Fair Work Act 2009

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This compilation is in 4 volumes

Volume 1:	**Chapter 1, Part 1-1 to Chapter 2, Part 2-4 sections 1 to 257**
Volume 2:	Chapter 2, Part 2-5 to Chapter 3A, Part 3A-5 sections 258 to 536NK
Volume 3:	Chapter 3B, Part 3B-1 to Chapter 6, Part 6-5 sections 536NL to 800
Volume 4:	Schedules Endnotes

Each volume has its own contents

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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 July 2026 (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. The details of amendments made up to, but not commenced at, the compilation date are underlined in the endnotes. Any uncommenced amendments affecting the law are accessible on the Register (www.legislation.gov.au).

Application, saving and transitional provisions

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.

Presentational changes

The *Legislation Act 2003* provides for First Parliamentary Counsel to make presentational changes to a compilation. Presentational changes are applied to give a more consistent look and feel to legislation published on the Register, and enable the user to more easily navigate those documents.

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. Any modifications affecting the law are accessible on the Register.

Self-repealing provisions

If a provision of the compiled law has been repealed in accordance with a provision of the law, details are included in the endnotes.

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An Act relating to workplace relations, and for related purposes

Chapter 1—Introduction

Part 1-1—Introduction

Division 1—Preliminary

1 Short title

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

2 Commencement

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

Commencement information

Column 1	Column 2	Column 3
Provision(s)	**Commencement**	**Date/Details**
1. Sections 1 and 2 and anything in this Act not elsewhere covered by this table	The day on which this Act receives the Royal Assent.	7 April 2009
2. Sections 3 to 40	A single day to be fixed by Proclamation. However, if any of the provision(s) do not commence within the period of 12 months beginning on the day on which this Act receives the Royal Assent, they commence on the first day after the end of that period.	26 May 2009 (*see* F2009L01818)

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Section 2

Commencement information

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

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

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

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Division 2—Object of this Act

3 Object of this Act

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

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

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

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

(ca) ensuring a safety net of fair and relevant minimum terms and conditions for regulated workers through enforceable minimum standards orders and related measures; and

(caa) ensuring a safety net of fair and relevant minimum terms and conditions for persons in a road transport contractual chain through enforceable road transport contractual chain orders and through road transport contractual chain guidelines; and

(cb) providing appropriate remedies in relation to unfair terms of services contracts; and

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

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

(f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action; and

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

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Division 3—Guide to this Act

4 Guide to this Act

Overview of this Act

(1) This Act is about workplace relations. It:

(a) provides for terms and conditions of employment (Chapter 2); and

(b) sets out rights and responsibilities of employees, employers and organisations in relation to that employment (Chapter 3); and

(ba) provides for minimum terms and conditions for regulated workers (Chapter 3A); and

(bb) sets out measures to deal with unfair terms of services contracts (Chapter 3A); and

(bc) provides for minimum terms and conditions for persons in a road transport contractual chain (Chapter 3B); and

(c) provides for compliance with, and enforcement of, this Act (Chapter 4); and

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

(e) deals with other matters relating to the above (Chapter 6).

Overview of the rest of this Chapter

(2) The rest of this Chapter deals with:

(a) definitions that are used in this Act (Part 1-2); and

(b) the application of this Act (Part 1-3), including how this Act interacts with certain State and Territory laws and its geographical application;

(c) certain matters relating to the road transport industry (Part 1-4).

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Definitions

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

Application, saving and transitional provisions for amendments

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

5 Terms and conditions of employment (Chapter 2)

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

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

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

Main terms and conditions

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

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

(5) Part 2-4 is about enterprise agreements. An enterprise agreement is made at the enterprise level and provides terms and conditions for those national system employees to whom it applies. An enterprise

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agreement can have terms that are ancillary or supplementary to the National Employment Standards.

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

(7) Part 2-8 provides for the transfer of certain modern awards, enterprise agreements, workplace determinations and other instruments if there is a transfer of business from one national system employer to another national system employer.

Other terms and conditions

(8) In addition, other terms and conditions of employment for national system employees include those:

(a) provided by a national minimum wage order (see Part 2-6) or an equal remuneration order (see Part 2-7); and

(aa) provided by Part 2-7A (which deals with regulated labour hire arrangement orders); and

(b) provided by Part 2-9 (which deals with the frequency and method of making payments to employees, deductions from payments, high-income employees, prohibiting pay secrecy, limitations on fixed term contracts, employee right to disconnect and preservation of employer-funded paid parental leave).

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

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

(2) Part 3-1 provides general workplace protections. It:

(a) protects workplace rights; and

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(b) protects freedom of association and involvement in lawful industrial activities; and

(c) provides other protections, including protection from discrimination.

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

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

(5) Part 3-4 is about the rights of officials of organisations who hold entry permits to enter premises for purposes related to their representative role under this Act and under State or Territory OHS laws. In exercising those rights, permit holders must comply with the requirements set out in the Part.

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

(6A) Part 3-5A prohibits sexual harassment of workers, persons seeking to become workers and persons conducting businesses or undertakings, and provides for the granting of remedies when that happens.

(7) Part 3-6 deals with other rights and responsibilities of national system employers in relation to:

(a) termination of employment; and

(b) keeping records and giving payslips; and

(c) advertising rates of pay.

(8) Part 3-7 deals with offences in relation to corrupting benefits.

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6A Rights and responsibilities of regulated workers, regulated businesses, organisations etc. (Chapter 3A)

(1) Chapter 3A sets out rights and responsibilities of certain regulated workers who perform work under services contracts, and of certain regulated businesses, organisations and others.

(2) Part 3A-1 has the core provisions for the Chapter. It deals with compliance with the instruments made under the Chapter (minimum standards orders, minimum standards guidelines and collective agreements) and interaction issues.

(3) Part 3A-2 is about minimum standards orders and minimum standards guidelines, which can be made for certain regulated workers.

(4) Part 3A-3 deals with unfair termination and unfair deactivation of certain regulated workers, and the granting of remedies when that happens.

(5) Part 3A-4 is about collective agreements. A collective agreement is made between a regulated business and an organisation. It provides terms and conditions for those regulated workers to whom it applies.

(6) Part 3A-5 is about unfair contract terms of services contracts. It provides for certain remedies if a services contract includes an unfair term.

6B Rights and responsibilities of persons in a road transport contractual chain

(1) Chapter 3B sets out rights and responsibilities of persons in a road transport contractual chain.

(2) Part 3B-1 has the core provisions for the Chapter. It deals with compliance with road transport contractual chain orders made under the Chapter and interaction issues.

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(3) Part 3B-2 is about road transport contractual chain orders and road transport contractual chain guidelines, which can be made for certain persons in a road transport contractual chain.

7 Compliance and enforcement (Chapter 4)

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

(2) Part 4-1 is about civil remedies. Certain provisions in this Act impose obligations on certain persons. Civil remedies may be sought in relation to contraventions of these civil remedy provisions. Part 4-1:

(a) deals with applications for orders for contraventions of civil remedy provisions; and

(b) sets out the orders the courts can make in relation to a contravention of a civil remedy provision.

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

8 Administration (Chapter 5)

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

(2) Part 5-1 is about the Fair Work Commission. It:

(a) establishes and confers functions on the FWC; and

(b) sets out how matters before the FWC are to be conducted (for example, how the FWC is to deal with applications made to it).

(3) Part 5-2 is about the Office of the Fair Work Ombudsman. It:

(a) establishes and confers functions on the Fair Work Ombudsman; and

(b) confers functions and powers on Fair Work Inspectors.

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9 Miscellaneous (Chapter 6)

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

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

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

(4) Part 6-3 extends provisions of the National Employment Standards relating to unpaid parental leave, paid family and domestic violence leave and notice of termination to employees not otherwise covered by the provisions.

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

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

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

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

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

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

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

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

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Part 1-2—Definitions

Division 1—Introduction

10 Guide to this Part

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

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

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

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

11 Meanings of *employee* and *employer*

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

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

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Division 2—The Dictionary

12 The Dictionary

In this Act:

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

action includes an omission.

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

adverse action: see section 342.

affected employees:

(a) for a variation of an enterprise agreement under Subdivision A of Division 7 of Part 2-4: see subsection 207(2); and

(b) for a variation of an enterprise agreement under Subdivision AA, AB or AC of Division 7 of Part 2-4 to add an employer to a supported bargaining agreement or a cooperative workplace agreement: means an employee employed by the employer at the time the variation is made who will be covered by the agreement if the variation is approved (or made) by the FWC; and

(c) for a variation of an enterprise agreement under Subdivision AD of Division 7 of Part 2-4 (variation of single interest employer agreement to add employer and employees): see paragraphs 216D(1)(b) and 216DB(1)(b); and

(d) for a variation of an enterprise agreement under Subdivision AE of Division 7 of Part 2-4 (variation of multi-enterprise agreement to remove employer and employees): see paragraph 216E(1)(b).

affected employer:

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

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

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

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

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

affected member certificate: see subsection 520(1).

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

aggrieved person in relation to an alleged contravention of Division 2 of Part 3-5A (prohibiting sexual harassment in connection with work): see subsection 527F(1).

agreed terms for a workplace determination: see section 274.

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

alternative protected rate of pay order: see subsection 306M(2).

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

annual wage review: see subsection 285(1).

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

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

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

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

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applicable time: see subsection 23B(2).

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

applies:

(a) in relation to a modern award: see section 47; and

(b) in relation to an enterprise agreement: see section 52; and

(ba) in relation to a minimum standards order: see section 536JD; and

(bb) in relation to a collective agreement: see section 536JL; and

(bc) in relation to a road transport contractual chain order: see section 536NR; and

(c) in relation to a copied State instrument: see section 768AM.

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

appointment:

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

(b) of an insolvency practitioner includes a person becoming an insolvency practitioner:

(i) by taking possession or control of property; or

(ii) by operation of law.

appropriate safe job: see subsection 81(3).

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

arbitrated protected rate of pay order: see subsection 306Q(1).

ART President or Deputy President means the President, a Judicial Deputy President or a Non-Judicial Deputy President of the Administrative Review Tribunal.

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

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associated regulated business for a regulated worker: see subsection 350B(5).

associated with an underpayment amount: see subsection 546A(1).

Australia means the Commonwealth of Australia and, when used in a geographical sense, includes Norfolk Island, the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands, but does not include any other external Territory.

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

Australian employer: see subsection 35(1).

Australian government: see subsection 794A(2).

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

authority documents: see subsection 489(3).

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

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

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

award modernisation process means:

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

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

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

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ballot paper: see subsection 455(2).

Bankruptcy Act 1966: a reference to the *Bankruptcy Act 1966* or a provision of that Act is a reference to that Act or provision:

(a) applying of its own force; or

(b) applying, with or without modifications, because of a law of the Commonwealth, a State or a Territory.

bankruptcy trustee of a person means the trustee under the *Bankruptcy Act 1966* of the person's estate in bankruptcy.

bargaining order: see subsection 229(1).

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

bargaining services: see subsection 353(3).

bargaining services fee: see subsection 353(2).

base rate of pay: see section 16.

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

breastfeeding:

(a) includes the act of expressing milk; and

(b) includes:

(i) an act of breastfeeding; and

(ii) breastfeeding over a period of time.

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

cash or in kind payment: see subsection 536F(4).

casual employee: see section 15A.

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

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

close relative: see subsection 106B(3).

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collective agreement: see section 15B.

Commissioner means a Commissioner of the FWC.

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

Commonwealth means the Commonwealth of Australia and, when used in a geographical sense, includes Norfolk Island, the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands, but does not include any other external Territory.

Commonwealth authority means:

(a) a body corporate established for a public purpose by or under a law of the Commonwealth; or

(b) a body corporate:

(i) incorporated under a law of the Commonwealth or a State or a Territory; and

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

Commonwealth Ombudsman means the person for the time being holding office as Ombudsman under the *Ombudsman Act 1976*.

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

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

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

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

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

complaint handler means:

(a) the President; or

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

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

compliance powers: see section 703.

compliance purposes: see subsection 706(1).

conduct includes an omission.

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

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

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

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

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

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

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

consistent with the Digital Labour Platform Deactivation Code: see subsection 536LJ(3).

consistent with the Road Transport Industry Termination Code: see subsection 536LN(3).

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

consolidation order:

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

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

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

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

constitutional trade or commerce means trade or commerce:
(a) between Australia and a place outside Australia; or
(b) among the States; or
(c) between a State and a Territory; or
(d) between 2 Territories; or
(e) within a Territory.

consultation notice for a collective agreement: see subsection 536ML(1).

continental shelf means:
(a) the continental shelf (as defined in the *Seas and Submerged Lands Act 1973*) of Australia (including its external Territories); and
(b) the Greater Sunrise special regime area (as defined in the *Seas and Submerged Lands Act 1973*).

continuous service has a meaning affected by section 22.

contractor high income threshold: see section 15C.

contravene this Act, or a provision of this Act, includes contravene any of the following:
(a) a civil remedy provision;
(b) a provision of this Act that creates an offence;
(c) a related offence provision.

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cooperation agreement: see subsection 717B(1).

cooperative workplace agreement: a multi-enterprise agreement is a ***cooperative workplace agreement*** if there was no supported bargaining authorisation or single interest employer authorisation in operation in relation to the agreement immediately before the agreement was made.

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

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

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

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

copied State instrument: see section 768AH.

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

Corporations Act 2001: the reference to the *Corporations Act 2001* in the definitions of ***insolvency practitioner*** and ***liquidator*** in this section is a reference to that Act:

(a) applying of its own force; or

(b) applying, with or without modifications, because of a law of the Commonwealth, a State or a Territory.

coverage terms*:*

(a) in relation to a modern award (other than a modern enterprise award): see section 143; and

(b) in relation to a modern enterprise award: see section 143A; and

(c) in relation to a State reference public sector modern award: see section 143B.

covered employment instrument means:

(a) an enterprise agreement; or

(b) a workplace determination; or

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(c) a determination under section 24 of the *Public Service Act 1999* that applies to a class of APS employees in an Agency (within the meaning of that Act); or

(d) an instrument made under any other law of the Commonwealth (other than this Act), or of a State or a Territory, that provides for the terms and conditions of employment for a class of national system employees of:

(i) the Commonwealth or a State or Territory; or

(ii) an authority of the Commonwealth or of a State or Territory; or

(e) any other instrument relating to the employment of a class of national system employees that:

(i) is made under a law of the Commonwealth (other than this Act) or a State or Territory; and

(ii) is prescribed by the regulations.

covers:

(a) in relation to a modern award: see section 48; and

(b) in relation to an enterprise agreement: see section 53; and

(c) in relation to a workplace determination: see section 277; and

(ca) in relation to a minimum standards order: see section 536JE; and

(cb) in relation to minimum standards guidelines: see section 536JG; and

(cc) in relation to a collective agreement: see section 536JM; and

(cd) in relation to a road transport contractual chain order: see section 536NS; and

(ce) in relation to road transport contractual chain guidelines: see section 536NU; and

(d) in relation to a copied State instrument: see section 768AN.

day of placement: see subsection 67(6).

deactivated: see section 536LG.

de facto partner of a person means:

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(a) another person who, although not legally married to the first person, lives with the first person in a relationship as a couple on a genuine domestic basis (whether the first person and the other person are of the same sex or different sexes); or
(b) a former de facto partner (within the meaning of paragraph (a)) of the first person.

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

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

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

deferral declaration, in relation to a minimum standards order: see subsection 536KQA(1).

deferral declaration, in relation to a road transport contractual chain order: see subsection 536PU(1).

deferral determination, in relation to a road transport minimum standards order: see subsection 536KQH(1).

deferral determination, in relation to a road transport contractual chain order: see subsection 536QA(1).

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

delegates' rights term means a term in a fair work instrument that provides for the exercise of the rights of workplace delegates.

Note: The rights of workplace delegates are set out in section 350C, and a delegates' rights term must provide at least for the exercise of those rights.

Deputy President means a Deputy President of the FWC.

designated emergency management body: see subsections 195A(4) and (5).

designated outworker term of a modern award, enterprise agreement, workplace determination or other instrument, means

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any of the following terms, so far as the term relates to outworkers in the textile, clothing or footwear industry:

(a) a term that deals with the registration of an employer or outworker entity;

(b) a term that deals with the making and retaining of, or access to, records about work to which outworker terms of a modern award apply;

(c) a term imposing conditions under which an arrangement may be entered into by an employer or an outworker entity for the performance of work, where the work is of a kind that is often performed by outworkers;

(d) a term relating to the liability of an employer or outworker entity for work undertaken by an outworker under such an arrangement, including a term which provides for the outworker to make a claim against an employer or outworker entity;

(e) a term that requires minimum pay or other conditions, including the National Employment Standards, to be applied to an outworker who is not an employee;

(f) any other terms prescribed by the regulations.

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

digital labour platform: see section 15L.

Digital Labour Platform Deactivation Code means the code made under section 536LJ.

digital labour platform operator: see section 15M.

digital platform work: see section 15N.

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

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

discriminatory term of an enterprise agreement: see section 195.

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

dismissed: see section 386.

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

eligible community service activity: see section 109.

eligible protected action ballot agent: see subsection 468A(1).

eligible State or Territory court means one of the following courts:

(a) a District, County or Local Court;
(b) a magistrates court;
(c) the Industrial Relations Court of South Australia;
(ca) the Industrial Court of New South Wales;
(d) any other State or Territory court that is prescribed by the regulations.

emergency application, in relation to an application for a road transport contractual chain order, or an application for a determination varying or revoking a road transport contractual chain order: see subsections 536PEA(1) and (2).

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

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

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

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

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

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

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

employee-like worker: see section 15P.

employee-like worker collective agreement: see subsection 536MK(4).

employee-like worker guidelines: see subsection 536KR(2).

employee-like worker minimum standards order: see subsection 536JY(2).

employee organisation means an organisation of employees.

employee record, in relation to an employee, means:

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

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

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

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

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

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

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

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

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

employer organisation means an organisation of employers.

employer response action: see section 411.

employing authority: see subsection 795(6).

end of the minimum bargaining period: see subsection 235(5).

engage in conduct means:
(a) do an act; or
(b) omit to perform an act.

engages in industrial activity: see section 347.

enterprise means a business, activity, project or undertaking.

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

entry notice: see subsection 487(2).

entry permit: see section 512.

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

Note: See also subsections 302(3A) to (3C) and (4) and (4A) for matters relevant to the meaning of ***equal remuneration for work of equal or comparable value***.

equal remuneration order: see subsection 302(1).

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

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exemption certificate: see subsection 519(1).

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

Expert Panel means an Expert Panel constituted under section 620.

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

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

extended paid family and domestic violence leave provisions: see subsection 757B(4).

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

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

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

Fair Work Inspector means:

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

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

fair work instrument means:

(a) a modern award; or

(b) an enterprise agreement; or

(c) a workplace determination; or

(d) an FWC order, including a minimum standards order or a road transport contractual chain order, but not including minimum standards guidelines or road transport contractual chain guidelines, even if the guidelines are made by order.

family and domestic violence: see subsection 106B(2).

Federal Court means the Federal Court of Australia.

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Finance Minister means the Minister administering the *Public Governance, Performance and Accountability Act 2013*.

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

first stage criteria: see section 156F.

first stage test: see section 156Q.

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

Fixed Term Contract Information Statement: see subsection 333J(1).

flexibility term:

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

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

flexible day: see subsection 74(3C).

flexible unpaid parental leave: see subsections 72A(1) and (2A).

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

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

franchisee entity of a franchise: see subsection 558A(1).

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

full deferral declaration, in relation to a minimum standards order: see subsection 536KQA(2).

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full deferral declaration, in relation to a road transport contractual chain order: see subsection 536PU(2).

full deferral determination, in relation to a road transport minimum standards order: see subsection 536KQJ(2).

full deferral determination, in relation to a road transport contractual chain order: see subsection 536QB(2).

full rate of pay: see section 18.

full suspension declaration, in relation to a minimum standards order: see subsection 536KQD(2).

full suspension declaration, in relation to a road transport contractual chain order: see subsection 536PX(2).

full suspension determination, in relation to a road transport minimum standards order: see subsection 536KQP(2).

full suspension determination, in relation to a road transport contractual chain order: see subsection 536QG(2).

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

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

FWO notice: see subsection 712A(1).

gender identity has the meaning given by the *Sex Discrimination Act 1984*.

general building and construction work: see subsection 23B(1).

General Manager means the General Manager of the FWC.

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

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

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

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genuine redundancy: see section 389.

good faith bargaining requirements: see section 228.

governing body of an agency of the Commonwealth: see subsection 794B(5).

greenfields agreement: see subsection 172(4).

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

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

guarantee of termination entitlements: see subsection 226A(1).

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

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

high income employee: see section 329.

high income threshold: see section 333.

host employment instrument: see subsection 306E(6).

ILO means the International Labour Organization.

immediate family of a person means:

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

in a road transport contractual chain: see section 15RA.

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

independent contractor is not confined to an individual.

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

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

individual flexibility arrangement:

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

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

industrial action: see section 19.

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

industrial association means:

(a) an association of employees or independent contractors, or both, or an association of employers, that is registered or recognised as such an association (however described) under a workplace law; or

(b) an association of employees, or independent contractors, or both (whether formed formally or informally), a purpose of which is the protection and promotion of their interests in matters concerning their employment, or their interests as independent contractors (as the case may be); or

(c) an association of employers a principal purpose of which is the protection and promotion of their interests in matters concerning employment and/or independent contractors;

and includes:

(d) a branch of such an association; and

(e) an organisation; and

(f) a branch of an organisation.

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industrial body means:

(a) the FWC; or

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

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

industrial law means:

(a) this Act; or

(b) the Registered Organisations Act; or

(c) a law of the Commonwealth, however designated, that regulates the relationships between employers and employees; or

(d) a State or Territory industrial law.

Industry Minister means the Minister administering the *Australian Jobs Act 2013*.

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

Infrastructure Minister means the Minister administering the *Infrastructure Australia Act 2008*.

insolvency practitioner for an employer means:

(a) a liquidator of the employer; or

(b) an administrator of the employer appointed under the *Corporations Act 2001*; or

(c) a restructuring practitioner for the employer appointed under that Act; or

(d) a person appointed as a receiver of property of the employer; or

(e) a person who has possession or control of property of the employer for the purpose of enforcing:

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(i) a charge; or
(ii) a mortgage; or
(iii) a lien; or
(iv) a pledge; or
(v) a security interest, within the meaning of the *Personal Property Securities Act 2009*, to which that Act applies, other than a transitional security interest within the meaning of that Act; or

(f) a bankruptcy trustee of the employer.

inspector means a Fair Work Inspector.

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

intersex status has the meaning given by the *Sex Discrimination Act 1984*.

intractable bargaining declaration: see section 234.

intractable bargaining workplace determination: see section 269.

involved in: see section 550.

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

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

jury service pay: see subsection 111(6).

jury service summons: see subsection 111(7).

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

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

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

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liquidator means a liquidator appointed (provisionally or otherwise) under the *Corporations Act 2001*.

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

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

lock out: see subsection 19(3).

made:

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

(b) in relation to a variation of an enterprise agreement under Subdivision A of Division 7 of Part 2-4 (variation of enterprise agreements by employers and employees): see section 209; and

(c) in relation to a variation of an enterprise agreement under Subdivision AA of Division 7 of Part 2-4 (variation of supported bargaining agreement to add employer and employees (with consent)): see subsection 216A(4); and

(d) in relation to a variation of an enterprise agreement under Subdivision AC of Division 7 of Part 2-4 (variation of cooperative workplace agreement to add employer and employees): see subsection 216C(4); and

(e) in relation to a variation of an enterprise agreement under Subdivision AD of Division 7 of Part 2-4 (variation of single interest employer agreement to add employer and employees): see subsection 216D(5); and

(f) in relation to a variation of an enterprise agreement under Subdivision AE of Division 7 of Part 2-4 (variation of multi-enterprise agreement to remove employer and employees): see subsection 216E(7).

magistrates court means:

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

(b) a court constituted by an industrial magistrate; or

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(ba) the Local Court of New South Wales; or
(c) the Local Court of the Northern Territory.

majority support determination: see subsection 236(1).

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

medical certificate means a certificate signed by a medical practitioner.

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

membership action: see subsection 350(3).

members' voluntary winding up: see subsection 121(5).

minimum employment period: see section 383.

minimum standards guidelines: see section 15D.

minimum standards objective: see section 536JX.

minimum standards order: see section 15E.

minimum wages objective: see subsection 284(1).

miscarriage means a spontaneous loss of an embryo or fetus before a period of gestation of 20 weeks.

miscellaneous modern award: see subsection 163(4).

model consultation term: see subsection 205(3).

model flexibility term: see subsection 202(5).

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

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

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modern award powers: see subsection 134(2).

modern awards objective: see subsection 134(1).

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

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

modifications includes additions, omissions and substitutions.

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

MySuper product: see subsection 23A(1).

named employer award: see subsection 312(2).

National Employment Standards: see subsection 61(3).

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

national system employee: see section 13.

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

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

national system employer: see section 14.

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

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

new employer:

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

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

nominal expiry date:

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

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

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

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

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

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

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

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

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

non-transferring employee:

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

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

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

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

notional flexible period: see subsection 72A(6).

objectionable emergency management term of an enterprise agreement: see section 195A.

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objectionable term means a term that:

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

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

either of the following:

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

(d) the payment of a bargaining services fee.

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

offence against this Act, or a particular provision of this Act, includes a reference to an offence against a related offence provision.

Note: See also section 11.6 of the *Criminal Code*.

office, in an industrial association, means:

(a) an office of president, vice president, secretary or assistant secretary of the association; or

(b) the office of a voting member of a collective body of the association, being a collective body that has power in relation to any of the following functions:

(i) the management of the affairs of the association;

(ii) the determination of policy for the association;

(iii) the making, alteration or rescission of rules of the association;

(iv) the enforcement of rules of the association, or the performance of functions in relation to the enforcement of such rules; or

(c) an office the holder of which is, under the rules of the association, entitled to participate directly in any of the functions referred to in subparagraphs (b)(i) and (iv), other than an office the holder of which participates only in accordance with directions given by a collective body or another person for the purpose of implementing:

(i) existing policy of the association; or

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(ii) decisions concerning the association; or

(d) an office the holder of which is, under the rules of the association, entitled to participate directly in any of the functions referred to in subparagraphs (b)(ii) and (iii); or

(e) the office of a person holding (whether as trustee or otherwise) property:

(i) of the association; or

(ii) in which the association has a beneficial interest.

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

officer, of an industrial association, means:

(a) an official of the association; or

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

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

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

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

opt out notice: see subsection 15AB(8).

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

organisation means an organisation registered under the Registered Organisations Act.

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

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

outworker means:

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

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

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

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

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

(a) a constitutional corporation;

(b) the Commonwealth;

(c) a Commonwealth authority;

(d) a body corporate incorporated in a Territory;

(e) a person so far as:

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

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

(iii) the arrangement is connected with a Territory.

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

outworker terms: see subsection 140(3).

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

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

paid family and domestic violence leave means paid family and domestic violence leave to which a national system employee is entitled under section 106A.

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

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

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

part deferral declaration, in relation to a minimum standards order: see subsection 536KQA(2).

part deferral declaration, in relation to a road transport contractual chain order: see subsection 536PU(2).

part deferral determination, in relation to a road transport minimum standards order: see subsection 536KQJ(2).

part deferral determination, in relation to a road transport contractual chain order: see subsection 536QB(2).

partial work ban: see subsection 470(3).

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

part suspension declaration, in relation to a minimum standards order: see subsection 536KQD(2).

part suspension declaration, in relation to a road transport contractual chain order: see subsection 536PX(2).

part suspension determination, in relation to a road transport minimum standards order: see subsection 536KQP(2).

part suspension determination, in relation to a road transport contractual chain order: see subsection 536QG(2).

passes the better off overall test:

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

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

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pattern bargaining: see section 412.

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

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

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

period of employment: see section 384.

permissible occasion: see sections 102 and 104.

permit holder means a person who holds an entry permit.

permit qualification matters: see subsection 513(1).

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

pieceworker: see section 21.

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

post-declaration negotiating period: see subsection 235A(1).

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

premises includes:

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

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

pre-parental leave position: an employee's ***pre-parental leave position***, in relation to a particular period of unpaid parental leave, is:

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(a) unless paragraph (b) applies, the position the employee held before starting the period of unpaid parental leave; or

(b) if, before starting the period of unpaid parental leave, the employee:

(i) was transferred to a safe job because of her pregnancy; or

(ii) reduced her working hours due to her pregnancy;

the position the employee held immediately before that transfer or reduction.

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

President means the President of the FWC.

primary party: see subsection 15RA(2).

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

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

prohibited beneficiary: see subsection 536F(5).

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

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

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

protected employee for a termination of an enterprise agreement under section 226: see subsection 226A(2).

protected from unfair deactivation: see section 536LD.

protected from unfair dismissal: see section 382.

protected from unfair termination: see section 536LE.

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protected industrial action: see section 408.

protected rate of pay: see section 306F.

public holiday: see section 115.

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

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

reasonably foreseeable employee for an enterprise agreement: see subsection 193(5).

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

recurring extended exemption period: see subsection 306K(2).

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

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

registered employee association means:

(a) an employee organisation; or

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

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

registered organisations officer or employee: see section 536E.

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

(a) the employee is a casual employee; and

(b) the employee has been employed by the employer on a regular and systematic basis.

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regulated business: see section 15F.

regulated employee: see subsection 306E(5).

regulated host: see section 306C.

regulated labour hire arrangement order: see subsection 306E(1).

regulated road transport contractor: see section 15Q.

regulated worker: see section 15G.

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

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

related offence provision means:

(a) section 6 of the *Crimes Act 1914*; or

(b) a provision of Part 2.4 of the *Criminal Code*;

to the extent that the offence created by the provision relates to an offence against this Act other than an offence mentioned in paragraph (a) or (b).

related party has the same meaning as in the Registered Organisations Act.

relevant affairs, in relation to a registered organisations officer or employee, means the affairs of:

(a) if the registered organisations officer or employee is an officer or employee of an organisation—the organisation and any branch of the organisation, including the affairs of the members of the organisation or any of those branches; or

(b) if the registered organisations officer or employee is an officer or employee of a branch of an organisation—the branch, including the affairs of the members of the branch.

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

(a) the person believes that if one or more of the circumstances that gave rise to the complaint were substantiated, the circumstances would justify considering:
  (i) terminating the appointment of the FWC Member in accordance with section 641; or
  (ii) (other than if the FWC Member is the President) suspending the FWC Member from office in accordance with section 642; or

(b) the person believes that if one or more of the circumstances that gave rise to the complaint were substantiated, the circumstances may:
  (i) adversely affect, or have adversely affected, the performance of duties by the FWC Member; or
  (ii) have the capacity to adversely affect, or have adversely affected, the reputation of the FWC.

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

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

removed person: see subsections 177A(1) and (2).

respondent in relation to an alleged contravention of Division 2 of Part 3-5A (prohibiting sexual harassment in connection with work): see subsection 527F(1).

responsible agency in relation to a contravention of a civil remedy provision by an Australian government or the commission of an offence by the Commonwealth: see subsection 794C(4).

responsible franchisor entity for a franchisee entity: see subsection 558A(2).

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

right to disconnect term means a term in a modern award that provides for the exercise of an employee's rights set out in subsections 333M(1) and (2).

Note: Section 333M deals with the right to disconnect.

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

Road Transport Advisory Group: see section 40E.

road transport business: see section 15R.

road transport collective agreement: see subsection 536MK(5).

road transport contractual chain: see section 15RA.

road transport contractual chain guidelines: see section 536QP.

road transport contractual chain order: see section 536PD.

road transport employee-like worker: see section 15RB.

road transport guidelines: see subsection 536KR(3).

road transport industry: see section 15S.

road transport industry contractual chain participant: see section 40H.

Road Transport Industry Termination Code means the code made under subsection 536LN(1).

road transport minimum standards order: see subsection 536JY(3).

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

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

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

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

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

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

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

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

scope order: see subsection 238(1).

secondary party: see subsection 15RA(2).

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

second stage test:

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

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

section 15AA commencement: see subsection 15AB(8).

section 179A disclosable benefit: see subsection 179A(4).

section 179 disclosable benefit: see subsection 179(6).

selected civil remedy provision means a provision referred to in column 1 of item 1, 2, 3, 4, 5, 7, 8, 9, 10, 10A, 10F, 11A, 29,

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29AA, 29A, 32, 33, 33A, 34 or 34AAA in the table in subsection 539(2).

serious contravention has the meaning given by section 557A.

serious misconduct has the meaning prescribed by the regulations.

service: see section 22.

services contract: see section 15H.

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

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

sexual harassment court application: see subsection 527T(2).

sexual harassment FWC application: see subsection 734A(3).

sexually harass has the meaning given by section 28A of the *Sex Discrimination Act 1984*.

Note: Other parts of speech and grammatical forms of "sexually harass" (for example, "sexual harassment") have a corresponding meaning (see section 18A of the *Acts Interpretation Act 1901*).

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

single enterprise: see section 168A.

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

single interest employer agreement: a multi-enterprise agreement is a single interest employer agreement if a single interest employer authorisation was in operation in relation to the agreement immediately before the agreement was made.

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

small business employer: see section 23.

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

small claims proceedings means proceedings dealt with as small claims proceedings under section 548.

special measure to achieve equality: see subsections 195(4) to (6).

spouse includes a former spouse.

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

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

State award: see section 768AJ.

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

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

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

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

(a) is made under, or recognised by, a law of a State that is a State or Territory industrial law; and
(b) determines terms and conditions of employment.

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

state of mind: see subsection 793(3).

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

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

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

State public sector employee, of a State, means:

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

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

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

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

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

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

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

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

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

step-child: without limiting who is a step-child of a person, someone who is a child of the person's de facto partner is a

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step-child of a person, if he or she would be the person's step-child except that the person is not legally married to the de facto partner.

stillborn: see subsection 77A(2).

stop sexual harassment order: see paragraph 527F(1)(a).

superannuation fund means a superannuation fund or a superannuation scheme.

supported bargaining agreement: a multi-enterprise agreement is a ***supported bargaining agreement*** if a supported bargaining authorisation was in operation in relation to the agreement immediately before the agreement was made.

supported bargaining authorisation: see subsection 242(1).

suspension declaration, in relation to a minimum standards order: see subsection 536KQD(1).

suspension declaration, in relation to a road transport contractual chain order: see subsection 536PX(1).

suspension determination, in relation to a road transport minimum standards order: see subsection 536KQN(1).

suspension determination, in relation to a road transport contractual chain order: see subsection 536QF(1).

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

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

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

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

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

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

TCF outwork code: see section 789DA.

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

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

terminated: see section 536LL.

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

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

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

Territory employer: see subsection 338(4).

test time: see subsection 193(6).

this Act includes the regulations.

time-sensitive road transport contractual chain order means a road transport contractual chain order made or varied as a result of an emergency application.

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

training arrangement means a combination of work and training that is subject to a training agreement, or a training contract, that takes effect under a law of a State or Territory relating to the training of employees.

transferable instrument: see subsection 312(1).

transfer of business:

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

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

transfer of employment: see subsection 22(7).

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

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

transferring employee:

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

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

transferring work:

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

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

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

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

underpayment amount:

(a) in relation to a contravention of a civil remedy provision—see subsection 546A(2); and

(b) in relation to the commission of an offence against subsection 327A(1)—see subsection 327A(7).

unfair dismissal application: see subsection 729(2).

unfairly deactivated: see section 536LF.

unfairly dismissed: see section 385.

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unfairly terminated: see section 536LK.

unfairness ground: see section 536JR.

unlawful term of an enterprise agreement: see section 194.

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

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

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

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

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

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

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

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

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

Vice President means a Vice President of the FWC.

vocational placement means a placement that is:

(a) undertaken with an employer for which a person is not entitled to be paid any remuneration; and
(b) undertaken as a requirement of an education or training course; and
(c) authorised under a law or an administrative arrangement of the Commonwealth, a State or a Territory.

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

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Voluntary Small Business Wage Compliance Code means the Voluntary Small Business Wage Compliance Code declared under subsection 327B(1).

volunteer of a designated emergency management body: see subsection 195A(6).

voting request order: see subsections 240A(1), (2) and (4).

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

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

worker:

(aa) in Part 3-5A—see subsection 527D(2); and

(a) in Part 6-4B—see subsection 789FC(2); and

(b) otherwise—has its ordinary meaning.

worker in a business or undertaking: see subsection 527D(3).

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

workplace delegate: see subsection 350C(1).

workplace determination means:

(b) an industrial action related workplace determination; or

(c) an intractable bargaining workplace determination.

workplace instrument means an instrument that:

(a) is made under, or recognised by, a workplace law; and

(b) concerns the relationships between:

(i) employers and employees; or

(ii) digital labour platform operators and employee-like workers; or

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(iii) road transport businesses and regulated road transport contractors; or

(iv) persons in a road transport contractual chain.

workplace law means:

(a) this Act; or

(b) the Registered Organisations Act; or

(c) the *Independent Contractors Act 2006*; or

(d) any other law of the Commonwealth, a State or a Territory that regulates the relationships between employers and employees (including by dealing with occupational health and safety matters).

workplace right: see subsection 341(1).

work value reasons: see subsection 157(2A).

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

13 Meaning of *national system employee*

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

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

14 Meaning of *national system employer*

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

(a) a constitutional corporation, so far as it employs, or usually employs, an individual; or

(b) the Commonwealth, so far as it employs, or usually employs, an individual; or

(c) a Commonwealth authority, so far as it employs, or usually employs, an individual; or

(d) a person so far as the person, in connection with constitutional trade or commerce, employs, or usually employs, an individual as:

(i) a flight crew officer; or

(ii) a maritime employee; or

(iii) a waterside worker; or

(e) a body corporate incorporated in a Territory, so far as the body employs, or usually employs, an individual; or

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

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Note 1: In this context, ***Australia*** includes Norfolk Island, the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands (see the definition of ***Australia*** in section 12).

Note 2: Sections 30D and 30N extend the meaning of ***national system employer*** in relation to a referring State.

Particular employers declared not to be national system employers

(2) Despite subsection (1) and sections 30D and 30N, a particular employer is not a national system employer if:

(a) that employer:

(i) is a body established for a public purpose by or under a law of a State or Territory, by the Governor of a State, by the Administrator of a Territory or by a Minister of a State or Territory; or

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

(iii) is a wholly-owned subsidiary (within the meaning of the *Corporations Act 2001*) of, or is wholly controlled by, an employer to which subparagraph (ii) applies; and

(b) that employer is specifically declared, by or under a law of the State or Territory, not to be a national system employer for the purposes of this Act; and

(c) an endorsement by the Minister under paragraph (4)(a) is in force in relation to the employer.

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

Endorsement of declarations

(4) The Minister may, in writing:

(a) endorse, in relation to an employer, a declaration referred to in paragraph (2)(b); or

(b) revoke or amend such an endorsement.

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

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

Employers that cannot be declared

(6) Subsection (2) does not apply to an employer that:
(a) generates, supplies or distributes electricity; or
(b) supplies or distributes gas; or
(c) provides services for the supply, distribution or release of water; or
(d) operates a rail service or a port;
unless the employer is a body established for a local government purpose by or under a law of a State or Territory, or is a wholly-owned subsidiary (within the meaning of the *Corporations Act 2001*) of, or is wholly controlled by, such a body.

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

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

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

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

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

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

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

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

15 Ordinary meanings of *employee* and *employer*

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

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

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

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

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

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

15AA Determining the ordinary meanings of *employee* and *employer*

(1) For the purposes of this Act, whether an individual is an ***employee*** of a person within the ordinary meaning of that expression, or whether a person is an ***employer*** of an individual within the ordinary meaning of that expression, is to be determined by ascertaining the real substance, practical reality and true nature of the relationship between the individual and the person.

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(2) For the purposes of ascertaining the real substance, practical reality and true nature of the relationship between the individual and the person:

(a) the totality of the relationship between the individual and the person must be considered; and

(b) in considering the totality of the relationship between the individual and the person, regard must be had not only to the terms of the contract governing the relationship, but also to other factors relating to the totality of the relationship including, but not limited to, how the contract is performed in practice.

Note: This section was enacted as a response to the decisions of the High Court of Australia in *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1 and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2.

(3) Subsections (1) and (2) do not apply to the following provisions of this Act:

(a) Divisions 2A and 2B of Part 1-3;

(b) Part 3-1, to the extent that Part 3-1 applies only because of the operation of section 30G or 30R.

15AB Individual may elect that section 15AA does not apply

(1) This section applies to a relationship between a person and an individual.

Person may notify individual before the section 15AA commencement that they may give an opt out notice

(2) The person may give the individual a written notice before the section 15AA commencement stating that the individual may give the person an opt out notice, if the person considers that the relationship may, on the section 15AA commencement, become a relationship in which the person is the employer of the individual because of the operation of section 15AA.

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Person may notify individual on or after the section 15AA commencement that they may give an opt out notice

(3) The person may give the individual a written notice on or after the section 15AA commencement stating that the individual may give the person an opt out notice, if the person considers that the relationship may be a relationship in which the person is the employer of the individual because of the operation of section 15AA.

Earnings requirement

(4) The person must not give the individual a notice under subsection (2) or (3) unless the person considers that, when the notice is given, the individual's earnings for work performed under the relationship exceed the contractor high income threshold.

Individual may give an opt out notice

(5) The individual may give an opt out notice to the person, stating that the individual elects that section 15AA is not to apply to the relationship between the person and the individual:
  (a) if the person has given a notice to the individual under subsection (2) or (3) of this section—within 21 days of the giving of the notice; or
  (b) if the person has not given a notice to the individual under subsection (2) or (3) of this section—at any time after the commencement of this section.

(6) The individual may give only one opt out notice in respect of the relationship.

Opt out notice to include a statement about earnings

(7) The opt out notice must state that the individual considers that the individual's earnings for work performed under the relationship exceed the contractor high income threshold when the opt out notice is given.

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Definitions

(8) In this section, and in sections 15AC and 15AD:

opt out notice means a notice under subsection (5).

section 15AA commencement means the commencement of section 15AA of this Act.

Note: Section 15AA of this Act is inserted by item 237 of Schedule 1 to the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024*, which commences in accordance with item 21 of the table in subsection 2(1) of that Act.

15AC Effect of an opt out notice

(1) This section applies if an individual gives an opt out notice to a person in respect of the relationship between the person and the individual in accordance with section 15AB.

Opt out notice given before the section 15AA commencement

(2) If the opt out notice is given before the section 15AA commencement, and is not revoked before that commencement under section 15AD, then:

(a) by force of this section, section 15AA does not start to apply to the relationship on that commencement; and

(b) section 15AA does not apply to the relationship after that commencement, unless the opt out notice is revoked.

Opt out notice given on or after the section 15AA commencement

(3) If the opt out notice is given on or after the section 15AA commencement, then:

(a) by force of this section, section 15AA ceases to apply to the relationship on the day on which the opt out notice is given; and

(b) section 15AA does not apply to the relationship on or after that day, unless the opt out notice is revoked.

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Note: If an individual does not give an opt out notice to a person in accordance with section 15AB, section 15AA starts to apply, or continues to apply, (as applicable) to the relationship between the person and the individual.

15AD Opt out notice may be revoked by an individual

(1) An individual who has given an opt out notice to a person may (subject to subsection (4)), at any time after giving the opt out notice, revoke the opt out notice by giving written notice (a ***revocation notice***) to the person that the individual elects that section 15AA is to apply to the relationship between the person and the individual.

Revocation before the section 15AA commencement

(2) If an individual gives a revocation notice to a person before the section 15AA commencement, section 15AA applies, by force of this subsection, to the relationship between the person and the individual on and after that commencement.

Revocation on or after the section 15AA commencement

(3) If an individual gives a revocation notice to a person on or after the section 15AA commencement, section 15AA applies, by force of this subsection, to the relationship between the person and the individual on and after the day on which the revocation notice is given.

(4) An individual may give only one revocation notice in respect of a particular relationship.

15A Meaning of *casual employee*

General rule

(1) An employee is a ***casual employee*** of an employer only if:
  (a) the employment relationship is characterised by an absence of a firm advance commitment to continuing and indefinite work; and

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(b) the employee would be entitled to a casual loading or a specific rate of pay for casual employees under the terms of a fair work instrument if the employee were a casual employee, or the employee is entitled to such a loading or rate of pay under the contract of employment.

Note: An employee who commences employment as a casual employee remains a casual employee until the occurrence of a specified event (see subsection (5)).

Indicia that apply for purposes of general rule

(2) For the purposes of paragraph (1)(a), whether the employment relationship is characterised by an absence of a firm advance commitment to continuing and indefinite work is to be assessed:

(a) on the basis of the real substance, practical reality and true nature of the employment relationship; and

(b) on the basis that a firm advance commitment can be in the form of the contract of employment or, in addition to the terms of that contract, in the form of a mutual understanding or expectation between the employer and employee not rising to the level of a term of that contract (or to a variation of any such term); and

(c) having regard to, but not limited to, the following considerations (which may indicate the presence, rather than an absence, of such a commitment):

(i) whether there is an inability of the employer to elect to offer, or not offer, work or an inability of the employee to elect to accept or reject work (and whether this occurs in practice);

(ii) whether, having regard to the nature of the employer's enterprise, it is reasonably likely that there will be future availability of continuing work in that enterprise of the kind usually performed by the employee;

(iii) whether there are full-time employees or part-time employees performing the same kind of work in the employer's enterprise that is usually performed by the employee;

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(iv) whether there is a regular pattern of work for the employee.

Note: A regular pattern of work does not of itself indicate a firm advance commitment to continuing and indefinite work. An employee who has a regular pattern of work may still be a casual employee if there is no firm advance commitment to continuing and indefinite work.

(3) To avoid doubt:

(a) for the purposes of paragraph (2)(b), a mutual understanding or expectation may be inferred from conduct of the employer and employee after entering into the contract of employment or from how the contract is performed; and

(b) the considerations referred to in paragraph (2)(c) must all be considered but no single consideration is determinative and not all considerations necessarily need to be satisfied for an employee to be considered as other than a casual employee; and

(c) a pattern of work is regular for the purposes of subparagraph (2)(c)(iv) even if it is not absolutely uniform and includes some fluctuation or variation over time (including for reasonable absences such as for illness, injury or recreation).

Exceptions to general rule

(4) Despite subsection (1), an employee is not a ***casual employee*** of an employer if:

(a) the contract of employment 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

(b) the employee is a member of the academic staff or teaching staff of a higher education institution; and

(c) the employee is covered by one of the following modern awards:

(i) the Higher Education Industry-Academic Staff-Award 2020 as in force from time to time;

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(ii) the Higher Education Industry-General Staff-Award 2020 as in force from time to time; and

(d) the employee is not a State public sector employee of a State within the meaning of subsection 30A(1).

Note 1: A modern award covers an employee if the award is expressed to cover the employee, even if the modern award does not apply to the employee because an enterprise agreement applies to the employee in relation to that particular employment (see subsection 57(1) which deals with interaction between modern awards and enterprise agreements).

Note 2: This means an employee on a fixed term contract who is not covered by paragraphs (4)(b) and (c) may be a casual employee or may be other than a casual employee, depending on whether the employee satisfies the requirements of subsections (1) to (3).

Employees engaged as casual employees remain so until the occurrence of a specified event

(5) A person who commences employment as a casual employee within the meaning of subsections (1) to (4) remains a ***casual employee*** of the employer until:

(a) the employee's employment status is changed to full-time employment or part-time employment under Division 4A of Part 2-2; or

(b) the employee's employment status is changed by order of the FWC under section 66MA or 739; or

(c) the employee's employment status is changed to full-time employment or part-time employment under the terms of a fair work instrument that applies to the employee; or

(d) the employee accepts an alternative offer of employment (other than as a casual employee) by the employer and commences work on that basis.

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Division 3A—Definitions relating to regulated workers and persons in a road transport contractual chain

Subdivision A—General

15B Meaning of *collective agreement*

A ***collective agreement*** means the following:

(a) an employee-like worker collective agreement (see subsection 536MK(4));

(b) a road transport collective agreement (see subsection 536MK(5)).

15C Meaning of *contractor high income threshold*

(1) Subject to this section, the ***contractor 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 contractor high income threshold.

(3) If:

(a) in prescribing a manner in which the contractor 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 contractor 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 contractor high income threshold is the amount that it would be if the change had not occurred.

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15D Meaning of *minimum standards guidelines*

Minimum standards guidelines means the following:

(a) employee-like worker guidelines (see subsection 536KR(2));

(b) road transport guidelines (see subsection 536KR(3)).

15E Meaning of *minimum standards order*

A ***minimum standards order*** means the following:

(a) an employee-like worker minimum standards order (see subsection 536JY(2));

(b) a road transport minimum standards order (see subsection 536JY(3)).

15F Meaning of *regulated business*

A person is a ***regulated business*** if:

(a) the person is a digital labour platform operator (see section 15M); or

(b) the person is a road transport business (see subsection 15R).

15G Meaning of *regulated worker*

A person is a ***regulated worker*** if:

(a) the person is an employee-like worker (see section 15P); or

(b) the person is a regulated road transport contractor (see section 15Q).

15H Meaning of *services contract*

General meaning

(1) A ***services contract*** is a contract for services:

(a) that relates to the performance of work under the contract by an individual; and

(b) that has the requisite constitutional connection specified in subsection (2) or (3).

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Note: Conditions or collateral arrangements relating to a services contract may be taken to be part of the services contract: see subsection (4).

The requisite constitutional connection

(2) A contract for services has the requisite constitutional connection if:

(a) at least one party to the contract is:

(i) a constitutional corporation; or

(ii) the Commonwealth or a Commonwealth authority; or

(iii) a body corporate incorporated in a Territory in Australia; or

(b) one or more of the following subparagraphs is satisfied:

(i) the work concerned is wholly or principally to be performed in a Territory in Australia;

(ii) the contract was entered into in a Territory in Australia;

(iii) at least one party to the contract is a natural person who is resident in, or a body corporate that has its principal place of business in, a Territory in Australia;

(iv) the work concerned is done in the course of constitutional trade or commerce.

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).

(3) For the purposes of Part 3A-2 (minimum standards for regulated workers), Part 3A-3 (unfair deactivation and unfair termination) and Part 3A-4 (collective agreements) to the extent to which those Parts relate to digital platform work, a contract for services also has the requisite constitutional connection if the contract was arranged or facilitated through or by means of a digital labour platform, where the operator of the digital labour platform is:

(a) a constitutional corporation; or

(b) the Commonwealth or a Commonwealth authority; or

(c) a body corporate incorporated in a Territory in Australia; or

(d) a natural person who is resident in, or a body corporate that has its principal place of business in, a Territory in Australia.

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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).

Conditions and collateral arrangements

(4) A condition or collateral arrangement that relates to a services contract is taken to be part of that services contract if, were the condition or arrangement itself a contract for services, it would have the requisite constitutional connection.

15J Prospective regulated workers

A reference to a regulated worker, in relation to a services contract, includes a reference to a person who may become a regulated worker for a services contract.

15K Effect of Chapter in determining whether a person is an employee or an employer

For the purposes of ascertaining the real substance, practical reality and true nature of the relationship between an individual and a person for the purposes of determining:

(a) whether the individual is an ***employee*** of the person within the ordinary meaning of that expression; or

(b) whether the person is an ***employer*** of the individual within the ordinary meaning of that expression;

the effect upon the relationship of a minimum standards order, minimum standards guidelines or a collective agreement applying to, or covering, the individual or the person is to be disregarded.

15KA Specific provision about the effect of certain provisions in determining whether a person is an employee or an employer

(1) For the purposes of ascertaining the real substance, practical reality and true nature of the relationship between an individual and a person, any steps taken by a digital labour platform operator to

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comply with its obligations under any of the following in relation to the individual are to be disregarded:

(a) Part 3A-3;

(b) the Digital Labour Platform Deactivation Code;

(c) an order made under, or for the purposes of, Chapter 3A.

(1A) For the purposes of ascertaining the real substance, practical reality and true nature of the relationship between an individual and a person, any steps taken by a road transport business to comply with its obligations under any of the following in relation to the individual are to be disregarded:

(a) Part 3A-3;

(b) the Road Transport Industry Termination Code;

(c) an order made under, or for the purposes of, Chapter 3A.

(2) An employee-like worker to whom an employee-like worker minimum standards order applies in relation to particular digital platform work is not an employee of any person in relation to that work.

(3) A regulated road transport contractor to whom a road transport minimum standards order applies in relation to particular work in the road transport industry is not an employee of any person in relation to that work.

Subdivision B—Digital platform work

15L Meaning of *digital labour platform*

(1) A ***digital labour platform*** means an online enabled application, website or system operated to arrange, allocate or facilitate the provision of labour services, where:

(a) the operator of the application, website or system:

(i) engages independent contractors directly or indirectly through or by means of the application, website or system; or

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(ii) acts as an intermediary for or on behalf of more than one distinct but interdependent sets of users who interact with the independent contractors or the operator via the application, website or system; and

(b) any of the following processes payments referable to the work performed by the independent contractors:

(i) the operator of the application, website or system;

(ii) an associated entity of the operator;

(iii) a person contracted, whether directly or through one or more interposed entities, by the operator or an associated entity of the operator to process the payments.

(2) A ***digital labour platform*** also means an online enabled application, website or system that is prescribed by the regulations for the purposes of this subsection.

(3) A ***digital labour platform*** does not include an online application, website or system prescribed by the regulations for the purposes of this subsection.

(4) For the purposes of this section:

(a) an online application, website or system may be specified by name or by inclusion in a specified class or specified classes;

(b) an online application, website or system may be specified in respect of all forms of digital platform work, or in respect of specified forms of digital platform work.

15M Meaning of *digital labour platform operator*

A ***digital labour platform operator*** means the operator of a digital labour platform, being an operator that enters into or facilitates a services contract under which work is performed by employee-like workers.

15N Meaning of *digital platform work*

(1) ***Digital platform work*** means:

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(a) work performed by an independent contractor, where:
(i) the work is performed under a services contract through or by means of a digital labour platform, or the services contract under which the work is performed was arranged or facilitated through or by means of a digital labour platform; and
(ii) payment is made for that work; or
(b) work prescribed by the regulations for the purposes of this subsection.

(2) ***Digital platform work*** does not include work prescribed by the regulations for the purposes of this subsection.

(3) For the purposes of paragraph (1)(b) and subsection (2), work may be specified by name or by inclusion in a specified class or specified classes.

15P Meaning of *employee-like worker*

(1) A person is an ***employee-like worker*** if:
(a) the person is:
(i) an individual who is a party to a services contract in their capacity as an individual (other than as a principal), and performs work under the contract; or
(ii) if a body corporate is a party to a services contract (other than as a principal)—an individual who is a director of the body corporate, or a member of the family of a director of a body corporate, and performs work under the contract; or
(iii) if a trustee of a trust is a party to a services contract in their capacity as a trustee (other than as a principal)—an individual who is a trustee of the same trust and performs work under the contract, whether or not the individual is a party to the contract; or
(iv) if a partner in a partnership is a party to a services contract in their capacity as a partner (other than as a principal)—an individual who is a partner in the same

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partnership and performs work under the contract, whether or not the individual is a party to the contract; and

(b) the person performs all, or a significant majority, of the work to be performed under the services contract; and

(c) the work that the person performs under the services contract is digital platform work; and

(d) the person does not perform any work under the services contract as an employee; and

(e) the person satisfies 2 or more of the following:

(i) the person has low bargaining power in negotiations in relation to the services contract under which the work is performed;

(ii) the person receives remuneration at or below the rate of an employee performing comparable work;

(iii) the person has a low degree of authority over the performance of the work;

(iv) the person has such other characteristics as are prescribed by the regulations.

(2) In this Part, a reference to an independent contractor includes a reference to an individual who is an employee-like worker within the meaning of subsection (1).

(3) Regulations made for the purposes of subparagraph (1)(e)(iv) may specify that a person must have all or only one or some of the characteristics prescribed.

(4) For the purposes of determining whether an individual satisfies the criteria specified in paragraph (1)(e), the effect of a minimum standards order, minimum standards guidelines or a collective agreement applying to, or covering, the individual is to be disregarded.

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Subdivision C—Road transport industry

15Q Meaning of *regulated road transport contractor*

(1) A person is a ***regulated road transport contractor*** if:

(a) the person is:

(i) an individual who is a party to a services contract in their capacity as an individual (other than as a principal), and performs work under the contract; or

(ii) if a body corporate is a party to a services contract (other than as a principal)—an individual who is a director of the body corporate, or a member of the family of a director of a body corporate, and performs work under the contract; or

(iii) if a trustee of a trust is a party to a services contract in their capacity as a trustee (other than as a principal)—an individual who is a trustee of the same trust and performs work under the contract, whether or not the individual is a party to the contract; or

(iv) if a partner in a partnership is a party to a services contract in their capacity as a partner (other than as a principal)—an individual who is a partner in the same partnership and performs work under the contract, whether or not the individual is a party to the contract; and

(b) the person performs all, or a significant majority, of the work to be performed under the services contract; and

(c) the person does not perform any work under the services contract as an employee; and

(d) the work performed under the services contract is work in the road transport industry; and

(e) the person is not an employee-like worker who performs work in the road transport industry under the services contract.

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(2) In this Part, a reference to an independent contractor includes a reference to an individual who is a regulated road transport contractor within the meaning of subsection (1).

15R Meaning of *road transport business*

(1) A person is a ***road transport business*** if the person:
  (a) receives services under a services contract, where the services contract provides for the performance of work in the road transport industry; or
  (b) is a constitutional corporation, or is included in a class of constitutional corporations, prescribed by the regulations for the purposes of this paragraph.

(2) For the purposes of paragraph (1)(b), a business or undertaking may be specified by name or by inclusion in a specified class or specified classes.

15RA Meanings of *road transport contractual chain* and *in a road transport contractual chain*

(1) A ***road transport contractual chain*** means a chain or series of contracts or arrangements:
  (a) under which work is performed for a party to the first contract or arrangement in the chain or series by a regulated road transport contractor or a road transport employee-like worker under a services contract, or by an employee; and
  (b) in which at least one party to the first contract or arrangement in the chain or series is a constitutional corporation.

(2) A person is ***in a road transport contractual chain*** if:
  (a) the person is a party (a ***primary party***) to the first contract or arrangement in the road transport contractual chain; or
  (b) the person is a party (a ***secondary party***) to a subsequent contract or arrangement in the road transport contractual chain, being a contract or arrangement under which work is performed for the secondary party by a regulated road

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transport contractor or a road transport employee-like worker under a services contract, or by an employee; or

(c) the person is a regulated road transport contractor or a road transport employee-like worker who performs work under a services contract in the road transport contractual chain.

(3) Despite subsection (2), an individual is not ***in a road transport contractual chain*** in relation to:

(a) the delivery of a thing to the individual by a regulated road transport contractor, a road transport employee-like worker or an employee, if the delivery of the thing is solely for the individual's private or domestic purposes; or

(b) the consignment of a thing by the individual for delivery by a regulated road transport contractor, a road transport employee-like worker or an employee if the consignment of the thing is solely for the individual's private or domestic purposes; or

(c) work performed by the individual in the capacity of an employee; or

(d) work performed by the individual in an industry prescribed by the regulations for the purposes of this subsection.

(4) For the purposes of paragraph (3)(d):

(a) an industry may be specified by name or by inclusion in a specified class or specified classes; and

(b) an industry may be specified in respect of work in the road transport industry, or in respect of specified forms of such work.

(5) For the purposes of subsection (1), work performed by a regulated road transport contractor or a road transport employee-like worker under a services contract, or by an employee, in a chain or series of contracts or arrangements:

(a) is taken to be performed for the person who engaged the regulated road transport contractor, road transport employee-like worker or employee; and

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(b) is also taken to be performed for each party to a contract or arrangement in the chain or series of contracts or arrangements.

(6) This section also has the effect that it would have if it only applied to a secondary party to the extent that rights conferred on, and obligations imposed on, the secondary party by Chapter 3B have, or are likely to have, an impact on the business of the constitutional corporation that is a primary party to the first contract or arrangement in a road transport contractual chain.

(7) This section also has the effect that it would have if it only applied to a secondary party to a contract or arrangement in a road transport contractual chain that:
(a) is a constitutional corporation; or
(b) is a party to a contract with a constitutional corporation; or
(c) is a national system employer to the extent that it engages national system employees to perform work in the road transport industry; or
(d) is a regulated business; or
(e) is engaged in constitutional trade or commerce; or
(f) is incorporated in a Territory; or
(g) is prescribed by the regulations.

15RB Meaning of *a road transport employee-like worker*

A ***road transport employee-like worker*** means an employee-like worker who performs work in the road transport industry.

15S Meaning of *road transport industry*

(1) The ***road transport industry*** means:
(a) the ***road transport and distribution industry*** within the meaning of the Road Transport and Distribution Award 2020 as in force on 1 July 2024, with such modifications (if any) as are prescribed by regulations for the purposes of this paragraph; and

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(b) the ***long distance operations in the private road transport industry*** within the meaning of the Road Transport (Long Distance Operations) Award 2020 as in force on 1 July 2024, with such modifications (if any) as are prescribed by regulations for the purposes of this paragraph; and

(c) the ***waste management industry*** within the meaning of the Waste Management Award 2020 as in force on 1 July 2024, with such modifications (if any) as are prescribed by regulations for the purposes of this paragraph; and

(d) the ***cash in transit industry*** within the meaning of the Transport (Cash in Transit) Award 2020 as in force on 1 July 2024, with such modifications (if any) as are prescribed by regulations for the purposes of this paragraph; and

(e) the ***passenger vehicle transportation industry*** within the meaning of clause 4.2 of the Passenger Vehicle Transportation Award 2020, not including paragraph 4.2(c)), as in force on 1 July 2024, with such modifications (if any) as are prescribed by regulations for the purposes of this paragraph; and

(f) any other industry (however described) prescribed by the regulations for the purposes of this paragraph.

(2) For the purposes of paragraph (1)(f), the regulations may prescribe an industry by applying, adopting or incorporating any matter contained in a modern award as in force or existing from time to time.

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Division 4—Other definitions

16 Meaning of *base rate of pay*

General meaning

(1) The ***base rate of pay*** of a national system employee is the rate of pay payable to the employee for his or her ordinary hours of work, but not including any of the following:

(a) incentive-based payments and bonuses;

(b) loadings;

(c) monetary allowances;

(d) overtime or penalty rates;

(e) any other separately identifiable amounts.

Meaning for pieceworkers in relation to entitlements under National Employment Standards

(2) Despite subsection (1), if one of the following paragraphs applies to a national system employee who is a pieceworker, the employee's ***base rate of pay***, in relation to entitlements under the National Employment Standards, is the base rate of pay referred to in that paragraph:

(a) a modern award applies to the employee and specifies the employee's base rate of pay for the purposes of the National Employment Standards;

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

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

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Meaning for pieceworkers for the purpose of section 206

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

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

17 Meaning of *child* of a person

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

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

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

It does not matter whether the child is an adult.

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

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

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

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

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

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

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

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

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

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

18 Meaning of *full rate of pay*

General meaning

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

Meaning for pieceworkers in relation to entitlements under National Employment Standards

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

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

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

19 Meaning of *industrial action*

(1) ***Industrial action*** means action of any of the following kinds:

(a) the performance of work by an employee in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work by an employee, the result of which is a restriction or limitation on, or a delay in, the performance of the work;

(b) a ban, limitation or restriction on the performance of work by an employee or on the acceptance of or offering for work by an employee;

(c) a failure or refusal by employees to attend for work or a failure or refusal to perform any work at all by employees who attend for work;

(d) the lockout of employees from their employment by the employer of the employees.

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

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

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

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

(c) action by an employee if:

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(i) the action was based on a reasonable concern of the employee about an imminent risk to his or her health or safety; and

(ii) the employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work, whether at the same or another workplace, that was safe and appropriate for the employee to perform.

(3) An employer ***locks out*** employees from their employment if the employer prevents the employees from performing work under their contracts of employment without terminating those contracts.

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

19A Meaning of *industrial action*: regulated workers

(1) This section applies to a regulated worker and to a regulated business if:

(a) the regulated worker is covered by a minimum standards order, or is mentioned in an application for a minimum standards order as a regulated worker who would be covered by the order if it is made; and

(b) the regulated business is covered by the same minimum standards order, or is mentioned in an application for the same minimum standards order as a regulated business that would be covered by the order if it is made; and

(c) if the regulated business is a digital labour platform operator—the regulated worker is an employee-like worker:

(i) from whom the digital labour platform operator receives services under a services contract; or

(ii) who performs services under a services contract that was arranged or facilitated through or by means of the digital labour platform operated by the digital labour platform operator; and

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(d) if the regulated business is a road transport business—the regulated road transport contractor performs work under the services contract for the regulated business.

(2) ***Industrial action***, in relation to the regulated worker and the regulated business, means action of any of the following kinds:

(a) the performance of work under the services contract by the regulated worker in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work by the regulated worker, the result of which is a restriction or limitation on, or a delay in, the performance of the work;

(b) a ban, limitation or restriction on the performance of work under the services contract by the regulated worker or on the acceptance of or offering for work by the regulated worker;

(c) a failure or refusal by the regulated worker to attend for work under the services contract or, if the regulated worker attends for work, a refusal to perform any work at all;

(d) the lockout of the regulated worker by the regulated business.

(3) The action referred to in paragraph (2)(a), (b) or (c) must be directed against the regulated business (whether or not the regulated business is a party to the services contract).

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

(a) action by a regulated worker that is authorised or agreed to by the regulated business that is covered by the same minimum standards order as the regulated worker;

(b) action by a regulated business referred to in paragraph (2)(d) that is authorised or agreed to by, or on behalf of, regulated workers covered by the same minimum standards order as the regulated business;

(c) action by the regulated worker, if:

(i) the action was based on a reasonable concern of the regulated worker about an imminent risk to the health or safety of the regulated worker; and

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(ii) the regulated worker did not unreasonably fail to comply with a direction of the regulated business to perform other available work, whether at the same or another workplace, that was safe and appropriate for the regulated worker to perform.

(5) A regulated business ***locks out*** a regulated worker if either or both of the following apply:

(a) the regulated business prevents the regulated worker from performing work under a services contract without terminating the contract;

(b) if the regulated business is a digital labour platform operator and the regulated worker is an employee-like worker—the digital labour platform operator modifies, limits or suspends the employee-like worker's access to a digital labour platform operated by the digital labour platform operator.

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

Agreed ordinary hours of work

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

If there is no agreement

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

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

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

(i) 38 hours; and

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

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If the agreed hours are less than usual weekly hours

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

(a) 38 hours; and

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

Regulations may prescribe usual weekly hours

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

21 Meaning of *pieceworker*

(1) A ***pieceworker*** is:

(a) a national system employee to whom a modern award applies and who is defined or described in the award as a pieceworker; or

(b) a national system employee to whom an enterprise agreement applies and who is defined or described in the agreement as a pieceworker; or

(c) an award/agreement free employee who is in a class of employees prescribed by the regulations as pieceworkers.

Note: Sections 197 and 198 affect whether the FWC may approve an enterprise agreement covering a national system employee that includes a term that:

(a) defines or describes the employee as a pieceworker, if the employee is covered by a modern award that is in operation and does not include such a term; or

(b) does not define or describe the employee as a pieceworker, if the employee is covered by a modern award that is in operation and includes such a term.

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

22 Meanings of *service* and *continuous service*

General meaning

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

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

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

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

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

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

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

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

(i) any period of unauthorised absence; or

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

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

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

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

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

When service with one employer counts as service with another employer

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

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

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

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

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

Note: For example:

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

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

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

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

(a) the following conditions are satisfied:

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

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

(b) the following conditions are satisfied:

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

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

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

(8) A transfer of employment:

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

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

23 Meaning of *small business employer*

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

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

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

(b) a casual employee is not to be counted unless, at that time, the employee is a regular casual employee of the employer.

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

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

(a) the employee who is being dismissed or whose employment is being terminated; and

(b) any other employee of the employer who is also being dismissed or whose employment is also being terminated.

23A Terms relating to superannuation

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

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

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

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

(3) A ***corporate MySuper product*** is a MySuper product that is offered by a superannuation fund that:

(a) is a standard employer-sponsored fund (within the meaning of the *Superannuation Industry (Supervision) Act 1993*); and

(b) is not a public offer superannuation fund (within the meaning of that Act); and

(c) has:

(i) one standard employer-sponsor (within the meaning of that Act); or

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

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

23B Meaning of general building and construction work

(1) Work is ***general building and construction work*** if:

(a) the work is done, onsite, by an employee in the industry of:

(i) general building and construction within the meaning of paragraph 4.3(a) of the Building and Construction General On-site Award 2020 as in force at the applicable time; or

(ii) civil construction within the meaning of paragraph 4.3(b) of the Building and Construction General On-site Award 2020 as in force at the applicable time; and

(b) the work is not any of the following:

(ii) work in the industry of metal and engineering construction within the meaning of paragraph 4.3(c) of the Building and Construction General On-site Award 2020 as in force at the applicable time;

(iii) work in manufacturing and associated industries and occupations within the meaning of clause 4.8 of the Manufacturing and Associated Industries and Occupations Award 2020 as in force at the applicable time;

(iv) the work of an employee who is covered by the Joinery and Building Trades Award 2020, as in force at the applicable time, in relation to the work;

(v) work in the industry of electrical services, within the meaning of clause 4.3 of the Electrical, Electronic and Communications Contracting Award 2022 as in force at the applicable time, provided by electrical, electronics and communications contractors and their employees;

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(vi) work that is plumbing, or fire sprinkler fitting, within the meaning of clause 4.2 of the Plumbing and Fire Sprinklers Award 2020 as in force at the applicable time;

(vii) work in the black coal mining industry within the meaning of clause 4.2 of the Black Coal Mining Industry Award 2020 as in force at the applicable time;

(viii) work in the mining industry within the meaning of clause 4.2 of the Mining Industry Award 2020 as in force at the applicable time;

(ix) work in the quarrying industry within the meaning of clause 4.3 of the Cement, Lime and Quarrying Award 2020 as in force at the applicable time;

(x) work in the concrete products industry within the meaning of clause 4.2 of the Concrete Products Award 2020 as in force at the applicable time;

(xi) work in the premixed concrete industry within the meaning of clause 4.2 of the Premixed Concrete Award 2020 as in force at the applicable time;

(xii) work in connection with the installation, major modernisation, servicing, repair or maintenance of lifts and escalators, or air-conditioning or ventilation;

(xiii) work in the asphalt industry within the meaning of clause 4.2 of the Asphalt Industry Award 2020 as in force at the applicable time;

(xiv) work, in that part of the industry of civil construction described in subparagraph 4.3(b)(i) of the Building and Construction General On-site Award 2020 as in force at the applicable time, that is the construction, repair, maintenance or demolition of power houses or other structures that use eligible renewable energy sources (within the meaning of section 17 of the *Renewable Energy (Electricity) Act 2000*) to generate electricity.

(2) The ***applicable time*** is the start of the day before this section commences.

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Part 1-3—Application of this Act

Division 1—Introduction

24 Guide to this Part

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

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

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

Division 3 is about the geographical application of this Act.

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

25 Meanings of *employee* and *employer*

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

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

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Division 2—Interaction with State and Territory laws

26 Act excludes State or Territory industrial laws

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

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

(a) a general State industrial law; or

(b) an Act of a State or Territory that applies to employment generally and has one or more of the following as its main purpose or one or more of its main purposes:

(i) regulating workplace relations (including industrial matters, industrial activity, collective bargaining, industrial disputes and industrial action);

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

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

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

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

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

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

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

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

(e) a law of a State or Territory providing for the variation or setting aside of rights and obligations arising under a contract of employment, or another arrangement for employment, that a court or tribunal finds is unfair; or

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

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

(h) either of the following:

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

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

that is prescribed by the regulations.

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

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

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

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

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

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

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

(a) all employers and employees in the State or Territory; or

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

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

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

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

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

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

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

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

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

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

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

(h) the *Anti-Discrimination Act 1992* (NT).

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

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

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

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

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

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

(iii) any non-excluded matters.

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

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

(a) superannuation;

(b) workers compensation;

(c) occupational health and safety;

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

(e) child labour;

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

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

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

(h) leave for victims of crime;

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

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

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

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

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

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

(l) regulation of any of the following:

(i) employee associations;

(ii) employer associations;

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

(m) workplace surveillance;

(n) business trading hours;

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

(p) any other matters prescribed by the regulations.

28 Act excludes prescribed State and Territory laws

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

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

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

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

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

(2) Despite subsection (1), a term of a modern award or enterprise agreement applies subject to the following:

(a) any law covered by subsection 27(1A);

(b) any law of a State or Territory so far as it is covered by paragraph 27(1)(b), (c) or (d).

Note: In addition, a term of an enterprise agreement could be an unlawful term and of no effect if it requires or permits a designated emergency management body to act other than in accordance with a State or Territory law and this affects or could affect the body's volunteers (see paragraphs 194(baa), 195A(1)(d) and 253(1)(b)).

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

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

This Division is not a complete statement of the circumstances in which this Act and instruments made under it are intended to apply to the exclusion of, or prevail over, laws of the States and Territories or instruments made under those laws.

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

30A Meaning of terms used in this Division

(1) In this Division:

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

excluded subject matter means any of the following matters:

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

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

(n) workplace surveillance;
(o) business trading hours;
(p) claims for enforcement of contracts of employment, except so far as a law of a State provides for the variation or setting aside of rights and obligations arising under a contract of employment, or another arrangement for employment, that a court or tribunal finds is unfair;
(q) rights or remedies incidental to a matter referred to in a preceding paragraph of this definition;

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

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

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

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

law enforcement officer means:

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

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

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

local government employee, of a State, means:

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

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

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

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

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

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

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

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

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

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

referred subject matters means any of the following:

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

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

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

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

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

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

(e) the administration of this Act;

(f) the application of this Act;

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

but does not include any excluded subject matter.

referring State: see section 30B.

State public sector employee, of a State, means:

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

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

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

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

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

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

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

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30B Meaning of *referring State*

Reference of matters by State Parliament to Commonwealth Parliament

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

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

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

This subsection has effect subject to subsection (6).

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

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

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

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

Reference covering referred provisions

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

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

Reference covering amendments

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

Reference covering transitional matters

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

Effect of termination of reference

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

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

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

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

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

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

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

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

(ii) has been amended;

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

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

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

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

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

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

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

(v) protection from unfair dismissal;

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

(i) an independent tribunal system;

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

30C Extended meaning of *national system employee*

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

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

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

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

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

30D Extended meaning of *national system employer*

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

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

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

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

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

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

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

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

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

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

30F Extended meaning of *outworker entity*

(1) An ***outworker entity*** includes a person, other than in the person's capacity as a national system employer, so far as:

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

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

(c) one or more of the following applies:

(i) at the time the arrangement is made, one or more parties to the arrangement is in a State that is a referring State because of this Division;

(ii) the work is to be performed in a State that is a referring State because of this Division;

(iii) the person referred to in paragraph (a) carries on an activity (whether of a commercial, governmental or other nature) in a State that is a referring State because

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

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

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

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

30G General protections

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

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

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

30H Division only has effect if supported by reference

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

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

30K Meaning of terms used in this Division

(1) In this Division:

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

excluded subject matter means any of the following matters:

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

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(m) regulation of any of the following:
  (i) employee associations;
  (ii) employer associations;
  (iii) members of employee associations or of employer associations;
(n) workplace surveillance;
(o) business trading hours;
(p) claims for enforcement of contracts of employment, except so far as a law of a State provides for the variation or setting aside of rights and obligations arising under a contract of employment, or another arrangement for employment, that a court or tribunal finds is unfair;
(q) rights or remedies incidental to a matter referred to in a preceding paragraph of this definition;

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

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

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

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

law enforcement officer means:

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

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

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

local government employee, of a State, means:

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

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

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

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

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

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

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

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

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

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

referred subject matters means any of the following:

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

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

(ii) terms and conditions of employment contained in instruments (including instruments such as awards, determinations and enterprise-level agreements);

(iii) bargaining in relation to terms and conditions of employment;

(iv) the effect of a transfer of business on terms and conditions of employment;

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

(c) rights and responsibilities of persons, including employees, employers, independent contractors, outworkers, outworker entities, associations of employees or associations of employers, being rights and responsibilities relating to any of the following:

(i) freedom of association in the context of workplace relations, and related protections;

(ii) protection from discrimination relating to employment;

(iii) termination of employment;

(iv) industrial action;

(v) protection from payment of fees for services related to bargaining;

(vi) sham independent contractor arrangements;

(vii) standing down employees without pay;

(viii) union rights of entry and rights of access to records;

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

(e) the administration of this Act;

(f) the application of this Act;

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

but does not include any excluded subject matter.

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referring State: see section 30L.

State public sector employee, of a State, means:

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

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

and includes a law enforcement officer of the State.

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

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

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

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

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

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

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

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

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

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30L Meaning of *referring State*

Reference of matters by State Parliament to Commonwealth Parliament

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

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

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

This subsection has effect subject to subsection (6).

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

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

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

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

Reference covering referred provisions

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

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amending this Act, as originally enacted, and as subsequently amended by amendments enacted at any time before the State's referral law commenced, to include the referred provisions.

Reference covering amendments

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

Reference covering transitional matters

(5) This subsection covers making laws with respect to the transition from the regime provided for by:

(a) the *Workplace Relations Act 1996* (as it continues to apply because of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*); or

(b) a law of a State relating to workplace relations or industrial relations;

to the regime provided for by this Act.

Effect of termination of reference

(6) Despite anything to the contrary in a referral law of a State, a State ceases to be a ***referring State*** if any or all of the following occurs:

(a) the State's initial reference terminates;

(b) the State's amendment reference terminates, and neither of subsections (7) and (8) apply to the termination;

(c) the State's transition reference terminates.

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

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

(b) the day fixed is no earlier than the first day after the end of the period of 6 months beginning on the day on which the proclamation is published; and

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

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

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

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

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

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

(ii) has been amended;

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

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

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

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

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

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

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

(v) protection from unfair dismissal;

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

(i) an independent tribunal system;

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

30M Extended meaning of *national system employee*

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

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

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

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

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

30N Extended meaning of *national system employer*

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

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

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

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

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

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

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

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

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

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

30Q Extended meaning of *outworker entity*

(1) An ***outworker entity*** includes a person, other than in the person's capacity as a national system employer, so far as:

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

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

(c) one or more of the following applies:

(i) at the time the arrangement is made, one or more parties to the arrangement is in a State that is a referring State because of this Division;

(ii) the work is to be performed in a State that is a referring State because of this Division;

(iii) the person referred to in paragraph (a) carries on an activity (whether of a commercial, governmental or

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other nature) in a State that is a referring State because of this Division, and the work is reasonably likely to be performed in that State;

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

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

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

30R General protections

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

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

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

30S Division only has effect if supported by reference

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

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Division 3—Geographical application of this Act

31 Exclusion of persons etc. insufficiently connected with Australia

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

Note 1: In this context, ***Australia*** includes Norfolk Island, the Territory of Christmas Island, the Territory of Cocos (Keeling) Islands and the coastal sea (see the definition of ***Australia*** in section 12 of this Act and section 15B of the *Acts Interpretation Act 1901*).

Note 2: The regulations may prescribe the person or entity by reference to a class (see subsection 13(3) of the *Legislation Act 2003*).

(2) Before the Governor-General makes regulations for the purposes of subsection (1) prescribing either or both of the following:

(a) a provision of this Act that is not to apply to a person or entity;

(b) a person to whom, or an entity to which, a provision of this Act is not to apply;

the Minister must be satisfied that the provision should not apply to the person or entity in Australia because there is not a sufficient connection between the person or entity and Australia.

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

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

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

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

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

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(b) the Territory of Christmas Island;

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

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

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

32A Rules may modify application of this Act in Norfolk Island

(1) The Minister may, by legislative instrument, make rules prescribing modifications of this Act for its application in relation to Norfolk Island.

(2) To avoid doubt, the rules may not do the following:

(a) create an offence or civil penalty;

(b) provide powers of:

(i) arrest or detention; or

(ii) entry, search or seizure;

(c) impose a tax;

(d) set an amount to be appropriated from the Consolidated Revenue Fund under an appropriation in this Act;

(e) directly amend the text of this Act.

(3) If the rules prescribe modifications of this Act for its application in relation to Norfolk Island, then this Act has effect as so modified in relation to Norfolk Island.

Note: This Act would, in the absence of any such rules, apply in relation to Norfolk Island in the same way as it applies in relation to the rest of Australia.

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

Extension to Australian ships etc.

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

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

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

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

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

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

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

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

(ii) uses Australia as a base.

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

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

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

Extensions prescribed by regulations

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

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Modifications relating to extended application

(4) Despite subsections (1) and (3), if the regulations prescribe modifications of this Act, or specified provisions of this Act, for its operation under subsection (1) or (3) in relation to one or both of the following:

(a) all or part of the exclusive economic zone;

(b) all or part of the continental shelf;

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

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

Extension relating to Greater Sunrise special regime area

(6) Despite subsection 13AB(1) of the *Seas and Submerged Lands Act 1973*:

(a) an extension of this Act under subsection (1) of this section has effect; and

(b) an extension of this Act, or a provision of this Act, because of regulations made for the purposes of subsection (3) of this section may (subject to those regulations) have effect;

in relation to acts, omissions, matters and things directly or indirectly connected with the exploration of, or exploitation of the natural resources of, the continental shelf in the Greater Sunrise special regime area. This subsection has effect whether or not the extension is affected by subsection (4) of this section.

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

Extension to Australian ships etc.

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

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(a) any Australian ship outside the outer limits of the exclusive economic zone and the continental shelf; and

(b) any ship, outside the outer limits of the exclusive economic zone and the continental shelf, that:

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

(ii) uses Australia as a base.

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

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

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

Extensions prescribed by regulations

(3) Without limiting subsection (1), if the regulations prescribe further extensions of this Act, or specified provisions of this Act, in relation to all or part of the area outside the outer limits of the exclusive economic zone and the continental shelf, then this Act, or the specified provisions, extend accordingly to:

(a) any Australian employer; and

(b) any Australian-based employee.

(3A) For the purposes of extending this Act in accordance with subsection (3):

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

(i) an Australian employer; and

(ii) an employer of an Australian-based employee; and

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

(i) an employee of an Australian employer; and

(ii) an Australian-based employee.

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

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

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

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

(1) An ***Australian employer*** is an employer that:

(a) is a trading corporation formed within the limits of the Commonwealth (within the meaning of paragraph 51(xx) of the Constitution); or

(b) is a financial corporation formed within the limits of the Commonwealth (within the meaning of paragraph 51(xx) of the Constitution); or

(c) is the Commonwealth; or

(d) is a Commonwealth authority; or

(e) is a body corporate incorporated in a Territory; or

(f) carries on in Australia, in the exclusive economic zone or in the waters above the continental shelf an activity (whether of a commercial, governmental or other nature), and whose central management and control is in Australia; or

(g) is prescribed by the regulations.

(2) An ***Australian-based employee*** is an employee:

(a) whose primary place of work is in Australia; or

(b) who is employed by an Australian employer (whether the employee is located in Australia or elsewhere); or

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(c) who is prescribed by the regulations.

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

35A Regulations excluding application of Act

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

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

36 Geographical application of offences

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

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

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Division 4—Miscellaneous

37 Act binds Crown

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

(2) However, this Act does not make the Crown liable to be prosecuted for an offence, except as provided for by subsection (3).

(3) The Crown in right of the Commonwealth is liable to be prosecuted for an offence against any of the following provisions:
  (a) subsection 327A(1);
  (b) a related offence provision, to the extent that the related offence provision relates to an offence against subsection 327A(1).

(4) The Crown, in each of its capacities and to the extent the Commonwealth's legislative power permits, is liable to be the subject of proceedings for a contravention of a civil remedy provision.

38 Act not to apply so as to exceed Commonwealth power

(1) Unless the contrary intention appears, if a provision of this Act:
  (a) would, apart from this section, have an application (an ***invalid application***) in relation to:
    (i) one or more particular persons, things, matters, places, circumstances or cases; or
    (ii) one or more classes (however defined or determined) of persons, things, matters, places, circumstances or cases;

  because of which the provision exceeds the Commonwealth's legislative power; and
  (b) also has at least one application (a ***valid application***) in relation to:
    (i) one or more particular persons, things, matters, places, circumstances or cases; or

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(ii) one or more classes (however defined or determined) of persons, things, matters, places, circumstances or cases;

that, if it were the provision's only application, would be within the Commonwealth's legislative power;

it is the Parliament's intention that the provision is not to have the invalid application, but is to have every valid application.

(2) Despite subsection (1), the provision is not to have a particular valid application if:

(a) apart from this section, it is clear, taking into account the provision's context and the purpose or object underlying this Act, that the provision was intended to have that valid application only if every invalid application, or a particular invalid application, of the provision had also been within the Commonwealth's legislative power; or

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

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

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

39 Acquisition of property

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

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40 Interaction between fair work instruments and public sector employment laws

Generally, public sector employment laws prevail

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

When fair work instruments or their terms prevail

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

(a) the instrument or term is prescribed by the regulations for the purposes of that particular law; or

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

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

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

Laws that fair work instruments never prevail over

(4) Subsection (2) does not apply to any provisions of the following that are public sector employment laws:

(a) the *Safety, Rehabilitation and Compensation Act 1988*;

(b) the *Superannuation Act 1976*;

(c) the *Superannuation Act 1990*;

(d) the *Superannuation Act 2005*;

(e) the *Superannuation (Productivity Benefit) Act 1988*;

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(f) an instrument made under a law referred to in any of the above paragraphs.

Relationship with section 29

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

40A Application of the *Acts Interpretation Act 1901*

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

(2) Amendments of the *Acts Interpretation Act 1901* made after that day do not apply to this Act.

40B Effect of the *Migration Act 1958*

For the purposes of this Act, any effect of the *Migration Act 1958*, or an instrument made under that Act, on the validity of a contract of employment, or the validity of a contract for services, is to be disregarded.

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Part 1-4—Road transport industry objective and advisory group

Division 1—Guide to this Part

40C Guide to this Part

This Part deals with special provisions relating to the road transport industry.

Division 2 sets out the road transport objective.

The Expert Panel for the road transport industry must have regard to the road transport objective when performing functions and exercising powers under certain provisions of this Act. These functions and powers cover both employees and employers and regulated road transport contractors and road transport businesses.

Division 3 establishes the Road Transport Advisory Group. This Group includes representatives from the road transport industry. It has advisory functions under Chapter 3A (in relation to road transport minimum standards) and the prioritisation of the FWC's work so far as it relates to the road transport industry.

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Division 2—The road transport objective

40D The road transport objective

In performing a function or exercising a power under this Act, the Expert Panel for the road transport industry must take into account the need for an appropriate safety net of minimum standards for regulated road transport workers and employees in the road transport industry, having regard to the following:

(a) the need for standards that ensure that the road transport industry is safe, sustainable and viable;

(b) the need to avoid unreasonable adverse impacts upon the following:

(i) sustainable competition among road transport industry participants;

(ii) road transport industry business viability, innovation and productivity;

(iii) administrative and compliance costs for road transport industry participants;

(c) the need to avoid adverse impacts on the sustainability, performance and competitiveness of supply chains and the national economy;

(d) the need for minimum standards in road transport contractual chains.

This is the ***road transport objective***.

Note: The matters that must be dealt with by the Expert Panel for the road transport industry are matters relating to modern awards relating to the road transport industry, road transport minimum standards orders and road transport contractual chain orders (see subsection 617(10B)). The President also has a discretion to direct the Expert Panel for the road transport industry to deal with a matter (see subsection 617(10D)).

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Division 3—Road Transport Advisory Group

40E Establishment of Road Transport Advisory Group

(1) There is to be a Road Transport Advisory Group.

(2) The function of the Road Transport Advisory Group is to advise the FWC in relation to matters that relate to the road transport industry including, but not limited to the following:

(a) the making and varying of modern awards that relate to the road transport industry;

(b) the making and varying of road transport minimum standards orders and road transport guidelines;

(ba) the making and varying of road transport contractual chain orders and road transport contractual chain guidelines;

(c) the prioritisation by the FWC of matters relating to the road transport industry;

(d) such other matters as are prescribed by the regulations.

(3) Before advising the FWC in relation to a matter, the Road Transport Advisory Group must consult any relevant subcommittee established under section 40G.

(4) The President must consult, and have regard to the views of, the Road Transport Advisory Group in determining priorities for the work of the FWC in relation to matters affecting the road transport industry.

40F Membership of Road Transport Advisory Group

(1) The Road Transport Advisory Group consists of such members as the Minister from time to time appoints.

(2) In appointing the members of the Road Transport Advisory Group, the Minister must ensure that the membership consists of persons who are members of or who are nominated by the following:

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(a) an organisation that is entitled to represent the industrial interests of one or more regulated road transport contractors;

(b) an organisation that is entitled to represent the industrial interests of one or more road transport businesses.

(3) A member of the Road Transport Advisory Group holds office for the period specified in the instrument of appointment. The period must not exceed 3 years.

Note: A member of the Road Transport Advisory Group is eligible for reappointment (see subsection 33(4A) of the *Acts Interpretation Act 1901*).

(4) The Minister may revoke a person's appointment to the Road Transport Advisory Group.

(5) The President may give the Road Transport Advisory Group directions as to the way in which the body is to carry out its functions.

(6) The President may appoint a member of the Expert Panel for the road transport industry to chair the Road Transport Advisory Group.

40G Road Transport Advisory Group subcommittees

(1) The Road Transport Advisory Group may establish subcommittees to advise it in relation to matters relevant to the performance of its functions.

(2) A subcommittee may include persons who are not members of the Road Transport Advisory Group, but a subcommittee must be chaired by a member.

(3) The Road Transport Advisory Group must establish a subcommittee under subsection (1) of which a majority of the members are owner drivers or representatives of owner drivers:

(a) if a proposed road transport minimum standards order or a proposed road transport contractual chain order will cover owner drivers; or

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(b) if the FWC proposes to perform a function or exercise a power in relation to a road transport minimum standards order or a road transport contractual chain order that has, or may have, an effect upon owner drivers that is more than minor or technical.

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Chapter 2—Terms and conditions of employment

Part 2-1—Core provisions for this Chapter

Division 1—Introduction

41 Guide to this Part

This Part has the core provisions for this Chapter, which deals with terms and conditions of employment of national system employees. The main terms and conditions come from the National Employment Standards, modern awards, enterprise agreements and workplace determinations.

The National Employment Standards (Part 2-2) are minimum terms and conditions that apply to all national system employees.

A modern award (see Part 2-3), an enterprise agreement (see Part 2-4) or a workplace determination (see Part 2-5) provides terms and conditions for those national system employees to whom the award, agreement or determination applies. Only one of those instruments can apply to an employee at a particular time.

Division 2 has the provisions to enforce the National Employment Standards, modern awards and enterprise agreements. It also sets out when a modern award or enterprise agreement applies to a person and the significance of that for this Act.

Note: In most cases, this Act applies to a workplace determination as if it were an enterprise agreement in operation (see section 279). For the rules about workplace determinations, see Part 2-5.

Division 3 deals with the interaction between the National Employment Standards, modern awards and enterprise agreements.

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42 Meanings of *employee* and *employer*

In this Part, ***employee*** means a national system employee, and ***employer*** means a national system employer.

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

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Division 2—Core provisions for this Chapter

Subdivision A—Terms and conditions of employment provided under this Act

43 Terms and conditions of employment provided under this Act

Main terms and conditions

(1) The main terms and conditions of employment of an employee that are provided under this Act are those set out in:
  (a) the National Employment Standards (see Part 2-2); and
  (b) a modern award (see Part 2-3), an enterprise agreement (see Part 2-4) or a workplace determination (see Part 2-5) that applies to the employee.

Note 1: The situations in which a workplace determination, rather than a modern award or enterprise agreement, provides an employee's terms and conditions of employment are limited. In most cases, this Act applies to a workplace determination as if it were an enterprise agreement in operation (see section 279). See Part 2-5 generally for the rules on workplace determinations.

Note 2: Part 2-8 provides for the transfer of certain modern awards, enterprise agreements and workplace determinations if there is a transfer of business from an employee's employer to another employer.

Note 3: Copied State instruments provide the main terms and conditions of employment for an employee to whom the instrument applies. See Part 6-3A generally for the rules about those instruments.

Other terms and conditions

(2) In addition, other terms and conditions of employment include:
  (a) those terms and conditions arising from:
    (i) a national minimum wage order (see Part 2-6); or
    (ii) an equal remuneration order (see Part 2-7); and
  (b) those terms and conditions provided by Part 2-9.

Note: Part 2-9 deals with miscellaneous terms and conditions of employment, such as payment of wages.

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Subdivision B—Terms and conditions of employment provided by the National Employment Standards

44 Contravening the National Employment Standards

An employer must not contravene a provision of the National Employment Standards.

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

Subdivision C—Terms and conditions of employment provided by a modern award

45 Contravening a modern award

A person must not contravene a term of a modern award.

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

Note 2: A person does not contravene a term of a modern award unless the award applies to the person: see subsection 46(1).

46 The significance of a modern award applying to a person

(1) A modern award does not impose obligations on a person, and a person does not contravene a term of a modern award, unless the award applies to the person.

(2) A modern award does not give a person an entitlement unless the award applies to the person.

Note: Subsection (2) does not affect the ability of outworker terms in a modern award to be enforced under Part 4-1 in relation to outworkers who are not employees.

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47 When a modern award *applies* to an employer, employee, organisation or outworker entity

*When a modern award **applies** to an employee, employer, organisation or outworker entity*

(1) A modern award ***applies*** to an employee, employer, organisation or outworker entity if:

(a) the modern award covers the employee, employer, organisation or outworker entity; and

(b) the modern award is in operation; and

(c) no other provision of this Act provides, or has the effect, that the modern award does not apply to the employee, employer, organisation or outworker entity.

Note 1: Section 57 provides that a modern award does not apply to an employee (or to an employer, or an employee organisation, in relation to the employee) in relation to particular employment at a time when an enterprise agreement applies to the employee in relation to that employment.

Note 2: In a modern award, coverage of an outworker entity must be expressed to relate only to outworker terms: see subsection 143(4).

Modern awards do not apply to high income employees

(2) However, a modern award does not apply to an employee (or to an employer, or an employee organisation, in relation to the employee) at a time when the employee is a high income employee.

Modern awards apply to employees in relation to particular employment

(3) A reference in this Act to a modern award applying to an employee is a reference to the award applying to the employee in relation to particular employment.

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48 When a modern award *covers* an employer, employee, organisation or outworker entity

*When a modern award **covers** an employee, employer, organisation or outworker entity*

(1) A modern award ***covers*** an employee, employer, organisation or outworker entity if the award is expressed to cover the employee, employer, organisation or outworker entity.

Note: In a modern award, coverage of an outworker entity must be expressed to relate only to outworker terms: see subsection 143(4).

Effect of other provisions of this Act, FWC orders or court orders on coverage

(2) A modern award also ***covers*** an employee, employer, organisation or outworker entity if any of the following provides, or has the effect, that the award covers the employee, employer, organisation or outworker entity:

(a) a provision of this Act or of the Registered Organisations Act;

(b) an FWC order made under a provision of this Act;

(c) an order of a court.

(3) Despite subsections (1) and (2), a modern award does not ***cover*** an employee, employer, organisation or outworker entity if any of the following provides, or has the effect, that the award does not cover the employee, employer or organisation or outworker entity:

(a) a provision of this Act;

(b) an FWC order made under a provision of this Act;

(c) an order of a court.

Modern awards that have ceased to operate

(4) Despite subsections (1) and (2), a modern award that has ceased to operate does not ***cover*** an employee, employer, organisation or outworker entity.

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Modern awards cover employees in relation to particular employment

(5) A reference to a modern award covering an employee is a reference to the award covering the employee in relation to particular employment.

49 When a modern award is in operation

When a modern award comes into operation

(1) A modern award comes into operation:
  (a) on 1 July in the next financial year after it is made; or
  (b) if it is made on 1 July in a financial year—on that day.

(2) However, if the FWC specifies another day as the day on which the modern award comes into operation, it comes into operation on that other day. The FWC must not specify another day unless it is satisfied that it is appropriate to do so.

(3) The specified day must not be earlier than the day on which the modern award is made.

Note: For when a State reference public sector modern award comes into operation, see section 168J.

When a determination revoking a modern award comes into operation

(4) A determination revoking a modern award comes into operation on the day specified in the determination.

(5) The specified day must not be earlier than the day on which the determination is made.

Modern awards and revocation determinations take effect from first full pay period

(6) A modern award, or a determination revoking a modern award, does not take effect in relation to a particular employee until the

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start of the employee's first full pay period that starts on or after the day the award or determination comes into operation.

Modern awards operate until revoked

(7) A modern award continues in operation until it is revoked.

Subdivision D—Terms and conditions of employment provided by an enterprise agreement

50 Contravening an enterprise agreement

A person must not contravene a term of an enterprise agreement.

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

Note 2: A person does not contravene a term of an enterprise agreement unless the agreement applies to the person: see subsection 51(1).

51 The significance of an enterprise agreement applying to a person

(1) An enterprise agreement does not impose obligations on a person, and a person does not contravene a term of an enterprise agreement, unless the agreement applies to the person.

(2) An enterprise agreement does not give a person an entitlement unless the agreement applies to the person.

52 When an enterprise agreement *applies* to an employer, employee or employee organisation

When an enterprise agreement applies to an employee, employer or organisation

(1) An enterprise agreement ***applies*** to an employee, employer or employee organisation if:

(a) the agreement is in operation; and

(b) the agreement covers the employee, employer or organisation; and

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(c) no other provision of this Act provides, or has the effect, that the agreement does not apply to the employee, employer or organisation.

Enterprise agreements apply to employees in relation to particular employment

(2) A reference in this Act to an enterprise agreement applying to an employee is a reference to the agreement applying to the employee in relation to particular employment.

53 When an enterprise agreement *covers* an employer, employee or employee organisation

Employees and employers

(1) An enterprise agreement ***covers*** an employee or employer if the agreement is expressed to cover (however described) the employee or the employer.

Employee organisations

(2) An enterprise agreement ***covers*** an employee organisation:
(a) for an enterprise agreement that is not a greenfields agreement—if the FWC has noted in its decision to approve the agreement that the agreement covers the organisation (see subsection 201(2)); or
(b) for a greenfields agreement—if the agreement is made by the organisation.

Effect of provisions of this Act, FWC orders and court orders on coverage

(3) An enterprise agreement also ***covers*** an employee, employer or employee organisation if any of the following provides, or has the effect, that the agreement covers the employee, employer or organisation:
(a) a provision of this Act or of the Registered Organisations Act;

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(b) an FWC order made under a provision of this Act;
(c) an order of a court.

(4) Despite subsections (1), (2) and (3), an enterprise agreement does not ***cover*** an employee, employer or employee organisation if any of the following provides, or has the effect, that the agreement does not cover the employee, employer or organisation:
(a) another provision of this Act;
(b) an FWC order made under another provision of this Act;
(c) an order of a court.

Enterprise agreements that have ceased to operate

(5) Despite subsections (1), (2) and (3), an enterprise agreement that has ceased to operate does not ***cover*** an employee, employer or employee organisation.

Enterprise agreements cover employees in relation to particular employment

(6) A reference in this Act to an enterprise agreement covering an employee is a reference to the agreement covering the employee in relation to particular employment.

54 When an enterprise agreement is in operation

(1) An enterprise agreement approved by the FWC operates from:
(a) 7 days after the agreement is approved; or
(b) if a later day is specified in the agreement—that later day.

(2) An enterprise agreement ceases to operate on the earlier of the following days:
(a) the day on which a termination of the agreement comes into operation under section 224 or 227;
(b) the day on which section 58 or subsection 278(1A) first has the effect that there is no employee to whom the agreement applies.

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Note: Section 58 and subsection 278(1A) deal with when an enterprise agreement ceases to apply to an employee.

(3) An enterprise agreement that has ceased to operate can never operate again.

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Division 3—Interaction between the National Employment Standards, modern awards and enterprise agreements

Subdivision A—Interaction between the National Employment Standards and a modern award or an enterprise agreement

55 Interaction between the National Employment Standards and a modern award or enterprise agreement

National Employment Standards must not be excluded

(1) A modern award or enterprise agreement must not exclude the National Employment Standards or any provision of the National Employment Standards.

Terms expressly permitted by Part 2-2 or regulations may be included

(2) A modern award or enterprise agreement may include any terms that the award or agreement is expressly permitted to include:
  (a) by a provision of Part 2-2 (which deals with the National Employment Standards); or
  (b) by regulations made for the purposes of section 127.

Note: In determining what is permitted to be included in a modern award or enterprise agreement by a provision referred to in paragraph (a), any regulations made for the purpose of section 127 that expressly prohibit certain terms must be taken into account.

(3) The National Employment Standards have effect subject to terms included in a modern award or enterprise agreement as referred to in subsection (2).

Note: See also the note to section 63 (which deals with the effect of averaging arrangements).

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Ancillary and supplementary terms may be included

(4) A modern award or enterprise agreement may also include the following kinds of terms:

(a) terms that are ancillary or incidental to the operation of an entitlement of an employee under the National Employment Standards;

(b) terms that supplement the National Employment Standards;

but only to the extent that the effect of those terms is not detrimental to an employee in any respect, when compared to the National Employment Standards.

Note 1: Ancillary or incidental terms permitted by paragraph (a) include (for example) terms:

(a) under which, instead of taking paid annual leave at the rate of pay required by section 90, an employee may take twice as much leave at half that rate of pay; or

(b) that specify when payment under section 90 for paid annual leave must be made.

Note 2: Supplementary terms permitted by paragraph (b) include (for example) terms:

(a) that increase the amount of paid annual leave to which an employee is entitled beyond the number of weeks that applies under section 87; or

(b) that provide for an employee to be paid for taking a period of paid annual leave or paid/personal carer's leave at a rate of pay that is higher than the employee's base rate of pay (which is the rate required by sections 90 and 99).

Note 3: Terms that would not be permitted by paragraph (a) or (b) include (for example) terms requiring an employee to give more notice of the taking of unpaid parental leave than is required by section 74.

Enterprise agreements may include terms that have the same effect as provisions of the National Employment Standards

(5) An enterprise agreement may include terms that have the same (or substantially the same) effect as provisions of the National Employment Standards, whether or not ancillary or supplementary terms are included as referred to in subsection (4).

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Effect of terms that give an employee the same entitlement as under the National Employment Standards

(6) To avoid doubt, if a modern award includes terms permitted by subsection (4), or an enterprise agreement includes terms permitted by subsection (4) or (5), then, to the extent that the terms give an employee an entitlement (the ***award or agreement entitlement***) that is the same as an entitlement (the ***NES entitlement***) of the employee under the National Employment Standards:

(a) those terms operate in parallel with the employee's NES entitlement, but not so as to give the employee a double benefit; and

(b) the provisions of the National Employment Standards relating to the NES entitlement apply, as a minimum standard, to the award or agreement entitlement.

Note: For example, if the award or agreement entitlement is to 6 weeks of paid annual leave per year, the provisions of the National Employment Standards relating to the accrual and taking of paid annual leave will apply, as a minimum standard, to 4 weeks of that leave.

Terms permitted by subsection (4) or (5) do not contravene subsection (1)

(7) To the extent that a term of a modern award or enterprise agreement is permitted by subsection (4) or (5), the term does not contravene subsection (1).

Note: A term of a modern award has no effect to the extent that it contravenes this section (see section 56). An enterprise agreement that includes a term that contravenes this section must not be approved (see section 186) and a term of an enterprise agreement has no effect to the extent that it contravenes this section (see section 56).

56 Terms of a modern award or enterprise agreement contravening section 55 have no effect

A term of a modern award or enterprise agreement has no effect to the extent that it contravenes section 55.

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Subdivision B—Interaction between modern awards and enterprise agreements

57 Interaction between modern awards and enterprise agreements

(1) A modern award does not apply to an employee in relation to particular employment at a time when an enterprise agreement applies to the employee in relation to that employment.

(2) If a modern award does not apply to an employee in relation to particular employment because of subsection (1), the award does not apply to an employer, or an employee organisation, in relation to the employee.

57A Designated outworker terms of a modern award continue to apply

(1) This section applies if, at a particular time:
  (a) an enterprise agreement applies to an employer; and
  (b) a modern award covers the employer (whether the modern award covers the employer in the employer's capacity as an employer or an outworker entity); and
  (c) the modern award includes one or more designated outworker terms.

(2) Despite section 57, the designated outworker terms of the modern award apply at that time to the following:
  (a) the employer;
  (b) each employee who is both:
    (i) a person to whom the enterprise agreement applies; and
    (ii) a person who is covered by the modern award;
  (c) each employee organisation that is covered by the modern award.

(3) To avoid doubt:

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(a) designated outworker terms of a modern award can apply to an employer under subsection (2) even if none of the employees of the employer is an outworker; and

(b) to the extent to which designated outworker terms of a modern award apply to an employer, an employee or an employee organisation because of subsection (2), the modern award applies to the employer, employee or organisation.

Subdivision C—Interaction between one or more enterprise agreements

58 Only one enterprise agreement can apply to an employee

Only one enterprise agreement can apply to an employee

(1) Only one enterprise agreement can apply to an employee at a particular time.

General rule—later agreement does not apply until earlier agreement passes its nominal expiry date

(2) If:

(a) an enterprise agreement (the ***earlier agreement***) applies to an employee in relation to particular employment; and

(b) another enterprise agreement (the ***later agreement***) that covers the employee in relation to the same employment comes into operation; and

(c) subsections (3), (4) and (5) do not apply;

then:

(d) if the earlier agreement has not passed its nominal expiry date:

(i) the later agreement cannot apply to the employee in relation to that employment until the earlier agreement passes its nominal expiry date; and

(ii) the earlier agreement ceases to apply to the employee in relation to that employment when the earlier agreement

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passes its nominal expiry date, and can never so apply again; or

(e) if the earlier agreement has passed its nominal expiry date—the earlier agreement ceases to apply to the employee when the later agreement comes into operation, and can never so apply again.

Special rule—supported bargaining agreement replaces single-enterprise agreement

(3) If:

(a) a single-enterprise agreement applies to an employee in relation to particular employment; and

(b) a supported bargaining agreement that covers the employee in relation to the same employment comes into operation;

the single-enterprise agreement ceases to apply to the employee when the supported bargaining agreement comes into operation, and can never so apply again.

Special rule—single-enterprise agreement replaces single interest employer agreement

(4) If:

(a) a single interest employer agreement applies to an employee in relation to particular employment; and

(b) a single-enterprise agreement that covers the employee in relation to the same employment comes into operation;

the single interest employer agreement ceases to apply to the employee when the single-enterprise agreement comes into operation, and can never so apply again.

Special rule—single-enterprise agreement replaces supported bargaining agreement

(5) If:

(a) a supported bargaining agreement applies to an employee in relation to particular employment; and

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(b) a single-enterprise agreement that covers the employee in relation to the same employment comes into operation;

the supported bargaining agreement ceases to apply to the employee when the single-enterprise agreement comes into operation, and can never so apply again.

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Part 2-2—The National Employment Standards

Division 1—Introduction

59 Guide to this Part

This Part contains the National Employment Standards.

Division 2 identifies the National Employment Standards, the detail of which is set out in Divisions 3 to 12.

Division 13 contains miscellaneous provisions relating to the National Employment Standards.

The National Employment Standards are minimum standards that apply to the employment of national system employees. Part 2-1 (which deals with the core provisions for this Chapter) contains the obligation for employers to comply with the National Employment Standards (see section 44).

The National Employment Standards also underpin what can be included in modern awards and enterprise agreements. Part 2-1 provides that the National Employment Standards cannot be excluded by modern awards or enterprise agreements, and contains other provisions about the interaction between the National Employment Standards and modern awards or enterprise agreements (see sections 55 and 56).

Divisions 2, 2A and 3 of Part 6-3 extend the operation of the parental leave, paid family and domestic violence leave and notice of termination provisions of the National Employment Standards to employees not otherwise covered by those provisions.

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60 Meanings of *employee* and *employer*

In this Part, ***employee*** means a national system employee, and ***employer*** means a national system employer.

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

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Division 2—The National Employment Standards

61 The National Employment Standards are minimum standards applying to employment of employees

(1) This Part sets minimum standards that apply to the employment of employees which cannot be displaced, even if an enterprise agreement includes terms of the kind referred to in subsection 55(5).

Note: Subsection 55(5) allows enterprise agreements to include terms that have the same (or substantially the same) effect as provisions of the National Employment Standards.

(2) The minimum standards relate to the following matters:

(a) maximum weekly hours (Division 3);
(b) requests for flexible working arrangements (Division 4);
(ba) casual employment (Division 4A);
(c) parental leave and related entitlements (Division 5);
(d) annual leave (Division 6);
(e) personal/carer's leave, compassionate leave and paid family and domestic violence leave (Division 7);
(f) community service leave (Division 8);
(g) long service leave (Division 9);
(h) public holidays (Division 10);
(ha) superannuation contributions (Division 10A);
(i) notice of termination and redundancy pay (Division 11);
(j) Fair Work Information Statement (Division 12).

(3) Divisions 3 to 12 constitute the ***National Employment Standards***.

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Division 3—Maximum weekly hours

62 Maximum weekly hours

Maximum weekly hours of work

(1) An employer must not request or require an employee to work more than the following number of hours in a week unless the additional hours are reasonable:
  (a) for a full-time employee—38 hours; or
  (b) for an employee who is not a full-time employee—the lesser of:
    (i) 38 hours; and
    (ii) the employee's ordinary hours of work in a week.

Employee may refuse to work unreasonable additional hours

(2) The employee may refuse to work additional hours (beyond those referred to in paragraph (1)(a) or (b)) if they are unreasonable.

Determining whether additional hours are reasonable

(3) In determining whether additional hours are reasonable or unreasonable for the purposes of subsections (1) and (2), the following must be taken into account:
  (a) any risk to employee health and safety from working the additional hours;
  (b) the employee's personal circumstances, including family responsibilities;
  (c) the needs of the workplace or enterprise in which the employee is employed;
  (d) whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of, working additional hours;

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(e) any notice given by the employer of any request or requirement to work the additional hours;

(f) any notice given by the employee of his or her intention to refuse to work the additional hours;

(g) the usual patterns of work in the industry, or the part of an industry, in which the employee works;

(h) the nature of the employee's role, and the employee's level of responsibility;

(i) whether the additional hours are in accordance with averaging terms included under section 63 in a modern award or enterprise agreement that applies to the employee, or with an averaging arrangement agreed to by the employer and employee under section 64;

(j) any other relevant matter.

Authorised leave or absence treated as hours worked

(4) For the purposes of subsection (1), the hours an employee works in a week are taken to include any hours of leave, or absence, whether paid or unpaid, that the employee takes in the week and that are authorised:

(a) by the employee's employer; or

(b) by or under a term or condition of the employee's employment; or

(c) by or under a law of the Commonwealth, a State or a Territory, or an instrument in force under such a law.

63 Modern awards and enterprise agreements may provide for averaging of hours of work

(1) A modern award or enterprise agreement may include terms providing for the averaging of hours of work over a specified period. The average weekly hours over the period must not exceed:

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

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

(i) 38 hours; and

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(ii) the employee's ordinary hours of work in a week.

(2) The terms of a modern award or enterprise agreement may provide for average weekly hours that exceed the hours referred to in paragraph (1)(a) or (b) if the excess hours are reasonable for the purposes of subsection 62(1).

Note: Hours in excess of the hours referred to in paragraph (1)(a) or (b) that are worked in a week in accordance with averaging terms in a modern award or enterprise agreement (whether the terms comply with subsection (1) or (2)) will be treated as additional hours for the purposes of section 62. The averaging terms will be relevant in determining whether the additional hours are reasonable (see paragraph 62(3)(i)).

64 Averaging of hours of work for award/agreement free employees

(1) An employer and an award/agreement free employee may agree in writing to an averaging arrangement under which hours of work over a specified period of not more than 26 weeks are averaged. The average weekly hours over the specified period must not exceed:

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

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

(i) 38 hours; and

(ii) the employee's ordinary hours of work in a week.

(2) The agreed averaging arrangement may provide for average weekly hours that exceed the hours referred to in paragraph (1)(a) or (b) if the excess hours are reasonable for the purposes of subsection 62(1).

Note: Hours in excess of the hours referred to in paragraph (1)(a) or (b) that are worked in a week in accordance with an agreed averaging arrangement (whether the arrangement complies with subsection (1) or (2)) will be treated as additional hours for the purposes of section 62. The averaging arrangement will be relevant in determining whether the additional hours are reasonable (see paragraph 62(3)(i)).

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Division 4—Requests for flexible working arrangements

65 Requests for flexible working arrangements

Employee may request change in working arrangements

(1) If:

(a) any of the circumstances referred to in subsection (1A) apply to an employee; and

(b) the employee would like to change his or her working arrangements because of those circumstances;

then the employee may request the employer for a change in working arrangements relating to those circumstances.

Note: Examples of changes in working arrangements include changes in hours of work, changes in patterns of work and changes in location of work.

(1A) The following are the circumstances:

(aa) the employee is pregnant;

(a) the employee is the parent, or has responsibility for the care, of a child who is of school age or younger;

(b) the employee is a carer (within the meaning of the *Carer Recognition Act 2010*);

(c) the employee has a disability;

(d) the employee is 55 or older;

(e) the employee is experiencing family and domestic violence;

(f) the employee provides care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because the member is experiencing family and domestic violence.

(1B) To avoid doubt, and without limiting subsection (1), an employee who:

(a) is a parent, or has responsibility for the care, of a child; and

(b) is returning to work after taking leave in relation to the birth or adoption of the child;

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may request to work part-time to assist the employee to care for the child.

(2) The employee is not entitled to make the request unless:

(a) for an employee other than a casual employee—the employee has completed at least 12 months of continuous service with the employer immediately before making the request; or

(b) for a casual employee—the employee:

(i) is, immediately before making the request, a regular casual employee of the employer who has been employed on that basis for a sequence of periods of employment during a period of at least 12 months; and

(ii) has a reasonable expectation of continuing employment by the employer on a regular and systematic basis.

(2A) For the purposes of applying paragraph (2)(a) in relation to an employee who has had their employment changed under Division 4A of Part 2-2, any period for which the employee was a regular casual employee of the employer is taken to be continuous service for the purposes of that paragraph.

Formal requirements

(3) The request must:

(a) be in writing; and

(b) set out details of the change sought and of the reasons for the change.

Agreeing to the request

65A Responding to requests for flexible working arrangements

Responding to the request

(1) If, under subsection 65(1), an employee requests an employer for a change in working arrangements relating to circumstances that apply to the employee, the employer must give the employee a written response to the request within 21 days.

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(2) The response must:

(a) state that the employer grants the request; or

(b) if, following discussion between the employer and the employee, the employer and the employee agree to a change to the employee's working arrangements that differs from that set out in the request—set out the agreed change; or

(c) subject to subsection (3)—state that the employer refuses the request and include the matters required by subsection (6).

(3) The employer may refuse the request only if:

(a) the employer has:

(i) discussed the request with the employee; and

(ii) genuinely tried to reach an agreement with the employee about making changes to the employee's working arrangements to accommodate the circumstances mentioned in subsection (1); and

(b) the employer and the employee have not reached such an agreement; and

(c) the employer has had regard to the consequences of the refusal for the employee; and

(d) the refusal is on reasonable business grounds.

Note: An employer's grounds for refusing a request may be taken to be reasonable business grounds, or not to be reasonable business grounds, in certain circumstances: see subsection 65C(5).

(4) To avoid doubt, subparagraph (3)(a)(ii) does not require the employer to agree to a change to the employee's working arrangements if the employer would have reasonable business grounds for refusing a request for the change.

Reasonable business grounds for refusing requests

(5) Without limiting what are reasonable business grounds for the purposes of paragraph (3)(d) and subsection (4), reasonable business grounds for refusing a request include the following:

(a) that the new working arrangements requested would be too costly for the employer;

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(b) that there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested;

(c) that it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested;

(d) that the new working arrangements requested would be likely to result in a significant loss in efficiency or productivity;

(e) that the new working arrangements requested would be likely to have a significant negative impact on customer service.

Note: The specific circumstances of the employer, including the nature and size of the enterprise carried on by the employer, are relevant to whether the employer has reasonable business grounds for refusing a request for the purposes of paragraph (3)(d) and subsection (4). For example, if the employer has only a small number of employees, there may be no capacity to change the working arrangements of other employees to accommodate the request (see paragraph (5)(b)).

Employer must explain grounds for refusal

(6) If the employer refuses the request, the written response under subsection (1) must:

(a) include details of the reasons for the refusal; and

(b) without limiting paragraph (a) of this subsection:

(i) set out the employer's particular business grounds for refusing the request; and

(ii) explain how those grounds apply to the request; and

(c) either:

(i) set out the changes (other than the requested change) in the employee's working arrangements that would accommodate, to any extent, the circumstances mentioned in subsection (1) and that the employer would be willing to make; or

(ii) state that there are no such changes; and

(d) set out the effect of sections 65B and 65C.

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Genuinely trying to reach an agreement

(7) 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.

65B Disputes about the operation of this Division

Application of this section

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

(a) the dispute relates to a request by the employee to the employer under subsection 65(1) for a change in working arrangements relating to circumstances that apply to the employee; and

(b) either:

(i) the employer has refused the request; or

(ii) 21 days have passed since the employee made the request, and the employer has not given the employee a written response to the request under section 65A.

Note 1: Modern awards and enterprise agreements must include a term that provides a procedure for settling disputes in relation to the National Employment Standards (see paragraph 146(b) and subsection 186(6)).

Note 2: Subsection 55(4) permits inclusion of terms that are ancillary or incidental to, or that supplement, the National Employment Standards. However, a term of a modern award or an enterprise agreement has no effect to the extent it contravenes section 55 (see section 56).

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.

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.

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(4) If a dispute is referred under subsection (3):
  (a) the FWC must first deal with the dispute by means other than arbitration, unless there are exceptional circumstances; and
  (b) the FWC may deal with the dispute by arbitration in accordance with section 65C.

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

Representatives

(5) The employer or employee 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) 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).

65C Arbitration

(1) For the purposes of paragraph 65B(4)(b), the FWC may deal with the dispute by arbitration by making any of the following orders:
  (a) if the employer has not given the employee a written response to the request under section 65A—an order that the employer be taken to have refused the request;
  (b) if the employer refused the request:
    (i) an order that it would be appropriate for the grounds on which the employer refused the request to be taken to have been reasonable business grounds; or
    (ii) an order that it would be appropriate for the grounds on which the employer refused the request to be taken not to have been reasonable business grounds;
  (e) if the FWC is satisfied that the employer has not responded, or has not responded adequately, to the employee's request

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under section 65A—an order that the employer take such further steps as the FWC considers appropriate, having regard to the matters in section 65A;

(f) subject to subsection (3) of this section:

(i) an order that the employer grant the request; or

(ii) an order that the employer make specified changes (other than the requested changes) in the employee's working arrangements to accommodate, to any extent, the circumstances mentioned in paragraph 65B(1)(a).

Note: An order by the FWC under paragraph (e) could, for example, require the employer to give a response, or further response, to the employee's request, and could set out matters that must be included in the response or further response.

(2) In making an order under subsection (1), the FWC must take into account fairness between the employer and the employee.

(2A) The FWC must not make an order under paragraph (1)(e) or (f) that would be inconsistent with:

(a) a provision of this Act; or

(b) a term of a fair work instrument (other than an order made under that paragraph) that, immediately before the order is made, applies to the employer and employee.

(3) The FWC may make an order under paragraph (1)(f) only if the FWC is satisfied that there is no reasonable prospect of the dispute being resolved without the making of such an order.

(4) If the FWC makes an order under paragraph (1)(a), the employer is taken to have refused the request.

(5) If the FWC makes an order under paragraph (1)(b), the grounds on which the employer refuses the request are taken:

(a) for an order made under subparagraph (1)(b)(i)—to be reasonable business grounds; or

(b) for an order made under subparagraph (1)(b)(ii)—not to be reasonable business grounds.

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Contravening an order under subsection (1)

(6) A person must not contravene a term of an order made under subsection (1).

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

66 State and Territory laws that are not excluded

This Act is not intended to apply to the exclusion of laws of a State or Territory that provide employee entitlements in relation to flexible working arrangements, to the extent that those entitlements are more beneficial to employees than the entitlements under this Division.

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Division 4A—Casual employment

Subdivision A—Application of Division

66A Division applies to casual employees etc.

(1) This Division applies in relation to an employee who is a casual employee.

(2) A reference in this Division to full-time employment or part-time employment is taken not to include employment for a specified period of time, for a specified task or for the duration of a specified season.

66AAA Object of this Division

The object of this Division is to establish a framework for dealing with changes to casual employment status that:

(a) is quick, flexible and informal; and

(b) addresses the needs of employers and employees; and

(c) provides for the resolution of disputes to support employee choice about employment status.

Subdivision B—Employee choice about casual employment

66AAB Employee notification

A casual employee may give an employer a written notification under this section if:

(a) having regard to subsections 15A(1) to (4) and the employee's current employment relationship with the employer, the employee believes that the employee no longer meets the requirements of those subsections; and

(b) the employee does not have a dispute with the employer relating to the operation of Division 4A of Part 2-2 being

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dealt with under section 66M (including by way of arbitration under section 66MA) or under section 739; and

(c) if the employer:

(i) is a small business employer at the time the notification is given—the employee has been employed by the employer for a period of at least 12 months beginning the day the employment started; or

(ii) is not a small business employer at the time the notification is given—the employee has been employed by the employer for a period of at least 6 months beginning the day the employment started; and

(d) in the period of 6 months before the day the notification is given, the employee has not:

(i) received a response from the employer under section 66AAC not accepting a previous notification made under this section; or

(v) had a dispute with the employer relating to the operation of Division 4A of Part 2-2 resolved under section 66M (including by way of arbitration under section 66MA) or under section 739.

Note: This section does not prevent an employee changing to full-time employment or part-time employment other than under this Division (see paragraphs 15A(5)(c) and (d)).

66AAC Employer response

Timing of response

(1) An employer must give an employee a written response to a notification given under section 66AAB within 21 days after the notification is given to the employer.

Information that must be included in response

(2) The response must be in writing and include the following:

(a) a statement that the employer:

(i) accepts the notification; or

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(ii) does not accept the notification on one or more grounds referred to in subsection (4); and

(b) if the employer accepts the notification—the following information:

(i) whether the employee is changing to full-time employment or part-time employment;

(ii) the employee's hours of work after the change takes effect;

(iii) the day the employee's change to full-time employment or part-time employment takes effect;

(c) if the employer does not accept the notification—reasons for the employer's decision.

Consulting with employee

(3) Before giving a response under subsection (1), the employer must consult with the employee about the notification and must, if the employer is accepting the notification, discuss the matters the employer intends to specify for the purposes of subparagraphs (2)(b)(i) to (iii).

Grounds for employer to not accept notification

(4) For the purposes of subparagraph (2)(a)(ii), the employer may not accept the notification on any of the following grounds:

(a) having regard to subsections 15A(1) to (4) and the employee's current employment relationship with the employer, the employee still meets the requirements of those subsections;

(b) there are fair and reasonable operational grounds for not accepting the notification;

(c) accepting the notification would result in the employer not complying with a recruitment or selection process required by or under a law of the Commonwealth or a State or a Territory.

Note 2: In relation to paragraph (4)(c), see (for example) the APS Employment Principle at paragraph 10A(1)(c) of the *Public Service*

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Act 1999 (which deals with decisions based on merit) and any directions made under subsection 11A(2) of that Act in relation to that principle.

(5) For the purposes of paragraph (4)(b), fair and reasonable operational grounds for not accepting the notification include the following:

(a) substantial changes would be required to the way in which work in the employer's enterprise is organised;

(b) there would be significant impacts on the operation of the employer's enterprise;

(c) substantial changes to the employee's terms and conditions would be reasonably necessary to ensure the employer does not contravene a term of a fair work instrument that would apply to the employee as a full-time employee or part-time employee (as the case may be).

Note: For the purposes of paragraphs (5)(a) and (c), substantial changes include changes that significantly affect the way an employee would need to work.

66AAD Effect of employer acceptance of employee notification

(1) If an employer responds under section 66AAC that the employer accepts an employee's notification given under section 66AAB, the employee is taken to be a full-time employee or part-time employee (as the case may be) beginning on the day specified in the response.

(2) The day specified in the response for the purposes of subsection (1) must be the first day of the employee's first full pay period that starts after the day the employer response is given, unless the employer and employee agree to another day.

Subdivision D—Other provisions

66K Effect of change

To avoid doubt, an employee is taken, on and after the day specified in a notice for the purposes of

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subparagraph 66AAC(2)(b)(iii), to be a full-time employee or part-time employee of the employer for the purposes of the following:

(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) the employee's contract of employment.

66L Other rights and obligations

(1) An employer must not do any of the following in order to avoid any right or obligation under this Division:
(a) reduce or vary an employee's hours of work;
(b) change the employee's pattern of work;
(c) terminate an employee's employment.

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

(2) Nothing in this Division:
(a) requires an employee to change to full-time employment or part-time employment under this Division; or
(b) permits an employer to require an employee to change to full-time employment or part-time employment under this Division; or
(c) requires an employer to increase the hours of work of an employee who gives a notification to change to full-time employment or part-time employment under this Division.

(3) To avoid doubt, each of the following is a workplace right within the meaning of Part 3-1:
(a) giving an employer a notification under section 66AAB;
(b) receiving a response from an employer in accordance with section 66AAC;
(c) being taken to be a full-time employee or part-time employee under section 66AAD;

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(d) receiving an offer or notice in accordance with sections 66B and 66C;
(e) accepting an offer and receiving a notice under section 66E;
(f) participating in a dispute about the operation of this Division in accordance with sections 66M and 66MA.

Note: The general protections provisions in Part 3-1 prohibit adverse action, coercion, undue influence or pressure, and misrepresentations because of a workplace right of an employee.

66M Disputes about the operation of this Division

Application of this section to disputes about employee choice

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

Resolving disputes

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

Note 1: Modern awards and enterprise agreements must include a term that provides a procedure for settling disputes in relation to the National Employment Standards (see paragraph 146(b) and subsection 186(6)).

Note 2: Subsection 55(4) permits inclusion of terms that are ancillary or incidental to, or that supplement, the National Employment Standards. However, a term of a modern award or an enterprise agreement has no effect to the extent it contravenes section 55 (see section 56).

FWC may deal with disputes

(5) If discussions at the workplace level do not resolve the dispute, a party to the dispute may refer the dispute to the FWC.

(6) If a dispute is referred under subsection (5):
(a) the FWC must first deal with the dispute by means other than arbitration, unless there are exceptional circumstances; and
(b) the FWC may deal with the dispute by arbitration in accordance with section 66MA.

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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

(10) The employer or employee may appoint a person, or an employer organisation or employee organisation, that is entitled to represent the industrial interests of the employer or employee 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) 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).

Procedural rules

(11) Without limiting section 609, the procedural rules may provide, in relation to a dispute between an employer and employee that has been referred to the FWC under subsection (5) of this section, for the joinder of the following as parties to the dispute:

(a) any other employee that has a dispute to which this section applies with the same employer;

(b) any employee organisation that is entitled to represent the industrial interests of such an employee.

66MA Arbitration

FWC may make any orders it considers appropriate

(1) For the purposes of paragraph 66M(6)(b), the FWC may deal with the dispute by arbitration, including by making any orders it considers appropriate, including (but not limited to) any order referred to in subsection (4) of this section.

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(2) However, the FWC must not make an order under this section unless the FWC considers that it would be fair and reasonable to make the order.

Note: The FWC must also take into account the object of this Act and the object of this Division (see paragraph 578(a)).

(3) The FWC must not make an order under subsection (1) that would be inconsistent with:

(a) a provision of this Act; or

(b) a term of a fair work instrument (other than an order made under that subsection) that, immediately before the order is made, applies to the employer and employee.

Orders relating to employee choice

(4) For the purposes of paragraph (1)(a), the orders are the following:

(a) that the employee continue to be treated as a casual employee;

(b) that the employee be treated as a full-time employee or part-time employee (as the case may be) from the first day of the employee's first full pay period that starts after the day the order is made, or such later day that the FWC considers appropriate.

(5) In considering whether to make, and the terms of, an order under subsection (1) (including an order referred to in subsection (4)) in relation to a dispute about the operation of Subdivision B of this Division (which deals with employee choice about casual employment), the FWC must:

(a) have regard to whether substantial changes to the employee's terms and conditions would be reasonably necessary to ensure the employer does not contravene a term of a fair work instrument that would apply to the employee as a full-time employee or part-time employee; and

(b) disregard conduct of the employer and employee that occurred after the employee gave the notification under section 66AAB (which deals with employee choice notifications) to the employer.

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Contravening an order under subsection (1)

(8) A person must not contravene a term of an order made under subsection (1).

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

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Division 5—Parental leave and related entitlements

Subdivision A—General

67 General rule—employee must have completed at least 12 months of service

Employees other than casual employees

(1) An employee, other than a casual employee, is not entitled to leave under this Division (other than unpaid pre-adoption leave or unpaid no safe job leave) unless the employee has, or will have, completed at least 12 months of continuous service with the employer immediately before the date that applies under subsection (3).

(1A) For the purposes of applying subsection (1) in relation to an employee who has had their employment changed under Division 4A of Part 2-2, any period for which the employee was a regular casual employee of the employer is taken to be continuous service for the purposes of that subsection.

Casual employees

(2) A casual employee, is not entitled to leave (other than unpaid pre-adoption leave or unpaid no safe job leave) under this Division unless:

(a) the employee is, or will be, immediately before the date that applies under subsection (3), a regular casual employee of the employer who has been employed on that basis for a sequence of periods of employment during a period of at least 12 months; and

(b) but for:

(i) the birth or expected birth of the child; or

(ii) the placement or the expected placement of the child;

the employee would have a reasonable expectation of continuing employment by the employer on a regular and systematic basis.

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Date at which employee must have completed 12 months of service

(3) For the purposes of subsections (1) and (2), the date that applies is:

(a) if the leave is:

(i) birth-related leave starting before the birth of the child; or

(ii) unpaid special parental leave;

the expected date of birth of the child; or

(b) in any other case—the date on which the employee's period of leave is to start.

*Meaning of **birth-related leave***

(4) ***Birth-related leave*** means leave of either of the following kinds:

(a) unpaid parental leave taken in association with the birth of a child (see section 70);

(b) unpaid special parental leave (see section 80).

*Meaning of **adoption-related leave***

(5) ***Adoption-related leave*** means leave of either of the following kinds:

(a) unpaid parental leave taken in association with the placement of a child for adoption (see section 70);

(b) unpaid pre-adoption leave (see section 85).

*Meaning of **day of placement***

(6) The ***day of placement***, in relation to the adoption of a child by an employee, means the earlier of the following days:

(a) the day on which the employee first takes custody of the child for the adoption;

(b) the day on which the employee starts any travel that is reasonably necessary to take custody of the child for the adoption.

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68 General rule for adoption-related leave—child must be under 16 etc.

An employee is not entitled to adoption-related leave unless the child that is, or is to be, placed with the employee for adoption:

(a) is, or will be, under 16 as at the day of placement, or the expected day of placement, of the child; and

(b) has not, or will not have, lived continuously with the employee for a period of 6 months or more as at the day of placement, or the expected day of placement, of the child; and

(c) is not (otherwise than because of the adoption) a child of the employee or the employee's spouse or de facto partner.

69 Transfer of employment situations in which employee is entitled to continue on leave etc.

(1) If:

(a) there is a transfer of employment in relation to an employee; and

(b) the employee has already started a period of leave under this Division when the employee's employment with the first employer ends;

the employee is entitled to continue on that leave for the rest of that period.

(2) If:

(a) there is a transfer of employment in relation to an employee; and

(b) the employee has, in relation to the first employer, already taken a step that is required or permitted by a provision of this Division in relation to taking a period of leave;

the employee is taken to have taken the step in relation to the second employer.

Note: Steps covered by this subsection include (for example) complying with a notice or evidence requirement of section 74 in relation to the first employer.

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Subdivision B—Parental leave

70 Entitlement to unpaid parental leave

An employee is entitled to 12 months of unpaid parental leave if:

(a) the leave is associated with:

(i) the birth of a child of the employee or the employee's spouse or de facto partner; or

(ii) the placement of a child with the employee for adoption; and

(b) the employee has or will have a responsibility for the care of the child.

Note: The employee's entitlement under this section may be affected by other provisions of this Division.

71 The period of leave

Application of this section

(1) This section applies to an employee who intends to take unpaid parental leave.

Leave must be taken in single continuous period

(2) The employee must take the leave in a single continuous period.

Note 1: An employee may take a form of paid leave at the same time as the employee is on unpaid parental leave (see section 79).

Note 2: For provisions affecting the rule in this subsection, see:

(a) subsection 72A(11) (flexible unpaid parental leave); and

(b) subsection 73(4) (pregnant employee may be required to take unpaid parental leave within 6 weeks before the birth); and

(c) paragraph 78A(2)(b) (permitted work periods while child is hospitalised); and

(d) subsection 79A(1) (keeping in touch days).

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When birth-related leave must start and end

(3) If the leave is birth-related leave for an employee who is pregnant with, or gives birth to, the child, the period of leave may start:

(a) up to 6 weeks before the expected date of birth of the child; or

(b) earlier, if the employer and employee so agree; or

(c) during the 24-month period starting on the date of birth of the child;

but must end during the 24-month period starting on the date of birth of the child.

Note 1: If the employee is not fit for work, the employee may be entitled to:
(a) paid personal leave under Subdivision A of Division 7; or
(b) unpaid special parental leave under section 80.

Note 2: If it is inadvisable for the employee to continue in the employee's present position, the employee may be entitled:
(a) to be transferred to an appropriate safe job under section 81; or
(b) to paid no safe job leave under section 81A; or
(c) to unpaid no safe job leave under section 82A.

Note 3: Section 344 prohibits the exertion of undue influence or undue pressure on the employee in relation to a decision by the employee whether to agree as mentioned in paragraph (3)(b) of this section.

(4) If the leave is birth-related leave but subsection (3) does not apply, the period of leave must start and end during the 24-month period starting on the date of birth of the child.

When adoption-related leave must start and end

(5) If the leave is adoption-related leave, the period of leave must start and end during the 24-month period starting on the day of placement of the child.

Limit on amount of leave

(6) The employee may take unpaid parental leave under this section only if the period of leave is no longer than 12 months, less the employee's notional flexible period.

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Note: An employee is entitled under section 76 to request an extension of the period of leave beyond the employee's available parental leave period. However, the period of leave may not be extended beyond 24 months after the date of birth or day of placement of the child (see subsection 76(7)).

72A Flexible unpaid parental leave

Taking leave during 24 months starting on date of birth or day of placement

(1) An employee may take up to 100 days (or, if a higher number of days is prescribed by the regulations, that higher number of days) of unpaid parental leave (***flexible unpaid parental leave***) during the 24-month period starting on the date of birth or day of placement of the child if the requirements of this section are satisfied in relation to the leave.

Note 1: The flexible unpaid parental leave is unpaid parental leave and so comes out of the employee's entitlement to 12 months of unpaid parental leave under section 70.

Note 2: The number of days of flexible unpaid parental leave that the employee takes must not be more than the number of flexible days notified to the employer under subsection 74(3C) (subject to any agreement under subsection 74(3D)).

(2) Flexible unpaid parental leave under subsection (1) is available in full to part-time and casual employees.

Taking leave that starts up to 6 weeks before the expected date of birth of the child

(2A) A pregnant employee may take unpaid parental leave (***flexible unpaid parental leave***) during the period that starts 6 weeks before the expected date of birth of the child if the requirements of this section are satisfied in relation to the leave.

Note 1: The flexible unpaid parental leave is unpaid parental leave and so comes out of the employee's entitlement to 12 months of unpaid parental leave under section 70.

Note 2: The number of days of flexible unpaid parental leave that the employee takes must not be more than the number of flexible days

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notified to the employer under subsection 74(3C) (subject to any agreement under subsection 74(3D)).

(2B) Flexible unpaid parental leave under subsection (2A) is available in full to pregnant part-time employees and pregnant casual employees.

(2C) The amount of flexible unpaid parental leave to which an employee is entitled under subsection (1) in relation to the child is reduced by the number of days of flexible unpaid parental leave taken by the employee under subsection (2A) in relation to the child.

How flexible unpaid parental leave may be taken

(3) The employee must take the flexible unpaid parental leave as:
  (a) a single continuous period of one or more days; or
  (b) separate periods of one or more days each.

Effect of taking unpaid parental leave under other provisions

(4) The employee may take the flexible unpaid parental leave whether or not the employee has taken unpaid parental leave under another provision of this Division in relation to the child.

(5) However, the employee may take flexible unpaid parental leave after taking one or more periods of unpaid parental leave under another provision of this Division only if the total of those periods (disregarding any extension under section 76A) is no longer than 12 months, less the employee's notional flexible period.

*Meaning of **notional flexible period***

(6) An employee's ***notional flexible period*** is the period during which the employee would be on flexible unpaid parental leave if the employee took leave for all the employee's flexible days in a single continuous period. For this purpose, the employee's flexible days are the flexible days notified to the employer under subsection 74(3C) (subject to any agreement under subsection 74(3D)).

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(7) For the purposes of subsection (6), assume that:
  (a) the employee ordinarily works each day that is not a Saturday or a Sunday; and
  (b) there are no public holidays during the period.

Multiple births

(10) An employee is not entitled to take flexible unpaid parental leave in relation to a child if:
  (a) the child and another child:
    (i) are born during the same multiple birth; or
    (ii) are both placed with the employee for adoption and have the same day of placement; and
  (b) the employee takes flexible unpaid parental leave in relation to the other child.

Interaction with section 71

(11) Flexible unpaid parental leave taken by an employee is an exception to the rules in section 71 about:
  (a) taking the employee's unpaid parental leave in a single continuous period; and
  (b) when the employee's period of unpaid parental leave must start.

(12) Despite anything in subsection (11), flexible unpaid parental leave cannot be used to break up a period of unpaid parental leave taken under section 71.

73 Pregnant employee may be required to take unpaid parental leave within 6 weeks before the birth

Employer may ask employee to provide a medical certificate

(1) If a pregnant employee who is entitled to unpaid parental leave (whether or not the employee has complied with section 74) continues to work during the 6 week period before the expected date of birth of the child, the employer may ask the employee to

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give the employer a medical certificate containing the following statements (as applicable):

(a) a statement of whether the employee is fit for work;

(b) if the employee is fit for work—a statement of whether it is inadvisable for the employee to continue in the employee's present position during a stated period because of:

(i) illness, or risks, arising out of the employee's pregnancy; or

(ii) hazards connected with the position.

Note: Personal information given to an employer under this subsection may be regulated under the *Privacy Act 1988*.

Employer may require employee to take unpaid parental leave

(2) The employer may require the employee to take a period of unpaid parental leave other than flexible unpaid parental leave (the ***period of leave***) as soon as practicable if:

(a) the employee does not give the employer the requested certificate within 7 days after the request; or

(b) within 7 days after the request, the employee gives the employer a medical certificate stating that the employee is not fit for work; or

(c) the following subparagraphs are satisfied:

(i) within 7 days after the request, the employee gives the employer a medical certificate stating that the employee is fit for work, but that it is inadvisable for the employee to continue in the employee's present position for a stated period for a reason referred to in subparagraph (1)(b)(i) or (ii);

(ii) the employee has not complied with the notice and evidence requirements of section 74 for taking unpaid parental leave.

Note: If the medical certificate contains a statement as referred to in subparagraph (c)(i) and the employee has complied with the notice and evidence requirements of section 74, then the employee is entitled to be transferred to a safe job (see section 81) or to paid no safe job leave (see section 81A).

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When the period of leave must end

(3) The period of leave must not end later than the earlier of the following:
  (a) the end of the pregnancy;
  (b) if the employee has given the employer notice of the taking of a period of leave connected with the birth of the child (whether it is unpaid parental leave or some other kind of leave)—the start date of that leave.

Special rules about the period of leave

(4) The period of leave is an exception to the rules in section 71 about:
  (a) taking the employee's unpaid parental leave in a single continuous period; and
  (b) when the employee's period of unpaid parental leave must start.

Note: The period of leave is unpaid parental leave and so comes out of the employee's entitlement to 12 months of unpaid parental leave under section 70.

(5) The employee is not required to comply with section 74 in relation to the period of leave.

74 Notice and evidence requirements

General requirement to give notice of taking leave

(1) An employee must give the employee's employer written notice of the taking of unpaid parental leave under section 71, or flexible unpaid parental leave, or both, by the employee.

Notice requirements

(2) The employee must give the notice to the employer:
  (a) at least 10 weeks before starting any of the leave covered by the notice; or
  (b) if that is not practicable, and:

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(i) the first or only period of leave covered by the notice is leave to be taken under section 71; or

(ii) any of the leave covered by the notice starts before the child's date of birth or expected date of birth;

as soon as practicable (which may be a time after any of the leave covered by the notice has started).

(2A) However, if the first or only period of leave covered by the notice is leave to be taken under section 72A, the notice may be given at any later time if the employer agrees.

(3) If any of the leave covered by the notice is to be taken under section 71, the notice must specify the intended start and end dates of the leave to be taken under section 71.

(3C) If any of the leave covered by the notice is to be taken under section 72A, the notice must specify the total number of days (***flexible days***) of flexible unpaid parental leave that the employee intends to take in relation to the child.

(3D) If the employer agrees, the employee may:

(a) reduce the number of flexible days, including by reducing the number of flexible days to zero; or

(b) increase the number of flexible days, but not so as to increase the number of flexible days above 100 (or, if a higher number of days is prescribed by regulations made for the purposes of subsection 72A(1), that higher number).

Taking leave under section 71—confirming or changing intended start and end dates

(4) If any of the leave covered by the notice is to be taken under section 71, then at least 4 weeks before the intended start date specified in the notice given under subsection (1), the employee must:

(a) confirm the intended start and end dates of the leave to be taken under section 71; or

(b) advise the employer of any changes to the intended start and end dates of the leave to be taken under section 71;

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unless it is not practicable to do so.

Taking flexible unpaid parental leave—notifying days on which employee will take leave

(4B) The employee must give the employer written notice of a flexible day on which the employee will take flexible unpaid parental leave:

(a) at least 4 weeks before that day; or

(b) if that is not practicable—as soon as practicable (which may be a time after the leave has started).

Note: Whether or not it is practicable for the employee to give notice at least 4 weeks before that day will depend on the employee's personal and family circumstances. For example, it may not be practicable for the employee to give notice at least 4 weeks before that day where the employee experiences a health issue, a pregnancy complication or an unexpected change in the employee's child care arrangements.

(4C) If the employer agrees, the employee may change a day on which the employee takes flexible unpaid parental leave from a day specified in a notice under subsection (4B).

Evidence requirements

(5) An employee who has given the employee's employer notice of the taking of unpaid parental leave must, if required by the employer, give the employer evidence that would satisfy a reasonable person:

(a) if the leave is birth-related leave:

(i) of the date of birth, or the expected date of birth, of the child; and

(ii) that paragraph 77A(1)(a) (which deals with the stillbirth of a child) applies in relation to the employee, if relevant; or

(b) if the leave is adoption-related leave:

(i) of the day of placement, or the expected day of placement, of the child; and

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(ii) that the child is, or will be, under 16 as at the day of placement, or the expected day of placement, of the child.

(6) Without limiting subsection (5), an employer may require the evidence referred to in paragraph (5)(a) to be a medical certificate.

Example: If the application of paragraph 77A(1)(a) (which deals with the stillbirth of a child) is relevant—certification by a medical practitioner of the child as having been delivered.

Compliance

(7) An employee is not entitled to take unpaid parental leave under section 71, or flexible unpaid parental leave, unless the employee complies with this section.

Note: Personal information given to an employer under this section may be regulated under the *Privacy Act 1988*.

75 Extending period of unpaid parental leave—extending to use more of available parental leave period

Application of this section

(1) This section applies if:

(a) an employee has, in accordance with section 74, given notice of the taking of a period of unpaid parental leave (the ***original leave period***) under section 71; and

(b) the original leave period is less than the employee's available parental leave period; and

(c) the original leave period has started.

(2) The employee's ***available parental leave period*** is 12 months, less any periods of the following kinds:

(b) a period of unpaid parental leave that the employee has been required to take under subsection 73(2) or 82(2);

(d) if the employee has given notice in accordance with subsection 74(2) or (2A) of the taking of flexible unpaid

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parental leave—a period equal to the employee's notional flexible period.

First extension by giving notice to employer

(3) The employee may extend the period of unpaid parental leave taken under section 71 by giving the employee's employer written notice of the extension at least 4 weeks before the end date of the original leave period. The notice must specify the new end date for the leave.

(4) Only one extension is permitted under subsection (3).

Further extensions by agreement with employer

(5) If the employer agrees, the employee may further extend the period of unpaid parental leave one or more times.

No entitlement to extension beyond available parental leave period

(6) The employee is not entitled under this section to extend the period of unpaid parental leave beyond the employee's available parental leave period.

76 Extending period of unpaid parental leave—extending for up to 12 months beyond available parental leave period

Employee may request further period of leave

(1) An employee who takes unpaid parental leave under section 71 for the employee's available parental leave period may request the employee's employer to agree to an extension of unpaid parental leave for the employee for a further period of up to 12 months immediately following the end of the available parental leave period.

Note: Extended periods of unpaid parental leave can include keeping in touch days on which an employee performs work (see section 79A).

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Making the request

(2) The request must be in writing, and must be given to the employer at least 4 weeks before the end of the available parental leave period.

Note: The request must be made when the employee is taking unpaid parental leave under section 71.

No extension beyond 24 months after birth or placement

(7) Despite any other provision of this Division, the employee is not entitled to extend the period of unpaid parental leave beyond 24 months after the date of birth or day of placement of the child.

76A Responding to requests for extension of unpaid parental leave

Responding to the request

(1) If, under subsection 76(1), an employee requests an employer to agree to an extension of unpaid parental leave for the employee for a further period of up to 12 months immediately following the end of the available parental leave period, the employer must give the employee a written response to the request within 21 days.

(2) The response must:
  (a) state that the employer grants the request; or
  (b) if, following discussion between the employer and the employee, the employer and the employee agree to an extension of unpaid parental leave for the employee for a period that differs from the period requested—set out the agreed extended period; or
  (c) subject to subsection (3)—state that the employer refuses the request and include the matters required by subsection (6).

(3) The employer may refuse the request only if:
  (a) the employer has:
    (i) discussed the request with the employee; and

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(ii) genuinely tried to reach an agreement with the employee about an extension of the period of unpaid parental leave for the employee; and

(b) the employer and the employee have not reached such an agreement; and

(c) the employer has had regard to the consequences of the refusal for the employee; and

(d) the refusal is on reasonable business grounds.

Note: An employer's grounds for refusing a request may be taken to be reasonable business grounds, or not to be reasonable business grounds, in certain circumstances (see subsection 76C(6)).

(4) To avoid doubt, subparagraph (3)(a)(ii) does not require the employer to agree to an extension of the period of unpaid parental leave for the employee if the employer would have reasonable business grounds for refusing a request for the extension.

Reasonable business grounds for refusing requests

(5) Without limiting what are reasonable business grounds for the purposes of paragraph (3)(d) and subsection (4), reasonable business grounds for refusing a request include the following:

(a) that the extension of the period of unpaid parental leave requested by the employee would be too costly for the employer;

(b) that there is no capacity to change the working arrangements of other employees to accommodate the extension of the period of unpaid parental leave requested by the employee;

(c) that it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the extension of the period of unpaid parental leave requested by the employee;

(d) that the extension of the period of unpaid parental leave requested by the employee would be likely to result in a significant loss in efficiency or productivity;

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(e) that the extension of the period of unpaid parental leave requested by the employee would be likely to have a significant negative impact on customer service.

Note: The specific circumstances of the employer, including the nature and size of the enterprise carried on by the employer, are relevant to whether the employer has reasonable business grounds for refusing a request for the purposes of paragraph (3)(d) and subsection (4). For example, if the employer has only a small number of employees, there may be no capacity to change the working arrangements of other employees to accommodate the request (see paragraph (5)(b)).

Employer must explain grounds for refusal

(6) If the employer refuses the request, the written response under subsection (1) must:

(a) include details of the reasons for the refusal; and

(b) without limiting paragraph (a) of this subsection:

(i) set out the employer's particular business grounds for refusing the request; and

(ii) explain how those grounds apply to the request; and

(c) either:

(i) set out the extension of the period of unpaid parental leave for the employee (other than the period requested by the employee) that the employer would be willing to agree to; or

(ii) state that there is no extension of the period that the employer would be willing to agree to; and

(d) set out the effect of sections 76B and 76C.

Genuinely trying to reach an agreement

(7) 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.

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76B Disputes about extension of period of unpaid parental leave

Application of this section

(1) This section applies to a dispute between an employer and an employee that relates to a request by the employee to the employer under subsection 76(1) to agree to an extension of unpaid parental leave for the employee for a further period of up to 12 months immediately following the end of the available parental leave period if:

(a) the employer has refused the request; or

(b) 21 days have passed since the employee made the request, and the employer has not given the employee a written response to the request under section 76A.

Note 1: Modern awards and enterprise agreements must include a term that provides a procedure for settling disputes in relation to the National Employment Standards (see paragraph 146(b) and subsection 186(6)).

Note 2: Subsection 55(4) permits inclusion of terms that are ancillary or incidental to, or that supplement, the National Employment Standards. However, a term of a modern award or an enterprise agreement has no effect to the extent it contravenes section 55 (see section 56).

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.

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 first deal with the dispute by means other than arbitration, unless there are exceptional circumstances; and

(b) the FWC may deal with the dispute by arbitration in accordance with section 76C.

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

Representatives

(5) The employer or employee 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) 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).

76C Arbitration

(1) For the purposes of paragraph 76B(4)(b), the FWC may deal with the dispute by arbitration by making any of the following orders:

(a) if the employer has not given the employee a written response to the request under section 76A—an order that the employer be taken to have refused the request;

(b) if the employer refused the request:

(i) an order that it would be appropriate for the grounds on which the employer refused the request to be taken to have been reasonable business grounds; or

(ii) an order that it would be appropriate for the grounds on which the employer refused the request to be taken not to have been reasonable business grounds;

(c) if the FWC is satisfied that the employer has not responded, or has not responded adequately, to the employee's request under section 76A—an order that the employer take such further steps as the FWC considers appropriate, having regard to the matters in section 76A;

(d) subject to subsection (4) of this section:

(i) an order that the employer grant the request; or

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(ii) an order that the employer agree to an extension of unpaid parental leave for the employee for a further period of up to 12 months (other than the period requested by the employee) immediately following the end of the available parental leave period.

Note: An order by the FWC under paragraph (c) could, for example, require the employer to give a response, or further response, to the employee's request, and could set out matters that must be included in the response or further response.

(2) In making an order under subsection (1), the FWC must take into account fairness between the employer and the employee.

(3) The FWC must not make an order under paragraph (1)(c) or (d) that would be inconsistent with:

(a) a provision of this Act; or

(b) a term of a fair work instrument (other than an order made under that paragraph) that, immediately before the order is made, applies to the employer and employee.

(4) The FWC may make an order under paragraph (1)(d) only if the FWC is satisfied that there is no reasonable prospect of the dispute being resolved without the making of such an order.

(5) If the FWC makes an order under paragraph (1)(a), the employer is taken to have refused the request.

(6) If the FWC makes an order under paragraph (1)(b), the grounds on which the employer refuses the request are taken:

(a) for an order made under subparagraph (1)(b)(i)—to be reasonable business grounds; or

(b) for an order made under subparagraph (1)(b)(ii)—not to be reasonable business grounds.

Contravening an order under subsection (1)

(7) A person must not contravene a term of an order made under subsection (1).

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

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77 Reducing period of unpaid parental leave

If the employer agrees, an employee whose period of unpaid parental leave has started may reduce the period of unpaid parental leave the employee takes.

77A Effect of stillbirth or death of child on unpaid parental leave

Stillbirth—preserving entitlement to birth-related leave

(1) If:

(a) a child is stillborn; and

(b) an employee would have been entitled to unpaid parental leave that is birth-related leave, if the child had been born alive;

then the employee is taken to be entitled to the unpaid parental leave, despite the stillbirth of the child.

Note: In addition, an employer generally must not refuse or cancel employer-funded paid parental leave for an employee because the employee's child is stillborn or dies (see section 333X).

(2) A ***stillborn*** child is a child:

(a) who weighs at least 400 grams at delivery or whose period of gestation was at least 20 weeks; and

(b) who has not breathed since delivery; and

(c) whose heart has not beaten since delivery.

(3) The provisions of this Division have effect in relation to the employee as if the birth of a child included the stillbirth of a child.

Note: One effect of this subsection is that if the employee has not given notice in accordance with section 74 before the stillbirth of the child, the employee can do so as soon as practicable (which may be a time after the leave has started).

Stillbirth or death of child—cancelling leave or returning to work

(4) If a child is stillborn, or dies during the 24-month period starting on the child's date of birth, then an employee who is entitled to a period of unpaid parental leave in relation to the child may:

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(a) before the period of leave starts, give the employee's employer written notice cancelling the leave; or

(b) if the period of leave has started, give the employee's employer written notice that the employee wishes to return to work on a specified day.

(5) For the purposes of paragraph (4)(b), the specified day must be at least 4 weeks after the employer receives the notice.

(6) If the employee takes action under subsection (4), the employee's entitlement to unpaid parental leave in relation to the child ends:

(a) if the action is taken under paragraph (4)(a)—immediately after the cancellation of the leave; or

(b) if the action is taken under paragraph (4)(b)—immediately before the specified day.

Interaction with section 77

(7) Subsections (4) to (6) do not limit section 77 (which deals with the employee reducing the period of unpaid parental leave with the agreement of the employer).

78 Employee who ceases to have responsibility for care of child

(1) This section applies to an employee who has taken unpaid parental leave in relation to a child if the employee ceases to have any responsibility for the care of the child for a reason other than because the child:

(a) is stillborn; or

(b) dies during the 24-month period starting on the child's date of birth.

(2) The employer may give the employee written notice requiring the employee to return to work on a specified day.

(3) The specified day:

(a) must be at least 4 weeks after the notice is given to the employee; and

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(b) if the leave is birth-related leave taken by an employee who has given birth—must not be earlier than 6 weeks after the date of birth of the child.

(4) The employee's entitlement to unpaid parental leave in relation to the child ends immediately before the specified day.

78A Hospitalised children

Agreeing to not take unpaid parental leave for a period while child remains in hospital

(1) If:

(a) a child is required to remain in hospital after the child's birth, or is hospitalised immediately after the child's birth, including because:

(i) the child was born prematurely; or

(ii) the child developed a complication or contracted an illness during the child's period of gestation or at birth; or

(iii) the child developed a complication or contracted an illness following the child's birth; and

(b) an employee, whether before or after the birth of the child, gives notice in accordance with section 74 of the taking of a period of unpaid parental leave (the ***original leave period***) in relation to the child;

then the employee may agree with the employee's employer that the employee will not take unpaid parental leave for a period (the ***permitted work period***) while the child remains in hospital.

Note: Section 344 prohibits the exertion of undue influence or undue pressure on the employee in relation to a decision by the employee whether to agree.

(2) If the employee and employer so agree, then the following rules have effect:

(a) the employee is taken to not be taking unpaid parental leave during the permitted work period;

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(b) the permitted work period does not break the continuity of the original leave period;

(c) the employee is taken to have advised the employer, for the purposes of subsection 74(4), of an end date for the original leave period that is the date on which that period would end if it were extended by a period equal to the permitted work period.

Note: One effect of paragraph (b) is that, if the employee takes periods of unpaid parental leave either side of the permitted work period, the periods are still treated as a single continuous period for the purposes of section 71.

When permitted work period must start

(3) The permitted work period must start after the birth of the child.

When permitted work period ends

(4) The permitted work period ends at the earliest of the following:

(a) the time agreed by the employee and employer;

(b) the end of the day of the child's first discharge from hospital after birth;

(c) if the child dies before being discharged—the end of the day the child dies.

Only one permitted work period allowed

(5) Only one period may be agreed to under subsection (1) for which the employee will not take unpaid parental leave in relation to the child.

Evidence

(6) The employee must, if required by the employer, give the employer evidence that would satisfy a reasonable person of either or both of the following:

(a) that paragraph (1)(a) applies in relation to the child;

(b) that the employee is fit for work.

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(7) Without limiting subsection (6), an employer may require the evidence referred to in that subsection to be a medical certificate.

Note: Personal information given to an employer under this section may be regulated under the *Privacy Act 1988*.

79 Interaction with paid leave

(1) This Subdivision (except for subsections (2) and (3)) does not prevent an employee from taking any other kind of paid leave while the employee is taking unpaid parental leave. If the employee does so, the taking of that other paid leave does not break the continuity of the period of unpaid parental leave.

Note: For example, if the employee has paid annual leave available, the employee may (with the employer's agreement) take some or all of that paid annual leave at the same time as the unpaid parental leave.

(2) While an employee is taking unpaid parental leave, the employee is not entitled to take:

(a) paid personal/carer's leave; or

(b) compassionate leave, unless the permissible occasion is the stillbirth or death of the child in relation to whom the employee is taking unpaid parental leave.

(3) An employee is not entitled to any payment under Division 8 (which deals with community service leave) in relation to activities the employee engages in while taking unpaid parental leave.

79A Keeping in touch days

(1) This Subdivision does not prevent an employee from performing work for the employee's employer on a keeping in touch day while the employee is taking unpaid parental leave. If the employee does so, the performance of that work does not break the continuity of the period of unpaid parental leave.

(2) A day on which the employee performs work for the employer during the period of leave is a ***keeping in touch day*** if:

(a) the purpose of performing the work is to enable the employee to keep in touch with the employee's employment in order to

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facilitate a return to that employment after the end of the period of leave; and

(b) both the employee and the employer consent to the employee performing work for the employer on that day; and

(c) the day is not within:

(i) if the employee suggested or requested that the employee perform work for the employer on that day—14 days after the date of birth, or day of placement, of the child to which the period of leave relates; or

(ii) otherwise—42 days after the date of birth, or day of placement, of the child; and

(d) the employee has not already performed work for the employer or another entity on 10 days during the period of leave that were keeping in touch days.

The duration of the work the employee performs on that day is not relevant for the purposes of this subsection.

Note: The employer will be obliged, under the relevant contract of employment or industrial instrument, to pay the employee for performing work on a keeping in touch day.

(3) The employee's decision whether to give the consent mentioned in paragraph (2)(b) is taken, for the purposes of section 344 (which deals with undue influence or pressure), to be a decision to make, or not make, an arrangement under the National Employment Standards.

(4) For the purposes of paragraph (2)(d), treat as 2 separate periods of unpaid parental leave:

(a) a period of unpaid parental leave taken during the employee's available parental leave period; and

(b) a period of unpaid parental leave taken as an extension of the leave referred to in paragraph (a) for a further period immediately following the end of the available parental leave period.

(5) Subsection (1) does not apply in relation to flexible unpaid parental leave.

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79B Unpaid parental leave not extended by paid leave or keeping in touch days

If, during a period of unpaid parental leave, an employee:

(a) takes paid leave; or

(b) performs work for the employee's employer on a keeping in touch day;

taking that leave or performing that work does not have the effect of extending the period of unpaid parental leave.

Subdivision C—Other entitlements

80 Unpaid special parental leave

Entitlement to unpaid special parental leave

(1) An employee is entitled to a period of unpaid special parental leave if the employee is not fit for work during that period because:

(a) the employee is pregnant and has a pregnancy-related illness; or

(b) all of the following apply:

(i) the employee has been pregnant;

(ii) the pregnancy ends after a period of gestation of at least 12 weeks otherwise than by the birth of a living child;

(iii) the child is not stillborn.

Note 1: Entitlement is also affected by section 67 (which deals with the length of the employee's service).

Note 1A: If the child is stillborn, the employee may be entitled to unpaid parental leave (see section 77A).

Note 2: If an employee has an entitlement to paid personal/carer's leave (see section 96), the employee may take that leave instead of taking unpaid special parental leave under this section.

Notice and evidence

(2) An employee must give the employee's employer notice of the taking of unpaid special parental leave by the employee.

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(3) The notice:
  (a) must be given to the employer as soon as practicable (which may be a time after the leave has started); and
  (b) must advise the employer of the period, or expected period, of the leave.

(4) An employee who has given the employee's employer notice of the taking of unpaid special parental leave must, if required by the employer, give the employer evidence that would satisfy a reasonable person that the leave is taken for a reason specified in subsection (1).

(5) Without limiting subsection (4), an employer may require the evidence referred to in that subsection to be a medical certificate.

(6) An employee is not entitled to take unpaid special parental leave unless the employee complies with subsections (2) to (4).

(7) Subdivision B does not apply to unpaid special parental leave.

Note: Personal information given to an employer under this section may be regulated under the *Privacy Act 1988*.

81 Transfer to a safe job

(1) This section applies to a pregnant employee if the employee gives the employee's employer evidence that would satisfy a reasonable person that the employee is fit for work, but that it is inadvisable for the employee to continue in the employee's present position during a stated period (the ***risk period***) because of:
  (a) illness, or risks, arising out of the employee's pregnancy; or
  (b) hazards connected with that position.

Note: Personal information given to an employer under this subsection may be regulated under the *Privacy Act 1988*.

(2) If there is an appropriate safe job available, then the employer must transfer the employee to that job for the risk period, with no other change to the employee's terms and conditions of employment.

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Note: If there is no appropriate safe job available, then the employee may be entitled to paid no safe job leave under section 81A or unpaid no safe job leave under 82A.

(3) An ***appropriate safe job*** is a safe job that has:
  (a) the same ordinary hours of work as the employee's present position; or
  (b) a different number of ordinary hours agreed to by the employee.

(4) If the employee is transferred to an appropriate safe job for the risk period, the employer must pay the employee for the safe job at the employee's full rate of pay (for the position the employee was in before the transfer) for the hours that the employee works in the risk period.

(5) If the employee's pregnancy ends before the end of the risk period, the ***risk period*** ends when the pregnancy ends.

(6) Without limiting subsection (1), an employer may require the evidence to be a medical certificate.

81A Paid no safe job leave

(1) If:
  (a) section 81 applies to a pregnant employee but there is no appropriate safe job available; and
  (b) the employee is entitled to unpaid parental leave; and
  (c) the employee has complied with the notice and evidence requirements of section 74 for taking unpaid parental leave;

then the employee is entitled to paid no safe job leave for the risk period.

(2) If the employee takes paid no safe job leave for the risk period, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the risk period.

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82 Employee on paid no safe job leave may be asked to provide a further medical certificate

Employer may ask employee to provide a medical certificate

(1) If an employee is on paid no safe job leave during the 6 week period before the expected date of birth of the child, the employer may ask the employee to give the employer a medical certificate stating whether the employee is fit for work.

Note: Personal information given to an employer under this subsection may be regulated under the *Privacy Act 1988*.

Employer may require employee to take unpaid parental leave

(2) The employer may require the employee to take a period of unpaid parental leave (the ***period of leave***) as soon as practicable if:

(a) the employee does not give the employer the requested certificate within 7 days after the request; or

(b) within 7 days after the request, the employee gives the employer a certificate stating that the employee is not fit for work.

Entitlement to paid no safe job leave ends

(3) When the period of leave starts, the employee's entitlement to paid no safe job leave ends.

When the period of leave must end etc.

(4) Subsections 73(3), (4) and (5) apply to the period of leave.

82A Unpaid no safe job leave

(1) If:

(a) section 81 applies to a pregnant employee but there is no appropriate safe job available; and

(b) the employee is not entitled to unpaid parental leave; and

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(c) if required by the employer—the employee has given the employer evidence that would satisfy a reasonable person of the pregnancy;

then the employee is entitled to unpaid no safe job leave for the risk period.

(2) Without limiting subsection (1), an employer may require the evidence referred to in paragraph (1)(c) to be a medical certificate.

83 Consultation with employee on unpaid parental leave

If:

(a) an employee is taking a period of unpaid parental leave, other than flexible unpaid parental leave; and

(b) the employee's employer makes a decision that will have a significant effect on the status, pay or location of the employee's pre-parental leave position;

the employer must take all reasonable steps to give the employee information about, and an opportunity to discuss, the effect of the decision on that position.

84 Return to work guarantee

On ending a period of unpaid parental leave, an employee is entitled to return to:

(a) the employee's pre-parental leave position; or

(b) if that position no longer exists—an available position for which the employee is qualified and suited nearest in status and pay to the pre-parental leave position.

84A Replacement employees

(1) Before an employer engages an employee to perform the work of another employee who is going to take, or is taking, unpaid parental leave, the employer must notify the replacement employee:

(a) that the engagement to perform that work is temporary; and

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(b) of the rights the employee taking unpaid parental leave has under:

(i) subsections 77A(4) and (5) (which provide a right to cancel the leave or end the leave early if the child is stillborn or dies within 24 months); and

(ii) section 84 (which deals with the return to work guarantee); and

(d) of the effect of section 78 (which provides the employer with a right to require the employee taking unpaid parental leave to return to work if the employee ceases to have any responsibility for the care of the child).

(2) Subsection (1) does not apply in relation to the taking of flexible unpaid parental leave.

85 Unpaid pre-adoption leave

Entitlement to unpaid pre-adoption leave

(1) An employee is entitled to up to 2 days of unpaid pre-adoption leave to attend any interviews or examinations required in order to obtain approval for the employee's adoption of a child.

Note: Entitlement is also affected by section 68 (which deals with the age etc. of the adopted child).

(2) However, an employee is not entitled to take a period of unpaid pre-adoption leave if:

(a) the employee could instead take some other form of leave; and

(b) the employer directs the employee to take that other form of leave.

(3) An employee who is entitled to a period of unpaid pre-adoption leave is entitled to take the leave as:

(a) a single continuous period of up to 2 days; or

(b) any separate periods to which the employee and the employer agree.

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Notice and evidence

(4) An employee must give the employee's employer notice of the taking of unpaid pre-adoption leave by the employee.

(5) The notice:

(a) must be given to the employer as soon as practicable (which may be a time after the leave has started); and

(b) must advise the employer of the period, or expected period, of the leave.

(6) An employee who has given the employee's employer notice of the taking of unpaid pre-adoption leave must, if required by the employer, give the employer evidence that would satisfy a reasonable person that the leave is taken to attend an interview or examination as referred to in subsection (1).

(7) An employee is not entitled to take unpaid pre-adoption leave unless the employee complies with subsections (4) to (6).

Note: Personal information given to an employer under this section may be regulated under the *Privacy Act 1988*.

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Division 6—Annual leave

86 Division applies to employees other than casual employees

This Division applies to employees, other than casual employees.

87 Entitlement to annual leave

Amount of leave

(1) For each year of service with an employer (other than periods of employment as a casual employee of the employer), an employee is entitled to:

(a) 4 weeks of paid annual leave; or

(b) 5 weeks of paid annual leave, if:

(i) a modern award applies to the employee and defines or describes the employee as a shiftworker for the purposes of the National Employment Standards; or

(ii) an enterprise agreement applies to the employee and defines or describes the employee as a shiftworker for the purposes of the National Employment Standards; or

(iii) the employee qualifies for the shiftworker annual leave entitlement under subsection (3) (this relates to award/agreement free employees).

Note: Section 196 affects whether the FWC may approve an enterprise agreement covering an employee, if the employee is covered by a modern award that is in operation and defines or describes the employee as a shiftworker for the purposes of the National Employment Standards.

Accrual of leave

(2) An employee's entitlement to paid annual leave accrues progressively during a year of service (other than periods of employment as a casual employee of the employer) according to the employee's ordinary hours of work, and accumulates from year to year.

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Note: If an employee's employment ends during what would otherwise have been a year of service, the employee accrues paid annual leave up to when the employment ends.

Award/agreement free employees who qualify for the shiftworker entitlement

(3) An award/agreement free employee qualifies for the shiftworker annual leave entitlement if:

(a) the employee:

(i) is employed in an enterprise in which shifts are continuously rostered 24 hours a day for 7 days a week; and

(ii) is regularly rostered to work those shifts; and

(iii) regularly works on Sundays and public holidays; or

(b) the employee is in a class of employees prescribed by the regulations as shiftworkers for the purposes of the National Employment Standards.

(4) However, an employee referred to in subsection (3) does not qualify for the shiftworker annual leave entitlement if the employee is in a class of employees prescribed by the regulations as not being qualified for that entitlement.

(5) Without limiting the way in which a class may be described for the purposes of paragraph (3)(b) or subsection (4), the class may be described by reference to one or more of the following:

(a) a particular industry or part of an industry;

(b) a particular kind of work;

(c) a particular type of employment.

88 Taking paid annual leave

(1) Paid annual leave may be taken for a period agreed between an employee and his or her employer.

(2) The employer must not unreasonably refuse to agree to a request by the employee to take paid annual leave.

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89 Employee not taken to be on paid annual leave at certain times

Public holidays

(1) If the period during which an employee takes paid annual leave includes a day or part-day that is a public holiday in the place where the employee is based for work purposes, the employee is taken not to be on paid annual leave on that public holiday.

Other periods of leave

(2) If the period during which an employee takes paid annual leave includes a period of any other leave (other than unpaid parental leave) under this Part, or a period of absence from employment under Division 8 (which deals with community service leave), the employee is taken not to be on paid annual leave for the period of that other leave or absence.

90 Payment for annual leave

(1) If, in accordance with this Division, an employee takes a period of paid annual leave, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period.

(2) If, when the employment of an employee ends, the employee has a period of untaken paid annual leave, the employer must pay the employee the amount that would have been payable to the employee had the employee taken that period of leave.

91 Transfer of employment situations that affect entitlement to payment for period of untaken paid annual leave

Transfer of employment situation in which employer may decide not to recognise employee's service with first employer

(1) Subsection 22(5) does not apply (for the purpose of this Division) to a transfer of employment between non-associated entities in relation to an employee, if the second employer decides not to

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recognise the employee's service with the first employer (for the purpose of this Division).

Employee is not entitled to payment for untaken annual leave if service with first employer counts as service with second employer

(2) If subsection 22(5) applies (for the purpose of this Division) to a transfer of employment in relation to an employee, the employee is not entitled to be paid an amount under subsection 90(2) for a period of untaken paid annual leave.

Note: Subsection 22(5) provides that, generally, if there is a transfer of employment, service with the first employer counts as service with the second employer.

92 Paid annual leave must not be cashed out except in accordance with permitted cashing out terms

Paid annual leave must not be cashed out, except in accordance with:

(a) cashing out terms included in a modern award or enterprise agreement under section 93, or

(b) an agreement between an employer and an award/agreement free employee under subsection 94(1).

93 Modern awards and enterprise agreements may include terms relating to cashing out and taking paid annual leave

Terms about cashing out paid annual leave

(1) A modern award or enterprise agreement may include terms providing for the cashing out of paid annual leave by an employee.

(2) The terms must require that:

(a) paid annual leave must not be cashed out if the cashing out would result in the employee's remaining accrued entitlement to paid annual leave being less than 4 weeks; and

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(b) each cashing out of a particular amount of paid annual leave must be by a separate agreement in writing between the employer and the employee; and

(c) the employee must be paid at least the full amount that would have been payable to the employee had the employee taken the leave that the employee has forgone.

Terms about requirements to take paid annual leave

(3) A modern award or enterprise agreement may include terms requiring an employee, or allowing for an employee to be required, to take paid annual leave in particular circumstances, but only if the requirement is reasonable.

Terms about taking paid annual leave

(4) A modern award or enterprise agreement may include terms otherwise dealing with the taking of paid annual leave.

94 Cashing out and taking paid annual leave for award/agreement free employees

Agreements to cash out paid annual leave

(1) An employer and an award/agreement free employee may agree to the employee cashing out a particular amount of the employee's accrued paid annual leave.

(2) The employer and the employee must not agree to the employee cashing out an amount of paid annual leave if the agreement would result in the employee's remaining accrued entitlement to paid annual leave being less than 4 weeks.

(3) Each agreement to cash out a particular amount of paid annual leave must be a separate agreement in writing.

(4) The employer must pay the employee at least the full amount that would have been payable to the employee had the employee taken the leave that the employee has forgone.

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Requirements to take paid annual leave

(5) An employer may require an award/agreement free employee to take a period of paid annual leave, but only if the requirement is reasonable.

Note: A requirement to take paid annual leave may be reasonable if, for example:

(a) the employee has accrued an excessive amount of paid annual leave; or

(b) the employer's enterprise is being shut down for a period (for example, between Christmas and New Year).

Agreements about taking paid annual leave

(6) An employer and an award/agreement free employee may agree on when and how paid annual leave may be taken by the employee.

Note: Matters that could be agreed include, for example, the following:

(a) that paid annual leave may be taken in advance of accrual;

(b) that paid annual leave must be taken within a fixed period of time after it is accrued;

(c) the form of application for paid annual leave;

(d) that a specified period of notice must be given before taking paid annual leave.

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Division 7—Personal/carer's leave, compassionate leave and paid family and domestic violence leave

Subdivision A—Paid personal/carer's leave

95 Subdivision applies to employees other than casual employees

This Subdivision applies to employees, other than casual employees.

96 Entitlement to paid personal/carer's leave

Amount of leave

(1) For each year of service with an employer (other than periods of employment as a casual employee of the employer), an employee is entitled to 10 days of paid personal/carer's leave.

Accrual of leave

(2) An employee's entitlement to paid personal/carer's leave accrues progressively during a year of service (other than periods of employment as a casual employee of the employer) according to the employee's ordinary hours of work, and accumulates from year to year.

97 Taking paid personal/carer's leave

An employee may take paid personal/carer's leave if the leave is taken:

(a) because the employee is not fit for work because of a personal illness, or personal injury, affecting the employee; or

(b) to provide care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because of:

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(i) a personal illness, or personal injury, affecting the member; or

(ii) an unexpected emergency affecting the member.

Note 1: The notice and evidence requirements of section 107 must be complied with.

Note 2: If an employee has an entitlement to paid personal/carer's leave, the employee may take that leave instead of taking unpaid special parental leave under section 80.

98 Employee taken not to be on paid personal/carer's leave at certain times

Public holidays

(1) If the period during which an employee takes paid personal/carer's leave includes a day or part-day that is a public holiday in the place where the employee is based for work purposes, the employee is taken not to be on paid personal/carer's leave on that public holiday.

Period of paid family and domestic violence leave

(2) If the period during which an employee takes paid personal/carer's leave includes a period of paid family and domestic violence leave, the employee is taken not to be on paid personal/carer's leave for the period of that paid family and domestic violence leave.

99 Payment for paid personal/carer's leave

If, in accordance with this Subdivision, an employee takes a period of paid personal/carer's leave, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period.

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100 Paid personal/carer's leave must not be cashed out except in accordance with permitted cashing out terms

Paid personal/carer's leave must not be cashed out, except in accordance with cashing out terms included in a modern award or enterprise agreement under section 101.

101 Modern awards and enterprise agreements may include terms relating to cashing out paid personal/carer's leave

(1) A modern award or enterprise agreement may include terms providing for the cashing out of paid personal/carer's leave by an employee.

(2) The terms must require that:
  (a) paid personal/carer's leave must not be cashed out if the cashing out would result in the employee's remaining accrued entitlement to paid personal/carer's leave being less than 15 days; and
  (b) each cashing out of a particular amount of paid personal/carer's leave must be by a separate agreement in writing between the employer and the employee; and
  (c) the employee must be paid at least the full amount that would have been payable to the employee had the employee taken the leave that the employee has forgone.

Subdivision B—Unpaid carer's leave

102 Entitlement to unpaid carer's leave

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

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103 Taking unpaid carer's leave

(1) An employee may take unpaid carer's leave for a particular permissible occasion if the leave is taken to provide care or support as referred to in section 102.

(2) An employee may take unpaid carer's leave for a particular permissible occasion as:

(a) a single continuous period of up to 2 days; or

(b) any separate periods to which the employee and his or her employer agree.

(3) An employee cannot take unpaid carer's leave during a particular period if the employee could instead take paid personal/carer's leave.

Note: The notice and evidence requirements of section 107 must be complied with.

Subdivision C—Compassionate leave

104 Entitlement to compassionate leave

(1) An employee is entitled to 2 days of compassionate leave for each occasion (a ***permissible occasion***) when:

(a) a member of the employee's immediate family or a member of the employee's household:

(i) contracts or develops a personal illness that poses a serious threat to his or her life; or

(ii) sustains a personal injury that poses a serious threat to his or her life; or

(iii) dies; or

(b) a child is stillborn, where the child would have been a member of the employee's immediate family, or a member of the employee's household, if the child had been born alive; or

(c) the employee, or the employee's spouse or de facto partner, has a miscarriage.

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(2) Paragraph (1)(c) does not apply:

(a) if the miscarriage results in a stillborn child; or

(b) to a former spouse, or former de facto partner, of the employee.

Note: For the definition of a ***stillborn*** child, see subsection 77A(2).

105 Taking compassionate leave

(1) An employee may take compassionate leave for a particular permissible occasion if the leave is taken:

(a) to spend time with the member of the employee's immediate family or household who has contracted or developed the personal illness, or sustained the personal injury, referred to in section 104; or

(b) after the death of the member of the employee's immediate family or household, or the stillbirth of the child, referred to in section 104; or

(c) after the employee, or the employee's spouse or de facto partner, has the miscarriage referred to in section 104.

(2) An employee may take compassionate leave for a particular permissible occasion as:

(a) a single continuous 2 day period; or

(b) 2 separate periods of 1 day each; or

(c) any separate periods to which the employee and his or her employer agree.

(3) If the permissible occasion is the contraction or development of a personal illness, or the sustaining of a personal injury, the employee may take the compassionate leave for that occasion at any time while the illness or injury persists.

Note: The notice and evidence requirements of section 107 must be complied with.

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106 Payment for compassionate leave (other than for casual employees)

If, in accordance with this Subdivision, an employee, other than a casual employee, takes a period of compassionate leave, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period.

Note: For casual employees, compassionate leave is unpaid leave.

Subdivision CA—Paid family and domestic violence leave

106A Entitlement to paid family and domestic violence leave

(1) An employee is entitled to 10 days of paid family and domestic violence leave in a 12 month period.

(2) Paid family and domestic violence leave:
  (a) is available in full at the start of each 12 month period of the employee's employment; and
  (b) does not accumulate from year to year; and
  (c) is available in full to part-time and casual employees.

(3) For the purposes of subsection (2), if an employee is employed by a particular employer:
  (a) as a casual employee; or
  (b) for a specified period of time, for a specified task or for the duration of a specified season;

the start of the employee's employment is taken to be the start of the employee's first employment with that employer.

(4) The employee may take paid family and domestic violence leave as:
  (a) a single continuous 10 day period; or
  (b) separate periods of one or more days each; or
  (c) any separate periods to which the employee and the employer agree, including periods of less than one day.

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(5) To avoid doubt, this section does not prevent the employee and the employer agreeing that the employee may take paid or unpaid leave in addition to the entitlement in subsection (1) to deal with the impact of family and domestic violence.

106B Taking paid family and domestic violence leave

(1) The employee may take paid family and domestic violence leave if:

(a) the employee is experiencing family and domestic violence; and

(b) the employee needs to do something to deal with the impact of the family and domestic violence; and

(c) it is impractical for the employee to do that thing outside the employee's work hours.

Note 1: Examples of actions, by an employee who is experiencing family and domestic violence, that could be covered by paragraph (b) include arranging for the safety of the employee or a close relative (including relocation), attending court hearings, accessing police services, attending counselling and attending appointments with medical, financial or legal professionals.

Note 2: The notice and evidence requirements of section 107 must be complied with.

(2) ***Family and domestic violence*** is violent, threatening or other abusive behaviour by a close relative of a person, a member of a person's household, or a current or former intimate partner of a person, that:

(a) seeks to coerce or control the person; and

(b) causes the person harm or to be fearful.

(3) A ***close relative*** of a person is another person who:

(a) is a member of the first person's immediate family; or

(b) is related to the first person according to Aboriginal or Torres Strait Islander kinship rules.

Note: ***Immediate family*** is defined in section 12.

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106BA Payment for paid family and domestic violence leave

(1) If, in accordance with this Subdivision, an employee takes a period of paid family and domestic violence leave, the employer must pay the employee, in relation to the period:

(a) for an employee other than a casual employee—at the employee's full rate of pay, worked out as if the employee had not taken the period of leave; or

(b) for a casual employee—at the employee's full rate of pay, worked out as if the employee had worked the hours in the period for which the employee was rostered.

(2) Without limiting paragraph (1)(b), an employee is taken to have been rostered to work hours in a period if the employee has accepted an offer by the employer of work for those hours.

(3) Paragraph (1)(b) does not prevent a casual employee from taking a period of paid family and domestic violence leave that does not include hours for which the employee is rostered to work. However, the employer is not required to pay the employee in relation to such a period.

106C Confidentiality

(1) Employers must take steps to ensure information concerning any notice or evidence an employee has given under section 107 of the employee taking leave under this Subdivision is treated confidentially, as far as it is reasonably practicable to do so.

(2) An employer must not, other than with the consent of the employee, use such information for a purpose other than satisfying itself in relation to the employee's entitlement to leave under this Subdivision. In particular, an employer must not use such information to take adverse action against an employee.

(3) Subsection (2) has effect subject to subsection (4).

(4) Nothing in this Subdivision prevents an employer from dealing with information provided by an employee if doing so is required

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by an Australian law or is necessary to protect the life, health or safety of the employee or another person.

Note: Information covered by this section that is personal information may also be regulated under the *Privacy Act 1988*.

106D Operation of paid family and domestic violence leave and leave for victims of crime

(1) This Subdivision does not exclude or limit the operation of a law of a State or Territory to the extent that it provides for leave for victims of crime.

Note: Leave for victims of crime is a non-excluded matter under paragraph 27(2)(h).

(2) If an employee who is entitled, under a law of a State or Territory, to leave for victims of crime is also entitled to leave under this Subdivision, that law applies in addition to this Subdivision.

(3) A person who is a national system employee only because of section 30C or 30M is entitled to leave under this Subdivision only to the extent that the leave would not constitute leave for victims of crime.

Note: To the extent that leave would constitute leave for victims of crime, the entitlement to paid family and domestic violence leave is extended to the persons mentioned in subsection (3) by Division 2A of Part 6-3 (see subsection 757B(2)).

106E Entitlement to days of leave

What constitutes a day of leave for the purposes of this Subdivision is taken to be the same as what constitutes a day of leave for the purposes of sections 72A and 85 and Subdivisions B and C.

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Subdivision D—Notice and evidence requirements

107 Notice and evidence requirements

Notice

(1) An employee must give his or her employer notice of the taking of leave under this Division by the employee.

(2) The notice:
  (a) must be given to the employer as soon as practicable (which may be a time after the leave has started); and
  (b) must advise the employer of the period, or expected period, of the leave.

Evidence

(3) An employee who has given his or her employer notice of the taking of leave under this Division must, if required by the employer, give the employer evidence that would satisfy a reasonable person that:
  (a) if it is paid personal/carer's leave—the leave is taken for a reason specified in section 97; or
  (b) if it is unpaid carer's leave—the leave is taken for a permissible occasion in circumstances specified in subsection 103(1); or
  (c) if it is compassionate leave—the leave is taken for a permissible occasion in circumstances specified in subsection 105(1); or
  (d) if it is paid family and domestic violence leave, and the employee has met the requirement specified in paragraph 106B(1)(a)—the leave is taken for the purpose specified in paragraph 106B(1)(b), and the requirement specified in paragraph 106B(1)(c) is met.

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Compliance

(4) An employee is not entitled to take leave under this Division unless the employee complies with this section.

Modern awards and enterprise agreements may include evidence requirements

(5) A modern award or enterprise agreement may include terms relating to the kind of evidence that an employee must provide in order to be entitled to paid personal/carer's leave, unpaid carer's leave or compassionate leave.

Note: Personal information given to an employer under this section may be regulated under the *Privacy Act 1988*.

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Division 8—Community service leave

108 Entitlement to be absent from employment for engaging in eligible community service activity

An employee who engages in an eligible community service activity is entitled to be absent from his or her employment for a period if:

(a) the period consists of one or more of the following:
  (i) time when the employee engages in the activity;
  (ii) reasonable travelling time associated with the activity;
  (iii) reasonable rest time immediately following the activity; and

(b) unless the activity is jury service—the employee's absence is reasonable in all the circumstances.

109 Meaning of *eligible community service activity*

General

(1) Each of the following is an ***eligible community service activity***:

(a) jury service (including attendance for jury selection) that is required by or under a law of the Commonwealth, a State or a Territory; or

(b) a voluntary emergency management activity (see subsection (2)); or

(c) an activity prescribed in regulations made for the purpose of subsection (4).

Voluntary emergency management activities

(2) An employee engages in a ***voluntary emergency management activity*** if, and only if:

(a) the employee engages in an activity that involves dealing with an emergency or natural disaster; and

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(b) the employee engages in the activity on a voluntary basis (whether or not the employee directly or indirectly takes or agrees to take an honorarium, gratuity or similar payment wholly or partly for engaging in the activity); and

(c) the employee is a member of, or has a member-like association with, a recognised emergency management body; and

(d) either:

(i) the employee was requested by or on behalf of the body to engage in the activity; or

(ii) no such request was made, but it would be reasonable to expect that, if the circumstances had permitted the making of such a request, it is likely that such a request would have been made.

(3) A ***recognised emergency management body*** is:

(a) a body, or part of a body, that has a role or function under a plan that:

(i) is for coping with emergencies and/or disasters; and

(ii) is prepared by the Commonwealth, a State or a Territory; or

(b) a fire-fighting, civil defence or rescue body, or part of such a body; or

(c) any other body, or part of a body, a substantial purpose of which involves:

(i) securing the safety of persons or animals in an emergency or natural disaster; or

(ii) protecting property in an emergency or natural disaster; or

(iii) otherwise responding to an emergency or natural disaster; or

(d) a body, or part of a body, prescribed by the regulations;

but does not include a body that was established, or is continued in existence, for the purpose, or for purposes that include the purpose, of entitling one or more employees to be absent from their employment under this Division.

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Regulations may prescribe other activities

(4) The regulations may prescribe an activity that is of a community service nature as an eligible community service activity.

110 Notice and evidence requirements

Notice

(1) An employee who wants an absence from his or her employment to be covered by this Division must give his or her employer notice of the absence.

(2) The notice:
  (a) must be given to the employer as soon as practicable (which may be a time after the absence has started); and
  (b) must advise the employer of the period, or expected period, of the absence.

Evidence

(3) An employee who has given his or her employer notice of an absence under subsection (1) must, if required by the employer, give the employer evidence that would satisfy a reasonable person that the absence is because the employee has been or will be engaging in an eligible community service activity.

Compliance

(4) An employee's absence from his or her employment is not covered by this Division unless the employee complies with this section.

Note: Personal information given to an employer under this section may be regulated under the *Privacy Act 1988*.

111 Payment to employees (other than casuals) on jury service

Application of this section

(1) This section applies if:

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(a) in accordance with this Division, an employee is absent from his or her employment for a period because of jury service; and

(b) the employee is not a casual employee.

Employee to be paid base rate of pay

(2) Subject to subsections (3), (4) and (5), the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period.

Evidence

(3) The employer may require the employee to give the employer evidence that would satisfy a reasonable person:

(a) that the employee has taken all necessary steps to obtain any amount of jury service pay to which the employee is entitled; and

(b) of the total amount (even if it is a nil amount) of jury service pay that has been paid, or is payable, to the employee for the period.

Note: Personal information given to an employer under this subsection may be regulated under the *Privacy Act 1988*.

(4) If, in accordance with subsection (3), the employer requires the employee to give the employer the evidence referred to in that subsection:

(a) the employee is not entitled to payment under subsection (2) unless the employee provides the evidence; and

(b) if the employee provides the evidence—the amount payable to the employee under subsection (2) is reduced by the total amount of jury service pay that has been paid, or is payable, to the employee, as disclosed in the evidence.

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Payment only required for first 10 days of absence

(5) If an employee is absent because of jury service in relation to a particular jury service summons for a period, or a number of periods, of more than 10 days in total:

(a) the employer is only required to pay the employee for the first 10 days of absence; and

(b) the evidence provided in response to a requirement under subsection (3) need only relate to the first 10 days of absence; and

(c) the reference in subsection (4) to the total amount of jury service pay as disclosed in evidence is a reference to the total amount so disclosed for the first 10 days of absence.

*Meaning of **jury service pay***

(6) ***Jury service pay*** means an amount paid in relation to jury service under a law of the Commonwealth, a State or a Territory, other than an amount that is, or that is in the nature of, an expense-related allowance.

*Meaning of **jury service summons***

(7) ***Jury service summons*** means a summons or other instruction (however described) that requires a person to attend for, or perform, jury service.

112 State and Territory laws that are not excluded

(1) This Act is not intended to apply to the exclusion of laws of a State or Territory that provide employee entitlements in relation to engaging in eligible community service activities, to the extent that those entitlements are more beneficial to employees than the entitlements under this Division.

Note: For example, this Act would not apply to the exclusion of a State or Territory law providing for a casual employee to be paid jury service pay.

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(2) If the community service activity is an activity prescribed in regulations made for the purpose of subsection 109(4), subsection (1) of this section has effect subject to any provision to the contrary in the regulations.

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Division 9—Long service leave

113 Entitlement to long service leave

Entitlement in accordance with applicable award-derived long service leave terms

(1) If there are applicable award-derived long service leave terms (see subsection (3)) in relation to an employee, the employee is entitled to long service leave in accordance with those terms.

Note: This Act does not exclude State and Territory laws that deal with long service leave, except in relation to employees who are entitled to long service leave under this Division (see paragraph 27(2)(g)), and except as provided in subsection 113A(3).

(2) However, subsection (1) does not apply if:

(a) a workplace agreement, or an AWA, that came into operation before the commencement of this Part applies to the employee; or

(b) one of the following kinds of instrument that came into operation before the commencement of this Part applies to the employee and expressly deals with long service leave:

(i) an enterprise agreement;

(ii) a preserved State agreement;

(iii) a workplace determination;

(iv) a pre-reform certified agreement;

(v) a pre-reform AWA;

(vi) a section 170MX award;

(vii) an old IR agreement.

Note: If there ceases to be any agreement or instrument of a kind referred to in paragraph (a) or (b) that applies to the employee, the employee will, at that time, become entitled under subsection (1) to long service leave in accordance with applicable award-derived long service leave terms.

(3) ***Applicable award-derived long service leave terms***, in relation to an employee, are:

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(a) terms of an award, or a State reference transitional award, that (disregarding the effect of any instrument of a kind referred to in subsection (2)):

(i) would have applied to the employee at the test time (see subsection (3A)) if the employee had, at that time, been in his or her current circumstances of employment; and

(ii) would have entitled the employee to long service leave; and

(b) any terms of the award, or the State reference transitional award, that are ancillary or incidental to the terms referred to in paragraph (a).

(3A) For the purpose of subparagraph (3)(a)(i), the test time is:

(a) immediately before the commencement of this Part; or

(b) if the employee is a Division 2B State reference employee (as defined in Schedule 2 to the Transitional Act)—immediately before the Division 2B referral commencement (as defined in that Schedule).

Entitlement in accordance with applicable agreement-derived long service leave terms

(4) If there are applicable agreement-derived long service leave terms (see subsection (5)) in relation to an employee, the employee is entitled to long service leave in accordance with those terms.

(5) There are ***applicable agreement-derived long service leave terms***, in relation to an employee if:

(a) an order under subsection (6) is in operation in relation to terms of an instrument; and

(b) those terms of the instrument would have applied to the employee immediately before the commencement of this Part if the employee had, at that time, been in his or her current circumstances of employment; and

(c) there are no applicable award-derived long service leave terms in relation to the employee.

(6) If the FWC is satisfied that:

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(a) any of the following instruments that was in operation immediately before the commencement of this Part contained terms entitling employees to long service leave:
  (i) an enterprise agreement;
  (ii) a collective agreement;
  (iii) a pre-reform certified agreement;
  (iv) an old IR agreement; and
(b) those terms constituted a long service leave scheme that was applying in more than one State or Territory; and
(c) the scheme, considered on an overall basis, is no less beneficial to the employees than the long service leave entitlements that would otherwise apply in relation to the employees under State and Territory laws;

the FWC may, on application by, or on behalf of, a person to whom the instrument applies, make an order that those terms of the instrument (and any terms that are ancillary or incidental to those terms) are applicable agreement-derived long service leave terms.

References to instruments

(7) References in this section to a kind of instrument (other than an enterprise agreement) are references to a transitional instrument of that kind, as continued in existence by Schedule 3 to the Transitional Act.

113A Enterprise agreements may contain terms discounting service under prior agreements etc. in certain circumstances

(1) This section applies if:
(a) an instrument (the ***first instrument***) of one of the following kinds that came into operation before the commencement of this Part applies to an employee on or after the commencement of this Part:
  (i) an enterprise agreement;
  (ii) a workplace agreement;
  (iii) a workplace determination;

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(iv) a preserved State agreement;
(v) an AWA;
(vi) a pre-reform certified agreement;
(vii) a pre-reform AWA;
(viii) an old IR agreement;
(ix) a section 170MX award; and

(b) the instrument states that the employee is not entitled to long service leave; and

(c) the instrument ceases, for whatever reason, to apply to the employee; and

(d) immediately after the first instrument ceases to apply, an enterprise agreement (the ***replacement agreement***) starts to apply to the employee.

(2) The replacement agreement may include terms to the effect that an employee's service with the employer during a specified period (the ***excluded period***) (being some or all of the period when the first instrument applied to the employee) does not count as service for the purpose of determining whether the employee is qualified for long service leave, or the amount of long service leave to which the employee is entitled, under this Division or under a law of a State or Territory.

(3) If the replacement agreement includes terms as permitted by subsection (2), the excluded period does not count, and never again counts, as service for the purpose of determining whether the employee is qualified for long service leave, or the amount of long service leave to which the employee is entitled, under this Division or under a law of a State or Territory, unless a later agreement provides otherwise. This subsection has effect despite sections 27 and 29.

(4) References in this section to a kind of instrument (other than an enterprise agreement) are references to a transitional instrument of that kind, as continued in existence by Schedule 3 to the Transitional Act.

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Division 10—Public holidays

114 Entitlement to be absent from employment on public holiday

Employee entitled to be absent on public holiday

(1) An employee is entitled to be absent from his or her employment on a day or part-day that is a public holiday in the place where the employee is based for work purposes.

Reasonable requests to work on public holidays

(2) However, an employer may request an employee to work on a public holiday if the request is reasonable.

(3) If an employer requests an employee to work on a public holiday, the employee may refuse the request if:
  (a) the request is not reasonable; or
  (b) the refusal is reasonable.

(4) In determining whether a request, or a refusal of a request, to work on a public holiday is reasonable, the following must be taken into account:
  (a) the nature of the employer's workplace or enterprise (including its operational requirements), and the nature of the work performed by the employee;
  (b) the employee's personal circumstances, including family responsibilities;
  (c) whether the employee could reasonably expect that the employer might request work on the public holiday;
  (d) whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of, work on the public holiday;
  (e) the type of employment of the employee (for example, whether full-time, part-time, casual or shiftwork);

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(f) the amount of notice in advance of the public holiday given by the employer when making the request;

(g) in relation to the refusal of a request—the amount of notice in advance of the public holiday given by the employee when refusing the request;

(h) any other relevant matter.

115 Meaning of *public holiday*

The public holidays

(1) The following are ***public holidays***:

(a) each of these days:

(i) 1 January (New Year's Day);

(ii) 26 January (Australia Day);

(iii) Good Friday;

(iv) Easter Monday;

(v) 25 April (Anzac Day);

(vi) the holiday for the birthday of the Sovereign (on the day on which it is celebrated in a State or Territory or a region of a State or Territory);

(vii) 25 December (Christmas Day);

(viii) 26 December (Boxing Day);

(b) any other day, or part-day, declared or prescribed by or under a law of a State or Territory to be observed generally within the State or Territory, or a region of the State or Territory, as a public holiday, other than a day or part-day, or a kind of day or part-day, that is excluded by the regulations from counting as a public holiday.

Substituted public holidays under State or Territory laws

(2) If, under (or in accordance with a procedure under) a law of a State or Territory, a day or part-day is substituted for a day or part-day that would otherwise be a public holiday because of subsection (1), then the substituted day or part-day is the ***public holiday***.

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Substituted public holidays under modern awards and enterprise agreements

(3) A modern award or enterprise agreement may include terms providing for an employer and employee to agree on the substitution of a day or part-day for a day or part-day that would otherwise be a public holiday because of subsection (1) or (2).

Substituted public holidays for award/agreement free employees

(4) An employer and an award/agreement free employee may agree on the substitution of a day or part-day for a day or part-day that would otherwise be a public holiday because of subsection (1) or (2).

Note: This Act does not exclude State and Territory laws that deal with the declaration, prescription or substitution of public holidays, but it does exclude State and Territory laws that relate to the rights and obligations of an employee or employer in relation to public holidays (see paragraph 27(2)(j)).

116 Payment for absence on public holiday

If, in accordance with this Division, an employee is absent from his or her employment on a day or part-day that is a public holiday, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work on the day or part-day.

Note: If the employee does not have ordinary hours of work on the public holiday, the employee is not entitled to payment under this section. For example, the employee is not entitled to payment if the employee is a casual employee who is not rostered on for the public holiday, or is a part-time employee whose part-time hours do not include the day of the week on which the public holiday occurs.

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Division 10A—Superannuation contributions

116A Division does not apply to certain employees or employers in referring States

This Division does not apply in relation to:

(a) an employee who is a national system employee only because of section 30C or 30M (which extend the meaning of ***national system employee***); or

(b) an employer that is a national system employer only because of section 30D or 30N (which extend the meaning of ***national system employer***).

116B Employer's obligation to make superannuation contributions

An employer must make contributions to a superannuation fund for the benefit of an employee so as to avoid liability to pay superannuation guarantee charge under the *Superannuation Guarantee Charge Act 1992* in relation to the employee.

116C Reduction of employer's liability to the extent of superannuation charge payments

The obligation to make contributions for an employee under section 116B does not apply to an employer to the extent that:

(a) the employer has made a charge payment (within the meaning of section 63A of the *Superannuation Guarantee (Administration) Act 1992*) in respect of the employee under Part 8 of that Act; and

(b) the employee is a benefiting employee (within the meaning of that Part); and

(c) the Commissioner of Taxation is required to pay, or otherwise deal with, a shortfall component (within the meaning of that Part) for the benefit of the employee under that Part.

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116D Preventing multiple actions

Scope

(1) This section applies if:

(a) an employer has contravened, or allegedly contravened, a civil remedy provision that relates to a contravention of this Division; and

(b) the contravention, or alleged contravention, relates wholly or partly to an employee; and

(c) the employee or another person referred to in an item in column 2 of the table in subsection 539(2) would be entitled to apply for an order under Division 2 of Part 4-1 in relation to the contravention, or alleged contravention.

No application for orders in certain circumstances

(2) An application for such an order may not be made if:

(a) the Commissioner of Taxation has commenced proceedings against the employer to recover an amount of superannuation guarantee charge; and

(b) either:

(i) the Commissioner has obtained an order for recovery of the charge; or

(ii) if the proceedings have not been finally disposed of—the Commissioner has not discontinued the proceedings; and

(c) the employer's superannuation guarantee shortfall in respect of which the charge is imposed arises because the employer has an individual base superannuation guarantee shortfall, or a choice loading, for the employee that is greater than nil.

(3) Terms (apart from employee and employer) used in this section that are defined in the *Superannuation Guarantee (Administration) Act 1992* have the same meaning in this section as they have in that Act.

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116E Orders for compensation

(1) This section applies if a court makes an order under section 545 awarding compensation to an employee for a contravention of a civil remedy provision that relates to a contravention of this Division.

(2) The court must have regard to the principle that any component of the compensation payable on account of unpaid superannuation contributions should usually be paid to a superannuation fund for the benefit of the employee.

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Division 11—Notice of termination and redundancy pay

Subdivision A—Notice of termination or payment in lieu of notice

117 Requirement for notice of termination or payment in lieu

Notice specifying day of termination

(1) An employer must not terminate an employee's employment unless the employer has given the employee written notice of the day of the termination (which cannot be before the day the notice is given).

Note 1: Section 123 describes situations in which this section does not apply.

Note 2: Sections 28A and 29 of the *Acts Interpretation Act 1901* provide how a notice may be given. In particular, the notice may be given to an employee by:
(a) delivering it personally; or
(b) leaving it at the employee's last known address; or
(c) sending it by pre-paid post to the employee's last known address.

Amount of notice or payment in lieu of notice

(2) The employer must not terminate the employee's employment unless:
(a) the time between giving the notice and the day of the termination is at least the period (the ***minimum period of notice***) worked out under subsection (3); or
(b) the employer has paid to the employee (or to another person on the employee's behalf) payment in lieu of notice of at least the amount the employer would have been liable to pay to the employee (or to another person on the employee's behalf) at the full rate of pay for the hours the employee would have worked had the employment continued until the end of the minimum period of notice.

(3) Work out the minimum period of notice as follows:

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(a) first, work out the period using the following table:

Period		
	Employee's period of continuous service with the employer at the end of the day the notice is given	**Period**
1	Not more than 1 year	1 week
2	More than 1 year but not more than 3 years	2 weeks
3	More than 3 years but not more than 5 years	3 weeks
4	More than 5 years	4 weeks

(b) then increase the period by 1 week if the employee is over 45 years old and has completed at least 2 years of continuous service with the employer at the end of the day the notice is given.

(4) A reference in this section to continuous service with the employer does not include periods of employment as a casual employee of the employer.

118 Modern awards and enterprise agreements may provide for notice of termination by employees

A modern award or enterprise agreement may include terms specifying the period of notice an employee must give in order to terminate his or her employment.

Subdivision B—Redundancy pay

119 Redundancy pay

Entitlement to redundancy pay

(1) An employee is entitled to be paid redundancy pay by the employer if the employee's employment is terminated:

(a) at the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone,

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except where this is due to the ordinary and customary turnover of labour; or

(b) because of the insolvency or bankruptcy of the employer.

Note: Sections 121, 122 and 123 describe situations in which the employee does not have this entitlement.

Amount of redundancy pay

(2) The amount of the redundancy pay equals the total amount payable to the employee for the redundancy pay period worked out using the following table at the employee's base rate of pay for his or her ordinary hours of work:

Redundancy pay period		
	Employee's period of continuous service with the employer on termination	**Redundancy pay period**
1	At least 1 year but less than 2 years	4 weeks
2	At least 2 years but less than 3 years	6 weeks
3	At least 3 years but less than 4 years	7 weeks
4	At least 4 years but less than 5 years	8 weeks
5	At least 5 years but less than 6 years	10 weeks
6	At least 6 years but less than 7 years	11 weeks
7	At least 7 years but less than 8 years	13 weeks
8	At least 8 years but less than 9 years	14 weeks
9	At least 9 years but less than 10 years	16 weeks
10	At least 10 years	12 weeks

(3) A reference in this section to continuous service with the employer does not include periods of employment as a casual employee of the employer.

120 Variation of redundancy pay for other employment or incapacity to pay

(1) This section applies if:

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(a) an employee is entitled to be paid an amount of redundancy pay by the employer because of section 119; and
(b) the employer:
(i) obtains other acceptable employment for the employee; or
(ii) cannot pay the amount.

(2) On application by the employer, the FWC may determine that the amount of redundancy pay is reduced to a specified amount (which may be nil) that the FWC considers appropriate.

(3) The amount of redundancy pay to which the employee is entitled under section 119 is the reduced amount specified in the determination.

121 Exclusions from obligation to pay redundancy pay

(1) Section 119 does not apply to the termination of an employee's employment if, immediately before the time of the termination, or at the time when the person was given notice of the termination as described in subsection 117(1) (whichever happened first):
(a) the employee's period of continuous service with the employer (other than periods of employment as a casual employee of the employer) is less than 12 months; or
(b) the employer is a small business employer.

(2) A modern award may include a term specifying other situations in which section 119 does not apply to the termination of an employee's employment.

(3) If a modern award that is in operation includes such a term (the ***award term***), an enterprise agreement may:
(a) incorporate the award term by reference (and as in force from time to time) into the enterprise agreement; and
(b) provide that the incorporated term covers some or all of the employees who are also covered by the award term.

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Certain small businesses to pay redundancy pay

(4) Despite subsection (1), an employee whose employment is terminated is entitled to be paid redundancy pay in accordance with this Division if:

(a) at the time of the termination, section 119 did not apply to the termination because the employer was a small business employer; and

(b) the employer is bankrupt or in liquidation (other than only because of a members' voluntary winding up); and

(c) the employer is a small business employer because the employment of one or more employees was terminated; and

(d) those terminations occurred:

(i) on or after the day that is 6 months before the employer became bankrupt or went into liquidation; or

(ii) if there was an insolvency practitioner (the ***last insolvency practitioner***) for the employer on the business day before the employer became bankrupt or went into liquidation—on or after the day that is 6 months before the insolvency practitioner was appointed; or

(iii) if, before the last insolvency practitioner was appointed, other insolvency practitioners for the employer were appointed without any intervening business days between any of those appointments—on or after the day that is 6 months before the first of those insolvency practitioners was appointed; or

(iv) due to the insolvency of the employer.

(5) A ***members' voluntary winding up*** is a winding up under section 495 of the *Corporations Act 2001*.

Time of liquidation—members' voluntary winding up where company turns out to be insolvent

(6) If a liquidator takes action under section 496 of the *Corporations Act 2001* (company turns out to be insolvent) in relation to a small business employer whose liquidation began as a members'

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voluntary winding up, then, for the purposes of subparagraph (4)(d)(i), the time the employer goes into liquidation is the time the employer goes into liquidation because of the members' voluntary winding up.

Application to partnerships

(7) For the purposes of subsection (4), a small business employer that is a partnership is not bankrupt or in liquidation unless each partner of the partnership is bankrupt or in liquidation, as the case requires.

122 Transfer of employment situations that affect the obligation to pay redundancy pay

Transfer of employment situation in which employer may decide not to recognise employee's service with first employer

(1) Subsection 22(5) does not apply (for the purpose of this Subdivision) to a transfer of employment between non-associated entities in relation to an employee if the second employer decides not to recognise the employee's service with the first employer (for the purpose of this Subdivision).

Employee is not entitled to redundancy pay if service with first employer counts as service with second employer

(2) If subsection 22(5) applies (for the purpose of this Subdivision) to a transfer of employment in relation to an employee, the employee is not entitled to redundancy pay under section 119 in relation to the termination of his or her employment with the first employer.

Note: Subsection 22(5) provides that, generally, if there is a transfer of employment, service with the first employer counts as service with the second employer.

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Employee not entitled to redundancy pay if refuses employment in certain circumstances

(3) An employee is not entitled to redundancy pay under section 119 in relation to the termination of his or her employment with an employer (the ***first employer***) if:

(a) the employee rejects an offer of employment made by another employer (the ***second employer***) that:

(i) is on terms and conditions substantially similar to, and, considered on an overall basis, no less favourable than, the employee's terms and conditions of employment with the first employer immediately before the termination; and

(ii) recognises the employee's service with the first employer, for the purpose of this Subdivision; and

(b) had the employee accepted the offer, there would have been a transfer of employment in relation to the employee.

(4) If the FWC is satisfied that subsection (3) operates unfairly to the employee, the FWC may order the first employer to pay the employee a specified amount of redundancy pay (not exceeding the amount that would be payable but for subsection (3)) that the FWC considers appropriate. The first employer must pay the employee that amount of redundancy pay.

Subdivision C—Limits on scope of this Division

123 Limits on scope of this Division

Employees not covered by this Division

(1) This Division does not apply to any of the following employees:

(a) an employee employed for a specified period of time, for a specified task, or for the duration of a specified season;

(b) an employee whose employment is terminated because of serious misconduct;

(c) a casual employee;

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(d) an employee (other than an apprentice) to whom a training arrangement applies and whose employment is for a specified period of time or is, for any reason, limited to the duration of the training arrangement;

(e) an employee prescribed by the regulations as an employee to whom this Division does not apply.

(2) Paragraph (1)(a) does not prevent this Division from applying to an employee if a substantial reason for employing the employee as described in that paragraph was to avoid the application of this Division.

Other employees not covered by notice of termination provisions

(3) Subdivision A does not apply to:

(b) a daily hire employee working in the building and construction industry (including working in connection with the erection, repair, renovation, maintenance, ornamentation or demolition of buildings or structures); or

(c) a daily hire employee working in the meat industry in connection with the slaughter of livestock; or

(d) a weekly hire employee working in connection with the meat industry and whose termination of employment is determined solely by seasonal factors; or

(e) an employee prescribed by the regulations as an employee to whom that Subdivision does not apply.

Other employees not covered by redundancy pay provisions

(4) Subdivision B does not apply to:

(a) an employee who is an apprentice; or

(b) an employee to whom an industry-specific redundancy scheme in a modern award applies; or

(c) an employee to whom a redundancy scheme in an enterprise agreement applies if:

(i) the scheme is an industry-specific redundancy scheme that is incorporated by reference (and as in force from

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time to time) into the enterprise agreement from a modern award that is in operation; and

(ii) the employee is covered by the industry-specific redundancy scheme in the modern award; or

(d) an employee prescribed by the regulations as an employee to whom that Subdivision does not apply.

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Division 12—Fair Work Ombudsman to prepare and publish statements

124 Fair Work Ombudsman to prepare and publish Fair Work Information Statement

(1) The Fair Work Ombudsman must prepare a ***Fair Work Information Statement***. The Fair Work Ombudsman must publish the Statement in the *Gazette*.

Note: If the Fair Work Ombudsman changes the Statement, the Fair Work Ombudsman must publish the new version of the Statement in the *Gazette*.

(2) The Statement must contain information about the following:
(a) the National Employment Standards;
(b) modern awards;
(c) agreement-making under this Act;
(d) the right to freedom of association;
(e) the role of the FWC and the Fair Work Ombudsman;
(f) termination of employment;
(g) individual flexibility arrangements;
(h) right of entry (including the protection of personal information by privacy laws).

(3) The Fair Work Information Statement is not a legislative instrument.

(4) The regulations may prescribe other matters relating to the content or form of the Statement, or the manner in which employers may give the Statement to employees.

125 Giving new employees the Fair Work Information Statement

(1) An employer must give each employee the Fair Work Information Statement before, or as soon as practicable after, the employee starts employment.

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(2) Subsection (1) does not require the employer to give the employee the Statement more than once in any 12 months.

Note: This is relevant if the employer employs the employee more than once in the 12 months.

125A Fair Work Ombudsman to prepare and publish Casual Employment Information Statement

(1) The Fair Work Ombudsman must prepare a Casual Employment Information Statement. The Fair Work Ombudsman must publish the Statement in the Gazette.

Note: If the Fair Work Ombudsman changes the Statement, the Fair Work Ombudsman must publish the new version of the Statement in the Gazette.

(2) The Statement must contain information about casual employment and how this can be changed under Division 4A of Part 2-2, including the following:

(a) the meaning of casual employee under section 15A;

(aa) an employee who has completed 6 months of employment (12 months if a small business employer) can notify the employer if, having regard to the employee's current employment relationship with the employer, the employee believes that the employee no longer meets the requirements of subsections 15A(1) to (4);

(ab) the grounds upon which an employer may not accept a notification given by an employee;

(e) the FWC may deal with disputes about the operation of that Division.

(3) The Casual Employment Information Statement is not a legislative instrument.

(4) The regulations may prescribe other matters relating to the content or form of the Statement, or the manner in which employers may give the Statement to employees.

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125B Giving employees the Casual Employment Information Statement

(1) An employer must give a casual employee the Casual Employment Information Statement:

(a) before, or as soon as practicable after, the employee starts employment as a casual employee with the employer; and

(b) as soon as practicable after the employee has been employed by the employer for a period of 6 months beginning the day the employment started; and

(c) as soon as practicable after the following:

(i) the employee has been employed by the employer for a period of 12 months beginning the day the employment started;

(ii) the end of any subsequent period of 12 months for which the employee is employed by the employer.

(2) However, paragraph (1)(b) and subparagraph (1)(c)(ii) do not apply if at the time the employer has employed the employee for the period referred to in that paragraph or subparagraph, the employer is a small business employer.

(3) This section does not, apart from the operation of paragraph (1)(b), require the employer to give the employee the Statement more than once in any 12 months.

Note: This is relevant if the employer employs the employee more than once in the 12 months.

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Division 13—Miscellaneous

126 Modern awards and enterprise agreements may provide for school-based apprentices and trainees to be paid loadings in lieu

A modern award or enterprise agreement may provide for school-based apprentices or school-based trainees to be paid loadings in lieu of any of the following:

(a) paid annual leave;

(b) paid personal/carer's leave;

(c) paid absence under Division 10 (which deals with public holidays).

Note: Section 199 affects whether the FWC may approve an enterprise agreement covering an employee who is a school-based apprentice or school-based trainee, if the employee is covered by a modern award that is in operation and provides for the employee to be paid loadings in lieu of paid annual leave, paid personal/carer's leave or paid absence under Division 10.

127 Regulations about what modern awards and enterprise agreements can do

The regulations may:

(a) permit modern awards or enterprise agreements or both to include terms that would or might otherwise be contrary to this Part or section 55 (which deals with the interaction between the National Employment Standards and a modern award or enterprise agreement); or

(b) prohibit modern awards or enterprise agreements or both from including terms that would or might otherwise be permitted by a provision of this Part or section 55.

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128 Relationship between National Employment Standards and agreements etc. permitted by this Part for award/agreement free employees

The National Employment Standards have effect subject to:

(a) an agreement between an employer and an award/agreement free employee or a requirement made by an employer of an award/agreement free employee, that is expressly permitted by a provision of this Part; or

(b) an agreement between an employer and an award/agreement free employee that is expressly permitted by regulations made for the purpose of section 129.

Note 1: In determining what matters are permitted to be agreed or required under paragraph (a), any regulations made for the purpose of section 129 that expressly prohibit certain agreements or requirements must be taken into account.

Note 2: See also the note to section 64 (which deals with the effect of averaging arrangements).

129 Regulations about what can be agreed to etc. in relation to award/agreement free employees

The regulations may:

(a) permit employers, and award/agreement free employees, to agree on matters that would or might otherwise be contrary to this Part; or

(b) prohibit employers and award/agreement free employees from agreeing on matters, or prohibit employers from making requirements of such employees, that would or might otherwise be permitted by a provision of this Part.

130 Restriction on taking or accruing leave or absence while receiving workers' compensation

(1) An employee is not entitled to take or accrue any leave or absence (whether paid or unpaid) under this Part during a period (a ***compensation period***) when the employee is absent from work because of a personal illness, or a personal injury, for which the

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employee is receiving compensation payable under a law (a ***compensation law***) of the Commonwealth, a State or a Territory that is about workers' compensation.

(2) Subsection (1) does not prevent an employee from taking or accruing leave during a compensation period if the taking or accruing of the leave is permitted by a compensation law.

(3) Subsection (1) does not prevent an employee from taking unpaid parental leave during a compensation period.

131 Relationship with other Commonwealth laws

This Part establishes minimum standards and so is intended to supplement, and not to override, entitlements under other laws of the Commonwealth.

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Part 2-3—Modern awards

Division 1—Introduction

132 Guide to this Part

This Part provides for the FWC to make, vary and revoke modern awards. Modern awards may set minimum terms and conditions for national system employees in particular industries or occupations. Modern awards can have terms that are ancillary or supplementary to the National Employment Standards (see Part 2-1).

Division 2 provides for the modern awards objective. This requires the FWC to ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account certain social and economic factors. Division 2 also contains special provisions about modern award minimum wages.

Division 3 deals with the terms of modern awards.

Division 4A provides for the FWC to conduct 4 yearly reviews of default fund terms of modern awards.

It also sets out the process for making the Schedule of Approved Employer MySuper products in a 4 yearly review, and amending the schedule after it is made to include other employer MySuper products. If an employer MySuper product is on the schedule, an employer covered by a modern award can make contributions, for the benefit of a default fund employee, to a superannuation fund that offers the product (see subsection 149D(1A)).

Division 5 provides for the FWC to exercise modern award powers in certain circumstances.

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Division 6 contains some general provisions relating to modern award powers.

Division 7 contains additional provisions relating to modern enterprise awards.

Division 8 contains additional provisions relating to State reference public sector modern awards.

The obligation to comply with a modern award is in section 45 (in Part 2-1).

In relation to minimum wages in modern awards, the FWC has powers both under this Part and under Part 2-6 (which deals with minimum wages). The following is a summary of the FWC's powers under the 2 Parts:

(a) the initial making of a modern award setting modern award minimum wages can only occur under this Part;

(b) the main power to vary modern award minimum wages is in annual wage reviews under Part 2-6;

(c) modern award minimum wages can also be varied under this Part, but only for work value reasons or in other limited circumstances;

(d) modern award minimum wages can be set (otherwise than in the initial making of a modern award) or revoked either under this Part or in annual wage reviews under Part 2-6.

133 Meanings of *employee* and *employer*

In this Part, ***employee*** means a national system employee, and ***employer*** means a national system employer.

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

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Division 2—Overarching provisions

134 The modern awards objective

What is the modern awards objective?

(1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

(a) relative living standards and the needs of the low paid; and

(aa) the need to improve access to secure work across the economy; and

(ab) the need to achieve gender equality in the workplace by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and providing workplace conditions that facilitate women's full economic participation; and

(b) the need to encourage collective bargaining; and

(c) the need to promote social inclusion through increased workforce participation; and

(d) the need to promote flexible modern work practices and the efficient and productive performance of work; and

(da) the need to provide additional remuneration for:

(i) employees working overtime; or

(ii) employees working unsocial, irregular or unpredictable hours; or

(iii) employees working on weekends or public holidays; or

(iv) employees working shifts; and

(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and

(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

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(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

This is the ***modern awards objective***.

When does the modern awards objective apply?

(2) The modern awards objective applies to the performance or exercise of the FWC's ***modern award powers***, which are:

(a) the FWC's functions or powers under this Part; and

(b) the FWC's functions or powers under Part 2-6, so far as they relate to modern award minimum wages.

Note 1: The FWC must also take into account the objects of this Act and any other applicable provisions. For example, if the FWC is setting, varying or revoking modern award minimum wages, the minimum wages objective also applies (see section 284).

Note 2: Further, the FWC must take into account the road transport objective when performing certain functions: see section 40D and subsection 617(10B).

135 Special provisions relating to modern award minimum wages

(1) Modern award minimum wages cannot be varied under this Part except as follows:

(a) modern award minimum wages can be varied if the FWC is satisfied that the variation is justified by work value reasons (see subsection 157(2));

(b) modern award minimum wages can be varied under section 160 (which deals with variation to remove ambiguities or correct errors) or section 161 (which deals with variation on referral by the Australian Human Rights Commission).

Note 1: The main power to vary modern award minimum wages is in annual wage reviews under Part 2-6. Modern award minimum wages can also be set or revoked in annual wage reviews.

Note 2: For the meanings of ***modern award minimum wages***, and ***setting*** and ***varying*** such wages, see section 284.

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(2) In exercising its powers under this Part to set, vary or revoke modern award minimum wages, the FWC must take into account the rate of the national minimum wage as currently set in a national minimum wage order.

135A Special provisions relating to penalty rates and overtime rates

(1) In exercising its powers under this Part to make, vary or revoke modern awards, the FWC must ensure that:

(a) the rate of a penalty rate or an overtime rate that employees are entitled to receive is not reduced; and

(b) modern awards do not include terms that substitute employees' entitlements to receive penalty rates or overtime rates where those terms would have the effect of reducing the additional remuneration referred to in paragraph 134(1)(da) that any employee would otherwise receive.

(2) Subsection (1) does not limit the operation of section 144 (flexibility terms) or section 160 (which deals with variation to remove ambiguities or correct errors).

(3) Nothing in subsection (1) requires the FWC to exercise its powers under this Part to make, vary or revoke modern awards.

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Division 3—Terms of modern awards

Subdivision A—Preliminary

136 What can be included in modern awards

Terms that may or must be included

(1) A modern award must only include terms that are permitted or required by:

(a) Subdivision B (which deals with terms that may be included in modern awards); or

(b) Subdivision C (which deals with terms that must be included in modern awards); or

(c) section 55 (which deals with interaction between the National Employment Standards and a modern award or enterprise agreement); or

(d) Part 2-2 (which deals with the National Employment Standards).

Note 1: Subsection 55(4) permits inclusion of terms that are ancillary or incidental to, or that supplement, the National Employment Standards.

Note 2: Part 2-2 includes a number of provisions permitting inclusion of terms about particular matters.

Terms that must not be included

(2) A modern award must not include terms that contravene:

(a) Subdivision D (which deals with terms that must not be included in modern awards); or

(b) section 55 (which deals with the interaction between the National Employment Standards and a modern award or enterprise agreement).

Note: The provisions referred to in subsection (2) limit the terms that can be included in modern awards under the provisions referred to in subsection (1).

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137 Terms that contravene section 136 have no effect

A term of a modern award has no effect to the extent that it contravenes section 136.

138 Achieving the modern awards objective

A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.

Subdivision B—Terms that may be included in modern awards

139 Terms that may be included in modern awards—general

(1) A modern award may include terms about any of the following matters:

(a) minimum wages (including wage rates for junior employees, employees with a disability and employees to whom training arrangements apply), and:

(i) skill-based classifications and career structures; and

(ii) incentive-based payments, piece rates and bonuses;

(b) type of employment, such as full-time employment, casual employment, regular part-time employment and shift work, and the facilitation of flexible working arrangements, particularly for employees with family responsibilities;

(c) arrangements for when work is performed, including hours of work, rostering, notice periods, rest breaks and variations to working hours;

(d) overtime rates;

(e) penalty rates, including for any of the following:

(i) employees working unsocial, irregular or unpredictable hours;

(ii) employees working on weekends or public holidays;

(iii) shift workers;

(f) annualised wage arrangements that:

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(i) have regard to the patterns of work in an occupation, industry or enterprise; and

(ii) provide an alternative to the separate payment of wages and other monetary entitlements; and

(iii) include appropriate safeguards to ensure that individual employees are not disadvantaged;

(g) allowances, including for any of the following:

(i) expenses incurred in the course of employment;

(ii) responsibilities or skills that are not taken into account in rates of pay;

(iii) disabilities associated with the performance of particular tasks or work in particular conditions or locations;

(h) leave, leave loadings and arrangements for taking leave;

(i) superannuation;

(j) procedures for consultation, representation and dispute settlement.

(2) Any allowance included in a modern award must be separately and clearly identified in the award.

140 Outworker terms

(1) A modern award may include either or both of the following:

(a) terms relating to the conditions under which an employer may employ employees who are outworkers;

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

Note: A person who is an employer may also be an outworker entity (see the definition of ***outworker entity*** in section 12).

(2) Without limiting subsection (1), terms referred to in that subsection may include terms relating to the pay or conditions of outworkers.

(3) The following terms of a modern award are ***outworker terms***:

(a) terms referred to in subsection (1);

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(b) terms that are incidental to terms referred to in subsection (1), included in the modern award under subsection 142(1);

(c) machinery terms in relation to terms referred to in subsection (1), included in the modern award under subsection 142(2).

141 Industry-specific redundancy schemes

When can a modern award include an industry-specific redundancy scheme?

(1) A modern award may include an industry-specific redundancy scheme if the scheme was included in the award:

(a) in the award modernisation process; or

(b) in accordance with subsection (2).

Note: An employee to whom an industry-specific redundancy scheme in a modern award applies is not entitled to the redundancy entitlements in Subdivision B of Division 11 of Part 2-2.

Coverage of industry-specific redundancy schemes must not be extended

(2) If:

(a) a modern award includes an industry-specific redundancy scheme; and

(b) the FWC is making or varying another modern award under Division 5 so that it (rather than the modern award referred to in paragraph (a)) will cover some or all of the classes of employees who are covered by the scheme;

the FWC may include the scheme in that other modern award. However, the FWC must not extend the coverage of the scheme to classes of employees that it did not previously cover.

Varying industry-specific redundancy schemes

(3) The FWC may only vary an industry-specific redundancy scheme in a modern award under Division 5:

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(a) by varying the amount of any redundancy payment in the scheme; or

(b) in accordance with a provision of Subdivision B of Division 5 (which deals with varying modern awards in some limited situations).

(4) In varying an industry-specific redundancy scheme as referred to in subsection (3), the FWC:

(a) must not extend the coverage of the scheme to classes of employees that it did not previously cover; and

(b) must retain the industry-specific character of the scheme.

Omitting industry-specific redundancy schemes

(5) The FWC may vary a modern award under Division 5 by omitting an industry-specific redundancy scheme from the award.

141A Terms permitting fixed term contracts

(1) A modern award may include terms that permit an employee to be employed under 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).

(2) Without limiting subsection (1), a modern award may include terms that permit any of the circumstances mentioned in subsections 333E(2) to (4) (about certain fixed term contracts) to occur.

142 Incidental and machinery terms

Incidental terms

(1) A modern award may include terms that are:

(a) incidental to a term that is permitted or required to be in the modern award; and

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(b) essential for the purpose of making a particular term operate in a practical way.

Machinery terms

(2) A modern award may include machinery terms, including formal matters (such as a title, date or table of contents).

Subdivision C—Terms that must be included in modern awards

143 Coverage terms of modern awards other than modern enterprise awards and State reference public sector modern awards

Coverage terms must be included

(1) A modern award must include terms (***coverage terms***) setting out the employers, employees, organisations and outworker entities that are covered by the award, in accordance with this section.

Employers and employees

(2) A modern award must be expressed to cover:
(a) specified employers; and
(b) specified employees of employers covered by the modern award.

Organisations

(3) A modern award may be expressed to cover one or more specified organisations, in relation to all or specified employees or employers that are covered by the award.

Outworker entities

(4) A modern award may be expressed to cover, but only in relation to outworker terms included in the award, specified outworker entities.

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How coverage is expressed

(5) For the purposes of subsections (2) to (4):
  (a) employers may be specified by name or by inclusion in a specified class or specified classes; and
  (b) employees must be specified by inclusion in a specified class or specified classes; and
  (c) organisations must be specified by name; and
  (d) outworker entities may be specified by name or by inclusion in a specified class or specified classes.

(6) Without limiting the way in which a class may be described for the purposes of subsection (5), the class may be described by reference to a particular industry or part of an industry, or particular kinds of work.

Employees not traditionally covered by awards etc.

(7) A modern award must not be expressed to cover classes of employees:
  (a) who, because of the nature or seniority of their role, have traditionally not been covered by awards (whether made under laws of the Commonwealth or the States); or
  (b) who perform work that is not of a similar nature to work that has traditionally been regulated by such awards.

Note: For example, in some industries, managerial employees have traditionally not been covered by awards.

Modern enterprise awards

(8) A modern award (other than a modern enterprise award) must be expressed not to cover employees who are covered by a modern enterprise award, or an enterprise instrument (within the meaning of the Transitional Act), or employers in relation to those employees.

(9) This section does not apply to modern enterprise awards.

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State reference public sector modern awards

(10) A modern award (other than a State reference public sector modern award) must be expressed not to cover employees who are covered by a State reference public sector modern award, or a State reference public sector transitional award (within the meaning of the Transitional Act), or employers in relation to those employees.

(11) This section does not apply to State reference public sector modern awards.

143A Coverage terms of modern enterprise awards

Coverage terms must be included

(1) A modern enterprise award must include terms (***coverage terms***) setting out, in accordance with this section:
  (a) the enterprise or enterprises to which the modern enterprise award relates; and
  (b) the employers, employees and organisations that are covered by the modern enterprise award.

Enterprises

(2) A modern enterprise award must be expressed to relate:
  (a) to a single enterprise (or a part of a single enterprise) only; or
  (b) to one or more enterprises, but only if the employers all carry on similar business activities under the same franchise and are:
    (i) franchisees of the same franchisor; or
    (ii) related bodies corporate of the same franchisor; or
    (iii) any combination of the above.

Employers and employees

(3) A modern enterprise award must be expressed to cover:

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(a) a specified employer that carries on, or specified employers that carry on, the enterprise or enterprises referred to in subsection (2); and
(b) specified employees of employers covered by the modern enterprise award.

Organisations

(4) A modern enterprise award may be expressed to cover one or more specified organisations, in relation to:
(a) all or specified employees covered by the award; or
(b) the employer, or all or specified employers, covered by the award.

Outworker entities

(5) A modern enterprise award must not be expressed to cover outworker entities.

How coverage etc. is expressed

(6) For the purposes of subsection (2), an enterprise must be specified:
(a) if paragraph (2)(a) applies to the enterprise—by name; or
(b) if paragraph (2)(b) applies to the enterprise—by name, or by the name of the franchise.

(7) For the purposes of subsections (3) and (4):
(a) an employer or employers may be specified by name or by inclusion in a specified class or specified classes; and
(b) employees must be specified by inclusion in a specified class or specified classes; and
(c) organisations must be specified by name.

Employees not traditionally covered by awards etc.

(8) A modern enterprise award must not be expressed to cover classes of employees:

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(a) who, because of the nature or seniority of their role, have traditionally not been covered by awards (whether made under laws of the Commonwealth or the States); or

(b) who perform work that is not of a similar nature to work that has traditionally been regulated by such awards.

Note: For example, in some industries, managerial employees have traditionally not been covered by awards.

143B Coverage terms of State reference public sector modern awards

Coverage terms must be included

(1) A State reference public sector modern award must include terms (***coverage terms***) setting out, in accordance with this section, the employers, employees and organisations that are covered by the modern award.

Employers and employees

(2) The coverage terms must be such that:

(a) the only employers that are expressed to be covered by the modern award are one or more specified State reference public sector employers; and

(b) the only employees who are expressed to be covered by the modern award are specified State reference public sector employees of those employers.

Organisations

(3) A State reference public sector modern award may be expressed to cover one or more specified organisations, in relation to:

(a) all or specified employees covered by the modern award; or

(b) the employer, or all or specified employers, covered by the modern award.

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Outworker entities

(4) A State reference public sector modern award must not be expressed to cover outworker entities.

How coverage etc. is expressed

(5) For the purposes of this section:
  (a) an employer or employers may be specified by name or by inclusion in a specified class or specified classes; and
  (b) employees must be specified by inclusion in a specified class or specified classes; and
  (c) organisations must be specified by name.

144 Flexibility terms

Flexibility terms must be included

(1) A modern award must include a term (a ***flexibility term***) enabling an employee and his or her employer to agree on an arrangement (an ***individual flexibility arrangement***) varying the effect of the award in relation to the employee and the employer, in order to meet the genuine needs of the employee and employer.

Effect of individual flexibility arrangements

(2) If an employee and employer agree to an individual flexibility arrangement under a flexibility term in a modern award:
  (a) the modern award has effect in relation to the employee and the employer as if it were varied by the flexibility arrangement; and
  (b) the arrangement is taken, for the purposes of this Act, to be a term of the modern award.

(3) To avoid doubt, the individual flexibility arrangement does not change the effect the modern award has in relation to the employer and any other employee.

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Requirements for flexibility terms

(4) The flexibility term must:

(a) identify the terms of the modern award the effect of which may be varied by an individual flexibility arrangement; and

(b) require that the employee and the employer genuinely agree to any individual flexibility arrangement; and

(c) require the employer to ensure that any individual flexibility arrangement must result in the employee being better off overall than the employee would have been if no individual flexibility arrangement were agreed to; and

(d) set out how any flexibility arrangement may be terminated by the employee or the employer; and

(e) require the employer to ensure that any individual flexibility arrangement must be in writing and signed:

(i) in all cases—by the employee and the employer; and

(ii) if the employee is under 18—by a parent or guardian of the employee; and

(f) require the employer to ensure that a copy of any individual flexibility arrangement must be given to the employee.

(5) Except as required by subparagraph (4)(e)(ii), the flexibility term must not require that any individual flexibility arrangement agreed to by an employer and employee under the term must be approved, or consented to, by another person.

145 Effect of individual flexibility arrangement that does not meet requirements of flexibility term

Application of this section

(1) This section applies if:

(a) an employee and employer agree to an arrangement that purports to be an individual flexibility arrangement under a flexibility term in a modern award; and

(b) the arrangement does not meet a requirement set out in section 144.

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Note: A failure to meet such a requirement may be a contravention of a provision of Part 3-1 (which deals with general protections).

Arrangement has effect as if it were an individual flexibility arrangement

(2) The arrangement has effect as if it were an individual flexibility arrangement.

Employer contravenes flexibility term in specified circumstances

(3) If subsection 144(4) requires the employer to ensure that the arrangement meets the requirement, the employer contravenes the flexibility term of the award.

Flexibility arrangement may be terminated by agreement or notice

(4) The flexibility term is taken to provide (in addition to any other means of termination of the arrangement that the term provides) that the arrangement can be terminated:
  (a) by either the employee, or the employer, giving written notice of not more than 28 days; or
  (b) by the employee and the employer at any time if they agree, in writing, to the termination.

145A Consultation about changes to rosters or hours of work

(1) Without limiting paragraph 139(1)(j), a modern award must include a term that:
  (a) requires the employer to consult employees about a change to their regular roster or ordinary hours of work; and
  (b) allows for the representation of those employees for the purposes of that consultation.

(2) The term must require the employer:
  (a) to provide information to the employees about the change; and

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(b) to invite the employees to give their views about the impact of the change (including any impact in relation to their family or caring responsibilities); and

(c) to consider any views about the impact of the change that are given by the employees.

146 Terms about settling disputes

Without limiting paragraph 139(1)(j), a modern award must include a term that provides a procedure for settling disputes:

(a) about any matters arising under the award; and

(b) in relation to the National Employment Standards.

147 Ordinary hours of work

A modern award must include terms specifying, or providing for the determination of, the ordinary hours of work for each classification of employee covered by the award and each type of employment permitted by the award.

Note: An employee's ordinary hours of work are significant in determining the employee's entitlements under the National Employment Standards.

148 Base and full rates of pay for pieceworkers

If a modern award defines or describes employees covered by the award as pieceworkers, the award must include terms specifying, or providing for the determination of, base and full rates of pay for those employees for the purposes of the National Employment Standards.

Note: An employee's base and full rates of pay are significant in determining the employee's entitlements under the National Employment Standards.

149 Automatic variation of allowances

If a modern award includes allowances that the FWC considers are of a kind that should be varied when wage rates in the award are

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varied, the award must include terms providing for the automatic variation of those allowances when wage rates in the award are varied.

149B Term requiring avoidance of liability to pay superannuation guarantee charge

(1) A modern award must include a term that requires an employer covered by the award to make contributions to a superannuation fund for the benefit of an employee covered by the award so as to avoid liability to pay superannuation guarantee charge under the *Superannuation Guarantee Charge Act 1992* in relation to the employee.

Reduction of employer's liability to the extent of superannuation charge payments

(2) The obligation of an employer to make contributions for the benefit of an employee under a term mentioned in subsection (1) does not apply to the extent that:

(a) the employer has made a charge payment (within the meaning of section 63A of the *Superannuation Guarantee (Administration) Act 1992*) in respect of the employee under Part 8 of that Act; and

(b) the employee is a benefiting employee (within the meaning of that Part); and

(c) the Commissioner of Taxation is required to pay, or otherwise deal with, a shortfall component (within the meaning of that Part) for the benefit of the employee under that Part.

149C Default fund terms

(1) A modern award must include a default fund term that complies with section 149D.

(2) A ***default fund term*** is a term of a modern award that requires, permits or prohibits an employer covered by the award to make

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contributions to a superannuation fund for the benefit of an employee (a ***default fund employee***) who:

(a) is covered by the award; and

(b) has no chosen fund (within the meaning of the *Superannuation Guarantee (Administration) Act 1992*).

149D Default fund term must provide for contributions to be made to certain funds

Specified superannuation fund offering standard MySuper product

(1) A default fund term of a modern award must require an employer covered by the award to make contributions, for the benefit of a default fund employee, to a superannuation fund that:

(a) offers a standard MySuper product; and

(b) is specified in the default fund term of the award in relation to that product;

if:

(c) the employer will be liable to pay superannuation guarantee charge under the *Superannuation Guarantee Charge Act 1992* in relation to the employee if the employer does not make contributions to a superannuation fund for the benefit of the employee; and

(d) the employer is not making contributions to a superannuation fund referred to in subsection (1A), (2), (3), (4) or (5) for the benefit of the employee.

Note: If a superannuation fund is specified in the default fund term of a modern award in relation to a standard MySuper product and, in addition to offering the standard MySuper product, the fund offers a tailored MySuper product that a default fund employee is entitled to hold, then any contributions made by the employer to the fund for the benefit of that employee will be paid into the tailored MySuper product instead of the standard MySuper product (see section 29WB of the *Superannuation Industry (Supervision) Act 1993*).

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Superannuation funds offering employer MySuper products on the schedule

(1A) A default fund term of a modern award must permit an employer covered by the award to make contributions, for the benefit of a default fund employee, to a superannuation fund that offers an employer MySuper product that:

(a) relates to the employer; and

(b) is on the Schedule of Approved Employer MySuper Products.

Note: The Schedule of Approved Employer MySuper Products is made during a 4 yearly review of default fund terms of modern awards under Division 4A of Part 2-3.

Defined Benefits Scheme

(2) A default fund term of a modern award must permit an employer covered by the award to make contributions, for the benefit of a default fund employee, to a superannuation fund in relation to which a default fund employee is a defined benefit member.

Exempt public sector superannuation scheme

(3) A default fund term of a modern award must permit an employer covered by the award to make contributions, for the benefit of a default fund employee, to a superannuation fund that is an exempt public sector superannuation scheme.

State public sector superannuation scheme

(4) A default fund term of a modern award must permit an employer covered by the award to make contributions, for the benefit of a default fund employee, to a superannuation fund that:

(a) is a public sector superannuation scheme (within the meaning of the *Superannuation Industry (Supervision) Act 1993*); and

(b) a law of a State requires the employer to make contributions to for the benefit of the employee.

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Transitionally authorised superannuation fund

(5) A default fund term of a modern award must permit an employer covered by the award to make contributions, for the benefit of a default fund employee, to a superannuation fund in relation to which a transitional authorisation is in operation under section 156K.

149E Workplace delegates' rights

A modern award must include a delegates' rights term for workplace delegates covered by the award.

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

149F Right to disconnect

A modern award must include a right to disconnect term.

Note: ***Right to disconnect term*** is defined in section 12.

Subdivision D—Terms that must not be included in modern awards

150 Objectionable terms

A modern award must not include an objectionable term.

151 Terms about payments and deductions for benefit of employer etc.

A modern award must not include a term that has no effect because of:

(a) subsection 326(1) (which deals with unreasonable deductions for the benefit of an employer); or

(b) subsection 326(3) (which deals with unreasonable requirements to spend or pay an amount); or

(c) subsection 326(4) (which deals with deductions or payments in relation to employees under 18).

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152 Terms about right of entry

A modern award must not include terms that require or authorise an official of an organisation to enter premises:

(a) to hold discussions with, or interview, an employee; or

(b) to inspect any work, process or object.

153 Terms that are discriminatory

Discriminatory terms must not be included

(1) A modern award must not include terms that discriminate against an employee because of, or for reasons including, the employee's race, colour, sex, sexual orientation, 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.

Certain terms are not discriminatory

(2) A term of a modern award does not discriminate against an employee:

(a) if the reason for the discrimination is the inherent requirements of the particular position held by the employee; or

(b) merely because it discriminates, in relation to employment of the employee as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed:

(i) in good faith; and

(ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.

(3) A term of a modern award does not discriminate against an employee merely because it provides for minimum wages for:

(a) all junior employees, or a class of junior employees; or

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(b) all employees with a disability, or a class of employees with a disability; or

(c) all employees to whom training arrangements apply, or a class of employees to whom training arrangements apply.

154 Terms that contain State-based differences

General rule—State-based difference terms must not be included

(1) A modern award must not include terms and conditions of employment (***State-based difference terms***) that:

(a) are determined by reference to State or Territory boundaries; or

(b) are expressed to operate in one or more, but not every, State and Territory.

When State-based difference terms may be included

(2) However, a modern award may include State-based difference terms if the terms were included in the award:

(a) in the award modernisation process; or

(b) in accordance with subsection (3);

but only for up to 5 years starting on the day on which the first modern award that included those terms came into operation.

(3) If:

(a) a modern award includes State-based difference terms as permitted under subsection (2); and

(b) the FWC is making or varying another modern award so that it (rather than the modern award referred to in paragraph (a)) will cover some or all of the classes of employees who are covered by those terms;

the FWC may include those terms in that other modern award. However, the FWC must not extend the coverage of those terms to classes of employees that they did not previously cover.

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155 Terms dealing with long service leave

A modern award must not include terms dealing with long service leave.

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Division 4A—4 yearly reviews of default fund terms of modern awards

Subdivision A—4 yearly reviews of default fund terms

156A 4 yearly reviews of default fund terms

Timing of 4 yearly reviews

(1) The FWC must conduct a 4 yearly review of default fund terms of modern awards starting as soon as practicable after each 4th anniversary of the commencement of this Part.

Note: The President may give directions about the conduct of those reviews (see section 582).

Two stages of the 4 yearly reviews

(2) There are 2 stages of the 4 yearly review.

First stage—the Default Superannuation List

(3) In the first stage, the FWC must make the Default Superannuation List for the purposes of the review.

Note: In the first stage, the FWC must be constituted by an Expert Panel for the purposes of making the list and determining applications to include standard MySuper products on the list (see paragraphs 617(4)(a) and (b)).

Second stage—reviewing and varying default fund terms

(4) In the second stage, the FWC:
(a) must review the default fund term of each modern award; and
(b) must make a determination varying the term in accordance with section 156H; and
(c) if section 156J applies—must make a determination varying the term in accordance with that section.

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Note: For the second stage, the FWC must be constituted by a Full Bench (see subsections 616(2A) and (3A)).

The Schedule of Approved Employer MySuper Products

(5) In the 4 yearly review, the FWC must also make the Schedule of Approved Employer MySuper Products.

Note: The FWC must be constituted by an Expert Panel for the purposes of making the schedule and determining applications to include employer MySuper products on the schedule (see paragraphs 617(4)(c) and (d)).

Subdivision B—The first stage of the 4 yearly review

156B Making the Default Superannuation List

(1) In the 4 yearly review, the FWC must make and publish the ***Default Superannuation List***.

(2) The Default Superannuation List must specify each standard MySuper product that the FWC has determined under section 156E is to be included on the list.

(3) The Default Superannuation List must not specify any other product.

156C Applications to list a standard MySuper product

(1) Before making the Default Superannuation List, the FWC must publish a notice that invites superannuation funds that offer a standard MySuper product to apply to the FWC to have the product included on the list.

(2) The notice must specify the period in which an application may be made.

(3) After the notice is published, a superannuation fund that offers a standard MySuper product may make a written application to have the product included on the list.

(4) The application must:

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(a) be made in the period specified in the notice; and
(b) be accompanied by any fees that are prescribed by the regulations; and
(c) provide information relating to the first stage criteria.

(5) The FWC must publish any application made under subsection (3).

(6) However, if an application includes information that is claimed by the superannuation fund to be confidential or commercially sensitive, and the FWC is satisfied that the information is confidential or commercially sensitive:
(a) the FWC may decide not to publish the information; and
(b) if it does so, it must instead publish a summary of the information which contains sufficient detail to allow a reasonable understanding of the substance of the information (without disclosing anything that is confidential or commercially sensitive).

(7) A reference in this Act (other than in this section) in relation to an application made under subsection (3) includes a reference to a summary referred to in paragraph (6)(b).

156D Submissions on applications to list a standard MySuper product

(1) The FWC must ensure that all persons and bodies have a reasonable opportunity to make written submissions to the FWC in relation to an application made under subsection 156C(3).

(2) If:
(a) a person or body makes a written submission in relation to an application made under subsection 156C(3); and
(b) the person or body has an interest in relation to:
(i) the superannuation fund that made the application; or
(ii) if the person or body refers to another superannuation fund in the submission—that superannuation fund;

then the person or body must disclose that interest in the submission.

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(3) The FWC must publish any submission that is made.

156E Determining applications to list a standard MySuper product

(1) If an application is made under subsection 156C(3) to have a standard MySuper product included on the Default Superannuation List, the FWC must make a determination about whether to include the product on the list.

(2) The FWC must not determine that the product is to be included on the list unless, taking into account:

(a) the information provided in the application; and

(b) the first stage criteria; and

(c) any submissions that were made in relation to the application;

the FWC is satisfied that including the product on the list would be in the best interests of default fund employees to whom modern awards apply or a particular class of those employees.

156F First stage criteria

The ***first stage criteria*** are as follows:

(a) the appropriateness of the MySuper product's long term investment return target and risk profile;

(b) the superannuation fund's expected ability to deliver on the MySuper product's long term investment return target, given its risk profile;

(c) the appropriateness of the fees and costs associated with the MySuper product, given:

(i) its stated long term investment return target and risk profile; and

(ii) the quality and timeliness of services provided;

(d) the net returns on contributions invested in the MySuper product;

(e) whether the superannuation fund's governance practices are consistent with meeting the best interests of members of the

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fund, including whether there are mechanisms in place to deal with conflict of interest;

(f) the appropriateness of any insurance offered in relation to the MySuper product;

(g) the quality of advice given to a member of the superannuation fund relating to the member's existing interest in the fund and products offered by the fund;

(h) the administrative efficiency of the superannuation fund;

(i) any other matters the FWC considers relevant.

Subdivision C—Second stage of the 4 yearly review

156G Review of the default fund term of modern awards

(1) As soon as practicable after the Default Superannuation List is made, the FWC must review the default fund term of each modern award.

(2) The FWC must ensure that the following persons have a reasonable opportunity to make written submissions (including submissions requesting that a particular superannuation fund be specified in the term in relation to a standard MySuper product) to the FWC in relation to the default fund term of the award:

(a) an employee and employer that are covered by the modern award;

(b) an organisation that is entitled to represent the industrial interests of one or more employees or employers that are covered by the award;

(c) if the award includes an outworker term—an organisation that is entitled to represent the industrial interests of one or more outworkers to whom the outworker term relates.

(3) If:

(a) a person or body (whether or not a person referred to in subsection (2)) makes a written submission in relation to the default fund term of a modern award; and

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(b) the person or body refers to a particular superannuation fund in the submission; and

(c) the person or body has an interest in relation to that superannuation fund;

then the person or body must disclose that interest in the submission.

(4) The FWC must publish any submission that is made.

156H Default fund term must specify certain superannuation funds

(1) After reviewing the default fund term of a modern award, the FWC must make a determination varying the term:

(a) to remove every superannuation fund that is specified in the term; and

(b) to specify at least 2, but no more than 15, superannuation funds in relation to standard MySuper products that satisfy the second stage test.

Note: See subsection (3) for when the default fund term may specify more than 15 superannuation funds.

(2) A standard MySuper product satisfies the ***second stage test*** if:

(a) it is on the Default Superannuation List; and

(b) the FWC is satisfied that specifying a superannuation fund in relation to the product in the default fund term of the modern award would be in the best interests of the default fund employees to whom the modern award applies, taking into account:

(i) any submissions that were made in relation to the default fund term of the award; and

(ii) any other matter the FWC considers relevant.

(3) The default fund term may specify more than 15 superannuation funds in relation to standard MySuper products that satisfy the second stage test if, taking into account the range of occupations of employees covered by the modern award, the FWC is satisfied it is warranted.

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156J Variation to comply with section 149D

If, at the time of the 4 yearly review, the default fund term of a modern award does not comply with section 149D, the FWC must make a determination varying the term so that it does.

156K Transitional authorisation for certain superannuation funds

(1) The FWC may make a transitional authorisation in relation to a superannuation fund (other than a superannuation fund referred to in subsection 149D(1), (1A), (2), (3) or (4)) if, at the time of the 4 yearly review, the FWC is satisfied that it is appropriate to make the authorisation.

(2) The transitional authorisation comes into operation on the day it is made and ceases to be in operation on the day specified in the authorisation.

Subdivision D—The Schedule of Approved Employer MySuper Products

156L The Schedule of Approved Employer MySuper Products

(1) In the 4 yearly review, the FWC must:
  (a) make and publish the ***Schedule of Approved Employer MySuper Products***; and
  (b) revoke any previous Schedule of Approved Employer MySuper Products.

Note: If an employer MySuper product is on the schedule, an employer covered by a modern award can make contributions, for the benefit of a default fund employee, to a superannuation fund that offers the product (see subsection 149D(1A)).

(2) When the schedule is made, it must specify any employer MySuper product that the FWC has determined under section 156P is to be included on the schedule.

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(3) After the schedule is made, it must be amended to specify any employer MySuper product that the FWC has determined under section 156P is to be included on the schedule.

Note: The FWC must be constituted by an Expert Panel for the purposes of amending the schedule (see paragraph 617(5)(b)).

(4) If the schedule is amended as referred to in subsection (3), the FWC must publish the schedule as amended.

(5) The schedule must not specify any other product.

156M FWC to invite applications to include employer MySuper products on schedule

(1) Before making the schedule, the FWC must publish a notice that invites:

(a) superannuation funds that offer an employer MySuper product; and

(b) employers to which an employer MySuper product relates;

to apply to the FWC to have the product included on the schedule.

(2) The notice must specify the period in which an application may be made.

156N Making applications to include employer MySuper products on schedule

(1) The following may apply to the FWC to have an employer MySuper product included on the schedule:

(a) a superannuation fund that offers the product;

(b) an employer to which the product relates.

(2) The application must be made:

(a) in the period (the ***standard application period***) specified in the notice under section 156M; or

(b) in the period (the ***interim application period***) that:

(i) starts immediately after the schedule is made under paragraph 156L(1)(a); and

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(ii) ends immediately before the next 4th anniversary of the commencement of this Part.

Note: Paragraph (2)(a) deals with applications that are made in a 4 yearly review of default fund terms, and paragraph (2)(b) deals with applications that are made outside a 4 yearly review.

(3) The application must also:
(a) be accompanied by any fees that are prescribed by the regulations; and
(b) provide information relating to the first stage criteria.

(4) The FWC must publish any application made under subsection (1).

(5) However, if an application includes information that is claimed by the applicant to be confidential or commercially sensitive, and the FWC is satisfied that the information is confidential or commercially sensitive:
(a) the FWC may decide not to publish the information; and
(b) if it does so, it must instead publish a summary of the information which contains sufficient detail to allow a reasonable understanding of the substance of the information (without disclosing anything that is confidential or commercially sensitive).

(6) A reference in this Act (other than in this section) in relation to an application made under subsection (1) includes a reference to a summary referred to in paragraph (5)(b).

(7) Only one application in relation to an employer MySuper product may be made under subsection (1) in the period that:
(a) starts at the start of the standard application period; and
(b) ends at the end of the interim application period.

156P FWC to determine applications

(1) If an application is made under subsection 156N(1) to have an employer MySuper product included on the schedule, the FWC must make a determination about whether to include the product on the schedule.

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Note: The FWC must be constituted by an Expert Panel for the purposes of making this determination (see paragraphs 617(4)(d) and (5)(a)).

(2) The FWC must not determine that the product is to be included on the schedule unless the product satisfies the first stage test and the second stage test.

156Q The first stage test

An employer MySuper product satisfies the ***first stage test*** if the FWC is satisfied that including the product on the Schedule of Approved Employer MySuper Products would be in the best interests of default fund employees, or a particular class of those employees, taking into account:

(a) the information provided in the application; and

(b) the first stage criteria; and

(c) any submissions that were made in relation to whether the product satisfies the first stage test.

156R Submissions about the first stage test

(1) The FWC must ensure that all persons and bodies have a reasonable opportunity to make written submissions to the FWC about whether an employer MySuper product satisfies the first stage test.

(2) If:

(a) a person or body makes a written submission in relation to whether an employer MySuper product satisfies the first stage test; and

(b) the person or body has an interest in relation to:

(i) the superannuation fund that offers the product; or

(ii) if the person or body refers to another superannuation fund in the submission—that superannuation fund;

then the person or body must disclose that interest in the submission.

(3) The FWC must publish any submission that is made.

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156S The second stage test

An employer MySuper product satisfies the ***second stage test*** if the FWC is satisfied that including the product on the Schedule of Approved Employer MySuper Products would be in the best interests of default fund employees of an employer to which the product relates, or a particular class of those employees, taking into account:

(a) any submissions that were made in relation to whether the product satisfies the second stage test; and

(b) any other matter the FWC considers relevant.

156T Submissions about the second stage test

(1) The FWC must ensure that the following persons have a reasonable opportunity to make written submissions to the FWC about whether an employer MySuper product satisfies the second stage test:

(a) an employee of an employer to which the product relates;

(b) an employer to which the product relates;

(c) an organisation that is entitled to represent the industrial interests of a person referred to in paragraph (a) or (b).

(2) If:

(a) a person or body (whether or not a person referred to in subsection (1)) makes a written submission in relation to whether an employer MySuper product satisfies the second stage test; and

(b) the person or body has an interest in relation to:

(i) the superannuation fund that offers the product; or

(ii) if the person or body refers to another superannuation fund in the submission—that superannuation fund;

then the person or body must disclose that interest in the submission.

(3) The FWC must publish any submission that is made.

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Subdivision E—Publishing documents under this Division

156U Publishing documents under this Division

If the FWC is required by this Division to publish a document, the FWC must publish the document on its website or by any other means that the FWC considers appropriate.

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Division 5—Exercising modern award powers

Subdivision A—Exercise of powers if necessary to achieve modern awards objective

157 FWC may vary etc. modern awards if necessary to achieve modern awards objective

(1) The FWC may:

(a) make a determination varying a modern award, otherwise than to vary modern award minimum wages or to vary a default fund term of the award; or

(b) make a modern award; or

(c) make a determination revoking a modern award;

if the FWC is satisfied that making the determination or modern award is necessary to achieve the modern awards objective.

Note 1: Generally, the FWC must be constituted by a Full Bench to make, vary or revoke a modern award. However, the President may direct a single FWC Member to make a variation (see section 616).

Note 2: Special criteria apply to changing coverage of modern awards or revoking modern awards (see sections 163 and 164).

Note 3: If the FWC is setting modern award minimum wages, the minimum wages objective also applies (see section 284).

Note 4: If the FWC is making, varying or revoking a modern award that the President considers might relate to the road transport industry, it must take into account the road transport objective (see section 40D).

(2) The FWC may make a determination varying modern award minimum wages if the FWC is satisfied that:

(a) the variation of modern award minimum wages is justified by work value reasons; and

(b) making the determination outside the system of annual wage reviews is necessary to achieve the modern awards objective.

Note: As the FWC is varying modern award minimum wages, the minimum wages objective also applies (see section 284).

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(2A) ***Work value reasons*** are reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:

(a) the nature of the work;

(b) the level of skill or responsibility involved in doing the work;

(c) the conditions under which the work is done.

(2B) The FWC's consideration of work value reasons must:

(a) be free of assumptions based on gender; and

(b) include consideration of whether historically the work has been undervalued because of assumptions based on gender.

(3) The FWC may make a determination or modern award under this section:

(a) on its own initiative; or

(b) on application under section 158.

158 Applications to vary, revoke or make modern award

(1) The following table sets out who may apply for the making of a determination varying or revoking a modern award, or for the making of a modern award, under section 157:

Who may make an application?

Item	Column 1 This kind of application …	Column 2 may be made by …
1	an application to vary, omit or include terms (other than outworker terms or coverage terms) in a modern award	(a) an employer, employee or organisation that is covered by the modern award; or (b) an organisation that is entitled to represent the industrial interests of one or more employers or employees that are covered by the modern award.

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Who may make an application?		
Item	**Column 1** **This kind of application …**	**Column 2** **may be made by …**
2	an application to vary, omit or include outworker terms in a modern award	(a) an employer, employee or outworker entity that is or would be covered by the outworker terms; or (b) an organisation that is entitled to represent the industrial interests of one or more outworkers to whom the outworker terms relate or would relate.
3	an application to vary or include coverage terms in a modern award to increase the range of employers, employees or organisations that are covered by the award	(a) an employer, employee or organisation that would become covered by the modern award; or (b) an organisation that is entitled to represent the industrial interests of one or more employers or employees that would become covered by the modern award.
4	an application to vary or include coverage terms in a modern award to increase the range of outworker entities that are covered by outworker terms	(a) an outworker entity that would become covered by the outworker terms; or (b) an organisation that is entitled to represent the industrial interests of one or more outworkers who would become outworkers to whom the outworker terms relate.
5	an application to vary or omit coverage terms in a modern award to reduce the range of employers, employees or organisations that are covered by the award	(a) an employer, employee or organisation that would stop being covered by the modern award; or (b) an organisation that is entitled to represent the industrial interests of one or more employers or employees that would stop being covered by the modern award.

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Who may make an application?		
Item	**Column 1** **This kind of application …**	**Column 2** **may be made by …**
6	an application to vary or omit coverage terms in a modern award to reduce the range of outworker entities that are covered by outworker terms	(a) an outworker entity that would stop being covered by the outworker terms; or (b) an organisation that is entitled to represent the industrial interests of one or more outworkers who would stop being outworkers to whom the outworker terms relate.
7	an application for the making of a modern award	(a) an employee or employer that would be covered by the modern award; or (b) an organisation that is entitled to represent the industrial interests of one or more employers or employees that would be covered by the modern award.
8	an application to revoke a modern award	(a) an employer, employee or organisation that is covered by the modern award; or (b) an organisation that is entitled to represent the industrial interests of one or more employers or employees that are covered by the modern award.

Note: The FWC may dismiss an application to vary, revoke or make a modern award in certain circumstances (see section 587).

(2) Subject to the requirements of the table about who can make what kind of application, an applicant may make applications for 2 or more related things at the same time.

Note: For example, an applicant may apply for the making of a modern award and for the related revocation of an existing modern award.

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Subdivision B—Other situations

159 Variation of modern award to update or omit name of employer, organisation or outworker entity

(1) The FWC may make a determination varying a modern award:

(a) to reflect a change in the name of an employer, organisation or outworker entity; or

(b) to omit the name of an organisation, employer or outworker entity from the modern award, if:

(i) the registration of the organisation has been cancelled under the *Workplace Relations Act 1996*; or

(ii) the employer, organisation or outworker entity has ceased to exist; or

(c) if the modern award is a named employer award and the named employer is the old employer in a transfer of business—to reflect the transfer of business to the new employer.

(2) The FWC may make a determination under this section:

(a) in any case—on its own initiative; or

(b) if paragraph (1)(a) or (b) applies—on application by the employer, organisation or outworker entity referred to in that paragraph; or

(c) if paragraph (1)(c) applies—on application by:

(i) the old employer or the new employer; or

(ii) a transferring employee who was covered by the modern award as an employee of the old employer; or

(iii) an organisation that is entitled to represent the industrial interests of the old employer, the new employer, or one or more employees referred to in subparagraph (ii).

159A Variation of default fund term of modern award

(1) The FWC may make a determination varying the default fund term of a modern award in relation to a superannuation fund specified in

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the term in relation to a standard MySuper product (the ***specified product***) in the following circumstances:

(a) to reflect a change in the name of the fund or the specified product;

(b) if the fund has ceased to exist—to omit the name of the fund and the specified product;

(c) if the specified product has ceased to exist and no other MySuper product is specified in relation to the fund—to omit the name of the fund and the specified product;

(d) if the specified product has ceased to exist and another MySuper product is specified in relation to the fund—to omit the name of the specified product;

(e) if the Australian Prudential Regulation Authority gives the FWC notice under subsection 29U(4) of the *Superannuation Industry (Supervision) Act 1993* that the fund no longer offers the specified product and no other MySuper product is specified in relation to the fund—to omit the name of the fund and the specified product;

(f) if the Australian Prudential Regulation Authority gives the FWC notice under subsection 29U(4) of the *Superannuation Industry (Supervision) Act 1993* that the fund no longer offers the specified product and another MySuper product is specified in relation to the fund—to omit the name of the specified product.

(2) The FWC may make a determination under this section:

(a) in any case—on its own initiative; or

(b) on application by an employee, employer, organisation or outworker entity covered by the modern award.

160 Variation of modern award to remove ambiguity or uncertainty or correct error

(1) The FWC may make a determination varying a modern award to remove an ambiguity or uncertainty or to correct an error.

(2) The FWC may make the determination:

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(a) on its own initiative; or

(b) on application by an employer, employee, organisation or outworker entity that is covered by the modern award; or

(c) on application by an organisation that is entitled to represent the industrial interests of one or more employers or employees that are covered by the modern award; or

(d) if the modern award includes outworker terms—on application by an organisation that is entitled to represent the industrial interests of one or more outworkers to whom the outworker terms relate.

161 Variation of modern award on referral by Australian Human Rights Commission

(1) The FWC must review a modern award if the award is referred to it under section 46PW of the *Australian Human Rights Commission Act 1986* (which deals with discriminatory industrial instruments).

(2) The following are entitled to make submissions to the FWC for consideration in the review:

(a) if the referral relates to action that would be unlawful under Part 4 of the *Age Discrimination Act 2004*—the Age Discrimination Commissioner;

(b) if the referral relates to action that would be unlawful under Part 2 of the *Disability Discrimination Act 1992*—the Disability Discrimination Commissioner;

(c) if the referral relates to action that would be unlawful under Part II of the *Sex Discrimination Act 1984*—the Sex Discrimination Commissioner.

(3) If the FWC considers that the modern award reviewed requires a person to do an act that would be unlawful under any of the Acts referred to in subsection (2) (but for the fact that the act would be done in direct compliance with the modern award), the FWC must make a determination varying the modern award so that it no longer requires the person to do an act that would be so unlawful.

Note: Special criteria apply to changing coverage of modern awards (see section 163).

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Division 6—General provisions relating to modern award powers

162 General

This Division contains some specific provisions relevant to the exercise of modern award powers. For other provisions relevant to the exercise of modern award powers, see the general provisions about the FWC's processes in Part 5-1.

Note: Relevant provisions of Part 5-1 include the following:

(a) section 582 (which deals with the President's power to give directions);

(b) section 590 (which deals with the FWC's discretion to inform itself as it considers appropriate, including by commissioning research);

(c) section 596 (which deals with being represented in a matter before the FWC);

(d) section 601 (which deals with writing and publication requirements).

163 Special criteria relating to changing coverage of modern awards

Special rule about reducing coverage

(1) The FWC must not make a determination varying a modern award so that certain employers or employees stop being covered by the award unless the FWC is satisfied that they will instead become covered by another modern award (other than the miscellaneous modern award) that is appropriate for them.

Special rule about making a modern award

(2) The FWC must not make a modern award covering certain employers or employees unless the FWC has considered whether it should, instead, make a determination varying an existing modern award to cover them.

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Special rule about covering organisations

(3) The FWC must not make a modern award, or make a determination varying a modern award, so that an organisation becomes covered by the award, unless the organisation is entitled to represent the industrial interests of one or more employers or employees who are or will be covered by the award.

The miscellaneous modern award

(4) The ***miscellaneous modern award*** is the modern award that is expressed to cover employees who are not covered by any other modern award.

164 Special criteria for revoking modern awards

The FWC must not make a determination revoking a modern award unless the FWC is satisfied that:

(a) the award is obsolete or no longer capable of operating; or

(b) all the employees covered by the award are covered by a different modern award (other than the miscellaneous modern award) that is appropriate for them, or will be so covered when the revocation comes into operation.

165 When variation determinations come into operation, other than determinations setting, varying or revoking modern award minimum wages

Determinations come into operation on specified day

(1) A determination under this Part that varies a modern award (other than a determination that sets, varies or revokes modern award minimum wages) comes into operation on the day specified in the determination.

Note 1: For when a modern award, or a revocation of a modern award, comes into operation, see section 49.

Note: For when a determination under this Part setting, varying or revoking modern award minimum wages comes into operation, see section 166.

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(2) The specified day must not be earlier than the day on which the determination is made, unless:

(a) the determination is made under section 160 (which deals with variation to remove ambiguities or correct errors); and

(b) the FWC is satisfied that there are exceptional circumstances that justify specifying an earlier day.

Determinations take effect from first full pay period

(3) The determination does not take effect in relation to a particular employee until the start of the employee's first full pay period that starts on or after the day the determination comes into operation.

166 When variation determinations setting, varying or revoking modern award minimum wages come into operation

Determinations generally come into operation on 1 July

(1) A determination under this Part that sets, varies or revokes modern award minimum wages comes into operation:

(a) on 1 July in the next financial year after it is made; or

(b) if it is made on 1 July in a financial year—on that day.

Note: Modern award minimum wages can also be set, varied or revoked by determinations made in annual wage reviews. For when those determinations come into operation, see section 286.

FWC may specify another day of operation if appropriate

(2) However, if the FWC specifies another day in the determination as the day on which it comes into operation, the determination comes into operation on that other day. The FWC must not specify another day unless it is satisfied that it is appropriate to do so.

(3) The specified day must not be earlier than the day on which the determination is made, unless:

(a) the determination is made under section 160 (which deals with variation to remove ambiguities or correct errors); and

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(b) the FWC is satisfied that there are exceptional circumstances that justify specifying an earlier day.

Determinations may take effect in stages

(4) The FWC may specify in the determination that changes to modern award minimum wages made by the determination take effect in stages if the FWC is satisfied that it is appropriate to do so.

Determinations take effect from first full pay period

(5) A change to modern award minimum wages made by the determination does not take effect in relation to a particular employee until the start of the employee's first full pay period that starts on or after:

(a) unless paragraph (b) applies—the day the determination comes into operation; or

(b) if the determination takes effect in stages under subsection (4)—the day the change to modern award minimum wages is specified to take effect.

167 Special rules relating to retrospective variations of awards

Application of this section

(1) This section applies if a determination varying a modern award has a retrospective effect because it comes into operation under subsection 165(2) or 166(3) on a day before the day on which the determination is made.

No effect on past approval of enterprise agreement or variation

(2) If, before the determination was made, an enterprise agreement or a variation of an enterprise agreement was approved by the FWC, the validity of the approval is not affected by the retrospective effect of the determination.

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No creation of liability to pay pecuniary penalty for past conduct

(3) If:

(a) a person engaged in conduct before the determination was made; and

(b) but for the retrospective effect of the determination, the conduct would not have contravened a term of the modern award or an enterprise agreement;

a court must not order the person to pay a pecuniary penalty under Division 2 of Part 4-1 in relation to the conduct, on the grounds that the conduct contravened a term of the modern award or enterprise agreement.

Note 1: This subsection does not affect the powers of a court to make other kinds of orders under Division 2 of Part 4-1.

Note 2: A determination varying a modern award could result in a contravention of a term of an enterprise agreement because of the effect of subsection 206(2).

168 Varied modern award must be published

(1) If the FWC makes a determination under this Part or Part 2-6 (which deals with minimum wages) varying a modern award, the FWC must publish the award as varied as soon as practicable.

(2) The publication may be on the FWC's website or by any other means that the FWC considers appropriate.

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Division 7—Additional provisions relating to modern enterprise awards

168A Modern enterprise awards

(1) This Division contains additional provisions that relate to modern enterprise awards. The provisions in this Division have effect despite anything else in this Part.

(2) A ***modern enterprise award*** is a modern award that is expressed to relate to:

(a) a single enterprise (or a part of a single enterprise) only; or

(b) one or more enterprises, if the employers all carry on similar business activities under the same franchise and are:

(i) franchisees of the same franchisor; or

(ii) related bodies corporate of the same franchisor; or

(iii) any combination of the above.

(3) A ***single enterprise*** is:

(a) a business, project or undertaking that is carried on by an employer; or

(b) the activities carried on by:

(i) the Commonwealth, a State or a Territory; or

(ii) a body, association, office or other entity established for a public purpose by or under a law of the Commonwealth, a State or a Territory; or

(iii) any other body in which the Commonwealth, a State or a Territory has a controlling interest.

(4) For the purposes of subsection (3), if 2 or more employers carry on a business, project or undertaking as a joint venture or common enterprise, the employers are taken to be one employer.

(5) For the purposes of subsection (3), if 2 or more related bodies corporate each carry on a single enterprise:

(a) the bodies corporate are taken to be one employer; and

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(b) the single enterprises are taken to be one single enterprise.

Note: However, a modern enterprise award could just relate to a part of that single enterprise.

(6) A ***part of a single enterprise*** includes, for example:
(a) a geographically distinct part of the single enterprise; or
(b) a distinct operational or organisational unit within the single enterprise.

168B The modern enterprise awards objective

What is the modern enterprise awards objective?

(1) The FWC must recognise that modern enterprise awards may provide terms and conditions tailored to reflect employment arrangements that have been developed in relation to the relevant enterprises. This is the ***modern enterprise awards objective***.

When does the modern enterprise awards objective apply?

(2) The modern enterprise awards objective applies to the performance of the FWC's functions or powers under this Act, so far as they relate to modern enterprise awards.

References to the modern awards objective

(3) A reference to the modern awards objective in this Act, other than section 134, is taken to include a reference to the modern enterprise awards objective.

168C Rules about making and revoking modern enterprise awards

Making modern enterprise awards

(1) The FWC must not, under this Part:
(a) make a modern enterprise award; or
(b) make a determination varying a modern award so that it becomes a modern enterprise award.

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Note: Modern enterprise awards can be made only in accordance with the enterprise instrument modernisation process provided for by Part 2 of Schedule 6 of the Transitional Act.

Revoking modern enterprise awards

(2) The FWC may make a determination revoking a modern enterprise award only on application under section 158.

(3) The FWC must not make a determination revoking a modern enterprise award unless the FWC is satisfied that:
  (a) the award is obsolete or no longer capable of operating; or
  (b) all the employees covered by the award will, when the revocation comes into operation, be covered by a different modern award (other than the miscellaneous modern award or a modern enterprise award) that is appropriate for them.

(4) In deciding whether to make a determination revoking a modern enterprise award the FWC must take into account the following:
  (a) the circumstances that led to the making of the modern enterprise award;
  (b) the content of the modern award referred to in paragraph (3)(b);
  (c) the terms and conditions of employment applying in the industry in which the persons covered by the modern enterprise award operate, and the extent to which those terms and conditions are reflected in the modern enterprise award;
  (d) the extent to which the modern enterprise award provides enterprise-specific terms and conditions of employment;
  (e) the likely impact on the persons covered by the modern enterprise award, and the persons covered by the modern award referred to in paragraph (3)(b), of a decision to revoke, or not revoke, the modern enterprise award, including any impact on the ongoing viability or competitiveness of any enterprise carried on by those persons;
  (f) the views of the persons covered by the modern enterprise award;
  (g) any other matter prescribed by the regulations.

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168D Rules about changing coverage of modern enterprise awards

(1) The FWC must not make a determination varying a modern enterprise award so as to extend the coverage of the modern enterprise award so that it ceases to be a modern enterprise award.

(2) In deciding whether to make a determination varying the coverage of a modern enterprise award in some other way, the FWC must take into account the following:

(a) the circumstances that led to the making of the modern enterprise award;

(b) whether there is a modern award (other than the miscellaneous modern award or a modern enterprise award) that would, but for the modern enterprise award, cover the persons covered, or proposed to be covered, by the modern enterprise award;

(c) the content of the modern award referred to in paragraph (b);

(d) the terms and conditions of employment applying in the industry in which the persons covered, or proposed to be covered, by the modern award operate, and the extent to which those terms and conditions are reflected in the modern enterprise award;

(e) the extent to which the modern enterprise award provides enterprise-specific terms and conditions of employment;

(f) the likely impact on the persons covered, or proposed to be covered, by the modern enterprise award, and the persons covered by the modern award referred to in paragraph (b), of a decision to make, or not make, the variation, including any impact on the ongoing viability or competitiveness of any enterprise carried on by those persons;

(g) the views of the persons covered, or proposed to be covered, by the modern enterprise award;

(h) any other matter prescribed by the regulations.

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Division 8—Additional provisions relating to State reference public sector modern awards

168E State reference public sector modern awards

(1) This Division contains additional provisions that relate to State reference public sector modern awards. The provisions in this Division have effect despite anything else in this Part.

(2) A ***State reference public sector modern award*** is a modern award in relation to which the following conditions are satisfied:

(a) the only employers that are expressed to be covered by the modern award are one or more specified State reference public sector employers;

(b) the only employees who are expressed to be covered by the modern award are specified State reference public sector employees of those employers.

(3) A ***State reference public sector employee*** is an employee:

(a) who is a national system employee only because of section 30C or 30M; and

(b) who is a State public sector employee as defined in section 30A or 30K.

(4) A ***State reference public sector employer*** is an employer:

(a) that is a national system employer only because of section 30D or 30N; and

(b) that is a State public sector employer as defined in section 30A or 30K.

168F The State reference public sector modern awards objective

The State reference public sector modern awards objective

(1) The FWC must recognise:

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(a) the need to facilitate arrangements for State reference public sector employers and State reference public sector employees that are appropriately adapted to the effective administration of a State; and

(b) that State reference public sector modern awards may provide terms and conditions tailored to reflect employment arrangements that have been developed in relation to State reference public sector employers and State reference public sector employees.

This is the ***State reference public sector modern awards objective***.

When does the State reference public sector modern awards objective apply?

(2) The State reference public sector modern awards objective applies to the performance of the FWC's functions or powers under this Act, so far as they relate to State reference public sector modern awards.

References to the modern awards objective

(3) A reference to the modern awards objective in this Act, other than section 134, is taken to include a reference to the State reference public sector modern awards objective.

168G Making State reference public sector modern awards on application

(1) The FWC may make a State reference public sector modern award (the ***proposed award***) only on application under section 158 by:

(a) a State reference public sector employer; or

(b) an organisation that is entitled to represent the industrial interests of a State reference public sector employer or of a State reference public sector employee.

(2) The application must specify the employers, employees and organisations (the ***proposed parties***) proposed to be covered by the proposed award.

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(3) The FWC must consider the application, and must make a State reference public sector modern award covering the proposed parties if the FWC is satisfied that:

(a) the employers and organisations that are proposed parties have agreed to the making of the application; and

(b) either:

(i) none of the employers and employees that are proposed parties are already covered by a State reference public sector modern award; or

(ii) if there are employers and employees that are proposed parties and that are already covered by a State reference public sector modern award (the ***current award***)—it is appropriate (in accordance with section 168L) to vary the coverage of the current award so that the employers or employees cease to be covered by the current award.

(4) The FWC must not make a State reference public sector modern award otherwise than in accordance with this Division or in accordance with Part 2 of Schedule 6A to the Transitional Act.

168H State reference public sector modern awards may contain State-based differences

Section 154 (which deals with terms that contain State-based differences) does not apply in relation to State reference public sector modern awards.

168J When State reference public sector modern awards come into operation

Section 49 does not apply for the purpose of determining when a State reference public sector modern award comes into operation. Instead, the modern award comes into operation on the day on which it is expressed to commence, being a day that is not earlier than the day on which the modern award is made.

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168K Rules about revoking State reference public sector modern awards

(1) The FWC may make a determination revoking a State reference public sector modern award only on application under section 158 by:

(a) a State reference public sector employer; or

(b) an organisation that is entitled to represent the industrial interests of a State reference public sector employer or of a State reference public sector employee.

(2) The FWC must not make a determination revoking a State reference public sector modern award unless the FWC is satisfied that:

(a) the modern award is obsolete or no longer capable of operating; or

(b) all the employees covered by the modern award will, when the revocation comes into operation, be covered by a different modern award (other than the miscellaneous modern award) that is appropriate for them.

(3) In deciding whether to revoke a State reference public sector modern award, the FWC must take into account the following:

(a) the circumstances that led to the making of the modern award;

(b) the terms and conditions of employment applying in the industry or occupation in which the persons covered by the modern award operate, and the extent to which those terms and conditions are reflected in the modern award;

(c) the extent to which the modern award facilitates arrangements, and provides terms and conditions of employment, referred to in paragraphs 168F(1)(a) and (b);

(d) the likely impact on the persons covered by the modern award of a decision to revoke, or not to revoke, the modern award;

(e) the views of the persons covered by the modern award;

(f) any other matter prescribed by the regulations.

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168L Rules about varying coverage of State reference public sector modern awards

(1) The FWC may make a determination varying the coverage of a State reference public sector modern award only on application under section 158 by:

(a) a State reference public sector employer; or

(b) an organisation that is entitled to represent the industrial interests of a State reference public sector employer or of a State reference public sector employee.

(2) The FWC must not make a determination varying the coverage of a State reference public sector modern award so that it ceases to be a State reference public sector modern award.

(3) In deciding whether to make a determination varying the coverage of a State reference public sector modern award in some other way, the FWC must take into account the following:

(a) the circumstances that led to the making of the modern award;

(b) the terms and conditions of employment applying in the industry or occupation in which the persons covered, or proposed to be covered, by the modern award operate, and the extent to which those terms and conditions are reflected in the modern award;

(c) the likely impact on the persons covered, or proposed to be covered, by the modern award of a decision to make, or not make, the variation;

(d) if the variation would result in the modern award covering one or more additional classes of employers or employees—whether it is appropriate for that modern award to cover those classes of employers or employees, as well as the classes of employers and employees that it already covers;

(e) the views of the persons covered, or proposed to be covered, by the modern award;

(f) any other matter prescribed by the regulations.

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Part 2-4—Enterprise agreements

Division 1—Introduction

169 Guide to this Part

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

Division 2 deals with the making of enterprise agreements about permitted matters. An enterprise agreement (including a greenfields agreement) may be a single-enterprise agreement or a multi-enterprise agreement.

Division 3 deals with the right of employees to be represented by a bargaining representative during bargaining for a proposed enterprise agreement. It also sets out the persons who are bargaining representatives for such agreements.

Subdivision A of Division 4 deals with the approval of proposed enterprise agreements by employees and sets out when an enterprise agreement is made.

Subdivision B of Division 4 deals with the approval of enterprise agreements by the FWC. The remaining Subdivisions of the Division deal with certain approval requirements, including in relation to genuine agreement by employees and the better off overall test.

Division 5 deals with the mandatory terms of enterprise agreements relating to individual flexibility arrangements, consultation requirements and the rights of workplace delegates.

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Division 6 deals with the base rate of pay under an enterprise agreement.

Division 7 deals with the variation and termination of enterprise agreements.

Division 8 provides for the FWC to facilitate bargaining by making bargaining orders, intractable bargaining declarations, majority support determinations and scope orders. It also permits bargaining representatives to apply for the FWC to deal with bargaining disputes.

Division 9 provides for the making of supported bargaining authorisations in relation to proposed multi-enterprise agreements. The effect of such an authorisation is that specified employers are subject to certain rules that would not otherwise apply (for example, bargaining orders that would not usually be available for multi-enterprise agreements will be available). It also permits the FWC to assist the bargaining representatives for such agreements.

Division 10 deals with single interest employer authorisations.

Division 11 deals with other matters relating to enterprise agreements.

170 Meanings of *employee* and *employer*

In this Part, ***employee*** means a national system employee, and ***employer*** means a national system employer.

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

171 Objects of this Part

The objects of this Part are:

(a) to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the

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enterprise level, for enterprise agreements that deliver productivity benefits; and

(b) to enable the FWC to facilitate good faith bargaining and the making of enterprise agreements, including through:

(i) making bargaining orders; and

(ii) dealing with disputes where the bargaining representatives request assistance; and

(iii) ensuring that applications to the FWC for approval of enterprise agreements are dealt with without delay.

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Division 2—Employers and employees may make enterprise agreements

172 Making an enterprise agreement

Enterprise agreements may be made about permitted matters

(1) An agreement (an ***enterprise agreement***) that is about one or more of the following matters (the ***permitted matters***) may be made in accordance with this Part:

(a) matters pertaining to the relationship between an employer that will be covered by the agreement and that employer's employees who will be covered by the agreement;

(b) matters pertaining to the relationship between the employer or employers, and the employee organisation or employee organisations, that will be covered by the agreement;

(c) deductions from wages for any purpose authorised by an employee who will be covered by the agreement;

(d) how the agreement will operate.

Note 1: For when an enterprise agreement ***covers*** an employer, employee or employee organisation, see section 53.

Note 2: An employee organisation that was a bargaining representative for a proposed enterprise agreement that is not a greenfields agreement will be covered by the agreement if the organisation notifies the FWC under section 183 that it wants to be covered.

Single-enterprise agreements

(2) An employer, or 2 or more employers that are related employers, may make an enterprise agreement (a ***single-enterprise agreement***):

(a) with the employees who are employed at the time the agreement is made and who will be covered by the agreement; or

(b) with one or more relevant employee organisations if:

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(i) the agreement relates to a genuine new enterprise that the employer or employers are establishing or propose to establish; and

(ii) the employer or employers have not employed any of the persons who will be necessary for the normal conduct of that enterprise and will be covered by the agreement.

Note: The expression genuine new enterprise includes a genuine new business, activity, project or undertaking (see the definition of ***enterprise*** in section 12).

Multi-enterprise agreements

(3) Two or more employers that are not all related employers, or that are all related employers mentioned in subsection (3A), may make an enterprise agreement (a ***multi-enterprise agreement***):

(a) with the employees who are employed at the time the agreement is made and who will be covered by the agreement; or

(b) with one or more relevant employee organisations if:

(i) the agreement relates to a genuine new enterprise that the employers are establishing or propose to establish; and

(ii) the employers have not employed any of the persons who will be necessary for the normal conduct of that enterprise and will be covered by the agreement.

Note 1: The expression genuine new enterprise includes a genuine new business, activity, project or undertaking (see the definition of ***enterprise*** in section 12).

Note 2: The FWC must not approve a multi-enterprise agreement that is not a greenfields agreement if the agreement would cover employees in relation to general building and construction work (see subsection 186(2B)).

(3A) Two or more employers that are all related employers under paragraph (5A)(c) (whether or not those employers are also related employers under another paragraph of subsection (5A)) may make a multi-enterprise agreement under subsection (3).

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Greenfields agreements

(4) A single-enterprise agreement made as referred to in paragraph (2)(b), or a multi-enterprise agreement made as referred to in paragraph (3)(b), is a ***greenfields agreement***.

Requirement for employer specified in single interest employer authorisation

(5) Despite any other provision of this Part, if an employer is specified in a single interest employer authorisation that is in operation:
  (a) the only kind of enterprise agreement the employer may make with their employees who are specified in the authorisation is a single interest employer agreement; and
  (b) the employer must not initiate bargaining, agree to bargain, or be required to bargain with those employees for any other kind of enterprise agreement.

Related employers

(5A) Two or more employers are ***related employers*** if:
  (a) the employers are engaged in a joint venture or common enterprise; or
  (b) the employers are related bodies corporate; or
  (c) the employers carry on similar business activities under the same franchise and are:
    (i) franchisees of the same franchisor; or
    (ii) related bodies corporate of the same franchisor; or
    (iii) any combination of the above.

Requirement that there be at least 2 employees

(6) An enterprise agreement cannot be made with a single employee.

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Requirement for employer specified in supported bargaining authorisation

(7) Despite any other provision of this Part, if an employer is specified in a supported bargaining authorisation that is in operation:

(a) the only kind of enterprise agreement the employer may make with their employees who are specified in the authorisation is a supported bargaining agreement; and

(b) the employer must not initiate bargaining, agree to bargain, or be required to bargain with those employees for any other kind of enterprise agreement.

172A Special measures to achieve equality

Without limiting subsection 172(1), the matters mentioned in paragraph 172(1)(a) include special measures to achieve equality.

Note: A special measure to achieve equality may be a discriminatory term under section 195 (and thus be an unlawful term under section 194) to the extent that action that may be taken because of the term is unlawful under an anti-discrimination law.

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Division 3—Bargaining and representation during bargaining

173 Notice of employee representational rights

Employers for single-enterprise agreements to notify each employee of representational rights

(1) An employer that will be covered by a proposed single-enterprise agreement (other than a greenfields agreement) must take all reasonable steps to give notice of the right to be represented by a bargaining representative to each employee who:

(a) will be covered by the agreement; and

(b) is employed at the notification time for the agreement.

Note: For the content of the notice, see section 174.

Notification time

(2) The ***notification time*** for a proposed enterprise agreement is the time when:

(a) the employer agrees to bargain, or initiates bargaining, for the agreement; or

(aa) the employer receives a request to bargain under subsection (2A) in relation to the agreement; or

(b) a majority support determination in relation to the agreement comes into operation; or

(c) a scope order in relation to the agreement comes into operation; or

(d) a supported bargaining authorisation in relation to the agreement that specifies the employer comes into operation; or

(e) a single interest employer authorisation in relation to the agreement that specifies the employer comes into operation.

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Note: An employer that is required to give a notice under subsection (1) cannot request employees to approve the agreement under section 181 until 21 days after the last notice is given (see subsection 181(2)).

(2A) A bargaining representative of an employee who will be covered by a proposed single-enterprise agreement (other than a greenfields agreement) may give the employer who will be covered by the proposed agreement a request in writing to bargain for the proposed agreement if:

(a) the proposed agreement will replace an earlier single-enterprise agreement (the ***earlier agreement***) that has passed its nominal expiry date; and

(b) a single interest employer authorisation did not cease to be in operation because of the making of the earlier agreement; and

(c) no more than 5 years have passed since the nominal expiry date; and

(d) the proposed agreement will cover the same, or substantially the same, group of employees as the earlier agreement.

When notice must be given

(3) The employer must give the notice as soon as practicable, and not later than 14 days, after the notification time for the agreement.

Notice need not be given in certain circumstances

(4) An employer is not required to give a notice to an employee under subsection (1) in relation to a proposed enterprise agreement if the employer has already given the employee a notice under that subsection within a reasonable period before the notification time for the agreement.

How notices are given

(5) The regulations may prescribe how notices under subsection (1) may be given.

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174 Content and form of notice of employee representational rights

Application of this section

(1) This section applies if an employer that will be covered by a proposed enterprise agreement is required to give a notice under subsection 173(1) to an employee.

Notice requirements

(1A) The notice must:
(a) contain the content prescribed by the regulations; and
(b) not contain any other content; and
(c) be in the form prescribed by the regulations.

(1B) When prescribing the content of the notice for the purposes of paragraph (1A)(a), the regulations must ensure that the notice complies with this section.

Content of notice—employee may appoint a bargaining representative

(2) The notice must specify that the employee may appoint a bargaining representative to represent the employee:
(a) in bargaining for the agreement; and
(b) in a matter before the FWC that relates to bargaining for the agreement.

Content of notice—default bargaining representative

(3) The notice must explain that:
(a) if the employee is a member of an employee organisation that is entitled to represent the industrial interests of the employee in relation to work that will be performed under the agreement; and
(b) the employee does not appoint another person as his or her bargaining representative for the agreement;

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the organisation will be the bargaining representative of the employee.

Content of notice—copy of instrument of appointment to be given

(5) The notice must explain the effect of paragraph 178(2)(a) (which deals with giving a copy of an instrument of appointment of a bargaining representative to an employee's employer).

176 Bargaining representatives for proposed enterprise agreements that are not greenfields agreements

Bargaining representatives

(1) The following paragraphs set out the persons who are ***bargaining representatives*** for a proposed enterprise agreement that is not a greenfields agreement:

(a) an employer that will be covered by the agreement is a bargaining representative for the agreement;

(b) an employee organisation is a bargaining representative of an employee who will be covered by the agreement if:

(i) the employee is a member of the organisation; and

(ii) in the case where the agreement is a multi-enterprise agreement in relation to which a supported bargaining authorisation is in operation—the organisation applied for the authorisation;

unless the employee has appointed another person under paragraph (c) as his or her bargaining representative for the agreement, or has revoked the status of the organisation as his or her bargaining representative for the agreement under subsection 178A(2); or

(c) a person is a bargaining representative of an employee who will be covered by the agreement if the employee appoints, in writing, the person as his or her bargaining representative for the agreement;

(d) a person is a bargaining representative of an employer that will be covered by the agreement if the employer appoints, in

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writing, the person as his or her bargaining representative for the agreement.

Bargaining representatives for a proposed multi-enterprise agreement if a supported bargaining authorisation is in operation

(2) If:

(a) the proposed enterprise agreement is a multi-enterprise agreement in relation to which a supported bargaining authorisation is in operation; and

(b) an employee organisation applied for the authorisation; and

(c) but for this subsection, the organisation would not be a bargaining representative of an employee who will be covered by the agreement;

the organisation is taken to be a ***bargaining representative*** of such an employee unless:

(d) the employee is a member of another employee organisation that also applied for the authorisation; or

(e) the employee has appointed another person under paragraph (1)(c) as his or her bargaining representative for the agreement; or

(f) the employee has revoked the status of the organisation as his or her bargaining representative for the agreement under subsection 178A(2).

(3) Despite subsections (1) and (2):

(a) an employee organisation; or

(b) an official of an employee organisation (whether acting in that capacity or otherwise);

cannot be a bargaining representative of an employee unless the organisation is entitled to represent the industrial interests of the employee in relation to work that will be performed under the agreement.

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Employee may appoint himself or herself

(4) To avoid doubt and despite subsection (3), an employee who will be covered by the agreement may appoint, under paragraph (1)(c), himself or herself as his or her bargaining representative for the agreement.

Note: Section 228 sets out the good faith bargaining requirements. Applications may be made for bargaining orders that require bargaining representatives to meet the good faith bargaining requirements (see section 229).

177 Bargaining representatives for proposed enterprise agreements that are greenfields agreements

The following paragraphs set out the persons who are ***bargaining representatives*** for a proposed single-enterprise agreement that is a greenfields agreement:

(a) an employer that will be covered by the agreement;

(b) an employee organisation:

(i) that is entitled to represent the industrial interests of one or more of the employees who will be covered by the agreement, in relation to work to be performed under the agreement; and

(ii) with which the employer agrees to bargain for the agreement;

(c) a person who is a bargaining representative of an employer that will be covered by the agreement if the employer appoints, in writing, the person as his or her bargaining representative for the agreement.

177A Restrictions on removed persons being bargaining representatives

Definition of removed persons

(1) A person is a ***removed person*** if:

(a) any of the following events has happened as a result of a scheme determined under subsection 323B(1) of the

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Registered Organisations Act (a scheme for the administration of the Construction and General Division of the CFMEU and its branches):

(i) the person is removed (however described and including by having their office vacated) or suspended as an officer (within the meaning of this Act), or the person's role as an officer otherwise comes to an end;

(ii) the person's employment, as a person employed by the CFMEU or any of its branches, divisions or parts working in the Construction and General Division or any of its branches, is terminated or otherwise comes to an end, or is suspended;

(iii) the person is removed (however described) or suspended as a workplace delegate, or the person's role as a workplace delegate otherwise comes to an end; and

(b) if the event involved suspension—the suspension has not ended.

(2) A person is also a ***removed person*** if:

(a) on or after 1 July 2024 and before the Construction and General Division and its branches are placed under administration by force of subsection 323A(1) of the Registered Organisations Act, the person, by the person's own choice:

(i) ceases to be an officer (within the meaning of this Act) of the Construction and General Division or any of its branches; or

(ii) ceases to be a person employed by the CFMEU or any of its branches, divisions or parts working in the Construction and General Division or any of its branches; or

(iii) ceases to be a workplace delegate for members of the Construction and General Division or any of its branches; and

(b) during the period of the administration, the administrator formed the opinion that, if the person had not made the choice, the administrator would have taken action under the

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scheme of administration to ensure the person ceased to be an officer, employee or workplace delegate (as applicable).

Removed person must not be bargaining representative without a certificate

(3) A removed person must not do any of the following, whether in their personal capacity or any other capacity:
  (a) be a bargaining representative of an employee or employer;
  (b) purport to be a bargaining representative of an employee or employer;
  (c) hold out that the person is a bargaining representative of an employee or employer.

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

(4) Subsection (3) does not apply if the removed person holds a certificate granted under subsection (7).

(5) If, in proceedings for a pecuniary penalty order against a removed person for a contravention of subsection (3), the person wishes to rely on the exception in subsection (4), the person bears an evidential burden in relation to the matter.

(6) Subsection (3) has effect despite subsection 176(1) and section 177. However, subsection (3) does not prevent an employee who will be covered by the agreement concerned from appointing themselves under paragraph 176(1)(c) as their own bargaining representative for the agreement.

Certificate to be a bargaining representative

(7) The FWC may, on application in writing by a removed person, grant the person a certificate to be a bargaining representative, if satisfied that the person is a fit and proper person to be a bargaining representative.

(8) In deciding whether the removed person is a fit and proper person to be a bargaining representative, the FWC must have regard to the following matters:

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(a) the reasons the person became a removed person, including whether the person engaged or allegedly engaged in a kind of conduct described in subparagraph 141(1)(c)(i), (ii) or (iii) of the Registered Organisations Act;

(b) whether the person has ever been convicted of an offence against a law of the Commonwealth, a State, a Territory or a foreign country involving:

(i) fraud or dishonesty; or

(ii) intentional use of violence against another person; or

(iii) intentional damage or destruction of property;

(c) the general character of the person.

(9) The FWC may also have regard to any other matters the FWC considers relevant.

(10) The FWC must not grant the certificate:

(a) if the removed person has been disqualified under a scheme determined under subsection 323B(1) of the Registered Organisations Act and the period of the disqualification has not ended; or

(b) at any time while the removed person is not eligible to be a candidate for an election, or to be elected or appointed, to an office in an organisation under subsection 215(1) of the Registered Organisations Act.

(11) Nothing in this section affects the operation of Part VIIC of the *Crimes Act 1914* (which includes provisions relieving persons from requirements to disclose spent convictions).

(12) In this section:

CFMEU has the same meaning as in the Registered Organisations Act.

Construction and General Division has the same meaning as in the Registered Organisations Act.

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178 Appointment of bargaining representatives—other matters

When appointment of a bargaining representative comes into force

(1) An appointment of a bargaining representative comes into force on the day specified in the instrument of appointment.

Copies of instruments of appointment must be given

(2) A copy of an instrument of appointment of a bargaining representative for a proposed enterprise agreement must:
   (a) for an appointment made by an employee who will be covered by the agreement—be given to the employee's employer; and
   (b) for an appointment made by an employer that will be covered by a proposed enterprise agreement that is not a greenfields agreement—be given, on request, to a bargaining representative of an employee who will be covered by the agreement; and
   (c) for an appointment made by an employer that will be covered by a proposed single-enterprise agreement that is a greenfields agreement—be given, on request, to an employee organisation that is a bargaining representative for the agreement.

Regulations may prescribe matters relating to qualifications and appointment

(3) The regulations may prescribe matters relating to the qualifications or appointment of bargaining representatives.

178A Revocation of appointment of bargaining representatives etc.

(1) The appointment of a bargaining representative for an enterprise agreement may be revoked by written instrument.

(2) If a person would, apart from this subsection, be a bargaining representative of an employee for an enterprise agreement because of the operation of paragraph 176(1)(b) or subsection 176(2)

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(which deal with employee organisations), the employee may, by written instrument, revoke the person's status as the employee's bargaining representative for the agreement.

(3) A copy of an instrument under subsection (1) or (2):
  (a) for an instrument made by an employee who will be covered by the agreement—must be given to the employee's employer; and
  (b) for an instrument made by an employer that will be covered by a proposed enterprise agreement, other than a single-enterprise agreement that is a greenfields agreement—must be given to the bargaining representative and, on request, to a bargaining representative of an employee who will be covered by the agreement.

(3A) A copy of an instrument under subsection (1) made by an employer that will be covered by a proposed single-enterprise agreement that is a greenfields agreement must be given to the bargaining representative and, on request, to an employee organisation that is a bargaining representative for the agreement.

(4) The regulations may prescribe matters relating to the content or form of the instrument of revocation, or the manner in which the copy of the instrument may be given.

178B Notified negotiation period for a proposed single-enterprise agreement that is a greenfields agreement

(1) If a proposed single-enterprise agreement is a greenfields agreement, an employer that is a bargaining representative for the agreement may give written notice:
  (a) to each employee organisation that is a bargaining representative for the agreement; and
  (b) stating that the period of 6 months beginning on a specified day is the ***notified negotiation period*** for the agreement.

(2) The specified day must be later than:

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(a) if only one employee organisation is a bargaining representative for the agreement—the day on which the employer gave the notice to the organisation; or

(b) if 2 or more employee organisations are bargaining representatives for the agreement—the last day on which the employer gave the notice to any of those organisations.

Multiple employers—agreement to giving of notice

(3) If 2 or more employers are bargaining representatives for the agreement, the notice has no effect unless the other employer or employers agree to the giving of the notice.

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Division 4—Approval of enterprise agreements

Subdivision A—Pre-approval steps and applications for the FWC's approval

179 Disclosure by organisations that are bargaining representatives

(1) If:

(a) an organisation is a bargaining representative for a proposed enterprise agreement that is not a greenfields agreement; and

(b) the organisation is not an employer that will be covered by the agreement; and

(c) as a direct or indirect consequence of the operation of one or more terms of the agreement (the ***beneficial terms***), the organisation or a person mentioned in subsection (2) will, or can reasonably be expected to, receive or obtain (directly or indirectly) a section 179 disclosable benefit (each such person is a ***beneficiary***);

the organisation must take all reasonable steps to ensure that, in the time required by subsection (3), each employer that will be covered by the agreement is given a document in accordance with subsection (4).

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

(2) For the purposes of paragraph (1)(c), the persons are any of the following:

(a) a related party of the organisation (other than a related party prescribed by the regulations);

(b) a person or body prescribed by the regulations for the purposes of this paragraph.

(3) The document must be given to the employers a reasonable time before the voting process referred to in subsection 181(1) starts for the agreement.

(4) The document must:

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(a) itemise the beneficial terms; and
(b) describe the nature and (as far as reasonably practicable) amount of each section 179 disclosable benefit in relation to each beneficiary; and
(c) name each beneficiary; and
(d) be in accordance with any other requirements prescribed by the regulations for the purposes of this paragraph; and
(e) be given in a manner (if any) prescribed by the regulations.

(5) An organisation that gives a document under subsection (1) must not knowingly or recklessly make a false or misleading representation in the document.

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

(6) A ***section 179 disclosable benefit*** is any financial benefit, other than a financial benefit that is:
(a) payable to an individual as an employee covered by the agreement; or
(b) payment of a membership fee for membership of an organisation; or
(c) prescribed by the regulations for the purposes of this paragraph.

179A Disclosure by employers

(1) If:
(a) an employer will be covered by a proposed enterprise agreement that is not a greenfields agreement; and
(b) as a direct or indirect consequence of the operation of one or more terms of the agreement (the ***beneficial terms***), the employer or a person mentioned in subsection (2) will, or can reasonably be expected to, receive or obtain (directly or indirectly) a section 179A disclosable benefit (each such person is a ***beneficiary***);

the employer must prepare a document in accordance with subsection (3).

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(2) For the purposes of paragraph (1)(b), the persons are any of the following:

(a) an associated entity of the employer (other than an associated entity prescribed by the regulations);

(b) a person or body prescribed by the regulations for the purposes of this paragraph.

(3) The document must:

(a) itemise the beneficial terms; and

(b) describe the nature and (as far as reasonably practicable) amount of each section 179A disclosable benefit in relation to each beneficiary; and

(c) name each beneficiary; and

(d) be in accordance with any other requirements prescribed by the regulations for the purposes of this paragraph.

(4) A ***section 179A disclosable benefit*** is any financial benefit, other than a financial benefit that is:

(a) received or obtained in the ordinary course of the employer's business; or

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

180 Certain pre-approval requirements

Pre-approval requirements

(1) Before an employer requests under subsection 181(1) that employees approve a proposed enterprise agreement by voting for the agreement, the employer must comply with the requirements set out in this section.

Employees must be given copy of disclosure documents etc.

(4A) If an organisation gives the employer a document under section 179 before the voting process referred to in subsection 181(1) starts for the agreement, the employer must take

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all reasonable steps to ensure that the employees employed at the time who will be covered by the agreement:

(a) are given a copy of the document as soon as practicable after it was given to the employer; or

(b) are given access to a copy of the document as soon as practicable after it was given to the employer and have access to that copy until the voting process starts.

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

(4B) If the employer is required to prepare a document under section 179A, the employer must take all reasonable steps to ensure that the employees employed at the time who will be covered by the agreement:

(a) are given a copy of the document a reasonable time before the voting process referred to in subsection 181(1) starts for the agreement; or

(b) are given access to a copy of the document a reasonable time before the voting process starts and have access to that copy until the voting process starts.

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

(4C) The employer must not knowingly or recklessly make a false or misleading representation in the document that employees are given a copy of or access to under subsection (4B).

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

Terms of the agreement must be explained to employees etc.

(5) The employer must take all reasonable steps to ensure that:

(a) the terms of the agreement, and the effect of those terms, are explained to the employees employed at the time who will be covered by the agreement; and

(b) the explanation is provided in an appropriate manner taking into account the particular circumstances and needs of those employees.

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(6) Without limiting paragraph (5)(b), the following are examples of the kinds of employees whose circumstances and needs are to be taken into account for the purposes of complying with that paragraph:

(a) employees from culturally and linguistically diverse backgrounds;

(b) young employees;

(c) employees who did not have a bargaining representative for the agreement.

180A Agreement of bargaining representatives that are employee organisations—proposed multi-enterprise agreements

(1) This section applies to a proposed enterprise agreement that is a multi-enterprise agreement.

(2) An employer must not request under subsection 181(1) that employees approve the enterprise agreement by voting for it unless:

(a) each bargaining representative for the enterprise agreement that is an employee organisation has provided the employer with written agreement to the making of the request; or

(b) a voting request order permits the employer to make the request.

Note: Voting request orders can be made where failure to provide written agreement to the making of a request is unreasonable in the circumstances (see section 240B).

180B Agreement of bargaining representatives that are employee organisations—certain proposed single-enterprise agreements

(1) This section applies to a proposed single-enterprise agreement (the ***new agreement***) if:

(a) a single interest employer agreement or a supported bargaining agreement (each of which is an ***old agreement***)

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applies to an employee in relation to particular employment; and

(b) the old agreement has not passed its nominal expiry date; and

(c) when the new agreement comes into operation, the old agreement will cease to apply to the employee in relation to that employment.

(2) An employer must not request under subsection 181(1) that employees approve the new agreement by voting for it unless:

(a) each employee organisation to which the old agreement applies has provided the employer with written agreement to the making of the request; or

(b) a voting request order permits the employer to make the request.

Note: Voting request orders can be made where failure to provide written agreement to the making of a request is unreasonable in the circumstances (see section 240B).

181 Employers may request employees to approve a proposed enterprise agreement

(1) An employer that will be covered by a proposed enterprise agreement may request the employees employed at the time who will be covered by the agreement to approve the agreement by voting for it.

(2) If the employer is required by subsection 173(1) (which deals with giving notice of employee representational rights) to take all reasonable steps to give notice in relation to the agreement, the request must not be made until at least 21 days after the day on which the last notice under subsection 173(1) in relation to the agreement is given.

(3) Without limiting subsection (1), the employer may request that the employees vote by ballot or by an electronic method.

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182 When an enterprise agreement is made

Single-enterprise agreement that is not a greenfields agreement

(1) If the employees of the employer, or each employer, that will be covered by a proposed single-enterprise agreement that is not a greenfields agreement have been asked to approve the agreement under subsection 181(1), the agreement is ***made*** when a majority of those employees who cast a valid vote approve the agreement.

Multi-enterprise agreement that is not a greenfields agreement

(2) If:

(a) a proposed enterprise agreement is a multi-enterprise agreement; and

(b) the employees of each of the employers that will be covered by the agreement have been asked to approve the agreement under subsection 181(1); and

(c) those employees have voted on whether or not to approve the agreement; and

(d) a majority of the employees of at least one of those employers who cast a valid vote have approved the agreement;

the agreement is ***made*** immediately after the end of the voting process referred to in subsection 181(1).

Greenfields agreement

(3) A greenfields agreement is ***made*** when it has been signed by each employer and each relevant employee organisation that the agreement is expressed to cover (which need not be all of the relevant employee organisations for the agreement).

(4) If:

(a) a proposed single-enterprise agreement is a greenfields agreement that has not been made under subsection (3); and

(b) there has been a notified negotiation period for the agreement; and

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(c) the notified negotiation period has ended; and

(d) the employer or employers that were bargaining representatives for the agreement (the ***relevant employer or employers***) gave each of the employee organisations that were bargaining representatives for the agreement a reasonable opportunity to sign the agreement; and

(e) the relevant employer or employers apply to the FWC for approval of the agreement;

the agreement is taken to have been ***made***:

(f) by the relevant employer or employers with each of the employee organisations that were bargaining representatives for the agreement; and

(g) when the application is made to the FWC for approval of the agreement.

Note: See also section 185A (material that must accompany an application).

183 Entitlement of an employee organisation to have an enterprise agreement cover it

(1) After an enterprise agreement that is not a greenfields agreement is made, an employee organisation that was a bargaining representative for the proposed enterprise agreement concerned may give the FWC a written notice stating that the organisation wants the enterprise agreement to cover it.

(2) The notice must be given to the FWC, and a copy given to each employer covered by the enterprise agreement, before the FWC approves the agreement.

Note: The FWC must note in its decision to approve the enterprise agreement that the agreement covers the employee organisation (see subsection 201(2)).

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184 Multi-enterprise agreement to be varied if not all employees approve the agreement

Application of this section

(1) This section applies if:
  (a) a multi-enterprise agreement is made; and
  (b) the agreement was not approved by the employees of all of the employers that made a request under subsection 181(1) in relation to the agreement.

Variation of agreement

(2) Before a bargaining representative applies under section 185 for approval of the agreement, the bargaining representative must vary the agreement so that the agreement is expressed to cover only the following:
  (a) each employer whose employees approved the agreement;
  (b) the employees of each of those employers.

(3) The bargaining representative who varies the agreement as referred to in subsection (2) must give written notice of the variation to all the other bargaining representatives for the agreement.

(4) The notice must specify the employers and employees that the agreement as varied covers.

(5) Subsection (3) does not require the bargaining representative to give a notice to a person if the bargaining representative does not know, or could not reasonably be expected to know, that the person is a bargaining representative for the agreement.

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185 Bargaining representative must apply for the FWC's approval of an enterprise agreement

Application for approval

(1) If an enterprise agreement is made, a bargaining representative for the agreement must apply to the FWC for approval of the agreement.

(1A) Despite subsection (1), if the agreement is a multi-enterprise agreement that is a greenfields agreement, the application must be made by:

(a) an employer covered by the agreement; or

(b) a relevant employee organisation that is covered by the agreement.

Material to accompany the application

(2) The application must be accompanied by:

(a) a signed copy of the agreement; and

(b) any declarations that are required by the procedural rules to accompany the application.

When the application must be made

(3) If the agreement is not a greenfields agreement, the application must be made:

(a) within 14 days after the agreement is made; or

(b) if in all the circumstances the FWC considers it fair to extend that period—within such further period as the FWC allows.

(4) If the agreement is a greenfields agreement, the application must be made within 14 days after the agreement is made.

Signature requirements

(5) The regulations may prescribe requirements relating to the signing of enterprise agreements.

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Single-enterprise agreements that are greenfields agreements

(6) This section does not apply to an agreement made under subsection 182(4).

185A Material that must accompany an application under subsection 182(4) for approval of a greenfields agreement

An application under subsection 182(4) for approval of an agreement must be accompanied by:

(a) a copy of the agreement; and

(b) any declarations that are required by the procedural rules to accompany the application.

Subdivision B—Approval of enterprise agreements by the FWC

186 When the FWC must approve an enterprise agreement—general requirements

Basic rule

(1) If an application for the approval of an enterprise agreement is made under subsection 182(4) or section 185, the FWC must approve the agreement under this section if the requirements set out in this section and section 187 are met.

Note: The FWC may approve an enterprise agreement under this section with undertakings (see section 190).

Requirements relating to the safety net etc.

(2) The FWC must be satisfied that:

(a) if the agreement is not a greenfields agreement—the agreement has been genuinely agreed to by the employees covered by the agreement; and

(b) if the agreement is a multi-enterprise agreement:

(i) the agreement has been genuinely agreed to by each employer covered by the agreement; and

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(ii) no person coerced, or threatened to coerce, any of the employers to make the agreement; and

(c) the terms of the agreement do not contravene section 55 (which deals with the interaction between the National Employment Standards and enterprise agreements etc.); and

(d) the agreement passes the better off overall test.

Note 1: For provisions dealing with determining whether an enterprise agreement has been genuinely agreed to by employees, see section 188.

Note 2: The FWC may approve an enterprise agreement that does not pass the better off overall test if approval would not be contrary to the public interest (see section 189).

Note 3: The terms of an enterprise agreement may supplement the National Employment Standards (see paragraph 55(4)(b)).

(2AA) In applying paragraph 186(2)(b), the FWC must disregard anything done, and the effect of anything done, by a person other than one of the employers who bargained for the agreement, that is authorised by or under this Act (including protected industrial action).

Requirement relating to representation for cooperative workplace agreement (not greenfields)

(2A) If the agreement is a cooperative workplace agreement that is not a greenfields agreement, the FWC must be satisfied that at least some of the employees covered by the agreement were represented by an employee organisation in relation to bargaining for the agreement.

Requirement that multi-enterprise agreements (other than greenfields agreements) not cover employees in relation to general building and construction work

(2B) If the agreement is a multi-enterprise agreement that is not a greenfields agreement, the FWC must be satisfied that the agreement does not cover employees in relation to general building and construction work.

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Requirement that the group of employees covered by the agreement is fairly chosen

(3) The FWC must be satisfied that the group of employees covered by the agreement was fairly chosen.

(3A) If the agreement does not cover all of the employees of the employer or employers covered by the agreement, the FWC must, in deciding whether the group of employees covered was fairly chosen, take into account whether the group is geographically, operationally or organisationally distinct.

Requirement that there be no unlawful terms

(4) The FWC must be satisfied that the agreement does not include any unlawful terms (see Subdivision D of this Division).

Requirement that there be no designated outworker terms

(4A) The FWC must be satisfied that the agreement does not include any designated outworker terms.

Requirement for a nominal expiry date etc.

(5) The FWC must be satisfied that:
(a) the agreement specifies a date as its nominal expiry date; and
(b) the date will not be more than 4 years after the day on which the FWC approves the agreement.

Requirement for a term about settling disputes

(6) The FWC must be satisfied that the agreement includes a term:
(a) that provides a procedure that requires or allows the FWC, or another person who is independent of the employers, employees or employee organisations covered by the agreement, to settle disputes:
(i) about any matters arising under the agreement; and
(ii) in relation to the National Employment Standards; and

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(b) that allows for the representation of employees covered by the agreement for the purposes of that procedure.

187 When the FWC must approve an enterprise agreement—additional requirements

Additional requirements

(1) This section sets out additional requirements that must be met before the FWC approves an enterprise agreement under section 186.

Requirement that approval not be inconsistent with good faith bargaining etc.

(2) The FWC must be satisfied that approving the agreement would not be inconsistent with or undermine good faith bargaining by one or more bargaining representatives for a proposed enterprise agreement, or an enterprise agreement, in relation to which a scope order is in operation.

Requirement relating to notice of variation of agreement

(3) If a bargaining representative is required to vary the agreement as referred to in subsection 184(2), the FWC must be satisfied that the bargaining representative has complied with that subsection and subsection 184(3) (which deals with giving notice of the variation).

Requirements relating to particular kinds of employees

(4) The FWC must be satisfied as referred to in any provisions of Subdivision E of this Division that apply in relation to the agreement.

Note: Subdivision E of this Division deals with approval requirements relating to particular kinds of employees.

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Requirements relating to greenfields agreements

(5) If the agreement is a greenfields agreement, the FWC must be satisfied that:

(a) the relevant employee organisations that will be covered by the agreement are (taken as a group) entitled to represent the industrial interests of a majority of the employees who will be covered by the agreement, in relation to work to be performed under the agreement; and

(b) it is in the public interest to approve the agreement.

(6) If an agreement is made under subsection 182(4) (which deals with a single-enterprise agreement that is a greenfields agreement), the FWC must be satisfied that the agreement, considered on an overall basis, provides for pay and conditions that are consistent with the prevailing pay and conditions within the relevant industry for equivalent work.

Note: In considering the prevailing pay and conditions within the relevant industry for equivalent work, the FWC may have regard to the prevailing pay and conditions in the relevant geographical area.

188 Determining whether an enterprise agreement has been genuinely agreed to by employees

Statement of principles

(1) The FWC must take into account the statement of principles made under section 188B in determining whether it is satisfied that an enterprise agreement has been genuinely agreed to by the employees covered by the agreement.

Sufficient interest and sufficiently representative

(2) The FWC cannot be satisfied that an enterprise agreement has been genuinely agreed to by the employees covered by the agreement unless the FWC is satisfied that the employees requested to approve the agreement by voting for it:

(a) have a sufficient interest in the terms of the agreement; and

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(b) are sufficiently representative, having regard to the employees the agreement is expressed to cover.

Note: In *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union* [2018] FCAFC 77 (2018) 262 FCR 527, a Full Court of the Federal Court observed that whether an agreement has been genuinely agreed involves consideration of the authenticity of the agreement of the employees, including whether the employees who voted for the agreement had an informed and genuine understanding of what was being approved.

Agreement of bargaining representatives that are employee organisations

(2A) The FWC cannot be satisfied that an enterprise agreement to which section 180A or 180B applies has been genuinely agreed to by the employees covered by the agreement unless the FWC is satisfied that the employer complied with section 180A or 180B (as the case requires) in relation to the agreement.

Where notice of employee representational rights was required

(3) Subsection (4) applies in relation to an enterprise agreement if an employer was required by subsection 173(1) (which deals with giving notice of employee representational rights) to take all reasonable steps to give notice in relation to the agreement.

(4) The FWC cannot be satisfied that the agreement has been genuinely agreed to by the employees covered by the agreement unless the FWC is satisfied that the employer complied with the following provisions in relation to the agreement:

(a) sections 173 and 174 (which deal with giving notice of employee representational rights);

(b) subsection 181(2) (which requires that employees not be requested to approve certain enterprise agreements until 21 days after the last notice of employee representational rights is given).

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Explanation of terms of the agreement

(4A) The FWC cannot be satisfied that the agreement has been genuinely agreed to by the employees covered by the agreement unless the FWC is satisfied that the employer complied with subsection 180(5) in relation to the agreement.

Minor errors may be disregarded

(5) In determining whether it is satisfied that an enterprise agreement has been genuinely agreed to by the employees covered by the agreement (including determining whether it is satisfied that an employer complied with the provisions mentioned in subsection (2A) or (4) or (4A)), the FWC may disregard minor procedural or technical errors made in relation to the following requirements if it is satisfied that the employees were not likely to have been disadvantaged by the errors:

(a) section 173 or 174 (which deal with notices of employee representational rights for certain agreements);

(aa) subsection 180(5) (which requires employers to explain the terms of agreements);

(ab) section 180A or 180B (which deal with agreement of certain bargaining representatives);

(b) subsection 181(2) (which requires that employees not be requested to approve certain enterprise agreements until 21 days after the last notice of employee representational rights is given);

(c) subsection 182(1) or (2) (which deal with the making of different kinds of enterprise agreements by employee vote).

Regulations

(6) The FWC cannot be satisfied that an enterprise agreement has been genuinely agreed to by the employees covered by the agreement unless the FWC is satisfied that the requirements (if any) prescribed by the regulations for the purposes of this subsection are met.

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188A Disclosure documents

Failure by an organisation to comply with section 179 (disclosure by organisations), or by an employer to comply with section 179A or subsection 180(4A), (4B) or (4C) (disclosure by employers), in relation to an agreement:

(a) does not mean that the agreement has not been genuinely agreed to by employees; and

(b) is not otherwise relevant to approval by the FWC of the agreement.

188B Statement of principles on genuine agreement

(1) The FWC must, by legislative instrument, make a statement of principles for employers on ensuring that employees have genuinely agreed to an enterprise agreement.

(2) The FWC must publish the statement on the FWC's website and by any other means that the FWC considers appropriate.

(3) The statement must deal with the following matters:

(a) informing employees of bargaining for a proposed enterprise agreement;

(b) informing employees of their right to be represented by a bargaining representative;

(c) providing employees with a reasonable opportunity to consider a proposed enterprise agreement;

(d) explaining to employees the terms of a proposed enterprise agreement and their effect;

(e) providing employees with a reasonable opportunity to vote on a proposed agreement in a free and informed manner, including by informing employees of the time, place and method for the vote;

(f) any matter prescribed by the regulations for the purposes of this paragraph;

(g) any other matters the FWC considers relevant.

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(4) The statement is a legislative instrument, but section 42 (disallowance) of the *Legislation Act 2003* does not apply to the statement.

189 FWC may approve an enterprise agreement that does not pass better off overall test—public interest test

Application of this section

(1) This section applies if:
  (a) the FWC is not required to approve an enterprise agreement under section 186; and
  (b) the only reason for this is that the FWC is not satisfied that the agreement passes the better off overall test.

Approval of agreement if not contrary to the public interest

(2) The FWC may approve the agreement under this section if the FWC is satisfied that, because of exceptional circumstances, the approval of the agreement would not be contrary to the public interest.

Note: The FWC may approve an enterprise agreement under this section with undertakings (see section 190).

(3) An example of a case in which the FWC may be satisfied of the matter referred to in subsection (2) is where the agreement is part of a reasonable strategy to deal with a short-term crisis in, and to assist in the revival of, the enterprise of an employer covered by the agreement.

Nominal expiry date

(4) The ***nominal expiry date*** of an enterprise agreement approved by the FWC under this section is the earlier of the following:
  (a) the date specified in the agreement as the nominal expiry date of the agreement;
  (b) 2 years after the day on which the FWC approved the agreement.

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190 FWC may approve an enterprise agreement with undertakings

Application of this section

(1) This section applies if:
  (a) an application for the approval of an enterprise agreement has been made under subsection 182(4) or section 185; and
  (b) the FWC has a concern that the agreement does not meet the requirements set out in sections 186 and 187.

Approval of agreement with undertakings

(2) The FWC may approve the agreement under section 186 if the FWC is satisfied that an undertaking accepted by the FWC under subsection (3) of this section meets the concern.

Undertakings

(3) The FWC may only accept a written undertaking from one or more employers covered by the agreement if the FWC is satisfied that the effect of accepting the undertaking is not likely to:
  (a) cause financial detriment to any employee covered by the agreement; or
  (b) result in substantial changes to the agreement.

FWC must seek views of bargaining representatives

(4) The FWC must not accept an undertaking under subsection (3) unless the FWC has sought the views of each person who the FWC knows is a bargaining representative for the agreement.

Signature requirements

(5) The undertaking must meet any requirements relating to the signing of undertakings that are prescribed by the regulations.

191 Effect of undertakings

(1) If:

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(a) the FWC approves an enterprise agreement after accepting an undertaking under subsection 190(3) in relation to the agreement; and

(b) the agreement covers a single employer;

the undertaking is taken to be a term of the agreement, as the agreement applies to the employer.

(2) If:

(a) the FWC approves an enterprise agreement after accepting an undertaking under subsection 190(3) in relation to the agreement; and

(b) the agreement covers 2 or more employers;

the undertaking is taken to be a term of the agreement, as the agreement applies to each employer that gave the undertaking.

191A FWC may approve an enterprise agreement with amendments

(1) This section applies if:

(a) an application for the approval of an enterprise agreement has been made under subsection 182(4) or section 185; and

(b) the FWC has a concern that the agreement does not meet the requirement set out in paragraph 186(2)(d) (better off overall test).

(2) The FWC may approve the agreement under section 186 if the FWC is satisfied that an amendment specified by the FWC is necessary to address the concern.

(3) If the FWC intends to specify an amendment under subsection (2), the FWC must seek the views of the following:

(a) the employer or employers that are covered by the agreement;

(b) the award covered employees for the agreement;

(ba) if the agreement is a single-enterprise agreement that covers one or more employees to whom a supported bargaining agreement or a single interest employer agreement applies—those employees;

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(c) a bargaining representative for the agreement.

191B Effect of amendment specified by FWC

(1) If:

(a) the FWC specifies an amendment in approving an enterprise agreement under subsection 191A(2); and

(b) the agreement covers a single employer;

the agreement is taken to be amended by the amendment, as the agreement applies to the employer.

(2) If:

(a) the FWC specifies an amendment in approving an enterprise agreement under subsection 191A(2); and

(b) the agreement covers 2 or more employers;

the agreement is taken to be amended by the amendment, as the agreement applies to each employer.

192 When the FWC may refuse to approve an enterprise agreement

(1) If an application for the approval of an enterprise agreement is made under subsection 182(4) or section 185, the FWC may refuse to approve the agreement if the FWC considers that compliance with the terms of the agreement may result in:

(a) a person committing an offence against a law of the Commonwealth; or

(b) a person being liable to pay a pecuniary penalty in relation to a contravention of a law of the Commonwealth.

(2) Subsection (1) has effect despite sections 186 and 189 (which deal with the approval of enterprise agreements).

(3) If the FWC refuses to approve an enterprise agreement under this section, the FWC may refer the agreement to any person or body the FWC considers appropriate.

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Subdivision C—Better off overall test

193 Passing the better off overall test

When a non-greenfields agreement passes the better off overall test

(1) An enterprise agreement that is not a greenfields agreement ***passes the better off overall test*** under this section if the FWC is satisfied, as at the test time, that:

(a) each award covered employee, and each reasonably foreseeable employee, for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee; and

(b) if the agreement is a single-enterprise agreement that covers one or more employees (each of whom is an ***old agreement employee***) to whom a supported bargaining agreement or a single interest employer agreement applies—each old agreement employee would be better off overall if the single-enterprise agreement applied to the employee than if the supported bargaining agreement or single interest employer agreement (as the case requires) applied to the employee.

Note 1: ***Reasonably foreseeable employee*** is defined in subsection (5).

Note 2: Section 193A sets out rules for applying the better off overall test, including requiring the FWC to only have regard to patterns or kinds of work, or types of employment, that are reasonably foreseeable at the test time (see subsection 193A(6)).

(1A) If an employee is, at the test time, both an old agreement employee and an award covered employee, the FWC must undertake an assessment against only paragraph (1)(b) for that employee.

FWC must disregard individual flexibility arrangement

(2) If, under the flexibility term in the relevant modern award, an individual flexibility arrangement has been agreed to by an award covered employee and his or her employer, the FWC must disregard the individual flexibility arrangement for the purposes of

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determining whether the agreement passes the better off overall test.

(2A) If, under the flexibility term in the supported bargaining agreement or single interest employer agreement, an individual flexibility arrangement has been agreed to by an old agreement employee and his or her employer, the FWC must disregard the individual flexibility arrangement for the purposes of determining whether the single-enterprise agreement passes the better off overall test.

When a greenfields agreement passes the better off overall test

(3) A greenfields agreement ***passes the better off overall test*** under this section if the FWC is satisfied, as at the test time, that each reasonably foreseeable employee for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee.

Award covered employee

(4) An ***award covered employee*** for an enterprise agreement is an employee who:

(a) is covered by the agreement; and

(b) at the test time, is covered by a modern award (the ***relevant modern award***) that:

(i) is in operation; and

(ii) covers the employee in relation to the work that he or she is to perform under the agreement; and

(iii) covers his or her employer.

Reasonably foreseeable employee

(5) A ***reasonably foreseeable employee*** for an enterprise agreement is a person who, if he or she were an employee at the test time of an employer covered by the agreement:

(a) would be covered by the agreement; and

(b) would be covered by a modern award (the ***relevant modern award***) that:

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(i) is in operation; and
(ii) would cover the person in relation to the work that he or she would perform under the agreement; and
(iii) covers the employer.

Test time

(6) The ***test time*** is the time the application for approval of the agreement by the FWC was made under subsection 182(4) or section 185.

193A Applying the better off overall test

(1) This section applies for the purposes of determining whether an enterprise agreement passes the better off overall test under section 193.

(2) To avoid doubt, the FWC must undertake a global assessment of whether each employee concerned would be better off having regard to:
(a) the terms of the agreement which would be more beneficial to the employee if the agreement applied to the employee than if the relevant modern award, supported bargaining agreement or single interest employer agreement (as the case requires) applied to the employee; and
(b) the terms of the agreement which would be less beneficial to the employee if the agreement applied to the employee than if the relevant modern award, supported bargaining agreement or single interest employer agreement (as the case requires) applied to the employee.

(3) The FWC must give consideration to any views relating to whether the agreement passes the better off overall test that have been expressed by any of the following:
(a) the employer or employers that are covered by the agreement;
(b) if the agreement is not a greenfields agreement:
(i) the award covered employees for the agreement; and

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(ii) if the agreement is a single-enterprise agreement that covers one or more employees to whom a supported bargaining agreement or a single interest employer agreement applies—those employees;

(c) in any case—a bargaining representative for the agreement.

(4) The FWC must give primary consideration to a common view (if any) relating to whether the agreement passes the better off overall test expressed by all of the following:

(a) the bargaining representative or bargaining representatives of the employer or employers that are covered by the agreement;

(b) the bargaining representative or bargaining representatives of award covered employees for the agreement (other than a bargaining representative that is not an employee organisation);

(c) if the agreement is a single-enterprise agreement that covers one or more employees to whom a supported bargaining agreement or a single interest employer agreement applies—the bargaining representative or bargaining representatives of those employees (other than a bargaining representative that is not an employee organisation).

(5) Subsection (4) does not apply if the agreement is a greenfields agreement.

(6) The FWC may only have regard to patterns or kinds of work, or types of employment, if they are reasonably foreseeable at the test time. In considering what is reasonably foreseeable, the FWC must have regard to the nature of the enterprise or enterprises to which the agreement relates.

(6A) The FWC must determine whether a particular pattern or kind of work, or type of employment, is reasonably foreseeable for the purposes of subsection (6) if a view is expressed by any of the following that it is, or is not, reasonably foreseeable:

(a) the employer or employers that are covered by the agreement;

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(b) if the agreement is not a greenfields agreement:
(i) the award covered employees for the agreement; and
(ii) if the agreement is a single-enterprise agreement that covers one or more employees to whom a supported bargaining agreement or a single interest employer agreement applies—those employees;
(c) in any case—a bargaining representative for the agreement.

(7) If a class of employees to which a particular employee belongs would be better off if the agreement applied to that class than if the relevant modern award, supported bargaining agreement or single interest employer agreement (as the case requires) applied to that class, the FWC is entitled to assume, in the absence of evidence to the contrary, that the employee would be better off overall if the agreement applied to the employee.

Subdivision D—Unlawful terms

194 Meaning of *unlawful term*

A term of an enterprise agreement is an ***unlawful term*** if it is:
(a) a discriminatory term; or
(b) an objectionable term; or
(baa) an objectionable emergency management term; or
(ba) a term that provides a method by which an employee or employer may elect (unilaterally or otherwise) not to be covered by the agreement; or
(c) if a particular employee would be protected from unfair dismissal under Part 3-2 after completing a period of employment of at least the minimum employment period—a term that confers an entitlement or remedy in relation to a termination of the employee's employment that is unfair (however described) before the employee has completed that period; or
(d) a term that excludes the application to, or in relation to, a person of a provision of Part 3-2 (which deals with unfair

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dismissal), or modifies the application of such a provision in a way that is detrimental to, or in relation to, a person; or

(e) a term that is inconsistent with a provision of Part 3-3 (which deals with industrial action); or

(f) a term that provides for an entitlement:

(i) to enter premises for a purpose referred to in section 481 (which deals with investigation of suspected contraventions); or

(ii) to enter premises to hold discussions of a kind referred to in section 484;

other than in accordance with Part 3-4 (which deals with right of entry); or

(g) a term that provides for the exercise of a State or Territory OHS right other than in accordance with Part 3-4 (which deals with right of entry); or

(h) a term that has the effect of requiring or permitting contributions, for the benefit of an employee (the ***relevant employee***) covered by the agreement who is a default fund employee, to be made to a superannuation fund or scheme that is specified in the agreement but does not satisfy one of the following:

(i) it is a fund that offers a MySuper product;

(ii) it is a fund or scheme of which the relevant employee, and each other default fund employee in relation to whom contributions are made to the fund or scheme by the same employer as the relevant employee, is a defined benefit member;

(iii) it is an exempt public sector superannuation scheme.

195 Meaning of *discriminatory term*

Discriminatory term

(1) A term of an enterprise agreement is a ***discriminatory term*** to the extent that it discriminates against an employee covered by the agreement because of, or for reasons including, the employee's race, colour, sex, sexual orientation, breastfeeding, gender identity,

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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.

Certain terms are not discriminatory terms

(2) A term of an enterprise agreement does not discriminate against an employee:

(a) if the reason for the discrimination is the inherent requirements of the particular position concerned; or

(b) merely because it discriminates, in relation to employment of the employee as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed:

(i) in good faith; and

(ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed; or

(c) if the term is a special measure to achieve equality—to the extent that action that may be taken because of the term is not unlawful under any anti-discrimination law in force in a place where the action may occur.

(3) A term of an enterprise agreement does not discriminate against an employee merely because it provides for wages for:

(a) all junior employees, or a class of junior employees; or

(b) all employees with a disability, or a class of employees with a disability; or

(c) all employees to whom training arrangements apply, or a class of employees to whom training arrangements apply.

Special measures to achieve equality

(4) A term of an enterprise agreement is a ***special measure to achieve equality*** if:

(a) the term has the purpose of achieving substantive equality for employees or prospective employees who have a particular attribute or a particular kind of attribute (as the case may be)

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mentioned in subsection (1), or a particular combination of these; and

Note: For example, a term that has the purpose of achieving substantive equality for employees who are female and have a physical or mental disability.

(b) a reasonable person would consider that the term is necessary in order to achieve substantive equality.

(5) A term of an enterprise agreement is to be treated as having the purpose referred to in paragraph (4)(a) if it is:

(a) solely for that purpose; or

(b) for that purpose as well as other purposes, whether or not that purpose is the dominant or substantial one.

(6) However, a term of an enterprise agreement ceases to be a ***special measure to achieve equality*** after substantive equality for the employees referred to in paragraph (4)(a) has been achieved.

195A Meaning of *objectionable emergency management term*

Objectionable emergency management term

(1) A term of an enterprise agreement is an ***objectionable emergency management term*** if an employer covered by the agreement is a designated emergency management body and the term has, or is likely to have, the effect of:

(a) restricting or limiting the body's ability to do any of the following:

(i) engage or deploy its volunteers;

(ii) provide support or equipment to those volunteers;

(iii) manage its relationship with, or work with, any recognised emergency management body in relation to those volunteers;

(iv) otherwise manage its operations in relation to those volunteers; or

(b) requiring the body to consult, or reach agreement with, any other person or body before taking any action for the

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purposes of doing anything mentioned in subparagraph (a)(i), (ii), (iii) or (iv); or

(c) restricting or limiting the body's ability to recognise, value, respect or promote the contribution of its volunteers to the well-being and safety of the community; or

(d) requiring or permitting the body to act other than in accordance with a law of a State or Territory, so far as the law confers or imposes on the body a power, function or duty that affects or could affect its volunteers.

(2) However, a term of an enterprise agreement is not an ***objectionable emergency management term*** if:

(a) both of the following apply:

(i) the term provides for the matters required by subsections 205(1) and (1A) (which deal with terms about consultation in enterprise agreements);

(ii) the term does not provide for any other matter that has, or is likely to have, the effect referred to in paragraph (1)(a), (b), (c) or (d) of this section; or

(b) the term is the model consultation term.

(3) Paragraphs (1)(a), (b), (c) and (d) do not limit each other.

Meaning of ***designated emergency management body***

(4) A body is a ***designated emergency management body*** if:

(a) either:

(i) the body is, or is a part of, a fire-fighting body or a State Emergency Service of a State or Territory (however described); or

(ii) the body is a recognised emergency management body that is prescribed by the regulations for the purposes of this subparagraph; and

(b) the body is, or is a part of a body that is, established for a public purpose by or under a law of the Commonwealth, a State or a Territory.

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(5) However, a body is not a ***designated emergency management body*** if the body is, or is a part of a body that is, prescribed by the regulations for the purposes of this subsection.

*Meaning of **volunteer** of a designated emergency management body*

(6) A person is a ***volunteer*** of a designated emergency management body if:

(a) the person engages in activities with the body on a voluntary basis (whether or not the person directly or indirectly takes or agrees to take an honorarium, gratuity or similar payment wholly or partly for engaging in the activity); and

(b) the person is a member of, or has a member-like association with, the body.

Limited application of subsection (1) for certain terms

(7) If:

(a) a term of an enterprise agreement deals to any extent with the following matters relating to provision of essential services or to situations of emergency:

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

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

(b) the application of subsection (1) in relation to the term would (apart from this subsection) be beyond the Commonwealth's legislative power to the extent that the term deals with those matters;

then subsection (1) does not apply in relation to the term to that extent.

Note: See paragraph (l) of the definition of ***excluded subject matter*** in subsections 30A(1) and 30K(1).

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Subdivision E—Approval requirements relating to particular kinds of employees

196 Shiftworkers

Application of this section

(1) This section applies if:
  (a) an employee is covered by an enterprise agreement; and
  (b) a modern award that is in operation and covers the employee defines or describes the employee as a shiftworker for the purposes of the National Employment Standards.

Shiftworkers and the National Employment Standards

(2) The FWC must be satisfied that the agreement defines or describes the employee as a shiftworker for the purposes of the National Employment Standards.

Note: Section 87 provides an employee with an entitlement to 5 weeks of paid annual leave if an enterprise agreement that applies to the employee defines or describes the employee as a shiftworker for the purposes of the National Employment Standards.

197 Pieceworkers—enterprise agreement includes pieceworker term

Application of this section

(1) This section applies if:
  (a) an enterprise agreement that covers an employee includes a term that defines or describes the employee as a pieceworker; and
  (b) a modern award that is in operation and covers the employee does not include such a term.

No detriment test

(2) The FWC must be satisfied that the effect of including such a term in the agreement is not detrimental to the employee in relation to

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the entitlements of the employee under the National Employment Standards.

198 Pieceworkers—enterprise agreement does not include a pieceworker term

Application of this section

(1) This section applies if:
  (a) an enterprise agreement that covers an employee does not include a term that defines or describes the employee as a pieceworker; and
  (b) a modern award that is in operation and covers the employee includes such a term.

No detriment test

(2) The FWC must be satisfied that the effect of not including such a term in the agreement is not detrimental to the employee in relation to the entitlements of the employee under the National Employment Standards.

199 School-based apprentices and school-based trainees

Application of this section

(1) This section applies if:
  (a) an employee who is a school-based apprentice or a school-based trainee is covered by an enterprise agreement; and
  (b) the agreement provides for the employee to be paid loadings (the ***agreement loadings***) in lieu of any of the following:
    (i) paid annual leave;
    (ii) paid personal/carer's leave;
    (iii) paid absence under Division 10 of Part 2-2 (which deals with public holidays); and

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(c) a modern award that is in operation and covers the employee provides for the employee to be paid loadings (the ***award loadings***) in lieu of leave or absence of that kind.

No detriment test

(2) The FWC must be satisfied that the amount or rate (as the case may be) of the agreement loadings is not detrimental to the employee when compared to the amount or rate of the award loadings.

200 Outworkers

Application of this section

(1) This section applies if:
(a) an employee who is an outworker is covered by an enterprise agreement; and
(b) a modern award that is in operation and covers the employee includes outworker terms.

Agreement must include outworker terms etc.

(2) The FWC must be satisfied that:
(a) the agreement includes terms of that kind; and
(b) those terms of the agreement are not detrimental to the employee in any respect when compared to the outworker terms of the modern award.

Subdivision F—Other matters

201 Approval decision to note certain matters

Approval decision to note model terms included in an enterprise agreement

(1) If:
(a) the FWC approves an enterprise agreement; and

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(b) either or both of the following apply:
(i) the model flexibility term is taken, under subsection 202(4), to be a term of the agreement;
(ii) the model consultation term is taken, under subsection 205(2), to be a term of the agreement;

the FWC must note in its decision to approve the agreement that those terms are so included in the agreement.

Approval decision to note modern award delegates' rights term included in an enterprise agreement

(1A) If:
(a) the FWC approves an enterprise agreement; and
(b) a delegates' rights term in a modern award is taken to be a term of the enterprise agreement because of subsection 205A(2):

the FWC must note in its decision to approve the agreement that the term is so included in the agreement.

Approval decision to note that an enterprise agreement covers an employee organisation

(2) If:
(a) an employee organisation has given a notice under subsection 183(1) that the organisation wants the enterprise agreement to cover it; and
(b) the FWC approves the agreement;

the FWC must note in its decision to approve the agreement that the agreement covers the organisation.

(2A) If:
(a) an agreement is made under subsection 182(4) (which deals with a single-enterprise agreement that is a greenfields agreement); and
(b) the FWC approves the agreement;

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the FWC must note in its decision to approve the agreement that the agreement covers each employee organisation that was a bargaining representative for the agreement.

Approval decision to note undertakings

(3) If the FWC approves an enterprise agreement after accepting an undertaking under subsection 190(3) in relation to the agreement, the FWC must note in its decision to approve the agreement that the undertaking is taken to be a term of the agreement.

Approval decision to note amendments

(4) If the FWC specifies an amendment in approving an enterprise agreement under subsection 191A(2), the FWC must note the amendment in its decision to approve the agreement.

Approval decision to note that enterprise agreement to be new host employment instrument for regulated labour hire arrangement order

(5) If:

(a) the FWC approves an enterprise agreement; and

(b) the enterprise agreement will become the host employment instrument covered by a regulated labour hire arrangement order because of section 306EB;

the FWC must note in its decision to approve the agreement that the agreement will be the host employment instrument covered by the order.

Note: Certain notification requirements also apply if the enterprise agreement will be the host employment instrument covered by a regulated labour hire arrangement order (see section 306EC).

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Division 5—Mandatory terms of enterprise agreements

202 Enterprise agreements to include a flexibility term etc.

Flexibility term must be included in an enterprise agreement

(1) An enterprise agreement must include a term (a ***flexibility term***) that:

(a) enables an employee and his or her employer to agree to an arrangement (an ***individual flexibility arrangement***) varying the effect of the agreement in relation to the employee and the employer, in order to meet the genuine needs of the employee and employer; and

(b) complies with section 203.

Effect of an individual flexibility arrangement

(2) If an employee and employer agree to an individual flexibility arrangement under a flexibility term in an enterprise agreement:

(a) the agreement has effect in relation to the employee and the employer as if it were varied by the arrangement; and

(b) the arrangement is taken to be a term of the agreement.

(3) To avoid doubt, the individual flexibility arrangement:

(a) does not change the effect the agreement has in relation to the employer and any other employee; and

(b) does not have any effect other than as a term of the agreement.

Model flexibility term

(4) If an enterprise agreement does not include a flexibility term, the model flexibility term is taken to be a term of the agreement.

(5) The FWC must determine the ***model flexibility term*** for enterprise agreements.

(6) In determining the model flexibility term, the FWC must:

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(a) ensure that the model term is consistent with the requirements set out in subsection (1); and

(b) take into account the following matters:

(i) whether the model term is broadly consistent with comparable terms in modern awards;

(ii) best practice workplace relations as determined by the FWC;

(iii) whether all persons and bodies have had a reasonable opportunity to be heard and make submissions to the FWC for consideration in determining the model term;

(iv) the object of this Act (see section 3), and the objects of this Part (see section 171);

(v) any other matters the FWC considers relevant.

Note 1: The FWC must be constituted by a Full Bench to make the model flexibility term (see subsection 616(4A)).

Note 2: For the variation of a determination, see subsection 33(3) of the *Acts Interpretation Act 1901*.

(7) A determination under subsection (5) is a legislative instrument, but section 42 (disallowance) of the *Legislation Act 2003* does not apply to the determination.

203 Requirements to be met by a flexibility term

Flexibility term must meet requirements

(1) A flexibility term in an enterprise agreement must meet the requirements set out in this section.

Requirements relating to content

(2) The flexibility term must:

(a) set out the terms of the enterprise agreement the effect of which may be varied by an individual flexibility arrangement agreed to under the flexibility term; and

(b) require the employer to ensure that any individual flexibility arrangement agreed to under the flexibility term:

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(i) must be about matters that would be permitted matters if the arrangement were an enterprise agreement; and

(ii) must not include a term that would be an unlawful term if the arrangement were an enterprise agreement.

(2A) If, in accordance with this Part, the enterprise agreement includes terms that would be outworker terms if they were included in a modern award, the flexibility term must not allow the effect of those outworker terms to be varied.

Requirement for genuine agreement

(3) The flexibility term must require that any individual flexibility arrangement is genuinely agreed to by the employer and the employee.

Requirement that the employee be better off overall

(4) The flexibility term must require the employer to ensure that any individual flexibility arrangement agreed to under the term must result in the employee being better off overall than the employee would have been if no individual flexibility arrangement were agreed to.

Requirement relating to approval or consent of another person

(5) Except as required by subparagraph (7)(a)(ii), the employer must ensure that the flexibility term does not require that any individual flexibility arrangement agreed to by an employer and employee under the term be approved, or consented to, by another person.

Requirement relating to termination of individual flexibility arrangements

(6) The flexibility term must require the employer to ensure that any individual flexibility arrangement agreed to under the term must be able to be terminated:

(a) by either the employee, or the employer, giving written notice of not more than 28 days; or

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(b) by the employee and the employer at any time if they agree, in writing, to the termination.

Other requirements

(7) The flexibility term must require the employer to ensure that:
(a) any individual flexibility arrangement agreed to under the term must be in writing and signed:
(i) in all cases—by the employee and the employer; and
(ii) if the employee is under 18—by a parent or guardian of the employee; and
(b) a copy of any individual flexibility arrangement agreed to under the term must be given to the employee within 14 days after it is agreed to.

204 Effect of arrangement that does not meet requirements of flexibility term

Application of this section

(1) This section applies if:
(a) an employee and employer agree to an arrangement that purports to be an individual flexibility arrangement under a flexibility term in an enterprise agreement; and
(b) the arrangement does not meet a requirement set out in section 203.

Note: A failure to meet such a requirement may be a contravention of a provision of Part 3-1 (which deals with general protections).

Arrangement has effect as if it were an individual flexibility arrangement

(2) The arrangement has effect as if it were an individual flexibility arrangement.

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Employer contravenes flexibility term in specified circumstances

(3) If section 203 requires the employer to ensure that the arrangement meets the requirement, the employer contravenes the flexibility term of the agreement.

Requirement relating to termination of arrangement

(4) If the arrangement does not provide that the arrangement is able to be terminated:

(a) by either the employee, or the employer, giving written notice of not more than 28 days; or

(b) by the employee and the employer at any time if they agree, in writing, to the termination;

the arrangement is taken to provide that the arrangement is able to be so terminated.

205 Enterprise agreements to include a consultation term etc.

Consultation term must be included in an enterprise agreement

(1) An enterprise agreement must include a term (a ***consultation term***) that:

(a) requires the employer or employers to which the agreement applies to consult the employees to whom the agreement applies about:

(i) a major workplace change that is likely to have a significant effect on the employees; or

(ii) a change to their regular roster or ordinary hours of work; and

(b) allows for the representation of those employees for the purposes of that consultation.

(1A) For a change to the employees' regular roster or ordinary hours of work, the term must require the employer:

(a) to provide information to the employees about the change; and

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(b) to invite the employees to give their views about the impact of the change (including any impact in relation to their family or caring responsibilities); and

(c) to consider any views given by the employees about the impact of the change.

Model consultation term

(2) If an enterprise agreement does not include a consultation term, or if the consultation term is an objectionable emergency management term, the model consultation term is taken to be a term of the agreement.

(3) The FWC must determine the ***model consultation term*** for enterprise agreements.

(4) In determining the model consultation term, the FWC must:

(a) ensure that the model term is consistent with the requirements set out in subsections (1) and (1A); and

(b) take into account the following matters:

(i) whether the model term is broadly consistent with comparable terms in modern awards;

(ii) best practice workplace relations as determined by the FWC;

(iii) whether all persons and bodies have had a reasonable opportunity to be heard and make submissions to the FWC for consideration in determining the model term;

(iv) whether the model term would, or would be likely to have, the effect referred to in paragraph 195A(1)(a), (b), (c) or (d) (objectionable emergency management terms);

(v) the object of this Act (see section 3), and the objects of this Part (see section 171);

(vi) any other matters the FWC considers relevant.

Note 1: The FWC must be constituted by a Full Bench to make the model consultation term (see subsection 616(4A)).

Note 2: For the variation of a determination, see subsection 33(3) of the *Acts Interpretation Act 1901*.

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(5) To avoid doubt, subsections (1) and (1A) do not limit the matters the model consultation term may deal with.

(6) A determination under subsection (3) is a legislative instrument, but section 42 (disallowance) of the *Legislation Act 2003* does not apply to the determination.

205A Enterprise agreements to include a delegates' rights term etc.

(1) An enterprise agreement must include a delegates' rights term for workplace delegates to whom the agreement applies.

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

When modern award term prevails

(2) However, if, when the agreement is approved, the delegates' rights term is less favourable than the delegates' rights term in one or more modern awards that cover the workplace delegates:

(a) the term in the enterprise agreement has no effect; and

(b) the most favourable term of those in the modern awards, as determined by the FWC, is taken to be a term of the enterprise agreement.

(3) To avoid doubt, if the delegates' rights term of a modern award is taken to be a term of an enterprise agreement, the term does not change if the modern award changes.

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Division 6—Base rate of pay under enterprise agreements

206 Base rate of pay under an enterprise agreement must not be less than the modern award rate or the national minimum wage order rate etc.

If an employee is covered by a modern award that is in operation

(1) If:

(a) an enterprise agreement applies to an employee; and

(b) a modern award that is in operation covers the employee;

the base rate of pay payable to the employee under the agreement (the ***agreement rate***) must not be less than the base rate of pay that would be payable to the employee under the modern award (the ***award rate***) if the modern award applied to the employee.

(2) If the agreement rate is less than the award rate, the agreement has effect in relation to the employee as if the agreement rate were equal to the award rate.

If an employer is required to pay an employee the national minimum wage etc.

(3) If:

(a) an enterprise agreement applies to an employee; and

(b) the employee is not covered by a modern award that is in operation; and

(c) a national minimum wage order would, but for the agreement applying to the employee, require the employee's employer to pay the employee a base rate of pay (the ***employee's order rate***) that at least equals the national minimum wage, or a special national minimum wage, set by the order;

the base rate of pay payable to the employee under the enterprise agreement (the ***agreement rate***) must not be less than the employee's order rate.

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(4) If the agreement rate is less than the employee's order rate, the agreement has effect in relation to the employee as if the agreement rate were equal to the employee's order rate.

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Division 7—Variation and termination of enterprise agreements

Subdivision A—Variation of enterprise agreements by employers and employees: general circumstances

207 Variation of an enterprise agreement may be made by employers and employees

Variation by employers and employees

(1) The following may jointly make a variation of an enterprise agreement:

(a) if the agreement covers a single employer—the employer and:

(i) the employees employed at the time who are covered by the agreement; and

(ii) the employees employed at the time who will be covered by the agreement if the variation is approved by the FWC;

(b) if the agreement covers 2 or more employers—all of those employers and:

(i) the employees employed at the time who are covered by the agreement; and

(ii) the employees employed at the time who will be covered by the agreement if the variation is approved by the FWC.

Note: For when a variation of an enterprise agreement is ***made***, see section 209.

(2) The employees referred to in paragraphs (1)(a) and (b) are the ***affected employees*** for the variation.

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Variation has no effect unless approved by the FWC

(3) A variation of an enterprise agreement has no effect unless it is approved by the FWC under section 211.

Limitation—greenfields agreement

(4) Subsection (1) applies to a greenfields agreement only if one or more of the persons who will be necessary for the normal conduct of the enterprise concerned and are covered by the agreement have been employed.

207A Agreement of employee organisations covered by the agreement

(1) This section applies to a proposed variation of a multi-enterprise agreement.

(2) An employer must not request under subsection 208(1) that employees approve the variation by voting for it unless:

(a) each employee organisation covered by the enterprise agreement has provided the employer with written agreement to the making of the request; or

(b) a voting request order permits the employer to make the request.

Note: Voting request orders can be made where failure to provide written agreement to the making of a request is unreasonable in the circumstances (see section 240B).

208 Employers may request employees to approve a proposed variation of an enterprise agreement

(1) An employer covered by an enterprise agreement may request the affected employees for a proposed variation of the agreement to approve the proposed variation by voting for it.

(2) Without limiting subsection (1), the employer may request that the affected employees vote by ballot or by an electronic method.

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209 When a variation of an enterprise agreement is made

Single-enterprise agreement

(1) If the affected employees of an employer, or each employer, covered by a single-enterprise agreement have been asked to approve a proposed variation under subsection 208(1), the variation is ***made*** when a majority of the affected employees who cast a valid vote approve the variation.

Multi-enterprise agreement

(2) If the affected employees of each employer covered by a multi-enterprise agreement have been asked to approve a proposed variation under subsection 208(1), the variation is ***made*** when a majority of the affected employees of each individual employer who cast a valid vote have approved the variation.

210 Application for the FWC's approval of a variation of an enterprise agreement

Application for approval

(1) If a variation of an enterprise agreement has been made, a person covered by the agreement must apply to the FWC for approval of the variation.

Material to accompany the application

(2) The application must be accompanied by:
  (a) a signed copy of the variation; and
  (b) a copy of the agreement as proposed to be varied; and
  (c) any declarations that are required by the procedural rules to accompany the application.

When the application must be made

(3) The application must be made:
  (a) within 14 days after the variation is made; or

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(b) if in all the circumstances the FWC considers it fair to extend that period—within such further period as the FWC allows.

Signature requirements

(4) The regulations may prescribe requirements relating to the signing of variations of enterprise agreements.

211 When the FWC must approve a variation of an enterprise agreement

Approval of variation by the FWC

(1) If an application for the approval of a variation of an enterprise agreement is made under section 210, the FWC must approve the variation if:

(a) the FWC is satisfied that had an application been made under subsection 182(4) or section 185 for the approval of the agreement as proposed to be varied, the FWC would have been required to approve the agreement under section 186; and

(b) the FWC is satisfied that the agreement as proposed to be varied would not specify a date as its nominal expiry date which is more than 4 years after the day on which the FWC approved the agreement;

unless the FWC is satisfied that there are serious public interest grounds for not approving the variation.

Note: The FWC may approve a variation under this section with undertakings (see section 212).

(1A) Despite subsection (1), the FWC must not approve the variation if:

(a) as a result of the variation, employees who were not covered by the agreement will be covered by it; and

(b) the employees' employer is specified in a supported bargaining authorisation, or a single interest employer authorisation, in relation to those employees.

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Modification of approval requirements

(2) For the purposes of the FWC deciding whether it is satisfied of the matter referred to in paragraph (1)(a), the FWC must:

(a) take into account subsections (3) and (4) and any regulations made for the purposes of subsection (6); and

(aa) if the agreement is a multi-enterprise agreement—take into account subsection (3A); and

(b) comply with subsection (5); and

(c) disregard sections 190 and 191 (which deal with the approval of enterprise agreements with undertakings); and

(d) disregard sections 191A and 191B (which deal with FWC amendment of enterprise agreements).

(3) The following provisions:

(a) section 180 (which deals with pre-approval steps);

(b) subsection 186(2) (which deals with the FWC's approval of enterprise agreements);

(c) section 188 (which deals with genuine agreement);

have effect as if:

(d) references in sections 180 and 188 (other than paragraph 188(2)(b)) to the proposed enterprise agreement, or the enterprise agreement, were references to the proposed variation, or the variation, of the enterprise agreement (as the case may be); and

(e) references in section 180, subsection 186(2) and section 188 to the employees employed at the time who will be covered by the proposed enterprise agreement, or the employees covered by the enterprise agreement, were references to the affected employees for the variation; and

(f) references in section 180 to subsection 181(1) were references to subsection 208(1); and

(fa) subsections 180(4A) to (4C) were omitted; and

(fb) the word "bargaining" in paragraph 180(6)(c) were omitted; and

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(g) the words "if the agreement is not a greenfields agreement—" in paragraph 186(2)(a) were omitted; and

(ga) references in paragraph 186(2)(a) to the agreement were references to the variation of the agreement; and

(h) paragraph 186(2)(b) were omitted; and

(ha) references in paragraphs 186(2)(c) and (d) and 188(2)(b) to the agreement were references to the enterprise agreement as proposed to be varied; and

(hb) references in section 188 to section 180A were references to section 207A; and

(j) the words "182(1) or (2)" in paragraph 188(5)(c) were omitted and the words "209(1) or (2)" were substituted.

(3A) Subsection 186(2B) has effect as if the requirement in that subsection that the agreement must not cover employees in relation to general building and construction work were a requirement that the agreement as proposed to be varied must not cover employees in relation to such work.

(4) Section 193 (which deals with passing the better off overall test) has effect as if:

(a) the words "that is not a greenfields agreement" in subsection (1) were omitted; and

(b) subsection (3) were omitted; and

(c) the words "the agreement" in subsection (6) were omitted and the words "the variation of the enterprise agreement" were substituted; and

(d) the reference in subsection (6) to subsection 182(4) or section 185 were a reference to section 210.

(4A) Section 193A (which also deals with passing the better off overall test) has effect as if:

(a) the words "if the agreement is not a greenfields agreement—" in paragraph (3)(b) were omitted; and

(aa) the words "in any case—a bargaining representative for the agreement" in paragraph (3)(c) were omitted and the words

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"the employee organisation or employee organisations that are covered by the agreement" were substituted; and

(ab) the words "the bargaining representative or bargaining representatives of" in paragraph (4)(a) were omitted; and

(ac) the words "the bargaining representative or bargaining representatives of award covered employees for the agreement (other than a bargaining representative that is not an employee organisation)" in paragraph (4)(b) were omitted and the words "the employee organisation or employee organisations that are covered by the agreement" were substituted; and

(ad) paragraph (4)(c) were omitted; and

(b) subsection (5) were omitted; and

(c) the words "if the agreement is not a greenfields agreement—" in paragraph (6A)(b) were omitted; and

(d) the words "in any case—a bargaining representative for the agreement" in paragraph (6A)(c) were omitted and the words "the employee organisation or employee organisations that are covered by the agreement" were substituted.

(5) For the purposes of determining whether an enterprise agreement as proposed to be varied passes the better off overall test, the FWC must disregard any individual flexibility arrangement that has been agreed to by an award covered employee and his or her employer under the flexibility term in the agreement.

Regulations may prescribe additional modifications

(6) The regulations may provide that, for the purposes of the FWC deciding whether it is satisfied of the matter referred to in paragraph (1)(a), specified provisions of this Part, or regulations made for the purposes of this Part, have effect with such modifications as are prescribed by the regulations.

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212 FWC may approve a variation of an enterprise agreement with undertakings

Application of this section

(1) This section applies if:
  (a) an application for the approval of a variation of an enterprise agreement has been made under section 210; and
  (b) the FWC has a concern that the variation does not meet the requirements set out in section 211.

Approval of agreement with undertakings

(2) The FWC may approve the variation under section 211 if the FWC is satisfied that an undertaking accepted by the FWC under subsection (3) of this section meets the concern.

Undertakings

(3) The FWC may only accept a written undertaking from one or more employers covered by the agreement if the FWC is satisfied that the effect of accepting the undertaking is not likely to:
  (a) cause financial detriment to any affected employee for the variation; or
  (b) result in substantial changes to the variation.

Signature requirements

(4) An undertaking must meet any requirements relating to the signing of undertakings that are prescribed by the regulations.

213 Effect of undertakings

(1) If:
  (a) the FWC approves a variation of an enterprise agreement after accepting an undertaking under subsection 212(3) in relation to the variation; and
  (b) the agreement covers a single employer;

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the undertaking is taken to be a term of the agreement, as the agreement applies to the employer.

(2) If:

(a) the FWC approves a variation of an enterprise agreement after accepting an undertaking under subsection 212(3) in relation to the variation; and

(b) the agreement covers 2 or more employers;

the undertaking is taken to be a term of the agreement, as the agreement applies to each employer that gave the undertaking.

213A FWC may approve variation with amendments

(1) This section applies if:

(a) an application for the approval of a variation of an enterprise agreement has been made under section 210; and

(b) the FWC has a concern that the variation does not meet the requirements set out in section 211 because the requirement set out in paragraph 186(2)(d) (better off overall test), as it has effect because of subsection 211(4), is not met.

(2) The FWC may approve the variation under section 211 if the FWC is satisfied that an amendment to the variation specified by the FWC is necessary to address the concern.

(3) If the FWC intends to specify an amendment under subsection (2), the FWC must seek the views of the following:

(a) one or more of the employers covered by the agreement;

(b) an employee organisation covered by the agreement.

213B Effect of amendment specified by FWC

(1) If:

(a) the FWC specifies an amendment in approving a variation of an enterprise agreement under subsection 213A(2); and

(b) the agreement covers a single employer;

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the variation is taken to be amended by the amendment, as the agreement applies to the employer.

(2) If:

(a) the FWC specifies an amendment in approving an enterprise agreement under subsection 191A(2); and

(b) the agreement covers 2 or more employers;

the variation is taken to be amended by the amendment, as the agreement applies to each employer.

214 When the FWC may refuse to approve a variation of an enterprise agreement

(1) If an application for the approval of a variation of an enterprise agreement is made under section 210, the FWC may refuse to approve the variation if the FWC considers that compliance with the terms of the agreement as proposed to be varied may result in:

(a) a person committing an offence against a law of the Commonwealth; or

(b) a person being liable to pay a pecuniary penalty in relation to a contravention of a law of the Commonwealth.

(2) Subsection (1) has effect despite section 211 (which deals with the approval of variations of enterprise agreements).

(3) If the FWC refuses to approve a variation of an enterprise agreement under this section, the FWC may refer the agreement as proposed to be varied to any person or body the FWC considers appropriate.

215 Approval decision to note undertakings

If the FWC approves a variation of an enterprise agreement after accepting an undertaking under subsection 212(3) in relation to the variation, the FWC must note in its decision to approve the variation that the undertaking is taken to be a term of the agreement.

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215A Approval decision to note amendments

If the FWC specifies an amendment in approving a variation of an enterprise agreement under subsection 213A(2), the FWC must note the amendment in its decision to approve the variation.

216 When variation comes into operation

If a variation of an enterprise agreement is approved under section 211, the variation operates from the day specified in the decision to approve the variation.

Subdivision AA—Variation of supported bargaining agreement to add employer and employees (with consent)

216A Variation of supported bargaining agreement to add employer and employees

(1) A variation of a supported bargaining agreement, that has the effect that an employer that was not covered by the agreement will be covered by it, may be made jointly by the employer and the affected employees.

Note: Once the employer is covered by the agreement, any of their employees who the agreement is expressed to cover will also be covered by it. See also the definition of ***affected employees*** in section 12.

(2) The employer may request the affected employees to approve the proposed variation by voting for it.

(3) Without limiting subsection (2), the employer may request that the affected employees vote by ballot or by an electronic method.

(4) The variation is ***made*** when a majority of the affected employees who cast a valid vote approve the variation.

(5) The variation has no effect unless it is approved by the FWC under section 216AB.

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216AAA Terms of variation must be explained to employees

(1) Before an employer requests under subsection 216A(2) that affected employees approve a proposed variation, the employer must take all reasonable steps to ensure that:

(a) the terms of the agreement as proposed to be varied, and the effect of those terms, are explained to the affected employees; and

(b) the explanation is provided in an appropriate manner taking into account the particular circumstances and needs of those employees.

(2) Without limiting paragraph (1)(b), the following are examples of the kinds of employees whose circumstances and needs are to be taken into account for the purposes of complying with that paragraph:

(a) employees from culturally and linguistically diverse backgrounds;

(b) young employees;

(c) employees who did not have a representative for the variation.

216AA Application for the FWC's approval of a variation of a supported bargaining agreement to add employer and employees

Application for approval

(1) If a variation of a supported bargaining agreement is made as mentioned in section 216A, the employer to be covered by the agreement must apply to the FWC for approval of the variation.

Material to accompany the application

(2) The application must be accompanied by:

(a) a signed copy of the variation; and

(b) a copy of the agreement as proposed to be varied; and

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(c) any declarations that are required by the procedural rules to accompany the application.

When the application must be made

(3) The application must be made:
(a) within 14 days after the variation is made; or
(b) if in all the circumstances the FWC considers it fair to extend that period—within such further period as the FWC allows.

Signature requirements

(4) The regulations may, for the purposes of this Subdivision, prescribe requirements relating to the signing of variations.

216AB When the FWC must approve a variation of a supported bargaining agreement to add employer and employees

(1) If an application for the approval of a variation of a supported bargaining agreement is made under section 216AA, the FWC must approve the variation if the FWC is satisfied that:
(a) if the application that was made under section 242 for the supported bargaining authorisation in relation to the agreement had specified the affected employees and their employer, the FWC would have been required to make the authorisation in accordance with section 216AC; and
(b) the affected employees have voted on whether to approve the variation and, of those who cast a valid vote, a majority approved the variation; and
(c) the variation has been genuinely agreed to by the affected employees in accordance with section 216AD;
unless the FWC is satisfied that there are serious public interest grounds for not approving the variation.

(2) Despite subsection (1), the FWC must not approve the variation if, as a result of the variation, the agreement would cover employees in relation to general building and construction work.

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(3) Despite subsection (1), the FWC must not approve the variation if the employer that will be covered by the agreement is specified in a single interest employer authorisation in relation to any of the affected employees.

216AC Determining whether the FWC would have been required to make a supported bargaining authorisation

For the purposes of paragraph 216AB(1)(a), the FWC is to determine whether it is satisfied that it would have been required to make the supported bargaining authorisation in accordance with sections 243 and 243A, modified as follows:

(a) as if paragraph 243(1)(a), subparagraph 243(1)(b)(iii) and paragraphs 243(1)(c) and (2A)(a) were omitted;

(b) as if references to the employers included the employer who made the application under section 216AA for approval of the variation;

(c) as if references to employees who will be covered by the agreement, or an employee, were references to the affected employees or an affected employee;

(d) as if all of the words in paragraph 243(2A)(b) were replaced with the words "the affected employees are, at the time the application for approval of the variation is being considered, employees in an industry, occupation or sector declared by the Minister under subsection (2B)".

216AD Determining whether a variation of a supported bargaining agreement to add employer and employees has been genuinely agreed to by affected employees

(1) For the purposes of paragraph 216AB(1)(c), the FWC is to determine whether it is satisfied that the variation has been genuinely agreed to by the affected employees in accordance with section 188, modified as follows:

(a) as if references (other than in a note) to an enterprise agreement being genuinely agreed to were references to the variation being genuinely agreed to;

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(b) as if references to employees covered by or expressed to be covered by the agreement, employees requested to approve the agreement by voting for it, or employees, were references to the affected employees;

(c) as if, in paragraph 188(2)(a), the reference to the agreement were a reference to the agreement as proposed to be varied;

(d) as if subsections 188(2A), (3) and (4) were omitted;

(e) as if, in subsections 188(4A) and (5), references to subsection 180(5) were references to section 216AAA;

(f) as if, in paragraph 188(5)(c), the reference to subsection 182(1) or (2) were a reference to subsection 216A(4).

(2) In taking into account the statement of principles made under section 188B:

(a) the FWC may disregard the matters mentioned in paragraphs 188B(3)(a) and (b); and

(b) the matters mentioned in paragraphs 188B(3)(c) and (d) are taken to be matters relating to the agreement as proposed to be varied; and

(c) the matters mentioned in paragraphs 188B(3)(e) are taken to be matters relating to the variation.

(3) The regulations may provide that, for the purposes of the FWC deciding whether it is satisfied that the variation has been genuinely agreed to, specified provisions of this Part, or regulations made for the purposes of this Part, have effect with such modifications as are prescribed by the regulations.

216AE When the FWC may refuse to approve a variation of a supported bargaining agreement to add employer and employees

(1) If an application for the approval of a variation of a supported bargaining agreement is made under section 216AA, the FWC may refuse to approve the variation if the FWC considers that

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compliance with the terms of the agreement as proposed to be varied may result in:

(a) a person committing an offence against a law of the Commonwealth; or

(b) a person being liable to pay a pecuniary penalty in relation to a contravention of a law of the Commonwealth.

(2) Subsection (1) has effect despite section 216AB (which deals with the approval of variations of supported bargaining agreements).

(3) If the FWC refuses to approve a variation of a supported bargaining agreement under this section, the FWC may refer the agreement as proposed to be varied to any person or body the FWC considers appropriate.

216AF When variation comes into operation

If a variation of a supported bargaining agreement is approved under section 216AB, the variation operates from the day specified in the decision to approve the variation.

Subdivision AB—Variation of supported bargaining agreement to add employer and employees (without consent)

216B Application for the FWC to vary a supported bargaining agreement to add employer and employees

Application for variation

(1) An employee organisation that is covered by a supported bargaining agreement may apply to the FWC for a variation of the agreement that has the effect that an employer that was not covered by the agreement will be covered by it.

Note: Once the employer is covered by the agreement, any of their employees who the agreement is expressed to cover will also be covered by it. See also the definition of ***affected employees*** in section 12.

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Material to accompany the application

(2) The application must be accompanied by:
  (a) a signed copy of the variation proposed by the employee organisation; and
  (b) a copy of the agreement as proposed to be varied; and
  (c) any declarations that are required by the procedural rules to accompany the application.

Signature requirements

(3) The regulations may, for the purposes of this Subdivision, prescribe requirements relating to the signing of variations.

216BA When the FWC must make a variation of a supported bargaining agreement to add employer and employees

(1) If an application for the FWC to vary a supported bargaining agreement is made under section 216B, the FWC must make the variation if the FWC is satisfied that:
  (a) a majority of the employees:
    (i) who are employed by the employer at a time determined by the FWC; and
    (ii) who will be covered by the agreement as proposed to be varied;

  want to be covered by the agreement; and
  (b) it is appropriate for the employees to be covered by the agreement.

(2) In determining whether it is satisfied that it is appropriate for the employees to be covered by the agreement:
  (a) the FWC must take into account the views of:
    (i) each employee organisation covered by the agreement; and
    (ii) the employer that will be covered by the agreement if the variation is made; and

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(b) the FWC may have regard to the matters referred to in section 243 (when the FWC must make a supported bargaining authorisation).

(3) Despite subsection (1), the FWC must not make the variation if:
(a) as a result of the variation, the agreement would cover employees in relation to general building and construction work; or
(b) the affected employees are covered by an enterprise agreement that has not passed its nominal expiry date.

(4) Despite subsection (1), the FWC must not make the variation if the employer that will be covered by the agreement is specified in a single interest employer authorisation in relation to any of the affected employees.

216BB When the FWC may refuse to make a variation of a supported bargaining agreement to add employer and employees

(1) If an application for the variation of a supported bargaining agreement is made under section 216B, the FWC may refuse to make the variation if the FWC considers that compliance with the terms of the agreement as proposed to be varied may result in:
(a) a person committing an offence against a law of the Commonwealth; or
(b) a person being liable to pay a pecuniary penalty in relation to a contravention of a law of the Commonwealth.

(2) Subsection (1) has effect despite section 216BA (which deals with making variations of supported bargaining agreements without consent).

(3) If the FWC refuses to make a variation of a supported bargaining agreement under this section, the FWC may refer the agreement as proposed to be varied to any person or body the FWC considers appropriate.

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216BC When variation comes into operation

If a variation of a supported bargaining agreement is made under section 216BA, the variation operates from the day specified in the decision to make the variation.

Subdivision AC—Variation of cooperative workplace agreement to add employer and employees

216C Variation of cooperative workplace agreement to add employer and employees

(1) A variation of a cooperative workplace agreement, that has the effect that an employer that was not covered by the agreement will be covered by it, may be made jointly by the employer and the affected employees.

Note: Once the employer is covered by the agreement, any of their employees who the agreement is expressed to cover will also be covered by it. See also the definition of ***affected employees*** in section 12.

(2) The employer may request the affected employees to approve the proposed variation by voting for it.

(3) Without limiting subsection (3), the employer may request that the affected employees vote by ballot or by an electronic method.

(4) The variation is ***made*** when a majority of the affected employees who cast a valid vote approve the variation.

(5) The variation has no effect unless it is approved by the FWC under section 216CB.

216CAA Terms of the variation must be explained to employees

(1) Before an employer requests under subsection 216C(2) that affected employees approve a proposed variation, the employer must take all reasonable steps to ensure that:

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(a) the terms of the agreement as proposed to be varied, and the effect of those terms, are explained to the affected employees; and

(b) the explanation is provided in an appropriate manner taking into account the particular circumstances and needs of those employees.

(2) Without limiting paragraph (1)(b), the following are examples of the kinds of employees whose circumstances and needs are to be taken into account for the purposes of complying with that paragraph:

(a) employees from culturally and linguistically diverse backgrounds;

(b) young employees;

(c) employees who did not have a representative for the variation.

216CA Application for the FWC's approval of a cooperative workplace agreement to add employer and employees

Application for approval

(1) If a variation of a cooperative workplace agreement is made as mentioned in section 216C, the employer must apply to the FWC for approval of the variation.

Material to accompany the application

(2) The application must be accompanied by:

(a) a signed copy of the variation; and

(b) a copy of the agreement as proposed to be varied; and

(c) any declarations that are required by the procedural rules to accompany the application.

When the application must be made

(3) The application must be made:

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(a) within 14 days after the variation is made; or
(b) if in all the circumstances the FWC considers it fair to extend that period—within such further period as the FWC allows.

Signature requirements

(4) The regulations may, for the purposes of this Subdivision, prescribe requirements relating to the signing of variations.

216CB When the FWC must approve a variation of a cooperative workplace agreement to add employer and employees

(1) If an application for the approval of a variation of a cooperative workplace agreement is made under section 216CA, the FWC must approve the variation if the FWC is satisfied that:
(a) the employers, and any employee organisations, covered by the agreement before the variation was made have had an opportunity to express to the FWC their views (if any) on the variation; and
(b) the affected employees have voted on whether to approve the variation and, of those who cast a valid vote, a majority approved the variation; and
(c) the variation has been genuinely agreed to by the affected employees in accordance with section 216CC; and
(d) it is not contrary to the public interest for the employer and the affected employees to be covered by the agreement.

(2) Despite subsection (1), the FWC must not approve the variation if:
(a) the agreement is a greenfields agreement that covers employees in relation to general building and construction work; or
(b) as a result of the variation, the agreement would cover employees in relation to general building and construction work.

(3) Despite subsection (1), the FWC must not approve the variation if the employer that will be covered by the agreement is specified in a

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supported bargaining authorisation, or a single interest employer authorisation, in relation to any of the affected employees.

216CC Determining whether a variation of a cooperative workplace agreement to add employer and employees has been genuinely agreed to by affected employees

(1) For the purposes of paragraph 216CB(1)(c), the FWC is to determine whether it is satisfied that the variation has been genuinely agreed to by the affected employees in accordance with section 188, modified as follows:

(a) as if references (other than in a note) to an enterprise agreement being genuinely agreed to were references to the variation being genuinely agreed to;

(b) as if references to employees covered by or expressed to be covered by the agreement, employees requested to approve the agreement by voting for it, or employees, were references to the affected employees;

(c) as if, in paragraph 188(2)(a), the reference to the agreement were a reference to the agreement as proposed to be varied;

(d) as if subsections 188(2A), (3) and (4) were omitted;

(e) as if, in subsections 188(4A) and (5), references to subsection 180(5) were references to section 216CAA;

(f) as if, in paragraph 188(5)(c), the reference to subsection 182(1) or (2) were a reference to subsection 216C(4).

(2) In taking into account the statement of principles made under section 188B:

(a) the FWC may disregard the matters mentioned in paragraphs 188B(3)(a) and (b); and

(b) the matters mentioned in paragraphs 188B(3)(c) and (d) are taken to be matters relating to the agreement as proposed to be varied; and

(c) the matters mentioned in paragraph 188B(3)(e) are taken to be matters relating to the variation.

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(3) The regulations may provide that, for the purposes of the FWC determining whether it is satisfied that the variation has been genuinely agreed to by the affected employees, specified provisions of this Part, or regulations made for the purposes of this Part, have effect with such modifications as are prescribed by the regulations.

216CD When the FWC may refuse to approve a variation of a cooperative workplace agreement

(1) If an application for the approval of a variation of a cooperative workplace agreement is made under section 216CA, the FWC may refuse to approve the variation if the FWC considers that compliance with the terms of the agreement as proposed to be varied may result in:

(a) a person committing an offence against a law of the Commonwealth; or

(b) a person being liable to pay a pecuniary penalty in relation to a contravention of a law of the Commonwealth.

(2) Subsection (1) has effect despite section 216CB (which deals with the approval of variations of cooperative workplace agreements).

(3) If the FWC refuses to approve a variation of a cooperative workplace agreement under this section, the FWC may refer the agreement as proposed to be varied to any person or body the FWC considers appropriate.

216CE When variation comes into operation

If a variation of a cooperative workplace agreement is approved under section 216CB, the variation operates from the day specified in the decision to approve the variation.

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Subdivision AD—Variation of single interest employer agreement to add employer and employees

216D Variation of single interest employer agreement to add employer and employees—joint variation

Variation by employers and employees

(1) The following may jointly make a variation of a single interest employer agreement that will have the effect that they will be covered by the agreement:
  (a) an employer that is not covered by the agreement;
  (b) the employees employed by the employer at the time who will be covered by the agreement if the variation is approved by the FWC (the ***affected employees***).

Variation has no effect unless approved by the FWC

(2) The variation has no effect unless it is approved by the FWC under section 216DC.

Approval by employee vote

(3) The employer may request the affected employees to approve the proposed variation by voting for it.

(4) Without limiting subsection (3), the employer may request that the affected employees vote by ballot or by an electronic method.

When a variation is made

(5) A variation under this section is ***made*** when a majority of the affected employees who cast a valid vote approve the variation.

216DAA Terms of variation must be explained to employees

(1) Before an employer requests under subsection 216D(3) that affected employees approve a proposed variation, the employer must take all reasonable steps to ensure that:

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(a) the terms of the agreement as proposed to be varied, and the effect of those terms, are explained to the affected employees; and

(b) the explanation is provided in an appropriate manner taking into account the particular circumstances and needs of those employees.

(2) Without limiting paragraph (1)(b), the following are examples of the kinds of employees whose circumstances and needs are to be taken into account for the purposes of complying with that paragraph:

(a) employees from culturally and linguistically diverse backgrounds;

(b) young employees;

(c) employees who did not have a representative for the variation.

216DA Application for the FWC's approval of a variation of a single interest employer agreement to add employer and employees—joint variation

Application for approval

(1) If a variation of a single interest employer agreement is made under section 216D, the employer to be covered by the agreement must apply to the FWC for approval of the variation.

Material to accompany the application

(2) The application must be accompanied by:

(a) a signed copy of the variation; and

(b) a copy of the agreement as proposed to be varied; and

(c) any declarations that are required by the procedural rules to accompany the application.

When the application must be made

(3) The application must be made:

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(a) within 14 days after the variation is made; or
(b) if in all the circumstances the FWC considers it fair to extend that period—within such further period as the FWC allows.

Signature requirements

(4) The regulations may prescribe requirements relating to the signing of variations of single interest employer agreements made under section 216D.

216DB Application for the FWC's approval of a variation of a single interest employer agreement to add employer and employees—application by employee organisation

Application for approval

(1) An employee organisation that is covered by a single interest employer agreement may apply to the FWC for the approval of a variation of the agreement that will have the effect that the following will be covered by the agreement:
(a) an employer that is not covered by the agreement;
(b) the employees employed by the employer at the time who will be covered by the agreement if the variation is approved by the FWC (the ***affected employees***).

Material to accompany the application

(2) The application must be accompanied by:
(a) a signed copy of the variation for which approval is sought; and
(b) a copy of the agreement as proposed to be varied; and
(c) any declarations that are required by the procedural rules to accompany the application.

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Signature requirements

(3) The regulations may prescribe requirements relating to the signing of variations of single interest employer agreements for which approval is sought under this section.

216DC When the FWC must approve a variation of a single interest employer agreement to add employer and employees

Approval of variation by the FWC

(1) The FWC must approve a variation of a single interest employer agreement if:

(a) an application for approval of the variation has been made under section 216DA or 216DB; and

(b) the FWC is satisfied that:

(i) the employers and any employee organisations covered by the agreement have had an opportunity to express to the FWC their views (if any) on the application; and

(ii) if the application was made by an employer under section 216DA—the variation has been genuinely agreed to by the affected employees in accordance with section 216DD; and

(iii) if the application was made by an employee organisation under section 216DB—the requirements of subsection (1A) are met; and

(iv) the requirements of either subsection (2) or (3) (which deal with franchisees and common interest employers) are met; and

(v) if the requirements of subsection (3) are met—the operations and business activities of the employer are reasonably comparable with those of the other employers who are covered by the agreement.

(1AA) If:

(a) the application for approval of the variation was made by an employee organisation under section 216DB; and

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(b) the employer that will be covered by the agreement employed 50 employees or more at the time that the application was made;

it is presumed for the purposes of subparagraph (1)(b)(v) that the operations and business activities of the employer are reasonably comparable with those of the other employers that are covered by the agreement, unless the contrary is proved.

Additional requirements for application by employee organisation

(1A) The requirements of this subsection are met if:

(a) the employer that will be covered by the agreement employed at least 20 employees at the time that the application for approval of the variation was made; and

(b) a majority of the affected employees want to be covered by the agreement; and

(c) subsection (1C) does not apply to the employer.

(1B) For the purposes of paragraph (1A)(b), the FWC may work out whether a majority of the affected employees want to be covered by the agreement using any method the FWC considers appropriate.

(1C) This subsection applies to an employer if:

(a) the employer and the affected employees are covered by another enterprise agreement that has not passed its nominal expiry date at the time that the FWC will approve the variation; or

(b) the employer and an employee organisation that is entitled to represent the industrial interests of one or more of the affected employees have agreed in writing to bargain for a proposed single-enterprise agreement that would cover the employer and the affected employees or substantially the same group of the affected employees.

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Franchisees

(2) The requirements of this subsection are met if the employers covered by the agreement and the employer that will be covered by the agreement carry on similar business activities under the same franchise and are:

(a) franchisees of the same franchisor; or

(b) related bodies corporate of the same franchisor; or

(c) any combination of the above.

Common interest employers

(3) The requirements of this subsection are met if it is appropriate to approve the variation, having regard to:

(a) whether the employers covered by the agreement and the employer that will be covered by the agreement have clearly identifiable common interests; and

(b) whether it would be contrary to the public interest to approve the variation.

(3A) For the purposes of paragraph (3)(a), matters that may be relevant to determining whether the employers have a common interest include the following:

(a) geographical location;

(b) regulatory regime;

(c) the nature of the enterprises to which the agreement relates, and the terms and conditions of employment in those enterprises.

(3AB) If:

(a) the application for approval of the variation was made by an employee organisation under section 216DB; and

(b) the employer that will be covered by the agreement employed 50 employees or more at the time that the application was made;

it is presumed that the requirements of subsection (3) are met, unless the contrary is proved.

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Calculating number of employees

(3AC) For the purposes of calculating the number of employees referred to in paragraph (1AA)(b), (1A)(a) or (3AB)(b):

(a) ***employee*** has its ordinary meaning; and

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

(c) a casual employee is not to be counted unless, at that time, the employee is a regular casual employee of the employer; and

(d) associated entities of the employer are taken to be one entity.

Employers and employees that are already bargaining

(3B) Despite subsection (1), the FWC may refuse to approve the variation if the FWC is satisfied that:

(a) the employer is bargaining in good faith for a proposed enterprise agreement that will cover the employer and the affected employees, or substantially the same group of the affected employees; and

(b) the employer and the affected employees have a history of effectively bargaining in relation to one or more enterprise agreements that have covered the employer and the affected employees, or substantially the same group of the affected employees; and

(c) on the day that the FWC will approve the variation, less than 9 months have passed since the most recent nominal expiry date of an agreement referred to in paragraph (b).

General building and construction work

(4) Despite subsection (1), the FWC must not approve the variation if:

(a) the agreement is a greenfields agreement that covers employees in relation to general building and construction work; or

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(b) as a result of the variation, the agreement would cover employees in relation to general building and construction work.

Supported bargaining authorisation

(5) Despite subsection (1), the FWC must not approve the variation if the employer that will be covered by the agreement is specified in a supported bargaining authorisation in relation to any of the affected employees.

216DD Determining whether a variation of a single interest employer agreement to add employer and employees has been genuinely agreed to by affected employees

(1) For the purposes of subparagraph 216DC(1)(b)(ii), the FWC is to determine whether it is satisfied that the variation has been genuinely agreed to by the affected employees in accordance with section 188, modified as follows:

(a) as if references (other than in a note) to an enterprise agreement being genuinely agreed to were references to the variation being genuinely agreed to;

(b) as if references to employees covered by or expressed to be covered by the agreement, employees requested to approve the agreement by voting for it, or employees, were references to the affected employees;

(c) as if, in paragraph 188(2)(a), the reference to the agreement were a reference to the agreement as proposed to be varied;

(d) as if subsections 188(2A), (3) and (4) were omitted;

(e) as if, in subsections 188(4A) and (5), references to subsection 180(5) were references to section 216DAA;

(f) as if, in paragraph 188(5)(c), the reference to subsection 182(1) or (2) were a reference to subsection 216D(5).

(2) In taking into account the statement of principles made under section 188B:

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(a) the FWC may disregard the matters mentioned in paragraphs 188B(3)(a) and (b); and

(b) the matters mentioned in paragraphs 188B(3)(c) and (d) are taken to be matters relating to the agreement as proposed to be varied; and

(c) the matters mentioned in paragraphs 188B(3)(e) are taken to be matters relating to the variation.

(3) The regulations may provide that, for the purposes of the FWC determining whether it is satisfied that the variation has been genuinely agreed to by the affected employees for the purposes of subparagraph 216DC(1)(b)(ii), specified provisions of this Part, or regulations made for the purposes of this Part, have effect with such modifications as are prescribed by the regulations.

216DE When the FWC may refuse to approve a variation of a single interest employer agreement

(1) If an application for the approval of a variation of a single interest employer agreement is made under section 216DA or 216DB, the FWC may refuse to approve the variation if the FWC considers that compliance with the terms of the agreement as proposed to be varied may result in:

(a) a person committing an offence against a law of the Commonwealth; or

(b) a person being liable to pay a pecuniary penalty in relation to a contravention of a law of the Commonwealth.

(2) Subsection (1) has effect despite section 216DC (which deals with the approval of variations of single interest employer agreements).

(3) If the FWC refuses to approve a variation of a single interest employer agreement under this section, the FWC may refer the agreement as proposed to be varied to any person or body the FWC considers appropriate.

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216DF When variation comes into operation

If a variation of a single interest employer agreement is approved under section 216DC, the variation operates from the day specified in the decision to approve the variation.

Subdivision AE—Variation of multi-enterprise agreement to remove employer and employees

216E Variation of multi-enterprise agreement to remove employer and employees with consent

Variation by employers and employees

(1) The following may jointly make a variation of a multi-enterprise agreement covered by subsection (2), that will have the effect that they will cease to be covered by the agreement:
  (a) an employer that is covered by the agreement;
  (b) the employees employed at the time who will cease to be covered by the agreement if the variation is approved by the FWC (the ***affected employees***).

(2) This subsection covers a multi-enterprise agreement made after the commencement of this subsection if the agreement is not a greenfields agreement and there are 2 or more employers covered by the agreement.

Variation has no effect unless approved by the FWC

(3) The variation has no effect unless it is approved by the FWC under section 216EB.

Approval by employee vote

(4) The employer may request the affected employees to approve the proposed variation by voting for it.

(5) Before making the request, the employer must:

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(a) take all reasonable steps to notify the employees of the following:
  (i) the time and place at which the vote will occur;
  (ii) the voting method that will be used; and
(b) give the employees a reasonable opportunity to decide whether they want to approve the proposed variation.

(6) Without limiting subsection (4), the employer may request that the affected employees vote by ballot or by an electronic method.

When a variation is made

(7) The variation is ***made*** when a majority of the affected employees who cast a valid vote approve the variation.

216EA Application for the FWC's approval of variation

Application for approval

(1) If a variation of a multi-enterprise agreement is made as mentioned in section 216E, one of the following must apply to the FWC for approval of the variation:
(a) the employer mentioned in paragraph 216E(1)(a);
(b) an affected employee;
(c) an employee organisation covered by the agreement that is entitled to represent the industrial interests of an affected employee.

Material to accompany the application

(2) The application must be accompanied by any declarations that are required by the procedural rules to accompany the application.

When the application must be made

(3) The application must be made:
(a) within 14 days after the variation is made; or

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(b) if in all the circumstances the FWC considers it fair to extend that period—within such further period as the FWC allows.

Signature requirements

(4) The regulations may prescribe requirements relating to the signing of variations of enterprise agreements.

216EB When the FWC must approve variation of multi-enterprise agreement to remove employer and employees

If an application for the approval of a variation of a multi-enterprise agreement is made under section 216EA, the FWC must approve the variation if the FWC is satisfied that:

(a) the employer mentioned in paragraph 216E(1)(a) complied with subsection 216E(5) (which deals with giving employees a reasonable opportunity to decide etc.) in relation to the variation; and

(b) the affected employees have voted, by ballot or by an electronic method, on whether to approve the variation and, of those who cast a valid vote, a majority approved the variation; and

(c) there are no other reasonable grounds for believing that a majority of the affected employees who cast a valid vote did not approve the variation; and

(d) each employee organisation covered by the agreement, that is entitled to represent the industrial interests of one or more affected employees, agrees to the variation.

216EC When variation comes into operation

If a variation of a multi-enterprise agreement is approved under section 216EB, the variation operates from the day specified in the decision to approve the variation.

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216ED Effect of variation

A multi-enterprise agreement that is varied under this Subdivision remains a multi-enterprise agreement, despite the variation.

Subdivision B—Variations of enterprise agreements where there is ambiguity, uncertainty or discrimination

217 Variation of an enterprise agreement to remove an ambiguity or uncertainty

(1) The FWC may vary an enterprise agreement to remove an ambiguity or uncertainty on application by any of the following:
  (a) one or more of the employers covered by the agreement;
  (b) an employee covered by the agreement;
  (c) an employee organisation covered by the agreement.

(2) If the FWC varies the enterprise agreement, the variation operates from the day specified in the decision to vary the agreement.

217A FWC may deal with certain disputes about variations

(1) This section applies if a variation of an enterprise agreement is proposed.

(2) An employer or employee organisation covered by the enterprise agreement or an affected employee for the variation may apply to the FWC for the FWC to deal with a dispute about the proposed variation if the employer and the affected employees are unable to resolve the dispute.

(3) The FWC must not arbitrate (however described) the dispute.

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218 Variation of an enterprise agreement on referral by Australian Human Rights Commission

Review of an enterprise agreement

(1) The FWC must review an enterprise agreement if the agreement is referred to it under section 46PW of the *Australian Human Rights Commission Act 1986* (which deals with discriminatory industrial instruments).

(2) The following are entitled to make submissions to the FWC for consideration in the review:
  (a) if the referral relates to action that would be unlawful under Part 4 of the *Age Discrimination Act 2004*—the Age Discrimination Commissioner;
  (b) if the referral relates to action that would be unlawful under Part 2 of the *Disability Discrimination Act 1992*—the Disability Discrimination Commissioner;
  (c) if the referral relates to action that would be unlawful under Part II of the *Sex Discrimination Act 1984*—the Sex Discrimination Commissioner.

Variation of an enterprise agreement

(3) If the FWC considers that the agreement reviewed requires a person to do an act that would be unlawful under any of the Acts referred to in subsection (2) (but for the fact that the act would be done in direct compliance with the agreement), the FWC must vary the agreement so that it no longer requires the person to do an act that would be so unlawful.

(4) If the agreement is varied under subsection (3), the variation operates from the day specified in the decision to vary the agreement.

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Subdivision BA—Variation of enterprise agreements to correct or amend errors, defects or irregularities

218A Variation of enterprise agreements to correct or amend errors, defects or irregularities

(1) The FWC may vary an enterprise agreement to correct or amend an obvious error, defect or irregularity (whether in substance or form).

(2) The FWC may vary an enterprise agreement under subsection (1):
  (a) on its own initiative; or
  (b) on application by any of the following:
    (i) one or more of the employers covered by the agreement;
    (ii) an employee covered by the agreement;
    (iii) an employee organisation covered by the agreement.

(3) If the FWC varies an enterprise agreement under subsection (1), the variation operates from the day specified in the decision to vary the agreement.

Subdivision C—Termination of enterprise agreements by employers and employees

219 Employers and employees may agree to terminate an enterprise agreement

Termination by employers and employees

(1) The following may jointly agree to terminate an enterprise agreement:
  (a) if the agreement covers a single employer—the employer and the employees covered by the agreement; or
  (b) if the agreement covers 2 or more employers—all of the employers and the employees covered by the agreement.

Note: For when a termination of an enterprise agreement is ***agreed to***, see section 221.

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Termination has no effect unless approved by the FWC

(2) A termination of an enterprise agreement has no effect unless it is approved by the FWC under section 223.

Limitation—greenfields agreement

(3) Subsection (1) applies to a greenfields agreement only if one or more of the persons who will be necessary for the normal conduct of the enterprise concerned and are covered by the agreement have been employed.

220 Employers may request employees to approve a proposed termination of an enterprise agreement

(1) An employer covered by an enterprise agreement may request the employees covered by the agreement to approve a proposed termination of the agreement by voting for it.

(2) Before making the request, the employer must:
  (a) take all reasonable steps to notify the employees of the following:
    (i) the time and place at which the vote will occur;
    (ii) the voting method that will be used; and
  (b) give the employees a reasonable opportunity to decide whether they want to approve the proposed termination.

(3) Without limiting subsection (1), the employer may request that the employees vote by ballot or by an electronic method.

221 When termination of an enterprise agreement is agreed to

Single-enterprise agreement

(1) If the employees of an employer, or each employer, covered by a single-enterprise agreement have been asked to approve a proposed termination of the agreement under subsection 220(1), the termination is ***agreed to*** when a majority of the employees who cast a valid vote approve the termination.

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Multi-enterprise agreement

(2) If the employees of each employer covered by a multi-enterprise agreement have been asked to approve a proposed termination of the agreement under subsection 220(1), the termination is ***agreed to*** when a majority of the employees of each individual employer who cast a valid vote have approved the termination.

222 Application for the FWC's approval of a termination of an enterprise agreement

Application for approval

(1) If a termination of an enterprise agreement has been agreed to, a person covered by the agreement must apply to the FWC for approval of the termination.

Material to accompany the application

(2) The application must be accompanied by any declarations that are required by the procedural rules to accompany the application.

When the application must be made

(3) The application must be made:
  (a) within 14 days after the termination is agreed to; or
  (b) if in all the circumstances the FWC considers it fair to extend that period—within such further period as the FWC allows.

223 When the FWC must approve a termination of an enterprise agreement

If an application for the approval of a termination of an enterprise agreement is made under section 222, the FWC must approve the termination if:
  (a) the FWC is satisfied that each employer covered by the agreement complied with subsection 220(2) (which deals with giving employees a reasonable opportunity to decide etc.) in relation to the agreement; and

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(b) the FWC is satisfied that the termination was agreed to in accordance with whichever of subsection 221(1) or (2) applies (those subsections deal with agreement to the termination of different kinds of enterprise agreements by employee vote); and

(c) the FWC is satisfied that there are no other reasonable grounds for believing that the employees have not agreed to the termination; and

(d) the FWC considers that it is appropriate to approve the termination taking into account the views of the employee organisation or employee organisations (if any) covered by the agreement.

224 When termination comes into operation

If a termination of an enterprise agreement is approved under section 223, the termination operates from the day specified in the decision to approve the termination.

Subdivision D—Termination of enterprise agreements after nominal expiry date

225 Application for termination of an enterprise agreement after its nominal expiry date

If an enterprise agreement has passed its nominal expiry date, any of the following may apply to the FWC for the termination of the agreement:

(a) one or more of the employers covered by the agreement;

(b) an employee covered by the agreement;

(c) an employee organisation covered by the agreement.

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226 Terminating an enterprise agreement after its nominal expiry date

(1) If an application for the termination of an enterprise agreement is made under section 225, the FWC must terminate the agreement if:

(a) the FWC is satisfied that the continued operation of the agreement would be unfair for the employees covered by the agreement; or

(b) the FWC is satisfied that the agreement does not, and is not likely to, cover any employees; or

(c) all of the following apply:

(i) the FWC is satisfied that the continued operation of the enterprise agreement would pose a significant threat to the viability of a business carried on by the employer, or employers, covered by the agreement;

(ii) the FWC is satisfied that the termination of the enterprise agreement would be likely to reduce the potential of terminations of employment covered by subsection (2) for the employees covered by the agreement;

(iii) if the agreement contains terms providing entitlements relating to the termination of employees' employment—each employer covered by the agreement has given the FWC a guarantee of termination entitlements in relation to the termination of the agreement.

(1A) However, the FWC must terminate the enterprise agreement under subsection (1) only if the FWC is satisfied that it is appropriate in all the circumstances to do so.

(2) This subsection covers a termination of the employment of an employee:

(a) at the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour; or

(b) because of the insolvency or bankruptcy of the employer.

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(3) In deciding whether to terminate the agreement, the FWC must consider the views of the following covered by the agreement:
  (a) the employees (unless there are no employees covered by the agreement);
  (b) each employer;
  (c) each employee organisation (if any).

Note: The President may be required to direct a Full Bench to perform a function or exercise a power in relation to the matter if any of the employers, employees, or employee organisations, covered by the agreement oppose the termination (see subsection 615A(3)).

(4) In deciding whether to terminate the agreement (the ***existing agreement***), the FWC must have regard to:
  (a) whether the application was made at or after the notification time for a proposed enterprise agreement that will cover the same, or substantially the same, group of employees as the existing agreement; and
  (b) whether bargaining for the proposed enterprise agreement is occurring; and
  (c) whether the termination of the existing agreement would adversely affect the bargaining position of the employees that will be covered by the proposed enterprise agreement.

(5) In deciding whether to terminate the agreement, the FWC may also have regard to any other relevant matter.

226A Guarantee of termination entitlements

Guarantee of termination entitlements

(1) A ***guarantee of termination entitlements*** is an undertaking given by an employer covered by an enterprise agreement that:
  (a) is an undertaking that the employer will comply with subsection (3) if the agreement is terminated under section 226 and the employer terminates the employment of a protected employee for the termination of the agreement:
    (i) at the employer's initiative because the employer no longer requires the job done by the employee to be done

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by anyone, except where this is due to the ordinary and customary turnover of labour; or

(ii) because of the insolvency or bankruptcy of the employer; and

(b) is in writing; and

(c) meets any requirements relating to the signing of undertakings that are prescribed by the regulations.

(2) A ***protected employee*** for a termination of an enterprise agreement under section 226 is an employee who would, but for the termination of the agreement, be covered by the agreement.

(3) For the purposes of paragraph (1)(a), the employer complies with this subsection, in relation to the termination of the protected employee's employment, if the employer complies with the terms of the enterprise agreement that, if the agreement were still in operation, would have provided the employee with entitlements that:

(a) relate to a termination of the employee's employment:

(i) at the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour; or

(ii) because of the insolvency or bankruptcy of the employer; and

(b) except if the employee was an award/agreement free employee immediately before the termination of the employee's employment—are more beneficial than the entitlements under a modern award that covered the employee in relation to the employment at that time.

When guarantee is in force

(4) A guarantee of termination entitlements given in relation to the termination of an enterprise agreement:

(a) comes into force on the day on which the termination of the agreement comes into operation under section 227; and

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(b) ceases to be in force at the earliest of the following times:

(i) if the guarantee specifies a period during which the guarantee is to remain in force and the FWC approves that period under subsection (5)—the end of that period;

(ii) immediately before another enterprise agreement that covers the same, or substantially the same, group of employees as the terminated agreement comes into force;

(iii) the end of the period of 4 years beginning on the day the guarantee is given to the FWC.

(5) The FWC may, in its decision terminating an enterprise agreement, approve a period for the purposes of subparagraph (4)(b)(i) if it considers the period to be appropriate.

Employer must comply with guarantee

(6) An employer must comply with a guarantee of termination entitlements given by the employer to the FWC in relation to the termination of an enterprise agreement if:

(a) the agreement is terminated under section 226; and

(b) the employer terminates the employment of a protected employee for the termination of the agreement while the guarantee is in force:

(i) at the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour; or

(ii) because of the insolvency or bankruptcy of the employer.

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

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Guarantee is a governing instrument for employment

(7) To avoid doubt, a guarantee of termination entitlements is a governing instrument for employment for the purposes of the *Fair Entitlements Guarantee Act 2012*.

227 When termination comes into operation

If an enterprise agreement is terminated under section 226, the termination operates from the day specified in the decision to terminate the agreement.

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Division 7A—Reconsideration of whether an enterprise agreement passes the better off overall test

227A Application for FWC to reconsider whether an enterprise agreement passes the better off overall test

(1) If the condition in subsection (2) is satisfied, any of the following may apply to the FWC for a reconsideration of whether an enterprise agreement passes the better off overall test:

(a) one or more of the employers covered by the agreement;

(b) an employee covered by the agreement;

(c) an employee organisation covered by the agreement.

(2) The condition in this subsection is satisfied if:

(a) before approving the agreement the FWC had regard, under subsection 193A(6), to patterns or kinds of work, or types of employment engaged in, or to be engaged in, by:

(i) the award covered employees for the agreement; and

(ii) if the agreement is a single-enterprise agreement that covers one or more employees to whom a supported bargaining agreement or a single interest employer agreement applies—those employees; and

(b) at the test time or a later time, one or more employees covered by subsection (4) or (5) engaged in other patterns or kinds of work, or other types of employment, to which the FWC did not have regard under subsection 193A(6).

Example: Before approving the agreement the FWC had regard, under subsection 193A(6), to work on Saturdays and Sundays as a pattern of work for a class of employees. At the test time some employees covered by subsection (4) worked only on Sundays, and the FWC did not have regard, under subsection 193A(6), to this pattern of work. In these circumstances, the condition in this subsection is satisfied.

(4) An employee is covered by this subsection if, on the assumption that the test time mentioned in paragraph 193(4)(b) were the time

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the application is made under subsection (1) of this section, the employee would be an award covered employee for the agreement.

(5) An employee is covered by this subsection if, on the assumption that the test time mentioned in section 193 were the time the application is made under subsection (1) of this section, the employee would be an employee referred to in subparagraph (2)(a)(ii).

227B Reconsideration of whether an enterprise agreement passes the better off overall test

(1) If an application is made under subsection 227A(1), the FWC must reconsider whether the agreement passes the better off overall test under section 193.

(2) For the purposes of the reconsideration, sections 193 and 193A have effect as if:

(a) the conditions in paragraphs 193(4)(a) and (b) were satisfied in relation to an employee covered by subsection 227A(4); and

(aa) in the case of an agreement of a kind covered by paragraph 193(1)(b)—the condition that a supported bargaining agreement or a single interest employer agreement applies to the employees is satisfied in relation to an employee covered by subsection 227A(5); and

(b) the words "the time the application for approval of the agreement by the FWC was made under subsection 182(4) or section 185" in subsection 193(6) were omitted and the words "the time mentioned in subsection 227B(2A)" were substituted; and

(c) the words "if the agreement is not a greenfields agreement—" in paragraph 193A(3)(b) were omitted; and

(d) the words "in any case—a bargaining representative for the agreement" in paragraph 193A(3)(c) were omitted and the words "the employee organisation or employee organisations that are covered by the agreement" were substituted; and

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(e) the words "the bargaining representative or bargaining representatives of" in paragraph 193A(4)(a) were omitted; and

(f) the words "the bargaining representative or bargaining representatives of award covered employees for the agreement (other than a bargaining representative that is not an employee organisation)" in paragraph 193A(4)(b) were omitted and the words "the employee organisation or employee organisations that are covered by the agreement" were substituted; and

(fa) paragraph 193A(4)(c) were omitted; and

(g) the words "if the agreement is not a greenfields agreement—" in paragraph 193A(6A)(b) were omitted; and

(h) the words "in any case—a bargaining representative for the agreement" in paragraph 193A(6A)(c) were omitted and the words "the employee organisation or employee organisations that are covered by the agreement" were substituted.

(2A) For the purposes of paragraph (2)(b), the time is:

(a) unless paragraph (b) applies—the time the application for approval of the agreement by the FWC was made under section 185; or

(b) if the FWC has approved one or more variations of the agreement under section 211—the time the application for approval of the most recent of those variations by the FWC was made under section 210.

(3) If the FWC has a concern that the enterprise agreement does not pass the better off overall test, the FWC may:

(a) accept an undertaking from one or more employers covered by the agreement if the FWC is satisfied the undertaking addresses the concern; or

(b) amend the agreement if the FWC is satisfied the amendment is necessary to address the concern.

(4) An amendment under paragraph (3)(b) operates from:

(a) 7 days after the FWC makes the amendment; or

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(b) if another day is specified in the amendment (which may be a day before the amendment is made)—that other day.

(5) The FWC must specify a day before the amendment is made for the purposes of paragraph (4)(b) if the FWC considers that it is necessary for the amendment to operate from the earlier day to address the concern to which the amendment relates.

227C Effect of undertakings

(1) If:

(a) the FWC accepts an undertaking under paragraph 227B(3)(a) in relation to an enterprise agreement; and

(b) the agreement covers a single employer;

the undertaking is taken to be a term of the agreement, as the agreement applies to the employer.

(2) If:

(a) the FWC accepts an undertaking under paragraph 227B(3)(a) in relation to an enterprise agreement; and

(b) the agreement covers 2 or more employers;

the undertaking is taken to be a term of the agreement, as the agreement applies to each employer that gave the undertaking.

227D Effect of amendment

(1) If:

(a) the FWC makes an amendment under paragraph 227B(3)(b) in relation to an enterprise agreement; and

(b) the agreement covers a single employer;

the agreement is taken to be amended by the amendment, as the agreement applies to the employer.

(2) If:

(a) the FWC makes an amendment under paragraph 227B(3)(b) in relation to an enterprise agreement; and

(b) the agreement covers 2 or more employers;

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the agreement is taken to be amended by the amendment, as the agreement applies to each employer.

227E No creation of liability to pay pecuniary penalty for past conduct

Application of this section

(1) This section applies if an amendment of an enterprise agreement made under paragraph 227B(3)(b) has a retrospective effect because it comes into operation on a day before the day on which the amendment is made.

No creation of liability to pay pecuniary penalty for past conduct

(2) If:

(a) a person engaged in conduct before the amendment was made; and

(b) but for the retrospective effect of the amendment, the conduct would not have contravened a term of the enterprise agreement;

a court must not order a 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 an enterprise agreement.

Note: This section does not affect the powers of a court to make other kinds of orders under Division 2 of Part 4-1.

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Division 8—FWC's general role in facilitating bargaining

Subdivision A—Bargaining orders

228 Bargaining representatives must meet the good faith bargaining requirements

(1) The following are the ***good faith bargaining requirements*** that a bargaining representative for a proposed enterprise agreement must meet:

(a) attending, and participating in, meetings at reasonable times;

(b) disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;

(c) responding to proposals made by other bargaining representatives for the agreement in a timely manner;

(d) giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative's responses to those proposals;

(e) refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining;

(f) recognising and bargaining with the other bargaining representatives for the agreement.

Note: See also section 255A (limitations relating to greenfields agreements).

(2) The good faith bargaining requirements do not require:

(a) a bargaining representative to make concessions during bargaining for the agreement; or

(b) a bargaining representative to reach agreement on the terms that are to be included in the agreement.

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229 Applications for bargaining orders

Persons who may apply for a bargaining order

(1) A bargaining representative for a proposed enterprise agreement may apply to the FWC for an order (a ***bargaining order***) under section 230 in relation to the agreement.

Note: See also section 255A (limitations relating to greenfields agreements).

Multi-enterprise agreements

(2) An application for a bargaining order must not be made in relation to a proposed multi-enterprise agreement unless a supported bargaining authorisation or single interest employer authorisation is in operation in relation to the agreement.

Timing of applications

(3) The application may only be made at whichever of the following times applies:

(a) if one or more enterprise agreements apply to an employee, or employees, who will be covered by the proposed enterprise agreement:

(i) not more than 90 days before the nominal expiry date of the enterprise agreement, or the latest nominal expiry date of those enterprise agreements (as the case may be); or

(ii) after an employer that will be covered by the proposed enterprise agreement has requested under subsection 181(1) that employees approve the agreement, but before the agreement is so approved;

(b) otherwise—at any time.

Note: An employer that is required to give a notice of employee representational rights under subsection 173(1) cannot request employees to approve the agreement under subsection 181(1) until 21 days after the last notice is given.

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Prerequisites for making an application

(4) The bargaining representative may only apply for the bargaining order if the bargaining representative:

(a) has concerns that:

(i) one or more of the bargaining representatives for the agreement have not met, or are not meeting, the good faith bargaining requirements; or

(ii) the bargaining process is not proceeding efficiently or fairly because there are multiple bargaining representatives for the agreement; and

(b) has given a written notice setting out those concerns to the relevant bargaining representatives; and

(c) has given the relevant bargaining representatives a reasonable time within which to respond to those concerns; and

(d) considers that the relevant bargaining representatives have not responded appropriately to those concerns.

Non-compliance with notice requirements may be permitted

(5) The FWC may consider the application even if it does not comply with paragraph (4)(b) or (c) if the FWC is satisfied that it is appropriate in all the circumstances to do so.

230 When the FWC may make a bargaining order

Bargaining orders

(1) The FWC may make a bargaining order under this section in relation to a proposed enterprise agreement if:

(a) an application for the order has been made; and

(b) the requirements of this section are met in relation to the agreement; and

(c) the FWC is satisfied that it is reasonable in all the circumstances to make the order.

Note: See also section 255A (limitations relating to greenfields agreements).

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Agreement to bargain or certain instruments in operation

(2) The FWC must be satisfied in all cases that one of the following applies:

(a) the employer or employers have agreed to bargain, or have initiated bargaining, for the agreement;

(aa) the employer or employers have received a request to bargain under subsection 173(2A) in relation to the agreement;

(b) a majority support determination in relation to the agreement is in operation;

(c) a scope order in relation to the agreement is in operation;

(d) all of the employers are specified in a supported bargaining authorisation that is in operation in relation to the agreement;

(e) all of the employers are specified in a single interest employer authorisation that is in operation in relation to the agreement.

Good faith bargaining requirements not met

(3) The FWC must in all cases be satisfied:

(a) that:

(i) one or more of the relevant bargaining representatives for the agreement have not met, or are not meeting, the good faith bargaining requirements; or

(ii) the bargaining process is not proceeding efficiently or fairly because there are multiple bargaining representatives for the agreement; and

(b) that the applicant has complied with the requirements of subsection 229(4) (which deals with notifying relevant bargaining representatives of concerns), unless subsection 229(5) permitted the applicant to make the application without complying with those requirements.

Bargaining order must be in accordance with section 231

(4) The bargaining order must be in accordance with section 231 (which deals with what a bargaining order must specify).

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231 What a bargaining order must specify

(1) A bargaining order in relation to a proposed enterprise agreement must specify all or any of the following:

(a) the actions to be taken by, and requirements imposed upon, the bargaining representatives for the agreement, for the purpose of ensuring that they meet the good faith bargaining requirements;

(b) requirements imposed upon those bargaining representatives not to take action that would constitute capricious or unfair conduct that undermines freedom of association or collective bargaining;

(c) the actions to be taken by those bargaining representatives to deal with the effects of such capricious or unfair conduct;

(d) such matters, actions or requirements as the FWC considers appropriate, taking into account subparagraph 230(3)(a)(ii) (which deals with multiple bargaining representatives), for the purpose of promoting the efficient or fair conduct of bargaining for the agreement.

(2) The kinds of bargaining orders that the FWC may make in relation to a proposed enterprise agreement include the following:

(a) an order excluding a bargaining representative for the agreement from bargaining;

(b) an order requiring some or all of the bargaining representatives of the employees who will be covered by the agreement to meet and appoint one of the bargaining representatives to represent the bargaining representatives in bargaining;

(c) an order that an employer not terminate the employment of an employee, if the termination would constitute, or relate to, a failure by a bargaining representative to meet the good faith bargaining requirement referred to in paragraph 228(1)(e) (which deals with capricious or unfair conduct that undermines freedom of association or collective bargaining);

(d) an order to reinstate an employee whose employment has been terminated if the termination constitutes, or relates to, a

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failure by a bargaining representative to meet the good faith bargaining requirement referred to in paragraph 228(1)(e) (which deals with capricious or unfair conduct that undermines freedom of association or collective bargaining).

(3) The regulations may:

(a) specify the factors the FWC may or must take into account in deciding whether or not to make a bargaining order for reinstatement of an employee; and

(b) provide for the FWC to take action and make orders in connection with, and to deal with matters relating to, a bargaining order of that kind.

232 Operation of a bargaining order

A bargaining order in relation to a proposed enterprise agreement:

(a) comes into operation on the day on which it is made; and

(b) ceases to be in operation at the earliest of the following:

(i) if the order is revoked—the time specified in the instrument of revocation;

(ii) when the agreement is approved by the FWC;

(iii) when a workplace determination that covers the employees that would have been covered by the agreement comes into operation;

(iv) when the bargaining representatives for the agreement agree that bargaining has ceased.

Note: See also section 255A (limitations relating to greenfields agreements).

233 Contravening a bargaining order

A person to whom a bargaining order applies must not contravene a term of the order.

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

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Subdivision B—Intractable bargaining declarations

234 Applications for intractable bargaining declarations

(1) A bargaining representative for a proposed enterprise agreement, other than a greenfields agreement, may apply to the FWC for a declaration (an ***intractable bargaining declaration***) under section 235 in relation to the agreement.

Note: The consequence of an intractable bargaining declaration being made in relation to the agreement is that the FWC may, in certain circumstances, make an intractable bargaining workplace determination under section 269 in relation to the agreement.

(2) An application for an intractable bargaining declaration must not be made in relation to a proposed multi-enterprise agreement unless a supported bargaining authorisation or single interest employer authorisation is in operation in relation to the agreement.

235 When the FWC may make an intractable bargaining declaration

Intractable bargaining declaration

(1) The FWC may make an intractable bargaining declaration in relation to a proposed enterprise agreement if:
  (a) an application for the declaration has been made; and
  (b) the FWC is satisfied of the matters set out in subsection (2); and
  (c) it is after the end of the minimum bargaining period (see subsection (5)).

Matters of which the FWC must be satisfied before making an intractable bargaining declaration

(2) The FWC must be satisfied that:
  (a) the FWC has dealt with the dispute about the agreement under section 240 and the applicant participated in the FWC's processes to deal with the dispute; and

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(b) there is no reasonable prospect of agreement being reached if the FWC does not make the declaration; and

(c) it is reasonable in all the circumstances to make the declaration, taking into account the views of all the bargaining representatives for the agreement.

What declaration must specify

(3) The declaration must specify:

(a) the date it is made; and

(b) the proposed enterprise agreement to which it relates; and

(c) any other matter prescribed by the procedural rules.

Operation of declaration

(4) The declaration:

(a) comes into operation on the day it is made; and

(b) ceases to be in operation when each employer specified in the declaration is covered by an enterprise agreement or a workplace determination.

End of the minimum bargaining period

(5) The ***end of the minimum bargaining period*** in relation to a proposed enterprise agreement is:

(a) if one or more enterprise agreements (the ***existing agreements***) apply to any of the employees that will be covered by the proposed agreement—the later of the following:

(i) the day that is 9 months after the nominal expiry date for that existing agreement, or the latest nominal expiry date for those existing agreements;

(ii) the day that is 9 months after the day bargaining starts, as worked out under subsection (6); or

(b) the day that is 9 months after the day bargaining starts, as worked out under subsection (6).

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(6) For the purposes of subparagraph (5)(a)(ii) and paragraph (5)(b), the day bargaining starts for a proposed agreement is:

(a) if a supported bargaining authorisation or single interest employer authorisation is in operation in relation to the proposed agreement—the day that the authorisation first comes into operation; or

(b) otherwise—the notification time for the proposed agreement.

235A Post-declaration negotiating period

(1) The FWC may, if it considers it appropriate to do so, specify in the declaration a period (the ***post-declaration negotiating period***) that:

(a) starts on the day the declaration is made; and

(b) ends on:

(i) the day specified by the FWC in the declaration; or

(ii) any later day determined under subsection (2).

Note: The FWC cannot make an intractable bargaining workplace determination during any post-declaration negotiating period (see section 269) but may still provide other assistance during the period, such as conciliation.

(2) The FWC may, if it considers it appropriate to do so and taking into account any views of the bargaining representatives, extend the period referred to in subsection (1) by determining a later day for the purposes of subparagraph (1)(b)(ii).

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Subdivision C—Majority support determinations and scope orders

236 Majority support determinations

(1) A bargaining representative of an employee who will be covered by a proposed single-enterprise agreement may apply to the FWC for a determination (a ***majority support determination***) that a majority of the employees who will be covered by the agreement want to bargain with the employer, or employers, that will be covered by the agreement.

(1A) Despite subsection (1), a bargaining representative may not apply to the FWC for a determination if a supported bargaining authorisation that specifies the employee is in operation.

Note: While a supported bargaining authorisation that specifies an employee is in operation, an employer cannot bargain with that employee for any kind of agreement other than a supported bargaining agreement (see subsection 172(7)).

(1B) Despite subsection (1), a bargaining representative of an employee may not apply to the FWC for a determination if:

(a) a single interest employer agreement or a supported bargaining agreement applies to the employee; and

(b) the agreement has not passed its nominal expiry date.

(2) The application must specify:

(a) the employer, or employers, that will be covered by the agreement; and

(b) the employees who will be covered by the agreement.

237 When the FWC must make a majority support determination

Majority support determination

(1) The FWC must make a majority support determination in relation to a proposed single-enterprise agreement if:

(a) an application for the determination has been made; and

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(b) the FWC is satisfied of the matters set out in subsection (2) in relation to the agreement.

Matters of which the FWC must be satisfied before making a majority support determination

(2) The FWC must be satisfied that:

(a) a majority of the employees:

(i) who are employed by the employer or employers at a time determined by the FWC; and

(ii) who will be covered by the agreement;

want to bargain; and

(b) the employer, or employers, that will be covered by the agreement have not yet agreed to bargain, or initiated bargaining, for the agreement; and

(c) the group of employees who will be covered by the agreement was fairly chosen; and

(d) it is reasonable in all the circumstances to make the determination.

(3) For the purposes of paragraph (2)(a), the FWC may work out whether a majority of employees want to bargain using any method the FWC considers appropriate.

(3A) If the agreement will not cover all of the employees of the employer or employers covered by the agreement, the FWC must, in deciding for the purposes of paragraph (2)(c) whether the group of employees who will be covered was fairly chosen, take into account whether the group is geographically, operationally or organisationally distinct.

Operation of determination

(4) The determination comes into operation on the day on which it is made.

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238 Scope orders

Bargaining representatives may apply for scope orders

(1) A bargaining representative for a proposed single-enterprise agreement (other than a greenfields agreement) may apply to the FWC for an order (a ***scope order***) under this section if:

(a) the bargaining representative has concerns that bargaining for the agreement is not proceeding efficiently or fairly; and

(b) the reason for this is that the bargaining representative considers that the agreement will not cover appropriate employees, or will cover employees that it is not appropriate for the agreement to cover.

(2) Despite subsection (1), a bargaining representative may not apply to the FWC for a scope order in relation to a proposed single-enterprise agreement if:

(a) a single interest employer agreement or a supported bargaining agreement applies to one or more employees who will be covered by the proposed single-enterprise agreement; and

(b) the single interest employer agreement or supported bargaining agreement has not passed its nominal expiry date.

Bargaining representative to give notice of concerns

(3) The bargaining representative may only apply for the scope order if the bargaining representative:

(a) has taken all reasonable steps to give a written notice setting out the concerns referred to in subsection (1) to the relevant bargaining representatives for the agreement; and

(b) has given the relevant bargaining representatives a reasonable time within which to respond to those concerns; and

(c) considers that the relevant bargaining representatives have not responded appropriately.

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When the FWC may make scope order

(4) The FWC may make the scope order if the FWC is satisfied:
  (a) that the bargaining representative who made the application has met, or is meeting, the good faith bargaining requirements; and
  (b) that making the order will promote the fair and efficient conduct of bargaining; and
  (c) that the group of employees who will be covered by the agreement proposed to be specified in the scope order was fairly chosen; and
  (d) it is reasonable in all the circumstances to make the order.

Matters which the FWC must take into account

(4A) If the agreement proposed to be specified in the scope order will not cover all of the employees of the employer or employers covered by the agreement, the FWC must, in deciding for the purposes of paragraph (4)(c) whether the group of employees who will be covered was fairly chosen, take into account whether the group is geographically, operationally or organisationally distinct.

Scope order must specify employer and employees to be covered

(5) The scope order must specify, in relation to a proposed single-enterprise agreement:
  (a) the employer, or employers, that will be covered by the agreement; and
  (b) the employees who will be covered by the agreement.

Scope order must be in accordance with this section etc.

(6) The scope order:
  (a) must be in accordance with this section; and
  (b) may relate to more than one proposed single-enterprise agreement.

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Orders etc. that the FWC may make

(7) If the FWC makes the scope order, the FWC may also:
  (a) amend any existing bargaining orders; and
  (b) make or vary such other orders (such as protected action ballot orders), determinations or other instruments made by the FWC, or take such other actions, as the FWC considers appropriate.

239 Operation of a scope order

A scope order in relation to a proposed single-enterprise agreement:
  (a) comes into operation on the day on which it is made; and
  (b) ceases to be in operation at the earliest of the following:
    (i) if the order is revoked—the time specified in the instrument of revocation;
    (ii) when the agreement is approved by the FWC;
    (iii) when a workplace determination that covers the employees that would have been covered by the agreement comes into operation;
    (iv) when the bargaining representatives for the agreement agree that bargaining has ceased.

Subdivision D—FWC may deal with a bargaining dispute on request

240 Application for the FWC to deal with a bargaining dispute

Bargaining representative may apply for the FWC to deal with a dispute

(1) A bargaining representative for a proposed enterprise agreement may apply to the FWC for the FWC to deal with a dispute about the agreement if the bargaining representatives for the agreement are unable to resolve the dispute.

Note: See also section 255A (limitations relating to greenfields agreements).

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(2) If the proposed enterprise agreement is:
  (a) a single-enterprise agreement; or
  (b) a supported bargaining agreement; or
  (c) a multi-enterprise agreement in relation to which a single interest employer authorisation is in operation;

the application may be made by one bargaining representative, whether or not the other bargaining representatives for the agreement have agreed to the making of the application.

(3) If subsection (2) does not apply, a bargaining representative may only make the application if all of the bargaining representatives for the agreement have agreed to the making of the application.

(4) If the bargaining representatives have agreed that the FWC may arbitrate (however described) the dispute, the FWC may do so.

Subdivision E—Voting request orders

240A Application to FWC for voting request order

Proposed multi-enterprise agreement

(1) After the notification time for a proposed multi-enterprise agreement, a bargaining representative for the enterprise agreement may apply to the FWC for an order (a ***voting request order***) permitting an employer to make a request under subsection 181(1) that employees approve the enterprise agreement by voting for it if:
  (a) each bargaining representative for the enterprise agreement that is an employee organisation has been asked to provide the employer with written agreement to the making of the request; and
  (b) one or more of the employee organisations has failed to provide the written agreement.

Variation of multi-enterprise agreement

(2) A person referred to in subsection (3) may apply to the FWC for an order (also a ***voting request order***) permitting an employer to make

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a request under subsection 208(1) that employees approve a variation of a multi-enterprise agreement by voting for it if:

(a) each employee organisation covered by the enterprise agreement has been asked to provide the employer with written agreement to the making of the request; and

(b) one or more of the employee organisations has failed to provide the written agreement.

(3) The persons are the following:

(a) an employer covered by the enterprise agreement;

(b) an employee organisation covered by the enterprise agreement;

(c) an affected employee for the variation.

Certain proposed single-enterprise agreements

(4) A bargaining representative for a proposed single-enterprise agreement (the ***new agreement***) may apply to the FWC for an order (also a ***voting request order***) permitting an employer to make a request under subsection 181(1) that employees approve the new agreement by voting for it if all of the following apply:

(a) a single interest employer agreement or a supported bargaining agreement (each of which is an ***old agreement***) applies to one or more employees who will be covered by the new agreement;

(b) the old agreement has not passed its nominal expiry date;

(c) when the new agreement comes into operation, the old agreement will cease to apply to the employees;

(d) it is after the notification time for the new agreement;

(e) each employee organisation to which the old agreement applies has been asked to provide the employer with written agreement to the making of the request;

(f) one or more of the employee organisations has failed to provide the written agreement.

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240B FWC must make voting request order

The FWC must, on application under subsection 240A(1), (2) or (4), make a voting request order permitting an employer to make a request if the FWC is satisfied that:

(a) for each employee organisation that has failed to provide written agreement to the making of the request, the failure was unreasonable in the circumstances; and

(b) if the request relates to approval of a proposed enterprise agreement—the making of the request by the employer would not be inconsistent with or undermine good faith bargaining for the enterprise agreement.

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Division 9—Supported bargaining

241 Objects of this Division

The objects of this Division are:

(a) to assist and encourage employees and their employers who require support to bargain, and to make an enterprise agreement that meets their needs; and

(c) to address constraints on the ability of those employees and their employers to bargain at the enterprise level, including constraints relating to a lack of skills, resources, bargaining strength or previous bargaining experience; and

(d) to enable the FWC to provide assistance to those employees and their employers to facilitate bargaining for enterprise agreements.

242 Supported bargaining authorisations

(1) The following persons may apply to the FWC for an authorisation (a ***supported bargaining authorisation***) under section 243 in relation to a proposed multi-enterprise agreement:

(a) a bargaining representative for the agreement;

(b) an employee organisation that is entitled to represent the industrial interests of an employee in relation to work to be performed under the agreement.

Note: The effect of a supported bargaining authorisation is that the employers specified in it are subject to certain rules in relation to the agreement that would not otherwise apply (such as in relation to the availability of bargaining orders, see subsection 229(2)).

(2) The application must specify:

(a) the employers that will be covered by the agreement; and

(b) the employees who will be covered by the agreement.

(3) An application under this section must not be made in relation to a proposed greenfields agreement.

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243 When the FWC must make a supported bargaining authorisation

Supported bargaining authorisation—main case

(1) The FWC must make a supported bargaining authorisation in relation to a proposed multi-enterprise agreement if:

(a) an application for the authorisation has been made; and

(b) the FWC is satisfied that it is appropriate for the employers and employees (which may be some or all of the employers or employees specified in the application) that will be covered by the agreement to bargain together, having regard to:

(i) the prevailing pay and conditions within the relevant industry or sector (including whether low rates of pay prevail in the industry or sector); and

(ii) whether the employers have clearly identifiable common interests; and

(iii) whether the likely number of bargaining representatives for the agreement would be consistent with a manageable collective bargaining process; and

(iv) any other matters the FWC considers appropriate; and

(c) the FWC is satisfied that at least some of the employees who will be covered by the agreement are represented by an employee organisation.

Note: This subsection is subject to section 243A (restrictions on making supported bargaining authorisations).

Common interests

(2) For the purposes of subparagraph (1)(b)(ii), examples of common interests that employers may have include the following:

(a) a geographical location;

(b) the nature of the enterprises to which the agreement will relate, and the terms and conditions of employment in those enterprises;

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(c) being substantially funded, directly or indirectly, by the Commonwealth, a State or a Territory.

Supported bargaining authorisation—declared industry etc.

(2A) The FWC must also make a supported bargaining authorisation in relation to a proposed multi-enterprise agreement if:

(a) an application for the authorisation has been made; and

(b) the employees specified in the application are employees in an industry, occupation or sector declared by the Minister under subsection (2B).

Note: This subsection is subject to section 243A (restrictions on making supported bargaining authorisations).

(2B) The Minister may, by legislative instrument, declare an industry, occupation or sector, if the Minister is satisfied that doing so is consistent with the objects of this Division set out in section 241.

What authorisation must specify etc.

(3) The authorisation must specify:

(a) the employers that will be covered by the agreement; and

(b) the employees who will be covered by the agreement; and

(c) any other matter prescribed by the procedural rules.

Operation of authorisation

(4) The authorisation comes into operation on the day on which it is made.

243A Restrictions on making supported bargaining authorisations

Relationship between this section and section 243

(1A) Section 243 has effect subject to this section.

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Employees covered by single-enterprise agreement that has not passed nominal expiry date

(1) The FWC must not make a supported bargaining authorisation specifying an employee who is covered by a single-enterprise agreement that has not passed its nominal expiry date.

(2) A supported bargaining authorisation has no effect to the extent that it specifies an employee who is covered by a single-enterprise agreement that has not passed its nominal expiry date.

(3) However, subsections (1) and (2) do not apply if the FWC is satisfied that the employer's main intention in making the agreement with the employees covered by it was to avoid being specified in a supported bargaining authorisation.

General building and construction work

(4) The FWC must not make a supported bargaining authorisation in relation to a proposed enterprise agreement if the agreement would cover employees in relation to general building and construction work.

244 Variation of supported bargaining authorisations—general

Variation to remove employer

(1) An employer specified in a supported bargaining authorisation may apply to the FWC for a variation of the authorisation to remove the employer's name from the authorisation.

(2) If an application is made under subsection (1), the FWC must vary the authorisation to remove the employer's name if the FWC is satisfied that, because of a change in the employer's circumstances, it is no longer appropriate for the employer to be specified in the authorisation.

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Variation to add employer

(3) The following may apply to the FWC for a variation of a supported bargaining authorisation to add the name of an employer that is not specified in the authorisation:

(a) the employer;

(b) a bargaining representative of an employee who will be covered by the proposed multi-enterprise agreement to which the authorisation relates;

(c) an employee organisation that is entitled to represent the industrial interests of an employee in relation to work to be performed under that agreement.

(4) If an application is made under subsection (3), the FWC must vary the authorisation to add the employer's name if the FWC is satisfied that it is in the public interest to do so, taking into account:

(a) if the employer's employees are in an industry, occupation or sector declared by the Minister under subsection 243(2B)—the declaration; and

(b) if paragraph (a) of this subsection does not apply—the matters set out in paragraph 243(1)(b); and

(c) any other matters the FWC considers appropriate.

(4A) Despite subsection (4), the FWC must not vary the authorisation if subsection 243A(1) (employees covered by single-enterprise agreement that has not passed nominal expiry date) would prevent the FWC from making a supported bargaining authorisation specifying the employees.

(5) Despite subsection (4), the FWC must not vary the authorisation if, as a result of the variation, the proposed multi-enterprise agreement to which the authorisation relates would cover employees in relation to general building and construction work.

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245 Variation of supported bargaining authorisations—enterprise agreement etc. comes into operation

(1) The FWC is taken to have varied a supported bargaining authorisation to remove an employer's name when the employer and all of their employees who are specified in the authorisation are covered by an enterprise agreement, or a workplace determination, that is in operation.

(2) The FWC is taken to have varied a supported bargaining authorisation to remove an employee when the employee is covered by an enterprise agreement, or a workplace determination, that is in operation.

246 FWC's assistance

Application of this section

(1) This section applies if a supported bargaining authorisation is in operation in relation to a proposed multi-enterprise agreement.

FWC's assistance

(2) The FWC may, on its own initiative, provide to the bargaining representatives for the agreement such assistance:
  (a) that the FWC considers appropriate to facilitate bargaining for the agreement; and
  (b) that the FWC could provide if it were dealing with a dispute.

Note: This section does not empower the FWC to arbitrate, because subsection 595(3) provides that the FWC may arbitrate only if expressly authorised to do so.

FWC may direct a person to attend a conference

(3) Without limiting subsection (2), the FWC may provide assistance by directing a person who is not an employer specified in the authorisation to attend a conference at a specified time and place if the FWC is satisfied that the person exercises such a degree of control over the terms and conditions of the employees who will be

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covered by the agreement that the participation of the person in bargaining is necessary for the agreement to be made.

(4) Subsection (3) does not limit the FWC's powers under Subdivision B of Division 3 of Part 5-1.

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Division 10—Single interest employer authorisations

248 Single interest employer authorisations

(1) The following may apply to the FWC for an authorisation (a ***single interest employer authorisation***) under section 249 in relation to a proposed enterprise agreement that will cover two or more employers:

(a) those employers;

(b) a bargaining representative of an employee who will be covered by the agreement.

(2) The application must specify the following:

(a) the employers that will be covered by the agreement;

(b) the employees who will be covered by the agreement;

(c) the person (if any) nominated by the employers to make applications under this Act if the authorisation is made.

249 When the FWC must make a single interest employer authorisation

Single interest employer authorisation

(1) The FWC must make a single interest employer authorisation in relation to a proposed enterprise agreement if:

(a) an application for the authorisation has been made; and

(b) the FWC is satisfied that:

(i) at least some of the employees that will be covered by the agreement are represented by an employee organisation; and

(ii) the employers and the bargaining representatives of the employees of those employers have had the opportunity to express to the FWC their views (if any) on the authorisation; and

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(iii) if the application was made by 2 or more employers under paragraph 248(1)(a)—the requirements of subsection (1A) are met; and

(iv) if the application was made by a bargaining representative under paragraph 248(1)(b)—each employer either has consented to the application or is covered by subsection (1B); and

(v) the requirements of either subsection (2) or (3) (which deal with franchisees and common interest employers) are met; and

(vi) if the requirements of subsection (3) are met—the operations and business activities of each of those employers are reasonably comparable with those of the other employers that will be covered by the agreement.

(1AA) If:

(a) the application for the authorisation was made by a bargaining representative under paragraph 248(1)(b); and

(b) an employer that will be covered by the agreement employed 50 employees or more at the time that the application was made;

it is presumed that the operations and business activities of the employer are reasonably comparable with those of the other employers that will be covered by the agreement, unless the contrary is proved.

Additional requirements for application by employers

(1A) The requirements of this subsection are met if:

(a) the employers that will be covered by the agreement have agreed to bargain together; and

(b) no person coerced, or threatened to coerce, any of the employers to agree to bargain together.

Additional requirements for application by bargaining representative

(1B) An employer is covered by this subsection if:

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(a) the employer employed at least 20 employees at the time that the application for the authorisation was made; and

(b) the employer has not made an application for a single interest employer authorisation that has not yet been decided in relation to the employees that will be covered by the agreement; and

(c) the employer is not named in a single interest employer authorisation or supported bargaining authorisation in relation to the employees that will be covered by the agreement; and

(d) a majority of the employees who are employed by the employer at a time determined by the FWC and who will be covered by the agreement want to bargain for the agreement; and

(e) subsection (1D) does not apply to the employer.

(1C) For the purposes of paragraph (1B)(d), the FWC may work out whether a majority of employees want to bargain using any method the FWC considers appropriate.

(1D) This subsection applies to an employer if:

(a) the employer and the employees of the employer that will be covered by the agreement are covered by an enterprise agreement that has not passed its nominal expiry date at the time that the FWC will make the authorisation; or

(b) the employer and an employee organisation that is entitled to represent the industrial interests of one or more of the employees of the employer that will be covered by the agreement have agreed in writing to bargain for a proposed single-enterprise agreement that would cover the employer and those employees or substantially the same group of those employees.

Franchisees

(2) The requirements of this subsection are met if the employers carry on similar business activities under the same franchise and are:

(a) franchisees of the same franchisor; or

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(b) related bodies corporate of the same franchisor; or
(c) any combination of the above.

Common interest employers

(3) The requirements of this subsection are met if:
(a) the employers have clearly identifiable common interests; and
(b) it is not contrary to the public interest to make the authorisation.

(3A) For the purposes of paragraph (3)(a), matters that may be relevant to determining whether the employers have a common interest include the following:
(a) geographical location;
(b) regulatory regime;
(c) the nature of the enterprises to which the agreement will relate, and the terms and conditions of employment in those enterprises.

(3AB) If:
(a) the application for the authorisation was made by a bargaining representative under paragraph 248(1)(b); and
(b) an employer that will be covered by the agreement employed 50 employees or more at the time that the application was made;
it is presumed that the requirements of subsection (3) are met in relation to that employer, unless the contrary is proved.

Calculating number of employees

(3AC) For the purposes of calculating the number of employees referred to in paragraph (1AA)(b), (1B)(a) or (3AB)(b):
(a) ***employee*** has its ordinary meaning; and
(b) subject to paragraph (c), all employees employed by the employer at the time that the application for the authorisation was made are to be counted; and

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(c) a casual employee is not to be counted unless, at that time, the employee is a regular casual employee of the employer; and

(d) associated entities of the employer are taken to be one entity.

Operation of authorisation

(4) The authorisation:

(a) comes into operation on the day on which it is made; and

(b) ceases to be in operation at the earlier of the following:

(i) at the same time as the enterprise agreement to which the authorisation relates is made;

(ii) 12 months after the day on which the authorisation is made or, if the period is extended under section 252, at the end of that period.

249A Restriction on making single interest employer authorisations

The FWC must not make a single interest employer authorisation in relation to a proposed enterprise agreement if the agreement would cover employees in relation to general building and construction work.

250 What a single interest employer authorisation must specify

What authorisation must specify

(1) A single interest employer authorisation in relation to a proposed enterprise agreement must specify the following:

(a) the employers that will be covered by the agreement;

(b) the employees who will be covered by the agreement;

(c) the person (if any) nominated by the employers to make applications under this Act if the authorisation is made;

(d) any other matter prescribed by the procedural rules.

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Authorisation may relate to only some of employers or employees

(2) If the FWC is satisfied of the matters specified in subsection 249(2) or (3) (which deal with franchisees and common interest employers) in relation to only some of the employers that will be covered by the agreement, the FWC may make a single interest employer authorisation specifying those employers and their employees only.

(3) The FWC may make a single interest employer authorisation that does not specify one or more employers specified in an application for the authorisation, and the employees (the ***relevant employees***) of those employers specified in that application, if the FWC is satisfied that:

(a) the employers are bargaining in good faith for a proposed enterprise agreement that will cover the employers and the relevant employees, or substantially the same group of the relevant employees; and

(b) the employers and the relevant employees have a history of effectively bargaining in relation to one or more enterprise agreements that have covered the employers and the relevant employees, or substantially the same group of the relevant employees; and

(c) on the day that the FWC will make the authorisation, less than 9 months have passed since the most recent nominal expiry date of an agreement referred to in paragraph (b).

(4) If the effect of subsection (3) is that no employers would be specified in the authorisation, the FWC may refuse the application for the authorisation.

251 Variation of single interest employer authorisations

Variation to remove employer

(1) The following may apply to the FWC for a variation of a single interest employer authorisation to remove an employer's name from the authorisation:

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(a) the employer;
(b) a bargaining representative of an employee who will be covered by the proposed enterprise agreement to which the authorisation relates.

(2) The FWC must vary the authorisation to remove the employer's name if:
(a) an application has been made under subsection (1); and
(b) the requirements of either subsection (2A) or (2B) are met.

(2A) The requirements of this subsection are met if the FWC is satisfied that:
(a) the employers specified in the authorisation and the bargaining representatives of the employees of those employers have had an opportunity to express to the FWC their views (if any) on the application; and
(b) because of a change in the employer's circumstances, it is no longer appropriate for the employer to be specified in the authorisation.

(2B) The requirements of this subsection are met if:
(a) the application was made by a bargaining representative of an employee who will be covered by the proposed enterprise agreement to which the authorisation relates; and
(b) the FWC is satisfied that:
(i) the employer (the ***relevant employer***) whose name is proposed to be removed employed fewer than 50 employees at the time that the application was made; and
(ii) the employers specified in the authorisation and the bargaining representatives of the employees of those employers have had the opportunity to express to the FWC their views (if any) on the application; and
(iii) the employees (the ***relevant employees***) who are employed by the relevant employer and that would be covered by the proposed enterprise agreement to which the authorisation relates have, on request by the

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bargaining representative, approved the removal of the relevant employer's name by voting for the removal; and

(iv) there are no reasonable grounds for believing that the removal of the relevant employer's name has not been genuinely approved by the relevant employees.

Note: A person must not coerce another person to exercise a workplace right in a particular way (see section 343).

(2C) Without limiting subparagraph (2B)(b)(iii), the bargaining representative may request that the relevant employees vote by ballot or by an electronic method.

(2D) For the purposes of subparagraph (2B)(b)(iii), the relevant employees are taken to have approved the removal of the employer's name if:

(a) at least 50% of the relevant employees cast a vote; and

(b) more than 50% of the valid votes were votes approving the removal.

Variation to add employer

(3) The following may apply to the FWC for a variation of a single interest employer authorisation to add the name of an employer (the ***new employer***) that is not specified in the authorisation to the authorisation:

(a) the new employer;

(b) a person who is a bargaining representative:

(i) for the proposed enterprise agreement to which the authorisation relates; and

(ii) of an employee of the new employer.

(4) The FWC must vary the authorisation to add the new employer's name if:

(a) an application for the variation has been made; and

(b) the FWC is satisfied that:

(i) the employers specified in the authorisation and the bargaining representatives of the employees of those

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employers have had an opportunity to express to the FWC their views (if any) on the application; and

(ii) if the application was made by the new employer under paragraph (3)(a)—no person coerced, or threatened to coerce, the new employer to make the application; and

(iii) if the application was made by a bargaining representative under paragraph (3)(b)—the requirements of subsection (5) are met; and

(iv) the requirements of subsection 249(2) or (3) (which deal with franchisees and common interest employers) would continue to be met if the new employer's name were added; and

(v) if the requirements of subsection 249(3) would continue to be met if the new employer's name were added—the operations and business activities of the new employer are reasonably comparable with those of the employers specified in the authorisation.

(4A) If:

(a) the application for approval of the variation was made by a bargaining representative under paragraph (3)(b) of this section; and

(b) the new employer employed 50 employees or more at the time that the application was made; and

(c) the requirements of subsection 249(2) do not apply to the new employer;

then the following matters are presumed, unless the contrary is proved:

(d) that the requirements of subsection 249(3) would continue to be met if the new employer's name were added;

(e) that, for the purposes of subparagraph (4)(b)(v) of this section, the operations and business activities of the new employer are reasonably comparable with those of the other employers that are specified in the authorisation.

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Additional requirements for application by bargaining representative

(5) The requirements of this subsection are met if:

(a) the new employer employed at least 20 employees at the time that the application for the variation was made; and

(b) the new employer has not made an application for a single interest employer authorisation that has not yet been decided in relation to the employees that will be covered by the agreement; and

(c) the new employer is not named in a single interest employer authorisation or supported bargaining authorisation in relation to the employees that will be covered by the agreement; and

(d) a majority of the employees who are employed by the new employer at a time determined by the FWC and who will be covered by the proposed enterprise agreement want to bargain for the agreement; and

(e) subsection (7) does not apply to the employer.

(5A) For the purposes of calculating the number of employees referred to in subparagraph (2B)(b)(i) or paragraph (4A)(b) or (5)(a):

(a) ***employee*** has its ordinary meaning; and

(b) subject to paragraph (c), all employees employed by the new employer at the time that the application for the variation was made are to be counted; and

(c) a casual employee is not to be counted unless, at that time, the employee is a regular casual employee of the new employer; and

(d) associated entities of the new employer are taken to be one entity.

(6) For the purposes of paragraph (5)(d), the FWC may work out whether a majority of employees want to bargain using any method the FWC considers appropriate.

(7) This subsection applies to an employer if:

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(a) the new employer and the employees of the new employer that will be covered by the agreement are covered by an enterprise agreement that has not passed its nominal expiry date at the time that the FWC will make the variation; or

(b) the new employer and an employee organisation that is entitled to represent the industrial interests of one or more of the employees of the new employer that will be covered by the agreement have agreed in writing to bargain for a proposed single-enterprise agreement that would cover the new employer and those employees or substantially the same group of those employees.

Employers and employees that are already bargaining

(8) Despite subsection (4), the FWC may refuse to vary the authorisation if the FWC is satisfied that:

(a) the new employer is bargaining in good faith for a proposed enterprise agreement that will cover the new employer and the employees of the new employer that will be covered by the agreement, or substantially the same group of those employees; and

(b) the new employer and those employees have a history of effectively bargaining in relation to one or more enterprise agreements that have covered the new employer and those employees, or substantially the same group of those employees; and

(c) on the day that the FWC will vary the authorisation, less than 9 months have passed since the most recent nominal expiry date of an agreement referred to in paragraph (b).

251A Restriction on variation of single interest employer authorisation

Despite subsection 251(4), the FWC must not vary a single interest employer authorisation if, as a result of the variation, the proposed enterprise agreement to which the authorisation relates would cover employees in relation to general building and construction work.

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252 Variation to extend period single interest employer authorisation is in operation

(1) A bargaining representative for a proposed enterprise agreement to which a single interest employer authorisation relates may apply to the FWC to vary the authorisation to extend the period for which the authorisation is in operation.

(2) The FWC may vary the authorisation to extend the period if the FWC is satisfied that:

(a) there are reasonable prospects that the agreement will be made if the authorisation is in operation for a longer period; and

(b) it is appropriate in all the circumstances to extend the period.

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Division 11—Other matters

253 Terms of an enterprise agreement that are of no effect

(1) A term of an enterprise agreement has no effect to the extent that:
  (a) it is not a term about a permitted matter; or
  (b) it is an unlawful term; or
  (c) it is a designated outworker term.

Note 1: A term of an enterprise agreement has no effect to the extent that it contravenes section 55 (see section 56).

Note 2: Certain terms of enterprise agreements relating to deductions, or requiring employees to spend or pay amounts, have no effect (see section 326).

(2) However, if an enterprise agreement includes a term that has no effect because of subsection (1), or section 56 or 326, the inclusion of the term does not prevent the agreement from being an enterprise agreement.

254 Applications by bargaining representatives

Application of this section

(1) This section applies if a provision of this Part permits an application to be made by a bargaining representative of an employer that will be covered by a proposed enterprise agreement.

Persons who may make applications

(2) If the agreement will cover more than one employer, the application may be made by:
  (a) in the case of a proposed enterprise agreement in relation to which a single interest employer authorisation is in operation—the person (if any) specified in the authorisation as the person who may make applications under this Act; or
  (b) in any case—a bargaining representative of an employer that will be covered by the agreement, on behalf of one or more

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other such bargaining representatives, if those other bargaining representatives have agreed to the application being made on their behalf.

254A 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.

255 Part does not empower the FWC to make certain orders

(1) This Part does not empower the FWC to make an order that requires, or has the effect of requiring:
  (a) particular content to be included or not included in a proposed enterprise agreement; or
  (b) an employer to request under subsection 181(1) that employees approve a proposed enterprise agreement; or
  (c) an employee to approve, or not approve, a proposed enterprise agreement; or
  (d) an employer to give a notice under section 178B; or

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(e) an employer to specify a particular day in a notice under section 178B; or

(f) an employer to agree to the giving of a notice under section 178B.

(2) Despite paragraph (1)(a), the FWC may make an order that particular content be included or not included in a proposed enterprise agreement if the order is made in the course of arbitration undertaken when dealing with a dispute under section 240.

Note: The FWC may only arbitrate a dispute under section 240 if arbitration has been agreed to by the bargaining representatives for the agreement (see subsection 240(4)).

255A Limitations relating to greenfields agreements

(1) If:

(a) a proposed single-enterprise agreement is a greenfields agreement; and

(b) there has been a notified negotiation period for the agreement; and

(c) the notified negotiation period has ended;

then:

(d) the following provisions do not apply in relation to the agreement at any time after the end of the notified negotiation period:

(i) section 228 (which deals with good faith bargaining requirements);

(ii) sections 229 and 230 (which deal with bargaining orders);

(iii) sections 234 and 235 (which deal with serious breach declarations);

(iv) section 240 (which deals with bargaining disputes); and

(e) a bargaining order that relates to the agreement ceases to have effect at the end of the notified negotiation period.

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(2) Paragraph (1)(e) has effect despite anything in section 232 (which deals with the operation of bargaining orders).

256 Prospective employers and employees

A reference to an employer, or an employee, in relation to a greenfields agreement, includes a reference to a person who may become an employer or employee.

256A How employees, employers and employee organisations are to be described

(1) This section applies if a provision of this Part requires or permits an instrument of any kind to specify the employers, employees or employee organisations covered, or who will be covered, by an enterprise agreement or other instrument.

(2) The employees may be specified by class or by name.

(3) The employers and employee organisations must be specified by name.

(4) Without limiting the way in which a class may be described for the purposes of subsection (2), the class may be described by reference to one or more of the following:

(a) a particular industry or part of an industry;

(b) a particular kind of work;

(c) a particular type of employment;

(d) a particular classification, job level or grade.

257 Enterprise agreements may incorporate material in force from time to time etc.

Despite section 46AA of the *Acts Interpretation Act 1901*, an enterprise agreement may incorporate material contained in an instrument or other writing:

(a) as in force at a particular time; or

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(b) as in force from time to time.

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