent advisor for the ballot.
- (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.
- (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 referred to in paragraph 414(2)(a) being longer than 3 working days or 120 hours (whichever is applicable), 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 Ballot agent and independent advisor

- (1) This section applies if the FWC must make a protected action ballot order under subsection 443(1).

Protected action ballot agent

- (1A) The FWC must, in accordance with subsections (1B) to (1D) of this section, decide the person or entity that is to be the protected action ballot agent for the protected action ballot.
- (1B) The person or entity must be the person or entity specified in the application for the protected action ballot order as the person or entity the applicant wishes to be the protected action ballot agent, unless:
- (a) the person or entity specified in the application does not meet the requirements of subsection (1C) (unless subsection (1D) applies); or
 - (b) the FWC is satisfied that there are exceptional circumstances that justify another person or entity being the protected action ballot agent.
- (1C) The person or entity must be an eligible protected action ballot agent.
- (1D) Subsection (1C) does not apply in relation to a person if the FWC is satisfied that:
- (a) there are exceptional circumstances that justify the ballot not being conducted by an eligible protected action ballot agent; and
 - (b) the person is a fit and proper person to conduct the ballot; and
 - (c) any other requirements prescribed by the regulations are met.

Note: Other than the Australian Electoral Commission, an entity that is not a person cannot be the protected action ballot agent for a protected action ballot.

Section 445

- (2) The regulations may prescribe:
- (a) conditions that a person must meet in order to satisfy the FWC, for the purposes of paragraph (1D)(b), 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, for the purposes of paragraph (1D)(b), 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:
- (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:
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- (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
 - (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 BA—FWC must conduct conferences

448A FWC must conduct conferences

- (1) If the FWC has made a protected action ballot order in relation to a proposed enterprise agreement, the FWC must make an order directing the bargaining representatives for the agreement to attend a conference:
 - (a) at a specified time or times during a specified period; and
 - (b) at a specified place, or by specified means;for the purposes of mediation or conciliation in relation to the agreement.
- (2) The specified period must end on or before the date specified in the protected action ballot order under paragraph 443(3)(c) as the day by which voting in the protected action ballot closes.
- (3) An FWC Member (other than an Expert Panel Member), or a delegate of the FWC, is responsible for conducting the conference.
- (4) The conference must be conducted in private.
- (5) At a conference, the FWC may:
 - (a) mediate or conciliate; or
 - (b) make a recommendation or express an opinion.
- (6) This section does not limit section 592 (which deals with conferences) or 595 (which deals with FWC's power to deal with disputes).

Subdivision C—Conduct of protected action ballot

449 Conduct of protected action ballot

- (1) A protected action ballot must be conducted by the person or entity specified in the protected action ballot order as the protected action ballot agent for the ballot.
- (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)).

Section 451

- (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.

- (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.

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

Section 454

- (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
 - (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
 - (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

Section 455

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.

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:

- (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

Section 459

(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;

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
 - (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

Section 461

- (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:
 - (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.

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;

- (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

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

Section 465

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

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).

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.

468A Eligible protected action ballot agents

- (1) Each of the following is an *eligible protected action ballot agent*:
 - (a) the Australian Electoral Commission;
 - (b) a person approved by the FWC under subsection (2).
- (2) For the purposes of paragraph (1)(b), the FWC may, in writing, approve a person as an eligible protected action ballot agent if the FWC is satisfied that:
 - (a) the person is a fit and proper person to be an eligible protected action ballot agent; and
 - (b) any other requirements prescribed by the regulations are met.
- (3) 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 be an eligible protected action ballot agent; and
 - (b) factors that the FWC must take into account in determining whether a person is a fit and proper person to be an eligible protected action ballot agent.

- (4) The FWC must, at least every 3 years after it approves a person as an eligible protected action ballot agent, consider whether the FWC remains satisfied that the person meets the requirements mentioned in subsection (2).
- (5) If, after considering the matter under subsection (4), the FWC is no longer satisfied that an eligible protected action ballot agent meets the requirements mentioned in subsection (2), the FWC must take:
 - (a) any action prescribed by the regulations; and
 - (b) any other action the FWC considers appropriate.

469 Regulations

The regulations may provide for the following matters:

- (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.

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

- (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

Section 471

- (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.

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).

Section 473

- (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.

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

Section 475

- (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.

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.

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 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.

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.

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.

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).

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

- (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.

Section 483AA

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).

- (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).

Section 483A

(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

- (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.

Section 483C

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.

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.

Section 483E

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.

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.

Section 486

- 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.

- (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.

Section 490

- (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.

- (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.

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

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.

Assisting health and safety representatives

- (4) Subsection (1), and sections 495 to 498, do not apply to an official of an organisation assisting a health and safety representative on request under a provision of a State or Territory OHS law equivalent to paragraph 68(2)(g) of the *Work Health and Safety Act 2011*.
- (5) However, sections 499 to 504 do apply in relation to the official:
- (a) whether or not the official is a permit holder; and

- (b) for the purposes of sections 499 to 502—if the official is not a permit holder, as if the official were a permit holder; and
- (c) as if giving the assistance to the health and safety representative were authorised by this Part, or were the exercise of rights under this Part (as the case requires); and
- (d) for the purposes of section 504—as if that section prohibited the use of information or a document obtained in giving the assistance other than for a purpose related to the exercise or performance of the powers or functions of the health and safety representative (subject to the exceptions set out in that section).

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).

*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).

Note 2: The FWC may deal with a dispute about whether the request is reasonable (see subsection 505(1)).

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.

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

Section 504

- 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).

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;

Section 505

- (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

Section 505A

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

Section 506

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).

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

Section 509

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;

- (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**).

- (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.

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:

Section 514

- (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).

- (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

Section 517

- (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.

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

Section 519

- (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;

- (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;

Section 521

- (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.

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

Section 521C

- (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

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

Section 521D

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.

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.

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.

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).

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).

Part 3-5A—Prohibiting sexual harassment in connection with work

Division 1—Introduction

527A Guide to this Part

This Part makes it unlawful for a person to sexually harass another person, where:

- (a) the other person is a worker in a business or undertaking, seeking to become a worker in a particular business or undertaking, or conducting a business or undertaking; and
- (b) the harassment occurs in connection with the other person being a person of the relevant kind.

Persons may be liable for acts contravening this Part that are performed by their employees or agents.

Applications may be made to the FWC to deal with a dispute about an alleged contravention of this Part, including by making a stop sexual harassment order.

In most cases, a dispute about an alleged contravention of this Part will be dealt with by a court only if the dispute has not been resolved by the FWC.

527B Meaning of employee and employer

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

527C Object of this Part

The object of this Part is to give effect, or further effect, to:

Section 527CA

- (a) the Convention on the Elimination of All Forms of Discrimination Against Women, done at New York on 18 December 1979 ([1983] ATS 9); and
- (b) Articles 2 and 7 of the International Covenant on Economic, Social and Cultural Rights, done at New York on 16 December 1966 ([1976] ATS 5); and
- (c) the ILO Convention (No. 111) concerning Discrimination in Respect of Employment and Occupation, done at Geneva on 25 June 1958 ([1974] ATS 12);

by prohibiting sexual harassment of workers, persons seeking to become workers and persons conducting businesses or undertakings, and providing remedies when that happens.

Note: The Conventions and the Covenant could in 2022 be viewed in the Australian Treaties Library on the AustLII website (<http://www.austlii.edu.au>).

527CA Concurrent operation of State and Territory laws

- (1) This Part does not exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with this Part.
- (2) Without limiting subsection (1), this Part does not exclude or limit the concurrent operation of a law of a State or Territory to the extent that:
 - (a) the law makes an act or omission:
 - (i) an offence; or
 - (ii) subject to a civil penalty; and
 - (b) that (or any similar) act or omission constitutes a contravention of a civil remedy provision of this Part.
- (3) Without limiting subsection (1), this Part does not exclude or limit the concurrent operation of a law of a State or Territory to the extent that the law allows an application to be made to a person, court or body:
 - (a) for an order or other direction (however described) to prevent a person from being sexually harassed; or

- (b) to deal with a dispute relating to an allegation that a person has been sexually harassed (whether or not by arbitration).

For this purpose, it is irrelevant whether:

- (c) sexual harassment has a different meaning for the purposes of the law to the meaning it has for the purposes of this Act; or
(d) the law describes the conduct prevented, or to which the dispute relates, as sexual harassment.

Note 1: An order made under this Part, or under Division 2 of Part 4-1 in relation to a contravention of this Part, will prevail over any order or other direction made by a person, court or body under a law of a State or Territory, to the extent of any inconsistency.

Note 2: Generally, section 734B prevents multiple applications or complaints under both this Act and State and Territory anti-discrimination laws in relation to the same conduct.

- (4) Section 26 has effect subject to this section.

Division 2—Prohibiting sexual harassment in connection with work

527D Prohibiting sexual harassment in connection with work

Prohibition

- (1) A person (the **first person**) must not sexually harass another person (the **second person**) who is:
- (a) a worker in a business or undertaking; or
 - (b) seeking to become a worker in a particular business or undertaking; or
 - (c) a person conducting a business or undertaking;
- if the harassment occurs in connection with the second person being a person of the kind mentioned in paragraph (a), (b) or (c).

Note: This section is a civil remedy provision (see Part 4-1).

Meaning of worker

- (2) For the purposes of this Part, **worker** has the same meaning as in the *Work Health and Safety Act 2011*.

Note: Broadly, for the purposes of the *Work Health and Safety Act 2011*, a worker is an individual who performs work in any capacity, including as an employee, a contractor, a subcontractor, an outworker, an apprentice, a trainee, a student gaining work experience or a volunteer.

When a person is a worker in a business or undertaking

- (3) For the purposes of this Act, if a person (the **first person**) is a worker because the first person carries out work for a person conducting a business or undertaking, the first person is a worker in the business or undertaking.

Other expressions

- (4) Subject to subsections (2) and (3), an expression used in this section that is defined for the purposes of the *Work Health and Safety Act 2011* has the same meaning in this section as it has in that Act.

527E Vicarious liability etc.

Employees and agents

- (1) If an employee or agent of a person (the *principal*) does, in connection with the employment of the employee or with the duties of the agent as an agent, an act that contravenes subsection 527D(1), this Act applies in relation to the principal (subject to subsection (2)) as if the principal had also done the act.
- (2) Subsection (1) does not apply if the principal proves that the principal took all reasonable steps to prevent the employee or agent from doing acts that would contravene subsection 527D(1).

Defence members

- (2A) If a person does an act that contravenes subsection 527D(1) in connection with the person's service as a defence member (within the meaning of the *Defence Force Discipline Act 1982*), this Act applies in relation to the Commonwealth (subject to subsection (2B)) as if the Commonwealth had also done the act.
- (2B) Subsection (2A) does not apply if the Commonwealth proves that the Commonwealth took all reasonable steps to prevent the person from doing acts that would contravene subsection 527D(1).

Other provisions not limited

- (3) Subsections (1) and (2A) do not limit section 550 or 793.

Division 3—Dealing with sexual harassment disputes

Subdivision A—Applying for the FWC to deal with sexual harassment disputes

527F Application for the FWC to deal with a sexual harassment dispute

- (1) If a person (the *aggrieved person*) alleges they have been sexually harassed in contravention of Division 2 by one or more other persons (a *respondent*), a person referred to in subsection (2) may apply for the FWC to do either or both of the following to deal with the dispute:

- (a) make an order (a *stop sexual harassment order*) under section 527J;
- (b) otherwise deal with the dispute.

Note 1: A person has limited ability to make a sexual harassment court application unless the FWC has dealt with the dispute as mentioned in paragraph (b) and is satisfied that all reasonable attempts to resolve the dispute (other than by arbitration) have been, or are likely to be, unsuccessful (see section 527T).

Note 2: The FWC may allow an application to be amended if, for example, the applicant wishes the FWC to deal with the dispute in a way not initially applied for (see section 586).

- (2) The persons are as follows:
- (a) the aggrieved person;
 - (b) an industrial association that is entitled to represent the industrial interests of the aggrieved person.
- (3) Despite paragraph (1)(a), a person referred to in subsection (2) cannot, except as provided by the regulations, apply for the FWC to make a stop sexual harassment order in relation to the dispute if the aggrieved person was a defence member (within the meaning of the *Defence Force Discipline Act 1982*) at the time the sexual harassment allegedly occurred.

- (4) Without limiting section 609, the procedural rules may provide for the following:
- (a) the making of applications under subsection (1) by:
 - (i) 2 or more persons of the kind referred to in subsection (2) acting jointly; or
 - (ii) a single industrial association that is entitled to represent the industrial interests of 2 or more aggrieved persons; being applications made in relation to the same alleged contravention, or related alleged contraventions, of Division 2;
 - (b) the joinder of the following as parties to the dispute:
 - (i) one or more aggrieved persons in relation to alleged contraventions of Division 2;
 - (ii) one or more industrial associations each of which is entitled to represent the industrial interests of one or more aggrieved persons in relation to alleged contraventions of Division 2;
 - (iii) if an aggrieved person in relation to the dispute alleges the aggrieved person has been sexually harassed in contravention of Division 2, other than because of the operation of subsection 527E(1), by a person who is an employee or agent of another person (the *principal*)—the principal;
 - (iv) if a party to the dispute alleges another party (the *principal*) has contravened Division 2 because of the operation of subsection 527E(1)—an employee or agent mentioned in that subsection in relation to the principal;
 - (c) the withdrawal of persons as parties to the dispute;
 - (d) the treatment of the dispute under this Act as if there were 2 or more different disputes (instead of a single dispute), with different parties to each of the disputes.

527G Time for application

The FWC may dismiss an application that is made under section 527F more than 24 months after the contravention, or the

Section 527H

last of the contraventions, of Division 2 is alleged to have occurred.

Note: For another power of the FWC to dismiss an application under section 527F, see section 587.

527H Application fees

- (1) An application to the FWC under section 527F 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 527F; 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.

Subdivision B—Stop sexual harassment orders

527J Stop sexual harassment orders

- (1) If:
 - (a) an application made under section 527F includes an application for a stop sexual harassment order; and
 - (b) the FWC is satisfied that:
 - (i) the aggrieved person has been sexually harassed in contravention of Division 2 by one or more persons; and
 - (ii) there is a risk that the aggrieved person will continue to be sexually harassed in contravention of Division 2 by the person or persons;then the FWC may make any order it considers appropriate (other than an order requiring payment of a pecuniary amount) to prevent the aggrieved person from being sexually harassed in contravention of Division 2 by the person or persons.

- (2) The FWC must start to deal with the application, to the extent that it consists of an application for a stop sexual harassment order, within 14 days after the application is made.

Note: For example, the FWC may start to inform itself of the matter under section 590, it may decide to conduct a conference under section 592, or it may decide to hold a hearing under section 593.

- (3) In considering the terms of a stop sexual harassment order, the FWC must take into account:
- (a) if the FWC is aware of any final or interim outcomes arising out of an investigation into the matter that is being, or has been, undertaken by another person or body—those outcomes; and
 - (b) if the FWC is aware of any procedure available to the aggrieved person—that procedure; and
 - (c) if the FWC is aware of any final or interim outcomes arising out of any procedure available to the aggrieved person to resolve grievances or disputes—those outcomes; and
 - (d) any matters that the FWC considers relevant.
- (4) Despite subsection (2), the FWC may dismiss an application made under section 527F, to the extent that it consists of an application for a stop sexual harassment order, if the FWC considers that the application might involve matters that relate to:
- (a) Australia's defence; or
 - (b) Australia's national security; or
 - (c) an existing or future covert operation (within the meaning of section 12E of the *Work Health and Safety Act 2011*) of the Australian Federal Police; or
 - (d) an existing or future international operation (within the meaning of section 12E of the *Work Health and Safety Act 2011*) of the Australian Federal Police.

Note: For another power of the FWC to dismiss an application under section 527F, see section 587.

Section 527K

527K Contravening a stop sexual harassment order

A person to whom a stop sexual harassment order applies must not contravene a term of the order.

Note: This section is a civil remedy provision (see Part 4-1).

527L Actions under work health and safety laws permitted

Section 115 of the *Work Health and Safety Act 2011* and corresponding provisions of corresponding WHS laws (within the meaning of that Act) do not apply in relation to an application made under section 527F that includes an application for a stop sexual harassment order.

Note: Ordinarily, if a person makes an application under section 527F for a stop sexual harassment order in relation to particular conduct, then section 115 of the *Work Health and Safety Act 2011* and corresponding provisions of corresponding WHS laws would prohibit a proceeding from being commenced, or an application from being made or continued, under those laws in relation to the same conduct. This section removes that prohibition.

527M This Subdivision is not to prejudice Australia's defence, national security etc.

Nothing in this Subdivision requires or permits a person to take, or to refrain from taking, any action if the taking of the action, or the refraining from taking the action, would be, or could reasonably be expected to be, prejudicial to:

- (a) Australia's defence; or
- (b) Australia's national security; or
- (c) an existing or future covert operation (within the meaning of section 12E of the *Work Health and Safety Act 2011*) of the Australian Federal Police; or
- (d) an existing or future international operation (within the meaning of section 12E of the *Work Health and Safety Act 2011*) of the Australian Federal Police.

527N Declarations by the Chief of the Defence Force

- (1) Without limiting section 527M, the Chief of the Defence Force may, by legislative instrument, declare that all or specified provisions of this Subdivision do not apply in relation to a specified activity.
- (2) A declaration under subsection (1) may only be made with the approval of the Minister and, if made with that approval, has effect according to its terms.

527P Declarations by the Director-General of Security

- (1) Without limiting section 527M, the Director-General of Security may, by legislative instrument, declare that all or specified provisions of this Subdivision do not apply in relation to a person carrying out work for the Director-General.
- (2) A declaration under subsection (1) may only be made with the approval of the Minister and, if made with that approval, has effect according to its terms.

527Q Declarations by the Director-General of ASIS

- (1) Without limiting section 527M, the Director-General of the Australian Secret Intelligence Service may, by legislative instrument, declare that all or specified provisions of this Subdivision do not apply in relation to a person carrying out work for the Director-General.
- (2) A declaration under subsection (1) may only be made with the approval of the Minister and, if made with that approval, has effect according to its terms.

Subdivision C—Dealing with sexual harassment disputes in other ways

527R Dealing with a sexual harassment dispute (other than by arbitration)

(1) If:

- (a) an application is made under section 527F for the FWC to deal with a dispute; and
- (b) the application does not consist solely of an application for a stop sexual harassment order;

then 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)).

(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 527S, or a sexual harassment court application, in relation to the dispute would not have a reasonable prospect of success, the FWC must advise the parties accordingly.

527S Dealing with a sexual harassment dispute by arbitration

(1) This section applies if:

- (a) the FWC issues a certificate under paragraph 527R(3)(a) in relation to a dispute; and

- (b) 2 or more of the parties (the *notifying parties*) jointly notify the FWC that they agree to the FWC arbitrating the dispute; and
 - (c) the notifying parties include at least one party that is:
 - (i) an aggrieved person in relation to the dispute; or
 - (ii) an industrial association that is entitled to represent the industrial interests of a person who is an aggrieved person in relation to the dispute; and
 - (d) the notifying parties include at least one party that is a respondent in relation to the dispute; and
 - (e) the notification:
 - (i) is given to the FWC within 60 days after the day the certificate is issued, or within such period as the FWC allows on an application made during or after those 60 days; and
 - (ii) complies with any requirements prescribed by the procedural rules.
- (2) The FWC must:
- (a) remove as a party to the dispute a party that is not one of the notifying parties; and
 - (b) notify a person who is removed under paragraph (a) of the removal.
- (3) After doing so, the FWC may deal with the dispute by arbitration, including by:
- (a) making one or more of the following orders:
 - (i) an order for the payment of compensation to an aggrieved person in relation to the dispute;
 - (ii) an order for payment of an amount to an aggrieved person in relation to the dispute for remuneration lost;
 - (iii) an order requiring a person to perform any reasonable act, or carry out any reasonable course of conduct, to redress loss or damage suffered by an aggrieved person in relation to the dispute; and
 - (b) expressing one or more of the following opinions:

Section 527T

- (i) an opinion that a respondent in relation to the dispute has sexually harassed one or more aggrieved persons in contravention of Division 2;
 - (ii) an opinion that a respondent in relation to the dispute has contravened Division 2 because of the operation of subsection 527E(1);
 - (iii) an opinion that it would be inappropriate for any further action to be taken in the matter.
- (4) A person to whom an order under paragraph (3)(a) applies must not contravene a term of the order.

Note: This subsection is a civil remedy provision (see Part 4-1).

527T Limitation on taking a sexual harassment dispute to court

- (1) A person who is entitled to apply under section 527F for the FWC to deal with a dispute (whether by making a stop sexual harassment order or otherwise) must not make a sexual harassment court application in relation to the dispute unless:
 - (a) both of the following apply:
 - (i) the FWC has issued a certificate under paragraph 527R(3)(a) in relation to the dispute;
 - (ii) the sexual harassment court application is made within a period specified in subsection (3); or
 - (b) the sexual harassment court application includes an application for an interim injunction.

Note: Generally, if parties to the dispute notify the FWC that they agree to the FWC arbitrating the dispute (see subsection 527S(1)), a sexual harassment court application cannot be made by a notifying party in relation to a contravention of Division 2 by another notifying party where the contravention is the subject of the dispute (see section 734A).

- (2) A **sexual harassment court application** is an application to a court under Division 2 of Part 4-1 for orders in relation to a contravention of Division 2 of this Part.

- (3) For the purposes of subparagraph (1)(a)(ii), the following periods are specified:
- (a) 60 days after the day the certificate is issued;
 - (b) if the person is removed under paragraph 527S(2)(a) as a party to the dispute—14 days after the person is given notice under paragraph 527S(2)(b) of the removal;
 - (c) such period as the court allows on an application made during or after a period mentioned in paragraph (a) or (b) of this subsection.

Note: For the purposes of paragraph (c), 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*.

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.

Division 4 is about the obligations of national system employers in relation to advertising rates of pay.

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).

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

- (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

Section 532

- (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;

- (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

Section 534

- 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.

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.

Note: If an employer fails to comply with subsection (1), (2) or (3), the employer may bear the burden of disproving allegations in proceedings relating to a contravention of certain civil remedy provisions: see section 557C.

- (4) An employer must not make or keep a record for the purposes of this section that the employer knows is false or misleading.

Note: This subsection is a civil remedy provision (see Part 4-1).

- (5) Subsection (4) does not apply if the record is not false or misleading in a material particular.

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).

Section 536

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; and
- (c) not include any information prescribed by the regulations in relation to paid family and domestic violence leave; and
- (d) comply with any requirements prescribed by the regulations in relation to the reporting of paid family and domestic violence leave.

Note 1: This subsection is a civil remedy provision (see Part 4-1).

Note 2: If an employer fails to comply with subsection (1) or (2), the employer may bear the burden of disproving allegations in proceedings relating to a contravention of certain civil remedy provisions: see section 557C.

(3) An employer must not give a pay slip for the purposes of this section that the employer knows is false or misleading.

Note: This subsection is a civil remedy provision (see Part 4-1).

(3A) A pay slip is not false or misleading merely because it complies with regulations made for the purposes of paragraph (2)(d).

(4) Subsection (3) does not apply if the pay slip is not false or misleading in a material particular.

Division 4—Employer obligations in relation to advertising rates of pay

536AA Employer obligations in relation to advertising rates of pay

Employers must not advertise employment with rate of pay that contravenes this Act or a fair work instrument

- (1) An employer must not advertise, or cause to be advertised, that the employer is offering employment at a rate of pay that would contravene either of the following, if the advertised employment occurred:

- (a) this Act;
- (b) a fair work instrument.

Note: This subsection is a civil remedy provision (see Part 4-1).

Advertisement of piecework must include any periodic rate of pay to which pieceworker is entitled

- (2) If:

- (a) an employer advertises, or causes to be advertised, that the employer is offering employment as a pieceworker; and
- (b) the employee would be entitled to a periodic rate of pay, if the advertised employment occurred;

the advertisement must:

- (c) specify that rate of pay (or a higher rate of pay); or
- (d) include a statement to the effect that a periodic rate of pay is payable in relation to the employment.

Note: This subsection is a civil remedy provision (see Part 4-1).

Reasonable excuse

- (3) Subsections (1) and (2) do not apply if the employer has a reasonable excuse.

Part 3-7—Corrupting benefits

Division 1—Introduction

536A Guide to this Part

This Part is about corrupting benefits provided to or in relation to organisations.

Division 2 prohibits benefits intended to influence an officer or employee of an organisation.

Division 3 prohibits national system employers providing cash or in kind payments to employee organisations and related persons, other than certain legitimate benefits specified in the Division.

536B Meanings of employee and employer

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

536C Concurrent operation of State and Territory laws

- (1) This Part does not exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with this Part.
- (2) Without limiting subsection (1), this Part does not exclude or limit the concurrent operation of a law of a State or Territory to the extent that:
 - (a) the law makes an act or omission:
 - (i) an offence; or
 - (ii) subject to a civil penalty; and
 - (b) that (or any similar) act or omission is also an offence against a provision of this Part.

- (3) Subsection (2) applies even if the law of the State or Territory does any one or more of the following, in relation to the offence or civil penalty:
- (a) provides for a penalty that differs from the penalty provided for in this Part;
 - (b) provides for fault elements that differ from the fault elements applicable to the offence created by this Part;
 - (c) provides for defences or exceptions that differ from the defences or exceptions applicable to the offence created by this Part.

536CA Dishonesty

- (1) For the purposes of this Part, ***dishonest*** means:
- (a) dishonest according to the standards of ordinary people; and
 - (b) known by the defendant to be dishonest according to the standards of ordinary people.
- (2) In a prosecution for an offence against this Part, the determination of dishonesty is a matter for the trier of fact.

Division 2—Giving, receiving or soliciting corrupting benefits

536D Giving, receiving or soliciting a corrupting benefit

Giving a corrupting benefit

- (1) A person (the ***defendant***) commits an offence if:
- (a) the defendant dishonestly:
 - (i) provides a benefit to another person; or
 - (ii) causes a benefit to be provided to another person; or
 - (iii) offers to provide, or promises to provide, a benefit to another person; or
 - (iv) causes an offer of the provision of a benefit, or a promise of the provision of a benefit, to be made to another person; and
 - (b) the defendant does so with the intention of influencing a registered organisations officer or employee (who may be the other person):
 - (i) in the performance of his or her duties or functions as such an officer or employee; or
 - (ii) in the exercise of his or her powers or performance of his or her functions under this Act or the Registered Organisations Act; or
 - (iii) to give an advantage of any kind in connection with the relevant affairs, which would not be legitimately due, to the defendant, a spouse (within the meaning of the Registered Organisations Act) or associated entity of the defendant, or a person who has a prescribed connection with the defendant.

Penalty:

- (a) for an individual—imprisonment for 10 years or 5,000 penalty units, or both; or
- (b) for a body corporate—25,000 penalty units.

Receiving or soliciting a corrupting benefit

- (2) A person (the ***defendant***) commits an offence if:
- (a) the defendant dishonestly:
 - (i) requests (whether or not expressly and whether or not by threats); or
 - (ii) receives or obtains; or
 - (iii) agrees to receive or obtain;a benefit from a person (the ***provider***) for the defendant or another person; and
 - (b) the defendant does so with the intention that, or the intention that the provider believes that, the receipt, or expectation of the receipt, of the benefit will influence a registered organisations officer or employee (who may be the defendant):
 - (i) in the performance of his or her duties or functions as such an officer or employee; or
 - (ii) in the exercise of his or her powers or performance of his or her functions under this Act or the Registered Organisations Act; or
 - (iii) to give an advantage of any kind in connection with the relevant affairs, which would not be legitimately due, to the provider, a spouse (within the meaning of the Registered Organisations Act) or associated entity of the provider, or a person who has a prescribed connection with the provider.

Penalty:

- (a) for an individual—imprisonment for 10 years or 5,000 penalty units, or both; or
- (b) for a body corporate—25,000 penalty units.

No need for actual influence etc.

- (3) For the purposes of paragraphs (1)(b) and (2)(b):
- (a) the defendant's intention does not need to be in relation to a particular registered organisations officer or employee; and

Section 536E

- (b) the defendant's intention does not need to be in relation to a registered organisations officer or employee performing or exercising duties, functions or powers in a particular way, or giving a particular advantage to a particular person; and
- (c) the provider mentioned in subsection (2) does not need to actually believe anything; and
- (d) it is not necessary that any person actually be influenced.

Giving an advantage which would not be legitimately due

- (4) In a prosecution for an offence against subsection (1) or (2), the determination of whether an advantage would not be legitimately due is a matter for the trier of fact.
- (5) For the purposes of subparagraphs (1)(b)(iii) and (2)(b)(iii), an advantage may be given in any way, including by doing or not doing a thing, or causing or influencing another person to do or not do a thing.
- (6) In working out whether an advantage would not be legitimately due to a person, disregard:
 - (a) whether the advantage might be, or be perceived to be, customary, necessary or required in the situation; and
 - (b) the value of the advantage; and
 - (c) any official tolerance of the advantage.

Meaning of benefit in this section

- (7) In this section:

benefit includes any advantage and is not limited to property.

536E Meaning of registered organisations officer or employee

Each of the following is a ***registered organisations officer or employee***:

- (a) an officer (within the meaning of the Registered Organisations Act) of an organisation or branch of an organisation;

(b) an employee of an organisation or branch of an organisation.

Division 3—Cash or in kind payments to employee organisations etc.

536F Giving a cash or in kind payment

Giving a cash or in kind payment

- (1) A person (the ***defendant***) commits an offence if:
- (a) the defendant is a national system employer other than an employee organisation; and
 - (b) the defendant:
 - (i) provides a cash or in kind payment to another person; or
 - (ii) causes a cash or in kind payment to be provided to another person; or
 - (iii) offers to provide, or promises to provide, a cash or in kind payment to another person; or
 - (iv) causes an offer of the provision of a cash or in kind payment, or a promise of the provision of a cash or in kind payment, to be made to another person; and
 - (c) the other person is an employee organisation or a prohibited beneficiary in relation to an employee organisation; and
 - (d) the defendant, a spouse (within the meaning of the Registered Organisations Act) or associated entity of the defendant, or a person who has a prescribed connection with the defendant, employs a person who is, or is entitled to be, a member of the organisation and whose industrial interests the organisation is entitled to represent.
- Penalty:
- (a) for an individual—imprisonment for 2 years or 500 penalty units, or both; or
 - (b) for a body corporate—2,500 penalty units.
- (3) Subsection (1) does not apply to the following cash or in kind payments:
- (a) a payment to the organisation:

- (i) made by deduction from the wages of an employee of the defendant who has agreed in writing to become a member of the organisation; and
- (ii) made for a membership fee payable by the employee;
- (b) a benefit provided and used for the sole or dominant purpose of benefiting the defendant's employees, or the defendant's former employees in relation to their former employment;
- (c) a gift or contribution deductible under section 30-15 of the *Income Tax Assessment Act 1997* and used in accordance with the law;
- (ca) a benefit of nominal value (meaning no more than 2 penalty units) associated with travel or hospitality during consultation, negotiation or bargaining;
- (cb) a benefit of nominal value (meaning no more than 2 penalty units) that is:
 - (i) a token gift, an event invitation or a similar benefit; and
 - (ii) given in accordance with common courteous practice among employers and organisations;
- (d) a payment made, at no more than market value, for goods or services supplied to the defendant in the ordinary course of the organisation's business;
- (e) a payment made under or in accordance with a law of the Commonwealth, or a law of a State or Territory;
- (f) a benefit provided in accordance with an order, judgment or award of a court or tribunal, or in settlement of a matter before the FWC or a genuine legal dispute;
- (g) a non-corrupting benefit prescribed by, or provided in circumstances prescribed by, the regulations.

Note: A defendant bears an evidential burden in relation to the matters in this subsection (see subsection 13.3(3) of the *Criminal Code*).

Meaning of cash or in kind payment

- (4) A **cash or in kind payment** is a benefit that is:
- (a) in cash or any other money form; or
 - (b) goods or services; or

Section 536G

- (c) prescribed by the regulations for the purposes of this paragraph.

Meaning of prohibited beneficiary

- (5) A person is a **prohibited beneficiary** in relation to an employee organisation if the person is any of the following:
 - (a) an entity controlled by the organisation;
 - (b) a registered organisations officer or employee in relation to the organisation;
 - (c) a spouse of, or entity controlled by, such an officer or employee;
 - (d) a person or entity to whom the organisation or a prohibited beneficiary of the organisation requests or directs the defendant to provide a cash or in kind payment;
 - (e) a person who has a prescribed connection with the organisation or a prohibited beneficiary of the organisation.
- (6) In subsection (5), **control**, **entity** and **spouse** have the same meanings as in the Registered Organisations Act.

Meaning of national system employer

- (7) Sections 30D and 30N do not apply to extend the meaning of **national system employer** in this section.

536G Receiving or soliciting a cash or in kind payment

- (1) A person (the **defendant**) commits an offence if:
 - (a) the defendant:
 - (i) requests (whether or not expressly and whether or not by threats); or
 - (ii) receives or obtains; or
 - (iii) agrees to receive or obtain;a cash or in kind payment from a person (the **provider**) for the defendant or another person; and

- (b) the defendant is an employee organisation or an officer (within the meaning of the Registered Organisations Act) or employee of an employee organisation; and
- (c) the provider is a national system employer other than an employee organisation; and
- (d) the provider, a spouse (within the meaning of the Registered Organisations Act) or associated entity of the provider, or a person who has a prescribed connection with the provider, employs a person who is, or is entitled to be, a member of the organisation and whose industrial interests the organisation is entitled to represent.

Penalty:

- (a) for an individual—imprisonment for 2 years or 500 penalty units, or both; or
 - (b) for a body corporate—2,500 penalty units.
- (2) Subsection (1) does not apply to a cash or in kind payment mentioned in subsection 536F(3).

536H Implied freedom of political communication

- (1) This Division does not apply to the extent (if any) that it would infringe any constitutional doctrine of implied freedom of political communication.
- (2) Subsection (1) does not limit the application of section 15A of the *Acts Interpretation Act 1901*.

Chapter 4—Compliance and enforcement

Part 4-1—Civil remedies

Division 1—Introduction

537 Guide to this Part

This Part 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.

Subdivision A of Division 2 deals with applications for orders in relation to contraventions of civil remedy provisions and safety net contractual entitlements, and applications for orders to enforce entitlements arising under subsection 542(1).

Subdivision B of Division 2 sets out the orders that can be made by the Federal Court, the Federal Circuit and Family Court of Australia (Division 2) or an eligible State or Territory Court in relation to a contravention of a civil remedy provision.

Division 3 sets out when proceedings relating to a contravention of a civil remedy provision may be dealt with as small claims proceedings.

Division 4 deals with general provisions relating to civil remedies, including rules about evidence and procedure.

Division 4A imposes obligations on responsible franchisor entities in relation to certain contraventions of civil remedy provisions by franchisee entities and on holding companies in relation to certain contraventions of civil remedy provisions by subsidiaries.

Division 5 deals with unclaimed money.

538 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).

Division 2—Orders

Subdivision A—Applications for orders

539 Applications for orders in relation to contraventions of civil remedy provisions

- (1) A provision referred to in column 1 of an item in the table in subsection (2) is a *civil remedy provision*.
- (2) For each civil remedy provision, the persons referred to in column 2 of the item may, subject to sections 540 and 544 and Subdivision B, apply to the courts referred to in column 3 of the item for orders in relation to a contravention or proposed contravention of the provision, including the maximum penalty referred to in column 4 of the item.

Note 1: Civil remedy provisions within a single Part may be grouped together in a single item of the table.

Note 2: Applications cannot be made by an inspector in relation to a contravention of a civil remedy provision by a person in certain cases where an undertaking or compliance notice has been given (see subsections 715(4) and 716(4A)).

Note 3: The regulations may also prescribe persons for the purposes of an item in column 2 of the table (see subsection 540(8)).

Note 4: See section 557A in relation to a serious contravention of a civil remedy provision.

Standing, jurisdiction and maximum penalties				
Item	Column 1 Civil remedy provision	Column 2 Persons	Column 3 Courts	Column 4 Maximum penalty
Part 2-1—Core provisions				
1	44	(a) an employee; (b) an employee organisation; (c) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	for a serious contravention—600 penalty units; or otherwise—60 penalty units
2	45 (other than in relation to a contravention or proposed contravention of an outworker term)	(a) an employee; (b) an employer; (c) an employee organisation; (d) an employer organisation; (e) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	for a serious contravention—600 penalty units; or otherwise—60 penalty units
3	45 (in relation to a contravention or proposed contravention of an outworker term)	(a) an outworker; (b) an employer; (c) an outworker entity; (d) an employee organisation; (e) an employer organisation; (f) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	for a serious contravention—600 penalty units; or otherwise—60 penalty units

Chapter 4 Compliance and enforcement**Part 4-1** Civil remedies**Division 2** Orders

Section 539

Standing, jurisdiction and maximum penalties				
Item	Column 1 Civil remedy provision	Column 2 Persons	Column 3 Courts	Column 4 Maximum penalty
4	50 (other than in relation to a contravention or proposed contravention of a term that would be an outworker term if it were included in a modern award)	(a) an employee; (b) an employer; (c) an employee organisation to which the enterprise agreement concerned applies; (d) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	for a serious contravention—600 penalty units; or otherwise—60 penalty units
5	50 (in relation to a contravention or proposed contravention of a term that would be an outworker term if it were included in a modern award)	(a) an employee; (b) an employer; (c) an employee organisation; (d) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	for a serious contravention—600 penalty units; or otherwise—60 penalty units

Standing, jurisdiction and maximum penalties				
Item	Column 1 Civil remedy provision	Column 2 Persons	Column 3 Courts	Column 4 Maximum penalty
Part 2-2—The National Employment Standards				
5AA	65C(6)	(a) an employee; (b) an employee organisation; (c) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	60 penalty units
5AB	76C(7)	(a) an employee; (b) an employee organisation; (c) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	60 penalty units
Part 2-4—Enterprise agreements				
5A	179(1) 179(5)	(a) an employee; (b) a bargaining representative for the proposed enterprise agreement; (c) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	60 penalty units

Chapter 4 Compliance and enforcement**Part 4-1** Civil remedies**Division 2** Orders

Section 539

Standing, jurisdiction and maximum penalties				
Item	Column 1 Civil remedy provision	Column 2 Persons	Column 3 Courts	Column 4 Maximum penalty
5B	180(4A) 180(4B) 180(4C)	(a) an employee; (b) a bargaining representative for the proposed enterprise agreement; (c) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	60 penalty units
5C	226A(6)	(a) an employee; (b) an employee organisation to which the enterprise agreement applied immediately before the termination of the agreement; (c) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	for a serious contravention—600 penalty units; or otherwise—60 penalty units
6	233	(a) an employee who the proposed enterprise agreement will cover; (b) a bargaining representative for the proposed enterprise agreement; (c) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	60 penalty units

Standing, jurisdiction and maximum penalties				
Item	Column 1 Civil remedy provision	Column 2 Persons	Column 3 Courts	Column 4 Maximum penalty
Part 2-5—Workplace determinations				
7	280	(a) an employee; (b) an employer; (c) an employee organisation to which the workplace determination concerned applies; (d) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	for a serious contravention—600 penalty units; or otherwise—60 penalty units
Part 2-6—Minimum wages				
8	293	(a) an employee; (b) an employee organisation; (c) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	for a serious contravention—600 penalty units; or otherwise—60 penalty units
Part 2-7—Equal remuneration				
9	305	(a) an employee; (b) an employee organisation; (c) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	for a serious contravention—600 penalty units; or otherwise—60 penalty units

Chapter 4 Compliance and enforcement**Part 4-1** Civil remedies**Division 2** Orders

Section 539

Standing, jurisdiction and maximum penalties				
Item	Column 1 Civil remedy provision	Column 2 Persons	Column 3 Courts	Column 4 Maximum penalty
Part 2-7A—Regulated labour hire arrangement orders				
9A	306EC(1)	(a) an employee;	(a) the Federal Court;	for a serious contravention—600 penalty units; or otherwise—60 penalty units
	306ED(2)	(b) an employee organisation;	(b) the Federal Circuit and Family Court of Australia (Division 2);	
	306ED(4)	(c) an inspector		
	306EE(2)			
	306EE(3)			
	306F(2)			
	306H(3)		(c) an eligible State or Territory court	
	306N(3)			
	306Q(7)			
	306S(1)			
	306SA(1)			
	306T			
	306U			
	306V			
Part 2-9—Other terms and conditions of employment				
10	323(1)	(a) an employee;	(a) the Federal Court;	for a serious contravention—600 penalty units; or otherwise—60 penalty units
	323(3)	(b) an employee organisation;	(b) the Federal Circuit and Family Court of Australia (Division 2);	
	325(1)	(c) an inspector		
	328(1)			
	328(2)			
	328(3)		(c) an eligible State or Territory court	

Standing, jurisdiction and maximum penalties				
Item	Column 1 Civil remedy provision	Column 2 Persons	Column 3 Courts	Column 4 Maximum penalty
10A	325(1A)	(a) a prospective employee; (b) an employee; (c) an employee organisation; (d) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	for a serious contravention—600 penalty units; or otherwise—60 penalty units
10B	333D	(a) a prospective employee; (b) an employee; (c) an employee organisation; (d) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	for a serious contravention—600 penalty units; or otherwise—60 penalty units
10C	333E	(a) a prospective employee; (b) an employee; (c) an employee organisation; (d) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	for a serious contravention—600 penalty units; or otherwise—60 penalty units

Chapter 4 Compliance and enforcement**Part 4-1** Civil remedies**Division 2** Orders

Section 539

Standing, jurisdiction and maximum penalties				
Item	Column 1 Civil remedy provision	Column 2 Persons	Column 3 Courts	Column 4 Maximum penalty
10D	333K	(a) a prospective employee; (b) an employee; (c) an employee organisation; (d) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	for a serious contravention—600 penalty units; or otherwise—60 penalty units
Part 3-1—General protections				
11	340(1) 340(2) 343(1) 344 345(1) 346 348 349(1) 350(1) 350(2) 350A(1) 351(1) 352 353(1) 354(1) 355 357(1) 358 359 369(3)	(a) a person affected by the contravention; (b) an industrial association; (c) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2)	60 penalty units

Standing, jurisdiction and maximum penalties

Item	Column 1 Civil remedy provision	Column 2 Persons	Column 3 Courts	Column 4 Maximum penalty
12	378	(a) a person to whom the costs are payable; (b) an industrial association; (c) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2)	60 penalty units

Part 3-2—Unfair dismissal

13	405	(a) a person affected by the contravention; (b) an employee organisation; (c) an employer organisation; (d) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	60 penalty units
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Chapter 4 Compliance and enforcement**Part 4-1** Civil remedies**Division 2** Orders

Section 539

Standing, jurisdiction and maximum penalties				
Item	Column 1 Civil remedy provision	Column 2 Persons	Column 3 Courts	Column 4 Maximum penalty
Part 3-3—Industrial action				
14	417(1)	(a) an employee; (b) an employer; (c) an employee organisation covered by the enterprise agreement or workplace determination concerned; (d) a person affected by the industrial action; (e) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2)	60 penalty units
15	421(1)	(a) a person affected by the contravention; (b) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2)	60 penalty units
16	434	an inspector	the Federal Court	60 penalty units
17	458(2)	(a) an employee; (b) an employer; (c) an applicant for the protected action ballot order; (d) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2)	30 penalty units

Standing, jurisdiction and maximum penalties

Item	Column 1 Civil remedy provision	Column 2 Persons	Column 3 Courts	Column 4 Maximum penalty
18	462(1) 462(3)	(a) an employee; (b) an employer; (c) an applicant for the protected action ballot order; (d) the protected action ballot agent (unless the protected action ballot agent is the Australian Electoral Commission); (da) if the protected action ballot agent is the Australian Electoral Commission— the Electoral Commissioner; (e) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2)	30 penalty units

Chapter 4 Compliance and enforcement

Part 4-1 Civil remedies

Division 2 Orders

Section 539

Standing, jurisdiction and maximum penalties				
Item	Column 1 Civil remedy provision	Column 2 Persons	Column 3 Courts	Column 4 Maximum penalty
19	463(1) 463(2)	(a) an employee; (b) an employer; (c) an applicant for the protected action ballot order; (d) the protected action ballot agent (unless the protected action ballot agent is the Australian Electoral Commission); (da) if the protected action ballot agent is the Australian Electoral Commission— the Electoral Commissioner; (e) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2)	60 penalty units

Standing, jurisdiction and maximum penalties				
Item	Column 1 Civil remedy provision	Column 2 Persons	Column 3 Courts	Column 4 Maximum penalty
20	467(1)	(a) an employee; (b) an employer; (c) an applicant for the protected action ballot order; (d) the protected action ballot agent (unless the protected action ballot agent is the Australian Electoral Commission); (da) if the protected action ballot agent is the Australian Electoral Commission—the Electoral Commissioner; (e) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2)	30 penalty units
21	470(1)	an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2)	60 penalty units

Chapter 4 Compliance and enforcement

Part 4-1 Civil remedies

Division 2 Orders

Section 539

Standing, jurisdiction and maximum penalties				
Item	Column 1 Civil remedy provision	Column 2 Persons	Column 3 Courts	Column 4 Maximum penalty
22	473(1) 473(2)	(a) an employer; (b) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2)	60 penalty units
23	474(1)	an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2)	60 penalty units
24	475(1) 475(2)	(a) an employer; (b) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2)	60 penalty units

Standing, jurisdiction and maximum penalties				
Item	Column 1 Civil remedy provision	Column 2 Persons	Column 3 Courts	Column 4 Maximum penalty
Part 3-4—Right of entry				
25	482(3) 483(4) 483B(4) 483C(5) 483D(4) 483E(5) 494(1) 495(1) 496 497 498 499 500 501 502(1) 503(1) 504 506 509 521C(3) 521D(3)	(a) a person affected by the contravention; (b) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2)	60 penalty units
26	517(1)	an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2)	60 penalty units

Chapter 4 Compliance and enforcement**Part 4-1** Civil remedies**Division 2** Orders

Section 539

Standing, jurisdiction and maximum penalties				
Item	Column 1 Civil remedy provision	Column 2 Persons	Column 3 Courts	Column 4 Maximum penalty
Part 3-5—Stand down				
27	527	(a) an employee; (b) an employee organisation; (c) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	60 penalty units
Part 3-5A—Prohibiting sexual harassment in connection with work				
27A	527D(1)	(a) a person affected by the contravention; (b) an industrial association; (c) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2);	60 penalty units
27B	527K	(a) a person affected by the contravention; (b) an industrial association; (c) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	60 penalty units

Standing, jurisdiction and maximum penalties

Item	Column 1 Civil remedy provision	Column 2 Persons	Column 3 Courts	Column 4 Maximum penalty
27C	527S(4)	a person affected by the contravention;	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2);	60 penalty units

Part 3-6—Other rights and responsibilities

28	530(4)	(a) an employee; (b) a registered employee association; (c) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2)	30 penalty units
29	535(1) 535(2) 535(4) 536(1) 536(2) 536(3)	(a) an employee; (b) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	for a serious contravention—600 penalty units; or otherwise—60 penalty units
29AA	536AA(1) 536AA(2)	(a) an employee organisation; (b) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2)	60 penalty units

Chapter 4 Compliance and enforcement**Part 4-1** Civil remedies**Division 2** Orders

Section 539

Standing, jurisdiction and maximum penalties				
Item	Column 1 Civil remedy provision	Column 2 Persons	Column 3 Courts	Column 4 Maximum penalty
Part 4-1—Civil remedies				
29A	558B(1) 558B(2)	(a) an employee; (b) an employee organisation; (c) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2)	60 penalty units
Part 5-1—The Fair Work Commission				
30	611(3)	(a) a person to whom the costs are payable; (b) an employee organisation; (c) an employer organisation; (d) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	60 penalty units
Part 5-2—Office of the Fair Work Ombudsman				
30A	707A(1)	an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	60 penalty units

Section 539

Standing, jurisdiction and maximum penalties				
Item	Column 1 Civil remedy provision	Column 2 Persons	Column 3 Courts	Column 4 Maximum penalty
31	711(3)	an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	30 penalty units
32	712(3)	an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	60 penalty units
32A	712B(1)	an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	600 penalty units

Chapter 4 Compliance and enforcement

Part 4-1 Civil remedies

Division 2 Orders

Section 539

Standing, jurisdiction and maximum penalties				
Item	Column 1 Civil remedy provision	Column 2 Persons	Column 3 Courts	Column 4 Maximum penalty
33	716(5)	an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	30 penalty units
33A	718A(1)	an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	60 penalty units
Part 6-3—Extension of National Employment Standards entitlements				
34	745 760	(a) an employee; (b) a registered employee association; (c) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	60 penalty units

Standing, jurisdiction and maximum penalties

Item	Column 1 Civil remedy provision	Column 2 Persons	Column 3 Courts	Column 4 Maximum penalty
Part 6-3A—Transfer of business from a State public sector employer				
34A	768AG	(a) the transferring employee; (b) an employer; (c) an employee organisation; (d) an employer organisation; (e) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	60 penalty units
34B	768BT	(a) the transferring employee; (b) an employer; (c) an employee organisation; (d) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	60 penalty units
Part 6-4—Additional provisions relating to termination of employment				
35	772(1) 777(3)	(a) a person affected by the contravention; (b) an industrial association; (c) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2)	60 penalty units

Chapter 4 Compliance and enforcement

Part 4-1 Civil remedies

Division 2 Orders

Section 539

Standing, jurisdiction and maximum penalties				
Item	Column 1 Civil remedy provision	Column 2 Persons	Column 3 Courts	Column 4 Maximum penalty
36	782	(a) a person to whom the costs are payable; (b) an industrial association; (c) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2)	60 penalty units
37	785(4)	(a) an employee; (b) a registered employee association; (c) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2)	30 penalty units
Part 6-4B—Workers bullied at work				
38	789FG	(a) a person affected by the contravention; (b) an industrial association; (c) an inspector	(a) the Federal Court; (b) the Federal Circuit and Family Court of Australia (Division 2); (c) an eligible State or Territory court	60 penalty units

- (3) The regulations may provide that a provision set out in the regulations is a ***civil remedy provision***.
- (4) If the regulations make provision as mentioned in subsection (3):
- (a) the regulations must set out:
 - (i) the persons who would be referred to in column 2; and
 - (ii) the courts that would be referred to in column 3; and

- (iii) the maximum penalty that would be referred to in column 4;
of the table in subsection (2) if there were an item for the civil remedy provision in the table; and
- (b) this Part has effect as if the matters referred to subparagraphs (a)(i) to (iii) were set out in such an item in the table.

Note: See section 798 for limits on the penalties that may be set out in the regulations.

540 Limitations on who may apply for orders etc.

Employees, employers, outworkers and outworker entities

- (1) The following persons may apply for an order under this Division, in relation to a contravention or proposed contravention of a civil remedy provision, only if the person is affected by the contravention, or will be affected by the proposed contravention:
 - (a) an employee;
 - (aa) a prospective employee;
 - (b) an employer;
 - (c) an outworker;
 - (d) an outworker entity.

Employee organisations and registered employee associations

- (2) An employee organisation or a registered employee association may apply for an order under this Division, in relation to a contravention or proposed contravention of a civil remedy provision in relation to an employee, only if:
 - (a) the employee is affected by the contravention, or will be affected by the proposed contravention; and
 - (b) the organisation or association is entitled to represent the industrial interests of the employee.
- (3) However, subsection (2) does not apply in relation to:
 - (a) items 4, 7 and 14 in the table in subsection 539(2); or

- (b) a contravention or proposed contravention of:
 - (i) an outworker term in a modern award; or
 - (ii) a term in an enterprise agreement that would be an outworker term if it were included in a modern award.
- (4) An employee organisation may apply for an order under this Division, in relation to a contravention or proposed contravention of:
 - (a) an outworker term in a modern award; or
 - (b) a term in an enterprise agreement that would be an outworker term if it were included in a modern award;only if the employee organisation is entitled to represent the industrial interests of an outworker to whom the term relates.

Employer organisations

- (5) An employer organisation may apply for an order under this Division, in relation to a contravention or proposed contravention of a civil remedy provision, only if the organisation has a member who is affected by the contravention, or who will be affected by the proposed contravention.

Industrial associations

- (6) An industrial association may apply for an order under this Division, in relation to a contravention or proposed contravention of a civil remedy provision, only if:
 - (a) the industrial association is affected by the contravention, or will be affected by the proposed contravention; or
 - (b) if the contravention is in relation to a person:
 - (i) the person is affected by the contravention, or will be affected by the proposed contravention; and
 - (ii) the industrial association is entitled to represent the industrial interests of the person.
- (7) If an item in column 2 of the table in subsection 539(2) refers to an industrial association then, to avoid doubt, an employee organisation, a registered employee association or an employer

organisation may apply for an order, in relation to a contravention or proposed contravention of a civil remedy provision, only if the organisation or association is entitled to apply for the order under subsection (6).

Regulations

- (8) The regulations may prescribe a person for the purposes of an item in column 2 of the table in subsection 539(2). The regulations may provide that the person is prescribed only in relation to circumstances specified in the regulations.

541 Applications for orders in relation to safety net contractual entitlements

- (1) This section applies if an inspector applies to a court for an order under this Division, in relation to an employer's contravention or proposed contravention of a provision or term referred to in subsection (3) in relation to an employee.
- (2) The inspector may also apply to the court, on behalf of the employee, for an order in relation to the employer's contravention, or proposed contravention, of a safety net contractual entitlement of the employee.
- (3) The provisions and terms are the following:
- (a) a provision of the National Employment Standards;
 - (b) a term of a modern award;
 - (c) a term of an enterprise agreement;
 - (d) a term of a workplace determination;
 - (e) a term of a national minimum wage order;
 - (f) a term of an equal remuneration order.

542 Entitlements under contracts

- (1) For the purposes of this Part, a safety net contractual entitlement of a national system employer or a national system employee, as in

Section 543

force from time to time, also has effect as an entitlement of the employer or employee under this Act.

- (2) The entitlement has effect under this Act subject to any modifications, by a law of the Commonwealth (including this Act or a fair work instrument), a State or a Territory, of the safety net contractual entitlement.

543 Applications for orders in relation to statutory entitlements derived from contracts

A national system employer or a national system employee may apply to the Federal Court or the Federal Circuit and Family Court of Australia (Division 2) to enforce an entitlement of the employer or employee arising under subsection 542(1).

544 Time limit on applications

A person may apply for an order under this Division in relation to a contravention of one of the following only if the application is made within 6 years after the day on which the contravention occurred:

- (a) a civil remedy provision;
- (b) a safety net contractual entitlement;
- (c) an entitlement arising under subsection 542(1).

Note 1: This section does not apply in relation to general protections court applications, sexual harassment court applications or unlawful termination court applications (see subparagraphs 370(a)(ii), 527T(1)(a)(ii) and 778(a)(ii)).

Note 2: For time limits on orders relating to underpayments, see subsection 545(5).

Subdivision B—Orders**545 Orders that can be made by particular courts***Federal Court and Federal Circuit and Family Court of Australia
(Division 2)*

- (1) The Federal Court or the Federal Circuit and Family Court of Australia (Division 2) may make any order the court considers appropriate if the court is satisfied that a person has contravened, or proposes to contravene, a civil remedy provision.

Note 1: For the court's power to make pecuniary penalty orders, see section 546.

Note 2: For limitations on orders in relation to costs, see section 570.

Note 3: The Federal Court and the Federal Circuit and Family Court of Australia (Division 2) may grant injunctions in relation to industrial action under subsections 417(3) and 421(3).

Note 4: There are limitations on orders that can be made in relation to contraventions of subsection 463(1) or (2) (which deals with protected action ballot orders) (see subsection 463(3)).

- (2) Without limiting subsection (1), orders the Federal Court or Federal Circuit and Family Court of Australia (Division 2) may make include the following:
- (a) an order granting an injunction, or interim injunction, to prevent, stop or remedy the effects of a contravention;
 - (b) an order awarding compensation for loss that a person has suffered because of the contravention;
 - (c) an order for reinstatement of a person.

Eligible State or Territory courts

- (3) An eligible State or Territory court may order an employer to pay an amount to, or on behalf of, an employee of the employer if the court is satisfied that:
- (a) the employer was required to pay the amount under this Act or a fair work instrument; and

Section 545A

- (b) the employer has contravened a civil remedy provision by failing to pay the amount.

Note 1: For the court's power to make pecuniary penalty orders, see section 546.

Note 2: For limitations on orders in relation to costs, see section 570.

- (3A) An eligible State or Territory court may order an outworker entity to pay an amount to, or on behalf of, an outworker if the court is satisfied that:

- (a) the outworker entity was required to pay the amount under a modern award; and
- (b) the outworker entity has contravened a civil remedy provision by failing to pay the amount.

Note 1: For the court's power to make pecuniary penalty orders, see section 546.

Note 2: For limitations on orders in relation to costs, see section 570.

When orders may be made

- (4) A court may make an order under this section:
 - (a) on its own initiative, during proceedings before the court; or
 - (b) on application.

Time limit for orders in relation to underpayments

- (5) A court must not make an order under this section in relation to an underpayment that relates to a period that is more than 6 years before the proceedings concerned commenced.

545A Orders relating to casual loading amounts

- (1) This section applies if:
 - (a) a person is employed by an employer in circumstances where the employment is described as casual employment; and
 - (b) the employer pays the person an identifiable amount (the **loading amount**) paid to compensate the person for not

having one or more relevant entitlements during a period (the *employment period*); and

- (c) during the employment period, the person was not a casual employee; and
- (d) the person (or another person for the benefit of the person) makes a claim to be paid an amount for one or more of the relevant entitlements with respect to the employment period.

Note: For the purposes of paragraph (d), another person making a claim for the benefit of the person could include an inspector or an employee organisation.

- (2) When making any orders in relation to the claim, a court must reduce (but not below nil) any amount payable by the employer to the person for the relevant entitlements (the *claim amount*) by an amount equal to the loading amount.

Note: If the claim is below a certain amount, the person may choose to use the small claims procedure: see section 548.

- (3) Despite subsection (2), the court may reduce the claim amount by an amount equal to a proportion (which may be nil) of the loading amount the court considers appropriate, having regard only to:
 - (a) if a term of the fair work instrument or contract of employment under which the loading amount is paid specifies the relevant entitlements the loading amount is compensating for and specifies the proportion of the loading amount attributable to each such entitlement—that term (including those proportions); or
 - (b) if a term of the fair work instrument or contract of employment under which the loading amount is paid specifies the relevant entitlements the loading amount is compensating for but does not specify the proportion of the loading amount attributable to each such entitlement—that term and what would be an appropriate proportion of the loading amount attributable to each of those entitlements in all the circumstances; or
 - (c) if paragraph (a) or (b) does not apply—the entitlements referred to in subsection (4) and what would be an

appropriate proportion of the loading amount attributable to each of those entitlements in all the circumstances.

- (4) A reference in this section to a ***relevant entitlement*** is a reference to an entitlement under the National Employment Standards, a fair work instrument or a contract of employment to any of the following:
- (a) paid annual leave;
 - (b) paid personal/carer's leave;
 - (c) paid compassionate leave;
 - (d) payment for absence on a public holiday;
 - (e) payment in lieu of notice of termination;
 - (f) redundancy pay.
- (5) To avoid doubt, an entitlement referred to in subsection (4) includes any such entitlement that has accrued but is untaken.

546 Pecuniary penalty orders

- (1) The Federal Court, the Federal Circuit and Family Court of Australia (Division 2) or an eligible State or Territory court may, on application, order a person to pay a pecuniary penalty that the court considers is appropriate if the court is satisfied that the person has contravened a civil remedy provision.

Note 1: Pecuniary penalty orders cannot be made in relation to conduct that contravenes a term of a modern award, a national minimum wage order or an enterprise agreement only because of the retrospective effect of a determination (see subsections 167(3) and 298(2)).

Note 2: Pecuniary penalty orders cannot be made in relation to conduct that contravenes a term of an enterprise agreement only because of the retrospective effect of an amendment made under paragraph 227B(3)(b) (see subsection 227E(2)).

Determining amount of pecuniary penalty

- (2) The pecuniary penalty must not be more than:

- (a) if the person is an individual—the maximum number of penalty units referred to in the relevant item in column 4 of the table in subsection 539(2); or
- (b) if the person is a body corporate—5 times the maximum number of penalty units referred to in the relevant item in column 4 of the table in subsection 539(2).

Payment of penalty

- (3) The court may order that the pecuniary penalty, or a part of the penalty, be paid to:
 - (a) the Commonwealth; or
 - (b) a particular organisation; or
 - (c) a particular person.

Recovery of penalty

- (4) The pecuniary penalty may be recovered as a debt due to the person to whom the penalty is payable.

No limitation on orders

- (5) To avoid doubt, a court may make a pecuniary penalty order in addition to one or more orders under section 545.

547 Interest up to judgment

- (1) This section applies to an order (other than a pecuniary penalty order) under this Division in relation to an amount that a person was required to pay to, or on behalf of, another person under this Act or a fair work instrument.
- (2) In making the order the court must, on application, include an amount of interest in the sum ordered, unless good cause is shown to the contrary.
- (3) Without limiting subsection (2), in determining the amount of interest, the court must take into account the period between the

Chapter 4 Compliance and enforcement

Part 4-1 Civil remedies

Division 2 Orders

Section 547

day the relevant cause of action arose and the day the order is made.

Division 3—Small claims procedure

548 Plaintiffs may choose small claims procedure

(1) Proceedings are to be dealt with as small claims proceedings under this section if:

- (a) a person applies for an order (other than a pecuniary penalty order) under Division 2 from a magistrates court or the Federal Circuit and Family Court of Australia (Division 2); and
- (b) the order relates to an amount referred to in subsection (1A); and
- (c) the person indicates, in a manner prescribed by the regulations or by the rules of the court, that he or she wants the small claims procedure to apply to the proceedings.

(1A) The amounts are as follows:

- (a) an amount that an employer was required to pay to, or on behalf of, an employee:
 - (i) under this Act or a fair work instrument; or
 - (ii) because of a safety net contractual entitlement; or
 - (iii) because of an entitlement of the employee arising under subsection 542(1);
- (b) an amount that an outworker entity was required to pay to, or on behalf of, an outworker under a modern award.

(1B) Proceedings are also to be dealt with as small claims proceedings under this section if:

- (a) a person applies for an order (other than a pecuniary penalty order) under Division 2 from a magistrates court or the Federal Circuit and Family Court of Australia (Division 2) in connection with a dispute relating to one or more of the following matters:
 - (i) whether a casual employee meets the requirements of either or both of paragraphs 66B(1)(a) and (b);

- (ii) whether an employer of a casual employee has reasonable grounds under section 66C not to make an offer to the employee to convert to full-time or part-time employment under section 66B;
 - (iii) whether a casual employee may make a request of an employer to convert to full-time or part-time employment under section 66F;
 - (iv) whether an employer of a casual employee has reasonable grounds under section 66H to refuse a request from the employee made under section 66F;
 - (v) whether a person has contravened subsection 333E(1) (limitations on fixed term contracts);
 - (vi) whether subsection 333G(1) (effect of entering prohibited fixed term contract) applies in relation to a contract; and
- (b) the person applying for the order indicates, in a manner prescribed by the regulations or by the rules of the court, that he or she wants the small claims procedure to apply to the proceedings.

- Note: Orders that a court may make under Division 2 in relation to small claims proceedings may include the following:
- (a) requiring an employer of a casual employee to consider whether the employer must make an offer under section 66B to convert the casual employee to part-time or full-time employment on the basis that the employee meets the requirements of paragraphs 66B(1)(a) and (b);
 - (b) requiring an employer of a casual employee to consider whether the employer must grant a request made under section 66F to convert the casual employee to part-time or full-time employment on the basis that the employee meets the requirements of subsection 66F(1);
 - (c) preventing an employer from relying on a particular ground under section 66C to not make such an offer, or a particular ground under section 66H to refuse such a request.

Limits on award

- (2) In small claims proceedings, the court may not award more than:
- (a) \$100,000; or

- (b) if a higher amount is prescribed by the regulations—that higher amount.
- (2A) Interest awarded under section 547 does not count towards the maximum amount that the court may award under subsection (2) of this section.

Procedure

- (3) In small claims proceedings, the court is not bound by any rules of evidence and procedure and may act:
 - (a) in an informal manner; and
 - (b) without regard to legal forms and technicalities.
- (4) At any stage of the small claims proceedings, the court may amend the papers commencing the proceedings if sufficient notice is given to any party adversely affected by the amendment.

Legal representation

- (5) A party to small claims proceedings may be represented in the proceedings by a lawyer only with the leave of the court.
- (6) If the court grants leave for a party to the proceedings to be represented by a lawyer, the court may, if it considers appropriate, do so subject to conditions designed to ensure that no other party is unfairly disadvantaged.
- (7) For the purposes of this section, a person is taken not to be represented by a lawyer if the lawyer is an employee or officer of the person.

Representation by an industrial association

- (8) The regulations may provide for a party to small claims proceedings to be represented in the proceedings, in specified circumstances, by an official of an industrial association.
- (9) However, if small claims proceedings are heard in a court of a State, the regulations may so provide only if the law of the State

Section 548

allows a party to be represented in that court in those circumstances by officials of bodies representing interests related to the matters in dispute.

Costs for filing fees paid in relation to the proceedings

- (10) If the court makes an order (the ***small claims order***) mentioned in subsection (1) against a party to small claims proceedings, the court may make an order as to costs against the party for any filing fees paid to the court by the party that applied for the small claims order.
- (11) Subsection (10) applies despite section 570.

Division 4—General provisions relating to civil remedies

549 Contravening a civil remedy provision is not an offence

A contravention of a civil remedy provision is not an offence.

550 Involvement in contravention treated in same way as actual contravention

- (1) A person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision.

Note: If a person (the *involved person*) is taken under this subsection to have contravened a civil remedy provision, the involved person's contravention may be a serious contravention (see subsection 557A(5A)). Serious contraventions attract higher maximum penalties (see subsection 539(2)).

- (2) A person is *involved in* a contravention of a civil remedy provision if, and only if, the person:
- (a) has aided, abetted, counselled or procured the contravention; or
 - (b) has induced the contravention, whether by threats or promises or otherwise; or
 - (c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or
 - (d) has conspired with others to effect the contravention.

551 Civil evidence and procedure rules for proceedings relating to civil remedy provisions

A court must apply the rules of evidence and procedure for civil matters when hearing proceedings relating to a contravention, or proposed contravention, of a civil remedy provision.

552 Civil proceedings after criminal proceedings

A court must not make a pecuniary penalty order against a person for a contravention of a civil remedy provision if the person has been convicted of an offence constituted by conduct that is substantially the same as the conduct constituting the contravention.

553 Criminal proceedings during civil proceedings

- (1) Proceedings for a pecuniary penalty order against a person for a contravention of a civil remedy provision are stayed if:
 - (a) criminal proceedings are commenced or have already commenced against the person for an offence; and
 - (b) the offence is constituted by conduct that is substantially the same as the conduct in relation to which the order would be made.
- (2) The proceedings for the order may be resumed if the person is not convicted of the offence. Otherwise, the proceedings for the order are dismissed.

554 Criminal proceedings after civil proceedings

Criminal proceedings may be commenced against a person for conduct that is substantially the same as conduct constituting a contravention of a civil remedy provision regardless of whether an order has been made against the person under Division 2.

555 Evidence given in proceedings for pecuniary penalty not admissible in criminal proceedings

- (1) Evidence of information given, or evidence of production of documents, by an individual is not admissible in criminal proceedings against the individual if:
 - (a) the individual previously gave the information or produced the documents in proceedings for a pecuniary penalty order

against the individual for a contravention of a civil remedy provision (whether or not the order was made); and

- (b) the conduct alleged to constitute the offence is substantially the same as the conduct in relation to which the order was sought.
- (2) However, this does not apply to criminal proceedings in relation to the falsity of the evidence given by the individual in the proceedings for the pecuniary penalty order.

556 Civil double jeopardy

If a person is ordered to pay a pecuniary penalty under a civil remedy provision in relation to particular conduct, the person is not liable to be ordered to pay a pecuniary penalty under some other provision of a law of the Commonwealth in relation to that conduct.

Note: A court may make other orders, such as an order for compensation, in relation to particular conduct even if the court has made a pecuniary penalty order in relation to that conduct (see subsection 546(5)).

557 Course of conduct

- (1) For the purposes of this Part, 2 or more contraventions of a civil remedy provision referred to in subsection (2) are, subject to subsection (3), taken to constitute a single contravention if:
- (a) the contraventions are committed by the same person; and
 - (b) the contraventions arose out of a course of conduct by the person.
- (2) The civil remedy provisions are the following:
- (a) section 44 (which deals with contraventions of the National Employment Standards);
 - (b) section 45 (which deals with contraventions of modern awards);
 - (c) section 50 (which deals with contraventions of enterprise agreements);

- (d) section 280 (which deals with contraventions of workplace determinations);
- (e) section 293 (which deals with contraventions of national minimum wage orders);
- (f) section 305 (which deals with contraventions of equal remuneration orders);
- (fa) subsection 306F(2) (which deals with the protected rate of pay payable to employees covered by a regulated labour hire arrangement order);
- (fb) subsection 306H(3) (which deals with the obligations of regulated hosts covered by a regulated labour hire arrangement order);
- (fc) subsection 306N(3) (which deals with the contravention of alternative protected rate of pay orders);
- (fd) subsection 306Q(7) (which deals with the contravention of arbitrated protected rate of pay orders);
- (g) subsection 323(1) (which deals with methods and frequency of payment);
- (h) subsection 323(3) (which deals with methods of payment specified in modern awards or enterprise agreements);
- (i) subsection 325(1) (which deals with unreasonable requirements on employees to spend or pay amounts);
- (ia) subsection 325(1A) (which deals with unreasonable requirements on prospective employees to spend or pay amounts);
- (j) subsection 417(1) (which deals with industrial action before the nominal expiry date of an enterprise agreement etc.);
- (k) subsection 421(1) (which deals with contraventions of orders in relation to industrial action);
- (l) section 434 (which deals with contraventions of Ministerial directions in relation to industrial action);
- (la) subsection 527D(1) (which deals with sexual harassment in connection with work);
- (m) subsection 530(4) (which deals with notifying Centrelink of certain proposed dismissals);

- (n) subsections 535(1), (2) and (4) (which deal with employer obligations in relation to employee records);
 - (o) subsections 536(1), (2) and (3) (which deal with employer obligations in relation to pay slips);
 - (oa) subsections 536AA(1) and (2) (which deal with employer obligations in relation to advertising rates of pay);
 - (p) section 745 (which deals with contraventions of the extended parental leave provisions);
 - (q) section 760 (which deals with contraventions of the extended notice of termination provisions);
 - (r) subsection 785(4) (which deals with notifying Centrelink of certain proposed terminations);
 - (s) any other civil remedy provisions prescribed by the regulations.
- (3) Subsection (1) does not apply to a contravention of a civil remedy provision that is committed by a person after a court has imposed a pecuniary penalty on the person for an earlier contravention of the provision.

557A Serious contravention of civil remedy provisions

- (1) A contravention of a civil remedy provision by a person is a **serious contravention** if:
- (a) the person knowingly contravened the provision; and
 - (b) the person's conduct constituting the contravention was part of a systematic pattern of conduct relating to one or more other persons.

Note: For the liability of bodies corporate for serious contraventions, see section 557B.

Example: Generally, subsection 323(1) requires an employer to pay an employee the full amount payable to the employee in relation to the performance of work.

A contravention of subsection 323(1) is a serious contravention if the employer knowingly does not pay the employee in full (even if the employer does not know the exact amount of the underpayment) and that contravention is part of a systematic pattern of conduct by the employer. The systematic pattern of conduct of the employer may

Section 557A

relate to more than one employee and may consist of different contraventions.

Systematic pattern of conduct

- (2) In determining whether the person's conduct constituting the contravention of the provision was part of a systematic pattern of conduct, a court may have regard to:
- (a) the number of contraventions (the **relevant contraventions**) of this Act committed by the person; and
 - (b) the period over which the relevant contraventions occurred; and
 - (c) the number of other persons affected by the relevant contraventions; and
 - (ca) the person's response, or failure to respond, to any complaints made about the relevant contraventions; and
 - (d) except if the provision contravened is section 535—whether the person also contravened subsection 535(1), (2) or (4) by failing to make or keep, in accordance with that section, an employee record relating to the conduct constituting the relevant contraventions; and
 - (e) except if the provision contravened is section 536—whether the person also contravened subsection 536(1), (2) or (3) by failing to give, in accordance with that section, a pay slip relating to the conduct constituting the relevant contraventions.
- (3) Subsection (2) does not limit the matters that a court may have regard to.
- (4) Subsection 557(1) does not apply for the purposes of determining whether the person's conduct was part of a systematic pattern of conduct.
- (5) Subsection (4) does not otherwise affect the operation of subsection 557(1) in relation to serious contraventions of civil remedy provisions.

Involvement in a serious contravention

- (5A) A person (the ***involved person***) who is involved in a contravention of a civil remedy provision by another person (the ***principal***) commits a ***serious contravention*** of the provision only if:
- (a) the principal's contravention was a serious contravention;
and
 - (b) the involved person knew that the principal's contravention was a serious contravention.

Application for a serious contravention order and alternative orders

- (6) If a person is applying for an order in relation to a serious contravention of a civil remedy provision, the person's application under subsection 539(2) must specify the relevant serious contravention.
- (7) If, in proceedings for an order in relation to a serious contravention of a civil remedy provision, the court:
- (a) is not satisfied that the person has committed a serious contravention against that provision; and
 - (b) is satisfied that the person has contravened that provision;
- the court may make a pecuniary penalty order against the person not for the serious contravention but for the contravention of that provision.

557B Liability of bodies corporate for serious contravention

- (1) For the purposes of subsection 557A(1), a body corporate knowingly contravenes a civil remedy provision if the body corporate expressly, tacitly or impliedly authorised the contravention.
- (2) This section does not limit section 793.

557C Presumption where records not provided

- (1) If:
-

Chapter 4 Compliance and enforcement

Part 4-1 Civil remedies

Division 4 General provisions relating to civil remedies

Section 557C

- (a) in proceedings relating to a contravention by an employer of a civil remedy provision referred to in subsection (3), an applicant makes an allegation in relation to a matter; and
 - (b) the employer was required:
 - (i) by subsection 535(1) or (2) to make and keep a record; or
 - (ii) by regulations made for the purposes of subsection 535(3) to make available for inspection a record; or
 - (iii) by subsection 536(1) or (2) to give a pay slip; in relation to the matter; and
 - (c) the employer failed to comply with the requirement; the employer has the burden of disproving the allegation.
- (2) Subsection (1) does not apply if the employer provides a reasonable excuse as to why there has not been compliance with subsection 557C(1)(b).
- (3) The civil remedy provisions are the following:
- (a) section 44 (which deals with contraventions of the National Employment Standards);
 - (b) section 45 (which deals with contraventions of modern awards);
 - (c) section 50 (which deals with contraventions of enterprise agreements);
 - (d) section 280 (which deals with contraventions of workplace determinations);
 - (e) section 293 (which deals with contraventions of national minimum wage orders);
 - (f) section 305 (which deals with contraventions of equal remuneration orders);
 - (g) subsection 323(1) (which deals with methods and frequency of payment);
 - (h) subsection 323(3) (which deals with methods of payment specified in modern awards or enterprise agreements);

- (i) subsection 325(1) (which deals with unreasonable requirements to spend or pay amounts);
- (j) any other civil remedy provisions prescribed by the regulations.

558 Regulations dealing with infringement notices

- (1) The regulations may provide for a person who is alleged to have contravened a civil remedy provision to pay a penalty to the Commonwealth as an alternative to civil proceedings.
- (2) The penalty must not exceed one-tenth of the maximum penalty that a court could have ordered the person to pay under section 546 if the court was satisfied that the person had contravened that provision.

Division 4A—Responsibility of responsible franchisor entities and holding companies for certain contraventions

558A Meaning of *franchisee entity* and *responsible franchisor entity*

- (1) A person is a *franchisee entity* of a franchise if:
 - (a) the person is a franchisee (including a subfranchisee) in relation to the franchise; and
 - (b) the business conducted by the person under the franchise is substantially or materially associated with intellectual property relating to the franchise.
- (2) A person is a *responsible franchisor entity* for a franchisee entity of a franchise if:
 - (a) the person is a franchisor (including a subfranchisor) in relation to the franchise; and
 - (b) the person has a significant degree of influence or control over the franchisee entity's affairs.

558B Responsibility of responsible franchisor entities and holding companies for certain contraventions

Responsible franchisor entities

- (1) A person contravenes this subsection if:
 - (a) an employer who is a franchisee entity of a franchise contravenes a civil remedy provision referred to in subsection (7); and
 - (b) the person is a responsible franchisor entity for the franchisee entity; and
 - (c) the contravention by the franchisee entity occurs in the franchisee entity's capacity as a franchisee entity; and
 - (d) either:

- (i) the responsible franchisor entity or an officer (within the meaning of the *Corporations Act 2001*) of the responsible franchisor entity knew or could reasonably be expected to have known that the contravention by the franchisee entity would occur; or
- (ii) at the time of the contravention by the franchisee entity, the responsible franchisor entity or an officer (within the meaning of the *Corporations Act 2001*) of the responsible franchisor entity knew or could reasonably be expected to have known that a contravention by the franchisee entity of the same or a similar character was likely to occur.

Note: This subsection is a civil remedy provision (see this Part).

Holding companies

- (2) A person contravenes this subsection if:
- (a) the person is a body corporate; and
 - (b) a subsidiary (within the meaning of the *Corporations Act 2001*) of the body corporate who is an employer contravenes a civil remedy provision referred to in subsection (7); and
 - (c) either:
 - (i) the body corporate or an officer (within the meaning of the *Corporations Act 2001*) of the body corporate knew or could reasonably be expected to have known that the contravention by the subsidiary would occur; or
 - (ii) at the time of the contravention by the subsidiary, the body corporate or an officer (within the meaning of the *Corporations Act 2001*) of the body corporate knew or could reasonably be expected to have known that a contravention by the subsidiary of the same or a similar character was likely to occur.

Note: This subsection is a civil remedy provision (see this Part).

Section 558B

Reasonable steps to prevent a contravention of the same or a similar character

- (3) A person does not contravene subsection (1) or (2) if, as at the time of the contravention referred to in paragraph (1)(a) or (2)(b), the person had taken reasonable steps to prevent a contravention by the franchisee entity or subsidiary of the same or a similar character.
- (4) For the purposes of subsection (3), in determining whether a person took reasonable steps to prevent a contravention by a franchisee entity or subsidiary (the **contravening employer**) of the same or a similar character, a court may have regard to all relevant matters, including the following:
- (a) the size and resources of the franchise or body corporate (as the case may be);
 - (b) the extent to which the person had the ability to influence or control the contravening employer's conduct in relation to the contravention referred to in paragraph (1)(a) or (2)(b) or a contravention of the same or a similar character;
 - (c) any action the person took directed towards ensuring that the contravening employer had a reasonable knowledge and understanding of the requirements under the applicable provisions referred to in subsection (7);
 - (d) the person's arrangements (if any) for assessing the contravening employer's compliance with the applicable provisions referred to in subsection (7);
 - (e) the person's arrangements (if any) for receiving and addressing possible complaints about alleged underpayments or other alleged contraventions of this Act within:
 - (i) the franchise; or
 - (ii) the body corporate or any subsidiary (within the meaning of the *Corporations Act 2001*) of the body corporate;as the case may be;
 - (f) the extent to which the person's arrangements (whether legal or otherwise) with the contravening employer encourage or

require the contravening employer to comply with this Act or
any other workplace law.

- (5) Subsection (4) does not limit subsection (3).

*Civil proceedings in relation to contravention by franchisee entity
or subsidiary not required*

- (6) To avoid doubt, a reference in paragraph (1)(a) or (2)(b) to a contravention by a franchisee entity or subsidiary includes any contravention whether or not an order has been sought or made against the franchisee entity or subsidiary under Division 2 for the contravention.

Relevant civil remedy provisions

- (7) The civil remedy provisions are the following:
- (a) section 44 (which deals with contraventions of the National Employment Standards);
 - (b) section 45 (which deals with contraventions of modern awards);
 - (c) section 50 (which deals with contraventions of enterprise agreements);
 - (d) section 280 (which deals with contraventions of workplace determinations);
 - (e) section 293 (which deals with contraventions of national minimum wage orders);
 - (f) section 305 (which deals with contraventions of equal remuneration orders);
 - (g) subsection 323(1) (which deals with methods and frequency of payment);
 - (h) subsection 323(3) (which deals with methods of payment specified in modern awards or enterprise agreements);
 - (i) subsection 325(1) (which deals with unreasonable requirements on employees to spend or pay amounts);

Chapter 4 Compliance and enforcement

Part 4-1 Civil remedies

Division 4A Responsibility of responsible franchisor entities and holding companies for certain contraventions

Section 558C

- (ia) subsection 325(1A) (which deals with unreasonable requirements on prospective employees to spend or pay amounts);
- (j) subsection 328(1), (2) or (3) (which deal with employer obligations in relation to guarantees of annual earnings);
- (k) subsection 357(1) (which deals with misrepresenting employment as an independent contracting arrangement);
- (l) section 358 (which deals with dismissing an employee to engage as an independent contractor);
- (m) section 359 (which deals with misrepresentations to engage an individual as an independent contractor);
- (n) subsection 535(1), (2) or (4) (which deal with employer obligations in relation to employee records);
- (o) subsection 536(1), (2) or (3) (which deal with employer obligations in relation to pay slips).

558C Right of responsible franchisor entity or holding company to recover

- (1) This section applies if:
 - (a) a person pays an amount to, or on behalf of, an employee pursuant to an order under subsection 545(1) relating to a contravention by the person of subsection 558B(1) or (2) in relation to a franchisee entity or subsidiary (the **contravening employer**); and
 - (b) the person has not otherwise recovered from the contravening employer an amount (the **recoverable amount**) equal to the amount paid by the person.
- (2) The person may commence proceedings against the contravening employer for payment to the person of so much of the recoverable amount as has not been recovered.
- (3) The proceedings may be commenced in:
 - (a) the Federal Court; or
 - (b) the Federal Circuit and Family Court of Australia (Division 2); or

- (c) an eligible State or Territory court.
- (4) The court may make an order requiring the contravening employer to pay the person the recoverable amount (or so much of it as has not been recovered from the contravening employer), if the court is satisfied that this section applies as referred to in subsection (1).
- (5) In making the order, the court must, on application, include an amount of interest in the sum ordered, unless good cause is shown to the contrary.
- (6) Without limiting subsection (5), in determining the amount of interest, the court must take into account the period between the day when the amount referred to in paragraph (1)(a) was paid by the person and the day when the order is made.
- (7) Proceedings cannot be commenced under this section more than 6 years after the time when the person paid the amount referred to in paragraph (1)(a).

Division 5—Unclaimed money

559 Unclaimed money

Payment to the Commonwealth

- (1) An employer may pay an amount to the Commonwealth if:
 - (a) the employer was required to pay the amount to an employee under this Act or a fair work instrument; and
 - (b) the employee has left the employment of the employer without having been paid the amount; and
 - (c) the employer is unable to pay the amount to the employee because the employer does not know the employee's whereabouts.

Discharge of employer

- (2) Payment of the amount to the Commonwealth is a sufficient discharge to the employer, as against the employee, for the amount paid.

Payment where money later claimed

- (3) The Fair Work Ombudsman, on behalf of the Commonwealth, must pay an amount to a person if:
 - (a) the amount has been paid to the Commonwealth under this section; and
 - (b) the person has made a claim for the amount in accordance with the form prescribed by the regulations; and
 - (c) the Fair Work Ombudsman is satisfied that the person is entitled to the amount.

Interest

- (3A) If:
 - (a) an amount is paid to a person under subsection (3) at a particular time; and

(b) the amount is at least \$100; and

(c) the amount is attributable to an amount that was paid to the Commonwealth under subsection (1) more than 6 months before that time;

the Fair Work Ombudsman, on behalf of the Commonwealth, must also pay to the person the amount of interest (if any) worked out in accordance with an instrument under subsection (3B).

(3B) The Minister may make an instrument for the purposes of subsection (3A).

(3C) An instrument under subsection (3B) may involve different rates of interest for different periods over which the interest accrues. For this purpose, *rate* includes a nil rate.

(3D) An instrument made under subsection (3B) is a legislative instrument.

Appropriation of Consolidated Revenue Fund

(4) The Consolidated Revenue Fund is appropriated for the purposes of subsection (3).

Part 4-2—Jurisdiction and powers of courts

Division 1—Introduction

560 Guide to this Part

This Part is about the jurisdiction and powers of the courts in relation to matters arising under this Act.

Divisions 2 and 3 confer jurisdiction on the Federal Court and the Federal Circuit and Family Court of Australia (Division 2). That jurisdiction is generally required to be exercised in the Fair Work Divisions of those courts.

Division 4 deals with intervention, costs, limitation on imprisonment, and regulations, in relation to proceedings in the Federal Court, the Federal Circuit and Family Court of Australia (Division 2) and, in some cases, a court of a State or Territory.

561 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).

Division 2—Jurisdiction and powers of the Federal Court

562 Conferring jurisdiction on the Federal Court

Jurisdiction is conferred on the Federal Court in relation to any matter (whether civil or criminal) arising under this Act.

563 Exercising jurisdiction in the Fair Work Division of the Federal Court

The jurisdiction conferred on the Federal Court under section 562 is to be exercised in the Fair Work Division of the Federal Court if:

- (a) an application is made to the Federal Court under this Act; or
- (b) a writ of mandamus or prohibition or an injunction is sought in the Federal Court against a person holding office under this Act; or
- (c) a declaration is sought under section 21 of the *Federal Court of Australia Act 1976* in relation to a matter arising under this Act; or
- (d) an injunction is sought under section 23 of the *Federal Court of Australia Act 1976* in relation to a matter arising under this Act; or
- (e) a prosecution is instituted in the Federal Court under this Act; or
- (f) an appeal is instituted in the Federal Court from a judgment of the Federal Circuit and Family Court of Australia (Division 2) or a court of a State or Territory in a matter arising under this Act; or
- (g) proceedings in relation to a matter arising under this Act are transferred to the Federal Court from the Federal Circuit and Family Court of Australia (Division 2); or
- (h) the Federal Circuit and Family Court of Australia (Division 2) or a court of a State or Territory states a case or reserves a question for the consideration of the Federal Court in a matter arising under this Act; or

Section 564

- (i) the President refers, under section 608 of this Act, a question of law to the Federal Court; or
- (j) the High Court remits a matter arising under this Act to the Federal Court.

564 No limitation on Federal Court's powers

To avoid doubt, nothing in this Act limits the Federal Court's powers under section 21, 22 or 23 of the *Federal Court of Australia Act 1976*.

565 Appeals from eligible State or Territory courts

Appeals from original decisions of eligible State or Territory courts

- (1) An appeal lies to the Federal Court from a decision of an eligible State or Territory court exercising jurisdiction under this Act.
- (1A) No appeal lies from a decision of an eligible State or Territory court exercising jurisdiction under this Act, except:
 - (a) if the court was exercising summary jurisdiction—an appeal, to that court or another eligible State or Territory court of the same State or Territory, as provided for by a law of that State or Territory; or
 - (b) in any case—an appeal as provided for by subsection (1).

Appeals from appellate decisions of eligible State or Territory courts

- (1B) An appeal lies to the Federal Court from a decision of an eligible State or Territory court made on appeal from a decision that:
 - (a) was a decision of that court or another eligible State or Territory court of the same State or Territory; and
 - (b) was made in the exercise of jurisdiction under this Act.
- (1C) No appeal lies from a decision to which subsection (1B) applies, except an appeal as provided for by that subsection.

Leave to appeal not required

- (2) It is not necessary to obtain the leave of the Federal Court, or the court appealed from, in relation to an appeal under subsection (1) or (1B).

Division 3—Jurisdiction and powers of the Federal Circuit and Family Court of Australia (Division 2)

566 Conferring jurisdiction on the Federal Circuit and Family Court of Australia (Division 2)

Jurisdiction is conferred on the Federal Circuit and Family Court of Australia (Division 2) in relation to any civil matter arising under this Act.

567 Exercising jurisdiction in the Fair Work Division of the Federal Circuit and Family Court of Australia (Division 2)

Jurisdiction conferred on the Federal Circuit and Family Court of Australia (Division 2) under section 566 is to be exercised in the Fair Work Division of the Court if:

- (a) an application is made to the Court under this Act; or
- (b) an injunction is sought under section 140 of the *Federal Circuit and Family Court of Australia Act 2021* in relation to a matter arising under this Act; or
- (c) a declaration is sought under section 141 of the *Federal Circuit and Family Court of Australia Act 2021* in relation to a matter arising under this Act; or
- (d) proceedings in relation to a matter arising under this Act are transferred to the Federal Circuit and Family Court of Australia (Division 2) from the Federal Court; or
- (e) the High Court remits a matter arising under this Act to the Federal Circuit and Family Court of Australia (Division 2).

568 No limitation on powers of the Federal Circuit and Family Court of Australia (Division 2)

To avoid doubt, nothing in this Act limits the powers of the Federal Circuit and Family Court of Australia (Division 2) under

section 139, 140 or 141 of the *Federal Circuit and Family Court of Australia Act 2021*.

Division 4—Miscellaneous

569 Minister's entitlement to intervene

- (1) The Minister may intervene on behalf of the Commonwealth in proceedings before a court (including a court of a State or Territory) in relation to a matter arising under this Act if the Minister believes it is in the public interest to do so.
- (2) If the Minister intervenes, the Minister is taken to be a party to the proceedings for the purposes of instituting an appeal from a judgment given in the proceedings.
- (3) Despite section 570, a court may make an order as to costs against the Commonwealth if:
 - (a) the Minister intervenes under subsection (1); or
 - (b) the Minister institutes an appeal from a judgment as referred to in subsection (2).

569A State or Territory Minister's entitlement to intervene

- (1) The Minister of a State or Territory who has responsibility for workplace relations matters may intervene on behalf of the State or Territory in proceedings before a court (including a court of a State or Territory) in relation to a matter arising under this Act if he or she believes it is in the public interest of the State or Territory to do so.
- (2) If the Minister of a State or Territory who has responsibility for workplace relations matters intervenes, he or she is taken to be a party to the proceedings for the purposes of instituting an appeal from a judgment given in the proceedings.
- (3) Despite section 570, a court may make an order as to costs against a State or Territory if:
 - (a) the Minister of a State or Territory who has responsibility for workplace relations matters intervenes under subsection (1); or

- (b) he or she institutes an appeal from a judgment as referred to in subsection (2).

570 Costs only if proceedings instituted vexatiously etc.

- (1) A party to proceedings (including an appeal) in a court (including a court of a State or Territory) in relation to a matter arising under this Act may be ordered by the court to pay costs incurred by another party to the proceedings only in accordance with subsection (2) or section 569 or 569A.

Note: The Commonwealth might be ordered to pay costs under section 569.
A State or Territory might be ordered to pay costs under section 569A.

- (2) The party may be ordered to pay the costs only if:
- (a) the court is satisfied that the party instituted the proceedings vexatiously or without reasonable cause; or
 - (b) the court is satisfied that the party's unreasonable act or omission caused the other party to incur the costs; or
 - (c) the court is satisfied of both of the following:
 - (i) the party unreasonably refused to participate in a matter before the FWC;
 - (ii) the matter arose from the same facts as the proceedings.

571 No imprisonment for failure to pay pecuniary penalty

- (1) A court (including a court of a State or Territory) may not order a person to serve a sentence of imprisonment if the person fails to pay a pecuniary penalty imposed under this Act.
- (2) This section applies despite any other law of the Commonwealth, a State or a Territory.

572 Regulations dealing with matters relating to court proceedings

The regulations may provide for the fees to be charged in relation to proceedings in a court (including a court of a State or Territory) under this Act.

Chapter 5—Administration

Part 5-1—The Fair Work Commission

Division 1—Introduction

573 Guide to this Part

This Part is about the Fair Work Commission.

Division 2 establishes and confers functions on the FWC. The FWC consists of the President, Vice Presidents, Deputy Presidents, Commissioners and Expert Panel Members. Division 2 also confers functions on the President.

Division 3 deals with the conduct of matters before the FWC (such as applications, representation by lawyers, the FWC's decisions and appeals).

Division 4 deals with the organisation of the FWC, who may perform functions of the FWC and delegation of the FWC's functions and powers. Certain functions must be performed by a Full Bench or an Expert Panel.

Division 5 deals with the appointment, terms and conditions of FWC Members.

Division 6 deals with cooperation with the States.

Division 7 deals with the FWC's seal. It also deals with other powers and functions of the President and the General Manager (including in relation to annual reports, reports on making enterprise agreements, arrangements with certain courts, and disclosing information obtained by the FWC).

Division 8 is about the General Manager of the FWC (whose function is to assist the President), staff of the FWC and others assisting the FWC.

Division 9 contains offences in relation to the FWC.

574 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).

Division 2—Establishment and functions of the Fair Work Commission

Subdivision A—Establishment and functions of the Fair Work Commission

575 Establishment of the Fair Work Commission

- (1) The body known immediately before the commencement of this subsection as Fair Work Australia is continued in existence as the Fair Work Commission.

Note: See also subsection 25B(1) of the *Acts Interpretation Act 1901*.

- (2) The Fair Work Commission consists of:
 - (a) the President; and
 - (aa) 2 Vice Presidents; and
 - (b) such number of Deputy Presidents as, from time to time, hold office under this Act; and
 - (c) such number of Commissioners as, from time to time, hold office under this Act; and
 - (d) such number of Expert Panel Members as, from time to time, hold office under this Act.

Note: The Fair Work Commission also has a General Manager and staff (see Division 8).

576 Functions of the FWC

- (1) The FWC has the functions conferred by this Act in relation to the following subject matters:
 - (a) the National Employment Standards (Part 2-2);
 - (b) modern awards (Part 2-3);
 - (c) enterprise agreements (Part 2-4);
 - (d) workplace determinations (Part 2-5);
 - (e) minimum wages (Part 2-6);
 - (f) equal remuneration (Part 2-7);

- (fa) regulated labour hire arrangement orders (Part 2-7A);
 - (g) transfer of business (Part 2-8);
 - (ga) other terms and conditions of employment (Part 2-9);
 - (h) general protections (Part 3-1);
 - (i) unfair dismissal (Part 3-2);
 - (j) industrial action (Part 3-3);
 - (k) right of entry (Part 3-4);
 - (l) stand down (Part 3-5);
 - (la) prohibiting sexual harassment in connection with work (Part 3-5A);
 - (m) other rights and responsibilities (Part 3-6);
 - (n) the extension of the National Employment Standards entitlements (Part 6-3);
 - (na) transfer of business from a State public sector employer (Part 6-3A);
 - (o) unlawful termination protections (Part 6-4);
 - (p) special provisions about TCF outworkers (Part 6-4A);
 - (q) workers bullied at work (Part 6-4B);
 - (r) Coronavirus economic response (Part 6-4C).
- (2) The FWC also has the following functions:
- (aa) promoting cooperative and productive workplace relations and preventing disputes;
 - (ab) promoting good faith bargaining and the making of enterprise agreements;
 - (a) dealing with disputes as referred to in section 595;
 - (b) providing assistance and advice about its functions and activities;
 - (c) providing administrative support in accordance with an arrangement under section 650 or 653A;
 - (ca) mediating any proceedings, part of proceedings or matter arising out of any proceedings that, under section 53A of the *Federal Court of Australia Act 1976* or section 169 of the *Federal Circuit and Family Court of Australia Act 2021*, have been referred by the Fair Work Division of the Federal

Section 577

Court or Federal Circuit and Family Court of Australia
(Division 2) to the FWC for mediation;

- (d) any other function conferred on the FWC by a law of the Commonwealth.

Note: Section 13 of the Registered Organisations Act confers an additional function on the FWC.

577 Performance of functions etc. by the FWC

- (1) The FWC must perform its functions and exercise its powers in a manner that:
- (a) is fair and just; and
 - (b) is quick, informal and avoids unnecessary technicalities; and
 - (c) is open and transparent; and
 - (d) promotes harmonious and cooperative workplace relations.

Note: The President also is responsible for ensuring that the FWC performs its functions and exercises its powers efficiently etc. (see section 581).

- (2) In performing its functions under paragraph 576(2)(b), the FWC must have regard to:
- (a) the need for guidelines and other materials to be available in multiple languages; and
 - (b) the need for community outreach in multiple languages.

578 Matters the FWC must take into account in performing functions etc.

In performing functions or exercising powers, in relation to a matter, under a part of this Act (including this Part), the FWC must take into account:

- (a) the objects of this Act, and any objects of the part of this Act; and
- (b) equity, good conscience and the merits of the matter; and
- (c) the need to respect and value the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual orientation, breastfeeding, gender identity, intersex status, age, physical or mental

disability, marital status, family or carer's responsibilities,
subjection to family and domestic violence, pregnancy,
religion, political opinion, national extraction or social origin.

579 FWC has privileges and immunities of the Crown

The FWC has the privileges and immunities of the Crown in right of the Commonwealth.

580 Protection of FWC Members

An FWC Member has, in performing his or her functions or exercising his or her powers as an FWC Member, the same protection and immunity as a Justice of the High Court.

Note: See also section 584B (which deals with protection of persons involved in handling etc. complaints about FWC Members).

Subdivision B—Functions and powers of the President

581 Functions of the President

The President is responsible for ensuring that the FWC performs its functions and exercises its powers in a manner that:

- (a) is efficient; and
- (b) adequately serves the needs of employers and employees throughout Australia.

Note: The President must perform his or her own functions and exercise his or her own powers in a manner that facilitates cooperation with prescribed State industrial authorities (see section 649).

581A Dealing with a complaint about an FWC Member

- (1) Without limiting section 581 (which deals with the functions of the President), the President may:
 - (a) deal, in accordance with subsection (2) of this section, with a complaint about the performance by another FWC Member of his or her duties; and

Section 581A

- (b) take any measures that the President believes are reasonably necessary to maintain public confidence in the FWC, including (but not limited to) temporarily restricting the duties of the FWC Member.

Note 1: The complaint is a *complaint about an FWC Member* (see section 12).

Note 2: The Minister may also handle complaints about FWC Members (see section 641A).

- (2) The President may deal with a complaint about an FWC Member referred to in paragraph (1)(a) by doing either or both of the following:
 - (a) deciding whether or not to handle the complaint and then doing one of the following:
 - (i) dismissing the complaint;
 - (ii) handling the complaint if the President has a relevant belief in relation to the complaint;
 - (iii) arranging for any other person to assist the President to handle the complaint if the President has a relevant belief in relation to the complaint;
 - (b) arranging for any other complaint handlers to decide whether or not to handle the complaint and then to do one of the following:
 - (i) dismiss the complaint;
 - (ii) handle the complaint if each of the complaint handlers has a relevant belief in relation to the complaint.

Note 1: A complaint handler (other than the President) may handle a complaint by referring it to the President. The President may then do either or both of the things referred to in paragraph (2)(a) or (b) in respect of the complaint.

Note 2: For protections for persons involved in relation to handling a complaint about an FWC Member, see section 584B.

Authorisation of persons or bodies

- (3) The President may authorise, in writing, a person or a body to do one or more of the following in relation to a complaint about an

FWC Member referred to in paragraph (1)(a) (whether in relation to a specific complaint or generally):

- (a) assist the President to handle the complaint or complaints;
- (b) decide whether or not to handle the complaint or complaints;
- (c) dismiss the complaint or complaints;
- (d) handle the complaint or complaints.

Referral to Minister

- (4) The President must refer a complaint about an FWC Member referred to in paragraph (1)(a) to the Minister if, after the complaint has been handled in accordance with subsection (2), the President is satisfied that:
 - (a) one or more of the circumstances that gave rise to the complaint have been substantiated; and
 - (b) each House of the Parliament should consider whether to present to the Governor-General an address praying for the termination of the appointment of the FWC Member.

Note: The appointment of an FWC Member may be terminated under section 641 if each House of the Parliament presents such an address to the Governor-General.

- (5) The Minister must consider whether each House of the Parliament should consider the matter referred to in paragraph (4)(b).

581B Code of Conduct

- (1) After consulting the other FWC Members, the President may determine a Code of Conduct for FWC Members.
- (2) Subsection (1) does not limit section 582 (which deals with directions by the President).
- (3) The Code of Conduct must be published on the FWC's website or by any other means that the President considers appropriate.
- (4) A determination under subsection (1) is not a legislative instrument.

582 Directions by the President

The President may give directions

- (1) The President may give directions under subsection (2) as to the manner in which the FWC is to perform its functions, exercise its powers or deal with matters.
- (2) The President may give a direction that is of a general nature, or that relates to a particular matter, to one or more of the following persons:
 - (a) an FWC Member;
 - (b) a Full Bench;
 - (c) an Expert Panel;
 - (d) the General Manager.
- (3) The direction must not relate to a decision by the FWC.
- (4) Without limiting subsection (2), the direction may be a direction of the following kind:
 - (aa) a direction about the conduct of 4 yearly reviews of default fund terms of modern awards under Division 4A of Part 2-3;
 - (ab) a direction about the exercise of modern award powers in accordance with Division 5 of Part 2-3;
 - (b) a direction about the conduct of annual wage reviews;
 - (c) a direction that 2 or more matters be dealt with jointly by one or more single FWC Members or one or more Full Benches;
 - (d) a direction about the transfer between FWC Members (including a transfer between Full Benches) of one or more matters being dealt with by the FWC;
 - (e) a direction that a single FWC Member perform a function or exercise a power in relation to the variation of a modern award.

Persons must comply with the President's directions

- (5) A person to whom a direction is given must comply with the direction.

Note: For directions to the General Manager, see section 658.

Direction is not a legislative instrument

- (6) If a direction is in writing, the direction is not a legislative instrument.

583 President not subject to direction

The President is not subject to direction by or on behalf of the Commonwealth.

584 Delegation of functions and powers of the President

- (1) The President may, in writing, delegate to a Vice President or a Deputy President all or any of the President's functions or powers, other than under:
- (aa) paragraph 581A(1)(b) (which deals with taking measures to maintain public confidence in the FWC); or
 - (a) section 620 (which deals with the constitution and decision-making of an Expert Panel); or
 - (b) section 625 (which deals with the delegation of functions and powers of the FWC).
- (2) In performing functions or exercising powers under a delegation, the delegate must comply with any directions of the President.

Note: See also sections 34AA and 34AB of the *Acts Interpretation Act 1901*.

Subdivision C—Protection of persons involved in handling etc. complaints about FWC Members

584B Protection of persons involved in handling etc. complaints about FWC Members

- (1) A person who is exercising powers or performing functions under or for the purposes of paragraph 581A(1)(a), subsections 581A(2) to (5), or section 641A, in relation to a complaint about an FWC Member, or assisting in exercising those powers or performing

Section 584B

those functions, has the same protection and immunity as a Justice of the High Court.

- (2) A witness requested to attend, or appearing, before a complaint handler or any other person, in relation to a complaint about an FWC Member, has the same protection, and is subject to the same liabilities in proceedings, as a witness in a case tried by the High Court.
- (3) A lawyer assisting, or appearing on behalf of a person before, a complaint handler or any other person, in relation to a complaint about an FWC Member, has the same protection and immunity as a barrister has in appearing for a party in proceedings in the High Court.

Division 3—Conduct of matters before the FWC

Subdivision A—Applications to the FWC

585 Applications in accordance with procedural rules

An application to the FWC must be in accordance with the procedural rules (if any) relating to applications of that kind.

Note 1: Certain provisions might impose additional requirements in relation to particular kinds of applications (see for example subsection 185(2)).

Note 2: The FWC may, under section 587, dismiss an application that is not made in accordance with the procedural rules.

586 Correcting and amending applications and documents etc.

The FWC may:

- (a) allow a correction or amendment of any application, or other document relating to a matter before the FWC, on any terms that it considers appropriate; or
- (b) waive an irregularity in the form or manner in which an application is made to the FWC.

587 Dismissing applications

- (1) Without limiting when the FWC may dismiss an application, the FWC may dismiss an application if:
 - (a) the application is not made in accordance with this Act; or
 - (b) the application is frivolous or vexatious; or
 - (c) the application has no reasonable prospects of success.

Note: For another power of the FWC to dismiss an application for a remedy for unfair dismissal made under Division 5 of Part 3-2, see section 399A.

- (2) Despite paragraphs (1)(b) and (c), the FWC must not dismiss an application under section 365 or 773, or an application under

Section 588

section 527F that does not consist solely of an application for a stop sexual harassment order, on the ground that the application:

- (a) is frivolous or vexatious; or
 - (b) has no reasonable prospects of success.
- (3) The FWC may dismiss an application:
- (a) on its own initiative; or
 - (b) on application.

588 Discontinuing applications

A person who has applied to the FWC may discontinue the application:

- (a) in accordance with the procedural rules (if any); and
- (b) whether or not the matter has been settled.

Subdivision B—Conduct of matters before the FWC

589 Procedural and interim decisions

- (1) The FWC may make decisions as to how, when and where a matter is to be dealt with.
- (2) The FWC may make an interim decision in relation to a matter before it.
- (3) The FWC may make a decision under this section:
 - (a) on its own initiative; or
 - (b) on application.
- (4) This section does not limit the FWC's power to make decisions.

590 Powers of the FWC to inform itself

- (1) The FWC may, except as provided by this Act, inform itself in relation to any matter before it in such manner as it considers appropriate.

- (2) Without limiting subsection (1), the FWC may inform itself in the following ways:
- (a) by requiring a person to attend before the FWC;
 - (b) by inviting, subject to any terms and conditions determined by the FWC, oral or written submissions;
 - (c) by requiring a person to provide copies of documents or records, or to provide any other information to the FWC;
 - (d) by taking evidence under oath or affirmation in accordance with the regulations (if any);
 - (e) by requiring an FWC Member, a Full Bench or an Expert Panel to prepare a report;
 - (f) by conducting inquiries;
 - (g) by undertaking or commissioning research;
 - (h) by conducting a conference (see section 592);
 - (i) by holding a hearing (see section 593).

591 FWC not bound by rules of evidence and procedure

The FWC is not bound by the rules of evidence and procedure in relation to a matter before it (whether or not the FWC holds a hearing in relation to the matter).

592 Conferences

- (1) For the purpose of performing a function or exercising a power of the FWC (other than a function or power under Part 2-6), the FWC may direct a person to attend a conference at a specified time and place.

Note: Part 2-6 deals with minimum wages. For the conduct of annual wage reviews, see Subdivision B of Division 3 of Part 2-6.

- (2) An FWC Member (other than an Expert Panel Member), or a delegate of the FWC, is responsible for conducting the conference.
- (3) The conference must be conducted in private, unless the person responsible for conducting the conference directs that it be conducted in public.

Section 593

Note: This subsection does not apply in relation to conferences conducted in relation to unfair dismissal, general protection or sexual harassment matters (see sections 368, 374, 398, 527R and 776).

- (4) At a conference, the FWC may:
 - (a) mediate or conciliate; or
 - (b) make a recommendation or express an opinion.
- (5) Subsection (4) does not limit what the FWC may do at a conference.

593 Hearings

- (1) The FWC is not required to hold a hearing in performing functions or exercising powers, except as provided by this Act.
- (2) If the FWC holds a hearing in relation to a matter, the hearing must be held in public, except as provided by subsection (3).

Confidential evidence in hearings

- (3) The FWC may make the following orders in relation to a hearing that the FWC holds if the FWC is satisfied that it is desirable to do so because of the confidential nature of any evidence, or for any other reason:
 - (a) orders that all or part of the hearing is to be held in private;
 - (b) orders about who may be present at the hearing;
 - (c) orders prohibiting or restricting the publication of the names and addresses of persons appearing at the hearing;
 - (d) orders prohibiting or restricting the publication of, or the disclosure to some or all of the persons present at the hearing of, the following:
 - (i) evidence given in the hearing;
 - (ii) matters contained in documents before the FWC in relation to the hearing.
- (4) Subsection (3) does not apply to the publication of a submission made to the FWC for consideration in an annual wage review (see subsection 289(2)).

594 Confidential evidence

- (1) The FWC may make an order prohibiting or restricting the publication of the following in relation to a matter before the FWC (whether or not the FWC holds a hearing in relation to the matter) if the FWC is satisfied that it is desirable to do so because of the confidential nature of any evidence, or for any other reason:
 - (a) evidence given to the FWC in relation to the matter;
 - (b) the names and addresses of persons making submissions to the FWC in relation to the matter;
 - (c) matters contained in documents lodged with the FWC or received in evidence by the FWC in relation to the matter;
 - (d) the whole or any part of its decisions or reasons in relation to the matter.
- (2) Subsection (1) does not apply to the publication of a submission made to the FWC for consideration in an annual wage review (see subsection 289(2)).

595 FWC's power to deal with disputes

- (1) The FWC may deal with a dispute only if the FWC is expressly authorised to do so under or in accordance with another provision of this Act.
- (2) The FWC may deal with a dispute (other than by arbitration) as it considers appropriate, including in the following ways:
 - (a) by mediation or conciliation;
 - (b) by making a recommendation or expressing an opinion.
- (3) The FWC may deal with a dispute by arbitration (including by making any orders it considers appropriate) only if the FWC is expressly authorised to do so under or in accordance with another provision of this Act.

Example: Parties may consent to the FWC arbitrating a bargaining dispute (see subsection 240(4)).

Section 596

- (4) In dealing with a dispute, the FWC may exercise any powers it has under this Subdivision.

Example: The FWC could direct a person to attend a conference under section 592.

- (5) To avoid doubt, the FWC must not exercise the power referred to in subsection (3) in relation to a matter before the FWC except as authorised by this section.

Subdivision C—Representation by lawyers and paid agents and Minister’s entitlement to make submissions

596 Representation by lawyers and paid agents

- (1) Except as provided by subsection (3) or the procedural rules, a person may be represented in a matter before the FWC (including by making an application or submission to the FWC on behalf of the person) by a lawyer or paid agent only with the permission of the FWC.
- (2) The FWC may grant permission for a person to be represented by a lawyer or paid agent in a matter before the FWC only if:
- (a) it would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter; or
 - (b) it would be unfair not to allow the person to be represented because the person is unable to represent himself, herself or itself effectively; or
 - (c) it would be unfair not to allow the person to be represented taking into account fairness between the person and other persons in the same matter.

Note: Circumstances in which the FWC might grant permission for a person to be represented by a lawyer or paid agent include the following:

- (a) where a person is from a non-English speaking background or has difficulty reading or writing;
- (b) where a small business is a party to a matter and has no specialist human resources staff while the other party is represented by an officer or employee of an industrial association or another person with experience in workplace relations advocacy.

- (3) The FWC's permission is not required for a person to be represented by a lawyer or paid agent in making a written submission under Part 2-3 or 2-6 (which deal with modern awards and minimum wages).
- (4) For the purposes of this section, a person is taken not to be represented by a lawyer or paid agent if the lawyer or paid agent:
 - (a) is an employee or officer of the person; or
 - (b) is an employee or officer of:
 - (i) an organisation; or
 - (ii) an association of employers that is not registered under the Registered Organisations Act; or
 - (iii) a peak council; or
 - (iv) a bargaining representative; that is representing the person; or
 - (c) is a bargaining representative.

597 Minister's entitlement to make submissions

- (1) The Minister is entitled to make a submission for consideration in relation to a matter before the FWC if:
 - (a) the matter is before a Full Bench and it is in the public interest for the Minister to make a submission; or
 - (b) the matter involves public sector employment.
- (2) Subsection (1) applies whether or not the FWC holds a hearing in relation to the matter.

597A State or Territory Minister's entitlement to make submissions

- (1) The Minister of a State or Territory who has responsibility for workplace relations matters is entitled to make a submission for consideration in relation to a matter before the FWC if:
 - (a) the matter is before a Full Bench; and
 - (b) it is in the public interest of the State or Territory for the Minister of the State or Territory to make a submission.

Section 598

- (2) Subsection (1) applies whether or not the FWC holds a hearing in relation to the matter.

Subdivision D—Decisions of the FWC

598 Decisions of the FWC

- (1) A reference in this Part to a decision of the FWC includes any decision of the FWC however described. However, to avoid doubt, a reference to a decision of the FWC does not include a statement under section 188B (which deals with principles on genuine agreement to enterprise agreements) or an outcome of a process carried out in accordance with subsection 595(2) (which deals with the FWC's power to deal with disputes).

Note: Examples of decisions that the FWC makes include making modern awards, approving or refusing to approve enterprise agreements, decisions as to how, when and where a matter is to be dealt with, deciding whether to grant permission to hear an appeal, and decisions in relation to appeals.

- (2) If the FWC makes a decision that makes or varies an instrument, a reference in this Part to a decision of the FWC includes the FWC's decision to make or vary the instrument in the particular terms decided.
- (3) A decision of the FWC that is described as an order must be made by order.

Note: An example of a decision that is described as an order is a bargaining order.

- (4) A decision of the FWC that is not described as an order may be made by order.

599 FWC not required to decide an application in terms applied for

Except as provided by this Act, the FWC is not required to make a decision in relation to an application in the terms applied for.

600 Determining matters in the absence of a person

The FWC may determine a matter before it in the absence of a person who has been required to attend before it.

601 Writing and publication requirements for the FWC's decisions

- (1) The following decisions of the FWC must be in writing:
 - (a) a decision of the FWC made under a Part of this Act other than this Part;
 - (b) an interim decision that relates to a decision to be made under a Part of this Act other than this Part;
 - (c) a decision in relation to an appeal or review.

Note: For appeals and reviews, see sections 604 and 605.

- (2) The FWC may give written reasons for any decision that it makes.
- (3) A decision, and reasons, that are in writing must be expressed in plain English and be easy to understand in structure and content.
- (4) The FWC must publish the following, on its website or by any other means that the FWC considers appropriate:
 - (a) a decision that is required to be in writing and any written reasons that the FWC gives in relation to such a decision;
 - (b) an enterprise agreement that has been approved by the FWC under Part 2-4.

The FWC must do so as soon as practicable after making the decision or approving the agreement.

- (5) Subsection (4) does not apply to any of the following decisions or reasons in relation to such decisions:
 - (a) a decision to issue, or refuse to issue, a certificate under paragraph 368(3)(a) or 527R(3)(a);
 - (c) a decision to issue an entry permit under section 512;
 - (d) a decision to impose conditions on an entry permit under section 515;
 - (e) a decision to issue, or refuse to issue, an exemption certificate under section 519;

Section 602

- (f) a decision to issue, or refuse to issue, an affected member certificate under section 520;
 - (g) a decision or reasons in relation to which an order is in operation under paragraph 594(1)(d).
- (6) Subsections (1) and (4) do not limit the FWC's power to put decisions in writing or publish decisions.

602 Correcting obvious errors etc. in relation to the FWC's decisions

- (1) The FWC may correct or amend any obvious error, defect or irregularity (whether in substance or form) in relation to a decision of the FWC (other than an error, defect or irregularity in a modern award or national minimum wage order).

Note 1: If the FWC makes a decision to make an instrument, the FWC may correct etc. the instrument under this section (see subsection 598(2)).

Note 2: The FWC corrects modern awards and national minimum wage orders under sections 160 and 296.

- (2) The FWC may correct or amend the error, defect or irregularity:
- (a) on its own initiative; or
 - (b) on application.

602A Validation of approval of enterprise agreement

- (1) If:
- (a) after an enterprise agreement was made:
 - (i) an application for the approval of a draft of the enterprise agreement was erroneously made to the FWC; and
 - (ii) the FWC approved the draft of the agreement; and
 - (b) the FWC is satisfied that, assuming that the application had been an application for the approval of the enterprise agreement that was made, the FWC would have approved the enterprise agreement that was made;

the FWC may determine in writing that the approval is as valid and effective, and is taken to have been as valid and effective, as it would have been if:

- (c) the application had been an application for the approval of the enterprise agreement that was made instead of an application for the approval of the draft of the agreement; and
 - (d) the requirements set out in subsection 185(2) or section 185A (whichever is applicable) had been met in relation to the application; and
 - (e) the approval had been an approval of the enterprise agreement that was made instead of an approval of the draft of the agreement.
- (2) The FWC may make a determination under subsection (1):
- (a) on its own initiative; or
 - (b) on application.
- (3) If the FWC makes a determination under subsection (1) in relation to an enterprise agreement that was made, the FWC must:
- (a) publish the agreement on the FWC's website or by any other means that the FWC considers appropriate; and
 - (b) do so as soon as practicable after making the determination.

602B Validation of approval of variation of enterprise agreement

- (1) If:
- (a) after a variation of an enterprise agreement was made:
 - (i) an application for the approval of a draft of the variation was erroneously made to the FWC; and
 - (ii) the FWC approved the draft of the variation; and
 - (b) the FWC is satisfied that, assuming that the application had been an application for the approval of the variation that was made, the FWC would have approved the variation that was made;

the FWC may determine in writing that the approval is as valid and effective, and is taken to have been as valid and effective, as it would have been if:

Section 603

- (c) the application had been an application for the approval of the variation that was made instead of an application for the approval of the draft of the variation; and
 - (d) the requirements set out in subsection 210(2) had been met in relation to the application; and
 - (e) the approval had been an approval of the variation that was made instead of an approval of the draft of the variation.
- (2) The FWC may make a determination under subsection (1):
- (a) on its own initiative; or
 - (b) on application.

603 Varying and revoking the FWC's decisions

- (1) The FWC may vary or revoke a decision of the FWC that is made under this Act (other than a decision referred to in subsection (3)).

Note: If the FWC makes a decision to make an instrument, the FWC may vary or revoke the instrument under this subsection (see subsection 598(2)).

- (2) The FWC may vary or revoke a decision under this section:
- (a) on its own initiative; or
 - (b) on application by:
 - (i) a person who is affected by the decision; or
 - (ii) if the kind of decision is prescribed by the regulations—a person prescribed by the regulations in relation to that kind of decision.
- (3) The FWC must not vary or revoke any of the following decisions of the FWC under this section:
- (a) a decision under Part 2-3 (which deals with modern awards);
 - (b) a decision under section 235 or Division 4, 7, 9 or 10 of Part 2-4 (which deal with enterprise agreements);
 - (c) a decision under Part 2-5 (which deals with workplace determinations);
 - (d) a decision under Part 2-6 (which deals with minimum wages);

- (e) a decision under Division 3 of Part 2-8 (which deals with transfer of business);
- (f) a decision under Division 8 of Part 3-3 (which deals with protected action ballots);
- (g) a decision under section 472 (which deals with partial work bans);
- (h) a decision that is prescribed by the regulations.

Note: The FWC can vary or revoke decisions, and instruments made by decisions, under other provisions of this Act (see, for example, sections 447 and 448).

Subdivision E—Appeals, reviews and referring questions of law

604 Appeal of decisions

- (1) A person who is aggrieved by a decision:
 - (a) made by the FWC (other than a decision of a Full Bench or an Expert Panel); or
 - (b) made under the Registered Organisations Act by the General Manager (including a delegate of the General Manager);may appeal the decision, with the permission of the FWC.
- (2) Without limiting when the FWC may grant permission, the FWC must grant permission if the FWC is satisfied that it is in the public interest to do so.

Note: Subsection (2) does not apply in relation to an application for an unfair dismissal (see section 400).

- (3) A person may appeal the decision by applying to the FWC.

605 Minister's entitlement to apply for review of a decision

- (1) The Minister may apply to the FWC for a review to be conducted by the FWC of a decision made by the FWC (other than a decision of a Full Bench or an Expert Panel) if the Minister believes that the decision is contrary to the public interest.

Section 606

- (2) Without limiting when the FWC may conduct a review, the FWC must conduct a review of the decision if the FWC is satisfied that it is in the public interest to conduct the review.

Note: The FWC must be constituted by a Full Bench to decide whether to conduct a review, and to conduct the review (see section 614).

- (3) In conducting a review:
- (a) the FWC must take such steps as it considers appropriate to ensure that each person with an interest in the review is made aware of the review; and
 - (b) the Minister is entitled to make submissions for consideration in the review.
- (4) Nothing in this section affects any right of appeal or any power of the FWC under section 604 or 607. A review of a decision and an appeal of the decision may be dealt with together if the FWC considers it appropriate.

606 Staying decisions that are appealed or reviewed

- (1) If, under section 604 or 605, the FWC hears an appeal from, or conducts a review of, a decision, the FWC may (except as provided by subsection (3)) order that the operation of the whole or part of the decision be stayed, on any terms and conditions that the FWC considers appropriate, until a decision in relation to the appeal or review is made or the FWC makes a further order.
- (2) If a Full Bench is hearing the appeal or conducting the review, an order under subsection (1) in relation to the appeal or review may be made by:
- (a) the Full Bench; or
 - (b) the President; or
 - (c) a Vice President; or
 - (d) a Deputy President.
- (3) This section does not apply in relation to a decision to make a protected action ballot order.

607 Process for appealing or reviewing decisions

- (1) An appeal from, or a review of, a decision of the FWC or the General Manager may be heard or conducted without holding a hearing only if:
 - (a) it appears to the FWC that the appeal or review can be adequately determined without persons making oral submissions for consideration in the appeal or review; and
 - (b) the persons who would otherwise, or who will, make submissions (whether oral or written) for consideration in the appeal or review consent to the appeal or review being heard or conducted without a hearing.
- (2) The FWC may:
 - (a) admit further evidence; and
 - (b) take into account any other information or evidence.
- (3) The FWC may do any of the following in relation to the appeal or review:
 - (a) confirm, quash or vary the decision;
 - (b) make a further decision in relation to the matter that is the subject of the appeal or review;
 - (c) refer the matter that is the subject of the appeal or review to an FWC Member (other than an Expert Panel Member) and:
 - (i) require the FWC Member to deal with the subject matter of the decision; or
 - (ii) require the FWC Member to act in accordance with the directions of the FWC.

608 Referring questions of law to the Federal Court

- (1) The President may refer a question of law arising in a matter before the FWC for the opinion of the Federal Court.
- (2) A question of law referred under subsection (1) must be determined by the Full Court of the Federal Court.

Section 609

- (3) The FWC may make a decision in relation to the matter even if the Federal Court is determining the question of law, except if the question is whether the FWC may exercise powers in relation to the matter.
- (4) Once the Federal Court has determined the question, the FWC may only make a decision in relation to the matter that is not inconsistent with the opinion of the Federal Court (if the FWC has not already done so).
- (5) However, if the FWC has made a decision in relation to the matter that is inconsistent with the opinion of the Federal Court, the FWC must vary the decision in such a way as to make it consistent with the opinion of the Federal Court.

Subdivision F—Miscellaneous

609 Procedural rules

- (1) After consulting the other FWC Members, the President may, by legislative instrument, make procedural rules in relation to:
 - (a) the practice and procedure to be followed by the FWC; or
 - (b) the conduct of business in relation to matters allowed or required to be dealt with by the FWC.
- (2) Without limiting subsection (1), the procedural rules may provide for the following:
 - (a) the requirements for making an application to the FWC;
 - (b) the circumstances in which a lawyer or paid agent may make an application or submission to the FWC on behalf of a person who is entitled to make the application or submission;
 - (c) the form and manner in which, and the time within which, submissions may or must be made to the FWC;
 - (d) the procedural requirements for making decisions of the FWC;
 - (e) the form and manner in which the FWC gives directions and notifies persons of things;
 - (ea) the requirements for making a notification to the FWC;

- (f) who is notified by the FWC of things;
 - (g) the manner in which conferences are to be conducted in relation to applications made under Part 3-1, 3-2, 3-5A or Part 6-4 (which deal with general protections, unfair dismissal, prohibiting sexual harassment in connection with work and unlawful termination).
- (3) To avoid doubt, subsection (1) includes the power to make procedural rules in relation to any functions conferred on the FWC by any other law of the Commonwealth.

610 Regulations dealing with any FWC matters

The regulations may provide for any matter that the procedural rules may provide for.

Note: Regulations made under this section prevail over procedural rules (see subsection 796(2)).

611 Costs

- (1) A person must bear the person's own costs in relation to a matter before the FWC.
- (2) However, the FWC may order a person (the **first person**) to bear some or all of the costs of another person in relation to an application to the FWC if:
- (a) the FWC is satisfied that the first person made the application, or the first person responded to the application, vexatiously or without reasonable cause; or
 - (b) the FWC is satisfied that it should have been reasonably apparent to the first person that the first person's application, or the first person's response to the application, had no reasonable prospect of success.

Note: The FWC can also order costs under sections 376, 400A, 401 and 780.

- (3) A person to whom an order for costs applies must not contravene a term of the order.

Note: This subsection is a civil remedy provision (see Part 4-1).

Division 4—Organisation of the FWC

Subdivision A—Functions etc. to be performed by a single FWC Member, a Full Bench or an Expert Panel

612 FWC’s functions etc. may generally be performed by single FWC Member

- (1) A function or power of the FWC may be performed or exercised by a single FWC Member (other than an Expert Panel Member), as directed by the President, except as provided by this Subdivision.

Note: The President gives directions under section 582.

- (2) Action taken under subsection 508(1) (which deals with misuse of rights under Part 3-4) must be taken by a Vice President or a Deputy President, except as provided by section 615.
- (3) This section does not limit the power of the President to delegate a function or power of the FWC under section 625.

613 Appeal of decisions

- (1) A Full Bench must (except as provided by subsection (2)):
 - (a) decide under section 604 whether to grant permission to appeal a decision; and
 - (b) if the Full Bench decides to grant the permission—hear the appeal in accordance with section 607.

Note: For the constitution of a Full Bench, see section 618.

- (2) The President, a Vice President or a Deputy President directed by the President, may:
 - (a) decide under section 604 whether to grant permission to appeal:
 - (i) a decision of a delegate under subsection 625(2); or

- (ii) a decision of the General Manager (including a delegate of the General Manager) under the Registered Organisations Act; and
- (b) if the President, the Vice President or the Deputy President (as the case may be) grants the permission—hear the appeal in accordance with section 607.

Note: The President gives directions under section 582.

614 Review of decisions by a Full Bench

A Full Bench must:

- (a) decide under section 605 whether to conduct a review of a decision; and
- (b) if the Full Bench decides to conduct the review—conduct the review in accordance with section 607.

Note: For the constitution of a Full Bench, see section 618.

615 The President may direct a Full Bench to perform function etc.

- (1) A function or power of the FWC may be performed or exercised by a Full Bench if the President so directs.

Note: The President gives directions under section 582.

- (2) The President may direct that the function or power be exercised by a Full Bench generally, or in relation to a particular matter or class of matters.
- (3) To avoid doubt, a reference in this section to a Full Bench includes a reference to more than one Full Bench.

Note: For the constitution of a Full Bench, see section 618.

615A When the President must direct a Full Bench to perform function etc.

Full Benches—directions on application

- (1) The President must direct a Full Bench to perform a function or exercise a power in relation to a matter if:
- (a) an application is made under subsection (2); and
 - (b) the President is satisfied that it is in the public interest to do so.

Note: The President gives directions under section 582.

- (2) For the purposes of paragraph (1)(a), the following persons may apply to the FWC to have a Full Bench perform a function or exercise a power in relation to a matter:
- (a) a person who has made, or will make, submissions for consideration in the matter;
 - (b) the Minister.

Full Benches—directions for certain terminations of enterprise agreements

- (3) The President must direct a Full Bench to perform a function or exercise a power in relation to a matter arising under section 226 in relation to an application for the termination of an enterprise agreement if:
- (a) the President has given a direction to an FWC Member to perform the function or exercise the power; and
 - (b) the FWC Member is satisfied that any of the following persons covered by the agreement oppose the termination:
 - (i) an employee;
 - (ii) an employer;
 - (iii) an employee organisation.
- (4) Subsection (3) does not apply if the FWC Member is satisfied that the enterprise agreement does not, and is not likely to, cover any employees.

- (5) Subsection (3) does not prevent a power that may be delegated under subsection 625(1) from being exercised by a single FWC Member or a person to whom the power has been delegated.

Note: The powers that may be delegated under subsection 625(1) include:

- (a) the FWC's power to inform itself as it considers appropriate under section 590 (other than the FWC's power to hold a hearing); and
- (b) the FWC's power to conduct a conference in accordance with section 592.

615B Transfer to a Full Bench from an FWC Member

- (1) This section applies if:
- (a) the President gives a direction referred to in section 615 or 615A that a function be performed or a power be exercised by a Full Bench; and
 - (b) before the President gave the direction, the President had given a direction (the *earlier direction*) to an FWC Member to perform the function or exercise the power.
- (2) The President is taken to have revoked the earlier direction.
- (3) The Full Bench must, when performing the function or exercising the power, take into account:
- (a) everything that occurred before the FWC; and
 - (b) everything that the FWC did;
- in relation to the matter before the Full Bench began to perform the function or exercise the power.

615C Transfer to the President from an FWC Member or a Full Bench

- (1) This section applies if:
- (a) the President decides to perform a function or exercise a power; and
 - (b) before the President made that decision, the President had given a direction (the *earlier direction*) that the function be

Section 616

performed or the power be exercised by a Full Bench or an FWC Member.

- (2) The President is taken to have revoked the earlier direction.
- (3) The President must, when performing the function or exercising the power, take into account:
 - (a) everything that occurred before the FWC; and
 - (b) everything that the FWC did;in relation to the matter before the President began to perform the function or exercise the power.

616 FWC's functions etc. that must be performed by a Full Bench

Modern awards

- (1) Subject to subsection 617(8), a modern award must be made under Part 2-3 by a Full Bench.

Note: Subsection 617(8) relates to modern awards that must be made by an Expert Panel.

- (2A) A 4 yearly review of default fund terms of modern awards must be conducted under Division 4A of Part 2-3 by a Full Bench.

- (3A) A determination that varies a default fund term of a modern award made in a 4 yearly review conducted under Division 4A of Part 2-3 must be made by a Full Bench.

Note: A determination that varies a default fund term of a modern award may be made by a single FWC Member under Division 5 of Part 2-3.

- (3B) Subject to subsection 617(8), a determination that revokes a modern award under Division 5 of Part 2-3 must be made by a Full Bench.

Note: Subsection 617(8) relates to determinations that must be made by an Expert Panel.

- (3C) Subject to subsection (3D) of this section and subsections 617(6), (8), (9) and (11), a determination that varies a modern award under Division 5 of Part 2-3 (other than a determination varying the

default fund term of a modern award under section 159A) must be made by a Full Bench.

Note: Subsections 617(6), (8), (9) and (11) relate to determinations that must be made by an Expert Panel.

- (3D) Subject to subsections 617(6), (8), (9) and (11), the President may direct a single FWC Member to perform a function or exercise a power:
- (a) under section 159, 160 or 161 (varying a modern award); or
 - (b) in relation to any other variation under section 157 that the President considers appropriate of:
 - (i) a modern award; or
 - (ii) if 2 or more modern awards relate to the same industry or occupation—those awards.

Note 1: The President may give directions as to the manner in which the FWC is to perform its functions or exercise its powers (see section 582).

Note 2: Subsections 617(6), (8), (9) and (11) relate to determinations and modern awards that must be made by an Expert Panel.

Workplace determinations

- (4) A workplace determination must be made under Part 2-5 by a Full Bench.

Full Benches

- (5) To avoid doubt, a reference in this section to a Full Bench includes a reference to more than one Full Bench.

Note: For the constitution of a Full Bench, see section 618.

617 FWC's functions etc. that must be performed by an Expert Panel

Expert Panel for annual wage reviews

- (1) An annual wage review must be conducted under Part 2-6 by an Expert Panel constituted for the purposes of the review.

Section 617

Note: For the constitution of an Expert Panel for the purposes of an annual wage review, see subsection 620(1).

- (2) A national minimum wage order, or a determination, made in an annual wage review must be made by an Expert Panel constituted for the purposes of the review.
- (3) A determination that varies a national minimum wage order must be made under Part 2-6 by an Expert Panel constituted for the purposes of the review.

Expert Panel for 4 yearly review of default fund terms

- (4) In a 4 yearly review of default fund terms of modern awards, the following must be made by an Expert Panel constituted for the purposes of the review:
 - (a) the Default Superannuation List;
 - (b) a determination under section 156E on an application to have a standard MySuper product included on the Default Superannuation List;
 - (c) the Schedule of Approved Employer MySuper Products;
 - (d) a determination under section 156P on an application made in the standard application period to have an employer MySuper product included on the Schedule of Approved Employer MySuper Products.

Note: For the constitution of an Expert Panel for those purposes, see subsection 620(1A).

Expert Panel for amending the Schedule of Approved Employer MySuper Products

- (5) If an application is made in the interim application period to have an employer MySuper product included on the Schedule of Approved Employer MySuper Products, the following must be made by an Expert Panel constituted for the purposes of determining the application:
 - (a) a determination under section 156P on the application;

- (b) if the determination is to include the product on the schedule—an amendment of the schedule to specify the product.

Note: For the constitution of an Expert Panel for those purposes, see subsection 620(1A).

Expert Panel for pay equity

- (6) If the President considers that substantive gender pay equity matters might require the making of a determination under subsection 157(2) (other than a determination that the President considers might relate to the Care and Community Sector), the determination must be made by an Expert Panel constituted for the purpose of deciding whether to make the determination.

Note: For the constitution of an Expert Panel for that purpose, see subsection 620(1B).

- (7) An equal remuneration order made under section 302 (other than an equal remuneration order that the President considers might relate to the Care and Community Sector) must be made by an Expert Panel constituted for the purpose of deciding whether to make the equal remuneration order.

Note: For the constitution of an Expert Panel for that purpose, see subsection 620(1B).

Expert Panel for the Care and Community Sector

- (8) A determination or modern award made under subsection 157(1) that the President considers might relate to the Care and Community Sector must be made by an Expert Panel constituted for the purpose of deciding whether to make the determination or modern award.

Note: For the constitution of an Expert Panel for that purpose, see subsection 620(1C).

Expert Panel for pay equity in the Care and Community Sector

- (9) A determination made under subsection 157(2) that the President considers might relate to the Care and Community Sector must be

Section 617AA

made by an Expert Panel constituted for the purpose of deciding whether to make the determination.

Note: For the constitution of an Expert Panel for that purpose, see subsection 620(1D).

- (10) An equal remuneration order made under section 302 that the President considers might relate to the Care and Community Sector must be made by an Expert Panel constituted for the purpose of deciding whether to make the equal remuneration order.

Note: For the constitution of an Expert Panel for that purpose, see subsection 620(1D).

President's considerations

- (10A) For the purposes of subsections (6), (7), (8), (9) and (10), if the President considers that an equal remuneration order, determination or modern award might relate to the Care and Community Sector, it does not matter if the President considers that the equal remuneration order, determination or modern award might also relate to another sector.

Other variations of modern awards

- (11) The President may direct an Expert Panel constituted for the purpose of performing a function or exercising a power under section 159, 160 or 161 (about variations of modern awards) to perform the function or exercise the power.

Note: For the constitution of an Expert Panel for that purpose, see subsection 620(1B), (1C) or (1D).

617AA Full Bench and Expert Panel with identical membership

- (1) This section applies if a Full Bench and an Expert Panel consist of the same FWC Members.
- (2) In performing its functions or exercising its powers, the Full Bench is not limited by:
- (a) the functions or powers of the Expert Panel; or
 - (b) the purposes for which the Expert Panel was constituted.

- (3) In performing its functions or exercising its powers, the Expert Panel is not limited by the functions or powers of the Full Bench.
- (4) Without limiting subsection (2) or (3), a reference in this section to performing a function or exercising a power includes a reference to the following:
 - (a) making a determination or modern award under subsection 157(1);
 - (b) making a determination under subsection 157(2);
 - (c) making an equal remuneration order under section 302;
 - (d) performing a function or exercising a power under section 159, 160 or 161 (about variations of modern awards).
- (5) This section is enacted for the avoidance of doubt.

617A President may direct investigations and reports

- (1) The President may give a direction under section 582 requiring that a matter that is relevant to the function of an Expert Panel constituted under subsection 620(1B), (1C) or (1D) be investigated, and that a report about the matter be prepared.

Note: Matters that may be relevant include gender pay equity, equal remuneration, and the Care and Community Sector, in Australia.

- (2) The direction may be given to:
 - (a) an Expert Panel; or
 - (b) an Expert Panel Member; or
 - (c) a Commissioner; or
 - (d) a Full Bench that includes one or more Expert Panel Members.

617B Research must be published

- (1) If the President gives a direction under section 617A requiring a matter to be investigated, and a report about the matter to be prepared, the FWC must publish the report so that submissions can be made addressing issues covered by the report.

- (2) The publication may be on the FWC's website or by any other means that the FWC considers appropriate.

Subdivision B—Constitution of the FWC by a single FWC Member, a Full Bench or an Expert Panel

618 Constitution and decision-making of a Full Bench

Constitution of a Full Bench

- (1) A Full Bench constituted under this section consists of at least 3 FWC Members, including at least one FWC Member who is the President, a Vice President or a Deputy President.

Note: An Expert Panel Member might form part of a Full Bench.

- (2) The President may determine which FWC Members form part of a Full Bench.

Making decisions

- (3) A decision of a majority of the FWC Members on the Full Bench prevails.
- (4) However, if there is no majority, the decision of the FWC Member who has seniority under section 619 prevails.

619 Seniority of FWC Members

- (1) While the FWC is constituted by a Full Bench, the FWC Members on the Full Bench have seniority according to the following order:
- (a) the President;
 - (aa) the Vice Presidents, according to the days on which their appointments as Vice Presidents took effect;
 - (ab) if 2 appointments as Vice Presidents took effect on the same day—the Vice Presidents, according to the precedence assigned to them in their instruments of appointment;
 - (b) the Deputy Presidents, according to the days on which their appointments as Deputy Presidents took effect;

- (c) if 2 or more appointments as Deputy Presidents took effect on the same day—the Deputy Presidents, according to the precedence assigned to them in their instruments of appointment.
- (2) The FWC Member on a Full Bench who has seniority under this section is responsible for managing the Full Bench in performing functions and exercising powers of the FWC.

Note: The FWC Member who has seniority also has a deciding vote if there is no majority (see subsection 618(4)).

620 Constitution and decision-making of an Expert Panel

Constitution of an Expert Panel for annual wage reviews

- (1) An Expert Panel constituted under this subsection for the purpose of an annual wage review conducted under Part 2-6 consists of 7 FWC Members (except as provided by section 622), and must include:
 - (a) the President; and
 - (b) 3 Expert Panel Members who have knowledge of, or experience in, one or more of the following fields:
 - (i) workplace relations;
 - (ii) economics;
 - (iii) social policy;
 - (iv) business, industry or commerce.

Constitution of an Expert Panel for 4 yearly reviews of default fund terms etc.

- (1A) An Expert Panel constituted under this subsection for a purpose referred to in subsection 617(4) or (5) consists of 7 FWC Members (except as provided by section 622), and must include:
 - (a) the President, or a Vice President or Deputy President appointed by the President to be the Chair of the Panel; and
 - (b) 3 Expert Panel Members who have knowledge of, or experience in, one or more of the following fields:

Section 620

- (i) finance;
- (ii) investment management;
- (iii) superannuation.

Constitution of Expert Panel for pay equity

- (1B) An Expert Panel constituted under this subsection for a purpose referred to in subsection 617(6), (7) or (11) or section 617A must include (except as provided by section 622):
- (a) the President, or a Vice President or Deputy President appointed by the President to be the Chair of the Panel; and
 - (b) at least 2 Expert Panel Members or other FWC Members who have knowledge of, or experience in, one or both of the following fields:
 - (i) gender pay equity;
 - (ii) anti-discrimination; and
 - (c) subject to subsection (2A), such number (if any) of other FWC Members as the President considers appropriate.

Constitution of Expert Panel for the Care and Community Sector

- (1C) An Expert Panel constituted under this subsection for a purpose referred to in subsection 617(8) or (11) or section 617A must include (except as provided by section 622):
- (a) the President, or a Vice President or Deputy President appointed by the President to be the Chair of the Panel; and
 - (b) at least 2 Expert Panel Members or other FWC Members who have knowledge of, or experience in, the Care and Community Sector; and
 - (c) subject to subsection (2A), such number (if any) of other FWC Members as the President considers appropriate.

Constitution of Expert Panel for pay equity in the Care and Community Sector

- (1D) An Expert Panel constituted under this subsection for a purpose referred to in subsection 617(9), (10) or (11) or section 617A must include (except as provided by section 622):
- (a) the President, or a Vice President or Deputy President appointed by the President to be the Chair of the Panel; and
 - (b) at least one Expert Panel Member or other FWC Member who has knowledge of, or experience in, one or both of the following fields:
 - (i) gender pay equity;
 - (ii) anti-discrimination; and
 - (c) at least one Expert Panel Member or other FWC Member who has knowledge of, or experience in, the Care and Community Sector; and
 - (d) subject to subsection (2A), such number (if any) of other FWC Members as the President considers appropriate.

President to choose FWC Members

- (2) The President may determine which FWC Members form part of an Expert Panel.

Expert Panels to consist of majority of qualified FWC Members

- (2A) The President must ensure that an Expert Panel constituted under subsection (1B), (1C) or (1D) consists of a majority of FWC Members who have the knowledge or experience required under paragraph 620(1B)(b), paragraph (1C)(b) or paragraphs (1D)(b) and (c) (as the case may be).

Managing Expert Panels

- (3) The following person is responsible for managing an Expert Panel in performing the functions and exercising the powers referred to in section 617:
- (a) if paragraph (b) does not apply—the President;

Section 621

- (b) if the President has appointed a person to be the Chair of the Expert Panel under paragraph 620(1A)(a), (1B)(a), (1C)(a) or (1D)(a)—the Chair.

Making decisions

- (4) A decision of the majority of the FWC Members of an Expert Panel prevails.
- (5) However, if there is no majority, the decision of:
 - (a) if paragraph (b) does not apply—the President; or
 - (b) if the President has appointed a person to be the Chair of the Expert Panel under paragraph 620(1A)(a), (1B)(a), (1C)(a) or (1D)(a)—the Chair;prevails.

621 Reconstitution of the FWC when single FWC Member becomes unavailable

- (1) This section applies if:
 - (a) an FWC Member is dealing with a matter (other than by forming part of a Full Bench or an Expert Panel in relation to a matter); and
 - (b) the FWC Member becomes unavailable to continue dealing with the matter before the matter is completely dealt with.
- (2) The President must direct another FWC Member to constitute the FWC for the purposes of dealing with the matter.

Note: The new FWC Member must take into account everything that happened before the FWC Member began to deal with the matter (see section 623).

622 Reconstitution of the FWC when FWC Member of a Full Bench or an Expert Panel becomes unavailable

- (1) This section applies if:
 - (a) an FWC Member (the *unavailable member*) forms part of a Full Bench or an Expert Panel in relation to a matter; and

- (b) the FWC Member becomes unavailable to continue dealing with the matter before the matter is completely dealt with.
- (2) The Full Bench or the Expert Panel may continue to deal with the matter without the unavailable member if the Full Bench or the Expert Panel consists of the following:
 - (a) for an Expert Panel other than an Expert Panel referred to in paragraph (aa)—the President and at least 2 Expert Panel Members;
 - (aa) for an Expert Panel constituted under subsection 620(1B), (1C) or (1D)—at least 3 FWC Members, of whom:
 - (i) at least one FWC Member is the President, a Vice President or a Deputy President; and
 - (ii) a majority of the FWC Members have the knowledge or experience required under paragraph 620(1B)(b), paragraph (1C)(b) or paragraphs (1D)(b) and (c) (as the case may be);
 - (b) for a Full Bench—at least 3 FWC Members, including at least one FWC Member who is the President, a Vice President or a Deputy President.
- (3) Otherwise, the President must direct another FWC Member to form part of the Full Bench or the Expert Panel. After the President does so, the Full Bench or the Expert Panel may continue to deal with the matter without the unavailable member.

Note: The new FWC Member must take into account everything that happened before the FWC Member began to deal with the matter (see section 623).
- (4) For the purposes of subsection (3), if the President is directing an FWC member to form part of an Expert Panel constituted under subsection 620(1B), (1C) or (1D), the President must give preference to directing an FWC member that has the knowledge or experience required under paragraph 620(1B)(b), paragraph (1C)(b) or paragraphs (1D)(b) and (c) (as the case may be).

623 When new FWC Members begin to deal with matters

If an FWC Member begins to deal with a matter under section 621 or 622, the FWC Member must take into account everything that occurred before the FWC, and everything that the FWC did, in relation to the matter before the FWC Member began to deal with the matter.

624 FWC's decisions not invalid when improperly constituted

A decision of the FWC is not invalid merely because it was made by a Full Bench, or an Expert Panel, constituted otherwise than as provided by this Division.

Note: If the FWC makes a decision to make an instrument while constituted otherwise than as provided by this Division, the instrument is not invalid (see subsection 598(2)).

Subdivision C—Delegation of the FWC's functions and powers

625 Delegation by the President of functions and powers of the FWC

- (1) The President may, in writing, delegate all or any of the following powers of the FWC to the General Manager or a member of the staff of the FWC:
 - (a) correcting or amending applications and documents, or waiving irregularities, under section 586;
 - (b) informing itself as it considers appropriate under section 590 (other than the FWC's power to hold a hearing);
 - (c) conducting a conference in accordance with section 592;
 - (d) correcting or amending obvious errors, defects or irregularities under section 602.
- (2) The President may, in writing, delegate all or any of the following functions or powers of the FWC to a person referred to in subsection (3):
 - (a) publishing varied modern awards under section 168;
 - (b) publishing submissions under section 289;
 - (c) publishing research under section 291;

- (d) publishing varied wage rates under section 292;
 - (da) publishing the results of a protected action ballot under section 457;
 - (f) imposing conditions on entry permits, revoking or suspending entry permits, or banning the issue of any further entry permits, under section 507 or 510;
 - (g) the functions and powers of the FWC under Division 6 of Part 3-4 (which deals with entry permits, entry notices and certificates);
 - (h) publishing enterprise agreements under paragraph 601(4)(b);
 - (i) any function or power prescribed by the regulations.
- (3) The people to whom a delegation may be given under subsection (2) are any of the following:
- (a) the General Manager;
 - (b) a member of the staff of the FWC who is an SES employee or acting SES employee;
 - (c) a member of the staff of the FWC who is in a class of employees prescribed by the regulations.
- (4) In performing functions or exercising powers under a delegation under subsection (1) or (2), the delegate must comply with any directions of the President.

Note: See also sections 34AA and 34AB of the *Acts Interpretation Act 1901*.

Division 5—FWC Members

Subdivision A—Appointment of FWC Members

626 Appointment of FWC Members

- (1) An FWC Member is to be appointed by the Governor-General by written instrument.
- (2) The instrument of appointment must specify whether the FWC Member is the President, a Vice President, a Deputy President, a Commissioner or an Expert Panel Member.
- (3) The instrument of appointment must assign a precedence to the FWC Member if:
 - (a) the FWC Member and one other FWC Member are appointed as Vice Presidents on the same day; or
 - (b) the FWC Member and one or more other FWC Members are appointed as Deputy Presidents on the same day.

Note: Precedence is relevant to the seniority of Vice Presidents and Deputy Presidents (see paragraphs 619(1)(ab) and (c)).

- (4) The same person must not hold, at the same time, an appointment as both:
 - (a) an Expert Panel Member; and
 - (b) the President, a Vice President, a Deputy President or a Commissioner.

627 Qualifications for appointment of FWC Members

President and Vice Presidents

- (1) Before the Governor-General appoints a person as the President or a Vice President, the Minister must be satisfied that the person:
 - (a) is or has been a Judge of a court created by the Parliament; or

- (b) is qualified for appointment because the person has knowledge of, or experience in, one or more of the following fields:
 - (i) workplace relations;
 - (ii) law;
 - (iii) business, industry or commerce.
- (1A) Paragraph (1)(a) does not apply to a person who is a Judge of the Federal Circuit and Family Court of Australia (Division 2).

Deputy Presidents

- (2) Before the Governor-General appoints a person as a Deputy President, the Minister must be satisfied that the person:
 - (a) either:
 - (i) is or has been a Judge of a court created by the Parliament; or
 - (ii) has been a Judge of a court of a State or Territory; or
 - (b) has a high level of experience in the field of workplace relations, including a high level of experience that has been acquired:
 - (i) through legal practice; or
 - (ii) in the service of a peak council or another association representing the interests of employers or employees; or
 - (iii) in the service of government or an authority of government; or
 - (iv) in academia.
- (2A) Subparagraph (2)(a)(i) does not apply to a person who is a Judge of the Federal Circuit and Family Court of Australia (Division 2).

Commissioners

- (3) Before the Governor-General appoints a person as a Commissioner, the Minister must be satisfied that the person is qualified for appointment because the person has knowledge of, or experience in, one or more of the following fields:

Section 628

- (a) workplace relations;
- (b) law;
- (c) business, industry or commerce.

Expert Panel Members

- (4) Before the Governor-General appoints a person as an Expert Panel Member, the Minister must be satisfied that the person is qualified for appointment because the person has knowledge of, or experience in, one or more of the following fields:
 - (a) workplace relations;
 - (b) economics;
 - (c) social policy;
 - (d) business, industry or commerce;
 - (e) finance;
 - (f) investment management;
 - (g) superannuation;
 - (h) gender pay equity;
 - (i) anti-discrimination;
 - (j) the Care and Community Sector.

628 Basis of appointment of FWC Members

President, Vice Presidents, Deputy Presidents and Commissioners

- (1) The President, a Vice President, a Deputy President or a Commissioner holds office on a full-time basis.
- (2) A Deputy President or a Commissioner may perform his or her duties on a part-time basis, with the President's approval.

Expert Panel Members

- (3) An Expert Panel Member holds office on a part-time basis.

629 Period of appointment of FWC Members

President, Vice Presidents, Deputy Presidents and Commissioners

- (1) The President, a Vice President, a Deputy President or a Commissioner holds office until the earliest of the following:
- (a) he or she attains the age of 65 years;
 - (b) he or she resigns or the appointment is terminated under this Part.

Members of a prescribed State industrial authority

- (2) Despite subsection (1), a person who is a member of a prescribed State industrial authority may be appointed as a Deputy President or Commissioner for a period specified in the instrument of appointment.

Note: A member of a prescribed State industrial authority may hold office as a Deputy President or Commissioner (see section 631).

- (3) If a person is so appointed, the person holds office as Deputy President or Commissioner until the earliest of the following:
- (a) the specified period ends;
 - (b) the person ceases to be a member of the prescribed State industrial authority;
 - (c) the person resigns or the appointment is terminated under this Part.

Expert Panel Members

- (4) An Expert Panel Member holds office for the period specified in the instrument of appointment. The period must not exceed 5 years.

Note: An Expert Panel Member is eligible for reappointment (see subsection 33(4A) of the *Acts Interpretation Act 1901*).

Subdivision B—Terms and conditions of FWC Members

629A Status of the President

The President has the same status as a Judge of the Federal Court.

630 Appointment of a Judge not to affect tenure etc.

- (1) The appointment of a Judge of a court created by the Parliament as an FWC Member, or service by such a Judge as an FWC Member, does not affect:
 - (a) the Judge's tenure of office as a Judge; or
 - (b) the Judge's rank, title, status, precedence, salary, annual or other allowances or other rights or privileges as the holder of his or her office as a Judge.
- (2) For all purposes, the Judge's service as the FWC Member is taken to be service as a Judge.

631 Dual federal and State appointments of Deputy Presidents or Commissioners

- (1) Nothing in this Act prevents a Deputy President or Commissioner from being appointed to, and holding at the same time, an office as a member of a prescribed State industrial authority, with the President's approval.
- (2) Nothing in this Act prevents a member of a prescribed State industrial authority from being appointed to, and holding at the same time, an office as a Deputy President or Commissioner.

Note 1: A member of a prescribed State industrial authority may hold office as a Deputy President or Commissioner only if he or she is qualified for appointment (see section 627).

Note 2: For the period of appointment, and remuneration and allowances, of a Deputy President or Commissioner who is a member of a prescribed State industrial authority, see sections 629 and 637.

- (3) Subsections (1) and (2) have effect subject to any law of the relevant State.

632 Dual federal and Territory appointments of Deputy Presidents or Commissioners

Nothing in this Act prevents a Deputy President or Commissioner from being appointed to, and holding at the same time, one of the following offices, with the President's approval:

- (a) an office as a member of a Commonwealth or Territory tribunal prescribed by the regulations (other than a court);
- (b) an office under a Commonwealth or Territory law.

633 Outside work of FWC Members

Vice Presidents, Deputy Presidents and Commissioners

- (1) A Vice President, Deputy President or Commissioner (whether performing duties on a full-time or part-time basis) must not engage in paid work outside the duties of his or her office without the President's approval.
- (2) However, the President's approval is not required if the paid work is an office or appointment in the Defence Force.

Expert Panel Members

- (3) An Expert Panel Member must not engage in any paid work that, in the President's opinion, conflicts or may conflict with the proper performance of his or her duties.

634 Oath or affirmation of office

Before beginning to discharge the duties of his or her office, an FWC Member must take an oath or affirmation in accordance with the regulations.

635 Remuneration of the President

Remuneration if the President is not a Judge

- (1) The President (other than a President who is a Judge of a court created by the Parliament) is to be paid:
 - (a) salary at an annual rate equal to the annual rate of salary payable to the Chief Justice of the Federal Court; and
 - (b) such travelling allowances as are determined from time to time by the Remuneration Tribunal; and
 - (c) such other allowances as are prescribed by the regulations.

Remuneration if the President is a Judge

- (2) A President who is a Judge of a court created by the Parliament must be paid an additional allowance, in accordance with subsection (3), if the salary payable to the person as a Judge is less than the salary that would be payable to the person as President under subsection (1).
- (3) The amount of the allowance is the difference between the Judge's salary and the salary that is payable to the President under subsection (1).

Additional amount

- (4) The President or a former President must be paid an amount in accordance with subsection 7(5E) of the *Remuneration Tribunal Act 1973* if the President, or former President, would be entitled to that amount had the President or former President held the office of Chief Justice of the Federal Court instead of the office of President.

636 Application of Judges' Pensions Act to the President

- (1) The *Judges' Pensions Act 1968* does not apply to the President if:
 - (a) immediately before being appointed as the President, he or she was one of the following (a ***public sector superannuation scheme member***):

- (i) an eligible employee for the purposes of the *Superannuation Act 1976*;
 - (ii) a member of the superannuation scheme established by deed under the *Superannuation Act 1990*;
 - (iii) an ordinary employer-sponsored member of PSSAP (within the meaning of the *Superannuation Act 2005*); and
 - (b) he or she does not make an election under subsection (2).
- (2) The President may elect to cease to be a public sector superannuation scheme member.
- (3) The election must be made:
- (a) within 3 months of the President's appointment; and
 - (b) by written notice to the Minister.
- (4) If the President makes the election:
- (a) he or she is taken to have ceased to be a public sector superannuation scheme member immediately before being appointed as the President; and
 - (b) the *Judges' Pensions Act 1968* applies to him or her, and is taken to have so applied, immediately after he or she was appointed as the President.

637 Remuneration of FWC Members other than the President

Remuneration if an FWC Member is not a Judge

- (1) An FWC Member (other than an FWC Member who is a Judge of a court created by the Parliament) is to be paid the remuneration that is determined by the Remuneration Tribunal. If no determination of that remuneration by the Tribunal is in operation, the FWC Member is to be paid the remuneration that is prescribed by the regulations.
- (2) An FWC Member is to be paid the allowances that are prescribed by the regulations.

Section 638

- (3) Subsections (1) and (2) have effect subject to the *Remuneration Tribunal Act 1973* and to section 638 (which deals with remuneration of part-time Deputy Presidents and Commissioners).
- (4) Despite subsections (1) to (3), if a person who is a member of a prescribed State industrial authority is appointed as a Deputy President or Commissioner, the person is not to be paid any remuneration or allowances in relation to the office of Deputy President or Commissioner other than any travel allowance prescribed under subsection (2).

Remuneration if an FWC Member is a Judge

- (5) An FWC Member who is a Judge (other than the Chief Justice of the Federal Court) of a court created by the Parliament is to be paid an additional allowance, in accordance with subsection (6), if the salary payable to the person as a Judge is less than the salary that would be payable to the person as an FWC Member under subsection (1).
- (6) The amount of the allowance is the difference between the Judge's salary and the salary that is payable to the FWC Member under subsection (1).

Section does not apply to the President

- (7) This section does not apply to the President.

638 Remuneration of Deputy Presidents or Commissioners performing duties on a part-time basis

- (1) If the President approves a Deputy President or Commissioner (the ***part-time member***) performing his or her duties on a part-time basis, the President and the part-time member are to enter into a written agreement specifying the proportion (the ***agreed proportion***) of full-time duties to be worked by the part-time member.
- (2) The agreed proportion may be varied by a written agreement between the President and the part-time member.

- (3) The part-time member's annual rate of salary at a particular time is equal to the agreed proportion at that time of the annual rate of salary that would be payable to the part-time member if he or she were performing his or her duties on a full-time basis.
- (4) The allowances that are to be paid to the part-time member under section 637 are not affected by this section.

639 Leave of absence of FWC Members other than the President

- (1) An FWC Member has the recreation leave entitlements that are determined by the Remuneration Tribunal.
- (2) The President may grant an FWC Member leave of absence, other than recreation leave, on the terms and conditions as to remuneration or otherwise as the President determines.
- (3) In making a determination in accordance with this section, the Remuneration Tribunal and the President must take into account:
 - (a) any past employment of the FWC Member in the service of a State or an authority of a State; or
 - (b) any past service of the FWC Member as a member of an authority of a State.
- (4) This section does not apply to the President.

640 Disclosure of interests by FWC Members other than the President

- (1) This section applies if:
 - (a) an FWC Member (other than the President) is dealing, or will deal, with a matter; and
 - (b) the FWC Member has or acquires any interest (the *potential conflict*), pecuniary or otherwise, that conflicts or could conflict with the proper performance of the FWC Member's functions in relation to the matter.
- (2) The FWC Member must disclose the potential conflict to:

Section 641

- (a) a person who has made, or will make, a submission for consideration in the matter; and
 - (b) a person who the FWC Member considers is likely to make a submission for consideration in the matter; and
 - (c) the President.
- (4) The President must give a direction to the FWC Member not to deal, or to no longer deal, with the matter if:
 - (a) the President becomes aware that an FWC Member has a potential conflict in relation to a matter (whether or not because of a disclosure under subsection (2)); and
 - (b) the President considers that the FWC Member should not deal, or should no longer deal, with the matter.

641 Termination of appointment on grounds of misbehaviour or incapacity

The Governor-General may terminate the appointment of an FWC Member if an address praying for the termination, on one of the following grounds, is presented to the Governor-General by each House of the Parliament in the same session:

- (a) proved misbehaviour;
- (b) the FWC Member is unable to perform the duties of his or her office because of physical or mental incapacity.

641A Minister may handle complaints about FWC Members

The Minister may handle a complaint about the performance by an FWC Member of his or her duties:

- (a) for the purpose of considering whether each House of the Parliament should consider whether to present to the Governor-General an address praying for the termination of the appointment of the FWC Member; and
- (b) for the purpose of considering whether to advise the Governor-General to suspend the FWC Member.

Section 641B

- Note 1: The appointment of an FWC Member may be terminated under section 641 if each House of the Parliament presents such an address to the Governor-General.
- Note 2: The FWC Member may be suspended under section 642.
- Note 3: The complaint is a **complaint about an FWC Member** (see section 12).
- Note 4: For protections for persons involved in relation to handling a complaint about an FWC Member, see section 584B.

641B Modified application of the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012*

- (1) The object of this section is to modify the application of the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (the **JMIPC Act**) so as to allow a Commission to be established by the Houses of Parliament to investigate and report on alleged misbehaviour or incapacity of an FWC Member, so the Houses can be well-informed to consider whether to pray for:
- (a) the termination of the FWC Member's appointment under section 641; or
 - (b) the removal of the FWC Member from office under section 82 or 86 of the WR Act (within the meaning of the Transitional Act), as those sections continue to apply because of the operation of item 2 of Schedule 18 to the Transitional Act.
- (2) The JMIPC Act applies, in addition to its general application, as if a provision of that Act referred to in an item in column 1 of the following table were amended as specified in column 2 of the item.

Section 641B

Modified application of the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012*

Item	Column 1 Provision of the JMIPC Act	Column 2 Amendment
1	Subsection 3(1)	Omit “a Commonwealth judicial officer”, substitute “an FWC Member”.
2	Subsection 3(1)	Omit all the words after “whether to”, substitute: “pray for: (a) for a non-transitioned FWC Member—the termination of the FWC Member’s appointment under section 641 of the FW Act; or (b) for a transitioned FWC Member—the removal of the FWC Member from office under section 82 or 86 of the WR Act (as those sections continue to apply because of the operation of item 2 of Schedule 18 to the FW Transitional Act).”.
3	Paragraph 3(2)(b)	Omit “removal of a Commonwealth judicial officer under paragraph 72(ii) of the Constitution”, substitute “termination of appointment or removal from office of an FWC Member under the relevant provisions referred to in subsection (1)”.
4	Section 4	Omit “a Commonwealth judicial officer (that is, a High Court judge or a judge of the Federal Court of Australia, the Federal Circuit and Family Court of Australia (Division 1) or the Federal Circuit and Family Court of Australia (Division 2))”, substitute “an FWC Member”.

Section 641B

Modified application of the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012*

Item	Column 1 Provision of the JMIPC Act	Column 2 Amendment
5	Section 4	Omit “removal of the judicial officer, the judicial officer may be removed by the Governor-General in Council in accordance with paragraph 72(ii) of the Constitution”, substitute “termination of appointment or removal from office of the FWC Member, the FWC Member’s appointment may be terminated, or the FWC Member may be removed from office, by the Governor-General in Council under the applicable provisions of the FW Act or the WR Act”.
6	Section 7	Insert: <i>FW Act</i> means the <i>Fair Work Act 2009</i> . <i>FWC Member</i> has the same meaning as in the FW Act and includes a transitioned FWC Member. <i>FW Transitional Act</i> means the <i>Fair Work (Transitional Provisions and Consequential Amendments) Act 2009</i> .
7	Section 7 (definition of <i>incapacity</i>)	Omit the definition (including the note), substitute: <i>incapacity</i> : (a) in relation to the termination of appointment of a non-transitioned FWC Member under section 641 of the FW Act—has the same meaning as in that section; and (b) in relation to the removal of a transitioned FWC Member from office under section 82 of the WR Act (as that section continues to apply because of the operation

Section 641B

Modified application of the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012*

Item	Column 1 Provision of the JMIPC Act	Column 2 Amendment
		<p>of item 2 of Schedule 18 to the FW Transitional Act)—has the same meaning as in that section; and</p> <p>(c) in relation to the removal of a transitioned FWC Member from office under section 86 of the WR Act (as that section continues to apply because of the operation of item 2 of Schedule 18 to the FW Transitional Act)—has the same meaning as in that section; and</p> <p>(d) in relation to the termination of appointment of a member of the Commission under section 73 of this Act—has its ordinary meaning.</p>
8	Section 7 (definition of <i>misbehaviour</i>)	<p>Omit the definition (including the note), substitute:</p> <p><i>misbehaviour</i>:</p> <p>(a) in relation to the termination of appointment of a non-transitioned FWC Member under section 641 of the FW Act—has the same meaning as in that section; and</p> <p>(b) in relation to the removal of a transitioned FWC Member from office under section 82 of the WR Act (as that section continues to apply because of the operation of item 2 of Schedule 18 to the FW Transitional Act)—has the same meaning as in that section; and</p> <p>(c) in relation to the removal of a transitioned FWC Member from office under section 86 of the WR Act (as that section continues to apply because of the operation of item 2 of Schedule 18 to the FW</p>

Section 641B

Modified application of the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012*

Item	Column 1 Provision of the JMIPC Act	Column 2 Amendment
		Transitional Act)—has the same meaning as in that section; and (d) in relation to the termination of appointment of a member of the Commission under section 73 of this Act—has its ordinary meaning.
9	Section 7	Insert: <i>non-transitioned FWC Member</i> means an FWC Member who is not a transitioned FWC Member.
10	Section 7 (definition of <i>proved</i>)	Omit the definition, substitute: <i>proved</i> : (a) in relation to the termination of appointment of a non-transitioned FWC Member for misbehaviour under paragraph 641(a) of the FW Act—has the same meaning as in that paragraph; and (b) in relation to the termination of appointment of a non-transitioned FWC Member for incapacity under paragraph 641(b) of the FW Act—means the grounds referred to in that paragraph are established; and (c) in relation to the removal of a transitioned FWC Member from office for misbehaviour or incapacity under section 82 of the WR Act (as that section continues to apply because of the operation of item 2 of Schedule 18 to the FW Transitional Act)—has the same meaning as in that section; and (d) in relation to the removal of a transitioned FWC Member from office for

Section 641B

Modified application of the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012*

Item	Column 1 Provision of the JMIPC Act	Column 2 Amendment
		misbehaviour or incapacity under section 86 of the WR Act (as that section continues to apply because of the operation of item 2 of Schedule 18 to the FW Transitional Act)—has the same meaning as in that section.
11	Section 7	Insert: <i>transitioned FWC Member</i> means a person who is taken to be appointed as an FWA Member under item 1 of Schedule 18 to the FW Transitional Act. <i>WR Act</i> has the same meaning as in the FW Transitional Act. <i>WR Act repeal day</i> has the same meaning as in the FW Transitional Act.
12	Section 8	Omit “a Commonwealth judicial officer”, substitute “an FWC Member”.
13	Section 8	Omit “removal of the judicial officer, the judicial officer may be removed by the Governor-General in Council in accordance with paragraph 72(ii) of the Constitution”, substitute “termination of appointment or removal from office of the FWC Member, the FWC Member’s appointment may be terminated, or the FWC Member may be removed from office, by the Governor-General in Council under the applicable provisions of the FW Act or the WR Act”.
14	Subsection 9(1)	Omit “Commonwealth judicial officer”, substitute “FWC Member”.

Section 641B

Modified application of the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012*

Item	Column 1 Provision of the JMIPC Act	Column 2 Amendment
15	Subsection 9(1) (note 2)	Omit “Commonwealth judicial officer”, substitute “FWC Member”.
16	Paragraph 16(1)(b)	Omit “a Commonwealth judicial officer”, substitute “an FWC Member”.
17	Subsection 19(6)	After paragraph 19(6)(c), insert: (ca) an investigation into a complaint about an FWC Member; and
18	Subsection 20(2)	Omit “a Commonwealth judicial officer”, substitute “an FWC Member”.
19	Subsection 20(2)	Omit “the Commonwealth judicial officer” (wherever occurring), substitute “the FWC Member”.
20	Section 21	Omit “a Commonwealth judicial officer” (wherever occurring), substitute “an FWC Member”.
21	Paragraph 23(3)(a)	Omit “Commonwealth judicial officer to whom the investigation relates to perform his or her duties as such an officer”, substitute “FWC Member to whom the investigation relates to perform his or her duties as an FWC Member”.
22	Paragraph 23(3)(b) and subparagraph 23(3)(c)(i)	Omit “judiciary”, substitute “Fair Work Commission”.
23	Subparagraph 23(3)(c)(ii)	Omit “Commonwealth judicial officer”, substitute “FWC Member”.
24	Subsection 24(4) (heading)	Omit “ <i>Commonwealth judicial officer</i> ”, substitute “ <i>FWC Member</i> ”.
25	Subsections 24(4) and (5)	Omit “Commonwealth judicial officer” (wherever occurring), substitute “FWC Member”.

Section 642

Modified application of the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012*

Item	Column 1 Provision of the JMIPC Act	Column 2 Amendment
26	Paragraph 24(7)(c)	Omit “Commonwealth judicial officer”, substitute “FWC Member”.
27	Subdivision D of Division 2 of Part 3 (heading)	Omit “ Commonwealth judicial officer ”, substitute “ FWC Member ”.
28	Section 45 (heading)	Omit “ Commonwealth judicial officer ”, substitute “ FWC Member ”.
29	Subsections 45(1) and 46(2)	Omit “Commonwealth judicial officer”, substitute “FWC Member”.

642 Suspension on grounds of misbehaviour or incapacity

Governor-General may suspend an FWC Member

- (1) The Governor-General may suspend an FWC Member (other than the President) from office:
 - (a) for misbehaviour; or
 - (b) if the FWC Member is unable to perform the duties of his or her office because of physical or mental incapacity.

Statement of grounds

- (2) The Minister must cause to be tabled in each House of Parliament, within 7 sitting days of that House after the suspension, a statement identifying the FWC Member and setting out the ground of the suspension.

Resolution by a House of Parliament

- (3) A House of the Parliament may, within 15 sitting days of that House after the day on which the statement has been tabled in it,

declare by resolution that the appointment of the FWC Member should be terminated.

Suspension terminates

- (4) If a House does not pass a resolution in that way, the suspension terminates.

Appointment to be terminated

- (5) If each House of the Parliament passes a resolution in that way, the Governor-General must terminate the appointment of the FWC Member.

Suspension not to affect entitlements

- (6) The suspension of an FWC Member under this section does not affect any entitlement of the FWC Member to be paid remuneration, and allowances, in accordance with this Act.

643 Termination of appointment for bankruptcy, etc.

The Governor-General must terminate the appointment of an FWC Member (other than the President) if:

- (a) the FWC Member becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors, or makes an assignment of his or her remuneration for the benefit of his or her creditors; or
- (b) the FWC Member is absent, except on leave of absence, for 14 consecutive days or for 28 days in any 12 months.

644 Termination of appointment for outside work

Vice Presidents, Deputy Presidents and Commissioners

- (1) The Governor-General must terminate the appointment of a Vice President, Deputy President or Commissioner if the Vice President, Deputy President or Commissioner engages, except with the

Section 645

President's approval, in paid work outside the duties of his or her office (see subsection 633(1)).

Expert Panel Members

- (2) The Governor-General must terminate the appointment of an Expert Panel Member if the Expert Panel Member engages in paid work that, in the President's opinion, conflicts or may conflict with the proper performance of his or her duties (see subsection 633(3)).

645 Resignation of FWC Members

- (1) An FWC Member may resign his or her appointment by giving the Governor-General a written resignation.
- (2) The resignation takes effect on the day it is received by the Governor-General or, if a later day is specified in the resignation, on that later day.

646 Other terms and conditions of FWC Members

An FWC Member holds office on the terms and conditions (if any) in relation to matters not covered by this Act that are determined by the Governor-General.

647 Appointment of acting President and Vice President

Appointment by Governor-General

- (1) The Governor-General may, by written instrument, appoint a Vice President to act as the President:
 - (a) during a vacancy in the office of the President (whether or not an appointment has previously been made to the office); or
 - (b) during any period, or during all periods, when the President is absent from duty or from Australia, or is, for any reason, unable to perform the duties of the office.

Note: See also section 33A of the *Acts Interpretation Act 1901*, which contains extra rules about acting appointments.

- (1A) The Governor-General may, by written instrument, appoint a Deputy President to act as a Vice President:
- (a) during a vacancy in the office of a Vice President (whether or not an appointment has previously been made to the office); or
 - (b) during any period, or during all periods, when a Vice President is absent from duty or from Australia, or is, for any reason, unable to perform the duties of the office.

Note: See also section 33A of the *Acts Interpretation Act 1901*, which contains extra rules about acting appointments.

No invalidity

- (2) Anything done by or in relation to a person purporting to act under an appointment is not invalid merely because:
- (a) the occasion for the appointment had not arisen; or
 - (b) there was a defect or irregularity in connection with the appointment; or
 - (c) the appointment had ceased to have effect; or
 - (d) the occasion for the person to act had not arisen or had ceased.

Not disqualified

- (3) A person is not disqualified from being appointed under subsection (1) or (1A) merely because the person is over 65.

648 Appointment of acting Deputy Presidents and Commissioners

Appointment by Governor-General

- (1) The Governor-General may, by written instrument, appoint a person who is qualified for appointment as a Deputy President to act as a Deputy President for a specified period (including a period that exceeds 12 months).

Note: See also section 33A of the *Acts Interpretation Act 1901*, which contains extra rules about acting appointments.

Section 648

- (1A) The Governor-General may, by written instrument, appoint a person who is qualified for appointment as a Commissioner to act as a Commissioner for a specified period (including a period that exceeds 12 months).

Note: See also section 33A of the *Acts Interpretation Act 1901*, which contains extra rules about acting appointments.

- (2) Before the Governor-General appoints a person under subsection (1) or (1A), the Minister must be satisfied that the appointment is necessary to enable the FWC to perform its functions effectively.

No invalidity

- (3) Anything done by or in relation to a person purporting to act under an appointment is not invalid merely because:
- (a) the occasion for the appointment had not arisen; or
 - (b) there was a defect or irregularity in connection with the appointment; or
 - (c) the appointment had ceased to have effect; or
 - (d) the occasion for the person to act had not arisen or had ceased.

Not disqualified

- (4) A person is not disqualified from being appointed under subsection (1) or (1A) merely because the person is over 65.

Division 6—Cooperation with the States

649 President to cooperate with prescribed State industrial authorities

- (1) The President must perform his or her functions, and exercise his or her powers, in a manner that facilitates and encourages cooperation between the FWC and prescribed State industrial authorities.
- (2) Without limiting subsection (1), the President may invite the heads of prescribed State industrial authorities, or the principal registrars of prescribed State industrial authorities, to meet with the President to exchange information and discuss matters of mutual interest in relation to workplace relations.

650 Provision of administrative support

The President may make a written arrangement with a prescribed State industrial authority for:

- (a) the FWC to provide administrative support to the authority;
or
- (b) the authority to provide administrative support to the FWC.

Division 7—Seals and additional powers and functions of the President and the General Manager

651 Seals

Seal of the FWC

- (1) The FWC must have a seal on which are inscribed the words “The Seal of the Fair Work Commission”.

Duplicate seals

- (2) There are to be such duplicates of the seal of the FWC as the President directs.

Note: The President gives directions under section 582.

- (3) A document to which a duplicate seal of the FWC is affixed is taken to have the seal of the FWC affixed to it.

Custody and use of the seal of the FWC and duplicate seals

- (4) The seal of the FWC, and the duplicates of that seal, are to be kept in such custody as the President directs and must not be used except as authorised by the President.

Note: The President gives directions under section 582.

Judicial notice of the seal of the FWC

- (5) All courts, judges and persons acting judicially must:
 - (a) take judicial notice of the imprint of the seal of the FWC appearing on a document; and
 - (b) presume that the document was duly sealed.

652 Annual report

- (1) The President must, as soon as practicable after the end of each financial year, prepare a report on the operations of the FWC during that year.

Note 1: See also section 34C of the *Acts Interpretation Act 1901*, which contains extra rules about annual reports.

Note 2: The report prepared by the General Manager and given to the Minister under section 46 of the *Public Governance, Performance and Accountability Act 2013* may be included in the report prepared under this section. Section 329D of the Registered Organisations Act sets out additional requirements for the General Manager's report.

- (1A) A report prepared after the end of a financial year must be given to the Minister by 15 October in the next financial year for presentation to the Parliament.
- (2) To avoid doubt, subsection (1) does not require or authorise the disclosure of information for the purposes of the *Privacy Act 1988*.

653 Reports about making enterprise agreements, individual flexibility arrangements etc.

Review and research

- (1) The General Manager must:
- (a) review the developments, in Australia, in making enterprise agreements; and
 - (b) conduct research into the extent to which individual flexibility arrangements under modern awards and enterprise agreements are being agreed to, and the content of those arrangements; and
 - (c) conduct research into the operation of the provisions of the National Employment Standards relating to:
 - (i) requests for flexible working arrangements under subsection 65(1); and
 - (ii) requests for extensions of unpaid parental leave under subsection 76(1); and

Section 653

- (d) conduct research into:
 - (i) the circumstances in which employees make such requests; and
 - (ii) the outcome of such requests; and
 - (iii) the circumstances in which such requests are refused.
- (1A) The review and research must be conducted in relation to each of the following periods:
 - (a) the 3 year period that starts when this section commences;
 - (b) each later 3 year period.
- (2) Without limiting subsection (1), the General Manager must, in conducting the review and research, consider the effect that the matters referred to in paragraphs (1)(a) to (d) have had, during the period, on the employment (including wages and conditions of employment) of the following persons:
 - (a) women;
 - (b) part-time employees;
 - (c) persons from a non-English speaking background;
 - (d) mature age persons;
 - (e) young persons;
 - (f) any other persons prescribed by the regulations.

Report

- (3) The General Manager must give the Minister a written report of the review and research as soon as practicable, and in any event within 6 months, after the end of the period to which it relates.
- (4) The Minister must cause a copy of the report to be tabled in each House of the Parliament within 15 sitting days of that House after the Minister receives the report.
- (5) Subsections 34C(4) to (7) of the *Acts Interpretation Act 1901* apply to the report as if it were a periodic report as defined in subsection 34C(1) of that Act.

653A Arrangements with the Federal Court and the Federal Circuit and Family Court of Australia (Division 2)

The General Manager may make a written arrangement with the Federal Court or the Federal Circuit and Family Court of Australia (Division 2) for the FWC to provide administrative support to the Fair Work Division of the Court.

654 President must provide certain information etc. to the Minister and Fair Work Ombudsman

- (1) The President must provide to the Minister and the Fair Work Ombudsman information and copies of documents prescribed by the regulations by the time, and in the form, prescribed.
- (2) The regulations may prescribe:
 - (a) information that is publicly available, or derived from information that is publicly available, relating to:
 - (i) a decision of the FWC; or
 - (ii) a notice, notification or application given or made to the FWC; and
 - (b) a decision of the FWC that is publicly available.

655 Disclosure of information by the FWC

Information to which this section applies

- (1) This section applies to the following information:
 - (a) 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;
 - (b) information acquired by a person in the course of assisting the FWC under section 672, or in the course of performing functions, or exercising powers, as a consultant under section 673.

Chapter 5 Administration

Part 5-1 The Fair Work Commission

Division 7 Seals and additional powers and functions of the President and the General Manager

Section 655

Disclosure that is necessary or appropriate, or likely to assist administration or enforcement

- (2) The President may disclose, or authorise the disclosure of, the information if the President reasonably believes:
- (a) that it is necessary or appropriate to do so in the course of performing functions, or exercising powers, of the FWC; or
 - (b) that the disclosure is likely to assist in the administration or enforcement of a law of the Commonwealth, a State or a Territory.

Division 8—General Manager, staff and consultants

Subdivision A—Functions of the General Manager

656 Establishment

There is to be a General Manager of the Fair Work Commission.

657 Functions and powers of the General Manager

- (1) The General Manager is to assist the President in ensuring that the FWC performs its functions and exercises its powers.
- (1A) The General Manager also has the following functions:
 - (a) any function conferred on him or her by a fair work instrument;
 - (b) any function conferred on him or her by a law of the Commonwealth.

Note 1: Sections 653 and 653A confer additional functions and powers on the General Manager.

Note 2: Section 329A of the Registered Organisations Act confers additional functions on the General Manager.

- (2) The General Manager has power to do all things necessary or convenient to be done for the purpose of performing his or her functions.

658 Directions from the President

Despite the President's power of direction under section 582, the General Manager is not required to comply with a direction by the President to the extent that:

- (a) compliance with the direction would be inconsistent with the General Manager's performance of functions or exercise of powers under the *Public Governance, Performance and Accountability Act 2013* in relation to the FWC; or

Section 659

- (b) the direction relates to the General Manager's performance of functions or exercise of powers under the *Public Service Act 1999* in relation to the FWC; or
- (c) the direction relates to the conduct by the General Manager of the review and research, and the preparation of the report, under section 653; or
- (d) the direction relates to the General Manager's performance of functions or exercise of powers under the Registered Organisations Act.

659 General Manager not otherwise subject to direction

Except as provided by this or any other Act, the General Manager is not subject to direction by or on behalf of the Commonwealth.

Subdivision B—Appointment and terms and conditions of the General Manager

660 Appointment of the General Manager

- (1) The General Manager is to be appointed by the Governor-General by written instrument on the nomination of the President.
- (2) The General Manager holds office on a full-time basis.
- (3) The General Manager holds office for the period specified in the instrument of appointment. The period must not exceed 5 years.

Note: The General Manager is eligible for reappointment (see subsection 33(4A) of the *Acts Interpretation Act 1901*).

661 Remuneration of the General Manager

- (1) The General Manager is to be paid the remuneration that is determined by the Remuneration Tribunal. If no determination of that remuneration by the Tribunal is in operation, the General Manager is to be paid the remuneration that is prescribed by the regulations.

- (2) The General Manager is to be paid the allowances that are prescribed by the regulations.
- (3) This section has effect subject to the *Remuneration Tribunal Act 1973*.

662 Leave of absence of the General Manager

- (1) The General Manager has the recreation leave entitlements that are determined by the Remuneration Tribunal.
- (2) The Minister may grant the General Manager leave of absence, other than recreation leave, on the terms and conditions as to remuneration or otherwise that the Minister determines.

663 Outside work of the General Manager

The General Manager must not engage in paid work outside the duties of his or her office without the President's approval.

664 Disclosure of interests to the President

- (1) The General Manager must give written notice to the President of all material personal interests that the General Manager has or acquires that relate to the affairs of the FWC.
- (2) Section 29 of the *Public Governance, Performance and Accountability Act 2013* (which deals with the duty to disclose interests) does not apply to the General Manager.

665 Resignation of the General Manager

- (1) The General Manager may resign his or her appointment by giving the Governor-General a written resignation.
- (2) The resignation takes effect on the day it is received by the Governor-General or, if a later day is specified in the resignation, on that later day.

666 Termination of appointment of the General Manager

- (1) The Governor-General may terminate the appointment of the General Manager:
 - (a) for misbehaviour; or
 - (b) if the General Manager is unable to perform the duties of his or her office because of physical or mental incapacity.
- (2) The Governor-General must terminate the appointment of the General Manager if:
 - (a) the General Manager becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his or her creditors, or makes an assignment of his or her remuneration for the benefit of his or her creditors; or
 - (b) the General Manager is absent, except on leave of absence, for 14 consecutive days or for 28 days in any 12 months; or
 - (c) the General Manager engages, except with the President's approval, in paid work outside the duties of his or her office (see section 663); or
 - (d) the General Manager fails, without reasonable excuse, to comply with section 664 (which deals with disclosure of interests to the President).

667 Other terms and conditions of the General Manager

The General Manager holds office on the terms and conditions (if any) in relation to matters not covered by this Act that are determined by the Governor-General.

668 Appointment of acting General Manager

- (1) The Minister may, by written instrument, appoint a person who is nominated by the President to act as the General Manager:
 - (a) during a vacancy in the office of the General Manager (whether or not an appointment has previously been made to the office); or

- (b) during any period, or during all periods, when the General Manager is absent from duty or from Australia, or is, for any reason, unable to perform the duties of the office.

Note: See also section 33A of the *Acts Interpretation Act 1901*, which contains extra rules about acting appointments.

- (2) Anything done by or in relation to a person purporting to act under an appointment is not invalid merely because:
 - (a) the occasion for the appointment had not arisen; or
 - (b) there was a defect or irregularity in connection with the appointment; or
 - (c) the appointment had ceased to have effect; or
 - (d) the occasion to act had not arisen or had ceased.

669 Minister to consult the President

The Minister must consult the President before terms and conditions are determined under section 667.

Subdivision C—Staff and consultants

670 Staff

- (1) The staff of the FWC must be persons engaged under the *Public Service Act 1999*.
- (2) For the purposes of the *Public Service Act 1999*:
 - (a) the General Manager and the staff of the FWC together constitute a Statutory Agency; and
 - (b) the General Manager is the Head of that Statutory Agency.

671 Delegation by General Manager to staff

- (1) The General Manager may, in writing, delegate all or any of his or her functions or powers to:
 - (a) a member of the staff of the FWC who is an SES employee or acting SES employee; or

Section 672

- (b) a member of the staff of the FWC who is in a class of employees prescribed by the regulations.
- (2) In performing functions or exercising powers under a delegation, the delegate must comply with any directions of the General Manager.

Note: See also sections 34AA and 34AB of the *Acts Interpretation Act 1901*.

672 Persons assisting the FWC

The FWC may also be assisted:

- (a) by employees of Agencies (within the meaning of the *Public Service Act 1999*); or
- (b) by officers and employees of a State or Territory; or
- (c) by officers and employees of authorities of the Commonwealth, a State or a Territory;

whose services are made available to the FWC in connection with the performance of any of its functions.

673 Consultants

The General Manager may engage persons having suitable qualifications and experience as consultants to the FWC.

Subdivision D—Application of the finance law

673A Application of the finance law

For the purposes of the finance law (within the meaning of the *Public Governance, Performance and Accountability Act 2013*):

- (a) the following group of persons is a listed entity:
 - (i) the General Manager;
 - (ii) the staff of the FWC referred to in section 670;
 - (iii) persons whose services are made available to the FWC under section 672;
 - (iv) consultants engaged under section 673; and

- (b) the listed entity is to be known as the Fair Work Commission; and
- (c) the General Manager is the accountable authority of the listed entity; and
- (d) the persons referred to in paragraph (a) are officials of the listed entity; and
- (e) the purposes of the listed entity include the functions of the General Manager referred to in section 657.

Division 9—Offences relating to the Fair Work Commission

674 Offences in relation to the FWC

Insulting or disturbing an FWC Member

- (1) A person commits an offence if:
- (a) the person engages in conduct; and
 - (b) the person's conduct insults or disturbs an FWC Member in the performance of functions, or the exercise of powers, as an FWC Member.

Penalty: Imprisonment for 12 months.

Using insulting language

- (2) A person commits an offence if:
- (a) the person uses insulting language towards another person; and
 - (b) the person is reckless as to whether the language is insulting; and
 - (c) the other person is an FWC Member performing functions, or exercising powers, as an FWC Member.

Penalty: Imprisonment for 12 months.

Interrupting matters before the FWC

- (3) A person commits an offence if:
- (a) the person engages in conduct; and
 - (b) the person's conduct interrupts a matter before the FWC.

Penalty: Imprisonment for 12 months.

Creating or continuing a disturbance

- (4) A person commits an offence if:
- (a) the person engages in conduct; and
 - (b) the person's conduct creates, or contributes to creating or continuing, a disturbance; and
 - (c) the disturbance is in or near a place where the FWC is dealing with a matter.

Penalty: Imprisonment for 12 months.

Improper influence of FWC Members etc.

- (5) A person commits an offence if:
- (a) the person uses words (whether by writing or speech) that are intended to improperly influence another person; and
 - (b) the other person is an FWC Member or a person attending before the FWC.

Penalty: Imprisonment for 12 months.

Delegates of the FWC

- (6) A reference in subsections (1) to (5) to the FWC or an FWC Member includes a delegate of the FWC.

Adversely affecting public confidence in the FWC

- (7) A person commits an offence if:
- (a) the person publishes a statement; and
 - (b) the statement implies or states that an FWC Member (whether identified or not) has engaged in misconduct in relation to the performance of functions, or the exercise of powers, as an FWC Member; and
 - (c) the FWC Member has not engaged in that misconduct; and
 - (d) the publication is likely to have a significant adverse effect on public confidence that the FWC is properly performing its functions and exercising its powers.

Section 675

Penalty: 12 months imprisonment.

Note 1: Sections 135.1, 135.4, 139.1, 141.1 and 142.1 of the *Criminal Code* create offences of using various dishonest means to influence a Commonwealth public official.

Note 2: Sections 676 and 678 of this Act and sections 36A, 37, 38 and 40 of the *Crimes Act 1914* create offences relating to interference with a witness. Section 39 of that Act makes it an offence to destroy anything that may be required in evidence.

675 Contravening an FWC order

- (1) A person commits an offence if:
 - (a) the FWC has made an order under this Act; and
 - (b) either of the following applies:
 - (i) the order applies to the person;
 - (ii) a term of the order applies to the person; and
 - (c) the person engages in conduct; and
 - (d) the conduct contravenes:
 - (i) a term of the order referred to in subparagraph (b)(i); or
 - (ii) the term referred to in subparagraph (b)(ii).
- (2) However, subsection (1) does not apply to the following orders:
 - (aa) an order under subsection 65C(1) (which deals with arbitration of disputes relating to requests for flexible working arrangements);
 - (ab) an order under subsection 76C(1) (which deals with the extension of periods of unpaid parental leave);
 - (a) an order under Part 2-3 (which deals with modern awards);
 - (b) a bargaining order;
 - (c) a scope order;
 - (d) an order under Part 2-6 (which deals with minimum wages);
 - (e) an equal remuneration order;
 - (f) an order under Part 2-8 (which deals with transfer of business);
 - (g) an order under Division 6 of Part 3-3 (which deals with the suspension or termination of protected industrial action);

- (h) a protected action ballot order, or an order in relation to a protected action ballot order or a protected action ballot;
- (i) an order under Part 3-5 (which deals with stand down);
- (ia) an order under Part 3-5A (which deals with sexual harassment in connection with work);
- (j) an order under Part 6-4B (which deals with workers bullied at work);
- (k) an order under Part 6-4C (which deals with the Coronavirus economic response).

Penalty: Imprisonment for 12 months.

- (3) Strict liability applies to paragraphs (1)(a) and (b).

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

676 Intimidation etc.

A person commits an offence if:

- (a) the person threatens, intimidates, coerces or prejudices another person; and
- (b) the person does so because the other person has given, or proposes to give, information or documents to the FWC.

Penalty: Imprisonment for 12 months.

Note: A person may also contravene a civil remedy provision by threatening etc. a person who has given, or proposes to give, information or documents to the FWC (see section 343).

677 Offences in relation to attending before the FWC

Required to attend

- (1) A person commits an offence if:
- (a) the person has been required to attend before the FWC; and
 - (b) the person fails to attend as required.

Penalty: Imprisonment for 6 months.

Section 678

Oath or affirmation

- (2) A person commits an offence if:
- (a) the person attends before the FWC; and
 - (b) the FWC requires the person to take an oath or make an affirmation; and
 - (c) the person refuses or fails to be sworn or to make an affirmation as required.

Penalty: Imprisonment for 6 months.

Questions or documents

- (3) A person commits an offence if:
- (a) the person attends before the FWC; and
 - (b) the FWC requires the person to answer a question or produce a document; and
 - (c) the person refuses or fails to answer the question or produce the document.

Penalty: Imprisonment for 6 months.

Reasonable excuse

- (4) Subsection (1), (2) or (3) does not apply if the person has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matter in subsection (4) (see subsection 13.3(3) of the *Criminal Code*).

- (5) A reference in this section to the FWC or an FWC Member includes a delegate of the FWC.

678 False or misleading evidence

Giving false or misleading evidence

- (1) A person (the **witness**) commits an offence if:
- (a) the witness gives sworn or affirmed evidence; and
 - (b) the witness gives the evidence as a witness:

- (i) in a matter before the FWC; or
- (ii) before a person taking evidence on behalf of the FWC for use in a matter that the witness will start by application to the FWC; and
- (c) the evidence is false or misleading.

Penalty: Imprisonment for 12 months.

Note: A person will not commit an offence if the person carries out the conduct constituting the offence under duress (see section 10.2 of the *Criminal Code*).

Inducing or coercing another person to give false or misleading evidence

- (2) A person (the **offender**) commits an offence if:
- (a) another person (the **witness**) has been, or will be, required to appear as a witness in a matter before the FWC (whether the person is to appear before the FWC or a delegate of the FWC); and
 - (b) the offender induces, threatens or intimidates the witness to give false or misleading evidence in the matter.

Penalty: Imprisonment for 12 months.