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If a provision of the compiled law has been repealed in accordance with a provision of the law, details are included in the endnotes.

Contents

Chapter 2—Terms and conditions of employment 1

Part 2-5—Workplace determinations 1

Division 1—Introduction 1

258 Guide to this Part 1
259 Meanings of *employee* and *employer* 2

Division 3—Industrial action related workplace determinations 3

266 When the FWC must make an industrial action related workplace determination 3
267 Terms etc. of an industrial action related workplace determination 4
268 No other terms 5

Division 4—Intractable bargaining workplace determinations 6

269 When the FWC must make an intractable bargaining workplace determination 6
270 Terms etc. of an intractable bargaining workplace determination 6
270A Terms dealing with matters at issue 7
271 No other terms 8

Division 5—Core terms, mandatory terms and agreed terms of workplace determinations etc. 9

272 Core terms of workplace determinations 9
273 Mandatory terms of workplace determinations 10
274 Agreed terms for workplace determinations 11
275 Factors the FWC must take into account in deciding terms of a workplace determination 12

Division 6—Operation, coverage and interaction etc. of workplace determinations 13

276 When a workplace determination operates etc. 13
277 Employers, employees and employee organisations covered by a workplace determination 13
278 Interaction of a workplace determination with enterprise agreements etc. 14
279 Act applies to a workplace determination as if it were an enterprise agreement 15

Authorised Version C2026C00293 registered 15/07/2026

Division 7—Other matters 17
280 Contravening a workplace determination....17
281 Applications by bargaining representatives 17
281AA Entitlement for volunteer bodies to make submissions 17
281A How employees, employers and employee organisations are to be described....18

Part 2-6—Minimum wages 19

Division 1—Introduction 19
282 Guide to this Part....19
283 Meanings of *employee* and *employer* 20

Division 2—Overarching provisions 21
284 The minimum wages objective....21

Division 3—Annual wage reviews 23

Subdivision A—Main provisions 23
285 Annual wage reviews to be conducted 23
286 When annual wage review determinations varying modern awards come into operation 23
287 When national minimum wage orders come into operation etc. 24

Subdivision B—Provisions about conduct of annual wage reviews 26
288 General 26
289 Everyone to have a reasonable opportunity to make and comment on submissions 26
290 President may direct investigations and reports 27
291 Research must be published 28
292 Varied wage rates must be published 28

Division 4—National minimum wage orders 29
293 Contravening a national minimum wage order 29
294 Content of national minimum wage order—main provisions 29
295 Content of national minimum wage order—other matters 30
296 Variation of national minimum wage order to remove ambiguity or uncertainty or correct error 31
297 When determinations varying national minimum wage orders come into operation....31

Authorised Version C2026C00293 registered 15/07/2026

298 Special rule about retrospective variations of national minimum wage orders 32
299 When a national minimum wage order is in operation 33

Part 2-7—Equal remuneration 34

Division 1—Introduction 34
300 Guide to this Part 34
301 Meanings of *employee* and *employer* 34

Division 2—Equal remuneration orders 35
302 FWC may make an order requiring equal remuneration 35
303 Equal remuneration order may increase, but must not reduce, rates of remuneration 37
304 Equal remuneration order may implement equal remuneration in stages 37
305 Contravening an equal remuneration order 37
306 Inconsistency with modern awards, enterprise agreements and orders of the FWC 37

Part 2-7A—Regulated labour hire arrangement orders 38

Division 1—Introduction 38
306A Guide to this Part 38
306B Meanings of *employee* and *employer* 38
306C Meaning of *regulated host* 38
306D References to kinds of work and work performed for a person etc. 39

Division 2—Regulated labour hire arrangement orders 41

Subdivision A—Making regulated labour hire arrangement orders 41
306E FWC may make a regulated labour hire arrangement order 41
306EA Regulated labour hire arrangement order may cover additional arrangements 45
306EB Application of regulated labour hire arrangement order to new covered employment instrument 47
306EC Notification requirements in relation to new covered employment instrument 48
306ED Varying regulated labour hire arrangement order to cover new employers 49

Authorised Version C2026C00293 registered 15/07/2026

306EE Notifying tenderers etc. of regulated labour hire arrangement order....52

Subdivision B—Obligations of employers and regulated hosts etc. when a regulated labour hire arrangement order is in force 53

306F Protected rate of pay payable to employees if a regulated labour hire arrangement order is in force....53

306G Exceptions from requirement to pay protected rate of pay....56

306H Obligations of regulated hosts covered by a regulated labour hire arrangement order....57

Subdivision C—Short-term arrangements 58

306J Determination altering exemption period for short-term arrangements....58

306K Determination of recurring extended exemption period....58

306L Making and effect of determinations under this Subdivision....59

Subdivision D—Alternative protected rate of pay orders 61

306M Making an alternative protected rate of pay order....61

306N Effect of alternative protected rate of pay order....64

Subdivision E—Termination payments 65

306NA Determining amounts of payments relating to termination of employment....65

Division 3—Dealing with disputes 68

306P Disputes about the operation of this Part....68

306Q Dealing with disputes by arbitration....69

306R Application fees....71

Division 4—Anti-avoidance 72

306S Preventing making of regulated labour hire arrangement orders....72

306SA Avoidance of application of regulated labour hire arrangement orders....72

306T Short-term arrangements—engaging other employees....73

306U Short-term arrangements—entering into other labour hire agreements....74

306V Engaging independent contractors....74

Authorised Version C2026C00293 registered 15/07/2026

Division 5—Other matters 76
306W Guidelines....76
Part 2-8—Transfer of business 77
Division 1—Introduction 77
307 Guide to this Part....77
308 Meanings of *employee* and *employer*....77
309 Object of this Part....78
Division 2—Transfer of instruments 79
310 Application of this Division....79
311 When does a transfer of business occur....79
312 Instruments that may transfer....81
313 Transferring employees and new employer covered by transferable instrument....81
314 New non-transferring employees of new employer may be covered by transferable instrument....82
315 Organisations covered by transferable instrument....83
316 Transferring employees who are high income employees....84
Division 3—Powers of the FWC 86
317 FWC may make orders in relation to a transfer of business....86
318 Orders relating to instruments covering new employer and transferring employees....86
319 Orders relating to instruments covering new employer and non-transferring employees....88
320 Variation of transferable instruments....90
Part 2-9—Other terms and conditions of employment 92
Division 1—Introduction 92
321 Guide to this Part....92
322 Meanings of *employee* and *employer*....93
Division 2—Payment of wages etc. 94
Subdivision A—Civil remedy provisions relating to payment of wages etc. 94
323 Method and frequency of payment....94
324 Permitted deductions....95
325 Unreasonable requirements to spend or pay amount....96

Authorised Version C2026C00293 registered 15/07/2026

326 Certain terms have no effect....97
327 Things given or provided, and amounts required to be spent or paid, in contravention of this Subdivision....98
Subdivision B—Offence for failing to pay certain amounts as required 98
327A Offence—failing to pay certain amounts as required....98
327B The Voluntary Small Business Wage Compliance Code....101
327C Commencing proceedings for certain offences against this Act....102
Division 3—Guarantee of annual earnings 103
328 Employer obligations in relation to guarantee of annual earnings....103
329 High income employee....104
330 Guarantee of annual earnings and annual rate of guarantee....105
331 Guaranteed period....106
332 Earnings....106
333 High income threshold....107
333A Prospective employees....108
Division 4—Prohibiting pay secrecy 109
333B Employees not subject to pay secrecy....109
333C Pay secrecy terms to have no effect....110
333D Prohibition on pay secrecy terms....110
Division 5—Fixed term contracts 111
Subdivision A—Limitations on fixed term contracts 111
333E Limitations....111
333F Exceptions to limitations....113
333G Effect of entering prohibited fixed term contract....114
333H Anti-avoidance....115
Subdivision B—Other matters 116
333J Fixed Term Contract Information Statement....116
333K Giving new employees the Fixed Term Contract Information Statement....116
333L Disputes about the operation of this Division....116

Authorised Version C2026C00293 registered 15/07/2026

Division 6—Employee right to disconnect 118
Subdivision A—Employee right to disconnect 118
333M Employee right to disconnect 118
Subdivision B—Disputes about the employee right to disconnect 119
333N Disputes about the employee right to disconnect 119
Subdivision C—Orders to stop refusing contact or to stop taking certain actions 120
333P Orders to stop refusing contact or to stop taking certain actions 120
333Q Contravening an order 122
333R Actions under work health and safety laws permitted 122
333S This Subdivision is not to prejudice Australia's defence, national security etc. 123
333T Declarations by the Director-General of Security 123
333U Declarations by the Director-General of ASIS 124
Subdivision D—Dealing with disputes in other ways 124
333V Dealing with disputes in other ways 124
Subdivision E—Guidelines 124
333W Guidelines 124
Division 7—Preservation of employer-funded paid parental leave 125
333X Employer-funded paid parental leave—preserved if child is stillborn or dies 125
Chapter 3—Rights and responsibilities of employees, employers, organisations etc. 127
Part 3-1—General protections 127
Division 1—Introduction 127
334 Guide to this Part 127
335 Meanings of *employee* and *employer* 128
336 Objects of this Part 128
Division 2—Application of this Part 129
337 Application of this Part 129
338 Action to which this Part applies 129
338A Meaning of *independent contractor* 130
339 Additional effect of this Part 130

Authorised Version C2026C00293 registered 15/07/2026

Division 3—Workplace rights 132
340 Protection....132
341 Meaning of *workplace right*....132
342 Meaning of *adverse action*....134
343 Coercion....138
344 Undue influence or pressure....138
345 Misrepresentations....139
Division 4—Industrial activities 140
346 Protection....140
347 Meaning of *engages in industrial activity*....140
348 Coercion....141
349 Misrepresentations....141
350 Inducements—membership action....142
350A Protection for workplace delegates....142
350B Protection for workplace delegates—regulated workers....143
350C Workplace delegates and their rights....144
Division 5—Other protections 146
351 Discrimination....146
352 Temporary absence—illness or injury....147
353 Bargaining services fees....147
354 Coverage by particular instruments....148
355 Coercion—allocation of duties etc. to particular person....149
356 Objectionable terms....149
Division 6—Sham arrangements 150
Subdivision A—Independent contracting 150
357 Misrepresenting employment as independent contracting arrangement....150
358 Dismissing to engage as independent contractor....150
359 Misrepresentation to engage as independent contractor....151
Subdivision B—Casual employment 151
359B Dismissing to engage as casual employee....151
359C Misrepresentation to engage as casual employee....151
Division 7—Ancillary rules 152
360 Multiple reasons for action....152

Authorised Version C2026C00293 registered 15/07/2026

361 Reason for action to be presumed unless proved otherwise 152
362 Advising, encouraging, inciting or coercing action 152
363 Actions of industrial associations....152
364 Unincorporated industrial associations 154
Division 8—Compliance 155
Subdivision A—Contraventions involving dismissal 155
365 Application for the FWC to deal with a dismissal dispute 155
366 Time for application....155
367 Application fees....155
368 Dealing with a dismissal dispute (other than by arbitration)....156
369 Dealing with a dismissal dispute by arbitration 157
370 Taking a dismissal dispute to court....158
Subdivision B—Other contraventions 158
372 Application for the FWC to deal with a non-dismissal dispute 158
373 Application fees....159
374 Conferences....159
375 Advice on general protections court application....159
Subdivision C—Appeals and costs orders 160
375A Appeal rights 160
375B Costs orders against parties....160
376 Costs orders against lawyers and paid agents 160
377 Applications for costs orders....161
377A Schedule of costs....161
378 Contravening costs orders 162
Part 3-2—Unfair dismissal 163
Division 1—Introduction 163
379 Guide to this Part....163
380 Meanings of *employee* and *employer* 163
381 Object of this Part....163
Division 2—Protection from unfair dismissal 165
382 When a person is protected from unfair dismissal 165
383 Meaning of *minimum employment period*....165
384 Period of employment 165

Authorised Version C2026C00293 registered 15/07/2026

Division 3—What is an unfair dismissal 167
385 What is an unfair dismissal 167
386 Meaning of *dismissed* 167
387 Criteria for considering harshness etc. 168
388 The Small Business Fair Dismissal Code....169
389 Meaning of *genuine redundancy* 169
Division 4—Remedies for unfair dismissal 170
390 When the FWC may order remedy for unfair dismissal 170
391 Remedy—reinstatement etc. 170
392 Remedy—compensation 172
393 Monetary orders may be in instalments 173
Division 5—Procedural matters 174
394 Application for unfair dismissal remedy 174
395 Application fees....174
396 Initial matters to be considered before merits 175
397 Matters involving contested facts....175
398 Conferences 175
399 Hearings....176
399A Dismissing applications....176
400 Appeal rights 177
400A Costs orders against parties 177
401 Costs orders against lawyers and paid agents 177
402 Applications for costs orders....178
403 Schedule of costs....178
404 Security for costs....179
405 Contravening orders under this Part....179
Part 3-3—Industrial action 180
Division 1—Introduction 180
406 Guide to this Part....180
407 Meanings of *employee* and *employer* 181
Division 2—Protected industrial action 182
Subdivision A—What is protected industrial action 182
408 Protected industrial action....182
409 Employee claim action....182
410 Employee response action....184
411 Employer response action 185

Authorised Version C2026C00293 registered 15/07/2026

412 Pattern bargaining....185

Subdivision B—Common requirements for industrial action to be protected industrial action 187

413 Common requirements that apply for industrial action to be protected industrial action....187

414 Notice requirements for industrial action....188

Subdivision C—Significance of industrial action being protected industrial action 190

415 Immunity provision....190

416 Employer response action—employer may refuse to make payments to employees....190

416A Employer response action does not affect continuity of employment....190

Division 3—No industrial action before nominal expiry date of enterprise agreement etc. 191

417 Industrial action must not be organised or engaged in before nominal expiry date of enterprise agreement etc....191

Division 4—FWC orders stopping etc. industrial action 193

418 FWC must order that industrial action by employees or employers stop etc....193

419 FWC must order that industrial action by non-national system employees or non-national system employers stop etc....194

420 Interim orders etc....195

421 Contravening an order etc....195

Division 5—Injunction against industrial action if pattern bargaining is being engaged in 197

422 Injunction against industrial action if a bargaining representative is engaging in pattern bargaining....197

Division 6—Suspension or termination of protected industrial action by the FWC 198

423 FWC may suspend or terminate protected industrial action—significant economic harm etc....198

424 FWC must suspend or terminate protected industrial action—endangering life etc....200

425 FWC must suspend protected industrial action—cooling off....201

Authorised Version C2026C00293 registered 15/07/2026

426 FWC must suspend protected industrial action—significant harm to a third party 202
427 FWC must specify the period of suspension 203
428 Extension of a period of suspension 204
429 Employee claim action without a further protected action ballot after a period of suspension etc. 204
430 Notice of employee claim action engaged in after a period of suspension etc. 205

Division 7—Ministerial declarations 207
431 Ministerial declaration terminating industrial action 207
432 Informing people of declaration 207
433 Ministerial directions to remove or reduce threat 208
434 Contravening a Ministerial direction 208

Division 8—Protected action ballots 209

Subdivision A—Introduction 209
435 Guide to this Division 209
436 Object of this Division 209

Subdivision B—Protected action ballot orders 210
437 Application for a protected action ballot order 210
437A Application for a protected action ballot order—multi-enterprise agreements 211
438 Restriction on when application may be made 212
439 Joint applications 212
440 Notice of application 213
441 Application to be determined within 2 days after it is made 213
442 Dealing with multiple applications together 213
443 When the FWC must make a protected action ballot order 213
444 Ballot agent and independent advisor 215
445 Notice of protected action ballot order 216
446 Protected action ballot order may require 2 or more protected action ballots to be held at the same time 216
447 Variation of protected action ballot order 217
448 Revocation of protected action ballot order 218

Subdivision BA—FWC must conduct conferences 218
448A FWC must conduct conferences 218

Authorised Version C2026C00293 registered 15/07/2026

Subdivision C—Conduct of protected action ballot 219
449 Conduct of protected action ballot 219
450 Directions for conduct of protected action ballot....219
451 Timetable for protected action ballot 220
452 Compilation of roll of voters 221
453 Who is eligible to be included on the roll of voters 221
454 Variation of roll of voters 222
455 Protected action ballot papers....224
456 Who may vote in protected action ballot....224
457 Results of protected action ballot 224
458 Report about conduct of protected action ballot 225
Subdivision D—Effect of protected action ballot 226
459 Circumstances in which industrial action is authorised by protected action ballot....226
460 Immunity for persons who act in good faith on protected action ballot results....227
461 Validity of protected action ballot etc. not affected by technical breaches....228
Subdivision E—Compliance 229
462 Interferences etc. with protected action ballot....229
463 Contravening a protected action ballot order etc....231
Subdivision F—Liability for costs of protected action ballot 231
464 Costs of protected action ballot conducted by the Australian Electoral Commission....231
465 Costs of protected action ballot conducted by protected action ballot agent other than the Australian Electoral Commission....232
466 Costs of legal challenges 232
Subdivision G—Miscellaneous 233
467 Information about employees on roll of voters not to be disclosed 233
468 Records....234
468A Eligible protected action ballot agents 234
469 Regulations....235
Division 9—Payments relating to periods of industrial action 236
Subdivision A—Protected industrial action 236
470 Payments not to be made relating to certain periods of industrial action....236
471 Payments relating to partial work bans 237

Authorised Version C2026C00293 registered 15/07/2026

472 Orders by the FWC relating to certain partial work bans....239
473 Accepting or seeking payments relating to periods of industrial action....240
Subdivision B—Industrial action that is not protected industrial action 241
474 Payments not to be made relating to certain periods of industrial action....241
475 Accepting or seeking payments relating to periods of industrial action....242
Subdivision C—Miscellaneous 243
476 Other responses to industrial action unaffected....243
Division 10—Other matters 244
477 Applications by bargaining representatives....244
Part 3-4—Right of entry 245
Division 1—Introduction 245
478 Guide to this Part....245
479 Meanings of *employee* and *employer*....245
480 Object of this Part....246
Division 2—Entry rights under this Act 247
Subdivision A—Entry to investigate suspected contravention 247
481 Entry to investigate suspected contravention....247
482 Rights that may be exercised while on premises....248
483 Later access to record or document....249
483AA Application to the FWC for access to non-member records....250
Subdivision AA—Entry to investigate suspected contravention relating to TCF award workers 251
483A Entry to investigate suspected contravention relating to TCF award workers....251
483B Rights that may be exercised while on premises....253
483C Later access to record or document....254
483D Entry onto other premises to access records and documents....255
483E Later access to record or document—other premises....256
Subdivision B—Entry to hold discussions 257
484 Entry to hold discussions....257

Authorised Version C2026C00293 registered 15/07/2026

Subdivision C—Requirements for permit holders 258
486 Permit holder must not contravene this Subdivision....258
487 Giving entry notice or exemption certificate....258
488 Contravening entry permit conditions....259
489 Producing authority documents....259
490 When right may be exercised....260
491 Occupational health and safety requirements....260
492 Location of interviews and discussions....260
492A Route to location of interview and discussions....261
493 Residential premises....261
Division 3—State or Territory OHS rights 262
494 Official must be permit holder to exercise State or Territory OHS right....262
495 Giving notice of entry....264
496 Contravening entry permit conditions....265
497 Producing entry permit....265
498 When right may be exercised....265
499 Occupational health and safety requirements....265
Division 4—Prohibitions 266
500 Permit holder must not hinder or obstruct....266
501 Person must not refuse or delay entry....266
502 Person must not hinder or obstruct permit holder etc....266
503 Misrepresentations about things authorised by this Part....267
504 Unauthorised use or disclosure of information or documents....267
Division 5—Powers of the FWC 269
Subdivision A—Dealing with disputes 269
505 FWC may deal with a dispute about the operation of this Part....269
505A FWC may deal with a dispute about frequency of entry to hold discussions....271
506 Contravening order made to deal with dispute....272
Subdivision B—Taking action against permit holder 272
507 FWC may take action against permit holder....272

Authorised Version C2026C00293 registered 15/07/2026

Subdivision C—Restricting rights of organisations and officials where misuse of rights 273
508 FWC may restrict rights if organisation or official has misused rights 273
509 Contravening order made for misuse of rights....274
Subdivision D—When the FWC must impose conditions on, revoke or suspend entry permits 274
510 When the FWC must impose conditions on, revoke or suspend entry permits....274
Subdivision E—General rules for suspending entry permits 276
511 General rules for suspending entry permits....276
Division 6—Entry permits, entry notices and certificates 277
Subdivision A—Entry permits 277
512 FWC may issue entry permits 277
513 Considering application....277
514 When the FWC must not issue permit....278
515 Conditions on entry permit....278
516 Expiry of entry permit 279
517 Return of entry permits to the FWC....280
Subdivision B—Entry notices 280
518 Entry notice requirements 280
Subdivision C—Exemption certificates 282
519 Exemption certificates....282
Subdivision D—Affected member certificates 283
520 Affected member certificates 283
Subdivision E—Miscellaneous 284
521 Regulations dealing with instruments under this Part....284
Division 7—Accommodation and transport arrangements in remote areas 285
521A Meaning of *accommodation arrangement* 285
521B Meaning of *transport arrangement*....285
521C Accommodation arrangements for remote areas....286
521D Transport arrangements for remote areas....287

Authorised Version C2026C00293 registered 15/07/2026

Part 3-5—Stand down 289

Division 1—Introduction 289

522 Guide to this Part 289
523 Meanings of *employee* and *employer* 289

Division 2—Circumstances allowing stand down 290

524 Employer may stand down employees in certain circumstances 290
525 Employee not stood down during a period of authorised leave or absence 291

Division 3—Dealing with disputes 292

526 FWC may deal with a dispute about the operation of this Part 292
527 Contravening an FWC order dealing with a dispute about the operation of this Part 292

Part 3-5A—Prohibiting sexual harassment in connection with work 293

Division 1—Introduction 293

527A Guide to this Part 293
527B Meaning of employee and employer 293
527C Object of this Part 293
527CA Concurrent operation of State and Territory laws 294

Division 2—Prohibiting sexual harassment in connection with work 296

527D Prohibiting sexual harassment in connection with work 296
527E Vicarious liability etc. 297

Division 3—Dealing with sexual harassment disputes 298

Subdivision A—Applying for the FWC to deal with sexual harassment disputes 298

527F Application for the FWC to deal with a sexual harassment dispute 298
527G Time for application 299
527H Application fees 300

Subdivision B—Stop sexual harassment orders 300

527J Stop sexual harassment orders 300
527K Contravening a stop sexual harassment order 302

Authorised Version C2026C00293 registered 15/07/2026

527L Actions under work health and safety laws permitted....302
527M This Subdivision is not to prejudice Australia's defence, national security etc. 302
527N Declarations by the Chief of the Defence Force 303
527P Declarations by the Director-General of Security....303
527Q Declarations by the Director-General of ASIS....303
Subdivision C—Dealing with sexual harassment disputes in other ways 304
527R Dealing with a sexual harassment dispute (other than by arbitration) 304
527S Dealing with a sexual harassment dispute by arbitration 304
527T Limitation on taking a sexual harassment dispute to court....306
Part 3-6—Other rights and responsibilities 308
Division 1—Introduction 308
528 Guide to this Part....308
529 Meanings of *employee* and *employer* 308
Division 2—Notification and consultation relating to certain dismissals 310
Subdivision A—Requirement to notify Centrelink 310
530 Employer to notify Centrelink of certain proposed dismissals....310
Subdivision B—Failure to notify or consult registered employee associations 311
531 FWC may make orders where failure to notify or consult registered employee associations about dismissals....311
532 Orders that the FWC may make 312
533 Application for an FWC order....313
Subdivision C—Limits on scope of this Division 313
534 Limits on scope of this Division....313
Division 3—Employer obligations in relation to employee records and pay slips 315
535 Employer obligations in relation to employee records 315
536 Employer obligations in relation to pay slips....315

Authorised Version C2026C00293 registered 15/07/2026

Division 4—Employer obligations in relation to advertising rates of pay 317
536AA Employer obligations in relation to advertising rates of pay 317

Part 3-7—Corrupting benefits 318
Division 1—Introduction 318
536A Guide to this Part 318
536B Meanings of employee and employer 318
536C Concurrent operation of State and Territory laws 318
536CA Dishonesty 319
Division 2—Giving, receiving or soliciting corrupting benefits 320
536D Giving, receiving or soliciting a corrupting benefit 320
536E Meaning of registered organisations officer or employee 322
Division 3—Cash or in kind payments to employee organisations etc. 324
536F Giving a cash or in kind payment 324
536G Receiving or soliciting a cash or in kind payment 326
536H Implied freedom of political communication 327

Chapter 3A—Minimum standards for regulated workers 328

Part 3A-1—Core provisions for this Chapter 328
Division 1—Introduction 328
536J Guide to this Part 328
536JA Meaning of employee and employer 328
Division 2—Provisions relating to coverage and operation of minimum standards orders, minimum standards guidelines and collective agreements 329
Subdivision A—Coverage and operation of minimum standards orders and guidelines 329
536JB Contravening a minimum standards order 329
536JC The significance of a minimum standards order applying to a person 329
536JD When a minimum standards order *applies* to a person 329

Authorised Version C2026C00293 registered 15/07/2026

536JE When a minimum standards order *covers* a regulated worker or a regulated business 331
536JF When a minimum standards order is in operation....332
536JG When minimum standards guidelines *cover* a regulated worker or a regulated business 333
536JH When minimum standards guidelines are in operation....334
Subdivision B—Coverage and operation of collective agreements 335
536JJ Contravening a collective agreement 335
536JK The significance of a collective agreement applying to a person 335
536JL When a collective agreement *applies* to a person 335
536JM When a collective agreement *covers* a regulated worker, a regulated business or an organisation....336
536JN When a collective agreement is in operation....337
Division 3—Exclusion of certain State and Territory laws 339
536JP Exclusion of certain State and Territory laws 339
536JQ What are *workplace relations matters*....341
536JR What is an *unfairness ground*....342
536JS Interaction of minimum standards orders with State and Territory laws 343
536JT Authorisation of conduct for the purposes of the *Competition and Consumer Act 2010* 344
Part 3A-2—Minimum standards for regulated workers 346
Division 1—Introduction 346
536JV Guide to this Part....346
536JW Meaning of employee and employer....346
Division 2—The minimum standards objective 347
536JX The minimum standards objective 347
Division 3—Minimum standards orders 349
Subdivision A—General matters 349
536JY Minimum standards orders....349
536JZ Applications for minimum standards orders 349
Subdivision B—Matters relating to employee-like worker minimum standards orders 350
536K Particular matters FWC must take into account in making a decision on an employee-like worker minimum standards order....350

Authorised Version C2026C00293 registered 15/07/2026

Subdivision BA—Consultation process for employee-like worker minimum standards orders 351
536KAA FWC to prepare and publish a draft of an employee-like worker minimum standards order....351
536KAB Affected entities to have a reasonable opportunity to make submissions on a draft employee-like worker minimum standards order....352
536KAC Hearings in relation to draft order....353
536KAD Finalising draft order....353
536KAE Decision not to make order based on the draft....353
Subdivision C—Matters relating to road transport minimum standards orders 354
536KA Particular matters FWC must take into account in making a decision on a road transport minimum standards order....354
Subdivision D—Consultation process for road transport minimum standards orders 355
536KB FWC to prepare and publish a draft of a road transport minimum standards order....355
536KC Affected persons and bodies to have a reasonable opportunity to make and comment on a draft road transport minimum standards order....355
536KD Hearings in relation to draft order....356
536KE Finalising draft order....356
536KF Decision not to make order based on the draft....357
Subdivision E—Decisions on minimum standards orders 357
536KG Decisions on applications for minimum standards orders....357
536KH Terms that must be included in an employee-like worker minimum standards order....358
536KJ Terms that must be included in a road transport minimum standards order....359
536KK Term about settling disputes must be included in a minimum standards order....360
536KL Terms that may be included in a minimum standards order....360
536KM Terms that must not be included in a minimum standards order....360
536KMA Further terms that must not be included in an employee-like worker minimum standards order....361

Authorised Version C2026C00293 registered 15/07/2026

536KN Further terms that must not be included in a road transport minimum standards order....362
536KO Achieving the minimum standards objective....363
536KP Applications to vary or revoke minimum standards orders....363
536KQ FWC may vary or revoke minimum standards orders if consistent with the minimum standards objective....363

Division 3A—Deferral and suspension of minimum standards orders 365

Subdivision A—Ministerial declarations to defer or suspend minimum standards orders 365

536KQA Minister may make a declaration deferring the operation or application of a minimum standards order....365
536KQB Limitations on making a deferral declaration....366
536KQC Operation of a minimum standards order during deferral....367
536KQD Minister may make a declaration suspending a minimum standards order....367
536KQE Suspension declaration must be made within 12 months of certain dates....369
536KQF Operation of a minimum standards order during suspension....370
536KQG Consultation requirements....371

Subdivision B—FWC may defer or suspend road transport minimum standards orders 371

536KQH Applications for a deferral determination for a road transport minimum standards order....371
536KQJ FWC may make a determination deferring the operation or application of a road transport minimum standards order....372
536KQK Limitations on making a deferral determination....373
536KQL Decision on an application for a deferral determination in relation to a road transport minimum standards orders....374
536KQM Operation of a road transport minimum standards order during deferral....375
536KQN Applications for a suspension determination for a road transport minimum standards order....375

Authorised Version C2026C00293 registered 15/07/2026

536KQP FWC may make a determination suspending a road transport minimum standards order....377
536KQQ Decision on an application for a suspension determination in relation to a road transport minimum standards orders....379
536KQR Operation of a road transport minimum standards order during suspension....380

Subdivision C—FWC must consider and decide whether or not to vary or revoke a deferred or suspended minimum standards order 380

536KQS FWC must consider whether to vary or revoke a minimum standards order that has been deferred or suspended....380

Division 3B—Consultation before varying or revoking road transport minimum standards order after deferral 383

536KQT FWC to prepare and publish a notice relating to proposed variation or revocation of a road transport minimum standards order....383
536KQU Affected entities to have a reasonable opportunity to make submissions and comment on a proposed variation or revocation of a road transport minimum standards order....383
536KQV Finalising draft order....385

Division 3C—Consultation process before varying or revoking employee-like worker minimum standards orders after deferral 386

536KQW FWC to prepare and publish a notice relating to a proposed variation or revocation of an employee-like worker minimum standards order....386
536KQX Affected entities to have a reasonable opportunity to make submissions and comment on a proposed variation or revocation of an employee-like worker minimum standards order....386
536KQY Finalising draft order....388

Division 4—Minimum standards guidelines 389

536KR Minimum standards guidelines....389
536KS Applications for minimum standards guidelines....389
536KT Initial matter to be considered for employee-like worker minimum standards guidelines....390
536KU Decisions on applications for minimum standards guidelines....390

Authorised Version C2026C00293 registered 15/07/2026

536KV Minimum standards guidelines not to be made if a minimum standards order is in operation 391
536KW Terms that must be included in minimum standards guidelines 391
536KX Terms that may be included in minimum standards guidelines 391
536KY Terms that must not be included in minimum standards guidelines 392
536KZ FWC may vary or revoke minimum standards guidelines if consistent with the minimum standards objective and the road transport objective 392
536L Applications to vary or revoke minimum standards guidelines 393

Part 3A-3—Unfair deactivation or unfair termination of regulated workers 394

Division 1—Introduction 394
536LB Guide to this Part 394
536LC Object of this Part 394

Division 2—Protection from unfair deactivation or unfair termination 396
536LD When a person is protected from unfair deactivation 396
536LE When a person is protected from unfair termination 396

Division 3—What is an unfair deactivation or unfair termination 397

Subdivision A—Unfair deactivation 397
536LF What is an unfair deactivation 397
536LG Meaning of *deactivated* 397
536LH Criteria for considering whether a deactivation was unfair etc 397
536LJ Minister to make a Digital Labour Platform Deactivation Code 399

Subdivision B—What is an unfair termination 400
536LK What is an unfair termination 400
536LL Meaning of *terminated* 400
536LM Criteria for considering whether a termination was unfair etc 401

Authorised Version C2026C00293 registered 15/07/2026

536LN Minister to make Road Transport Industry Termination Code....401
Division 4—Remedies 403
Subdivision A—Remedies for unfair deactivation 403
536LP When the FWC may order remedy for unfair deactivation....403
536LQ Remedy—reactivation etc....403
Subdivision B—Remedies for unfair termination 405
536LR When the FWC may order remedy for unfair termination....405
536LS Remedy—new contract, etc....405
536LT Remedy—compensation....406
Division 5—Procedural matters 409
536LU Application for unfair deactivation or unfair termination remedy....409
536LV Application fees....410
536LW Initial matters to be considered before merits....410
536LX Matters involving contested facts....410
536LY Conferences....411
536LZ Hearings....411
536M Dismissing applications....412
536MA Appeal rights....412
536MB Costs orders against parties....412
536MC Costs orders against lawyers and paid agents....413
536MD Applications for costs orders....414
536ME Schedule of costs....414
536MF Security for costs....414
536MG Contravening orders under this Part....415
Part 3A-4—Collective agreements for regulated workers 416
Division 1—Introduction 416
536MH Guide to this Part....416
536MJ Object of this Part....416
Division 2—Regulated workers and regulated businesses may make collective agreements 417
536MK Making a collective agreement....417
536ML Notice of consultation period for a proposed collective agreement....418

Authorised Version C2026C00293 registered 15/07/2026

536MM Consultation notice to be given to FWC, etc.....419
536MN Notice to be given to regulated workers.....419
536MP Application for the FWC to deal with a dispute.....421
536MQ Negotiating entity may request that other negotiating entity sign a proposed collective agreement.....421
Division 3—Registration of collective agreements by the FWC 422
536MR Application to the FWC to register a collective agreement.....422
536MS FWC must register collective agreement.....423
Division 4—Variation of collective agreements 425
536MT Application for variation of a collective agreement.....425
536MU FWC must vary collective agreement.....426
Division 5—Termination of collective agreements 427
536MV FWC must be notified of termination.....427
536MW FWC must register termination notice.....427
Division 6—Other matters 428
536MX Terms of a collective agreement that are of no effect.....428
Part 3A-5—Unfair contract terms of services contracts 429
Division 1—Introduction 429
536MY Guide to this Part.....429
536MZ Meaning of employee and employer.....429
Division 2—Object of Part 430
536N Object of Part.....430
Division 3—Orders in relation to unfair contract terms of services contracts 431
536NA When the FWC may make an order in relation to an unfair contract term of a services contract.....431
536NB Matters to be considered in deciding whether a term of a services contract is an unfair contract term.....431
536NC Remedy—order to set aside etc. contract.....432
Division 4—Procedural matters 433
536ND Application for unfair contract term remedy.....433
536NE Application fees.....433
536NF Conferences.....433

Authorised Version C2026C00293 registered 15/07/2026

536NG Hearings....434
536NH Dismissing applications....434
536NJ Appeal rights....435
536NK Contravening orders under this Part....435

Authorised Version C2026C00293 registered 15/07/2026

Authorised Version C2026C00293 registered 15/07/2026

Chapter 2—Terms and conditions of employment

Part 2-5—Workplace determinations

Division 1—Introduction

258 Guide to this Part

This Part is about workplace determinations, which provide terms and conditions for those national system employees to whom they apply.

Division 3 deals with industrial action related workplace determinations. The FWC must make such a determination if:

(a) a termination of industrial action instrument is made in relation to a proposed enterprise agreement; and

(b) after the end of the post-industrial action negotiating period, the bargaining representatives for the agreement have not settled the matters that were at issue during bargaining for the agreement.

Division 4 deals with intractable bargaining workplace determinations. The FWC must make such a determination if:

(a) an intractable bargaining declaration is made in relation to a proposed enterprise agreement; and

(b) the bargaining representatives for the agreement have not settled the matters that were at issue during bargaining for the agreement.

Division 5 sets out the core terms, mandatory terms and agreed terms of workplace determinations. It also sets out the factors that the FWC must take into account in deciding the terms of a workplace determination.

Authorised Version C2026C00293 registered 15/07/2026

Division 6 deals with the operation, coverage and interaction etc. of workplace determinations. It also provides that, subject to certain exceptions, this Act applies to a workplace determination that is in operation as if it were an enterprise agreement that is in operation.

Division 7 deals with other matters relating to workplace determinations.

259 Meanings of *employee* and *employer*

In this Part, ***employee*** means a national system employee, and ***employer*** means a national system employer.

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

Authorised Version C2026C00293 registered 15/07/2026

Division 3—Industrial action related workplace determinations

266 When the FWC must make an industrial action related workplace determination

Industrial action related workplace determination

(1) If:

(a) a termination of industrial action instrument has been made in relation to a proposed enterprise agreement; and

(b) the post-industrial action negotiating period ends; and

(c) the bargaining representatives for the agreement have not settled all of the matters that were at issue during bargaining for the agreement;

the FWC must make a determination (an ***industrial action related workplace determination***) as quickly as possible after the end of that period.

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

Termination of industrial action instrument

(2) A ***termination of industrial action instrument*** in relation to a proposed enterprise agreement is:

(a) an order under section 423 or 424 terminating protected industrial action for the agreement; or

(b) a declaration under section 431 terminating protected industrial action for the agreement.

Post-industrial action negotiating period

(3) The ***post-industrial action negotiating period*** is the period that:

(a) starts on the day on which the termination of industrial action instrument is made; and

(b) ends:

Authorised Version C2026C00293 registered 15/07/2026

(i) 21 days after that day; or

(ii) if the FWC extends that period under subsection (4)—42 days after that day.

(4) The FWC must extend the period referred to in subparagraph (3)(b)(i) if:

(a) all of the bargaining representatives for the agreement jointly apply to the FWC for the extension within 21 days after the termination of industrial action instrument was made; and

(b) those bargaining representatives have not settled all of the matters that were at issue during bargaining for the agreement.

267 Terms etc. of an industrial action related workplace determination

Basic rule

(1) An industrial action related workplace determination must comply with subsection (4) and include:

(a) the terms set out in subsections (2) and (3); and

(b) the core terms set out in section 272; and

(c) the mandatory terms set out in section 273.

Note: For the factors that the FWC must take into account in deciding the terms of the determination, see section 275.

Agreed terms

(2) The determination must include the agreed terms (see subsection 274(2)) for the determination.

Terms dealing with the matters at issue

(3) The determination must include the terms that the FWC considers deal with the matters that were still at issue at the end of the post-industrial action negotiating period.

Authorised Version C2026C00293 registered 15/07/2026

Coverage

(4) The determination must be expressed to cover:
  (a) each employer that would have been covered by the proposed enterprise agreement concerned; and
  (b) the employees who would have been covered by that agreement; and
  (c) each employee organisation (if any) that was a bargaining representative of those employees.

268 No other terms

An industrial action related workplace determination must not include any terms other than those required by subsection 267(1).

Authorised Version C2026C00293 registered 15/07/2026

Division 4—Intractable bargaining workplace determinations

269 When the FWC must make an intractable bargaining workplace determination

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

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

(b) otherwise—after making the declaration.

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

270 Terms etc. of an intractable bargaining workplace determination

Basic rule

(1) An intractable bargaining workplace determination must comply with subsection (4) and include:

(a) the terms set out in this section; and

(b) the core terms set out in section 272; and

(c) the mandatory terms set out in section 273.

Note: For the factors that the FWC must take into account in deciding the terms of the determination, see section 275.

Agreed terms

(2) The determination must include the agreed terms (see subsection 274(3)) for the determination.

Authorised Version C2026C00293 registered 15/07/2026

Terms dealing with the matters at issue

(3) The determination must include the terms that the FWC considers deal with the matters that were still at issue:

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

(b) otherwise—after making the declaration.

Note: Any such terms must comply with section 270A.

Coverage

(4) The determination must be expressed to cover:

(a) each employer that would have been covered by the agreement; and

(b) the employees who would have been covered by that agreement; and

(c) each employee organisation (if any) that was a bargaining representative of those employees.

270A Terms dealing with matters at issue

(1) This section applies if, immediately before the determination is made, an enterprise agreement applies to one or more employees who will be covered by the determination.

(2) A term that is included in the determination to comply with subsection 270(3), and that deals with a particular matter, must be not less favourable to each of those employees, and any employee organisation that was a bargaining representative of any of those employees, than a term of the enterprise agreement that deals with the matter.

(3) If a term to be included in the determination is not less favourable to a class of employees to which a particular employee belongs, the FWC is entitled to assume, in the absence of evidence to the contrary, that the term is not less favourable to the employee.

Authorised Version C2026C00293 registered 15/07/2026

(4) Subsection (2) does not apply to a term that provides for a wage increase.

271 No other terms

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

Authorised Version C2026C00293 registered 15/07/2026

Division 5—Core terms, mandatory terms and agreed terms of workplace determinations etc.

272 Core terms of workplace determinations

Core terms

(1) This section sets out the core terms that a workplace determination must include.

Nominal expiry date

(2) The determination must include a term specifying a date as the determination's nominal expiry date, which must not be more than 4 years after the date on which the determination comes into operation.

Permitted matters etc.

(3) The determination must not include:
  (a) any terms that would not be about permitted matters if the determination were an enterprise agreement; or
  (b) a term that would be an unlawful term if the determination were an enterprise agreement; or
  (c) any designated outworker terms.

Better off overall test

(4) The determination must include terms such that the determination would, if the determination were an enterprise agreement, pass the better off overall test under section 193.

Safety net requirements

(5) The determination must not include a term that would, if the determination were an enterprise agreement, mean that the FWC could not approve the agreement:

Authorised Version C2026C00293 registered 15/07/2026

(a) because the term would contravene section 55 (which deals with the interaction between the National Employment Standards and enterprise agreements etc.); or

(b) because of the operation of Subdivision E of Division 4 of Part 2-4 (which deals with approval requirements relating to particular kinds of employees).

273 Mandatory terms of workplace determinations

Mandatory terms

(1) This section sets out the mandatory terms that a workplace determination must include.

Term about settling disputes

(2) The determination must include a term that provides a procedure for settling disputes:

(a) about any matters arising under the determination; and

(b) in relation to the National Employment Standards.

(3) Subsection (2) does not apply to the determination if the FWC is satisfied that an agreed term for the determination would, if the determination were an enterprise agreement, satisfy paragraphs 186(6)(a) and (b) (which deal with terms in enterprise agreements about settling disputes).

Flexibility term

(4) The determination must include the model flexibility term unless the FWC is satisfied that an agreed term for the determination would, if the determination were an enterprise agreement, satisfy paragraph 202(1)(a) and section 203 (which deal with flexibility terms in enterprise agreements).

Consultation term

(5) The determination must include the model consultation term unless the FWC is satisfied that an agreed term for the determination

Authorised Version C2026C00293 registered 15/07/2026

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

Delegates' rights term

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

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

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

274 Agreed terms for workplace determinations

Agreed term for an industrial action related workplace determination

(2) An ***agreed term*** for an industrial action related workplace determination is a term that the bargaining representatives for the proposed enterprise agreement concerned had, at the end of the post-industrial action negotiating period, agreed should be included in the agreement.

Note: The determination must include an agreed term (see subsection 267(2)).

Agreed term for an intractable bargaining workplace determination

(3) An ***agreed term*** for an intractable bargaining workplace determination is:

(a) a term that the bargaining representatives for the proposed enterprise agreement concerned had agreed, at the time the application for the intractable bargaining declaration concerned was made, should be included in the agreement; and

Authorised Version C2026C00293 registered 15/07/2026

(b) any other term, in addition to a term mentioned in paragraph (a), that the bargaining representatives had agreed, at the time the declaration was made, should be included in the agreement; and

(c) if there is a post-declaration negotiating period for the declaration—any other term, in addition to a term mentioned in paragraph (a) or (b), that the bargaining representatives had agreed, at the end of the period, should be included in the agreement.

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

275 Factors the FWC must take into account in deciding terms of a workplace determination

The factors that the FWC must take into account in deciding which terms to include in a workplace determination include the following:

(a) the merits of the case;

(c) the interests of the employers and employees who will be covered by the determination;

(ca) the significance, to those employers and employees, of any arrangements or benefits in an enterprise agreement that, immediately before the determination is made, applies to any of the employers in respect of any of the employees;

(d) the public interest;

(e) how productivity might be improved in the enterprise or enterprises concerned;

(f) the extent to which the conduct of the bargaining representatives for the proposed enterprise agreement concerned was reasonable during bargaining for the agreement;

(g) the extent to which the bargaining representatives for the proposed enterprise agreement concerned have complied with the good faith bargaining requirements;

(h) incentives to continue to bargain at a later time.

Authorised Version C2026C00293 registered 15/07/2026

Division 6—Operation, coverage and interaction etc. of workplace determinations

276 When a workplace determination operates etc.

(1) A workplace determination operates from the day on which it is made.

(2) A workplace determination ceases to operate on the earlier of the following days:

(a) the day on which a termination of the determination comes into operation under section 224 or 227 as applied to the determination by section 279 (which deals with the application of this Act to workplace determinations);

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

Note: Subsections 278(1) and (2) deal with when a workplace determination ceases to apply to an employee.

(3) A workplace determination that has ceased to operate can never operate again.

277 Employers, employees and employee organisations covered by a workplace determination

Employers, employees and employee organisations

(1) A workplace determination ***covers*** an employer, employee or employee organisation if the determination is expressed to cover the employer, employee or organisation.

Effect of provisions of this Act, FWC orders and court orders on coverage

(2) A workplace determination also ***covers*** an employer, employee or employee organisation if any of the following provides, or has the

Authorised Version C2026C00293 registered 15/07/2026

effect, that the determination covers the employer, employee or organisation:

(a) a provision of this Act;

(b) an FWC order made under a provision of this Act;

(c) an order of a court.

(3) Despite subsections (1) and (2), a workplace determination does not ***cover*** an employer, employee or employee organisation if any of the following provides, or has the effect, that the determination does not cover the employer, employee or organisation:

(a) another provision of this Act;

(b) an FWC order made under another provision of this Act;

(c) an order of a court.

Workplace determinations that have ceased to operate

(4) Despite subsections (1) and (2), a workplace determination that has ceased to operate does not ***cover*** an employer, employee or employee organisation.

Workplace determinations cover employees in relation to particular employment

(5) A reference in this Act to a workplace determination covering an employee is a reference to the determination covering the employee in relation to particular employment.

278 Interaction of a workplace determination with enterprise agreements etc.

Interaction with an earlier enterprise agreement

(1A) If:

(a) an enterprise agreement applies to an employee in relation to particular employment; and

(b) a workplace determination that covers the employee in relation to the same employment comes into operation;

Authorised Version C2026C00293 registered 15/07/2026

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

Interaction with a later enterprise agreement

(1) If:

(a) a workplace determination applies to an employee in relation to particular employment; and

(b) an enterprise agreement that covers the employee in relation to the same employment comes into operation;

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

Interaction with another workplace determination

(2) If:

(a) a workplace determination (the ***earlier determination***) applies to an employee in relation to particular employment; and

(b) another workplace determination (the ***later determination***) that covers the employee in relation to the same employment comes into operation;

the earlier determination ceases to apply to the employee in relation to that employment when the later determination comes into operation, and can never so apply again.

279 Act applies to a workplace determination as if it were an enterprise agreement

(1) This Act applies to a workplace determination that is in operation as if it were an enterprise agreement that is in operation.

(2) However, the following provisions do not apply to the determination:

(a) section 50 (which deals with contraventions of enterprise agreements);

(b) section 53 (which deals with the coverage of enterprise agreements);

Authorised Version C2026C00293 registered 15/07/2026

(c) section 54 (which deals with the operation of enterprise agreements);

(d) section 58 (which deals with the interaction between one or more enterprise agreements);

(e) section 183 (which deals with the entitlement of employee organisations to be covered by enterprise agreements);

(f) the provisions of Subdivisions A, AA, AB, AC, AD, AE and B of Division 7 of Part 2-4 (which deal with the variation of enterprise agreements) other than section 218 (which deals with variation of an enterprise agreement on referral by the Australian Human Rights Commission).

(3) In addition, Subdivision C of Division 7 of Part 2-4 (which deals with the termination of enterprise agreements by employers and employees) only applies to a workplace determination after the determination has passed its nominal expiry date.

Authorised Version C2026C00293 registered 15/07/2026

Division 7—Other matters

280 Contravening a workplace determination

A person must not contravene a term of a workplace determination.

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

Note 2: A person does not contravene a term of a workplace determination unless the determination applies to the person: see subsections 51(1) and 279(1).

281 Applications by bargaining representatives

Application of this section

(1) This section applies if a provision of this Part permits an application to be made by a bargaining representative of an employer that would have been covered by a proposed enterprise agreement.

Persons who may make applications

(2) If the agreement would have covered more than one employer, the application may be made by:

(a) in the case of a proposed enterprise agreement in relation to which a single interest employer authorisation is in operation—the person (if any) specified in the authorisation as the person who may make applications under this Act; or

(b) in any case—a bargaining representative of an employer that would have been covered by the agreement, on behalf of one or more other such bargaining representatives, if those other bargaining representatives have agreed to the application being made on their behalf.

281AA Entitlement for volunteer bodies to make submissions

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

Authorised Version C2026C00293 registered 15/07/2026

(a) the matter arises under this Part; and
(b) the matter affects, or could affect, the volunteers of a designated emergency management body.

(2) The bodies are as follows:
(a) a body corporate that:
(i) has a history of representing the interests of the designated emergency management body's volunteers; and
(ii) is not prescribed by the regulations for the purposes of this subparagraph;
(b) any other body that is prescribed by the regulations for the purposes of this paragraph.

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

281A How employees, employers and employee organisations are to be described

(1) This section applies if a provision of this Part requires or permits an instrument of any kind to specify the employers, employees or employee organisations covered, or who will be covered, by a workplace determination or other instrument.

(2) The employees may be specified by class or by name.

(3) The employers and employee organisations must be specified by name.

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

Authorised Version C2026C00293 registered 15/07/2026

Part 2-6—Minimum wages

Division 1—Introduction

282 Guide to this Part

This Part provides for the FWC (constituted by an Expert Panel) to set and vary minimum wages for national system employees. For employees covered by modern awards, minimum wages are specified in the modern award. For award/agreement free employees, minimum wages are specified in the national minimum wage order.

Division 2 provides for the minimum wages objective. This requires the FWC to establish and maintain a safety net of fair minimum wages, taking into account certain social and economic factors.

Division 3 provides for the FWC (constituted by an Expert Panel) to conduct annual wage reviews. In an annual wage review, the FWC may set or vary minimum wages in modern awards, and must make a national minimum wage order. Minimum wages in modern awards can also be set, or varied (in limited circumstances), under Part 2-3 (which deals with modern awards).

Division 4 provides for national minimum wage orders and requires employers to comply with them. The orders set the national minimum wage, as well as special national minimum wages for junior employees, employees to whom training arrangements apply and employees with a disability. The orders also set the casual loading for award/agreement free employees.

National minimum wages and special national minimum wages apply to award/agreement free employees. However, they are also relevant to other employees as follows:

Authorised Version C2026C00293 registered 15/07/2026

(a) in setting or varying modern award minimum wages, the FWC must take the national minimum wage into account (see subsection 135(2) (in Part 2-3) and subsection 285(3) (in this Part));

(b) for an employee who is not covered by a modern award and to whom an enterprise agreement applies, the employee's base rate of pay under the agreement must not be less than the relevant national minimum wage or special national minimum wage (see subsection 206(3) (in Part 2-4)).

For an employee who is covered by a modern award and to whom an enterprise agreement applies, the employee's base rate of pay under the agreement must not be less than the base rate of pay that would have been payable to the employee if the award applied (see subsection 206(1) (in Part 2-4)).

283 Meanings of *employee* and *employer*

In this Part, ***employee*** means a national system employee, and ***employer*** means a national system employer.

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

Authorised Version C2026C00293 registered 15/07/2026

Division 2—Overarching provisions

284 The minimum wages objective

What is the minimum wages objective?

(1) The FWC must establish and maintain a safety net of fair minimum wages, taking into account:

(a) the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth; and

(aa) the need to achieve gender equality, including by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and addressing gender pay gaps; and

(b) promoting social inclusion through increased workforce participation; and

(c) relative living standards and the needs of the low paid; and

(e) providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability.

This is the ***minimum wages objective***.

When does the minimum wages objective apply?

(2) The minimum wages objective applies to the performance or exercise of:

(a) the FWC's functions or powers under this Part; and

(b) the FWC's functions or powers under Part 2-3, so far as they relate to setting, varying or revoking modern award minimum wages.

Note: The FWC must also take into account the objects of this Act and any other applicable provisions. For example, if the FWC is setting, varying or revoking modern award minimum wages, the modern awards objective also applies (see section 134).

Authorised Version C2026C00293 registered 15/07/2026

*Meaning of **modern award minimum wages***

(3) ***Modern award minimum wages*** are the rates of minimum wages in modern awards, including:

(a) wage rates for junior employees, employees to whom training arrangements apply and employees with a disability; and

(b) casual loadings; and

(c) piece rates.

*Meaning of **setting** and **varying** modern award minimum wages*

(4) ***Setting*** modern award minimum wages is the initial setting of one or more new modern award minimum wages in a modern award, either in the award as originally made or by a later variation of the award. ***Varying*** modern award minimum wages is varying the current rate of one or more modern award minimum wages.

Authorised Version C2026C00293 registered 15/07/2026

Division 3—Annual wage reviews

Subdivision A—Main provisions

285 Annual wage reviews to be conducted

(1) The FWC must conduct and complete an ***annual wage review*** in each financial year.

Note 1: The FWC must be constituted by an Expert Panel to conduct annual wage reviews, and to make determinations and orders in those reviews (see section 617).

Note 2: The President may give directions about the conduct of annual wage reviews (see section 582).

(2) In an annual wage review, the FWC:

(a) must review:

(i) modern award minimum wages; and

(ii) the national minimum wage order; and

(b) may make one or more determinations varying modern awards to set, vary or revoke modern award minimum wages; and

(c) must make a national minimum wage order.

Note: For provisions about national minimum wage orders, see Division 4.

(3) In exercising its power in an annual wage review to make determinations referred to in paragraph (2)(b), the FWC must take into account the rate of the national minimum wage that it proposes to set in the review.

286 When annual wage review determinations varying modern awards come into operation

Determinations generally come into operation on 1 July

(1) A determination (a ***variation determination***) varying one or more modern awards to set, vary or revoke modern award minimum

Authorised Version C2026C00293 registered 15/07/2026

wages that is made in an annual wage review comes into operation on 1 July in the next financial year.

Later operation of determinations in exceptional circumstances

(2) If the FWC is satisfied that there are exceptional circumstances justifying why a variation determination should not come into operation until a later day, the FWC may specify that later day as the day on which it comes into operation. However, the determination must be limited just to the particular situation to which the exceptional circumstances relate.

Note: This may mean that the FWC needs to make more than one determination, if different circumstances apply to different employees.

(3) If a later day is so specified, the variation determination comes into operation on that later day.

Effect of determinations cannot be deferred

(4) The FWC cannot provide for the effect of a variation determination on modern award minimum wages to be deferred to a day that is later than the day on which the determination comes into operation.

Determinations take effect from first full pay period

(5) A variation determination does not take effect in relation to a particular employee until the start of the employee's first full pay period that starts on or after the day the determination comes into operation.

287 When national minimum wage orders come into operation etc.

Orders come into operation on 1 July

(1) A national minimum wage order that is made in an annual wage review comes into operation on 1 July in the next financial year (the ***year of operation***).

Authorised Version C2026C00293 registered 15/07/2026

Setting of different wages or loadings only permitted in exceptional circumstances

(2) The national minimum wage or the casual loading for award/agreement free employees set by the order must be the same for all employees, unless:

(a) the FWC is satisfied that there are exceptional circumstances justifying setting different wages or loadings; and

(b) the setting of different wages or loadings is limited just to the extent necessary because of the particular situation to which the exceptional circumstances relate.

(3) A special national minimum wage set by the order for a specified class of employees must be the same for all employees in that class, unless:

(a) the FWC is satisfied that there are exceptional circumstances justifying setting different wages; and

(b) the setting of different wages is limited just to the extent necessary because of the particular situation to which the exceptional circumstances relate.

Adjustments taking effect during year of operation only permitted in exceptional circumstances

(4) The order may provide that an adjustment of the national minimum wage, the casual loading for award/agreement free employees, or a special national minimum wage, set by the order takes effect (whether for some or all employees to whom that wage or loading applies) on a specified day in the year of operation that is later than 1 July, but only if:

(a) the FWC is satisfied that there are exceptional circumstances justifying the adjustment taking effect on that day; and

(b) the adjustment is limited just to the particular situation to which the exceptional circumstances relate.

Authorised Version C2026C00293 registered 15/07/2026

When orders take effect

(5) The order takes effect in relation to a particular employee from the start of the employee's first full pay period that starts on or after 1 July in the year of operation. However, an adjustment referred to in subsection (4) takes effect in relation to a particular employee from the start of the employee's first full pay period that starts on or after the day specified as referred to in that subsection.

Subdivision B—Provisions about conduct of annual wage reviews

288 General

This Subdivision contains some specific provisions relevant to the conduct of annual wage reviews. For other provisions relevant to the conduct of annual wage reviews, see the general provisions about the FWC's processes in Part 5-1.

Note: Relevant provisions of Part 5-1 include the following:

(a) section 582 (which deals with the President's power to give directions);

(b) section 590 (which deals with the FWC's discretion to inform itself as it considers appropriate, including by commissioning research);

(c) section 596 (which deals with being represented in a matter before the FWC);

(d) section 601 (which deals with writing and publication requirements).

289 Everyone to have a reasonable opportunity to make and comment on submissions

(1) The FWC must, in relation to each annual wage review, ensure that all persons and bodies have a reasonable opportunity to make written submissions to the FWC for consideration in the review.

(2) The FWC must publish all submissions made to the FWC for consideration in the review.

Authorised Version C2026C00293 registered 15/07/2026

(3) However, if a submission made by a person or body includes information that is claimed by the person or body to be confidential or commercially sensitive, and the FWC is satisfied that the information is confidential or commercially sensitive, the FWC:

(a) may decide not to publish the information; and

(b) may instead publish:

(i) a summary of the information which contains sufficient detail to allow a reasonable understanding of the substance of the information (without disclosing anything that is confidential or commercially sensitive); or

(ii) if the FWC considers that it is not practicable to prepare a summary that would comply with subparagraph (i)—a statement that confidential or commercially sensitive information in the submission has not been published.

(4) A reference in this Act (other than in this section) to a submission under this section includes a reference to a summary or statement referred to in paragraph (3)(b).

(5) The FWC must ensure that all persons and bodies have a reasonable opportunity to make comments to the FWC, for consideration in the review, on the material published under subsections (2) and (3).

(6) The publishing of material under subsections (2) and (3) may be on the FWC's website or by any other means that the FWC considers appropriate.

290 President may direct investigations and reports

(1) The President may give a direction under section 582 requiring that a matter be investigated, and that a report about the matter be prepared, for consideration in an annual wage review.

(2) The direction:

(a) may be given to:

(i) an Expert Panel; or

Authorised Version C2026C00293 registered 15/07/2026

(ii) an Expert Panel Member; or

(iii) a Full Bench that includes one or more Expert Panel Members; and

(b) must require the report to be given to the Expert Panel that is constituted to conduct the annual wage review, unless the direction is given to that Expert Panel.

291 Research must be published

(1) If the FWC undertakes or commissions research for the purposes of an annual wage review, the FWC must publish the research so that submissions can be made addressing issues covered by the research.

(2) The publication may be on the FWC's website or by any other means that the FWC considers appropriate.

292 Varied wage rates must be published

(1) If the FWC makes one or more determinations varying modern award minimum wages in an annual wage review, the FWC must publish the rates of those wages as so varied:

(a) for wages in a modern award (other than a modern enterprise award or a State reference public sector modern award)—before 1 July in the next financial year; and

(b) for wages in a modern enterprise award or a State reference public sector modern award—as soon as practicable.

Note: The FWC must also publish the modern award as varied (see section 168).

(2) The publication may be on the FWC's website or by any other means that the FWC considers appropriate.

Authorised Version C2026C00293 registered 15/07/2026

Division 4—National minimum wage orders

293 Contravening a national minimum wage order

An employer must not contravene a term of a national minimum wage order.

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

294 Content of national minimum wage order—main provisions

Setting minimum wages and the casual loading

(1) A national minimum wage order:

(a) must set the national minimum wage; and

(b) must set special national minimum wages for all award/agreement free employees in the following classes:

(i) junior employees;

(ii) employees to whom training arrangements apply;

(iii) employees with a disability; and

(c) must set the casual loading for award/agreement free employees.

Note: A national minimum wage order must be made in each annual wage review (see section 285).

Requiring employers to pay minimum wages and the casual loading

(2) The order:

(a) must require employers to pay employees to whom the national minimum wage applies a base rate of pay that at least equals the national minimum wage; and

(b) must require employers to pay to employees to whom a special national minimum wage applies a base rate of pay that at least equals that special national minimum wage; and

(c) must require employers to pay, to award/agreement free employees who are casual employees, a casual loading that at

Authorised Version C2026C00293 registered 15/07/2026

least equals the casual loading for award/agreement free employees (as applied to the employees' base rates of pay).

What employees does the national minimum wage apply to?

(3) The national minimum wage applies to all award/agreement free employees who are not:
  (a) junior employees; or
  (b) employees to whom training arrangements apply; or
  (c) employees with a disability.

What employees does a special national minimum wage apply to?

(4) A special national minimum wage applies to the employees to whom it is expressed in the order to apply. Those employees must be:
  (a) all junior employees who are award/agreement free employees, or a specified class of those employees; or
  (b) all employees to whom training arrangements apply and who are award/agreement free employees, or a specified class of those employees; or
  (c) all employees with a disability who are award/agreement free employees, or a specified class of those employees.

295 Content of national minimum wage order—other matters

Expressing minimum wages and the casual loading

(1) In a national minimum wage order:
  (a) the national minimum wage, and the special national minimum wages, set by the order must be expressed in a way that produces a monetary amount per hour; and
  (b) the casual loading for award/agreement free employees must be expressed as a percentage.

Note: The means by which the national minimum wage or a special national minimum wage may be expressed include:
  (a) a monetary amount per hour; or
  (b) a monetary amount for a specified number of hours; or

Authorised Version C2026C00293 registered 15/07/2026

(c) a method for calculating a monetary amount per hour.

Terms about how the order applies

(2) The order may also include terms about how the order, or any of the requirements in it, applies.

296 Variation of national minimum wage order to remove ambiguity or uncertainty or correct error

Permitted variations

(1) The FWC may make a determination varying a national minimum wage order to remove an ambiguity or uncertainty or to correct an error.

Note: The FWC must be constituted by an Expert Panel to vary a national minimum wage order (see section 617).

(2) If the FWC varies a national minimum wage order, the FWC must, as soon as practicable, publish the order as varied on its website or by any other means that the FWC considers appropriate.

No other variation or revocation permitted

(3) A national minimum wage order:
(a) cannot be varied except as referred to in subsection (1); and
(b) cannot be revoked.

297 When determinations varying national minimum wage orders come into operation

Determinations come into operation on specified day

(1) A determination varying a national minimum wage order under section 296 comes into operation on the day specified in the determination.

Note: For when a national minimum wage order comes into operation, see section 287.

Authorised Version C2026C00293 registered 15/07/2026

(2) The specified day must not be earlier than the day on which the determination is made, unless the FWC is satisfied that there are exceptional circumstances that justify specifying an earlier day.

Determinations take effect from first full pay period

(3) The determination does not take effect in relation to a particular employee until the start of the employee's first full pay period that starts on or after the day the determination comes into operation.

298 Special rule about retrospective variations of national minimum wage orders

Application of this section

(1) This section applies if a determination varying a national minimum wage order has a retrospective effect because it comes into operation under subsection 297(2) on a day before the day on which the determination is made.

No creation of liability to pay pecuniary penalty for past conduct

(2) If:

(a) a person engaged in conduct before the determination was made; and

(b) but for the retrospective effect of the determination, the conduct would not have contravened a term of the national minimum wage order or an enterprise agreement;

a court must not order the person to pay a pecuniary penalty under Division 2 of Part 4-1 in relation to the conduct, on the grounds that the conduct contravened a term of the national minimum wage order or enterprise agreement.

Note 1: This subsection does not affect the powers of a court to make other kinds of orders under Division 2 of Part 4-1.

Note 2: A determination varying a national minimum wage order could result in a contravention of a term of an enterprise agreement because of the effect of subsection 206(4).

Authorised Version C2026C00293 registered 15/07/2026

299 When a national minimum wage order is in operation

A national minimum wage order continues in operation until the next national minimum wage order comes into operation.

Note: For when a national minimum wage order comes into operation, see section 287.

Authorised Version C2026C00293 registered 15/07/2026

Part 2-7—Equal remuneration

Division 1—Introduction

300 Guide to this Part

This Part allows the FWC to make orders to ensure that there will be equal remuneration for men and women workers for work of equal or comparable value.

301 Meanings of *employee* and *employer*

In this Part, ***employee*** means a national system employee, and ***employer*** means a national system employer.

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

Authorised Version C2026C00293 registered 15/07/2026

Division 2—Equal remuneration orders

302 FWC may make an order requiring equal remuneration

Power to make an equal remuneration order

(1) The FWC may make any order (an ***equal remuneration order***) it considers appropriate to ensure that, for employees to whom the order will apply, there will be equal remuneration for work of equal or comparable value.

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

Meaning of ***equal remuneration for work of equal or comparable value***

(2) ***Equal remuneration for work of equal or comparable value*** means equal remuneration for men and women workers for work of equal or comparable value.

When the FWC may make an equal remuneration order

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

Gender equity considerations

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

Authorised Version C2026C00293 registered 15/07/2026

(a) comparisons within and between occupations and industries to establish whether the work has been undervalued on the basis of gender; or

(b) whether historically the work has been undervalued on the basis of gender; or

(c) any fair work instrument or State industrial instrument.

(3B) If the FWC takes into account a comparison for the purposes of paragraph (3A)(a), the comparison:

(a) is not limited to similar work; and

(b) does not need to be a comparison with an historically male-dominated occupation or industry.

(3C) If the FWC takes into account a matter referred to in paragraph (3A)(a) or (b), the FWC is not required to find discrimination on the basis of gender to establish the work has been undervalued as referred to in that paragraph.

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

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

(a) orders and determinations made by the FWC in annual wage reviews; and

(b) the reasons for those orders and determinations.

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

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

Requirement to make an equal remuneration order

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

Authorised Version C2026C00293 registered 15/07/2026

the order will apply, there is not equal remuneration for work of equal or comparable value.

303 Equal remuneration order may increase, but must not reduce, rates of remuneration

(1) Without limiting subsection 302(1), an equal remuneration order may provide for such increases in rates of remuneration as the FWC considers appropriate to ensure that, for employees to whom the order will apply, there will be equal remuneration for work of equal or comparable value.

(2) An equal remuneration order must not provide for a reduction in an employee's rate of remuneration.

304 Equal remuneration order may implement equal remuneration in stages

An equal remuneration order may implement equal remuneration for work of equal or comparable value in stages (as provided in the order) if the FWC considers that it is not feasible to implement equal remuneration for work of equal or comparable value when the order comes into operation.

305 Contravening an equal remuneration order

An employer must not contravene a term of an equal remuneration order.

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

306 Inconsistency with modern awards, enterprise agreements and orders of the FWC

A term of a modern award, an enterprise agreement or an FWC order has no effect in relation to an employee to the extent that it is less beneficial to the employee than a term of an equal remuneration order that applies to the employee.

Authorised Version C2026C00293 registered 15/07/2026

Part 2-7A—Regulated labour hire arrangement orders

Division 1—Introduction

306A Guide to this Part

This Part is about regulated labour hire arrangement orders.

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

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

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

Division 4 is about anti-avoidance.

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

306B Meanings of *employee* and *employer*

In this Part, ***employee*** means a national system employee, and ***employer*** means a national system employer.

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

306C Meaning of *regulated host*

A ***regulated host*** is:

Authorised Version C2026C00293 registered 15/07/2026

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

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

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

(1) A reference in this Part to work of a kind includes a reference to work that is substantially of that kind.

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

Authorised Version C2026C00293 registered 15/07/2026

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

Authorised Version C2026C00293 registered 15/07/2026

Division 2—Regulated labour hire arrangement orders

Subdivision A—Making regulated labour hire arrangement orders

306E FWC may make a regulated labour hire arrangement order

Regulated labour hire arrangement order

(1) The FWC must, on application by a person mentioned in subsection (7), make an order (a ***regulated labour hire arrangement order***) if the FWC is satisfied that:

(a) an employer supplies or will supply, either directly or indirectly, one or more employees of the employer to perform work for a regulated host; and

(b) a covered employment instrument that applies to the regulated host would apply to the employees if the regulated host were to employ the employees to perform work of that kind; and

(c) the regulated host is not a small business employer.

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

(1A) Despite subsection (1), the FWC must not make the order unless it is satisfied that the performance of the work is not or will not be for the provision of a service, rather than the supply of labour, having regard to the matters in subsection (7A).

(2) Despite subsection (1), the FWC must not make the order if the FWC is satisfied that it is not fair and reasonable in all the circumstances to do so, having regard to any matters in subsection (8) in relation to which submissions have been made.

(3) For the purposes of paragraph (1)(a), it does not matter:

Authorised Version C2026C00293 registered 15/07/2026

(a) whether the supply is the result of an agreement, or one or more agreements; or

(b) if there are one or more agreements relating to the supply—whether an agreement is between:

(i) the regulated host and the employer; or

(ii) the regulated host and a person other than the employer; or

(iii) the employer and a person other than the regulated host; or

(iv) any 2 persons who are neither the regulated host nor the employer; or

(c) whether the regulated host and employer are related bodies corporate.

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

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

Regulated employee and host employment instrument

(5) An employee referred to in paragraph (1)(a) is a ***regulated employee.***

(6) The covered employment instrument referred to in paragraph (1)(b) is a ***host employment instrument***.

Who may apply for an order

(7) The following persons may apply for the order:

(a) a regulated employee;

(b) an employee of the regulated host;

Authorised Version C2026C00293 registered 15/07/2026

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

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

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

Matters to be considered if submissions are made

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

Authorised Version C2026C00293 registered 15/07/2026

level or grade that would be applicable to the regulated employees; and

(iii) the rate of pay that would be payable to the regulated employees if the order were made;

(c) the history of industrial arrangements applying to the regulated host and the employer;

(d) the relationship between the regulated host and the employer, including whether they are related bodies corporate or engaged in a joint venture or common enterprise;

(da) if the performance of the work is or will be wholly or principally for the benefit of a joint venture or common enterprise engaged in by the regulated host and one or more other persons:

(i) the nature of the regulated host's interests in the joint venture or common enterprise; and

(ii) the pay arrangements that apply to employees of any of the other persons engaged in the joint venture or common enterprise (or related bodies corporate of those other persons);

(e) the terms and nature of the arrangement under which the work will be performed, including:

(i) the period for which the arrangement operates or will operate; and

(ii) the location of the work being performed or to be performed under the arrangement; and

(iii) the industry in which the regulated host and the employer operate; and

(iv) the number of employees of the employer performing work, or who are to perform work, for the regulated host under the arrangement;

(f) any other matter the FWC considers relevant.

What an order must specify

(9) A regulated labour hire arrangement order must specify:

(a) the regulated host covered by the order; and

Authorised Version C2026C00293 registered 15/07/2026

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

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

What an order may specify

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

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

306EA Regulated labour hire arrangement order may cover additional arrangements

Determination that application covers additional employers and employees

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

Authorised Version C2026C00293 registered 15/07/2026

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

(2) The FWC may make the determination:

(a) on its own initiative; or

(b) on application by any of the following:

(i) the applicant for the order or any other person who could have applied for the order (see subsection 306E(7));

(ii) the employer mentioned in paragraph 306E(1)(a);

(iii) an employer that supplies or will supply employees as referred to in paragraph (1)(a) of this section;

(iv) a person who is such an employee;

(v) an employee organisation that is entitled to represent the industrial interests of such an employee.

(3) If the FWC makes such a determination, the FWC must seek the views of the following before deciding whether to make the regulated labour hire arrangement order:

(a) the additional regulated employees;

(b) employee organisations that are entitled to represent the industrial interests of the additional regulated employees;

(c) the additional employers.

Additional employers and employees in regulated labour hire arrangement order

(4) Subject to subsections (5) and (6), if the FWC makes a determination under subsection (1) in relation to an application for a regulated labour hire arrangement order, the FWC may specify in the regulated labour hire arrangement order (if made) that, in addition to the persons referred to in paragraphs 306E(9)(b) and (c), the order also covers:

(a) any or all of the additional employers; and

(b) additional regulated employees of those employers.

(5) The FWC must not specify an additional employer or additional regulated employees of the employer under subsection (4) unless:

Authorised Version C2026C00293 registered 15/07/2026

(a) the FWC is satisfied of the matters mentioned in subsection 306E(1) in relation to the additional employer and the additional regulated employees; and

(b) the FWC is satisfied that the covered employment instrument that would apply to the additional regulated employees, as referred to in paragraph 306E(1)(b), is the host employment instrument covered by the order; and

(c) the FWC is satisfied that the performance of the work by the additional regulated employees is not or will not be for the provision of a service, rather than the supply of labour, having regard to the matters in subsection 306E(7A) in relation to the additional employer and the additional regulated employees.

(6) The FWC must not specify an additional employer or additional regulated employees of the employer under subsection (4) if the FWC is satisfied that it is not fair and reasonable in all the circumstances to do so, having regard to:

(a) the views (if any) of persons referred to in subsection (3); and

(b) any matters mentioned in subsection 306E(8) in relation to which submissions are made, to the extent the submissions relate to the additional employer and the additional regulated employees.

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

(1) This section applies if:

(a) a regulated labour hire arrangement order is in force; and

(b) the host employment instrument covered by the order ceases to apply to the regulated host covered by the order, or to a class of employees of the regulated host covered by the order, in connection with another covered employment instrument (the ***new instrument***) starting to apply to the regulated host or those employees; and

Authorised Version C2026C00293 registered 15/07/2026

(c) the new instrument would apply to the regulated employees covered by the order if the regulated host were to employ the employees to perform work of a kind to which the order relates.

(2) From the time the new instrument starts to apply to the regulated host or the class of employees mentioned in paragraph (1)(b), the order has effect (and may be dealt with) as if the new instrument were the host employment instrument covered by the order.

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

306EC Notification requirements in relation to new covered employment instrument

Notification by regulated host

(1) If a regulated labour hire arrangement order in force covers a regulated host and an event mentioned in subsection (2) occurs, the regulated host must, as soon as practicable after the event occurs, give written notice to any employers covered by the order of:
(a) the event; and
(b) the effect that the event will have or would have in relation to the order.

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

(2) The events are the following:
(a) approval, by employees, of a covered employment instrument that will, if it comes into operation, become the host employment instrument covered by the order because of section 306EB;
(b) any other approval or making of a covered employment instrument that will, if it comes into operation, become the host employment instrument covered by the order because of

Authorised Version C2026C00293 registered 15/07/2026

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

Notification by FWC

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

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

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

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

Authorised Version C2026C00293 registered 15/07/2026

Regulated host must make application

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

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

(3) Section 588 (discontinuing applications) does not apply in relation to the application unless the circumstances referred to in paragraph (1)(b) of this section no longer exist.

(4) As soon as possible after the application is made, the regulated host must give written notice of the following to each of the new employers:

(a) that the application has been made;

(b) the effect of subsection (11) in relation to the application.

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

FWC must decide whether to make variation order

(5) The FWC must:

(a) decide whether to make an order under this section varying the regulated labour hire arrangement order in accordance with subsection (6) or (7) to cover:

(i) any or all of the new employers; and

(ii) relevant regulated employees of those employers; and

(b) take all reasonable steps to make the decision before the time any of those employees start to perform the work referred to in paragraph (1)(b).

(6) The FWC must vary the regulated labour hire arrangement order to cover a new employer and the relevant regulated employees of the employer if the regulated host and the new employer notify the FWC that the regulated host and the new employer agree to the making of the variation.

Authorised Version C2026C00293 registered 15/07/2026

(7) Subject to subsections (8) and (9), the FWC must also vary the regulated labour hire arrangement order to cover a new employer and the relevant regulated employees of the employer if the FWC is satisfied of the matters referred to in subsection 306E(1) in relation to the regulated host, the new employer and the relevant regulated employees.

(8) The FWC must not vary the regulated labour hire arrangement order in accordance with subsection (7) unless the FWC is satisfied that the performance of the work by the relevant regulated employees is not or will not be for the provision of a service, rather than the supply of labour, having regard to the matters referred to in subsection 306E(7A) in relation to the new employer and the relevant regulated employees.

(9) The FWC must not vary the regulated labour hire arrangement order in accordance with subsection (7) if the FWC is satisfied that it is not fair and reasonable in all the circumstances to make the variation, having regard to any matters referred to in subsection 306E(8) in relation to which submissions have been made in respect of the variation.

When variation order comes into force

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

Interim arrangements before FWC decides application

(11) If the FWC does not decide whether to make an order under this section by the time referred to in paragraph (5)(b), the regulated labour hire arrangement order is taken (so long as it is in force) to cover the new employers and the relevant regulated employees from the time the application for the order under this section is made until:

(a) if the FWC decides not to make an order under this section—the time the FWC makes that decision; or

(b) if the FWC decides to make an order under this section—the time that order comes into force.

Authorised Version C2026C00293 registered 15/07/2026

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

(1) This section applies if:

(a) a regulated host is covered by a regulated labour hire arrangement order that is in force or has been made but is not yet in force; and

(b) a tender process is conducted:

(i) by or on behalf of the regulated host; or

(ii) for the purposes of a joint venture or common enterprise engaged in by the regulated host and one or more other persons.

(2) If it could reasonably be expected that one or more employers would, as a result of the tender process, become covered by the regulated labour hire arrangement order because of section 306ED, the regulated host must ensure that, from the start of the tender process, all prospective tenderers are advised, in writing, that if one or more tenderers are successful in the process:

(a) one or more employers could become covered by the regulated labour hire arrangement order; and

(b) the employers could be required to pay employees of the employers who perform work for the regulated host, in accordance with this Part, in connection with the work.

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

(3) If the regulated host is required to apply to the FWC in relation to one or more employers under subsection 306ED(2) as a result of the tender process, the regulated host must, as soon as practicable after the end of the tender process, advise the successful tenderer or tenderers in that process (whether or not they are the employers), in writing, of the following:

(a) that the regulated host is required to make the application;

(b) the effect of subsection 306ED(11) in relation to the application;

(c) that if the FWC decides to vary the order under section 306ED to cover those employers, and the order is in

Authorised Version C2026C00293 registered 15/07/2026

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

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

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

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

Application of section

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

Employer must not pay less than protected rate of pay

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

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

Exceptions

(3) The employer does not contravene subsection (2) if the employer pays the regulated employee at less than the protected rate of pay because:

(a) the regulated host provides information to the employer under section 306H (which deals with information about the protected rate of pay); and

(b) the employer reasonably relies on the information for the purposes of working out the protected rate of pay for the regulated employee; and

Authorised Version C2026C00293 registered 15/07/2026

(c) the information is incorrect in a material particular.

(3A) The employer does not contravene subsection (2) if:

(a) the regulated labour hire arrangement order covers the employer because of the operation of subsection 306ED(11); and

(b) the employer pays the regulated employee at less than the protected rate of pay because the employer has not been either:

(i) notified that the regulated host has made an application under subsection 306ED(2) (which deals with certain variation orders); or

(ii) for an employer who was a successful tenderer in a tender process—advised under subsection 306EE(2) or (3) (which deal with notifying tenderers) in relation to the regulated labour hire arrangement order.

Meaning of protected rate of pay

(4) Unless subsection (5) applies, the ***protected rate of pay*** for the regulated employee is the full rate of pay that would be payable to the employee if the host employment instrument covered by the regulated labour hire arrangement order were to apply to the employee.

(5) If the regulated employee is a casual employee, and there is no covered employment instrument that applies to the regulated host that provides for work of that kind to be performed by casual employees, the ***protected rate of pay*** for the regulated employee is the full rate of pay that would be payable to the employee if:

(a) the employee were an employee other than a casual employee and the host employment instrument covered by the regulated labour hire arrangement order were to apply to the employee; and

(b) the base rate of pay that would be payable to the employee, in the circumstances referred to in paragraph (a), were increased by 25%.

Authorised Version C2026C00293 registered 15/07/2026

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

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

(7) If the regulated employee is a pieceworker and paragraph 16(2)(b) would apply to the employee were the host employment instrument to apply to the employee, the base rate of pay that would be payable to the employee for the purposes of subsection (5) of this section is taken to be the base rate of pay that would be referred to in that paragraph.

(8) If the regulated employee is a pieceworker and paragraph 18(2)(b) would apply to the employee were the host employment instrument to apply to the employee, the full rate of pay that would be payable to the employee for the purposes of subsections (4) and (5) of this section is taken to be the full rate of pay that would be referred to in that paragraph.

(9) To avoid doubt, this section does not require that a regulated employee referred to in subsection (5) be taken to be an employee other than a casual employee for the purposes of determining entitlements to kinds of leave, or any other purpose, except determining the protected rate of pay for the regulated employee.

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

(10) Subsection (2) applies despite any provision of:

(a) a fair work instrument (other than an instrument made by the FWC under this Part) that applies to the regulated employee; or

(b) a covered employment instrument (other than a fair work instrument) that applies to the regulated employee; or

(c) the regulated employee's contract of employment;

Authorised Version C2026C00293 registered 15/07/2026

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

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

306G Exceptions from requirement to pay protected rate of pay

Training arrangements

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

Certain short-term arrangements

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

(3) However, if the regulated employee does in fact perform the work for longer than the maximum period applicable under paragraph (2)(b), as a result of a variation to or the making of one

Authorised Version C2026C00293 registered 15/07/2026

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

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

Application of this section

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

Ability to request information regarding protected rate of pay

(2) If the employer reasonably considers that the employer does not have all of the information needed regarding what is the protected rate of pay for one or more regulated employees of the employer covered by the order, the employer may request, in writing, that the regulated host provide the employer with specified information needed.

(3) The regulated host must comply with the request:
  (a) as soon as reasonably practicable; and
  (b) in any event, within such a period as would reasonably enable the employer to comply with its obligations under section 306F (protected rate of pay payable to employees if a regulated labour hire arrangement order is in force) in relation to the employees.

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

Manner of complying with request

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

Authorised Version C2026C00293 registered 15/07/2026

Subdivision C—Short-term arrangements

306J Determination altering exemption period for short-term arrangements

(1) This section applies if:

(a) a regulated labour hire arrangement order is in force that covers a regulated host, an employer and one or more regulated employees of the employer performing work for the regulated host; or

(b) a regulated labour hire arrangement order has been made but is not yet in force that covers a regulated host, an employer and one or more regulated employees of the employer performing work for the regulated host; or

(c) an application for a regulated labour hire arrangement order that would cover a regulated host, an employer and one or more regulated employees of the employer performing work for the regulated host has been made to the FWC under section 306E but has not been finally determined.

(2) The FWC may determine that, in relation to the regulated host, the employer and work to be performed by one or more regulated employees of the employer:

(a) there is no exemption period for the purposes of section 306G; or

(b) a specified period of less than 3 months is the exemption period for the purposes of that section; or

(c) a specified period of more than 3 months is the exemption period for the purposes of that section.

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

306K Determination of recurring extended exemption period

(1) This section applies if:

Authorised Version C2026C00293 registered 15/07/2026

(a) a regulated labour hire arrangement order is in force that covers a regulated host, one or more employers and one or more regulated employees performing work for the regulated host; or

(b) a regulated labour hire arrangement order has been made but is not yet in force that covers a regulated host, one or more employers and one or more regulated employees performing work for the regulated host; or

(c) an application for a regulated labour hire arrangement order that would cover a regulated host, one or more employers and one or more regulated employees performing work for the regulated host has been made to the FWC under section 306E but has not been finally determined.

(2) The FWC may determine that a specified period of more than 3 months, starting on a specified day of the year in specified consecutive years, is a ***recurring extended exemption period*** for the regulated host in relation to a specified kind of work to which the regulated labour hire arrangement order relates.

306L Making and effect of determinations under this Subdivision

Who may apply for determination

(1) The FWC may make a determination under this Subdivision only on application by:

(a) the regulated host, an employer covered by the regulated labour hire arrangement order or a regulated employee covered by the order who is performing or is to perform work for the regulated host; or

(b) an organisation entitled to represent the industrial interests of any of those persons.

Time for making determination

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

Authorised Version C2026C00293 registered 15/07/2026

Requirements for making determination

(3) Before deciding whether or not to make the determination, the FWC must seek the views of any person or organisation that, apart from the applicant, could have applied for the determination under subsection (1).

(4) The FWC may make the determination only if satisfied that there are exceptional circumstances that justify making it, having regard to:

(a) whether the purpose of the proposed exemption period or recurring extended exemption period relates to satisfying a seasonal or short-term need for workers; and

(b) the industry in which the work is performed or is to be performed; and

(c) the circumstances of:

(i) the regulated host; and

(ii) any relevant employers covered by the regulated labour hire arrangement order; and

(d) the views (if any) of any persons or organisations mentioned in subsection (1); and

(e) for a determination made for the purposes of paragraph 306J(2)(c)—the principle that the longer the period to be specified in the determination, the greater the justification required; and

(f) for a determination that a period is a recurring extended exemption period for a regulated host for a kind of work—the principle that the longer the period to be specified in the determination, and the greater the number of recurrences of that period to be specified, the greater the justification required; and

(g) any other matter the FWC considers relevant.

When determination comes into force

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

Authorised Version C2026C00293 registered 15/07/2026

(a) for a determination under section 306J that there is no exemption period for the purposes of section 306G—the day it is made;

(b) for a determination under section 306J that there is an exemption period of more than, or less than, 3 months for the purposes of section 306G—the day it is made or a later day specified in the determination;

(c) for a determination under section 306K (which deals with recurring extended exemption periods)—the day it is made or a later day specified in the determination.

Subdivision D—Alternative protected rate of pay orders

306M Making an alternative protected rate of pay order

Application of this section

(1) This section applies if:

(a) a regulated labour hire arrangement order is in force that covers a regulated host, an employer and a regulated employee of the employer performing work for the regulated host; or

(b) a regulated labour hire arrangement order has been made but is not yet in force that covers a regulated host, an employer and a regulated employee of the employer performing work for the regulated host; or

(c) an application for a regulated labour hire arrangement order that would cover a regulated host, an employer and a regulated employee of the employer performing work for the regulated host has been made to the FWC under section 306E but has not been finally determined.

Alternative protected rate of pay order

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

Authorised Version C2026C00293 registered 15/07/2026

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

(b) that the employer must pay the rate of pay worked out in that way to the regulated employee in connection with the work.

Rate of pay

(3) The rate of pay for the purposes of paragraph (2)(a) must be the protected rate of pay for the regulated employee that would apply if the references in section 306F to the host employment instrument covered by the regulated labour hire arrangement order were instead references to a specified covered employment instrument that:

(a) applies to a related body corporate of the regulated host and would apply to a person employed by the related body corporate to perform work of that kind; or

(b) applies to the regulated host and would apply to a person employed by the regulated host to perform work of that kind in circumstances that do not apply in relation to the employee.

Who may apply

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

Time for making

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

Criteria for making etc.

(6) The FWC must not make the order unless satisfied that:

(a) it would be unreasonable for the requirement in section 306F, that the employer pay the regulated employee at no less than

Authorised Version C2026C00293 registered 15/07/2026

the protected rate of pay, to apply in connection with that work (including, for example, because the rate would be insufficient or would be excessive); and

(b) there is a covered employment instrument of the kind referred to in paragraph (3)(a) or (b).

(7) Before deciding whether to make the order, the FWC must seek the views of the following:

(a) the employer;

(b) the regulated host;

(c) the employer to which a covered employment instrument to be specified in the order for the purposes of subsection (3) applies (if not the regulated host);

(d) the employee;

(e) employees to whom the covered employment instrument to be specified in the order for the purposes of subsection (3) applies;

(f) organisations entitled to represent the industrial interests of any of the persons referred to in paragraphs (a) to (e).

(8) In deciding whether to make the order, the FWC must have regard to:

(a) whether the host employment instrument covered by the regulated labour hire arrangement order applies only to a particular class or group of employees; and

(b) whether, in practice, the host employment instrument has ever applied to an employee at a classification, job level or grade that would be applicable to the regulated employee; and

(c) the views (if any) of any persons or organisations mentioned in subsection (7);

(d) the rate of pay that would be payable to the regulated employee in connection with the work if the order were made; and

(e) any other matter the FWC considers relevant.

Authorised Version C2026C00293 registered 15/07/2026

Exception for short-term arrangements

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

306N Effect of alternative protected rate of pay order

When alternative protected rate of pay order comes into force

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

Effect of alternative protected rate of pay order

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

then:
  (c) the alternative protected rate of pay order applies in relation to so much of the work as is performed during the period that the alternative protected rate of pay order is in force; and

Authorised Version C2026C00293 registered 15/07/2026

(d) during that period, the alternative protected rate of pay order has effect despite section 306F (protected rate of pay payable to employees if a regulated labour hire arrangement order is in force), and despite any provision of the following that provides for a lower rate of pay than that worked out in accordance with the order:

(i) a fair work instrument that applies to the regulated employee;

(ii) a covered employment instrument (other than a fair work instrument) that applies to the regulated employee;

(iii) the regulated employee's contract of employment.

Person must not contravene an alternative protected rate of pay order

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

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

Subdivision E—Termination payments

306NA Determining amounts of payments relating to termination of employment

Application of this section

(1) This section applies if:

(a) a regulated employee's employment is or is to be terminated; and

(b) the employee is or has been covered by a regulated labour hire arrangement order.

Determining amounts of payments relating to termination of employment

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

Authorised Version C2026C00293 registered 15/07/2026

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

(a) if the employee is covered by subsection (3) in relation to the amount—the applicable rate of pay that results from the operation of this Part; or

(b) in any other case—the applicable rate of pay to which the employee is entitled apart from the operation of this Part.

(3) This subsection covers the employee in relation to the amount if:

(a) immediately before the termination of the employment occurs or is to occur, the employee is or will be covered by a regulated labour hire arrangement order in force in relation to work performed by the employee for a regulated host; and

(b) the termination of the employment occurs or is to occur during a period in which the employee is performing work for the regulated host, including a period when the employee is taking paid or unpaid leave, or is absent, in connection with that work and the leave or absence is authorised:

(i) by the employee's employer; or

(ii) by or under a term or condition of the employee's employment; or

(iii) by or under a law of the Commonwealth, a State or a Territory, or an instrument in force under such a law; and

(c) the rate of pay mentioned in paragraph (2)(a) is higher than the rate mentioned in paragraph (2)(b); and

(d) unless the amount is a payment in lieu of notice of termination—the employee has not performed work for any other regulated host in relation to the employee's employment with the employer.

(4) If the performance of the work for the regulated host relates to a joint venture or common enterprise engaged in by the regulated host and one or more other persons, then for the purposes of paragraph (3)(d), disregard any work that is taken to be performed

Authorised Version C2026C00293 registered 15/07/2026

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

Excluded subject matters

(5) If the employer is a national system employer only because of section 30D or 30N, nothing in this Part, including the determination of any rate of pay under or in accordance with this Part, affects any amount:

(a) that the employer is required to pay to the employee (or to a person on the employee's behalf) in relation to the termination of the employment; and

(b) which relates to an excluded subject matter within the meaning of subsection 30A(1) or 30K(1).

Interaction with fair work instruments etc.

(6) This section applies despite:

(a) a fair work instrument that applies to the employee; or

(b) a covered employment instrument (other than a fair work instrument) that applies to the employee; or

(c) the employee's contract of employment.

Authorised Version C2026C00293 registered 15/07/2026

Division 3—Dealing with disputes

306P Disputes about the operation of this Part

When this Division applies to a dispute

(1) This Division applies to a dispute about the operation of this Part if:

(a) a regulated labour hire arrangement order is in force that covers a regulated host, an employer and a regulated employee of the employer performing work for the regulated host; or

(b) a regulated labour hire arrangement order has been made but is not yet in force that covers a regulated host, an employer and a regulated employee of the employer performing work for the regulated host.

(2) Without limiting subsection (1), this Division applies to a dispute about:

(a) what the protected rate of pay for a regulated employee is; or

(b) whether a regulated employee has been, or is being, paid less than the protected rate of pay for the employee.

Parties must attempt to resolve dispute at workplace level

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

(4) If discussions at the workplace level do not resolve the dispute, a party to the dispute may apply to the FWC to resolve the dispute.

How the FWC deals with dispute

(5) If a party to the dispute makes an application under subsection (4):

(a) the FWC must first deal with the dispute by means other than arbitration, unless there are exceptional circumstances; and

Authorised Version C2026C00293 registered 15/07/2026

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

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

Representatives

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

(a) resolving the dispute; or

(b) the FWC dealing with the dispute.

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

Joinder of other employees to disputes

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

306Q Dealing with disputes by arbitration

(1) The FWC may deal with the dispute by arbitration, including by making an order (an ***arbitrated protected rate of pay order***) determining:

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

(b) that the employer must pay the rate of pay worked out in that way to the employee in connection with the work.

Authorised Version C2026C00293 registered 15/07/2026

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

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

(3) The FWC must not make an arbitrated protected rate of pay order unless the FWC considers that it would be fair and reasonable to make the order.

(4) If the parties have notified the FWC, in writing, that they agree to the FWC arbitrating the dispute, an arbitrated protected rate of pay order made in relation to the dispute may apply in relation to work performed at any time on or after the day the regulated labour hire arrangement order comes into force.

(5) If the parties have not notified the FWC that they agree to the FWC arbitrating the dispute, an arbitrated protected rate of pay order made in relation to the dispute may apply only in relation to work performed on or after:

(a) if the arbitrated protected rate of pay order is made before the regulated labour hire arrangement order to which the order relates comes into force—the day the regulated labour hire arrangement order comes into force; or

(b) otherwise—the day the arbitrated protected rate of pay order is made.

Effect of arbitrated protected rate of pay order

(6) If the FWC makes an arbitrated protected rate of pay order in relation to the dispute, the order has effect, in relation to so much of the work as is performed during the period to which the order applies, despite the following:

(a) section 306F (protected rate of pay payable to employees if a regulated labour hire arrangement order is in force);

Authorised Version C2026C00293 registered 15/07/2026

(b) any provision of the following that provides for a lower rate of pay than that worked out in accordance with the order:
(i) a fair work instrument that applies to the employee;
(ii) a covered employment instrument (other than a fair work instrument) that applies to the employee;
(iii) the employee's contract of employment.

(7) A person must not contravene a term of an arbitrated protected rate of pay order.

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

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

306R Application fees

(1) An application under subsection 306P(4) must be accompanied by any fee prescribed by the regulations.

(2) The regulations may prescribe:
(a) a fee for making an application to the FWC under that subsection; and
(b) a method for indexing the fee; and
(c) the circumstances in which all or part of the fee may be waived or refunded.

Authorised Version C2026C00293 registered 15/07/2026

Division 4—Anti-avoidance

306S Preventing making of regulated labour hire arrangement orders

(1) A person contravenes this section if:

(a) the person is an employer or a regulated host; and

(b) the person, either alone or with one or more other persons:

(i) enters into a scheme; or

(ii) begins to carry out a scheme; or

(iii) carries out a scheme; and

(c) the person does so for the sole or dominant purpose of preventing the FWC from making a regulated labour hire arrangement order in relation to any person or persons (whether or not those persons are the same persons mentioned in paragraph (b)); and

(d) as a result of that scheme or part of that scheme, the FWC is prevented from making the order.

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

(2) In this section:

scheme means:

(a) any agreement, arrangement, understanding, promise or undertaking, whether express or implied and whether or not enforceable, or intended to be enforceable, by legal proceedings; or

(b) any scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise.

306SA Avoidance of application of regulated labour hire arrangement orders

(1) A person contravenes this section if:

(a) the person is an employer or a regulated host; and

Authorised Version C2026C00293 registered 15/07/2026

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

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

(2) In this section:

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

306T Short-term arrangements—engaging other employees

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

Authorised Version C2026C00293 registered 15/07/2026

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

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

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

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

(a) an employer covered by the regulated labour hire arrangement order is not required to pay a regulated employee at a rate determined under or in accordance with this Part because of the operation of subsection 306G(2) (including as it applies because of subsection 306M(9) or 306Q(8)); and

(b) the regulated host enters into an agreement that has the result that another person is to perform the same, or substantially the same, work as that performed by the regulated employee for the regulated host; and

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

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

306V Engaging independent contractors

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

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

Authorised Version C2026C00293 registered 15/07/2026

(b) the employer engages another person as an independent contractor, under a contract for services, to perform that work, or work of that kind, for the regulated host; and

(c) a result of the employer dismissing the employee and engaging the independent contractor is that the employer is not required to pay a person at a rate determined under or in accordance with this Part; and

(d) it could reasonably be concluded that the employer dismissed the employee and engaged the independent contractor for the purpose, or purposes including the purpose, of achieving that result.

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

Authorised Version C2026C00293 registered 15/07/2026

Division 5—Other matters

306W Guidelines

(1) The FWC may make written guidelines in relation to the operation of this Part.

(2) Guidelines made under subsection (1) are not a legislative instrument.

(3) The FWC must ensure that guidelines under subsection (1) are in force:

(a) by 1 November 2024; and

(b) at all times on and after that day.

Authorised Version C2026C00293 registered 15/07/2026

Part 2-8—Transfer of business

Division 1—Introduction

307 Guide to this Part

This Part provides for the transfer of enterprise agreements, certain modern awards and certain other instruments if there is a transfer of business from one national system employer to another national system employer. (For a transfer of business from a non-national system employer that is a State public sector employer to a national system employer, see Part 6-3A.)

Division 2 describes when a transfer of business occurs and defines the following key concepts: ***old employer***, ***new employer***, ***transferring work***, ***transferring employee*** and ***transferable instrument***.

Division 2 also sets out the circumstances in which enterprise agreements, certain modern awards and certain other instruments that covered the old employer and the transferring employees (including high income employees) cover the new employer, the transferring employees and certain non-transferring employees and organisations.

Division 3 provides for the FWC to make orders in relation to a transfer of business.

308 Meanings of *employee* and *employer*

In this Part, ***employee*** means a national system employee, and ***employer*** means a national system employer.

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

Authorised Version C2026C00293 registered 15/07/2026

309 Object of this Part

The object of this Part is to provide a balance between:

(a) the protection of employees' terms and conditions of employment under enterprise agreements, certain modern awards and certain other instruments; and

(b) the interests of employers in running their enterprises efficiently;

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

Authorised Version C2026C00293 registered 15/07/2026

Division 2—Transfer of instruments

310 Application of this Division

This Division provides for the transfer of rights and obligations under enterprise agreements, certain modern awards and certain other instruments if there is a transfer of business from an old employer to a new employer.

311 When does a transfer of business occur

*Meanings of **transfer of business**, **old employer**, **new employer** and **transferring work***

(1) There is a ***transfer of business*** from an employer (the ***old employer***) to another employer (the ***new employer***) if the following requirements are satisfied:

(a) the employment of an employee of the old employer has terminated;

(b) within 3 months after the termination, the employee becomes employed by the new employer;

(c) the work (the ***transferring work***) the employee performs for the new employer is the same, or substantially the same, as the work the employee performed for the old employer;

(d) there is a connection between the old employer and the new employer as described in any of subsections (3) to (6).

*Meaning of **transferring employee***

(2) An employee in relation to whom the requirements in paragraphs (1)(a), (b) and (c) are satisfied is a ***transferring employee*** in relation to the transfer of business.

Transfer of assets from old employer to new employer

(3) There is a connection between the old employer and the new employer if, in accordance with an arrangement between:

Authorised Version C2026C00293 registered 15/07/2026

(a) the old employer or an associated entity of the old employer; and

(b) the new employer or an associated entity of the new employer;

the new employer, or the associated entity of the new employer, owns or has the beneficial use of some or all of the assets (whether tangible or intangible):

(c) that the old employer, or the associated entity of the old employer, owned or had the beneficial use of; and

(d) that relate to, or are used in connection with, the transferring work.

Old employer outsources work to new employer

(4) There is a connection between the old employer and the new employer if the transferring work is performed by one or more transferring employees, as employees of the new employer, because the old employer, or an associated entity of the old employer, has outsourced the transferring work to the new employer or an associated entity of the new employer.

New employer ceases to outsource work to old employer

(5) There is a connection between the old employer and the new employer if:

(a) the transferring work had been performed by one or more transferring employees, as employees of the old employer, because the new employer, or an associated entity of the new employer, had outsourced the transferring work to the old employer or an associated entity of the old employer; and

(b) the transferring work is performed by those transferring employees, as employees of the new employer, because the new employer, or the associated entity of the new employer, has ceased to outsource the work to the old employer or the associated entity of the old employer.

Authorised Version C2026C00293 registered 15/07/2026

New employer is associated entity of old employer

(6) There is a connection between the old employer and the new employer if the new employer is an associated entity of the old employer when the transferring employee becomes employed by the new employer.

312 Instruments that may transfer

*Meaning of **transferable instrument***

(1) Each of the following is a ***transferable instrument***:
  (a) an enterprise agreement that has been approved by the FWC;
  (b) a workplace determination;
  (c) a named employer award.

*Meaning of **named employer award***

(2) Each of the following is a ***named employer award***:
  (a) a modern award (including a modern enterprise award) that is expressed to cover one or more named employers;
  (b) a modern enterprise award that is expressed to cover one or more specified classes of employers (other than a modern enterprise award that is expressed to relate to one or more enterprises as described in paragraph 168A(2)(b)).

Note: Paragraph 168A(2)(b) deals with employers that carry on similar business activities under the same franchise.

313 Transferring employees and new employer covered by transferable instrument

(1) If a transferable instrument covered the old employer and a transferring employee immediately before the termination of the transferring employee's employment with the old employer, then:
  (a) the transferable instrument covers the new employer and the transferring employee in relation to the transferring work after the time (the ***transfer time***) the transferring employee becomes employed by the new employer; and

Authorised Version C2026C00293 registered 15/07/2026

(b) while the transferable instrument covers the new employer and the transferring employee in relation to the transferring work, no other enterprise agreement or named employer award that covers the new employer at the transfer time covers the transferring employee in relation to that work.

(2) To avoid doubt, a transferable instrument that covers the new employer and a transferring employee under paragraph (1)(a) includes any individual flexibility arrangement that had effect as a term of the transferable instrument immediately before the termination of the transferring employee's employment with the old employer.

(3) This section has effect subject to any FWC order under subsection 318(1).

314 New non-transferring employees of new employer may be covered by transferable instrument

(1) If:

(a) a transferable instrument covers the new employer because of paragraph 313(1)(a); and

(b) after the transferable instrument starts to cover the new employer, the new employer employs a non-transferring employee; and

(c) the non-transferring employee performs the transferring work; and

(d) at the time the non-transferring employee is employed, no other enterprise agreement or modern award covers the new employer and the non-transferring employee in relation to that work;

then the transferable instrument covers the new employer and the non-transferring employee in relation to that work.

(2) A ***non-transferring employee*** of a new employer, in relation to a transfer of business, is an employee of the new employer who is not a transferring employee.

Authorised Version C2026C00293 registered 15/07/2026

(3) This section has effect subject to any FWC order under subsection 319(1).

315 Organisations covered by transferable instrument

Employer organisation covered by named employer award

(1) If:

(a) a named employer award covers the new employer because of paragraph 313(1)(a); and

(b) the named employer award covered an employer organisation in relation to the old employer immediately before the termination of a transferring employee's employment with the old employer;

then the named employer award covers the employer organisation in relation to the new employer.

Employee organisation covered by named employer award

(2) If:

(a) a named employer award covers the new employer and a transferring employee because of paragraph 313(1)(a); and

(b) the named employer award covered an employee organisation in relation to the transferring employee immediately before the termination of the transferring employee's employment with the old employer;

then the named employer award covers the employee organisation in relation to:

(c) the transferring employee; and

(d) any non-transferring employee of the new employer who:

(i) is covered by the named employer award because of a provision of this Part or an FWC order; and

(ii) performs the same work as the transferring employee.

Employee organisation covered by enterprise agreement

(3) To avoid doubt, if:

Authorised Version C2026C00293 registered 15/07/2026

(a) an enterprise agreement covers a transferring employee or a non-transferring employee because of a provision of this Part or an FWC order; and

(b) the enterprise agreement covered an employee organisation immediately before the termination of the transferring employee's employment with the old employer;

then the enterprise agreement covers the employee organisation.

316 Transferring employees who are high income employees

(1) This section applies if:

(a) the old employer had given a guarantee of annual earnings for a guaranteed period to a transferring employee; and

(b) the transferring employee was a high income employee immediately before the termination of the transferring employee's employment with the old employer; and

(c) some of the guaranteed period occurs after the time (the ***transfer time***) the transferring employee becomes employed by the new employer; and

(d) an enterprise agreement does not apply to the transferring employee in relation to the transferring work at the transfer time.

(2) The guarantee of annual earnings has effect after the transfer time (except as provided in this section) as if it had been given to the transferring employee by the new employer.

(3) The new employer is not required to comply with the guarantee of annual earnings in relation to any part of the guaranteed period before the transfer time.

(4) The new employer is not required to comply with the guarantee of annual earnings to the extent that it requires the new employer to pay an amount of earnings to the transferring employee, in relation to the part of the guaranteed period after the transfer time, at a rate that is more than the annual rate of the guarantee of annual earnings.

Authorised Version C2026C00293 registered 15/07/2026

(5) If:

(a) the transferring employee is entitled to non-monetary benefits under the guarantee of annual earnings after the transfer time; and

(b) it is not practicable for the new employer to provide those benefits to the transferring employee;

then the guarantee of annual earnings is taken to be varied so that, instead of the entitlement to those benefits, the transferring employee is entitled to an amount of money that is equivalent to the agreed money value of those benefits.

(6) This section does not affect the rights and obligations of the old employer that arose before the transfer time in relation to the guarantee of annual earnings.

Authorised Version C2026C00293 registered 15/07/2026

Division 3—Powers of the FWC

317 FWC may make orders in relation to a transfer of business

This Division provides for the FWC to make certain orders if there is, or is likely to be, a transfer of business from an old employer to a new employer.

318 Orders relating to instruments covering new employer and transferring employees

Orders that the FWC may make

(1) The FWC may make the following orders:

(a) an order that a transferable instrument that would, or would be likely to, cover the new employer and a transferring employee because of paragraph 313(1)(a) does not, or will not, cover the new employer and the transferring employee;

(b) an order that an enterprise agreement or a named employer award that covers the new employer covers, or will cover, the transferring employee.

Who may apply for an order

(2) The FWC may make the order only on application by any of the following:

(a) the new employer or a person who is likely to be the new employer;

(b) a transferring employee, or an employee who is likely to be a transferring employee;

(c) if the application relates to an enterprise agreement—an employee organisation that is, or is likely to be, covered by the agreement;

(d) if the application relates to a named employer award—an employee organisation that is entitled to represent the

Authorised Version C2026C00293 registered 15/07/2026

industrial interests of an employee referred to in paragraph (b).

Matters that the FWC must take into account

(3) In deciding whether to make the order, the FWC must take into account the following:

(a) the views of:

(i) the new employer or a person who is likely to be the new employer; and

(ii) the employees who would be affected by the order;

(b) whether any employees would be disadvantaged by the order in relation to their terms and conditions of employment;

(c) if the order relates to an enterprise agreement—the nominal expiry date of the agreement;

(d) whether the transferable instrument would have a negative impact on the productivity of the new employer's workplace;

(e) whether the new employer would incur significant economic disadvantage as a result of the transferable instrument covering the new employer;

(f) the degree of business synergy between the transferable instrument and any workplace instrument that already covers the new employer;

(g) the public interest.

Restriction on when order may come into operation

(4) The order must not come into operation in relation to a particular transferring employee before the later of the following:

(a) the time when the transferring employee becomes employed by the new employer;

(b) the day on which the order is made.

Authorised Version C2026C00293 registered 15/07/2026

319 Orders relating to instruments covering new employer and non-transferring employees

Orders that the FWC may make

(1) The FWC may make the following orders:

(a) an order that a transferable instrument that would, or would be likely to, cover the new employer and a non-transferring employee because of subsection 314(1) does not, or will not, cover the non-transferring employee;

(b) an order that a transferable instrument that covers, or is likely to cover, the new employer, because of a provision of this Part, covers, or will cover, a non-transferring employee who performs, or is likely to perform, the transferring work for the new employer;

(c) an order that an enterprise agreement or a modern award that covers the new employer does not, or will not, cover a non-transferring employee who performs, or is likely to perform, the transferring work for the new employer.

Note: Orders may be made under paragraphs (1)(b) and (c) in relation to a non-transferring employee who performs, or is likely to perform, the transferring work for the new employer, whether or not the non-transferring employee became employed by the new employer before or after the transferable instrument referred to in paragraph (1)(b) started to cover the new employer.

Who may apply for an order

(2) The FWC may make the order only on application by any of the following:

(a) the new employer or a person who is likely to be the new employer;

(b) a non-transferring employee who performs, or is likely to perform, the transferring work for the new employer;

(c) if the application relates to an enterprise agreement—an employee organisation that is, or is likely to be, covered by the agreement;

Authorised Version C2026C00293 registered 15/07/2026

(d) if the application relates to a named employer award—an employee organisation that is entitled to represent the industrial interests of an employee referred to in paragraph (b).

Matters that the FWC must take into account

(3) In deciding whether to make the order, the FWC must take into account the following:

(a) the views of:

(i) the new employer or a person who is likely to be the new employer; and

(ii) the employees who would be affected by the order;

(b) whether any employees would be disadvantaged by the order in relation to their terms and conditions of employment;

(c) if the order relates to an enterprise agreement—the nominal expiry date of the agreement;

(d) whether the transferable instrument would have a negative impact on the productivity of the new employer's workplace;

(e) whether the new employer would incur significant economic disadvantage as a result of the transferable instrument covering the new employer;

(f) the degree of business synergy between the transferable instrument and any workplace instrument that already covers the new employer;

(g) the public interest.

Restriction on when order may come into operation

(4) The order must not come into operation in relation to a particular non-transferring employee before the later of the following:

(a) the time when the non-transferring employee starts to perform the transferring work for the new employer;

(b) the day on which the order is made.

Authorised Version C2026C00293 registered 15/07/2026

320 Variation of transferable instruments

Application of this section

(1) This section applies in relation to a transferable instrument that covers, or is likely to cover, the new employer because of a provision of this Part.

Power to vary transferable instrument

(2) The FWC may vary the transferable instrument:
  (a) to remove terms that the FWC is satisfied are not, or will not be, capable of meaningful operation because of the transfer of business to the new employer; or
  (b) to remove an ambiguity or uncertainty about how a term of the instrument operates if:
    (i) the ambiguity or uncertainty has arisen, or will arise, because of the transfer of business to the new employer; and
    (ii) the FWC is satisfied that the variation will remove the ambiguity or uncertainty; or
  (c) to enable the transferable instrument to operate in a way that is better aligned to the working arrangements of the new employer's enterprise.

Who may apply for a variation

(3) The FWC may make the variation only on application by:
  (a) a person who is, or is likely to be, covered by the transferable instrument; or
  (b) if the application is to vary a named employer award—an employee organisation that is entitled to represent the industrial interests of an employee who is, or is likely to be, covered by the named employer award.

Authorised Version C2026C00293 registered 15/07/2026

Matters that the FWC must take into account

(4) In deciding whether to make the variation, the FWC must take into account the following:

(a) the views of:

(i) the new employer or a person who is likely to be the new employer; and

(ii) the employees who would be affected by the transferable instrument as varied;

(b) whether any employees would be disadvantaged by the transferable instrument as varied in relation to their terms and conditions of employment;

(c) if the transferable instrument is an enterprise agreement—the nominal expiry date of the agreement;

(d) whether the transferable instrument, without the variation, would have a negative impact on the productivity of the new employer's workplace;

(e) whether the new employer would incur significant economic disadvantage as a result of the transferable instrument, without the variation;

(f) the degree of business synergy between the transferable instrument, without the variation, and any workplace instrument that already covers the new employer;

(g) the public interest.

Restriction on when variation may come into operation

(5) A variation of a transferable instrument under subsection (2) must not come into operation before the later of the following:

(a) the time when the transferable instrument starts to cover the new employer;

(b) the day on which the variation is made.

Authorised Version C2026C00293 registered 15/07/2026

Part 2-9—Other terms and conditions of employment

Division 1—Introduction

321 Guide to this Part

This Part deals with other terms and conditions of employment.

Division 2 is about the frequency and methods of payment of amounts payable to national system employees in relation to the performance of work, and the circumstances in which a national system employer may make deductions from such amounts.

Division 2 also makes it an offence for a national system employer to fail to pay certain amounts to, on behalf of, or for the benefit of, a national system employee.

Division 3 is about the guarantee of annual earnings that may be given to a national system employee whose earnings exceed the high income threshold. Modern awards do not apply to such an employee.

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

Division 5 is about fixed term contracts.

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

(a) the period is greater than 2 years; or

(b) the contract can be renewed so that the employee is employed for more than 2 years; or

Authorised Version C2026C00293 registered 15/07/2026

(c) in certain circumstances, the employee is employed under consecutive contracts.

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

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

Division 6 is about generally allowing an employee to refuse contact or attempted contact from their employer (or from a third party where the contact or attempted contact relates to their work) outside the employee's working hours. The FWC may deal with disputes between an employer and an employee about the right to disconnect, including by making orders to stop an employee from refusing contact or to stop an employer from taking certain actions.

Division 7 is about preserving employer-funded paid parental leave if an employee's child is stillborn or dies. The employee's employer must not refuse to allow the employee to take that leave, or cancel that leave without a request from the employee. However, this does not apply if the terms and conditions of the employee's employment make express provision relating to stillbirth or the death of a child.

322 Meanings of *employee* and *employer*

In this Part, ***employee*** means a national system employee, and ***employer*** means a national system employer.

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

Authorised Version C2026C00293 registered 15/07/2026

Division 2—Payment of wages etc.

Subdivision A—Civil remedy provisions relating to payment of wages etc.

323 Method and frequency of payment

(1) An employer must pay an employee amounts payable to the employee in relation to the performance of work:

(a) in full (except as provided by section 324); and

(b) in money by one, or a combination, of the methods referred to in subsection (2); and

(c) at least monthly.

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

Note 2: Amounts referred to in this subsection include the following if they become payable during a relevant period:

(a) incentive-based payments and bonuses;

(b) loadings;

(c) monetary allowances;

(d) overtime or penalty rates;

(e) leave payments.

(2) The methods are as follows:

(a) cash;

(b) cheque, money order, postal order or similar order, payable to the employee;

(c) the use of an electronic funds transfer system to credit an account held by the employee;

(d) a method authorised under a modern award or an enterprise agreement.

(3) Despite paragraph (1)(b), if a modern award or an enterprise agreement specifies a particular method by which the money must be paid, then the employer must pay the money by that method.

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

Authorised Version C2026C00293 registered 15/07/2026

324 Permitted deductions

(1) An employer may deduct an amount from an amount payable to an employee in accordance with subsection 323(1) if:

(a) the deduction is authorised in writing by the employee and is principally for the employee's benefit; or

(b) the deduction is authorised by the employee in accordance with an enterprise agreement; or

(c) the deduction is authorised by or under a modern award or an FWC order; or

(d) the deduction is authorised by or under a law of the Commonwealth, a State or a Territory, or an order of a court.

Note 1: A deduction in accordance with a salary sacrifice or other arrangement, under which an employee chooses to:

(a) forgo an amount payable to the employee in relation to the performance of work; but

(b) receive some other form of benefit or remuneration;

will be permitted if it is made in accordance with this section and the other provisions of this Subdivision.

Note 2: Certain terms of modern awards, enterprise agreements and contracts of employment relating to deductions have no effect (see section 326). A deduction made in accordance with such a term will not be authorised for the purposes of this section.

(1A) However, an employer must not deduct an amount under paragraph (1)(a) if the deduction is:

(a) directly or indirectly for the benefit of the employer or a party related to the employer; and

(b) for an amount that may be varied from time to time;

unless the deduction, if it were a deduction referred to in subsection 326(1), would be a deduction made in circumstances prescribed under subsection 326(2) to be reasonable.

(2) An authorisation for the purposes of paragraph (1)(a):

(a) must specify:

(i) for a single deduction—the amount of the deduction; or

Authorised Version C2026C00293 registered 15/07/2026

(ii) for multiple or ongoing deductions—whether the deductions are for a specified amount or amounts, or for amounts as varied from time to time; and

(aa) must include any information prescribed by the regulations; and

(b) may be withdrawn in writing by the employee at any time.

(3) Any variation in a specified amount of a deduction must be authorised in writing by the employee.

325 Unreasonable requirements to spend or pay amount

(1) An employer must not directly or indirectly require an employee to spend, or pay to the employer or another person, an amount of the employee's money or the whole or any part of an amount payable to the employee in relation to the performance of work, if:

(a) the requirement is unreasonable in the circumstances; and

(b) for a payment—the payment is directly or indirectly for the benefit of the employer or a party related to the employer.

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

(1A) An employer (the ***prospective employer***) must not directly or indirectly require another person (the ***prospective employee***) to spend, or pay to the prospective employer or any other person, an amount of the prospective employee's money if:

(a) the requirement is in connection with employment or potential employment of the prospective employee by the prospective employer; and

(b) the requirement is unreasonable in the circumstances; and

(c) the payment is directly or indirectly for the benefit of the prospective employer or a party related to the prospective employer.

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

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

Authorised Version C2026C00293 registered 15/07/2026

326 Certain terms have no effect

Unreasonable deductions for benefit of employer

(1) A term of a modern award, an enterprise agreement or a contract of employment has no effect to the extent that the term permits, or has the effect of permitting, an employer to deduct an amount from an amount that is payable to an employee in relation to the performance of work, if the deduction is:

(a) directly or indirectly for the benefit of the employer or a party related to the employer; and

(b) unreasonable in the circumstances.

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

Unreasonable requirements to spend or pay an amount

(3) A term of a modern award, an enterprise agreement or a contract of employment has no effect to the extent that the term:

(a) permits, or has the effect of permitting, an employer to make a requirement that would contravene subsection 325(1); or

(b) directly or indirectly requires an employee to spend or pay an amount, if the requirement would contravene subsection 325(1) if it had been made by an employer.

Deductions or payments in relation to employees under 18

(4) A term of a modern award, an enterprise agreement or a contract of employment has no effect to the extent that the term:

(a) permits, or has the effect of permitting, an employer to deduct an amount from an amount that is payable to an employee in relation to the performance of work; or

(b) requires, or has the effect of requiring, an employee to make a payment to an employer or another person;

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

Authorised Version C2026C00293 registered 15/07/2026

327 Things given or provided, and amounts required to be spent or paid, in contravention of this Subdivision

In proceedings for recovery of an amount payable to an employee in relation to the performance of work:

(a) anything given or provided by the employer contrary to paragraph 323(1)(b) and subsection 323(3) is taken never to have been given or provided to the employee; and

(b) any amount that the employee has been required to spend or pay contrary to subsection 325(1), or in accordance with a term to which subsection 326(3) applies, is taken to be a deduction, from an amount payable to the employee, made by the employer otherwise than in accordance with section 324.

Subdivision B—Offence for failing to pay certain amounts as required

327A Offence—failing to pay certain amounts as required

(1) An employer commits an offence if:

(a) the employer is required to pay an amount (a ***required amount***) to, on behalf of, or for the benefit of, an employee under:

(i) this Act; or

(ii) a fair work instrument; or

(iii) a transitional instrument (as continued in existence by Schedule 3 to the Transitional Act); and

(b) the required amount is not an amount covered by subsection (2); and

(c) the employer engages in conduct; and

(d) the conduct results in a failure to pay the required amount to, on behalf of, or for the benefit of, the employee in full on or before the day when the required amount is due for payment.

Note 1: For the penalty for an offence against this subsection, see subsection (5).

Authorised Version C2026C00293 registered 15/07/2026

Note 2: A single payment to, on behalf of, or for the benefit of, an employee in relation to a particular period may comprise more than one required amount. For example, a single payment consisting of:

(a) a required amount referable to wages earned during the period; and

(b) a required amount referable to paid leave taken during the period.

(2) For the purposes of paragraph (1)(b), an amount is covered by this subsection if:

(a) either of the following apply:

(i) the employee is a national system employee only because of section 30C or 30M (which extend the meaning of ***national system employee***);

(ii) the employer is a national system employer only because of section 30D or 30N (which extend the meaning of ***national system employer***); and

(b) the amount is:

(i) a contribution payable to a superannuation fund for the benefit of the employee; or

(ii) referable to the employee taking a period of long service leave; or

(iii) referable to the employee taking a period of paid leave that the employee was entitled to take by reason of being a victim of crime; or

(iv) referable to the employee taking a period of paid leave that the employee was entitled to take because the employee attended for service on a jury, or for emergency services duties.

Fault elements

(3) For the purposes of subsection (1):

(a) absolute liability applies to paragraphs (1)(a) and (b); and

(b) the fault element for paragraphs (1)(c) and (d) is intention.

Note 1: For ***absolute liability***, see section 6.2 of the *Criminal Code*.

Note 2: For ***intention***, see section 5.2 of the *Criminal Code*.

Authorised Version C2026C00293 registered 15/07/2026

Things given or provided, and amounts required to be spent or paid, in contravention of Subdivision A

(4) Section 327 applies for the purposes of determining whether a person commits an offence against subsection (1) of this section in the same way as it applies in proceedings for recovery of an amount payable to an employee in relation to the performance of work.

Penalty—general

(5) An offence against subsection (1) is punishable on conviction as follows:

(a) for an individual—by a term of imprisonment of not more than 10 years or a fine of not more than the amount determined under subsection (6), or both;

(b) for a body corporate—by a fine of not more than the amount determined under subsection (6).

Determining maximum fine

(6) For the purposes of subsection (5), the amount is:

(a) if the court can determine the underpayment amount for the offence—the greater of 3 times the underpayment amount and whichever of the following applies:

(i) for an individual—5,000 penalty units;

(ii) for a body corporate—25,000 penalty units; or

(b) otherwise—the following amount:

(i) for an individual—5,000 penalty units;

(ii) for a body corporate—25,000 penalty units.

Underpayment amount

(7) The ***underpayment amount*** for an offence committed by an employer against subsection (1) is the difference between:

(a) the required amount mentioned in paragraph (1)(a); and

Authorised Version C2026C00293 registered 15/07/2026

(b) the amount (including a nil amount) the employer actually paid to, on behalf of, or for the benefit of, the employee on account of the required amount.

Penalty for courses of conduct

(8) If:

(a) a person is found guilty of committing 2 or more offences (the ***aggregated offences***) against subsection (1); and

(b) the aggregated offences arose out of a course of conduct by the person;

then, subject to subsections (9) and (10), the person is taken for the purposes of subsections (5) to (7) to have been found guilty of only a single offence.

(9) Paragraph (6)(a) applies in relation to the single offence if, and only if, the court can determine the underpayment amount for any of the aggregated offences.

(10) The underpayment amount for the single offence is taken to be the sum of each of the underpayment amounts for the aggregated offences that the court can determine.

327B The Voluntary Small Business Wage Compliance Code

(1) The Minister may, by legislative instrument, declare a Voluntary Small Business Wage Compliance Code.

(2) If the Fair Work Ombudsman is satisfied that a small business employer complied with the Voluntary Small Business Wage Compliance Code in relation to a failure by the employer to pay an amount to, on behalf of, or for the benefit of, an employee, the Fair Work Ombudsman must not:

(a) refer any conduct that resulted in the failure to the Director of Public Prosecutions or the Australian Federal Police for action in relation to a possible offence against subsection 327A(1); or

(b) enter into a cooperation agreement with the employer that covers any conduct that resulted in the failure.

Authorised Version C2026C00293 registered 15/07/2026

(3) The Fair Work Ombudsman must give the employer written notice of a decision under subsection (2).

(4) Subsection (2) does not affect:

(a) the power of an inspector to institute or continue civil proceedings in relation to the conduct; or

(b) the power of the Fair Work Ombudsman to accept an enforceable undertaking under section 715 in relation to the conduct; or

(c) the power of an inspector to give a notice under section 716 in relation to the conduct; or

(d) any other power or function of the Fair Work Ombudsman or an inspector that is not mentioned in paragraph (2)(a) or (b) of this section.

327C Commencing proceedings for certain offences against this Act

(1) Proceedings for an offence against:

(a) subsection 327A(1) (offence for failing to pay amounts as required); or

(b) a related offence provision, to the extent that the related offence provision relates to an offence against subsection 327A(1);

may be commenced only by the Director of Public Prosecutions or the Australian Federal Police.

(2) Despite anything in any other law, proceedings for an offence against a provision referred to in paragraph (1)(a) or (b) may be commenced at any time within 6 years after the commission of the offence.

Authorised Version C2026C00293 registered 15/07/2026

Division 3—Guarantee of annual earnings

328 Employer obligations in relation to guarantee of annual earnings

Employer must comply with guarantee

(1) An employer that has given a guarantee of annual earnings to an employee must (subject to any reductions arising from circumstances in which the employer is required or entitled to reduce the employee's earnings) comply with the guarantee during any period during which the employee:

(a) is a high income employee of the employer; and

(b) is covered by a modern award that is in operation.

Note 1: Examples of circumstances in which the employer is required or entitled to reduce the employee's earnings are unpaid leave or absence, and periods of industrial action (see Division 9 of Part 3-3).

Note 2: This subsection is a civil remedy provision (see Part 4-1).

Employer must comply with guarantee for period before termination

(2) If:

(a) the employment of a high income employee is terminated before the end of the guaranteed period; and

(b) either or both of the following apply:

(i) the employer terminates the employment;

(ii) the employee becomes a transferring employee in relation to a transfer of business from the employer to a new employer, and the guarantee of annual earnings has effect under subsection 316(2) as if it had been given to the employee by the new employer; and

(c) the employee is covered by a modern award that is in operation at the time of the termination;

Authorised Version C2026C00293 registered 15/07/2026

the employer must pay earnings to the employee in relation to the part of the guaranteed period before the termination at the annual rate of the guarantee of annual earnings.

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

Employer must give notice of consequences

(3) Before or at the time of giving a guarantee of annual earnings to an employee covered by a modern award that is in operation, an employer must notify the employee in writing that a modern award will not apply to the employee during any period during which the annual rate of the guarantee of annual earnings exceeds the high income threshold.

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

329 High income employee

(1) A full-time employee is a ***high income employee*** of an employer at a time if:

(a) the employee has a guarantee of annual earnings for the guaranteed period; and

(b) the time occurs during the period; and

(c) the annual rate of the guarantee of annual earnings exceeds the high income threshold at that time.

(2) An employee other than a full-time employee is a ***high-income employee*** of an employer at a time if:

(a) the employee has a guarantee of annual earnings for the guaranteed period; and

(b) the time occurs during the period; and

(c) the annual rate of the guarantee of annual earnings would have exceeded the high income threshold at that time if the employee were employed on a full-time basis at the same rate of earnings.

Authorised Version C2026C00293 registered 15/07/2026

(3) To avoid doubt, the employee does not have a guarantee of annual earnings for the guaranteed period if the employer revokes the guarantee of annual earnings with the employee's agreement.

330 Guarantee of annual earnings and annual rate of guarantee

(1) An undertaking given by an employer to an employee is a ***guarantee of annual earnings*** if:

(a) the employee is covered by a modern award that is in operation; and

(b) the undertaking is an undertaking in writing to pay the employee an amount of earnings in relation to the performance of work during a period of 12 months or more; and

(c) the employee agrees to accept the undertaking, and agrees with the amount of the earnings; and

(d) the undertaking and the employee's agreement are given before the start of the period, and within 14 days after:

(i) the day the employee is employed; or

(ii) a day on which the employer and employee agree to vary the terms and conditions of the employee's employment; and

(e) an enterprise agreement does not apply to the employee's employment at the start of the period.

(2) However, if:

(a) an employee is employed for a period shorter than 12 months; or

(b) an employee will perform duties of a particular kind for a period shorter than 12 months;

the undertaking may be given for that shorter period.

(3) The ***annual rate*** of the guarantee of annual earnings is the annual rate of the earnings covered by the undertaking.

Authorised Version C2026C00293 registered 15/07/2026

331 Guaranteed period

The ***guaranteed period*** for a guarantee of annual earnings is the period that:

(a) starts at the start of the period of the undertaking that is the guarantee of annual earnings; and

(b) ends at the earliest of the following:

(i) the end of that period;

(ii) an enterprise agreement starting to apply to the employment of the employee;

(iii) the employer revoking the guarantee of annual earnings with the employee's agreement.

332 Earnings

(1) An employee's ***earnings*** include:

(a) the employee's wages; and

(b) amounts applied or dealt with in any way on the employee's behalf or as the employee directs; and

(c) the agreed money value of non-monetary benefits; and

(d) amounts or benefits prescribed by the regulations.

(2) However, an employee's ***earnings*** do not include the following:

(a) payments the amount of which cannot be determined in advance;

(b) reimbursements;

(c) contributions to a superannuation fund to the extent that they are contributions to which subsection (4) applies;

(d) amounts prescribed by the regulations.

Note: Some examples of payments covered by paragraph (a) are commissions, incentive-based payments and bonuses, and overtime (unless the overtime is guaranteed).

(3) ***Non-monetary benefits*** are benefits other than an entitlement to a payment of money:

(a) to which the employee is entitled in return for the performance of work; and

Authorised Version C2026C00293 registered 15/07/2026

(b) for which a reasonable money value has been agreed by the employee and the employer;

but does not include a benefit prescribed by the regulations.

(4) This subsection applies to contributions that the employer makes to a superannuation fund to the extent that one or more of the following applies:

(a) the employer would have been liable to pay superannuation guarantee charge under the *Superannuation Guarantee Charge Act 1992* in relation to the person if the amounts had not been so contributed;

(b) the employer is required to contribute to the fund for the employee's benefit in relation to a defined benefit interest (within the meaning of section 291-175 of the *Income Tax Assessment Act 1997*) of the employee;

(c) the employer is required to contribute to the fund for the employee's benefit under a law of the Commonwealth, a State or a Territory.

333 High income threshold

(1) Subject to this section, the ***high income threshold*** is the amount prescribed by, or worked out in the manner prescribed by, the regulations.

(2) A regulation made for the purposes of subsection (1) has no effect to the extent that it would have the effect of reducing the amount of the high income threshold.

(3) If:

(a) in prescribing a manner in which the high income threshold is worked out, regulations made for the purposes of subsection (1) specify a particular matter or state of affairs; and

(b) as a result of a change in the matter or state of affairs, the amount of the high income threshold worked out in that manner would, but for this subsection, be less than it was on the last occasion on which this subsection did not apply;

Authorised Version C2026C00293 registered 15/07/2026

the ***high income threshold*** is the amount that it would be if the change had not occurred.

333A Prospective employees

If:

(a) an employer, or a person who may become an employer, gives to another person an undertaking that would have been a guarantee of annual earnings if the other person had been the employer's or person's employee; and

(b) the other person subsequently becomes the employer's or person's employee; and

(c) the undertaking relates to the work that the other person performs for the employer or person;

this Division applies in relation to the undertaking, after the other person becomes the employer's or person's employee, as if the other person had been the employer's or person's employee at the time the undertaking was given.

Authorised Version C2026C00293 registered 15/07/2026

Division 4—Prohibiting pay secrecy

333B Employees not subject to pay secrecy

(1) An employee may disclose, or not disclose, any of the following information to any other person:

(a) the employee's remuneration;

(b) any terms and conditions of the employee's employment that are reasonably necessary to determine remuneration outcomes.

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

(2) An employee may ask any other employee (whether employed by the same employer or a different employer) about any of the following information:

(a) the other employee's remuneration;

(b) any terms and conditions of the other employee's employment that are reasonably necessary to determine remuneration outcomes.

(3) For the avoidance of doubt:

(a) each of the rights in subsections (1) and (2) is a workplace right within the meaning of Part 3-1; and

(b) a person is not prevented from exercising any of those workplace rights because the person, or another person, is no longer an employee of an employer.

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

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

Authorised Version C2026C00293 registered 15/07/2026

333C Pay secrecy terms to have no effect

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

333D Prohibition on pay secrecy terms

An employer contravenes this section if:

(a) the employer enters into a contract of employment or other written agreement with an employee; and

(b) the contract or agreement includes a term that is inconsistent with subsection 333B(1) or (2) (about employee rights relating to pay secrecy).

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

Authorised Version C2026C00293 registered 15/07/2026

Division 5—Fixed term contracts

Subdivision A—Limitations on fixed term contracts

333E Limitations

(1) A person contravenes this subsection if:

(a) the person enters into a contract of employment with an employee; and

(b) the contract includes a term that provides the contract will terminate at the end of an identifiable period (whether or not the contract also includes other terms that provide for circumstances in which it may be terminated before the end of that period); and

(c) the employee is not a casual employee of the employer for whom the period referred to in paragraph (b) is identified by reference to the completion of the shift of work to which the contract relates; and

(d) subsection (2), (3) or (4) applies.

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

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

Employment for more than 2 years

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

Renewable contracts

(3) This subsection applies if:

(a) the sum of the identifiable period and any other period for which the contract may be extended or renewed is greater than 2 years; or

Authorised Version C2026C00293 registered 15/07/2026

(b) the contract provides for an option or right to extend or renew the contract more than once.

Consecutive contracts

(4) This subsection applies if the contract comes into effect after another contract (the ***previous contract***) of employment between the person and the employee in circumstances referred to in subsection (5).

(5) The circumstances for the purposes of subsection (4) are:

(a) the previous contract included a term that provided that the contract would terminate at the end of an identifiable period (whether or not the contract also includes other terms that provide for circumstances in which it may be terminated before the end of that period); and

(b) the previous contract was for the employee to perform the same, or substantially similar, work for the person as the employee is required to perform under the contract referred to in paragraph (1)(a) (the ***current contract***); and

(c) there is substantial continuity of the employment relationship between the person and employee during the period between the previous contract terminating and the current contract coming into effect; and

(d) any of the following apply:

(i) the sum of the period for which the previous contract was in effect and the identifiable period referred to in paragraph (1)(b) for the current contract is greater than 2 years;

(ii) the current contract contains an option for renewal or extension;

(iia) the previous contract contained an option for extension that has been exercised;

(iii) the previous contract came into effect after another contract (the ***initial contract***) that satisfies the requirements of paragraphs (a) and (b) of this subsection and there was substantial continuity of the employment

Authorised Version C2026C00293 registered 15/07/2026

relationship between the person and the employee during the period between the initial contract terminating and the previous contract coming into effect.

333F Exceptions to limitations

(1) Subsection 333E(1) does not apply in relation to a contract of employment entered into by a person and an employee if:

(a) the employee is engaged under the contract to perform only a distinct and identifiable task involving specialised skills; or

(b) the employee is engaged under the contract in relation to a training arrangement; or

(c) the employee is engaged under the contract to undertake essential work during a peak demand period; or

(d) the employee is engaged under the contract to undertake work during emergency circumstances or during a temporary absence of another employee; or

(e) in the year the contract is entered into the amount of the employee's earnings under the contract is above the high income threshold for that year; or

(f) the contract relates to a position for the performance of work that:

(i) is funded in whole or in part by government funding or funding of a kind prescribed by the regulations for the purposes of this subparagraph; and

(ii) the funding is payable for a period of more than 2 years; and

(iii) there are no reasonable prospects that the funding will be renewed after the end of that period; or

(g) the contract relates to a governance position that has a time limit under the governing rules of a corporation or association of persons; or

(h) a modern award that covers the employee includes terms that permit any of the circumstances mentioned in subsections 333E(2) to (4) to occur; or

Authorised Version C2026C00293 registered 15/07/2026

(i) the contract is of a kind prescribed by the regulations for the purposes of this paragraph.

(2) For the purposes of paragraph (1)(e), if under the terms of the contract either of the following apply:

(a) the employee is required to work fewer hours than a full-time employee for a year;

(b) the employee is required to work for only part of a year;

the high income threshold for that year is taken, for the purposes of that paragraph, to be the amount, or the amount worked out using a method, prescribed by the regulations for the purposes of this subsection.

(3) For the purposes of subsection (2), in determining whether an award/agreement free employee has worked fewer hours than a full-time employee, regard may be had to the following:

(a) the hours of work of any other full-time employees or part-time employees of the employer employed in the same position as (or in a position that is comparable to) the position of the employee;

(b) the definition of ***ordinary hours of work*** in subsection 20(2).

Evidential burden

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

333G Effect of entering prohibited fixed term contract

(1) If a person enters into a contract of employment with an employee in contravention of subsection 333E(1):

(a) the term of the contract that provides that the contract will terminate at the end of an identifiable period is taken to have no effect; and

(b) the contravention is taken not to affect the validity of any other term of the contract.

Authorised Version C2026C00293 registered 15/07/2026

(2) Subsection (1) of this section has effect for the purposes of all 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) a copied State instrument;

(e) the employee's contract of employment.

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

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

333H Anti-avoidance

(1) A person must not do any of the following in order to avoid any right or prohibition under this Division:

(a) terminate an employee's employment for a period;

(b) delay re-engaging an employee for a period;

(ba) not re-engage an employee and instead engage another person to perform the same, or substantially similar, work for the person as the employee had performed for the person;

(c) change the nature of the work or tasks the employee is required to perform for the person;

(d) otherwise alter an employment relationship.

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

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

Authorised Version C2026C00293 registered 15/07/2026

Subdivision B—Other matters

333J Fixed Term Contract Information Statement

(1) The Fair Work Ombudsman must prepare a ***Fixed Term Contract Information Statement*** and publish the Statement in the Gazette.

(2) The Statement must include information about:
  (a) Subdivision A of this Division (limitations on fixed term contracts); and
  (b) section 333L (disputes about the operation of this Division).

333K Giving new employees the Fixed Term Contract Information Statement

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

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

333L Disputes about the operation of this Division

Application of this section

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

Resolving disputes

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

Authorised Version C2026C00293 registered 15/07/2026

FWC may deal with disputes

(3) If discussions at the workplace level do not resolve the dispute, a party to the dispute may refer the dispute to the FWC.

(4) If a dispute is referred under subsection (3):
  (a) the FWC must deal with the dispute; and
  (b) if the parties notify the FWC that they agree to the FWC arbitrating the dispute—the FWC may deal with the dispute by arbitration.

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

Representatives

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

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

Authorised Version C2026C00293 registered 15/07/2026

Division 6—Employee right to disconnect

Subdivision A—Employee right to disconnect

333M Employee right to disconnect

(1) An employee may refuse to monitor, read or respond to contact, or attempted contact, from an employer outside of the employee's working hours unless the refusal is unreasonable.

(2) An employee may refuse to monitor, read or respond to contact, or attempted contact, from a third party if the contact or attempted contact relates to their work and is outside of the employee's working hours unless the refusal is unreasonable.

(3) Without limiting the matters that may be taken into account in determining whether a refusal is unreasonable for the purposes of subsections (1) and (2), the following must be taken into account:

(a) the reason for the contact or attempted contact;

(b) how the contact or attempted contact is made and the level of disruption the contact or attempted contact causes the employee;

(c) the extent to which the employee is compensated:

(i) to remain available to perform work during the period in which the contact or attempted contact is made; or

(ii) for working additional hours outside of the employee's ordinary hours of work;

(d) the nature of the employee's role and the employee's level of responsibility;

(e) the employee's personal circumstances (including family or caring responsibilities).

Note: For the purposes of paragraph (c), the extent to which an employee is compensated includes any non-monetary compensation.

(4) For the avoidance of doubt, each of the rights in subsections (1) and (2) is a workplace right within the meaning of Part 3-1.

Authorised Version C2026C00293 registered 15/07/2026

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

(5) For the avoidance of doubt, an employee's refusal to monitor, read or respond to contact, or attempted contact, from their employer, or from a third party if the contact or attempted contact relates to their work, will be unreasonable if the contact or attempted contact is required under a law of the Commonwealth, a State or a Territory.

(6) For the avoidance of doubt, if:

(a) an employee is covered by an enterprise agreement; and

(b) the enterprise agreement includes a right to disconnect term that is more favourable to the employee than the rights in subsections (1) and (2);

the right to disconnect term in the agreement continues to apply to the employee.

Subdivision B—Disputes about the employee right to disconnect

333N Disputes about the employee right to disconnect

(1) This section applies if:

(a) there is a dispute between an employer and an employee because the employee has refused to monitor, read or respond to contact or attempted contact under subsection 333M(1) or (2) and:

(i) the employer reasonably believes that the refusal is unreasonable; or

(ii) the employer has asserted that the refusal is unreasonable and the employee reasonably believes the refusal is not unreasonable; or

(b) there is another dispute between the employer and the employee about the operation of section 333M.

Authorised Version C2026C00293 registered 15/07/2026

Workplace level discussions

(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.

Application to FWC to deal with dispute

(3) If discussions at the workplace level do not resolve the dispute, a party to the dispute may apply for the FWC to do either or both of the following:
  (a) make an order under section 333P (orders to stop refusing contact or to stop taking certain actions);
  (b) otherwise deal with the dispute.

Representatives

(4) The employer or employee to the dispute may appoint a person or industrial association to provide the employer or employee (as the case may be) with support or representation for the purposes of:
  (a) resolving the dispute; or
  (b) applying to the FWC to make an order under section 333P or otherwise deal with the dispute; or
  (c) the FWC dealing with the dispute.

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

Subdivision C—Orders to stop refusing contact or to stop taking certain actions

333P Orders to stop refusing contact or to stop taking certain actions

(1) If an application made under subsection 333N(3) includes an application to make an order under this section and the FWC is satisfied that either or both of the following apply:

Authorised Version C2026C00293 registered 15/07/2026

(a) an employee has unreasonably refused to monitor, read or respond to contact or attempted contact for the purposes of subsection 333M(1) or (2) and there is a risk the employee will continue to do so;

(b) an employee's refusal to monitor, read or respond to contact or attempted contact for the purposes of subsection 333M(1) or (2) is not unreasonable and there is a risk that the employer will:

(i) take disciplinary or other action against the employee because of the employer's belief that the refusal is unreasonable; or

(ii) continue to require the employee to monitor, read or respond to contact or attempted contact despite the employee's refusal to do so;

then the FWC may make an order under subsection (2).

(2) The FWC may make any order it considers appropriate (other than an order requiring the payment of a pecuniary amount):

(a) if the FWC is satisfied that the circumstance set out in paragraph (1)(a) applies—to prevent the employee from continuing to unreasonably refuse to monitor, read or respond to contact or attempted contact; or

(b) if the FWC is satisfied that the circumstance set out in subparagraph (1)(b)(i) applies—to prevent the employer from taking the action; or

(c) if the FWC is satisfied that the circumstance set out in subparagraph (1)(b)(ii) applies—to prevent the employer from continuing to require the employee to monitor, read or respond to contact or attempted contact.

(3) The FWC must:

(a) start to deal with an application, to the extent that it consists of an application for an order under this section, within 14 days after the application is made; and

(b) deal with the application as soon as is reasonably practicable after the FWC starts to deal with it.

Authorised Version C2026C00293 registered 15/07/2026

(4) Despite subsection (2), the FWC may dismiss an application made under subsection 333N(3), to the extent that it consists of an application for an order under this section, if the FWC considers that the application:

(a) is frivolous or vexatious; or

(b) might involve matters that relate to:

(i) Australia's defence; or

(ii) Australia's national security; or

(iii) an existing or future covert operation (within the meaning of section 12E of the *Work Health and Safety Act 2011*) of the Australian Federal Police; or

(iv) an existing or future international operation (within the meaning of section 12E of the *Work Health and Safety Act 2011*) of the Australian Federal Police.

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

(5) If an employer considers an application made under subsection 333N(3) (the ***original application***) to be frivolous or vexatious, the employer may apply to the FWC:

(a) to have the original application dealt with expeditiously and efficiently; and

(b) a decision on the original application communicated by the FWC to the parties to the dispute in a timely way.

333Q Contravening an order

A person to whom an order under section 333P applies must not contravene a term of the order.

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

333R Actions under work health and safety laws permitted

Section 115 of the *Work Health and Safety Act 2011* and corresponding provisions of corresponding WHS laws (within the meaning of that Act) do not apply in relation to an application

Authorised Version C2026C00293 registered 15/07/2026

made under subsection 333N(3) that includes an application for an order under section 333P.

Note: Ordinarily, if a person makes an application under subsection 333N(3) for an order under section 333P in relation to particular conduct, then section 115 of the *Work Health and Safety Act 2011* and corresponding provisions of corresponding WHS laws would prohibit a proceeding from being commenced, or an application from being made or continued, under those laws in relation to the same conduct. This section removes that prohibition.

333S This Subdivision is not to prejudice Australia's defence, national security etc.

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

(a) Australia's defence; or

(b) Australia's national security; or

(c) an existing or future covert operation (within the meaning of section 12E of the *Work Health and Safety Act 2011*) of the Australian Federal Police; or

(d) an existing or future international operation (within the meaning of section 12E of the *Work Health and Safety Act 2011*) of the Australian Federal Police.

333T Declarations by the Director-General of Security

(1) Without limiting section 333S, the Director-General of Security may, by legislative instrument, declare that all or specified provisions of this subdivision do not apply in relation to a person carrying out work for the Director-General.

(2) A declaration under subsection (1) may only be made with the approval of the Minister and, if made with that approval, has effect according to its terms.

Authorised Version C2026C00293 registered 15/07/2026

333U Declarations by the Director-General of ASIS

(1) Without limiting section 333S, the Director-General of the Australian Secret Intelligence Service may, by legislative instrument, declare that all or specified provisions of this Subdivision do not apply in relation to a person carrying out work for the Director-General.

(2) A declaration under subsection (1) may only be made with the approval of the Minister and, if made with that approval, has effect according to its terms.

Subdivision D—Dealing with disputes in other ways

333V Dealing with disputes in other ways

If an application made under subsection 333N(3) for the FWC to deal with a dispute does not consist solely of an application for an order under section 333P:

(a) the FWC must deal with the dispute; and

(b) if the parties notify the FWC that they agree to the FWC arbitrating the dispute—the FWC may deal with the dispute by arbitration.

Note: For the purposes of paragraph (a), the FWC may deal with the dispute as it considers appropriate, including by mediation, conciliation, making a recommendation or expressing an opinion (see subsection 595(2)). See section 333P if the application also includes an application for an order under that section.

Subdivision E—Guidelines

333W Guidelines

(1) The FWC must make written guidelines in relation to the operation of this Division.

(2) Guidelines made under subsection (1) are not a legislative instrument.

Authorised Version C2026C00293 registered 15/07/2026

Division 7—Preservation of employer-funded paid parental leave

333X Employer-funded paid parental leave—preserved if child is stillborn or dies

Application of this section

(1) This section applies if:
  (a) a child is stillborn or dies; and
  (b) an employee would have been entitled to leave, under the terms and conditions of the employee's employment, if the child had not been stillborn or died; and
  (c) that leave is paid for by the employee's employer and 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.

Note: For the definition of a ***stillborn*** child, see subsection 77A(2).

Employee must be allowed to take paid parental leave

(2) The employee's employer must not, because of the stillbirth or death:
  (a) refuse to allow the employee to take that leave; or
  (b) cancel any part of that leave without being requested by the employee to do so.

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

Exception—express provision for refusal or cancellation of leave, or for no entitlement to leave

(3) Despite subsection (2), the employer may refuse or cancel that leave if, under the terms and conditions of the employee's employment:

Authorised Version C2026C00293 registered 15/07/2026

(a) the employer is expressly allowed to refuse or cancel that leave because of stillbirth or the death of a child; or

(b) the employee is expressly not entitled to that leave because of stillbirth or the death of a child.

(4) However, subsection (3) does not apply if the terms and conditions are varied, after the commencement of this section, unilaterally by the employer to provide as mentioned in paragraph (3)(a) or (b).

Exception—other leave that expressly addresses circumstance

(5) Despite subsection (2), the employer may refuse or cancel that leave if, under the terms and conditions of the employee's employment, the employee is entitled to other leave that expressly addresses stillbirth or the death of a child.

(6) For the purposes of subsection (5), in working out whether the employee is entitled to other leave, disregard:

(a) unpaid parental leave to which the employee is entitled under section 70 or under terms that have the same (or substantially the same) effect as that section; and

(b) compassionate leave to which the employee is entitled under section 104 or under terms that have the same (or substantially the same) effect as that section.

Authorised Version C2026C00293 registered 15/07/2026

Chapter 3—Rights and responsibilities of employees, employers, organisations etc.

Part 3-1—General protections

Division 1—Introduction

334 Guide to this Part

This Part provides general workplace protections.

Division 2 sets out the circumstances in which this Part applies.

Division 3 protects workplace rights, and the exercise of those rights.

Division 4 protects freedom of association, involvement in lawful industrial activities, and the exercise of workplace delegates' rights.

Division 5 provides other protections, including protection from discrimination.

Division 6 deals with sham arrangements.

Division 7 sets out rules for the purposes of establishing contraventions of this Part.

Division 8 deals with compliance. In most cases, a general protections dispute that involves dismissal will be dealt with by a court only if the dispute has not been resolved by the FWC.

Authorised Version C2026C00293 registered 15/07/2026

335 Meanings of *employee* and *employer*

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

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

336 Objects of this Part

(1) The objects of this Part are as follows:

(a) to protect workplace rights;

(b) to protect freedom of association by ensuring that persons are:

(i) free to become, or not become, members of industrial associations; and

(ii) free to be represented, or not represented, by industrial associations; and

(iii) free to participate, or not participate, in lawful industrial activities;

(c) to provide protection from workplace discrimination;

(d) to provide effective relief for persons who have been discriminated against, victimised or otherwise adversely affected as a result of contraventions of this Part.

(2) The protections referred to in subsection (1) are provided to a person (whether an employee, an employer or otherwise).

Authorised Version C2026C00293 registered 15/07/2026

Division 2—Application of this Part

337 Application of this Part

This Part applies only to the extent provided by this Division.

Note: Sections 30G and 30R extend the operation of this Part in a referring State.

338 Action to which this Part applies

(1) This Part applies to the following action:

(a) action taken by a constitutionally-covered entity;

(b) action that affects, is capable of affecting or is taken with intent to affect the activities, functions, relationships or business of a constitutionally-covered entity;

(c) action that consists of advising, encouraging or inciting, or action taken with intent to coerce, a constitutionally-covered entity:

(i) to take, or not take, particular action in relation to another person; or

(ii) to threaten to take, or not take, particular action in relation to another person;

(d) action taken in a Territory or a Commonwealth place;

(e) action taken by:

(i) a trade and commerce employer; or

(ii) a Territory employer;

that affects, is capable of affecting or is taken with intent to affect an employee of the employer;

(f) action taken by an employee of:

(i) a trade and commerce employer; or

(ii) a Territory employer;

that affects, is capable of affecting or is taken with intent to affect the employee's employer.

(2) Each of the following is a ***constitutionally-covered entity***:

Authorised Version C2026C00293 registered 15/07/2026

(a) a constitutional corporation;
(b) the Commonwealth;
(c) a Commonwealth authority;
(d) a body corporate incorporated in a Territory;
(e) an organisation.

(3) A ***trade and commerce employer*** is a national system employer within the meaning of paragraph 14(d).

(4) A ***Territory employer*** is a national system employer within the meaning of paragraph 14(f).

338A Meaning of *independent contractor*

A reference in this Part to an independent contractor includes a reference to a regulated worker.

Note: A regulated worker must be an individual: see section 15G and related definitions.

339 Additional effect of this Part

In addition to the effect provided by section 338, this Part also has the effect it would have if any one or more of the following applied:

(a) a reference to an employer in one or more provisions of this Part were a reference to a national system employer;
(b) a reference to an employee in one or more provisions of this Part were a reference to a national system employee;
(c) a reference to an industrial association in one or more provisions of this Part were a reference to an organisation, or another association of employees or employers, a purpose of which is the protection and promotion of the interests of national system employees or national system employers in matters concerning employment;
(d) a reference to an officer of an industrial association in one or more provisions of this Part were a reference to an officer of an organisation;

Authorised Version C2026C00293 registered 15/07/2026

(e) a reference to a person, another person or a third person in one or more provisions of this Part were a reference to a constitutionally-covered entity;

(f) a reference to a workplace law in one or more provisions of this Part were a reference to a workplace law of the Commonwealth;

(g) a reference to a workplace instrument in one or more provisions of this Part were a reference to a workplace instrument made under, or recognised by, a law of the Commonwealth;

(h) a reference to an industrial body in one or more provisions of this Part were a reference to an industrial body performing functions or exercising powers under a law of the Commonwealth.

Authorised Version C2026C00293 registered 15/07/2026

Division 3—Workplace rights

340 Protection

(1) A person must not take adverse action against another person:
  (a) because the other person:
    (i) has a workplace right; or
    (ii) has, or has not, exercised a workplace right; or
    (iii) proposes or proposes not to, or has at any time proposed or proposed not to, exercise a workplace right; or
  (b) to prevent the exercise of a workplace right by the other person.

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

(2) A person must not take adverse action against another person (the ***second person***) because a third person has exercised, or proposes or has at any time proposed to exercise, a workplace right for the second person's benefit, or for the benefit of a class of persons to which the second person belongs.

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

341 Meaning of *workplace right*

Meaning of ***workplace right***

(1) A person has a ***workplace right*** if the person:
  (a) is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body; or
  (b) is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument; or
  (c) is able to make a complaint or inquiry:
    (i) to a person or body having the capacity under a workplace law to seek compliance with that law or a workplace instrument; or

Authorised Version C2026C00293 registered 15/07/2026

(ii) if the person is an employee—in relation to his or her employment.

*Meaning of **process or proceedings under a workplace law or workplace instrument***

(2) Each of the following is a ***process or proceedings under a workplace law or workplace instrument***:

(a) a conference conducted or hearing held by the FWC;

(b) court proceedings under a workplace law or workplace instrument;

(c) protected industrial action;

(d) a protected action ballot;

(e) making, varying or terminating an enterprise agreement;

(f) appointing, or terminating the appointment of, a bargaining representative;

(g) making or terminating an individual flexibility arrangement under a modern award or enterprise agreement;

(h) agreeing to cash out paid annual leave or paid personal/carer's leave;

(i) making a request under Division 4 of Part 2-2 (which deals with requests for flexible working arrangements);

(ia) giving a notification, or receiving an offer or notice, under Division 4A of Part 2-2 (which deals with casual employment);

(j) dispute settlement for which provision is made by, or under, a workplace law or workplace instrument;

(k) any other process or proceedings under a workplace law or workplace instrument.

Prospective employees taken to have workplace rights

(3) A prospective employee is taken to have the workplace rights he or she would have if he or she were employed in the prospective employment by the prospective employer.

Authorised Version C2026C00293 registered 15/07/2026

Note: Among other things, the effect of this subsection would be to prevent a prospective employer making an offer of employment conditional on entering an individual flexibility arrangement.

Exceptions relating to prospective employees

(4) Despite subsection (3), a prospective employer does not contravene subsection 340(1) if the prospective employer makes an offer of employment conditional on the prospective employee accepting a guarantee of annual earnings.

(5) Despite paragraph (1)(a), a prospective employer does not contravene subsection 340(1) if the prospective employer refuses to employ a prospective employee because the prospective employee would be entitled to the benefit of Part 2-8 or 6-3A (which deal with transfer of business).

342 Meaning of *adverse action*

(1) The following table sets out circumstances in which a person takes ***adverse action*** against another person.

Meaning of *adverse action*

Item	Column 1 ***Adverse action* is taken by ...**	Column 2 **if ...**
1	an employer against an employee	the employer: (a) dismisses the employee; or (b) injures the employee in his or her employment; or (c) alters the position of the employee to the employee's prejudice; or (d) discriminates between the employee and other employees of the employer.
2	a prospective employer against a prospective employee	the prospective employer: (a) refuses to employ the prospective employee; or (b) discriminates against the prospective

Authorised Version C2026C00293 registered 15/07/2026

Meaning of *adverse action*

Item	Column 1 ***Adverse action* is taken by ...**	Column 2 **if ...**
		employee in the terms or conditions on which the prospective employer offers to employ the prospective employee.
3	a person (the ***principal***) who has entered into a contract for services with an independent contractor against the independent contractor, or a person employed or engaged by the independent contractor	the principal: (a) terminates the contract; or (b) injures the independent contractor in relation to the terms and conditions of the contract; or (c) alters the position of the independent contractor to the independent contractor's prejudice; or (d) refuses to make use of, or agree to make use of, services offered by the independent contractor; or (e) refuses to supply, or agree to supply, goods or services to the independent contractor.
3A	a digital labour platform operator that has entered into a contract with an employee-like worker for use of, or access to, a digital labour platform against the employee-like worker	the digital labour platform operator: (a) terminates the contract; or (b) injures the employee-like worker in relation to the terms and conditions of the contract; or (c) alters the position of the employee-like worker to the employee-like worker's prejudice; or (d) refuses to make use of, or agree to make use of, services offered by the employee-like worker; or (e) refuses to provide to the employee-like worker use of or access to the digital labour platform.
4	a person (the ***principal***) proposing to enter into a contract for services with an	the principal: (a) refuses to engage the independent contractor; or

Authorised Version C2026C00293 registered 15/07/2026

Meaning of *adverse action*

Item	Column 1 ***Adverse action* is taken by ...**	Column 2 **if ...**
	independent contractor against the independent contractor, or a person employed or engaged by the independent contractor	(b) discriminates against the independent contractor in the terms or conditions on which the principal offers to engage the independent contractor; or (c) refuses to make use of, or agree to make use of, services offered by the independent contractor; or (d) refuses to supply, or agree to supply, goods or services to the independent contractor.
4A	a digital labour platform operator that proposes to enter into a contract with an employee-like worker for use of, or access to, a digital labour platform against the employee-like worker	the digital labour platform operator: (a) refuses to agree to provide to the employee-like worker use of, or access to, the digital labour platform; or (b) discriminates against the employee-like worker in relation to the terms and conditions on which the digital labour platform operator agrees to provide to the employee-like worker use of, or access to, the digital labour platform; or (c) refuses to make use of, or agree to make use of, services offered by the employee-like worker.
5	an employee against his or her employer	the employee: (a) ceases work in the service of the employer; or (b) takes industrial action against the employer.
6	an independent contractor against a person who has entered into a contract for services with the independent contractor	the independent contractor: (a) ceases work under the contract; or (b) takes industrial action against the person.

Authorised Version C2026C00293 registered 15/07/2026

Meaning of *adverse action*

Item	Column 1 ***Adverse action* is taken by ...**	Column 2 **if ...**
6A	an employee-like worker against a digital labour platform operator that has entered into a contract with the employee-like worker for use of, or access to, a digital labour platform	the employee-like worker takes industrial action against the digital labour platform operator.
7	an industrial association, or an officer or member of an industrial association, against a person	the industrial association, or the officer or member of the industrial association: (a) organises or takes industrial action against the person; or (b) takes action that has the effect, directly or indirectly, of prejudicing the person in the person's employment or prospective employment; or (c) if the person is an independent contractor—takes action that has the effect, directly or indirectly, of prejudicing the independent contractor in relation to a contract for services; or (d) if the person is a member of the association—imposes a penalty, forfeiture or disability of any kind on the member (other than in relation to money legally owed to the association by the member).
8	an industrial association, or an officer or member of an industrial association, against an employee-like worker	the industrial association, or the officer or member of the industrial association, takes action that has the effect, directly or indirectly, of prejudicing the employee-like worker in relation to a contract for use of, or access to, a digital labour platform.

(2) ***Adverse action*** includes:

Authorised Version C2026C00293 registered 15/07/2026

(a) threatening to take action covered by the table in subsection (1); and
(b) organising such action.

(3) ***Adverse action*** does not include action that is authorised by or under:
(a) this Act or any other law of the Commonwealth; or
(b) a law of a State or Territory prescribed by the regulations.

(4) Without limiting subsection (3), ***adverse action*** does not include an employer standing down an employee who is:
(a) engaged in protected industrial action; and
(b) employed under a contract of employment that provides for the employer to stand down the employee in the circumstances.

343 Coercion

(1) A person must not organise or take, or threaten to organise or take, any action against another person with intent to coerce the other person, or a third person, to:
(a) exercise or not exercise, or propose to exercise or not exercise, a workplace right; or
(b) exercise, or propose to exercise, a workplace right in a particular way.

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

(2) Subsection (1) does not apply to protected industrial action.

344 Undue influence or pressure

An employer must not exert undue influence or undue pressure on an employee in relation to a decision by the employee to:
(a) make, or not make, an agreement or arrangement under the National Employment Standards; or
(b) make, or not make, an agreement or arrangement under a term of a modern award or enterprise agreement that is

Authorised Version C2026C00293 registered 15/07/2026

permitted to be included in the award or agreement under subsection 55(2); or

(c) agree to, or terminate, an individual flexibility arrangement; or

(d) accept a guarantee of annual earnings; or

(e) agree, or not agree, to a deduction from amounts payable to the employee in relation to the performance of work.

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

Note 2: This section can apply to decisions whether to consent to performing work on keeping in touch days (see subsection 79A(3)).

345 Misrepresentations

(1) A person must not knowingly or recklessly make a false or misleading representation about:

(a) the workplace rights of another person; or

(b) the exercise, or the effect of the exercise, of a workplace right by another person.

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

(2) Subsection (1) does not apply if the person to whom the representation is made would not be expected to rely on it.

Authorised Version C2026C00293 registered 15/07/2026

Division 4—Industrial activities

346 Protection

A person must not take adverse action against another person because the other person:

(a) is or is not, or was or was not, an officer or member of an industrial association; or

(b) engages, or has at any time engaged or proposed to engage, in industrial activity within the meaning of paragraph 347(a) or (b); or

(c) does not engage, or has at any time not engaged or proposed to not engage, in industrial activity within the meaning of paragraphs 347(c) to (g).

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

347 Meaning of *engages in industrial activity*

A person ***engages in industrial activity*** if the person:

(a) becomes or does not become, or remains or ceases to be, an officer or member of an industrial association; or

(b) does, or does not:

(i) become involved in establishing an industrial association; or

(ii) organise or promote a lawful activity for, or on behalf of, an industrial association; or

(iii) encourage, or participate in, a lawful activity organised or promoted by an industrial association; or

(iv) comply with a lawful request made by, or requirement of, an industrial association; or

(v) represent or advance the views, claims or interests of an industrial association; or

(vi) pay a fee (however described) to an industrial association, or to someone in lieu of an industrial association; or

Authorised Version C2026C00293 registered 15/07/2026

(vii) seek to be represented by an industrial association; or

(c) organises or promotes an unlawful activity for, or on behalf of, an industrial association; or

(d) encourages, or participates in, an unlawful activity organised or promoted by an industrial association; or

(e) complies with an unlawful request made by, or requirement of, an industrial association; or

(f) takes part in industrial action; or

(g) makes a payment:

(i) that, because of Division 9 of Part 3-3 (which deals with payments relating to periods of industrial action), an employer must not pay; or

(ii) to which an employee is not entitled because of that Division.

348 Coercion

A person must not organise or take, or threaten to organise or take, any action against another person with intent to coerce the other person, or a third person, to engage in industrial activity.

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

349 Misrepresentations

(1) A person must not knowingly or recklessly make a false or misleading representation about either of the following:

(a) another person's obligation to engage in industrial activity;

(b) another person's obligation to disclose whether he or she, or a third person:

(i) is or is not, or was or was not, an officer or member of an industrial association; or

(ii) is or is not engaging, or has or has not engaged, in industrial activity.

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

Authorised Version C2026C00293 registered 15/07/2026

(2) Subsection (1) does not apply if the person to whom the representation is made would not be expected to rely on it.

350 Inducements—membership action

(1) An employer must not induce an employee to take, or propose to take, membership action.

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

(2) A person who has entered into a contract for services with an independent contractor must not induce the independent contractor to take, or propose to take, membership action.

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

(2A) A regulated business must not induce a regulated contractor to take, or propose to take, membership action.

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

(3) A person takes ***membership action*** if the person becomes, does not become, remains or ceases to be, an officer or member of an industrial association.

350A Protection for workplace delegates

(1) The employer of a workplace delegate must not:

(a) unreasonably fail or refuse to deal with the workplace delegate; or

(b) knowingly or recklessly make a false or misleading representation to the workplace delegate; or

(c) unreasonably hinder, obstruct or prevent the exercise of the rights of the workplace delegate under this Act or a fair work instrument.

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

(2) To avoid doubt, subsection (1) applies only in relation to the workplace delegate acting in that capacity.

Authorised Version C2026C00293 registered 15/07/2026

(3) The burden of proving that the conduct of the employer is not unreasonable as mentioned in subsection (1) lies on the employer.

Exception—conduct required by law

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

350B Protection for workplace delegates—regulated workers

(1) The associated regulated business for a workplace delegate who is a regulated worker must not:

(a) unreasonably fail or refuse to deal with the workplace delegate; or

(b) knowingly or recklessly make a false or misleading representation to the workplace delegate; or

(c) unreasonably hinder, obstruct or prevent the exercise of the rights of the workplace delegate under this Act or a fair work instrument.

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

(2) To avoid doubt, subsection (1) applies only in relation to the workplace delegate acting in that capacity.

(3) The burden of proving that the conduct of the associated regulated business is not unreasonable as mentioned in subsection (1) lies on the associated regulated business.

Exception—conduct required by law

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

*Meaning of **associated regulated business***

(5) The ***associated regulated business*** for a workplace delegate who is a regulated worker is the regulated business that:

(a) engaged the workplace delegate under a services contract; or

Authorised Version C2026C00293 registered 15/07/2026

(b) arranged for, or facilitated entry into, the services contract under which the workplace delegate performs work.

350C Workplace delegates and their rights

*Meaning of **workplace delegate***

(1) A ***workplace delegate*** is a person appointed or elected, in accordance with the rules of an employee organisation, to be a delegate or representative (however described) for either or both of the following:

(a) members of the organisation who work in a particular enterprise;

(b) members of the organisation who perform work for, or that has been arranged or facilitated by, a particular regulated business.

Rights of workplace delegates

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

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

(3) The workplace delegate is entitled to:

(a) reasonable communication with those members, and any other persons eligible to be such members, in relation to their industrial interests; and

(b) for the purpose of representing those interests:

(i) in relation to employees—reasonable access to the workplace and workplace facilities where the enterprise concerned is being carried on; and

(ii) in relation to regulated workers—reasonable access to the workplace facilities provided by the regulated business concerned; and

Authorised Version C2026C00293 registered 15/07/2026

(iii) if the workplace delegate is an employee—reasonable access to paid time, during normal working hours, for the purposes of related training, unless the workplace delegate is employed by a small business employer.

(4) The employer of, or associated regulated business for, the workplace delegate is taken to have afforded the workplace delegate the rights mentioned in subsection (3) if the employer or regulated business has complied with the delegates' rights term in the fair work instrument that applies to the workplace delegate.

(5) Otherwise, in determining what is reasonable for the purposes of subsection (3), regard must be had to the following:

(a) the size and nature of the enterprise or regulated business;

(b) the resources of the employer concerned or the regulated business;

(c) the facilities available at the enterprise or provided by the regulated business.

Authorised Version C2026C00293 registered 15/07/2026

Division 5—Other protections

351 Discrimination

(1) An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person's race, colour, sex, sexual orientation, breastfeeding, gender identity, intersex status, age, physical or mental disability, marital status, family or carer's responsibilities, subjection to family and domestic violence, pregnancy, religion, political opinion, national extraction or social origin.

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

(2) However, subsection (1) does not apply to action that is:

(a) not unlawful under any anti-discrimination law in force in the place where the action is taken; or

(b) taken because of the inherent requirements of the particular position concerned; or

(c) if the action is taken against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed—taken:

(i) in good faith; and

(ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.

(3) Each of the following is an ***anti-discrimination law***:

(aa) the *Age Discrimination Act 2004*;

(ab) the *Disability Discrimination Act 1992*;

(ac) the *Racial Discrimination Act 1975*;

(ad) the *Sex Discrimination Act 1984*;

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

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

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

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

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

Authorised Version C2026C00293 registered 15/07/2026

(f) the *Anti-Discrimination Act 1998* of Tasmania;
(g) the *Discrimination Act 1991* of the Australian Capital Territory;
(h) the *Anti-Discrimination Act 1992* (NT).

352 Temporary absence—illness or injury

An employer must not dismiss an employee because the employee is temporarily absent from work because of illness or injury of a kind prescribed by the regulations.

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

353 Bargaining services fees

(1) An industrial association, or an officer or member of an industrial association, must not:
(a) demand; or
(b) purport to demand; or
(c) do anything that would:
(i) have the effect of demanding; or
(ii) purport to have the effect of demanding;
payment of a bargaining services fee.

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

(2) A ***bargaining services fee*** is a fee (however described) payable:
(a) to an industrial association; or
(b) to someone in lieu of an industrial association;
wholly or partly for the provision, or purported provision, of bargaining services, but does not include membership fees.

(3) ***Bargaining services*** are services provided by, or on behalf of, an industrial association in relation to an enterprise agreement, or a proposed enterprise agreement (including in relation to bargaining for, or the making, approval, operation, variation or termination of, the enterprise agreement, or proposed enterprise agreement).

Authorised Version C2026C00293 registered 15/07/2026

Exception for fees payable under contract

(4) Subsection (1) does not apply if the fee is payable to the industrial association under a contract for the provision of bargaining services.

354 Coverage by particular instruments

(1) A person must not discriminate against an employer because:

(a) employees of the employer are covered, or not covered, by:

(i) provisions of the National Employment Standards; or

(ii) a particular type of workplace instrument (including a particular kind of workplace instrument within a type of workplace instrument); or

(iii) an enterprise agreement that does, or does not, cover an employee organisation, or a particular employee organisation; or

(b) it is proposed that employees of the employer be covered, or not be covered, by:

(i) a particular type of workplace instrument (including a particular kind of workplace instrument within a type of workplace instrument); or

(ii) an enterprise agreement that does, or does not, cover an employee organisation, or a particular employee organisation.

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

(2) Subsection (1) does not apply to protected industrial action.

(3) A person must not discriminate against a regulated business because:

(a) regulated workers in relation to the regulated business are covered, or not covered, by a particular type of workplace instrument (including a particular kind of workplace instrument within a type of workplace instrument); or

(b) it is proposed that regulated workers in relation to the regulated business are covered, or not covered, by a

Authorised Version C2026C00293 registered 15/07/2026

particular type of workplace instrument (including a particular kind of workplace instrument within a type of workplace instrument).

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

355 Coercion—allocation of duties etc. to particular person

A person must not organise or take, or threaten to organise or take, any action against another person with intent to coerce the other person, or a third person, to:

(a) employ, or not employ, a particular person; or

(b) engage, or not engage, a particular independent contractor; or

(c) allocate, or not allocate, particular duties or responsibilities to a particular employee or independent contractor; or

(d) designate a particular employee or independent contractor as having, or not having, particular duties or responsibilities.

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

356 Objectionable terms

A term of a workplace instrument, or an agreement or arrangement (whether written or unwritten), has no effect to the extent that it is an objectionable term.

Authorised Version C2026C00293 registered 15/07/2026

Division 6—Sham arrangements

Subdivision A—Independent contracting

357 Misrepresenting employment as independent contracting arrangement

(1) A person (the ***employer***) that employs, or proposes to employ, an individual must not represent to the individual that the contract of employment under which the individual is, or would be, employed by the employer is a contract for services under which the individual performs, or would perform, work as an independent contractor.

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

(2) Subsection (1) does not apply if the employer proves that, when the representation was made, the employer reasonably believed that the contract was a contract for services.

(3) In determining, for the purpose of subsection (2), whether the employer's belief was reasonable:

(a) regard must be had to the size and nature of the employer's enterprise; and

(b) regard may be had to any other relevant matters.

358 Dismissing to engage as independent contractor

An employer must not dismiss, or threaten to dismiss, an individual who:

(a) is an employee of the employer; and

(b) performs particular work for the employer;

in order to engage the individual as an independent contractor to perform the same, or substantially the same, work under a contract for services.

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

Authorised Version C2026C00293 registered 15/07/2026

359 Misrepresentation to engage as independent contractor

A person (the ***employer***) that employs, or has at any time employed, an individual to perform particular work must not make a statement that the employer knows is false in order to persuade or influence the individual to enter into a contract for services under which the individual will perform, as an independent contractor, the same, or substantially the same, work for the employer.

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

Subdivision B—Casual employment

359B Dismissing to engage as casual employee

An employer must not dismiss, or threaten to dismiss, an individual who:

(a) is an employee of the employer; and

(b) performs particular work for the employer;

in order to engage the individual as a casual employee to perform the same, or substantially the same, work.

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

359C Misrepresentation to engage as casual employee

A person (the ***employer***) that employs, or has at any time employed, an individual to perform particular work other than as a casual employee must not make a statement that:

(a) the employer knows is false; and

(b) is made in order to persuade or influence the individual to enter into a contract for casual employment under which the individual will perform the same, or substantially the same, work for the employer.

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

Authorised Version C2026C00293 registered 15/07/2026

Division 7—Ancillary rules

360 Multiple reasons for action

For the purposes of this Part, a person takes action for a particular reason if the reasons for the action include that reason.

361 Reason for action to be presumed unless proved otherwise

(1) If:

(a) in an application in relation to a contravention of this Part, it is alleged that a person took, or is taking, action for a particular reason or with a particular intent; and

(b) taking that action for that reason or with that intent would constitute a contravention of this Part;

it is presumed that the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise.

(2) Subsection (1) does not apply in relation to orders for an interim injunction.

362 Advising, encouraging, inciting or coercing action

(1) If:

(a) for a particular reason (the ***first person's reason***), a person advises, encourages or incites, or takes any action with intent to coerce, a second person to take action; and

(b) the action, if taken by the second person for the first person's reason, would contravene a provision of this Part;

the first person is taken to have contravened the provision.

(2) Subsection (1) does not limit section 550.

363 Actions of industrial associations

(1) For the purposes of this Part, each of the following is taken to be action of an industrial association:

Authorised Version C2026C00293 registered 15/07/2026

(a) action taken by the committee of management of the industrial association;
(b) action taken by an officer or agent of the industrial association acting in that capacity;
(c) action taken by a member, or group of members, of the industrial association if the action is authorised by:
(i) the rules of the industrial association; or
(ii) the committee of management of the industrial association; or
(iii) an officer or agent of the industrial association acting in that capacity;
(d) action taken by a member of the industrial association who performs the function of dealing with an employer on behalf of the member and other members of the industrial association, acting in that capacity;
(e) if the industrial association is an unincorporated industrial association that does not have a committee of management—action taken by a member, or group of members, of the industrial association.

(2) Paragraphs (1)(c) and (d) do not apply if:
(a) the committee of management of the industrial association; or
(b) a person authorised by the committee; or
(c) an officer of the industrial association;
has taken all reasonable steps to prevent the action.

(3) If, for the purposes of this Part, it is necessary to establish the state of mind of an industrial association in relation to particular action, it is enough to show:
(a) that the action was taken by a person, or a group, referred to in paragraphs (1)(a) to (e); and
(b) that the person, or a person in the group, had that state of mind.

(4) Subsections (1) to (3) have effect despite subsections 793(1) and (2) (which deal with liabilities of bodies corporate).

Authorised Version C2026C00293 registered 15/07/2026

364 Unincorporated industrial associations

Person includes unincorporated industrial association

(1) For the purposes of this Part, a reference to a person includes a reference to an unincorporated industrial association.

Liability for contraventions by unincorporated industrial associations

(2) A contravention of this Part that would otherwise be committed by an unincorporated industrial association is taken to have been committed by each member, officer or agent of the industrial association who:

(a) took, or took part in, the relevant action; and

(b) did so with the relevant state of mind.

Authorised Version C2026C00293 registered 15/07/2026

Division 8—Compliance

Subdivision A—Contraventions involving dismissal

365 Application for the FWC to deal with a dismissal dispute

If:

(a) a person has been dismissed; and

(b) the person, or an industrial association that is entitled to represent the industrial interests of the person, alleges that the person was dismissed in contravention of this Part;

the person, or the industrial association, may apply to the FWC for the FWC to deal with the dispute.

366 Time for application

(1) An application under section 365 must be made:

(a) within 21 days after the dismissal took effect; or

(b) within such further period as the FWC allows under subsection (2).

(2) The FWC may allow a further period if the FWC is satisfied that there are exceptional circumstances, taking into account:

(a) the reason for the delay; and

(b) any action taken by the person to dispute the dismissal; and

(c) prejudice to the employer (including prejudice caused by the delay); and

(d) the merits of the application; and

(e) fairness as between the person and other persons in a like position.

367 Application fees

(1) The application must be accompanied by any fee prescribed by the regulations.

Authorised Version C2026C00293 registered 15/07/2026

(2) The regulations may prescribe:
  (a) a fee for making an application to the FWC under section 365; and
  (b) a method for indexing the fee; and
  (c) the circumstances in which all or part of the fee may be waived or refunded.

368 Dealing with a dismissal dispute (other than by arbitration)

(1) If an application is made under section 365, the FWC must deal with the dispute (other than by arbitration).

Note: The FWC may deal with a dispute by mediation or conciliation, or by making a recommendation or expressing an opinion (see subsection 595(2)). One of the recommendations that the FWC might make is that an application be made under Part 3-2 (which deals with unfair dismissal) in relation to the dispute.

(2) Any conference conducted for the purposes of dealing with the dispute (other than by arbitration) must be conducted in private, despite subsection 592(3).

Note: For conferences, see section 592.

(3) If the FWC is satisfied that all reasonable attempts to resolve the dispute (other than by arbitration) have been, or are likely to be, unsuccessful, then:
  (a) the FWC must issue a certificate to that effect; and
  (b) if the FWC considers, taking into account all the materials before it, that arbitration under section 369, or a general protections court application, in relation to the dispute would not have a reasonable prospect of success, the FWC must advise the parties accordingly.

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

Authorised Version C2026C00293 registered 15/07/2026

369 Dealing with a dismissal dispute by arbitration

(1) This section applies if:

(a) the FWC issues a certificate under paragraph 368(3)(a) in relation to the dispute; and

(b) the parties notify the FWC that they agree to the FWC arbitrating the dispute; and

(c) the notification:

(i) is given to the FWC within 14 days after the day the certificate is issued, or within such period as the FWC allows on an application made during or after those 14 days; and

(ii) complies with any requirements prescribed by the procedural rules; and

(d) sections 726, 728, 729, 730, 731 and 732 do not apply.

Note: Sections 726, 728, 729, 730, 731 and 732 prevent multiple applications or complaints of a kind referred to in those sections from being made in relation to the same dispute. A notification can only be made under this section where there is no such other application or complaint in relation to the dispute at the time the notification is made. Generally, once a notification is made no such application or complaint can be made in relation to the dispute (see section 727).

(2) The FWC may deal with the dispute by arbitration, including by making one or more of the following orders:

(a) an order for reinstatement of the person;

(b) an order for the payment of compensation to the person;

(c) an order for payment of an amount to the person for remuneration lost;

(d) an order to maintain the continuity of the person's employment;

(e) an order to maintain the period of the person's continuous service with the employer.

(3) A person to whom an order under subsection (2) applies must not contravene a term of the order.

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

Authorised Version C2026C00293 registered 15/07/2026

370 Taking a dismissal dispute to court

A person who is entitled to apply under section 365 for the FWC to deal with a dispute must not make a general protections court application in relation to the dispute unless:

(a) both of the following apply:

(i) the FWC has issued a certificate under paragraph 368(3)(a) in relation to the dispute;

(ii) the general protections court application is made within 14 days after the day the certificate is issued, or within such period as the court allows on an application made during or after those 14 days; or

(b) the general protections court application includes an application for an interim injunction.

Note 1: Generally, if the parties notify the FWC that they agree to the FWC arbitrating the dispute (see subsection 369(1)), a general protections court application cannot be made in relation to the dispute (see sections 727 and 728).

Note 2: For the purposes of subparagraph (a)(ii), in *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298, the Industrial Relations Court of Australia set down principles relating to the exercise of its discretion under a similarly worded provision of the *Industrial Relations Act 1988*.

Subdivision B—Other contraventions

372 Application for the FWC to deal with a non-dismissal dispute

If:

(a) a person alleges a contravention of this Part; and

(b) the person is not entitled to apply to the FWC under section 365 for the FWC to deal with the dispute;

the person may apply to the FWC under this section for the FWC to deal with the dispute.

Authorised Version C2026C00293 registered 15/07/2026

373 Application fees

(1) The application must be accompanied by any fee prescribed by the regulations.

(2) The regulations may prescribe:
  (a) a fee for making an application to the FWC under section 372; and
  (b) a method for indexing the fee; and
  (c) the circumstances in which all or part of the fee may be waived or refunded.

374 Conferences

(1) If:
  (a) an application is made under section 372; and
  (b) the parties to the dispute agree to participate;

the FWC must conduct a conference to deal with the dispute.

Note 1: For conferences, see section 592.

Note 2: The FWC may deal with a dispute by mediation or conciliation, or by making a recommendation or expressing an opinion (see subsection 595(2)).

(2) Despite subsection 592(3), the FWC must conduct the conference in private.

375 Advice on general protections court application

If the FWC considers, taking into account all the materials before it, that a general protections court application in relation to the dispute would not have a reasonable prospect of success, it must advise the parties accordingly.

Authorised Version C2026C00293 registered 15/07/2026

Subdivision C—Appeals and costs orders

375A Appeal rights

(1) Despite subsection 604(2), the FWC must not grant permission to appeal from a decision made by the FWC under subsection 369(2) (which is about arbitration of a dismissal dispute) unless the FWC considers that it is in the public interest to do so.

(2) Despite subsection 604(1), an appeal from a decision made by the FWC in relation to a matter arising under subsection 369(2) can only, to the extent that it is an appeal on a question of fact, be made on the ground that the decision involved a significant error of fact.

375B Costs orders against parties

(1) The FWC may make an order for costs against a party (the ***first party***) to a dispute for costs incurred by the other party to the dispute if:

(a) an application for the FWC to deal with the dispute has been made under section 365; and

(b) the FWC is satisfied that the first party caused those costs to be incurred because of an unreasonable act or omission of the first party in connection with the conduct or continuation of the dispute.

(2) The FWC may make an order under subsection (1) only if the other party to the dispute has applied for it in accordance with section 377.

(3) This section does not limit the FWC's power to order costs under section 611.

376 Costs orders against lawyers and paid agents

(1) This section applies if:

(a) an application for the FWC to deal with a dispute has been made under section 365 or 372; and

Authorised Version C2026C00293 registered 15/07/2026

(b) a person who is a party to the dispute has engaged a lawyer or paid agent (the ***representative***) to represent the person in the dispute; and

(c) under section 596, the person is required to seek the FWC's permission to be represented by the representative.

(2) The FWC may make an order for costs against the representative for costs incurred by the other party to the dispute if the FWC is satisfied that the representative caused those costs to be incurred because:

(a) the representative encouraged the person to start, continue or respond to the dispute and it should have been reasonably apparent that the person had no reasonable prospect of success in the dispute; or

(b) of an unreasonable act or omission of the representative in connection with the conduct or continuation of the dispute.

(3) The FWC may make an order under this section only if the other party to the dispute has applied for it in accordance with section 377.

(4) This section does not limit the FWC's power to order costs under section 611.

377 Applications for costs orders

An application for an order for costs in relation to an application under section 365 or 372 must be made within 14 days after the FWC finishes dealing with the dispute.

377A Schedule of costs

(1) A schedule of costs may be prescribed in relation to items of expenditure likely to be incurred in relation to matters that can be covered by an order under section 611, 375B or 376 in relation to an application under section 365, including expenses arising from the representation of a party by a person or organisation other than on a legal professional basis.

Authorised Version C2026C00293 registered 15/07/2026

(2) If a schedule of costs is prescribed for the purposes of subsection (1), then, in awarding costs under section 611, 375B or 376 in relation to an application under section 365, the FWC:

(a) is not limited to the items of expenditure appearing in the schedule; but

(b) if an item does appear in the schedule—must not award costs in relation to that item at a rate or of an amount that exceeds the rate or amount appearing in the schedule.

378 Contravening costs orders

A person to whom an order for costs made under section 375B or 376 applies must not contravene a term of the order.

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

Authorised Version C2026C00293 registered 15/07/2026

Part 3-2—Unfair dismissal

Division 1—Introduction

379 Guide to this Part

This Part is about the unfair dismissal of national system employees, and the granting of remedies for unfair dismissal.

Division 2 sets out when a person is protected from unfair dismissal.

Division 3 sets out the elements that make up an unfair dismissal.

Division 4 sets out the remedies the FWC can grant for unfair dismissal.

Division 5 is about the procedural aspects of getting remedies for unfair dismissal.

380 Meanings of *employee* and *employer*

In this Part, ***employee*** means a national system employee, and ***employer*** means a national system employer.

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

381 Object of this Part

(1) The object of this Part is:

(a) to establish a framework for dealing with unfair dismissal that balances:

(i) the needs of business (including small business); and

(ii) the needs of employees; and

(b) to establish procedures for dealing with unfair dismissal that:

Authorised Version C2026C00293 registered 15/07/2026

(i) are quick, flexible and informal; and

(ii) address the needs of employers and employees; and

(c) to provide remedies if a dismissal is found to be unfair, with an emphasis on reinstatement.

(2) The procedures and remedies referred to in paragraphs (1)(b) and (c), and the manner of deciding on and working out such remedies, are intended to ensure that a "fair go all round" is accorded to both the employer and employee concerned.

Note: The expression "fair go all round" was used by Sheldon J in *in re Loty and Holloway v Australian Workers' Union* [1971] AR (NSW) 95.

Authorised Version C2026C00293 registered 15/07/2026

Division 2—Protection from unfair dismissal

382 When a person is protected from unfair dismissal

A person is ***protected from unfair dismissal*** at a time if, at that time:

(a) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and

(b) one or more of the following apply:

(i) a modern award covers the person;

(ii) an enterprise agreement applies to the person in relation to the employment;

(iii) the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold.

383 Meaning of *minimum employment period*

The ***minimum employment period*** is:

(a) if the employer is not a small business employer—6 months ending at the earlier of the following times:

(i) the time when the person is given notice of the dismissal;

(ii) immediately before the dismissal; or

(b) if the employer is a small business employer—one year ending at that time.

384 Period of employment

(1) An employee's ***period of employment*** with an employer at a particular time is the period of continuous service the employee has completed with the employer at that time as an employee.

(2) However:

Authorised Version C2026C00293 registered 15/07/2026

(a) a period of service as a casual employee does not count towards the employee's period of employment unless:

(i) the employment as a casual employee was as a regular casual employee; and

(ii) during the period of service as a casual employee, the employee had a reasonable expectation of continuing employment by the employer on a regular and systematic basis; and

(b) if:

(i) the employee is a transferring employee in relation to a transfer of business from an old employer to a new employer; and

(ii) the old employer and the new employer are not associated entities when the employee becomes employed by the new employer; and

(iii) the new employer informed the employee in writing before the new employment started that a period of service with the old employer would not be recognised;

the period of service with the old employer does not count towards the employee's period of employment with the new employer.

Authorised Version C2026C00293 registered 15/07/2026

Division 3—What is an unfair dismissal

385 What is an unfair dismissal

A person has been ***unfairly dismissed*** if the FWC is satisfied that:

(a) the person has been dismissed; and

(b) the dismissal was harsh, unjust or unreasonable; and

(c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and

(d) the dismissal was not a case of genuine redundancy.

Note: For the definition of ***consistent with the Small Business Fair Dismissal Code***: see section 388.

386 Meaning of *dismissed*

(1) A person has been ***dismissed*** if:

(a) the person's employment with his or her employer has been terminated on the employer's initiative; or

(b) the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer.

(2) However, a person has not been ***dismissed*** if:

(a) the person was employed under a contract of employment for a specified period of time, for a specified task, or for the duration of a specified season, and the employment has terminated at the end of the period, on completion of the task, or at the end of the season; or

(b) the person was an employee:

(i) to whom a training arrangement applied; and

(ii) whose employment was for a specified period of time or was, for any reason, limited to the duration of the training arrangement;

and the employment has terminated at the end of the training arrangement; or

Authorised Version C2026C00293 registered 15/07/2026

(c) the person was demoted in employment but:
(i) the demotion does not involve a significant reduction in his or her remuneration or duties; and
(ii) he or she remains employed with the employer that effected the demotion.

(3) Subsection (2) does not apply to a person employed under a contract of a kind referred to in paragraph (2)(a) if a substantial purpose of the employment of the person under a contract of that kind is, or was at the time of the person's employment, to avoid the employer's obligations under this Part.

387 Criteria for considering harshness etc.

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:

(a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and
(b) whether the person was notified of that reason; and
(c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
(d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
(e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and
(f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
(g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
(h) any other matters that the FWC considers relevant.

Authorised Version C2026C00293 registered 15/07/2026

Note: For the purposes of paragraph (a), the following conduct can amount to a valid reason for the dismissal:
(a) the person sexually harasses another person; and
(b) the person does so in connection with the person's employment.

388 The Small Business Fair Dismissal Code

(1) The Minister may, by legislative instrument, declare a Small Business Fair Dismissal Code.

(2) A person's dismissal was ***consistent with the Small Business Fair Dismissal Code*** if:
(a) immediately before the time of the dismissal or at the time the person was given notice of the dismissal (whichever happened first), the person's employer was a small business employer; and
(b) the employer complied with the Small Business Fair Dismissal Code in relation to the dismissal.

389 Meaning of *genuine redundancy*

(1) A person's dismissal was a case of ***genuine redundancy*** if:
(a) the person's employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and
(b) the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.

(2) A person's dismissal was not a case of ***genuine redundancy*** if it would have been reasonable in all the circumstances for the person to be redeployed within:
(a) the employer's enterprise; or
(b) the enterprise of an associated entity of the employer.

Authorised Version C2026C00293 registered 15/07/2026

Division 4—Remedies for unfair dismissal

390 When the FWC may order remedy for unfair dismissal

(1) Subject to subsection (3), the FWC may order a person's reinstatement, or the payment of compensation to a person, if:
  (a) the FWC is satisfied that the person was protected from unfair dismissal (see Division 2) at the time of being dismissed; and
  (b) the person has been unfairly dismissed (see Division 3).

(2) The FWC may make the order only if the person has made an application under section 394.

(3) The FWC must not order the payment of compensation to the person unless:
  (a) the FWC is satisfied that reinstatement of the person is inappropriate; and
  (b) the FWC considers an order for payment of compensation is appropriate in all the circumstances of the case.

Note: Division 5 deals with procedural matters such as applications for remedies.

391 Remedy—reinstatement etc.

Reinstatement

(1) An order for a person's reinstatement must be an order that the person's employer at the time of the dismissal reinstate the person by:
  (a) reappointing the person to the position in which the person was employed immediately before the dismissal; or
  (b) appointing the person to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal.

(1A) If:

Authorised Version C2026C00293 registered 15/07/2026

(a) the position in which the person was employed immediately before the dismissal is no longer a position with the person's employer at the time of the dismissal; and

(b) that position, or an equivalent position, is a position with an associated entity of the employer;

the order under subsection (1) may be an order to the associated entity to:

(c) appoint the person to the position in which the person was employed immediately before the dismissal; or

(d) appoint the person to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal.

Order to maintain continuity

(2) If the FWC makes an order under subsection (1) and considers it appropriate to do so, the FWC may also make any order that the FWC considers appropriate to maintain the following:

(a) the continuity of the person's employment;

(b) the period of the person's continuous service with the employer, or (if subsection (1A) applies) the associated entity.

Order to restore lost pay

(3) If the FWC makes an order under subsection (1) and considers it appropriate to do so, the FWC may also make any order that the FWC considers appropriate to cause the employer to pay to the person an amount for the remuneration lost, or likely to have been lost, by the person because of the dismissal.

(4) In determining an amount for the purposes of an order under subsection (3), the FWC must take into account:

(a) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for reinstatement; and

Authorised Version C2026C00293 registered 15/07/2026

(b) the amount of any remuneration reasonably likely to be so earned by the person during the period between the making of the order for reinstatement and the actual reinstatement.

392 Remedy—compensation

Compensation

(1) An order for the payment of compensation to a person must be an order that the person's employer at the time of the dismissal pay compensation to the person in lieu of reinstatement.

Criteria for deciding amounts

(2) In determining an amount for the purposes of an order under subsection (1), the FWC must take into account all the circumstances of the case including:

(a) the effect of the order on the viability of the employer's enterprise; and

(b) the length of the person's service with the employer; and

(c) the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed; and

(d) the efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal; and

(e) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation; and

(f) the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation; and

(g) any other matter that the FWC considers relevant.

Misconduct reduces amount

(3) If the FWC is satisfied that misconduct of a person contributed to the employer's decision to dismiss the person, the FWC must

Authorised Version C2026C00293 registered 15/07/2026

reduce the amount it would otherwise order under subsection (1) by an appropriate amount on account of the misconduct.

Shock, distress etc. disregarded

(4) The amount ordered by the FWC to be paid to a person under subsection (1) must not include a component by way of compensation for shock, distress or humiliation, or other analogous hurt, caused to the person by the manner of the person's dismissal.

Compensation cap

(5) The amount ordered by the FWC to be paid to a person under subsection (1) must not exceed the lesser of:
  (a) the amount worked out under subsection (6); and
  (b) half the amount of the high income threshold immediately before the dismissal.

(6) The amount is the total of the following amounts:
  (a) the total amount of remuneration:
    (i) received by the person; or
    (ii) to which the person was entitled;
  (whichever is higher) for any period of employment with the employer during the 26 weeks immediately before the dismissal; and
  (b) if the employee was on leave without pay or without full pay while so employed during any part of that period—the amount of remuneration taken to have been received by the employee for the period of leave in accordance with the regulations.

393 Monetary orders may be in instalments

To avoid doubt, an order by the FWC under subsection 391(3) or 392(1) may permit the employer concerned to pay the amount required in instalments specified in the order.

Authorised Version C2026C00293 registered 15/07/2026

Division 5—Procedural matters

394 Application for unfair dismissal remedy

(1) A person who has been dismissed may apply to the FWC for an order under Division 4 granting a remedy.

Note 1: Division 4 sets out when the FWC may order a remedy for unfair dismissal.

Note 2: For application fees, see section 395.

Note 3: Part 6-1 may prevent an application being made under this Part in relation to a dismissal if an application or complaint has been made in relation to the dismissal other than under this Part.

(2) The application must be made:
  (a) within 21 days after the dismissal took effect; or
  (b) within such further period as the FWC allows under subsection (3).

(3) The FWC may allow a further period for the application to be made by a person under subsection (1) if the FWC is satisfied that there are exceptional circumstances, taking into account:
  (a) the reason for the delay; and
  (b) whether the person first became aware of the dismissal after it had taken effect; and
  (c) any action taken by the person to dispute the dismissal; and
  (d) prejudice to the employer (including prejudice caused by the delay); and
  (e) the merits of the application; and
  (f) fairness as between the person and other persons in a similar position.

395 Application fees

(1) An application to the FWC under this Division must be accompanied by any fee prescribed by the regulations.

Authorised Version C2026C00293 registered 15/07/2026

(2) The regulations may prescribe:
  (a) a fee for making an application to the FWC under this Division; and
  (b) a method for indexing the fee; and
  (c) the circumstances in which all or part of the fee may be waived or refunded.

396 Initial matters to be considered before merits

The FWC must decide the following matters relating to an application for an order under Division 4 before considering the merits of the application:
  (a) whether the application was made within the period required in subsection 394(2);
  (b) whether the person was protected from unfair dismissal;
  (c) whether the dismissal was consistent with the Small Business Fair Dismissal Code;
  (d) whether the dismissal was a case of genuine redundancy.

397 Matters involving contested facts

The FWC must conduct a conference or hold a hearing in relation to a matter arising under this Part if, and to the extent that, the matter involves facts the existence of which is in dispute.

398 Conferences

(1) This section applies in relation to a matter arising under this Part if the FWC conducts a conference in relation to the matter.

(2) Despite subsection 592(3), the FWC must conduct the conference in private.

(3) The FWC must take into account any difference in the circumstances of the parties to the matter in:
  (a) considering the application; and
  (b) informing itself in relation to the application.

Authorised Version C2026C00293 registered 15/07/2026

(4) The FWC must take into account the wishes of the parties to the matter as to the way in which the FWC:
  (a) considers the application; and
  (b) informs itself in relation to the application.

399 Hearings

(1) The FWC must not hold a hearing in relation to a matter arising under this Part unless the FWC considers it appropriate to do so, taking into account:
  (a) the views of the parties to the matter; and
  (b) whether a hearing would be the most effective and efficient way to resolve the matter.

(2) If the FWC holds a hearing in relation to a matter arising under this Part, it may decide not to hold the hearing in relation to parts of the matter.

(3) The FWC may decide at any time (including before, during or after conducting a conference in relation to a matter) to hold a hearing in relation to the matter.

399A Dismissing applications

(1) The FWC may, subject to subsection (2), dismiss an application for an order under Division 4 if the FWC is satisfied that the applicant has unreasonably:
  (a) failed to attend a conference conducted by the FWC, or a hearing held by the FWC, in relation to the application; or
  (b) failed to comply with a direction or order of the FWC relating to the application; or
  (c) failed to discontinue the application after a settlement agreement has been concluded.

Note 1: For another power of the FWC to dismiss applications for orders under Division 4, see section 587.

Note 2: The FWC may make an order for costs if the applicant's failure causes the other party to the matter to incur costs (see section 400A).

Authorised Version C2026C00293 registered 15/07/2026

(2) The FWC may exercise its power under subsection (1) on application by the employer.

(3) This section does not limit when the FWC may dismiss an application.

400 Appeal rights

(1) Despite subsection 604(2), the FWC must not grant permission to appeal from a decision made by the FWC under this Part unless the FWC considers that it is in the public interest to do so.

(2) Despite subsection 604(1), an appeal from a decision made by the FWC in relation to a matter arising under this Part can only, to the extent that it is an appeal on a question of fact, be made on the ground that the decision involved a significant error of fact.

400A Costs orders against parties

(1) The FWC may make an order for costs against a party to a matter arising under this Part (the ***first party***) for costs incurred by the other party to the matter if the FWC is satisfied that the first party caused those costs to be incurred because of an unreasonable act or omission of the first party in connection with the conduct or continuation of the matter.

(2) The FWC may make an order under subsection (1) only if the other party to the matter has applied for it in accordance with section 402.

(3) This section does not limit the FWC's power to order costs under section 611.

401 Costs orders against lawyers and paid agents

(1) This section applies if:

(a) an application for an unfair dismissal remedy has been made under section 394; and

Authorised Version C2026C00293 registered 15/07/2026

(b) a person who is a party to the matter has engaged a lawyer or paid agent (the ***representative***) to represent the person in the matter; and

(c) under section 596, the person is required to seek the FWC's permission to be represented by the representative.

(1A) The FWC may make an order for costs against the representative for costs incurred by the other party to the matter if the FWC is satisfied that the representative caused those costs to be incurred because:

(a) the representative encouraged the person to start, continue or respond to the matter and it should have been reasonably apparent that the person had no reasonable prospect of success in the matter; or

(b) of an unreasonable act or omission of the representative in connection with the conduct or continuation of the matter.

(2) The FWC may make an order under this section only if the other party to the matter has applied for it in accordance with section 402.

(3) This section does not limit the FWC's power to order costs under section 611.

402 Applications for costs orders

An application for an order for costs under section 611 in relation to a matter arising under this Part, or for costs under section 400A or 401, must be made within 14 days after:

(a) the FWC determines the matter; or

(b) the matter is discontinued.

403 Schedule of costs

(1) A schedule of costs may be prescribed in relation to items of expenditure likely to be incurred in relation to matters that can be covered by an order:

Authorised Version C2026C00293 registered 15/07/2026

(a) under section 611 in relation to a matter arising under this Part; or

(b) under section 400A or 401;

including expenses arising from the representation of a party by a person or organisation other than on a legal professional basis.

(2) If a schedule of costs is prescribed for the purposes of subsection (1), then, in awarding costs under section 611 in relation to a matter arising under this Part, or awarding costs under section 400A or 401, the FWC:

(a) is not limited to the items of expenditure appearing in the schedule; but

(b) if an item does appear in the schedule—must not award costs in relation to that item at a rate or of an amount that exceeds the rate or amount appearing in the schedule.

404 Security for costs

The procedural rules may provide for the furnishing of security for the payment of costs in relation to matters arising under this Part.

405 Contravening orders under this Part

A person to whom an order under this Part applies must not contravene a term of the order.

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

Authorised Version C2026C00293 registered 15/07/2026

Part 3-3—Industrial action

Division 1—Introduction

406 Guide to this Part

This Part deals mainly with industrial action by national system employees and national system employers.

Division 2 sets out when industrial action for a proposed enterprise agreement is protected industrial action. No action lies under any law in force in a State or Territory in relation to protected industrial action except in certain circumstances.

Division 3 provides that industrial action must not be organised or engaged in by certain persons before the nominal expiry date of an enterprise agreement or workplace determination has passed.

Division 4 provides for the FWC to make orders, in certain circumstances, that industrial action stop, not occur or not be organised for a specified period.

Division 5 deals with injunctions against industrial action if a bargaining representative of an employee who will be covered by a proposed enterprise agreement is engaging in pattern bargaining.

Division 6 provides for the FWC to make orders suspending or terminating protected industrial action for a proposed enterprise agreement in certain circumstances. If the FWC makes such an order, the action will no longer be protected industrial action.

Division 7 provides for the Minister to make a declaration terminating protected industrial action for a proposed enterprise agreement in certain circumstances. If the Minister makes such an order, the action will no longer be protected industrial action.

Authorised Version C2026C00293 registered 15/07/2026

Division 8 establishes the process that will allow employees to choose, by means of a fair and democratic secret ballot, whether to authorise protected industrial action for a proposed enterprise agreement.

Division 9 sets out restrictions about payments to employees relating to periods of industrial action.

Division 10 deals with the making of applications under this Part.

407 Meanings of *employee* and *employer*

In this Part, ***employee*** means a national system employee, and ***employer*** means a national system employer.

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

Authorised Version C2026C00293 registered 15/07/2026

Division 2—Protected industrial action

Subdivision A—What is protected industrial action

408 Protected industrial action

Industrial action is ***protected industrial action*** for a proposed enterprise agreement if it is one of the following:

(a) employee claim action for the agreement (see section 409);

(b) employee response action for the agreement (see section 410);

(c) employer response action for the agreement (see section 411).

409 Employee claim action

Employee claim action

(1) ***Employee claim action*** for a proposed enterprise agreement is industrial action that:

(a) is organised or engaged in for the purpose of supporting or advancing claims in relation to the agreement that are only about, or are reasonably believed to only be about, permitted matters; and

(b) is organised or engaged in, against an employer that will be covered by the agreement, by:

(i) a bargaining representative of an employee who will be covered by the agreement; or

(ii) an employee who is included in a group or groups of employees specified in a protected action ballot order for the industrial action; and

(c) meets the common requirements set out in Subdivision B; and

(d) meets the additional requirements set out in this section.

Authorised Version C2026C00293 registered 15/07/2026

Protected action ballot is necessary

(2) The industrial action must be authorised by a protected action ballot (see Division 8 of this Part).

Unlawful terms

(3) The industrial action must not be in support of, or to advance, claims to include unlawful terms in the agreement.

Industrial action must not be part of pattern bargaining

(4) A bargaining representative of an employee who will be covered by the agreement must not be engaging in pattern bargaining in relation to the agreement.

Industrial action must not relate to a demarcation dispute etc.

(5) The industrial action must not, if it is being organised or engaged in by a bargaining representative, relate to a significant extent to a demarcation dispute or contravene an FWC order that relates to a significant extent to a demarcation dispute.

Notice requirements after suspension order must be met

(6) If section 429 (which deals with employee claim action without a further protected action ballot after a period of suspension) applies in relation to the industrial action, the notice requirements of section 430 must be met.

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

Officer of an employee organisation

(7) If an employee organisation is a bargaining representative of an employee who will be covered by the agreement, the reference to a

Authorised Version C2026C00293 registered 15/07/2026

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

410 Employee response action

Employee response action

(1) ***Employee response action*** for a proposed enterprise agreement means industrial action that:

(a) is organised or engaged in as a response to industrial action by an employer; and

(b) is organised or engaged in, against an employer that will be covered by the agreement, by:

(i) a bargaining representative of an employee who will be covered by the agreement; or

(ii) an employee who will be covered by the agreement; and

(c) meets the common requirements set out in Subdivision B; and

(d) meets the additional requirements set out in this section.

Industrial action must not relate to a demarcation dispute etc.

(2) The industrial action must not, if it is being organised or engaged in by a bargaining representative, relate to a significant extent to a demarcation dispute or contravene an FWC order that relates to a significant extent to a demarcation dispute.

Officer of an employee organisation

(3) If an employee organisation is a bargaining representative of an employee who will be covered by the agreement, the reference to a bargaining representative of the employee in subparagraph (1)(b)(i) includes a reference to an officer of the organisation.

Authorised Version C2026C00293 registered 15/07/2026

411 Employer response action

Employer response action

(1) ***Employer response action*** for a proposed enterprise agreement means industrial action that:

(a) is organised or engaged in as a response to industrial action by:

(i) a bargaining representative of an employee who will be covered by the agreement; or

(ii) an employee who will be covered by the agreement; and

(b) is organised or engaged in by an employer that will be covered by the agreement against one or more employees that will be covered by the agreement; and

(c) meets the common requirements set out in Subdivision B; and

(d) meets the additional requirements set out in this section.

Protected action ballots

(2) Subsection (3) applies if the industrial action is organised or engaged in by an employer in response to industrial action that is authorised by a protected action ballot.

(3) The employer mentioned in subsection (2), and any bargaining representative of the employer for the proposed enterprise agreement, must not have contravened any order made under section 448A (which is about mediation and conciliation conferences) that related to the protected action ballot order for the protected action ballot.

412 Pattern bargaining

Pattern bargaining

(1) A course of conduct by a person is ***pattern bargaining*** if:

(a) the person is a bargaining representative for 2 or more proposed enterprise agreements; and

Authorised Version C2026C00293 registered 15/07/2026

(b) the course of conduct involves seeking common terms to be included in 2 or more of the agreements; and

(c) the course of conduct relates to 2 or more employers.

Exception—genuinely trying to reach an agreement

(2) The course of conduct, to the extent that it relates to a particular employer, is not pattern bargaining if the bargaining representative is genuinely trying to reach an agreement with that employer.

(3) For the purposes of subsection (2), the factors relevant to working out whether a bargaining representative is genuinely trying to reach an agreement with a particular employer, include the following:

(a) whether the bargaining representative is demonstrating a preparedness to bargain for the agreement taking into account the individual circumstances of that employer, including in relation to the nominal expiry date of the agreement;

(b) whether the bargaining representative is bargaining in a manner consistent with the terms of the agreement being determined as far as possible by agreement between that employer and its employees;

(c) whether the bargaining representative is meeting the good faith bargaining requirements.

(4) If a person seeks to rely on subsection (2), the person has the burden of proving that the subsection applies.

Genuinely trying to reach an agreement

(5) This section does not affect, and is not affected by, the meaning of the expression "genuinely trying to reach an agreement", or any variant of the expression, as used elsewhere in this Act.

Authorised Version C2026C00293 registered 15/07/2026

Subdivision B—Common requirements for industrial action to be protected industrial action

413 Common requirements that apply for industrial action to be protected industrial action

Common requirements

(1) This section sets out the ***common requirements*** for industrial action to be protected industrial action for a proposed enterprise agreement.

Type of proposed enterprise agreement

(2) The industrial action must not relate to a proposed enterprise agreement that is a greenfields agreement or a cooperative workplace agreement.

Genuinely trying to reach an agreement

(3) The following persons must be genuinely trying to reach an agreement:
  (a) if the person organising or engaging in the industrial action is a bargaining representative for the agreement—the bargaining representative;
  (b) if the person organising or engaging in the industrial action is an employee who will be covered by the agreement—the bargaining representative of the employee.

Notice requirements

(4) The notice requirements set out in section 414 must have been met in relation to the industrial action.

Compliance with orders

(5) The following persons must not have contravened any orders that apply to them and that relate to, or relate to industrial action

Authorised Version C2026C00293 registered 15/07/2026

relating to, the agreement or a matter that arose during bargaining for the agreement:

(a) if the person organising or engaging in the industrial action is a bargaining representative for the agreement—the bargaining representative;

(b) if the person organising or engaging in the industrial action is an employee who will be covered by the agreement—the employee and the bargaining representative of the employee.

No industrial action before an enterprise agreement etc. passes its nominal expiry date

(6) The person organising or engaging in the industrial action must not contravene section 417 (which deals with industrial action before the nominal expiry date of an enterprise agreement etc.) by organising or engaging in the industrial action.

No suspension or termination order is in operation etc.

(7) None of the following must be in operation:

(a) an order under Division 6 of this Part suspending or terminating industrial action in relation to the agreement;

(b) a Ministerial declaration under subsection 431(1) terminating industrial action in relation to the agreement;

(c) an intractable bargaining declaration in relation to the agreement.

414 Notice requirements for industrial action

Notice requirements—employee claim action

(1) Before a person engages in employee claim action for a proposed enterprise agreement, a bargaining representative of an employee who will be covered by the agreement must give written notice of the action to the employer of the employee.

(2) The period of notice must be at least:

(a) subject to paragraph (b):

Authorised Version C2026C00293 registered 15/07/2026

(i) if subparagraph (ii) of this paragraph does not apply—3 working days; or

(ii) if the proposed enterprise agreement is a multi-enterprise agreement—120 hours; or

(b) if a protected action ballot order for the employee claim action specifies a longer period of notice for the purposes of this paragraph—that period of notice.

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

Notice of employee claim action not to be given until ballot results declared

(3) A notice under subsection (1) must not be given until after the results of the protected action ballot for the employee claim action have been declared.

Notice requirements—employee response action

(4) Before a person engages in employee response action for a proposed enterprise agreement, a bargaining representative of an employee who will be covered by the agreement must give written notice of the action to the employer of the employee.

Notice requirements—employer response action

(5) Before an employer engages in employer response action for a proposed enterprise agreement, the employer must:

(a) give written notice of the action to each bargaining representative of an employee who will be covered by the agreement; and

(b) take all reasonable steps to notify the employees who will be covered by the agreement of the action.

Notice requirements—content

(6) A notice given under this section must specify the nature of the action and the day on which it will start.

Authorised Version C2026C00293 registered 15/07/2026

Subdivision C—Significance of industrial action being protected industrial action

415 Immunity provision

(1) No action lies under any law (whether written or unwritten) in force in a State or Territory in relation to any industrial action that is protected industrial action unless the industrial action has involved or is likely to involve:

(a) personal injury; or

(b) wilful or reckless destruction of, or damage to, property; or

(c) the unlawful taking, keeping or use of property.

(2) However, subsection (1) does not prevent an action for defamation being brought in relation to anything that occurred in the course of industrial action.

416 Employer response action—employer may refuse to make payments to employees

If an employer engages in employer response action against employees, the employer may refuse to make payments to the employees in relation to the period of the action.

Note: If an employee engages in protected industrial action against his or her employer, the employer must not make a payment to an employee in relation to certain periods of action (see Subdivision A of Division 9 of this Part).

416A Employer response action does not affect continuity of employment

Employer response action for a proposed enterprise agreement does not affect the continuity of employment of the employees who will be covered by the agreement, for such purposes as are prescribed by the regulations.

Authorised Version C2026C00293 registered 15/07/2026

Division 3—No industrial action before nominal expiry date of enterprise agreement etc.

417 Industrial action must not be organised or engaged in before nominal expiry date of enterprise agreement etc.

No industrial action

(1) A person referred to in subsection (2) must not organise or engage in industrial action from the day on which:

(a) an enterprise agreement is approved by the FWC until its nominal expiry date has passed; or

(b) a workplace determination comes into operation until its nominal expiry date has passed;

whether or not the industrial action relates to a matter dealt with in the agreement or determination.

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

(2) The persons are:

(a) an employer, employee, or employee organisation, who is covered by the agreement or determination; or

(b) an officer of an employee organisation that is covered by the agreement or determination, acting in that capacity.

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

Authorised Version C2026C00293 registered 15/07/2026

Injunctions and other orders

(3) If a person contravenes subsection (1), the Federal Court or Federal Circuit and Family Court of Australia (Division 2) may do either or both of the following:

(a) grant an injunction under this subsection;

(b) make any other order under subsection 545(1);

that the court considers necessary to stop, or remedy the effects of, the contravention.

(4) The court may grant an injunction under subsection (3) only on application by a person referred to in column 2 of item 14 of the table in subsection 539(2).

(5) Despite subsection 545(4), the court may make any other order under subsection 545(1) only on application by a person referred to in column 2 of item 14 of the table in subsection 539(2).

Note: Section 539 deals with applications for orders in relation to contraventions of civil remedy provisions.

Authorised Version C2026C00293 registered 15/07/2026

Division 4—FWC orders stopping etc. industrial action

418 FWC must order that industrial action by employees or employers stop etc.

(1) If it appears to the FWC that industrial action by one or more employees or employers that is not, or would not be, protected industrial action:

(a) is happening; or

(b) is threatened, impending or probable; or

(c) is being organised;

the FWC must make an order that the industrial action stop, not occur or not be organised (as the case may be) for a period (the ***stop period***) specified in the order.

Note: For interim orders, see section 420.

(2) The FWC may make the order:

(a) on its own initiative; or

(b) on application by either of the following:

(i) a person who is affected (whether directly or indirectly), or who is likely to be affected (whether directly or indirectly), by the industrial action;

(ii) an organisation of which a person referred to in subparagraph (i) is a member.

(3) In making the order, the FWC does not have to specify the particular industrial action.

(4) If the FWC is required to make an order under subsection (1) in relation to industrial action and a protected action ballot authorised the industrial action:

(a) some or all of which has not been taken before the beginning of the stop period specified in the order; or

(b) which has not ended before the beginning of that stop period; or

(c) beyond that stop period;

Authorised Version C2026C00293 registered 15/07/2026

the FWC may state in the order whether or not the industrial action may be engaged in after the end of that stop period without another protected action ballot.

419 FWC must order that industrial action by non-national system employees or non-national system employers stop etc.

Stop orders etc.

(1) If it appears to the FWC that industrial action by one or more non-national system employees or non-national system employers:

(a) is:

(i) happening; or

(ii) threatened, impending or probable; or

(iii) being organised; and

(b) will, or would, be likely to have the effect of causing substantial loss or damage to the business of a constitutional corporation;

the FWC must make an order that the industrial action stop, not occur or not be organised (as the case may be) for a period specified in the order.

Note: For interim orders, see section 420.

(2) The FWC may make the order:

(a) on its own initiative; or

(b) on application by either of the following:

(i) a person who is affected (whether directly or indirectly), or who is likely to be affected (whether directly or indirectly), by the industrial action;

(ii) an organisation of which a person referred to in subparagraph (i) is a member.

(3) In making the order, the FWC does not have to specify the particular industrial action.

Authorised Version C2026C00293 registered 15/07/2026

420 Interim orders etc.

Application must be determined within 2 days

(1) As far as practicable, the FWC must determine an application for an order under section 418 or 419 within 2 days after the application is made.

Interim orders

(2) If the FWC is unable to determine the application within that period, the FWC must, within that period, make an interim order that the industrial action to which the application relates stop, not occur or not be organised (as the case may be).

(3) However, the FWC must not make the interim order if the FWC is satisfied that it would be contrary to the public interest to do so.

(4) In making the interim order, the FWC does not have to specify the particular industrial action.

(5) An interim order continues in operation until the application is determined.

421 Contravening an order etc.

Contravening orders

(1) A person to whom an order under section 418, 419 or 420 applies must not contravene a term of the order.

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

(2) However, a person is not required to comply with an order if:
(a) the order is an order under section 418, or an order under section 420 that relates to an application for an order under section 418; and
(b) the industrial action to which the order relates is, or would be, protected industrial action.

Authorised Version C2026C00293 registered 15/07/2026

Injunctions

(3) The Federal Court or Federal Circuit and Family Court of Australia (Division 2) may grant an injunction, under this subsection, on such terms as the court considers appropriate if:

(a) a person referred to in column 2 of item 15 of the table in subsection 539(2) has applied for the injunction; and

(b) the court is satisfied that another person to whom the order applies has contravened, or proposes to contravene, a term of the order.

Note: Section 539 deals with applications for orders in relation to contraventions of civil remedy provisions.

No other orders

(4) Section 545 (which deals with orders that a court can make if a person has contravened etc. a civil remedy provision) does not apply to a contravention of a term of the order.

Authorised Version C2026C00293 registered 15/07/2026

Division 5—Injunction against industrial action if pattern bargaining is being engaged in

422 Injunction against industrial action if a bargaining representative is engaging in pattern bargaining

(1) The Federal Court or Federal Circuit and Family Court of Australia (Division 2) may grant an injunction on such terms as the court considers appropriate if:

(a) a person has applied for the injunction; and

(b) the requirement set out in subsection (2) is met.

(2) The court is satisfied that:

(a) employee claim action for a proposed enterprise agreement is being engaged in, or is threatened, impending or probable; and

(b) a bargaining representative of an employee who will be covered by the agreement is engaging in pattern bargaining in relation to the agreement.

Authorised Version C2026C00293 registered 15/07/2026

Division 6—Suspension or termination of protected industrial action by the FWC

423 FWC may suspend or terminate protected industrial action—significant economic harm etc.

Suspension or termination of protected industrial action

(1) The FWC may make an order suspending or terminating protected industrial action for a proposed enterprise agreement that is being engaged in if the requirements set out in this section are met.

Requirement—significant economic harm

(2) If the protected industrial action is employee claim action, the FWC must be satisfied that the action is causing, or is threatening to cause, significant economic harm to:
  (a) the employer, or any of the employers, that will be covered by the agreement; and
  (b) any of the employees who will be covered by the agreement.

(3) If the protected industrial action is:
  (a) employee response action; or
  (b) employer response action;
the FWC must be satisfied that the action is causing, or is threatening to cause, significant economic harm to any of the employees who will be covered by the agreement.

(4) For the purposes of subsections (2) and (3), the factors relevant to working out whether protected industrial action is causing, or is threatening to cause, significant economic harm to a person referred to in those subsections, include the following:
  (a) the source, nature and degree of harm suffered or likely to be suffered;
  (b) the likelihood that the harm will continue to be caused or will be caused;

Authorised Version C2026C00293 registered 15/07/2026

(c) the capacity of the person to bear the harm;
(d) the views of the person and the bargaining representatives for the agreement;
(e) whether the bargaining representatives for the agreement have met the good faith bargaining requirements and have not contravened any bargaining orders in relation to the agreement;
(f) if the FWC is considering terminating the protected industrial action:
(i) whether the bargaining representatives for the agreement are genuinely unable to reach agreement on the terms that should be included in the agreement; and
(ii) whether there is no reasonable prospect of agreement being reached;
(g) the objective of promoting and facilitating bargaining for the agreement.

Requirement—harm is imminent

(5) If the protected industrial action is threatening to cause significant economic harm as referred to in subsection (2) or (3), the FWC must be satisfied that the harm is imminent.

Requirement—protracted action etc.

(6) The FWC must be satisfied that:
(a) the protected industrial action has been engaged in for a protracted period of time; and
(b) the dispute will not be resolved in the reasonably foreseeable future.

Order may be made on own initiative or on application

(7) The FWC may make the order:
(a) on its own initiative; or
(b) on application by any of the following:
(i) a bargaining representative for the agreement;

Authorised Version C2026C00293 registered 15/07/2026

(ii) the Minister;

(iia) if the industrial action is being engaged in in a State that is a referring State as defined in section 30B or 30L—the Minister of the State who has responsibility for workplace relations matters in the State;

(iib) if the industrial action is being engaged in in a Territory—the Minister of the Territory who has responsibility for workplace relations matters in the Territory;

(iii) a person prescribed by the regulations.

424 FWC must suspend or terminate protected industrial action—endangering life etc.

Suspension or termination of protected industrial action

(1) The FWC must make an order suspending or terminating protected industrial action for a proposed enterprise agreement that:

(a) is being engaged in; or

(b) is threatened, impending or probable;

if the FWC is satisfied that the protected industrial action has threatened, is threatening, or would threaten:

(c) to endanger the life, the personal safety or health, or the welfare, of the population or of part of it; or

(d) to cause significant damage to the Australian economy or an important part of it.

(2) The FWC may make the order:

(a) on its own initiative; or

(b) on application by any of the following:

(i) a bargaining representative for the agreement;

(ii) the Minister;

(iia) if the industrial action is being engaged in, or is threatened, impending or probable, in a State that is a referring State as defined in section 30B or 30L—the

Authorised Version C2026C00293 registered 15/07/2026

Minister of the State who has responsibility for workplace relations matters in the State;

(iib) if the industrial action is being engaged in, or is threatened, impending or probable, in a Territory—the Minister of the Territory who has responsibility for workplace relations matters in the Territory;

(iii) a person prescribed by the regulations.

Application must be determined within 5 days

(3) If an application for an order under this section is made, the FWC must, as far as practicable, determine the application within 5 days after it is made.

Interim orders

(4) If the FWC is unable to determine the application within that period, the FWC must, within that period, make an interim order suspending the protected industrial action to which the application relates until the application is determined.

(5) An interim order continues in operation until the application is determined.

425 FWC must suspend protected industrial action—cooling off

(1) The FWC must make an order suspending protected industrial action for a proposed enterprise agreement that is being engaged in if the FWC is satisfied that the suspension is appropriate taking into account the following matters:

(a) whether the suspension would be beneficial to the bargaining representatives for the agreement because it would assist in resolving the matters at issue;

(b) the duration of the protected industrial action;

(c) whether the suspension would be contrary to the public interest or inconsistent with the objects of this Act;

(d) any other matters that the FWC considers relevant.

Authorised Version C2026C00293 registered 15/07/2026

(2) The FWC may make the order only on application by:
  (a) a bargaining representative for the agreement; or
  (b) a person prescribed by the regulations.

426 FWC must suspend protected industrial action—significant harm to a third party

Suspension of protected industrial action

(1) The FWC must make an order suspending protected industrial action for a proposed enterprise agreement that is being engaged in if the requirements set out in this section are met.

Requirement—adverse effect on employers or employees

(2) The FWC must be satisfied that the protected industrial action is adversely affecting:
  (a) the employer, or any of the employers, that will be covered by the agreement; or
  (b) any of the employees who will be covered by the agreement.

Requirement—significant harm to a third party

(3) The FWC must be satisfied that the protected industrial action is threatening to cause significant harm to any person other than:
  (a) a bargaining representative for the agreement; or
  (b) an employee who will be covered by the agreement.

(4) For the purposes of subsection (3), the FWC may take into account any matters it considers relevant including the extent to which the protected industrial action threatens to:
  (a) damage the ongoing viability of an enterprise carried on by the person; or
  (b) disrupt the supply of goods or services to an enterprise carried on by the person; or
  (c) reduce the person's capacity to fulfil a contractual obligation; or

Authorised Version C2026C00293 registered 15/07/2026

(d) cause other economic loss to the person.

Requirement—suspension is appropriate

(5) The FWC must be satisfied that the suspension is appropriate taking into account the following:
(a) whether the suspension would be contrary to the public interest or inconsistent with the objects of this Act;
(b) any other matters that the FWC considers relevant.

Order may only be made on application by certain persons

(6) The FWC may make the order only on application by:
(a) an organisation, person or body directly affected by the protected industrial action other than:
(i) a bargaining representative for the agreement; or
(ii) an employee who will be covered by the agreement; or
(b) the Minister; or
(ba) if the industrial action is being engaged in in a State that is a referring State as defined in section 30B or 30L—the Minister of the State who has responsibility for workplace relations matters in the State; or
(bb) if the industrial action is being engaged in in a Territory—the Minister of the Territory who has responsibility for workplace relations matters in the Territory; or
(c) a person prescribed by the regulations.

427 FWC must specify the period of suspension

Application of this section

(1) This section applies if the FWC is required or permitted by this Division to make an order suspending protected industrial action.

Suspension period

(2) The FWC must specify, in the order, the period for which the protected industrial action is suspended.

Authorised Version C2026C00293 registered 15/07/2026

Notice period

(3) The FWC may specify, in the order, a longer period of notice of up to 7 working days for the purposes of paragraph 430(2)(b) if the FWC is satisfied that there are exceptional circumstances justifying that longer period of notice.

428 Extension of a period of suspension

(1) The FWC may make an order extending the period of suspension specified in an order (the ***suspension order***) suspending protected industrial action for a proposed enterprise agreement if:

(a) the person who applied, or a person who could have applied, for the suspension order, applies for the extension; and

(b) the FWC has not previously made an order under this section in relation to the suspension order; and

(c) the FWC is satisfied that the extension is appropriate taking into account any matters the FWC considers relevant including the matters specified in the provision under which the suspension order was made.

(2) If the FWC is permitted to make an order under this section:

(a) the FWC must specify, in the order, the period of extension; and

(b) the FWC may specify, in the order, a longer period of notice of up to 7 working days for the purposes of paragraph 430(2)(b) if the FWC is satisfied that there are exceptional circumstances justifying that longer period of notice.

429 Employee claim action without a further protected action ballot after a period of suspension etc.

Application of this section

(1) This section applies in relation to employee claim action for a proposed enterprise agreement if:

Authorised Version C2026C00293 registered 15/07/2026

(a) an order suspending the employee claim action has been made; and

(b) a protected action ballot authorised the employee claim action:

(i) some or all of which had not been taken before the beginning of the period (the ***suspension period***) of suspension specified in the order; or

(ii) which had not ended before the beginning of the suspension period; or

(iii) beyond the suspension period; and

(c) the suspension period (including any extension under section 428) ends, or the order is revoked before the end of that period.

Further protected action ballot not required to engage in employee claim action

(2) A person may engage in the employee claim action without another protected action ballot.

(3) For the purposes of working out when the employee claim action may be engaged in, the suspension period (including any dates authorised by the protected action ballot as dates on which employee claim action is to be engaged in) must be disregarded.

(4) Nothing in this section authorises employee claim action that is different in type or duration from the employee claim action that was authorised by the protected action ballot.

430 Notice of employee claim action engaged in after a period of suspension etc.

(1) Before a person engages in employee claim action for a proposed enterprise agreement as permitted by subsection 429(2), a bargaining representative of an employee who will be covered by the agreement must give written notice of the action to the employer of the employee.

Authorised Version C2026C00293 registered 15/07/2026

(2) The period of notice must be at least:

(a) 3 working days; or

(b) if, under subsection 427(3) or paragraph 428(2)(b), the FWC specified, for the purposes of this paragraph, a longer period of notice in an order relating to the employee claim action—that period of notice.

(3) The notice must state the nature of the employee claim action and the day on which it will start.

Authorised Version C2026C00293 registered 15/07/2026

Division 7—Ministerial declarations

431 Ministerial declaration terminating industrial action

(1) The Minister may make a declaration, in writing, terminating protected industrial action for a proposed enterprise agreement if the Minister is satisfied that:

(a) the industrial action is being engaged in, or is threatened, impending or probable; and

(b) the industrial action is threatening, or would threaten:

(i) to endanger the life, the personal safety or health, or the welfare, of the population or a part of it; or

(ii) to cause significant damage to the Australian economy or an important part of it.

(2) The declaration comes into operation on the day that it is made.

(3) A declaration under subsection (1) is not a legislative instrument.

432 Informing people of declaration

(1) This section applies if the Minister makes a declaration under subsection 431(1).

(2) The declaration must be published in the *Gazette*.

(3) The Minister must inform the FWC of the making of the declaration.

(4) The Minister must, as soon as practicable, take all reasonable steps to ensure that the bargaining representatives for the proposed enterprise agreement concerned are made aware:

(a) of the making of the declaration; and

(b) of the effect of Part 2-5 (which deals with workplace determinations).

Authorised Version C2026C00293 registered 15/07/2026

433 Ministerial directions to remove or reduce threat

(1) If a declaration under subsection 431(1) is in operation in relation to a proposed enterprise agreement, the Minister may give directions, in writing, requiring the following persons to take, or refrain from taking, specified actions:

(a) specified bargaining representatives for the agreement;

(b) specified employees who will be covered by the agreement.

(2) The Minister may only give directions that the Minister is satisfied are reasonably directed to removing or reducing the threat referred to in paragraph 431(1)(b).

(3) A direction under subsection (1) is not a legislative instrument.

434 Contravening a Ministerial direction

A person to whom a direction under subsection 433(1) applies must not contravene the direction.

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

Authorised Version C2026C00293 registered 15/07/2026

Division 8—Protected action ballots

Subdivision A—Introduction

435 Guide to this Division

This Division establishes the process that will allow employees to choose, by means of a fair and democratic secret ballot, whether to authorise protected industrial action for a proposed enterprise agreement.

Subdivision B provides for the FWC to make a protected action ballot order, on application by a bargaining representative of an employee who will be covered by a proposed enterprise agreement, requiring a protected action ballot to be conducted.

Subdivision C deals with the conduct of a protected action ballot.

Subdivision D deals with the effect of a protected action ballot.

Subdivision E deals with compliance matters in relation to a protected action ballot.

Subdivision F deals with the liability for the costs of a protected action ballot.

Subdivision G deals with records and other miscellaneous matters.

436 Object of this Division

The object of this Division is to establish a fair, simple and democratic process to allow a bargaining representative to determine whether employees wish to engage in particular protected industrial action for a proposed enterprise agreement.

Note: Under Division 2, industrial action by employees for a proposed enterprise agreement (other than employee response action) is not

Authorised Version C2026C00293 registered 15/07/2026

protected industrial action unless it has been authorised in advance by a protected action ballot.

Subdivision B—Protected action ballot orders

437 Application for a protected action ballot order

Who may apply for a protected action ballot order

(1) A bargaining representative of an employee who will be covered by a proposed enterprise agreement, or 2 or more such bargaining representatives (acting jointly), may apply to the FWC for an order (a ***protected action ballot order***) requiring a protected action ballot to be conducted to determine whether employees wish to engage in particular protected industrial action for the agreement.

(2) Subsection (1) does not apply if the proposed enterprise agreement is:
  (a) a greenfields agreement; or
  (b) a cooperative workplace agreement.

(2A) Subsection (1) does not apply unless there has been a notification time in relation to the proposed enterprise agreement.

Note: For ***notification time***, see subsection 173(2). Protected industrial action cannot be taken until after bargaining has commenced (including where the scope of the proposed enterprise agreement is the only matter in dispute).

Matters to be specified in application

(3) The application must specify:
  (a) the group or groups of employees who are to be balloted; and
  (b) the question or questions to be put to the employees who are to be balloted, including the nature of the proposed industrial action; and
  (c) the name of the person or entity that the applicant wishes to be the protected action ballot agent for the protected action ballot.

Authorised Version C2026C00293 registered 15/07/2026

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

(5) A group of employees specified under paragraph (3)(a) is taken to include only employees who:

(a) will be covered by the proposed enterprise agreement; and

(b) either:

(i) are represented by a bargaining representative who is an applicant for the protected action ballot order; or

(ii) are bargaining representatives for themselves but are members of an employee organisation that is an applicant for the protected action ballot order.

Documents to accompany application

(6) The application must be accompanied by any documents and other information prescribed by the regulations.

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

(1) This section applies if:

(a) an application is made under section 437 for a protected action ballot order in relation to a multi-enterprise agreement; and

(b) the group or groups of employees specified in the application under paragraph 437(3)(a) include employees of different employers.

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

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

Authorised Version C2026C00293 registered 15/07/2026

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

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

(a) an application is taken to have been made specifying the employees of A; and

(b) a separate application is taken to have been made specifying the employees of B.

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

438 Restriction on when application may be made

(1) If one or more enterprise agreements cover the employees who will be covered by the proposed enterprise agreement, an application for a protected action ballot order must not be made earlier than 30 days before the nominal expiry date of the enterprise agreement, or the latest nominal expiry date of those enterprise agreements (as the case may be).

(2) To avoid doubt, making an application for a protected action ballot order does not constitute organising industrial action.

439 Joint applications

Without limiting section 609, the procedural rules may provide for the following:

(a) how a provision of this Act that applies in relation to an applicant for a protected action ballot order is to apply in relation to joint applicants for such an order;

(b) the joinder, with the consent of each existing applicant, of one or more bargaining representatives to an application for a protected action ballot order;

Authorised Version C2026C00293 registered 15/07/2026

(c) the withdrawal of one or more applicants from a joint application for a protected action ballot order.

440 Notice of application

Within 24 hours after making an application for a protected action ballot order, the applicant must give a copy of the application to:

(a) the employer of the employees who are to be balloted; and

(b) the person or entity that the application specifies as being the person or entity that the applicant wishes to be the protected action ballot agent for the protected action ballot.

441 Application to be determined within 2 days after it is made

(1) The FWC must, as far as practicable, determine an application for a protected action ballot order within 2 working days after the application is made.

(2) However, the FWC must not determine the application unless it is satisfied that each applicant has complied with section 440.

442 Dealing with multiple applications together

The FWC may deal with 2 or more applications for a protected action ballot order at the same time if:

(a) the applications relate to industrial action by:

(i) employees of the same employer; or

(ii) employees at the same workplace; and

(b) the FWC is satisfied that dealing with the applications at the same time will not unreasonably delay the determination of any of the applications.

443 When the FWC must make a protected action ballot order

(1) The FWC must make a protected action ballot order in relation to a proposed enterprise agreement if:

(a) an application has been made under section 437; and

Authorised Version C2026C00293 registered 15/07/2026

(b) the FWC is satisfied that each applicant has been, and is, genuinely trying to reach an agreement with the employer of the employees who are to be balloted.

(2) The FWC must not make a protected action ballot order in relation to a proposed enterprise agreement except in the circumstances referred to in subsection (1).

(3) A protected action ballot order must specify the following:

(a) the name of each applicant for the order;

(b) the group or groups of employees who are to be balloted;

(c) the date by which voting in the protected action ballot closes;

(d) the question or questions to be put to the employees who are to be balloted, including the nature of the proposed industrial action;

(e) the person or entity that the FWC decides, under subsection 444(1A), is to be the protected action ballot agent for the protected action ballot;

(f) the person (if any) that the FWC decides, under subsection 444(3), is to be the independent advisor for the ballot.

(3A) For the purposes of paragraph (3)(c), the FWC must specify a date that will enable the protected action ballot to be conducted as expeditiously as practicable.

(5) If the FWC is satisfied, in relation to the proposed industrial action that is the subject of the protected action ballot, that there are exceptional circumstances justifying the period of written notice referred to in paragraph 414(2)(a) being longer than 3 working days or 120 hours (whichever is applicable), the protected action ballot order may specify a longer period of up to 7 working days.

Note: Under subsection 414(1), before a person engages in employee claim action for a proposed enterprise agreement, a bargaining representative of an employee who will be covered by the agreement must give written notice of the action to the employer of the employee.

Authorised Version C2026C00293 registered 15/07/2026

444 Ballot agent and independent advisor

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

Protected action ballot agent

(1A) The FWC must, in accordance with subsections (1B) to (1D) of this section, decide the person or entity that is to be the protected action ballot agent for the protected action ballot.

(1B) The person or entity must be the person or entity specified in the application for the protected action ballot order as the person or entity the applicant wishes to be the protected action ballot agent, unless:

(a) the person or entity specified in the application does not meet the requirements of subsection (1C) (unless subsection (1D) applies); or

(b) the FWC is satisfied that there are exceptional circumstances that justify another person or entity being the protected action ballot agent.

(1C) The person or entity must be an eligible protected action ballot agent.

(1D) Subsection (1C) does not apply in relation to a person if the FWC is satisfied that:

(a) there are exceptional circumstances that justify the ballot not being conducted by an eligible protected action ballot agent; and

(b) the person is a fit and proper person to conduct the ballot; and

(c) any other requirements prescribed by the regulations are met.

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

Authorised Version C2026C00293 registered 15/07/2026

(2) The regulations may prescribe:

(a) conditions that a person must meet in order to satisfy the FWC, for the purposes of paragraph (1D)(b), that the person is a fit and proper person to conduct a protected action ballot; and

(b) factors that the FWC must take into account in determining, for the purposes of paragraph (1D)(b), whether a person is a fit and proper person to conduct a protected action ballot.

Independent advisor

(3) The FWC may decide that a person (the ***other person***) is to be the independent advisor for a protected action ballot if:

(a) the FWC has decided that a person other than the Australian Electoral Commission is to be the protected action ballot agent for the ballot; and

(b) the FWC considers it appropriate that there be an independent advisor for the ballot; and

(c) the FWC is satisfied that:

(i) the other person is sufficiently independent of each applicant for the protected action ballot order; and

(ii) any other requirements prescribed by the regulations are met.

445 Notice of protected action ballot order

As soon as practicable after making a protected action ballot order, the FWC must give a copy of the order to:

(a) each applicant for the order; and

(b) the employer of the employees who are to be balloted; and

(c) the protected action ballot agent for the protected action ballot.

446 Protected action ballot order may require 2 or more protected action ballots to be held at the same time

(1) This section applies if:

Authorised Version C2026C00293 registered 15/07/2026

(a) the FWC has made a protected action ballot order; and
(b) the FWC proposes to make another protected action ballot order or orders; and
(c) the orders would require a protected action ballot to be held in relation to industrial action by employees of the same employer or employees at the same workplace.

(2) The FWC may make, or vary, the protected action ballot orders so as to require the protected action ballots to be held at the same time if the FWC is satisfied:
(a) that the level of disruption of the employer's enterprise, or at the workplace, could be reduced if the ballots were held at the same time; and
(b) that requiring the ballots to be held at the same time will not unreasonably delay either ballot.

447 Variation of protected action ballot order

(1) An applicant for a protected action ballot order may apply to the FWC to vary the order.

(2) The protected action ballot agent for a protected action ballot may apply to the FWC to vary the protected action ballot order to change the date by which voting in the ballot closes.

(3) An application may be made under subsection (1) or (2):
(a) at any time before the date by which voting in the protected action ballot closes; or
(b) if the ballot has not been held before that date and the FWC consents—after that time.

(4) If an application is made under subsection (1) or (2), the FWC may vary the protected action ballot order.

Authorised Version C2026C00293 registered 15/07/2026

448 Revocation of protected action ballot order

(1) An applicant for a protected action ballot order may apply to the FWC, at any time before voting in the protected action ballot closes, to revoke the order.

(2) If an application to revoke a protected action ballot order is made, the FWC must revoke the order.

Subdivision BA—FWC must conduct conferences

448A FWC must conduct conferences

(1) If the FWC has made a protected action ballot order in relation to a proposed enterprise agreement, the FWC must make an order directing the bargaining representatives for the agreement to attend a conference:

(a) at a specified time or times during a specified period; and

(b) at a specified place, or by specified means;

for the purposes of mediation or conciliation in relation to the agreement.

(2) The specified period must end on or before the date specified in the protected action ballot order under paragraph 443(3)(c) as the day by which voting in the protected action ballot closes.

(3) An FWC Member (other than an Expert Panel Member), or a delegate of the FWC, is responsible for conducting the conference.

(4) The conference must be conducted in private.

(5) At a conference, the FWC may:

(a) mediate or conciliate; or

(b) make a recommendation or express an opinion.

(6) This section does not limit section 592 (which deals with conferences) or 595 (which deals with FWC's power to deal with disputes).

Authorised Version C2026C00293 registered 15/07/2026

Subdivision C—Conduct of protected action ballot

449 Conduct of protected action ballot

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

(2) The protected action ballot agent must conduct the protected action ballot expeditiously and in accordance with the following:
  (a) the protected action ballot order;
  (b) the timetable for the ballot;
  (c) this Subdivision;
  (d) any directions given by the FWC;
  (e) any procedures prescribed by the regulations.

450 Directions for conduct of protected action ballot

(1) This section applies if the protected action ballot agent is not the Australian Electoral Commission.

(2) The FWC must give the protected action ballot agent written directions in relation to the following matters relating to the protected action ballot:
  (a) the development of a timetable;
  (b) the voting method, or methods, to be used (which cannot be a method involving a show of hands);
  (c) the compilation of the roll of voters;
  (d) the addition of names to, or removal of names from, the roll of voters;
  (e) any other matter in relation to the conduct of the ballot that the FWC considers appropriate.

Note 1: For the purposes of paragraph (2)(b), examples of voting methods are attendance voting, electronic voting and postal voting.

Note 2: A protected action ballot agent must not contravene a term of a direction given by the FWC in relation to a protected action ballot (see subsection 463(2)).

Authorised Version C2026C00293 registered 15/07/2026

(3) A direction given under subsection (2) may require the protected action ballot agent to comply with a provision of this Subdivision (other than subsection 454(5)) in relation to a particular matter.

Note: Subsection 454(5) provides for the Australian Electoral Commission to vary the roll of voters on its own initiative.

(4) To enable the roll of voters to be compiled, the FWC may direct, in writing, either or both of the following:

(a) the employer of the employees who are to be balloted;

(b) the applicant for the protected action ballot order;

to give to the FWC or the protected action ballot agent:

(c) the names of the employees included in the group or groups of employees specified in the protected action ballot order; and

(d) any other information that it is reasonable for the FWC or the protected action ballot agent to require to assist in compiling the roll of voters.

451 Timetable for protected action ballot

(1) This section applies if:

(a) the protected action ballot agent is the Australian Electoral Commission; or

(b) the FWC has directed the protected action ballot agent to comply with this section.

Note: If this section does not apply, the protected action ballot agent must comply with directions given by the FWC in relation to the matters dealt with by this section (see section 450).

(2) As soon as practicable after receiving a copy of the protected action ballot order, the protected action ballot agent must, in consultation with each applicant for the order and the employer of the employees who are to be balloted:

(a) develop a timetable for the conduct of the protected action ballot; and

Authorised Version C2026C00293 registered 15/07/2026

(b) determine the voting method, or methods, to be used for the ballot (which cannot be a method involving a show of hands).

Note: For the purposes of paragraph (2)(b), examples of voting methods are attendance voting, electronic voting and postal voting.

452 Compilation of roll of voters

(1) This section applies if:

(a) the protected action ballot agent is the Australian Electoral Commission; or

(b) the FWC has directed the protected action ballot agent to comply with this section.

Note: If this section does not apply, the protected action ballot agent must comply with directions given by the FWC in relation to the matters dealt with by this section (see section 450).

(2) As soon as practicable after receiving a copy of the protected action ballot order, the protected action ballot agent must compile the roll of voters for the protected action ballot.

(3) For the purpose of compiling the roll of voters, the protected action ballot agent may direct, in writing, the employer of the employees who are to be balloted, or the applicant for the order (or both), to give to the ballot agent:

(a) the names of the employees included in the group or groups of employees specified in the protected action ballot order; and

(b) any other information that it is reasonable for the protected action ballot agent to require to assist in compiling the roll of voters.

453 Who is eligible to be included on the roll of voters

An employee is eligible to be included on the roll of voters for the protected action ballot only if:

(a) the employee will be covered by the proposed enterprise agreement to which the ballot relates; and

Authorised Version C2026C00293 registered 15/07/2026

(b) the employee is included in a group of employees specified in the order and either:

(i) is represented by a bargaining representative who was an applicant for the order; or

(ii) is the bargaining representative for himself or herself but is a member of an employee organisation that was an applicant for the order.

454 Variation of roll of voters

Variation by protected action ballot agent on request

(1) Subsections (2) to (4) apply if:

(a) the protected action ballot agent is the Australian Electoral Commission; or

(b) the FWC has directed the protected action ballot agent to comply with those subsections.

Note: If subsections (2) to (4) do not apply, the protected action ballot agent must comply with directions given by the FWC in relation to the matters dealt with by those subsections (see section 450).

Adding names to the roll of voters

(2) The protected action ballot agent must include an employee's name on the roll of voters for the protected action ballot if:

(a) the protected action ballot agent is requested to do so by:

(i) an applicant for the protected action ballot order; or

(ii) the employee; or

(iii) the employee's employer; and

(b) the protected action ballot agent is satisfied that the employee is eligible to be included on the roll of voters; and

(c) the request is made before the end of the working day before the day on which voting in the ballot starts.

Authorised Version C2026C00293 registered 15/07/2026

Removing names from the roll of voters

(3) The protected action ballot agent must remove an employee's name from the roll of voters for the protected action ballot if:
  (a) the protected action ballot agent is requested to do so by:
    (i) an applicant for the protected action ballot order; or
    (ii) the employee; or
    (iii) the employee's employer; and
  (b) the protected action ballot agent is satisfied that the employee is not eligible to be included on the roll of voters; and
  (c) the request is made before the end of the working day before the day on which voting in the ballot starts.

(4) The protected action ballot agent must remove a person's name from the roll of voters for the protected action ballot if:
  (a) the person (the ***former employee***) is no longer employed by the employer (the ***former employer***) of the employees who are to be balloted; and
  (b) the protected action ballot agent is requested to do so by:
    (i) an applicant for the protected action ballot order; or
    (ii) the former employee; or
    (iii) the former employer; and
  (c) the request is made before the end of the working day before the day on which voting in the ballot starts.

Variation by Australian Electoral Commission on its own initiative

(5) If the protected action ballot agent is the Australian Electoral Commission, the Commission may, on its own initiative and before the end of the working day before the day on which voting in the ballot starts:
  (a) include an employee's name on the roll of voters for the protected action ballot if the Commission is satisfied that the employee is eligible to be included on the roll of voters; or
  (b) remove an employee's name from the roll of voters for the protected action ballot if the Commission is satisfied that the

Authorised Version C2026C00293 registered 15/07/2026

employee is not eligible to be included on the roll of voters; or

(c) remove a person's name from the roll of voters for the protected action ballot if the person is no longer employed by the employer of the employees who are to be balloted.

455 Protected action ballot papers

(1) The ballot paper for the protected action ballot must:

(a) if a form is prescribed by the regulations—be in that form; and

(b) include any information prescribed by the regulations.

(2) ***Ballot paper*** means:

(a) for a voting method that is not an electronic voting method—a paper ballot paper; and

(b) for an electronic voting method—an electronic ballot paper.

456 Who may vote in protected action ballot

An employee may vote in the protected action ballot only if the employee's name is on the roll of voters for the ballot.

457 Results of protected action ballot

(1) As soon as practicable after voting in the protected action ballot closes, the protected action ballot agent must, in writing:

(a) make a declaration of the results of the ballot; and

(b) inform the following persons of the results:

(i) each applicant for the protected action ballot order;

(ii) the employer of the employees who were balloted;

(iii) the FWC.

(2) The FWC must publish the results of the protected action ballot, on its website or by any other means that the FWC considers appropriate, as soon as practicable after it is informed of them.

Authorised Version C2026C00293 registered 15/07/2026

458 Report about conduct of protected action ballot

Protected action ballot conducted by the Australian Electoral Commission

(1) If:

(a) the protected action ballot agent is the Australian Electoral Commission; and

(b) the Commission:

(i) receives any complaints about the conduct of the protected action ballot; or

(ii) becomes aware of any irregularities in relation to the conduct of the ballot;

the Commission must prepare a written report about the conduct of the ballot and give it to the FWC.

Protected action ballot conducted by person other than the Australian Electoral Commission

(2) If:

(a) the protected action ballot agent is not the Australian Electoral Commission; and

(b) the protected action ballot agent or the independent advisor (if any) for the protected action ballot:

(i) receives any complaints about the conduct of the ballot; or

(ii) becomes aware of any irregularities in relation to the conduct of the ballot;

the protected action ballot agent or the independent advisor (as the case may be) must prepare a report about the conduct of the ballot and give it to the FWC.

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

(3) If:

(a) the protected action ballot agent is not the Australian Electoral Commission; and

Authorised Version C2026C00293 registered 15/07/2026

(b) the FWC:

(i) receives any complaints about the conduct of the protected action ballot; or

(ii) becomes aware of any irregularities in relation to the conduct of the ballot;

the FWC must, in writing, direct the protected action ballot agent or the independent advisor (if any) for the ballot (or both) to prepare a report about the conduct of the ballot and give it to the FWC.

(4) A report under subsection (2) or (3) must be prepared in accordance with the regulations.

*Meaning of **conduct** of a protected action ballot*

(5) ***Conduct*** of a protected action ballot includes, but is not limited to, the compilation of the roll of voters for the ballot.

*Meaning of **irregularity** in relation to the conduct of a protected action ballot*

(6) An ***irregularity***, in relation to the conduct of a protected action ballot, includes, but is not limited to, an act or omission by means of which the full and free recording of votes by all employees entitled to vote in the ballot, and by no other persons is, or is attempted to be, prevented or hindered.

Subdivision D—Effect of protected action ballot

459 Circumstances in which industrial action is authorised by protected action ballot

(1) Industrial action by employees is authorised by a protected action ballot if:

(a) the action was the subject of the ballot; and

(b) at least 50% of the employees on the roll of voters for the ballot voted in the ballot; and

Authorised Version C2026C00293 registered 15/07/2026

(c) more than 50% of the valid votes were votes approving the action; and

(d) the action commences:

(i) during the 30-day period starting on the date of the declaration of the results of the ballot; or

(ii) if the FWC has extended that period under subsection (3)—during the extended period.

Note: Under Division 2, industrial action by employees for a proposed enterprise agreement (other than employee response action) is not protected industrial action unless it has been authorised in advance by a protected action ballot.

(2) If:

(a) the nature of the proposed industrial action specified in the question or questions put to the employees in the protected action ballot included periods of industrial action of a particular duration; and

(b) the question or questions did not specify that consecutive periods of that industrial action may be organised or engaged in;

then only the first period in a series of consecutive periods of that industrial action is the subject of the ballot for the purposes of paragraph (1)(a).

(3) The FWC may extend the 30-day period referred to in subparagraph (1)(d)(i) by up to 30 days if:

(a) an applicant for the protected action ballot order applies to the FWC for the period to be extended; and

(b) the period has not previously been extended.

460 Immunity for persons who act in good faith on protected action ballot results

(1) This section applies if:

(a) the results of a protected action ballot, as declared by the protected action ballot agent for the ballot, purported to authorise particular industrial action; and

Authorised Version C2026C00293 registered 15/07/2026

(b) an organisation or a person, acting in good faith on the declared ballot results, organised or engaged in that industrial action; and

(c) either:

(i) it later becomes clear that that industrial action was not authorised by the ballot; or

(ii) the decision to make the protected action ballot order is quashed or varied on appeal, or on review by the FWC, after the industrial action is organised or engaged in.

(2) No action lies against the organisation or person under any law (whether written or unwritten) in force in a State or a Territory in relation to the industrial action unless the action involved:

(a) personal injury; or

(b) intentional or reckless destruction of, or damage to, property; or

(c) the unlawful taking, keeping or use of property.

(3) This section does not prevent an action for defamation being brought in relation to anything that occurred in the course of the industrial action.

461 Validity of protected action ballot etc. not affected by technical breaches

A technical breach of a provision of this Division does not affect the validity of any of the following:

(a) a protected action ballot order;

(b) an order, direction or decision of the FWC in relation to a protected action ballot order or a protected action ballot;

(c) a direction or decision of the protected action ballot agent in relation to a protected action ballot order or a protected action ballot;

(d) a protected action ballot;

(e) the conduct of a protected action ballot;

(f) the declaration of the results of a protected action ballot.

Authorised Version C2026C00293 registered 15/07/2026

Subdivision E—Compliance

462 Interferences etc. with protected action ballot

General

(1) A person (the ***first person***) must not do any of the following in relation to a protected action ballot:

(a) hinder or obstruct the holding of the ballot;

(b) use any form of intimidation to prevent a person entitled to vote in the ballot from voting, or to influence the vote of such a person;

(c) threaten, offer or suggest, or use, cause or inflict, any violence, injury, punishment, damage, loss or disadvantage because of, or to induce:

(i) any vote or omission to vote; or

(ii) any support of, or opposition to, voting in a particular manner;

(d) offer an advantage (whether financial or otherwise) to a person entitled to vote in the ballot because of or to induce:

(i) any vote or omission to vote; or

(ii) any support of, or opposition to, voting in a particular manner;

(e) counsel or advise a person entitled to vote to refrain from voting;

(f) impersonate another person to obtain a ballot paper to which the first person is not entitled, or impersonate another person for the purpose of voting;

(g) do an act that results in a ballot paper or envelope being destroyed, defaced, altered, taken or otherwise interfered with;

(h) fraudulently put a paper ballot paper or other paper:

(i) into a repository that serves to receive or hold paper ballot papers; or

(ii) into the post;

Authorised Version C2026C00293 registered 15/07/2026

(ha) fraudulently deliver or send an electronic ballot paper or other document to a repository that serves to receive or hold electronic ballot papers;

(i) fraudulently deliver or send a ballot paper or other paper to a person receiving ballot papers for the purposes of the ballot;

(j) record a vote that the first person is not entitled to record;

(k) record more than one vote;

(l) forge a ballot paper or envelope, or utter a ballot paper or envelope that the first person knows to be forged;

(m) provide a ballot paper without authority;

(n) obtain or have possession of a ballot paper to which the first person is not entitled;

(o) request, require or induce another person:

(i) to show a ballot paper to the first person; or

(ii) to permit the first person to see a ballot paper in such a manner that the first person can see the vote;

while the vote is being made, or after the vote has been made, on the ballot paper;

(p) do an act that results in a repository that serves to receive or hold ballot papers being destroyed, taken, opened or otherwise interfered with.

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

*Meaning of **utter***

(2) A person is taken to ***utter*** a forged document if the person:

(a) uses or deals with it; or

(b) attempts to use or deal with it; or

(c) attempts to induce another person to use, deal with, act upon, or accept it.

Obligations of person performing functions or exercising powers for the purposes of a protected action ballot

(3) A person (the ***first person***) who is performing functions or exercising powers for the purposes of a protected action ballot

Authorised Version C2026C00293 registered 15/07/2026

must not show to another person, or permit another person to have access to, a ballot paper used in the ballot, except in the course of performing those functions or exercising those powers.

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

463 Contravening a protected action ballot order etc.

(1) A person must not contravene:
  (a) a term of a protected action ballot order; or
  (b) a term of an order made by the FWC in relation to a protected action ballot order or a protected action ballot.

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

(2) A person must not contravene a direction given by the FWC, or a protected action ballot agent, in relation to a protected action ballot order or a protected action ballot.

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

(3) However, an order cannot be made under Division 2 of Part 4-1 in relation to a contravention (or alleged contravention) of subsection (1) or (2) by the Australian Electoral Commission.

Subdivision F—Liability for costs of protected action ballot

464 Costs of protected action ballot conducted by the Australian Electoral Commission

(1) This section applies if the protected action ballot agent for a protected action ballot is the Australian Electoral Commission.

(2) The Commonwealth is liable for the costs incurred by the Australian Electoral Commission in relation to the protected action ballot, whether or not the ballot is completed.

(3) However, except as provided by regulations made for the purposes of subsection 466(1), the Commonwealth is not liable for any costs incurred by the Australian Electoral Commission in relation to

Authorised Version C2026C00293 registered 15/07/2026

legal challenges to matters connected with the protected action ballot.

465 Costs of protected action ballot conducted by protected action ballot agent other than the Australian Electoral Commission

(1) This section applies if the protected action ballot agent for a protected action ballot is not the Australian Electoral Commission.

(2) The applicant for the protected action ballot order is liable for the costs of conducting the protected action ballot, whether or not the ballot is completed.

(3) If the application for the protected action ballot order was made by joint applicants, each applicant is jointly and severally liable for the costs of conducting the protected action ballot, whether or not the ballot is completed.

(4) The ***costs of conducting a protected action ballot*** are:

(a) if the protected action ballot agent is an applicant for the protected action ballot order—the costs incurred by the applicant in relation to the ballot; or

(b) otherwise—the amount the protected action ballot agent charges to the applicant or applicants in relation to the ballot.

(5) However, the ***costs of conducting a protected action ballot*** do not include any costs incurred by the protected action ballot agent in relation to legal challenges to matters connected with the ballot.

466 Costs of legal challenges

(1) The regulations may provide for who is liable for costs incurred in relation to legal challenges to matters connected with a protected action ballot.

(2) Regulations made for the purposes of subsection (1) may also provide for a person who is liable for costs referred to in that

Authorised Version C2026C00293 registered 15/07/2026

subsection to be indemnified by another person for some or all of those costs.

Subdivision G—Miscellaneous

467 Information about employees on roll of voters not to be disclosed

(1) A person who:

(a) is the protected action ballot agent for a protected action ballot (other than the Australian Electoral Commission); or

(b) is the independent advisor for a protected action ballot; or

(c) acquires information from, or on behalf of, a person referred to in paragraph (a) or (b) in the course of performing functions or exercising powers for the purposes of the ballot;

must not disclose to any other person information about an employee who is on the roll of voters for the ballot if the information will identify whether or not the employee is a member of an employee organisation.

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

(2) Subsection (1) does not apply if:

(a) the disclosure is made in the course of performing functions or exercising powers for the purposes of the protected action ballot; or

(b) the disclosure is required or authorised by or under a law; or

(c) the employee has consented, in writing, to the disclosure.

Note 1: Personal information given to the FWC, the Australian Electoral Commission or another protected action ballot agent under this Division may be regulated under the *Privacy Act 1988*.

Note 2: The President of the FWC may, in certain circumstances, disclose, or authorise the disclosure of, information acquired by the FWC or a member of the staff of the FWC, in the course of performing functions or exercising powers as the FWC (see section 655).

Authorised Version C2026C00293 registered 15/07/2026

468 Records

(1) The protected action ballot agent for a protected action ballot must keep the following ballot material:
  (a) the roll of voters for the ballot;
  (b) the ballot papers, envelopes and other documents and records relating to the ballot;
  (c) any other material prescribed by the regulations.

(2) The ballot material must be kept for one year after the day on which the protected action ballot closed.

(3) The protected action ballot agent must comply with any requirements prescribed by the regulations relating to how the ballot material is to be kept.

468A Eligible protected action ballot agents

(1) Each of the following is an ***eligible protected action ballot agent***:
  (a) the Australian Electoral Commission;
  (b) a person approved by the FWC under subsection (2).

(2) For the purposes of paragraph (1)(b), the FWC may, in writing, approve a person as an eligible protected action ballot agent if the FWC is satisfied that:
  (a) the person is a fit and proper person to be an eligible protected action ballot agent; and
  (b) any other requirements prescribed by the regulations are met.

(3) The regulations may prescribe:
  (a) conditions that a person must meet in order to satisfy the FWC that the person is a fit and proper person to be an eligible protected action ballot agent; and
  (b) factors that the FWC must take into account in determining whether a person is a fit and proper person to be an eligible protected action ballot agent.

Authorised Version C2026C00293 registered 15/07/2026

(4) The FWC must, at least every 3 years after it approves a person as an eligible protected action ballot agent, consider whether the FWC remains satisfied that the person meets the requirements mentioned in subsection (2).

(5) If, after considering the matter under subsection (4), the FWC is no longer satisfied that an eligible protected action ballot agent meets the requirements mentioned in subsection (2), the FWC must take:
  (a) any action prescribed by the regulations; and
  (b) any other action the FWC considers appropriate.

469 Regulations

The regulations may provide for the following matters:
  (b) the procedures to be followed in relation to the conduct of a protected action ballot;
  (c) the form and content of the ballot paper for a protected action ballot;
  (d) the qualifications, appointment, powers and duties of scrutineers for a protected action ballot;
  (e) the preparation of reports under subsection 458(2) or (3);
  (f) the records that the protected action ballot agent must keep in relation to a protected action ballot and how those records are to be kept.

Authorised Version C2026C00293 registered 15/07/2026

Division 9—Payments relating to periods of industrial action

Subdivision A—Protected industrial action

470 Payments not to be made relating to certain periods of industrial action

(1) If an employee engaged, or engages, in protected industrial action against an employer on a day, the employer must not make a payment to an employee in relation to the total duration of the industrial action on that day.

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

(2) However, this section does not apply to a partial work ban.

Note: For payments relating to periods of partial work bans, see section 471.

(3) A ***partial work ban*** is industrial action that is not:

(a) a failure or refusal by an employee to attend for work; or

(b) a failure or refusal by an employee who attends for work to perform any work at all; or

(c) an overtime ban.

(4) If the industrial action is, or includes, an overtime ban, this section does not apply, in relation to a period of overtime to which the ban applies, unless:

(a) the employer requested or required the employee to work the period of overtime; and

(b) the employee refused to work the period of overtime; and

(c) the refusal was a contravention of the employee's obligations under a modern award, enterprise agreement or contract of employment.

(5) If:

(a) the industrial action is, or includes, an overtime ban; and

Authorised Version C2026C00293 registered 15/07/2026

(b) this section applies in relation to a period of overtime to which the ban applies;

then for the purposes of this section, the total duration of the industrial action is, or includes, the period of overtime to which the ban applies.

471 Payments relating to partial work bans

Employer gives notice of reduction in payments

(1) If:

(a) an employee engaged, or engages, in protected industrial action against an employer on a day; and

(b) the industrial action is a partial work ban; and

(c) the employer gives to the employee a written notice stating that, because of the ban, the employee's payments will be reduced by a proportion specified in the notice;

then the employee's payments are reduced in accordance with subsection (2) in relation to the period (the ***industrial action period***) referred to in subsection (5).

(2) The employee's payments in relation to the industrial action period are reduced:

(a) by the proportion specified in the notice; or

(b) if the FWC has ordered a different proportion under section 472—by the proportion specified in the order;

and the modern award, enterprise agreement or contract of employment that applies to the employee's employment has effect accordingly.

(3) The regulations may prescribe how the proportion referred to in paragraph (2)(a) is to be worked out.

Employer gives notice of non-payment

(4) If:

(a) an employee engaged, or engages, in protected industrial action against an employer on a day; and

Authorised Version C2026C00293 registered 15/07/2026

(b) the industrial action is a partial work ban; and

(c) the employer gives to the employee a written notice stating that, because of the ban:

(i) the employee will not be entitled to any payments; and

(ii) the employer refuses to accept the performance of any work by the employee until the employee is prepared to perform all of his or her normal duties;

then the employee is not entitled to any payments in relation to the period (the ***industrial action period***) referred to in subsection (5).

(4A) If:

(a) an employer has given an employee a notice under paragraph (4)(c); and

(b) the employee fails or refuses to attend for work, or fails or refuses to perform any work at all if he or she attends for work, during the industrial action period;

then:

(c) the failure or refusal is ***employee claim action***, even if it does not satisfy subsections 409(2) and 413(4), if the related industrial action referred to in paragraph (4)(a) is employee claim action; or

(d) the failure or refusal is ***employee response action***, even if it does not satisfy subsection 413(4), if the related industrial action referred to in paragraph (4)(a) is employee response action.

The industrial action period

(5) The ***industrial action period*** is the period:

(a) starting at the later of:

(i) the start of the first day on which the employee implemented the partial work ban; or

(ii) the start of the next day, after the day on which the notice was given, on which the employee performs work; and

(b) ending at the end of the day on which the ban ceases.

Authorised Version C2026C00293 registered 15/07/2026

Form and content of notice

(6) The regulations may prescribe requirements relating to one or both of the following:
  (a) the form of a notice given under paragraph (1)(c) or (4)(c);
  (b) the content of such a notice.

Manner of giving notice

(7) Without limiting paragraph (1)(c) or (4)(c), the employer is taken to have given a notice in accordance with that paragraph to the employee if the employer:
  (a) has taken all reasonable steps to ensure that the employee, and the employee's bargaining representative (if any), receives the notice; and
  (b) has complied with any requirements, relating to the giving of the notice, prescribed by the regulations.

Employer does not give notice

(8) If:
  (a) an employee engaged, or engages, in protected industrial action against an employer on a day; and
  (b) the industrial action is a partial work ban; and
  (c) the employer does not give the employee a notice in accordance with paragraph (1)(c) or (4)(c);

then the employee's payments for the day are not to be reduced because of the ban.

472 Orders by the FWC relating to certain partial work bans

(1) The FWC may make an order varying the proportion by which an employee's payments are reduced.

(2) The FWC may make the order only if a person has applied for it under subsection (4).

Authorised Version C2026C00293 registered 15/07/2026

(3) In considering making such an order, the FWC must take into account:

(a) whether the proportion specified in the notice given under paragraph 471(1)(c) was reasonable having regard to the nature and extent of the partial work ban to which the notice relates; and

(b) fairness between the parties taking into consideration all the circumstances of the case.

(4) An employee, or the employee's bargaining representative, may apply to the FWC for an order under subsection (2) if a notice has been given under paragraph 471(1)(c) stating that the employee's payments will be reduced.

473 Accepting or seeking payments relating to periods of industrial action

(1) An employee must not:

(a) accept a payment from an employer if the employer would contravene section 470 by making the payment; or

(b) ask the employer to make such a payment.

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

Note 2: Acts of coercion, or misrepresentations, relating to such payments may also contravene section 348 or 349.

(2) An employee organisation, or an officer or member of an employee organisation, must not ask an employer to make a payment to an employee if the employer would contravene section 470 by making the payment.

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

Note 2: Acts of coercion, or misrepresentations, relating to such payments may also contravene section 348 or 349.

Authorised Version C2026C00293 registered 15/07/2026

Subdivision B—Industrial action that is not protected industrial action

474 Payments not to be made relating to certain periods of industrial action

(1) If an employee engaged, or engages, in industrial action that is not protected industrial action against an employer on a day, the employer must not make a payment to an employee in relation to:

(a) if the total duration of the industrial action on that day is at least 4 hours—the total duration of the industrial action on that day; or

(b) otherwise—4 hours of that day.

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

(2) However, if the industrial action is, or includes, an overtime ban, this section does not apply, in relation to a period of overtime to which the ban applies, unless:

(a) the employer requested or required the employee to work the period of overtime; and

(b) the employee refused to work the period of overtime; and

(c) the refusal was a contravention of the employee's obligations under a modern award, enterprise agreement or contract of employment.

Note: An employee is able to refuse to work additional hours if they are unreasonable (see subsection 62(2)). There may be other circumstances in which an employee can lawfully refuse to work additional hours.

(2A) If:

(a) the industrial action is, or includes, an overtime ban; and

(b) this section applies in relation to a period of overtime to which the ban applies;

then, for the purposes of this section:

(c) the total duration of the industrial action is, or includes, the period of overtime to which the ban applies; and

Authorised Version C2026C00293 registered 15/07/2026

(d) if paragraph (1)(b) applies—the period of 4 hours mentioned in that paragraph includes the period of overtime to which the ban applies.

(3) If:

(a) the industrial action is during a shift (or other period of work); and

(b) the shift (or other period of work) occurs partly on one day and partly on the next day;

then, for the purposes of this section, the shift is taken to be a day and the remaining parts of the days are taken not to be part of that day.

Example: An employee, who is working a shift from 10 pm on Tuesday until 7 am on Wednesday, engages in industrial action that is not protected industrial action from 11 pm on Tuesday until 1 am on Wednesday. That industrial action would prevent the employer making a payment to the employee in relation to 4 hours of the shift, but would not prevent the employer from making a payment in relation to the remaining 5 hours of the shift.

(4) For the purposes of subsection (3), overtime is taken not to be a separate shift.

475 Accepting or seeking payments relating to periods of industrial action

(1) An employee must not:

(a) accept a payment from an employer if the employer would contravene section 474 by making the payment; or

(b) ask the employer to make such a payment.

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

Note 2: Acts of coercion, or misrepresentations, relating to such payments may also contravene section 348 or 349.

(2) An employee organisation, or an officer or member of an employee organisation, must not ask an employer to make a payment to an employee if the employer would contravene section 474 by making the payment.

Authorised Version C2026C00293 registered 15/07/2026

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

Note 2: Acts of coercion, or misrepresentations, relating to such payments may also contravene section 348 or 349.

Subdivision C—Miscellaneous

476 Other responses to industrial action unaffected

If an employee engaged, or engages, in industrial action against an employer, this Division does not affect any right of the employer, under this Act or otherwise, to do anything in response to the industrial action that does not involve payments to the employee.

Authorised Version C2026C00293 registered 15/07/2026

Division 10—Other matters

477 Applications by bargaining representatives

Application of this section

(1) This section applies if a provision of this Part permits an application to be made by a bargaining representative of an employer that will be covered by a proposed single-enterprise agreement.

Persons who may make applications

(2) If the agreement will cover more than one employer, the application may be made by a bargaining representative of an employer that will be covered by the agreement, on behalf of one or more other such bargaining representatives, if those other bargaining representatives have agreed to the application being made on their behalf.

Authorised Version C2026C00293 registered 15/07/2026

Part 3-4—Right of entry

Division 1—Introduction

478 Guide to this Part

This Part is about the rights of officials of organisations who hold entry permits to enter premises for purposes related to their representative role under this Act and under State or Territory OHS laws.

Division 2 allows permit holders to enter premises to investigate suspected contraventions of this Act and fair work instruments. The Division makes special provision in relation to TCF award workers. Division 2 also allows permit holders to enter premises to hold discussions with certain employees and TCF award workers. In exercising rights under Division 2, permit holders must comply with the requirements set out in the Division.

Division 3 sets out requirements for exercising rights under State or Territory OHS laws.

Division 4 prohibits certain action in relation to the operation of this Part.

Division 5 sets out powers of the FWC in relation to the operation of this Part.

Division 6 deals with entry permits, entry notices and certificates.

Division 7 deals with accommodation and transport arrangements in remote areas.

479 Meanings of *employee* and *employer*

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

Authorised Version C2026C00293 registered 15/07/2026

480 Object of this Part

The object of this Part is to establish a framework for officials of organisations to enter premises that balances:

(a) the right of organisations to represent their members in the workplace, hold discussions with potential members and investigate suspected contraventions of:
  (i) this Act and fair work instruments; and
  (ii) State or Territory OHS laws; and

(b) the right of employees and TCF award workers to receive, at work, information and representation from officials of organisations; and

(c) the right of occupiers of premises and employers to go about their business without undue inconvenience.

Authorised Version C2026C00293 registered 15/07/2026

Division 2—Entry rights under this Act

Subdivision A—Entry to investigate suspected contravention

481 Entry to investigate suspected contravention

(1) A permit holder may enter premises and exercise a right under section 482 or 483 for the purpose of investigating a suspected contravention of this Act, or a term of a fair work instrument, that relates to, or affects, a member of the permit holder's organisation:

(a) whose industrial interests the organisation is entitled to represent; and

(b) who performs work on the premises.

Note 1: Particulars of the suspected contravention must be specified in an entry notice or exemption certificate (see subsections 518(2) and 519(2)).

Note 2: The FWC may issue an affected member certificate if it is satisfied that a member referred to in this subsection is on the premises (see subsection 520(1)).

Note 3: A permit holder, or the organisation to which the permit holder belongs, may be subject to an order by the FWC under section 508 if rights under this Subdivision are misused.

Note 4: A person must not refuse or unduly delay entry by a permit holder, or intentionally hinder or obstruct a permit holder, exercising rights under this Subdivision, or otherwise act in an improper manner (see sections 501 and 502).

(2) The fair work instrument must apply or have applied to the member.

(3) The permit holder must reasonably suspect that the contravention has occurred, or is occurring. The burden of proving that the suspicion is reasonable lies on the person asserting that fact.

Note: A permit holder who seeks to exercise rights under this Part without reasonably suspecting that a contravention has occurred, or is occurring, is liable to be penalised under subsection 503(1) (which deals with misrepresentations about things authorised by this Part).

Authorised Version C2026C00293 registered 15/07/2026

482 Rights that may be exercised while on premises

Rights that may be exercised while on premises

(1) While on the premises, the permit holder may do the following:

(a) inspect any work, process or object relevant to the suspected contravention;

(b) interview any person about the suspected contravention:

(i) who agrees to be interviewed; and

(ii) whose industrial interests the permit holder's organisation is entitled to represent;

(c) require the occupier or an affected employer to allow the permit holder to inspect, and make copies of, any record or document (other than a non-member record or document) that is directly relevant to the suspected contravention and that:

(i) is kept on the premises; or

(ii) is accessible from a computer that is kept on the premises.

Note 1: The use or disclosure of information or documents obtained under this section is strictly controlled (see section 504).

Note 2: The use or disclosure of personal information obtained under this section is regulated under the *Privacy Act 1988.*

(1A) However, an occupier or affected employer is not required under paragraph (1)(c) to allow the permit holder to inspect, or make copies of, a record or document if to do so would contravene a law of the Commonwealth or a law of a State or Territory.

Meaning of ***affected employer***

(2) A person is an ***affected employer***, in relation to an entry onto premises under this Subdivision, if:

(a) the person employs a member of the permit holder's organisation whose industrial interests the organisation is entitled to represent; and

(b) the member performs work on the premises; and

Authorised Version C2026C00293 registered 15/07/2026

(c) the suspected contravention relates to, or affects, the member.

*Meaning of **non-member record or document***

(2A) A ***non-member record or document*** is a record or document that:

(a) relates to the employment of a person who is not a member of the permit holder's organisation; and

(b) does not also substantially relate to the employment of a person who is a member of the permit holder's organisation;

but does not include a record or document that relates only to a person or persons who are not members of the permit holder's organisation if the person or persons have consented in writing to the record or document being inspected or copied by the permit holder.

Occupier and affected employer must not contravene requirement

(3) An occupier or affected employer must not contravene a requirement under paragraph (1)(c).

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

483 Later access to record or document

Later access to record or document

(1) The permit holder may, by written notice, require an affected employer to produce, or provide access to, a record or document (other than a non-member record or document) that is directly relevant to the suspected contravention on a later day or days specified in the notice.

(1A) However, an affected employer is not required under subsection (1) to produce, or provide access to, a record or document if to do so would contravene a law of the Commonwealth or a law of a State or Territory.

Authorised Version C2026C00293 registered 15/07/2026

Other rules relating to notices

(2) The day or days specified in the notice must not be earlier than 14 days after the notice is given.

(3) The notice may be given:
  (a) while the permit holder is on the premises; or
  (b) within 5 days after the entry.

Affected employer must not contravene requirement

(4) An affected employer must not contravene a requirement under subsection (1).

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

Where record or document may be inspected or copied

(5) The permit holder may inspect, and make copies of, the record or document at:
  (a) the premises; or
  (b) if another place is agreed upon by the permit holder and the affected employer—that other place.

Note 1: The use or disclosure of information or documents obtained under this section is strictly controlled (see section 504).

Note 2: The use or disclosure of personal information obtained under this section is regulated under the *Privacy Act 1988.*

483AA Application to the FWC for access to non-member records

(1) The permit holder may apply to the FWC for an order allowing the permit holder to do either or both of the following:
  (a) require the occupier or an affected employer to allow the permit holder to inspect, and make copies of, specified non-member records or documents (or parts of such records or documents) under paragraph 482(1)(c);
  (b) require an affected employer to produce, or provide access to, specified non-member records or documents (or parts of such records or documents) under subsection 483(1).

Authorised Version C2026C00293 registered 15/07/2026

(2) The FWC may make the order if it is satisfied that the order is necessary to investigate the suspected contravention. Before doing so, the FWC must have regard to any conditions imposed on the permit holder's entry permit.

(3) If the FWC makes the order, this Subdivision has effect accordingly.

(4) An application for an order under this section:
  (a) must be in accordance with the regulations; and
  (b) must set out the reason for the application.

Subdivision AA—Entry to investigate suspected contravention relating to TCF award workers

483A Entry to investigate suspected contravention relating to TCF award workers

(1) Subject to subsection (6), a permit holder may enter premises and exercise a right under section 483B or 483C for the purpose of investigating a suspected contravention of:
  (a) this Act, or a term of a fair work instrument, that relates to, or affects, a TCF award worker:
    (i) whose industrial interests the permit holder's organisation is entitled to represent; and
    (ii) who performs work on the premises; or
  (b) a designated outworker term that is in an instrument that relates to TCF award workers whose industrial interests the permit holder's organisation is entitled to represent.

Note 1: Particulars of the suspected contravention must be specified in an entry notice, unless the entry is a designated outworker terms entry (see subsection 518(2)).

Note 2: A permit holder, or the organisation to which the permit holder belongs, may be subject to an order by the FWC under section 508 if rights under this Subdivision are misused.

Note 3: A person must not refuse or unduly delay entry by a permit holder, or intentionally hinder or obstruct a permit holder, exercising rights

Authorised Version C2026C00293 registered 15/07/2026

under this Subdivision, or otherwise act in an improper manner (see sections 501 and 502).

(1A) A ***TCF award worker*** is:

(a) an employee whose work is covered by a TCF award; or

(b) an individual who, for the purpose of a contract for the provision of services, performs work that is covered by a TCF award.

(2) The permit holder must reasonably suspect that the contravention has occurred, or is occurring.

(3) The burden of proving that the suspicion is reasonable lies on the person asserting that fact.

(4) Subsections (2) and (3) do not apply in relation to a designated outworker terms entry.

(5) A ***designated outworker terms entry*** is an entry under paragraph (1)(b) for the purpose of investigating a suspected contravention of a designated outworker term.

(6) Particular premises of a person cannot be entered under paragraph (1)(a) if:

(a) the person is accredited (however described) by a person or body specified by name in the regulations; and

(b) the accreditation is in writing and is in force; and

(c) the premises are identified in the accreditation as being the principal place of business of the accredited person.

Note: The fact that this subsection may result in certain premises not being able to be entered under paragraph (1)(a) for the purpose of investigating a particular suspected contravention does not:

(a) prevent the premises being entered for that purpose under Subdivision A; or

(b) prevent the premises being entered under paragraph (1)(b) of this section.

(7) Before the Governor-General makes a regulation specifying a particular person or body for the purposes of paragraph (6)(a), the Minister must be satisfied that the person or body:

Authorised Version C2026C00293 registered 15/07/2026

(a) has aims that are consistent with the objects of Part 6-4A; and

(b) has the endorsement of:

(i) at least one employee organisation that is entitled to represent the industrial interests of TCF award workers; and

(ii) at least one employer organisation that is entitled to represent the industrial interests of persons who employ or engage TCF award workers.

483B Rights that may be exercised while on premises

Rights that may be exercised while on premises

(1) While on the premises, the permit holder may do the following:

(a) inspect any work, process or object relevant to the suspected contravention;

(b) interview any person about the suspected contravention:

(i) who agrees to be interviewed; and

(ii) whose industrial interests the permit holder's organisation is entitled to represent;

(c) require the occupier or an affected employer to allow the permit holder to inspect, and make copies of, any record or document that is directly relevant to the suspected contravention and that:

(i) is kept on the premises; or

(ii) is accessible from a computer that is kept on the premises.

Note 1: The use or disclosure of information or documents obtained under this section is strictly controlled (see section 504).

Note 2: The use or disclosure of personal information obtained under this section is regulated under the *Privacy Act 1988.*

(2) However, an occupier or affected employer is not required under paragraph (1)(c) to allow the permit holder to inspect, or make copies of, a record or document if to do so would contravene a law of the Commonwealth or a law of a State or Territory.

Authorised Version C2026C00293 registered 15/07/2026

*Meaning of **affected employer***

(3) A person is an ***affected employer***:

(a) in relation to an entry onto premises under section 483A other than a designated outworker terms entry, if:

(i) the person employs or engages a TCF award worker whose industrial interests the permit holder's organisation is entitled to represent; and

(ii) the TCF award worker performs work on the premises; and

(iii) the suspected contravention relates to, or affects, the TCF award worker; or

(b) in relation to a designated outworker terms entry under section 483A, if the person is covered by a TCF award.

Occupier and affected employer must not contravene requirement

(4) An occupier or affected employer must not contravene a requirement under paragraph (1)(c).

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

483C Later access to record or document

Later access to record or document

(1) The permit holder may, by written notice, require the occupier or an affected employer to produce, or provide access to, a record or document that is directly relevant to the suspected contravention on a later day or days specified in the notice.

(2) However, an occupier or affected employer is not required under subsection (1) to produce, or provide access to, a record or document if to do so would contravene a law of the Commonwealth or a law of a State or Territory.

Authorised Version C2026C00293 registered 15/07/2026

Other rules relating to notices

(3) The day or days specified in the notice must not be earlier than 14 days after the notice is given.

(4) The notice may be given:
  (a) while the permit holder is on the premises; or
  (b) within 5 days after the entry.

Occupier and affected employer must not contravene requirement

(5) An occupier or affected employer must not contravene a requirement under subsection (1).

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

Where record or document may be inspected or copied

(6) The permit holder may inspect, and make copies of, the record or document at:
  (a) the premises; or
  (b) if another place is agreed upon by the permit holder and the occupier or affected employer—that other place.

Note 1: The use or disclosure of information or documents obtained under this section is strictly controlled (see section 504).

Note 2: The use or disclosure of personal information obtained under this section is regulated under the *Privacy Act 1988.*

483D Entry onto other premises to access records and documents

(1) A permit holder who may enter premises under paragraph 483A(1)(a) for the purpose of investigating a suspected contravention may enter other premises and exercise a right under subsection (2) or section 483E if the permit holder reasonably suspects that records or documents that are directly relevant to the suspected contravention:
  (a) are kept on the other premises; or
  (b) are accessible from a computer that is kept on the other premises.

Authorised Version C2026C00293 registered 15/07/2026

Note: Particulars of the suspected contravention must be specified in an entry notice (see subsection 518(2)).

Rights that may be exercised while on premises

(2) While on the other premises, the permit holder may require the occupier to allow the permit holder to inspect, and make copies of, any such record or document.

Note 1: The use or disclosure of information or documents obtained under this section is strictly controlled (see section 504).

Note 2: The use or disclosure of personal information obtained under this section is regulated under the *Privacy Act 1988.*

(3) However, an occupier is not required under subsection (2) to allow the permit holder to inspect, or make copies of, a record or document if to do so would contravene a law of the Commonwealth or a law of a State or Territory.

Occupier must not contravene requirement

(4) An occupier must not contravene a requirement under subsection (2).

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

483E Later access to record or document—other premises

Later access to record or document

(1) The permit holder may, by written notice, require the occupier of the other premises to produce, or provide access to, a record or document that is directly relevant to the suspected contravention on a later day or days specified in the notice.

(2) However, an occupier is not required under subsection (1) to produce, or provide access to, a record or document if to do so would contravene a law of the Commonwealth or a law of a State or Territory.

Authorised Version C2026C00293 registered 15/07/2026

Other rules relating to notices

(3) The day or days specified in the notice must not be earlier than 14 days after the notice is given.

(4) The notice may be given:
  (a) while the permit holder is on the other premises; or
  (b) within 5 days after the entry.

Occupier must not contravene requirement

(5) An occupier must not contravene a requirement under subsection (1).

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

Where record or document may be inspected or copied

(6) The permit holder may inspect, and make copies of, the record or document at:
  (a) the other premises; or
  (b) if another place is agreed upon by the permit holder and the occupier—that other place.

Note 1: The use or disclosure of information or documents obtained under this section is strictly controlled (see section 504).

Note 2: The use or disclosure of personal information obtained under this section is regulated under the *Privacy Act 1988.*

Subdivision B—Entry to hold discussions

484 Entry to hold discussions

A permit holder may enter premises for the purposes of holding discussions with one or more employees or TCF award workers:
  (a) who perform work on the premises; and
  (b) whose industrial interests the permit holder's organisation is entitled to represent; and
  (c) who wish to participate in those discussions.

Authorised Version C2026C00293 registered 15/07/2026

Note 1: A permit holder, or the organisation to which the permit holder belongs, may be subject to an order by the FWC under section 508 if rights under this Subdivision are misused.

Note 2: A person must not refuse or unduly delay entry by a permit holder, or intentionally hinder or obstruct a permit holder, exercising rights under this Subdivision, or otherwise act in an improper manner (see sections 501 and 502).

Note 3: Under paragraph 487(1)(b), the permit holder must give the occupier of the premises notice for the entry. Having given that notice, the permit holder may hold discussions with any person on the premises described in this section.

Subdivision C—Requirements for permit holders

486 Permit holder must not contravene this Subdivision

Subdivisions A, AA and B do not authorise a permit holder to enter or remain on premises, or exercise any other right, if he or she contravenes this Subdivision, or regulations prescribed under section 521, in exercising that right.

487 Giving entry notice or exemption certificate

Entry under Subdivision A or B

(1) Unless the FWC has issued an exemption certificate for the entry, the permit holder must:
  (a) before entering premises under Subdivision A—give the occupier of the premises and any affected employer an entry notice for the entry; and
  (b) before entering premises under Subdivision B—give the occupier of the premises an entry notice for the entry.

(2) An ***entry notice*** for an entry is a notice that complies with section 518.

(3) An entry notice for an entry under Subdivision A or B must be given during working hours at least 24 hours, but not more than 14 days, before the entry.

Authorised Version C2026C00293 registered 15/07/2026

(4) If the FWC has issued an exemption certificate for the entry, the permit holder must, either before or as soon as practicable after entering the premises, give a copy of the certificate to:

(a) the occupier of the premises or another person who apparently represents the occupier; and

(b) any affected employer or another person who apparently represents the employer;

if the occupier, employer or other person is present at the premises.

Entry under Subdivision AA

(5) If the permit holder enters premises under Subdivision AA, the permit holder must, either before or as soon as practicable after entering the premises, give an entry notice for the entry to the occupier of the premises or another person who apparently represents the occupier if the occupier or other person is present at the premises.

488 Contravening entry permit conditions

The permit holder must not contravene a condition imposed on the entry permit.

489 Producing authority documents

(1) If the permit holder has entered premises under Subdivision A or AA, the permit holder must produce his or her authority documents for inspection by the occupier of the premises, or an affected employer:

(a) on request; and

(b) before making a requirement under:

(i) paragraph 482(1)(c) or 483B(1)(c), or subsection 483D(2); or

(ii) subsection 483(1), 483C(1) or 483E(1).

Note: Paragraphs 482(1)(c) and 483B(1)(c) and subsection 483D(2) deal with access to records and documents while the permit holder is on the premises. Subsections 483(1), 483C(1) and 483E(1) deal with access to records and documents at later times.

Authorised Version C2026C00293 registered 15/07/2026

(2) If the permit holder has entered premises under Subdivision B, the permit holder must produce his or her authority documents for inspection by the occupier of the premises on request.

(3) ***Authority documents***, for an entry under Subdivision A, AA or B, means:

(a) the permit holder's entry permit; and

(b) either:

(i) a copy of the entry notice for the entry; or

(ii) if the FWC has issued an exemption certificate for the entry—the certificate.

490 When right may be exercised

(1) The permit holder may exercise a right under Subdivision A, AA or B only during working hours.

(2) The permit holder may hold discussions under section 484 only during mealtimes or other breaks.

(3) The permit holder may only enter premises under Subdivision A, AA or B on a day specified in the entry notice or exemption certificate for the entry.

491 Occupational health and safety requirements

The permit holder must comply with any reasonable request by the occupier of the premises for the permit holder to comply with an occupational health and safety requirement that applies to the premises.

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

492 Location of interviews and discussions

(1) The permit holder must conduct interviews or hold discussions in the rooms or areas of the premises agreed with the occupier of the premises.

Authorised Version C2026C00293 registered 15/07/2026

(2) Subsection (3) applies if the permit holder and the occupier cannot agree on the room or area of the premises in which the permit holder is to conduct an interview or hold discussions.

(3) The permit holder may conduct the interview or hold the discussions in any room or area:

(a) in which one or more of the persons who may be interviewed or participate in the discussions ordinarily take meal or other breaks; and

(b) that is provided by the occupier for the purpose of taking meal or other breaks.

Note 1: The permit holder may be subject to an order by the FWC under section 508 if rights under this section are misused.

Note 2: A person must not intentionally hinder or obstruct a permit holder exercising rights under this section, or otherwise act in an improper manner (see section 502).

492A Route to location of interview and discussions

(1) The permit holder must comply with any reasonable request by the occupier of the premises to take a particular route to reach a room or area of the premises determined under section 492.

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

(2) A request under subsection (1) is not unreasonable only because the route is not that which the permit holder would have chosen.

(3) The regulations may prescribe circumstances in which a request under subsection (1) is or is not reasonable.

493 Residential premises

The permit holder must not enter any part of premises that is used mainly for residential purposes.

Authorised Version C2026C00293 registered 15/07/2026

Division 3—State or Territory OHS rights

494 Official must be permit holder to exercise State or Territory OHS right

Official must be permit holder

(1) An official of an organisation must not exercise a State or Territory OHS right unless the official is a permit holder.

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

*Meaning of **State or Territory OHS right***

(2) A right to enter premises, or to inspect or otherwise access an employee record of an employee that is on premises, is a ***State or Territory OHS right*** if the right is conferred by a State or Territory OHS law, and:

(a) the premises are occupied or otherwise controlled by any of the following:
  (i) a constitutional corporation;
  (ii) a body corporate incorporated in a Territory;
  (iii) the Commonwealth;
  (iv) a Commonwealth authority; or

(b) the premises are located in a Territory; or

(c) the premises are, or are located in, a Commonwealth place; or

(d) the right relates to requirements to be met, action taken, or activity undertaken or controlled, by any of the following in its capacity as an employer:
  (i) a constitutional corporation;
  (ii) a body corporate incorporated in a Territory;
  (iii) the Commonwealth;
  (iv) a Commonwealth authority; or

(e) the right relates to requirements to be met, action taken, or activity undertaken or controlled, by an employee of, or an

Authorised Version C2026C00293 registered 15/07/2026

independent contractor providing services for, any of the following:

(i) a constitutional corporation;

(ii) a body corporate incorporated in a Territory;

(iii) the Commonwealth;

(iv) a Commonwealth authority; or

(f) the exercise of the right will have a direct effect on any of the following in its capacity as an employer:

(i) a constitutional corporation;

(ii) a body corporate incorporated in a Territory;

(iii) the Commonwealth;

(iv) a Commonwealth authority; or

(g) the exercise of the right will have a direct effect on a person who is employed by, or who is an independent contractor providing services for, any of the following:

(i) a constitutional corporation;

(ii) a body corporate incorporated in a Territory;

(iii) the Commonwealth;

(iv) a Commonwealth authority.

*Meaning of **State or Territory OHS law***

(3) A ***State or Territory OHS law*** is a law of a State or a Territory prescribed by the regulations.

Assisting health and safety representatives

(4) Subsection (1), and sections 495 to 498, do not apply to an official of an organisation assisting a health and safety representative on request under a provision of a State or Territory OHS law equivalent to paragraph 68(2)(g) of the *Work Health and Safety Act 2011*.

(5) However, sections 499 to 504 do apply in relation to the official:

(a) whether or not the official is a permit holder; and

Authorised Version C2026C00293 registered 15/07/2026

(b) for the purposes of sections 499 to 502—if the official is not a permit holder, as if the official were a permit holder; and

(c) as if giving the assistance to the health and safety representative were authorised by this Part, or were the exercise of rights under this Part (as the case requires); and

(d) for the purposes of section 504—as if that section prohibited the use of information or a document obtained in giving the assistance other than for a purpose related to the exercise or performance of the powers or functions of the health and safety representative (subject to the exceptions set out in that section).

495 Giving notice of entry

(1) A permit holder must not exercise a State or Territory OHS right to inspect or otherwise access an employee record of an employee, unless:

(a) he or she has given the occupier of the premises, and any affected employer, a written notice setting out his or her intention to exercise the right, and reasons for doing so; and

(b) the notice is given at least 24 hours before exercising the right.

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

*Meaning of **affected employer***

(2) A person is an ***affected employer***:

(a) in relation to an entry onto premises in accordance with this Division—if one or more of the person's employees perform work on the premises; and

(b) in relation to a right to inspect or otherwise access an employee record in accordance with this Division—if the person employs the employee to whom the record relates.

Authorised Version C2026C00293 registered 15/07/2026

496 Contravening entry permit conditions

In exercising a State or Territory OHS right, a permit holder must not contravene a condition imposed on his or her entry permit.

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

497 Producing entry permit

A permit holder must not exercise a State or Territory OHS right unless the permit holder produces his or her entry permit for inspection when requested to do so by the occupier of the premises or an affected employer.

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

498 When right may be exercised

A permit holder may exercise a State or Territory OHS right only during working hours.

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

499 Occupational health and safety requirements

A permit holder must not exercise a State or Territory OHS right unless he or she complies with any reasonable request by the occupier of the premises to comply with an occupational health and safety requirement that applies to the premises.

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

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

Authorised Version C2026C00293 registered 15/07/2026

Division 4—Prohibitions

500 Permit holder must not hinder or obstruct

A permit holder exercising, or seeking to exercise, rights in accordance with this Part must not intentionally hinder or obstruct any person, or otherwise act in an improper manner.

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

Note 2: A permit holder, or the organisation to which the permit holder belongs, may also be subject to an order by the FWC under section 508 if rights under this Part are misused.

Note 3: A person must not intentionally hinder or obstruct a permit holder exercising rights under this Part, or otherwise act in an improper manner (see section 502).

501 Person must not refuse or delay entry

A person must not refuse or unduly delay entry onto premises by a permit holder who is entitled to enter the premises in accordance with this Part.

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

502 Person must not hinder or obstruct permit holder etc.

(1) A person must not intentionally hinder or obstruct a permit holder exercising rights in accordance with this Part, or otherwise act in an improper manner..

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

(2) To avoid doubt, a failure to agree on a place as referred to in paragraph 483(5)(b), 483C(6)(b) or 483E(6)(b) does not constitute conduct referred to in subsection (1).

(3) Without limiting subsection (1), that subsection extends to conduct that occurs after an entry notice is given but before a permit holder enters premises.

Authorised Version C2026C00293 registered 15/07/2026

503 Misrepresentations about things authorised by this Part

(1) A person must not take action:

(a) with the intention of giving the impression; or

(b) reckless as to whether the impression is given;

that the doing of a thing is authorised by this Part if it is not so authorised.

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

(2) Subsection (1) does not apply if the person reasonably believes that the doing of the thing is authorised.

504 Unauthorised use or disclosure of information or documents

A person must not use or disclose information or a document obtained under section 482, 483, 483B, 483C, 483D or 483E in the investigation of a suspected contravention for a purpose that is not related to the investigation or rectifying the suspected contravention, unless:

(a) the person reasonably believes that the use or disclosure is necessary to lessen or prevent:

(i) a serious and imminent threat to an individual's life, health or safety; or

(ii) a serious threat to public health or public safety; or

(b) the person has reason to suspect that unlawful activity has been, is being or may be engaged in, and uses or discloses the information or document as a necessary part of an investigation of the matter or in reporting concerns to relevant persons or authorities; or

(c) the use or disclosure is required or authorised by or under law; or

(d) the person reasonably believes that the use or disclosure is reasonably necessary for one or more of the following by, or on behalf of, an enforcement body (within the meaning of the *Privacy Act 1988*):

(i) the prevention, detection, investigation, prosecution or punishment of criminal offences, breaches of a law

Authorised Version C2026C00293 registered 15/07/2026

imposing a penalty or sanction or breaches of a prescribed law;

(ii) the enforcement of laws relating to the confiscation of the proceeds of crime;

(iii) the protection of the public revenue;

(iv) the prevention, detection, investigation or remedying of seriously improper conduct or prescribed conduct;

(v) the preparation for, or conduct of, proceedings before any court or tribunal, or implementation of the orders of a court or tribunal; or

(e) if the information is, or the document contains, personal information (within the meaning of the *Privacy Act 1988*)—the use or disclosure is made with the consent of the individual to whom the information relates.

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

Authorised Version C2026C00293 registered 15/07/2026

Division 5—Powers of the FWC

Subdivision A—Dealing with disputes

505 FWC may deal with a dispute about the operation of this Part

(1) The FWC may deal with a dispute about the operation of this Part, including a dispute about:

(a) whether a request under section 491, 492A or 499 is reasonable; or

(b) when a right of the kind referred to in section 490 may be exercised by a permit holder on premises of a kind mentioned in subsection 521C(1) or 521D(1), despite that section; or

(c) whether accommodation is reasonably available as mentioned in subsection 521C(1) or premises reasonably accessible as mentioned in subsection 521D(1); or

(d) whether providing accommodation or transport, or causing accommodation or transport to be provided, would cause the occupier of premises undue inconvenience as mentioned in paragraph 521C(2)(a) or 521D(2)(a); or

(e) whether a request to provide accommodation or transport is made within a reasonable period as mentioned in paragraph 521C(2)(c) or 521D(2)(c).

Note 1: Sections 491 and 499 deal with requests for permit holders to comply with occupational health and safety requirements.

Note 2: Section 492A deals with requests for a permit holder to take a particular route to a room or area in which an interview is to be conducted or discussions held.

Note 3: Section 490 deals with when rights under Subdivision A, AA or B of Division 2 of this Part may be exercised.

Note 4: Sections 521C and 521D deal with accommodation in and transport to remote areas for the purpose of exercising rights under this Part.

(2) The FWC may deal with the dispute by arbitration, including by making one or more of the following orders:

(a) an order imposing conditions on an entry permit;

Authorised Version C2026C00293 registered 15/07/2026

(b) an order suspending an entry permit;
(c) an order revoking an entry permit;
(d) an order about the future issue of entry permits to one or more persons;
(e) any other order it considers appropriate.

Note: The FWC may also deal with a dispute by mediation or conciliation, or by making a recommendation or expressing an opinion (see subsection 595(2)).

(3) The FWC may deal with the dispute:
(a) on its own initiative; or
(b) on application by any of the following to whom the dispute relates:
(i) a permit holder;
(ii) a permit holder's organisation;
(iii) an employer;
(iv) an occupier of premises.

(4) In dealing with the dispute, the FWC must take into account fairness between the parties concerned.

(5) In dealing with the dispute, the FWC must not confer rights on a permit holder that are additional to, or inconsistent with, rights exercisable in accordance with Division 2, 3 or 7 of this Part, unless the dispute is about:
(a) whether a request under section 491, 492A or 499 is reasonable; or
(b) when a right of the kind referred to in section 490 may be exercised by the permit holder on premises of a kind mentioned in subsection 521C(1) or 521D(1), despite that section; or
(c) whether accommodation is reasonably available as mentioned in subsection 521C(1) or premises reasonably accessible as mentioned in subsection 521D(1); or
(d) whether providing accommodation or transport, or causing accommodation or transport to be provided, would cause the

Authorised Version C2026C00293 registered 15/07/2026

occupier of premises undue inconvenience as mentioned in paragraph 521C(2)(a) or 521D(2)(a); or

(e) whether a request to provide accommodation or transport is made within a reasonable period as mentioned in paragraph 521C(2)(c) or 521D(2)(c).

505A FWC may deal with a dispute about frequency of entry to hold discussions

(1) This section applies if:

(a) a permit holder or permit holders of an organisation enter premises under section 484 for the purposes of holding discussions with one or more employees or TCF award workers; and

(b) an employer of the employees or the TCF award workers, or occupier of the premises, disputes the frequency with which the permit holder or permit holders of the organisation enter the premises.

(2) The FWC may deal with a dispute about the frequency with which a permit holder or permit holders of an organisation enter premises under section 484.

(3) The FWC may deal with the dispute by arbitration, including by making one or more of the following orders:

(a) an order imposing conditions on an entry permit;

(b) an order suspending an entry permit;

(c) an order revoking an entry permit;

(d) an order about the future issue of entry permits to one or more persons;

(e) any other order it considers appropriate.

Note: The FWC may also deal with a dispute by mediation or conciliation, or by making a recommendation or expressing an opinion (see subsection 595(2)).

(4) However, the FWC may only make an order under subsection (3) if the FWC is satisfied that the frequency of entry by the permit

Authorised Version C2026C00293 registered 15/07/2026

holder or permit holders of the organisation would require an unreasonable diversion of the occupier's critical resources.

(5) The FWC may deal with the dispute:
  (a) on its own initiative; or
  (b) on application by any of the following to whom the dispute relates:
    (i) a permit holder;
    (ii) a permit holder's organisation;
    (iii) an employer;
    (iv) an occupier of premises.

(6) In dealing with the dispute, the FWC must take into account fairness between the parties concerned.

506 Contravening order made to deal with dispute

A person must not contravene a term of an order under subsection 505(2) or subsection 505A(3).

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

Subdivision B—Taking action against permit holder

507 FWC may take action against permit holder

(1) The FWC may, on application by an inspector or a person prescribed by the regulations, take the following action against a permit holder:
  (a) impose conditions on any entry permit issued to the permit holder;
  (b) suspend any entry permit issued to the permit holder;
  (c) revoke any entry permit issued to the permit holder.

(2) In deciding whether to take action under subsection (1), the FWC must take into account the permit qualification matters.

Note: For ***permit qualification matters***, see subsection 513(1).

Authorised Version C2026C00293 registered 15/07/2026

Subdivision C—Restricting rights of organisations and officials where misuse of rights

508 FWC may restrict rights if organisation or official has misused rights

(1) The FWC may restrict the rights that are exercisable under this Part by an organisation, or officials of an organisation, if the FWC is satisfied that the organisation, or an official of the organisation, has misused those rights.

Note: Only a Vice President, Deputy President or Full Bench may take action under this subsection (see subsections 612(2) and 615(1)).

(2) The action that the FWC may take under subsection (1) includes the following:

(a) imposing conditions on entry permits;

(b) suspending entry permits;

(c) revoking entry permits;

(d) requiring some or all of the entry permits that might in future be issued in relation to the organisation to be issued subject to specified conditions;

(da) requiring, for a specified period, some or all of the exemption certificates that might be issued in relation to the organisation on the ground mentioned in subparagraph 519(1)(b)(ii) (suspected underpayment) to be issued subject to specified conditions;

(e) banning, for a specified period, the issue of entry permits in relation to the organisation, either generally or to specified persons;

(ea) banning, for a specified period, the issue of exemption certificates on the ground mentioned in subparagraph 519(1)(b)(ii) (suspected underpayment) in relation to the organisation, either generally or to specified permit holders;

(f) making any order it considers appropriate.

(3) The FWC may take action under subsection (1):

Authorised Version C2026C00293 registered 15/07/2026

(a) on its own initiative; or
(b) on application by an inspector.

(4) Without limiting subsection (1), an official misuses rights exercisable under this Part if:
(a) the official exercises those rights repeatedly with the intention or with the effect of hindering, obstructing or otherwise harassing an occupier or employer; or
(b) in exercising a right under Subdivision B of Division 2 of this Part, the official encourages a person to become a member of an organisation and does so in a way that is unduly disruptive:
(i) because the exercise of the right is excessive in the circumstances; or
(ii) for some other reason.

509 Contravening order made for misuse of rights

A person must not contravene a term of an order under subsection 508(1).

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

Subdivision D—When the FWC must impose conditions on, revoke or suspend entry permits

510 When the FWC must impose conditions on, revoke or suspend entry permits

When the FWC must impose conditions on, revoke or suspend entry permits

(1) The FWC must, under this subsection, impose conditions on, revoke or suspend each entry permit held by a permit holder if it is satisfied that any of the following has happened since the first of those permits was issued:

Authorised Version C2026C00293 registered 15/07/2026

(a) the permit holder was found, in proceedings under this Act, to have contravened subsection 503(1) (which deals with misrepresentations about things authorised by this Part);

(b) the permit holder has contravened section 504 (which deals with unauthorised use or disclosure of information or documents);

(c) the Information Commissioner has, under paragraph 52(1)(b) of the *Privacy Act 1988*, found substantiated a complaint relating to action taken by the permit holder in relation to information or documents obtained under section 482, 483, 483B, 483C, 483D or 483E;

(d) the permit holder, or another person, was ordered to pay a pecuniary penalty under this Act in relation to a contravention of this Part by the permit holder;

(e) a court, or other person or body, under a State or Territory industrial law:

(i) cancelled or suspended a right of entry for industrial purposes that the permit holder had under that law; or

(ii) disqualified the permit holder from exercising, or applying for, a right of entry for industrial purposes under that law;

(f) the permit holder has, in exercising a right of entry under a State or Territory OHS law, taken action that was not authorised by that law.

(2) Despite subsection (1), the FWC is not required to suspend or revoke an entry permit under paragraph (1)(d) or (f) if the FWC is satisfied that the suspension or revocation would be harsh or unreasonable in the circumstances.

(3) Subsection (1) does not apply in relation to a circumstance referred to in a paragraph of that subsection if the FWC took the circumstance into account when taking action under that subsection on a previous occasion.

Authorised Version C2026C00293 registered 15/07/2026

Minimum suspension period

(4) A suspension under subsection (1) must be for a period that is at least as long as the period (the ***minimum suspension period***) specified in whichever of the following paragraphs applies:
  (a) if the FWC has not previously taken action under subsection (1) against the permit holder—3 months;
  (b) if the FWC has taken action under subsection (1) against the permit holder on only one occasion—12 months;
  (c) if the FWC has taken action under subsection (1) against the permit holder on more than one occasion—5 years.

Banning issue of future entry permits if entry permit revoked or suspended

(5) If the FWC revokes or suspends an entry permit under subsection (1), it must also ban the issue of any further entry permit to the permit holder for a specified period (the ***ban period***).

(6) The ban period must:
  (a) begin when the entry permit is revoked or suspended under subsection (1); and
  (b) be no shorter than the minimum suspension period.

Subdivision E—General rules for suspending entry permits

511 General rules for suspending entry permits

If the FWC suspends an entry permit, the suspension:
  (a) must be for a specified period; and
  (b) does not prevent the revocation of, or the imposition of conditions on, the entry permit during the suspension period; and
  (c) does not alter the time at which the entry permit would otherwise expire.

Authorised Version C2026C00293 registered 15/07/2026

Division 6—Entry permits, entry notices and certificates

Subdivision A—Entry permits

512 FWC may issue entry permits

The FWC may, on application by an organisation, issue a permit (an ***entry permit***) to an official of the organisation if the FWC is satisfied that the official is a fit and proper person to hold the entry permit.

513 Considering application

(1) In deciding whether the official is a fit and proper person, the FWC must take into account the following ***permit qualification matters***:

(a) whether the official has received appropriate training about the rights and responsibilities of a permit holder;

(b) whether the official has ever been convicted of an offence against an industrial law;

(c) whether the official has ever been convicted of an offence against a law of the Commonwealth, a State, a Territory or a foreign country, involving:

(i) entry onto premises; or

(ii) fraud or dishonesty; or

(iii) intentional use of violence against another person or intentional damage or destruction of property;

(d) whether the official, or any other person, has ever been ordered to pay a penalty under this Act or any other industrial law in relation to action taken by the official;

(e) whether a permit issued to the official under this Part, or under a similar law of the Commonwealth (no matter when in force), has been revoked or suspended or made subject to conditions;

(f) whether a court, or other person or body, under a State or Territory industrial law or a State or Territory OHS law, has:

Authorised Version C2026C00293 registered 15/07/2026

(i) cancelled, suspended or imposed conditions on a right of entry for industrial or occupational health and safety purposes that the official had under that law; or

(ii) disqualified the official from exercising, or applying for, a right of entry for industrial or occupational health and safety purposes under that law;

(g) any other matters that the FWC considers relevant.

(2) Despite paragraph 85ZZH(c) of the *Crimes Act 1914*, Division 3 of Part VIIC of that Act applies in relation to the disclosure of information to or by, or the taking into account of information by, the FWC for the purpose of making a decision under this Part.

Note: Division 3 of Part VIIC of the *Crimes Act 1914* includes provisions that, in certain circumstances, relieve persons from the requirement to disclose spent convictions and require persons aware of such convictions to disregard them.

514 When the FWC must not issue permit

The FWC must not issue an entry permit to an official at a time when a suspension or disqualification, imposed by a court or other person or body:

(a) applies to the official's exercise of; or

(b) prevents the official from exercising or applying for;

a right of entry for industrial or occupational health and safety purposes under a State or Territory industrial law or a State or Territory OHS law.

515 Conditions on entry permit

(1) The FWC may impose conditions on an entry permit when it is issued.

(2) In deciding whether to impose conditions under subsection (1), the FWC must take into account the permit qualification matters.

(3) The FWC must record on an entry permit any conditions that have been imposed on its use (whether under subsection (1) or any other provision of this Part).

Authorised Version C2026C00293 registered 15/07/2026

(4) If the FWC imposes a condition on an entry permit after it has been issued, the permit ceases to be in force until the FWC records the condition on the permit.

(5) To avoid doubt, a permit holder does not contravene an FWC order merely because the permit holder contravenes a condition imposed on his or her permit by order (whether the condition is imposed at the time the entry permit is issued or at any later time).

516 Expiry of entry permit

(1) Unless it is revoked, an entry permit expires at the earlier of the following times:
  (a) at the end of the period of 3 years beginning on the day it is issued, or that period as extended under subsection (2);
  (b) when the permit holder ceases to be an official of the organisation that applied for the permit.

(2) The FWC may extend the period of 3 years referred to in paragraph (1)(a) by a specified period if:
  (a) the organisation that applied for the permit (the ***old permit***) has applied for another entry permit for the permit holder; and
  (b) the application was made at least 1 month before the old permit would otherwise have expired under that paragraph; and
  (c) the FWC is satisfied that the old permit is likely to expire before the FWC determines the application.

(3) The period specified must not be longer than the period that the FWC considers necessary for it to determine the application.

(4) The FWC must not extend the period under subsection (2) if:
  (a) the FWC has requested or required the organisation or permit holder to provide copies of records or documents, or to provide any other information, in relation to the application; and

Authorised Version C2026C00293 registered 15/07/2026

(b) the organisation or permit holder has not complied with the request or requirement; and
(c) the FWC is satisfied that the organisation or permit holder does not have a reasonable excuse.

517 Return of entry permits to the FWC

When permit holder must return entry permit to the FWC

(1) A permit holder must return an entry permit to the FWC within 7 days of any of the following things happening:
(a) the permit is revoked or suspended;
(b) conditions are imposed on the permit after it is issued;
(c) the permit expires.

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

FWC to return entry permit to permit holder after suspension

(2) After the end of a suspension period, the FWC must return the entry permit to the permit holder if:
(a) the permit holder, or the permit holder's organisation, applies to the FWC for the return of the entry permit; and
(b) the entry permit has not expired.

Subdivision B—Entry notices

518 Entry notice requirements

Requirements for all entry notices

(1) An entry notice must specify the following:
(a) the premises that are proposed to be entered;
(b) the day of the entry;
(c) the organisation of which the permit holder for the entry is an official.

Authorised Version C2026C00293 registered 15/07/2026

Requirements for entry notice for entry to investigate suspected contravention

(2) An entry notice given for an entry under section 481, 483A or 483D must:

(a) specify that section as the provision that authorises the entry; and

(b) unless the entry is a designated outworker terms entry under section 483A—specify the particulars of the suspected contravention, or contraventions; and

(c) for an entry under section 481—contain a declaration by the permit holder for the entry that the permit holder's organisation is entitled to represent the industrial interests of a member, who performs work on the premises, and:

(i) to whom the suspected contravention or contraventions relate; or

(ii) who is affected by the suspected contravention or contraventions; and

(ca) for an entry under section 483A other than a designated outworker terms entry—contain a declaration by the permit holder for the entry that the permit holder's organisation is entitled to represent the industrial interests of a TCF award worker, who performs work on the premises, and:

(i) to whom the suspected contravention or contraventions relate; or

(ii) who is affected by the suspected contravention or contraventions; and

(cb) for a designated outworker terms entry under section 483A—contain a declaration by the permit holder for the entry that the permit holder's organisation is entitled to represent the industrial interests of TCF award workers; and

(cc) for an entry under section 483D—contain a declaration by the permit holder for the entry that the permit holder's organisation is entitled to represent the industrial interests of a TCF award worker:

(i) to whom the suspected contravention or contraventions relate; or

Authorised Version C2026C00293 registered 15/07/2026

(ii) who is affected by the suspected contravention or contraventions; and

(d) specify the provision of the organisation's rules that entitles the organisation to represent the member or TCF award worker.

Requirements for entry notice for entry to hold discussions

(3) An entry notice given for an entry under section 484 (which deals with entry to hold discussions) must:

(a) specify that section as the provision that authorises the entry; and

(b) contain a declaration by the permit holder for the entry that the permit holder's organisation is entitled to represent the industrial interests of an employee or TCF award worker who performs work on the premises; and

(c) specify the provision of the organisation's rules that entitles the organisation to represent the employee or TCF award worker.

Note: See section 503 (which deals with misrepresentations about things authorised by this Part).

Subdivision C—Exemption certificates

519 Exemption certificates

(1) The FWC must issue a certificate (an ***exemption certificate***) to an organisation for an entry under section 481 (which deals with entry to investigate suspected contraventions) if:

(a) the organisation has applied for the certificate; and

(b) either:

(i) the FWC reasonably believes that advance notice of the entry given by an entry notice might result in the destruction, concealment or alteration of relevant evidence; or

(ii) the FWC is satisfied that the suspected contravention, or contraventions, involve the underpayment of wages, or

Authorised Version C2026C00293 registered 15/07/2026

other monetary entitlements, of a member of the organisation whose industrial interests the organisation is entitled to represent and who performs work on the premises, and the FWC reasonably believes that advance notice of the entry given by an entry notice would hinder an effective investigation into the suspected contravention or contraventions.

(2) An exemption certificate must specify the following:
  (a) the premises to which it relates;
  (b) the organisation to which it relates;
  (c) the day or days on which the entry may occur;
  (d) particulars of the suspected contravention, or contraventions, to which the entry relates;
  (da) if the exemption certificate is issued on the ground mentioned in subparagraph (1)(b)(ii) (suspected underpayment)—the names of any permit holders who may enter;
  (e) section 481 as the provision that authorises the entry.

Subdivision D—Affected member certificates

520 Affected member certificates

(1) The FWC must, on application by an organisation, issue a certificate (an ***affected member certificate***) to the organisation if the FWC is satisfied that:
  (a) a member of the organisation performs work on particular premises; and
  (b) the organisation is entitled to represent the industrial interests of the member; and
  (c) a suspected contravention of a kind referred to in subsection 481(1) relates to, or affects, the member.

(2) An affected member certificate must state the following:
  (a) the premises to which it relates;
  (b) the organisation to which it relates;

Authorised Version C2026C00293 registered 15/07/2026

(c) particulars of the suspected contravention, or contraventions, to which it relates;

(d) that the FWC is satisfied of the matters referred to in paragraphs (1)(a), (b) and (c).

(3) An affected member certificate must not reveal the identity of the member or members to whom it relates.

Subdivision E—Miscellaneous

521 Regulations dealing with instruments under this Part

The regulations may provide for, and in relation to, the following:

(a) the form of entry permits, entry notices, exemption certificates and affected member certificates;

(b) additional information to be included on, or given with, entry permits, entry notices, exemption certificates and affected member certificates;

(c) the manner in which entry permits, entry notices, exemption certificates and affected member certificates are to be given;

(d) any other matter in relation to entry permits, entry notices, exemption certificates and affected member certificates.

Authorised Version C2026C00293 registered 15/07/2026

Division 7—Accommodation and transport arrangements in remote areas

521A Meaning of *accommodation arrangement*

(1) If:

(a) an occupier of premises enters into an arrangement with an organisation; and

(b) under the terms of the arrangement, a permit holder is provided with accommodation for the purpose of assisting him or her to exercise rights under this Part;

the arrangement is an ***accommodation arrangement***.

(2) If:

(a) an occupier of premises enters into an arrangement with a permit holder; and

(b) under the terms of the arrangement, the permit holder is provided with accommodation for the purpose of assisting him or her to exercise rights under this Part;

the arrangement is an ***accommodation arrangement***.

521B Meaning of *transport arrangement*

(1) If:

(a) an occupier of premises enters into an arrangement with an organisation; and

(b) under the terms of the arrangement, a permit holder is provided with transport for the purpose of assisting him or her to exercise rights under this Part;

the arrangement is a ***transport arrangement***.

(2) If:

(a) an occupier of premises enters into an arrangement with a permit holder; and

Authorised Version C2026C00293 registered 15/07/2026

(b) under the terms of the arrangement, the permit holder is provided with transport for the purpose of assisting him or her to exercise rights under this Part;

the arrangement is a ***transport arrangement***.

521C Accommodation arrangements for remote areas

This section applies only in remote areas

(1) This section applies if rights under this Part are to be exercised by a permit holder on premises that are located in a place where accommodation is not reasonably available to the permit holder unless the occupier of the premises on which the rights are to be exercised provides the accommodation, or causes it to be provided.

Where parties cannot agree on an accommodation arrangement

(2) If all of the following are satisfied:

(a) to provide accommodation, or cause accommodation to be provided, to the permit holder would not cause the occupier undue inconvenience;

(b) the permit holder, or the organisation of which the permit holder is an official, requests the occupier to provide, or cause to be provided, accommodation for the purpose of assisting the permit holder to exercise rights under this Part on the premises;

(c) the request is made within a reasonable period before accommodation is required;

(d) the permit holder, and the organisation of which the permit holder is an official, have been unable to enter into an accommodation arrangement with the occupier by consent;

the occupier must enter into an accommodation arrangement for the purpose of assisting the permit holder to exercise rights under this Part.

Note: The FWC may deal with disputes about whether accommodation is reasonably available, whether providing accommodation or causing it to be provided would cause the occupier undue inconvenience and

Authorised Version C2026C00293 registered 15/07/2026

whether a request to provide accommodation is made within a reasonable period (see subsection 505(1)).

Costs

(3) If an accommodation arrangement is entered into under subsection (2), the occupier must not charge an organisation or a permit holder a fee for accommodation under the arrangement that is more than is necessary to cover the cost to the occupier of providing the accommodation, or causing it to be provided.

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

FWC's powers if rights misused whilst in accommodation

(4) For the purposes of this Part, the FWC may treat the conduct of the permit holder whilst in accommodation under an accommodation arrangement to which the occupier is a party, whether entered into under subsection (2) or by consent, as conduct engaged in as part of the exercise of rights by the permit holder under this Part.

521D Transport arrangements for remote areas

This section applies only in remote areas

(1) This section applies if rights under this Part are to be exercised by a permit holder on premises that are located in a place that is not reasonably accessible to the permit holder unless the occupier of the premises on which the rights are to be exercised provides transport, or causes it to be provided.

Where parties cannot agree on transport arrangement

(2) If all of the following are satisfied:

(a) to provide transport to the premises for the permit holder, or cause that transport to be provided, would not cause the occupier undue inconvenience;

(b) the permit holder, or the organisation of which the permit holder is an official, requests the occupier to provide, or cause to be provided, transport to the premises for the

Authorised Version C2026C00293 registered 15/07/2026

purpose of assisting the permit holder to exercise rights under this Part;

(c) the request is made within a reasonable period before transport is required;

(d) the permit holder, and the organisation of which the permit holder is an official, have been unable to enter into a transport arrangement with the occupier by consent;

the occupier must enter into a transport arrangement for the purpose of assisting the permit holder to exercise rights under this Part.

Note: The FWC may deal with disputes about whether premises are reasonably accessible, whether providing transport or causing it to be provided would cause the occupier undue inconvenience and whether a request to provide transport is made within a reasonable period (see subsection 505(1)).

Costs

(3) If a transport arrangement is entered into under subsection (2), the occupier must not charge an organisation or a permit holder a fee for transport under the arrangement that is more than is necessary to cover the cost to the occupier of providing the transport, or causing it to be provided.

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

FWC's powers if rights misused whilst in transport

(4) For the purposes of this Part, the FWC may treat the conduct of the permit holder whilst in transport under a transport arrangement to which the occupier is a party, whether entered into under subsection (2) or by consent, as conduct engaged in as part of the exercise of rights by the permit holder under this Part.

Authorised Version C2026C00293 registered 15/07/2026

Part 3-5—Stand down

Division 1—Introduction

522 Guide to this Part

This Part provides for a national system employer to stand down a national system employee without pay in certain circumstances.

Division 2 sets out the circumstances in which an employer may stand down an employee without pay.

Division 3 provides for the FWC to deal with disputes about the operation of this Part.

523 Meanings of *employee* and *employer*

In this Part, ***employee*** means a national system employee, and ***employer*** means a national system employer.

Authorised Version C2026C00293 registered 15/07/2026

Division 2—Circumstances allowing stand down

524 Employer may stand down employees in certain circumstances

(1) An employer may, under this subsection, stand down an employee during a period in which the employee cannot usefully be employed because of one of the following circumstances:

(a) industrial action (other than industrial action organised or engaged in by the employer);

(b) a breakdown of machinery or equipment, if the employer cannot reasonably be held responsible for the breakdown;

(c) a stoppage of work for any cause for which the employer cannot reasonably be held responsible.

(2) However, an employer may not stand down an employee under subsection (1) during a period in which the employee cannot usefully be employed because of a circumstance referred to in that subsection if:

(a) an enterprise agreement, or a contract of employment, applies to the employer and the employee; and

(b) the agreement or contract provides for the employer to stand down the employee during that period if the employee cannot usefully be employed during that period because of that circumstance.

Note 1: If an employer may not stand down an employee under subsection (1), the employer may be able to stand down the employee in accordance with the enterprise agreement or the contract of employment.

Note 2: An enterprise agreement or a contract of employment may also include terms that impose additional requirements that an employer must meet before standing down an employee (for example requirements relating to consultation or notice).

(3) If an employer stands down an employee during a period under subsection (1), the employer is not required to make payments to the employee for that period.

Authorised Version C2026C00293 registered 15/07/2026

525 Employee not stood down during a period of authorised leave or absence

An employee is not taken to be stood down under subsection 524(1) during a period when the employee:

(a) is taking paid or unpaid leave that is authorised by the employer; or

(b) is otherwise authorised to be absent from his or her employment.

Note: An employee may take paid or unpaid leave (for example, annual leave) during all or part of a period during which the employee would otherwise be stood down under subsection 524(1).

Authorised Version C2026C00293 registered 15/07/2026

Division 3—Dealing with disputes

526 FWC may deal with a dispute about the operation of this Part

(1) The FWC may deal with a dispute about the operation of this Part.

(2) The FWC may deal with the dispute by arbitration.

Note: The FWC may also deal with a dispute by mediation or conciliation, or by making a recommendation or expressing an opinion (see subsection 595(2)).

(3) The FWC may deal with the dispute only on application by any of the following:

(a) an employee who has been, or is going to be, stood down under subsection 524(1) (or purportedly under subsection 524(1));

(b) an employee in relation to whom the following requirements are satisfied:

(i) the employee has made a request to take leave to avoid being stood down under subsection 524(1) (or purportedly under subsection 524(1));

(ii) the employee's employer has authorised the leave;

(c) an employee organisation that is entitled to represent the industrial interests of an employee referred to in paragraph (a) or (b);

(d) an inspector.

(4) In dealing with the dispute, the FWC must take into account fairness between the parties concerned.

527 Contravening an FWC order dealing with a dispute about the operation of this Part

A person must not contravene a term of an FWC order dealing with a dispute about the operation of this Part.

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

Authorised Version C2026C00293 registered 15/07/2026

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

Division 1—Introduction

527A Guide to this Part

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

(a) the other person is a worker in a business or undertaking, seeking to become a worker in a particular business or undertaking, or conducting a business or undertaking; and

(b) the harassment occurs in connection with the other person being a person of the relevant kind.

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

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

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

527B Meaning of employee and employer

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

527C Object of this Part

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

Authorised Version C2026C00293 registered 15/07/2026

(a) the Convention on the Elimination of All Forms of Discrimination Against Women, done at New York on 18 December 1979 ([1983] ATS 9); and

(b) Articles 2 and 7 of the International Covenant on Economic, Social and Cultural Rights, done at New York on 16 December 1966 ([1976] ATS 5); and

(c) the ILO Convention (No. 111) concerning Discrimination in Respect of Employment and Occupation, done at Geneva on 25 June 1958 ([1974] ATS 12); and

(d) Article 7, and paragraphs (b) and (e) of Article 10, of the ILO Convention (No. 190) concerning Violence and Harassment, done at Geneva on 21 June 2019; and

(e) the Violence and Harassment Recommendation, 2019 (Recommendation No. 206), which the General Conference of the ILO adopted on 21 June 2019;

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

Note 1: The Conventions mentioned in paragraphs (a) and (c) and the Covenant could in 2022 be viewed in the Australian Treaties Library on the AustLII website (http://www.austlii.edu.au).

Note 2: The Convention mentioned in paragraph (d) and the Recommendation could in 2022 be viewed on the ILO website (http://www.ilo.org).

527CA Concurrent operation of State and Territory laws

(1) This Part does not exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with this Part.

(2) Without limiting subsection (1), this Part does not exclude or limit the concurrent operation of a law of a State or Territory to the extent that:

(a) the law makes an act or omission:

(i) an offence; or

(ii) subject to a civil penalty; and

(b) that (or any similar) act or omission constitutes a contravention of a civil remedy provision of this Part.

Authorised Version C2026C00293 registered 15/07/2026

(3) Without limiting subsection (1), this Part does not exclude or limit the concurrent operation of a law of a State or Territory to the extent that the law allows an application to be made to a person, court or body:

(a) for an order or other direction (however described) to prevent a person from being sexually harassed; or

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

For this purpose, it is irrelevant whether:

(c) sexual harassment has a different meaning for the purposes of the law to the meaning it has for the purposes of this Act; or

(d) the law describes the conduct prevented, or to which the dispute relates, as sexual harassment.

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

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

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

Authorised Version C2026C00293 registered 15/07/2026

Division 2—Prohibiting sexual harassment in connection with work

527D Prohibiting sexual harassment in connection with work

Prohibition

(1) A person (the ***first person***) must not sexually harass another person (the ***second person***) who is:

(a) a worker in a business or undertaking; or

(b) seeking to become a worker in a particular business or undertaking; or

(c) a person conducting a business or undertaking;

if the harassment occurs in connection with the second person being a person of the kind mentioned in paragraph (a), (b) or (c).

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

*Meaning of **worker***

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

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

When a person is a worker in a business or undertaking

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

Authorised Version C2026C00293 registered 15/07/2026

Other expressions

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

527E Vicarious liability etc.

Employees and agents

(1) If an employee or agent of a person (the ***principal***) does, in connection with the employment of the employee or with the duties of the agent as an agent, an act that contravenes subsection 527D(1), this Act applies in relation to the principal (subject to subsection (2)) as if the principal had also done the act.

(2) Subsection (1) does not apply if the principal proves that the principal took all reasonable steps to prevent the employee or agent from doing acts that would contravene subsection 527D(1).

Defence members

(2A) If a person does an act that contravenes subsection 527D(1) in connection with the person's service as a defence member (within the meaning of the *Defence Force Discipline Act 1982*), this Act applies in relation to the Commonwealth (subject to subsection (2B)) as if the Commonwealth had also done the act.

(2B) Subsection (2A) does not apply if the Commonwealth proves that the Commonwealth took all reasonable steps to prevent the person from doing acts that would contravene subsection 527D(1).

Other provisions not limited

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

Authorised Version C2026C00293 registered 15/07/2026

Division 3—Dealing with sexual harassment disputes

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

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

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

(a) make an order (a ***stop sexual harassment order***) under section 527J;

(b) otherwise deal with the dispute.

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

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

(2) The persons are as follows:

(a) the aggrieved person;

(b) an industrial association that is entitled to represent the industrial interests of the aggrieved person.

(3) Despite paragraph (1)(a), a person referred to in subsection (2) cannot, except as provided by the regulations, apply for the FWC to make a stop sexual harassment order in relation to the dispute if the aggrieved person was a defence member (within the meaning of the *Defence Force Discipline Act 1982*) at the time the sexual harassment allegedly occurred.

Authorised Version C2026C00293 registered 15/07/2026

(4) Without limiting section 609, the procedural rules may provide for the following:

(a) the making of applications under subsection (1) by:

(i) 2 or more persons of the kind referred to in subsection (2) acting jointly; or

(ii) a single industrial association that is entitled to represent the industrial interests of 2 or more aggrieved persons;

being applications made in relation to the same alleged contravention, or related alleged contraventions, of Division 2;

(b) the joinder of the following as parties to the dispute:

(i) one or more aggrieved persons in relation to alleged contraventions of Division 2;

(ii) one or more industrial associations each of which is entitled to represent the industrial interests of one or more aggrieved persons in relation to alleged contraventions of Division 2;

(iii) if an aggrieved person in relation to the dispute alleges the aggrieved person has been sexually harassed in contravention of Division 2, other than because of the operation of subsection 527E(1), by a person who is an employee or agent of another person (the ***principal***)—the principal;

(iv) if a party to the dispute alleges another party (the ***principal***) has contravened Division 2 because of the operation of subsection 527E(1)—an employee or agent mentioned in that subsection in relation to the principal;

(c) the withdrawal of persons as parties to the dispute;

(d) the treatment of the dispute under this Act as if there were 2 or more different disputes (instead of a single dispute), with different parties to each of the disputes.

527G Time for application

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

Authorised Version C2026C00293 registered 15/07/2026

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

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

527H Application fees

(1) An application to the FWC under section 527F must be accompanied by any fee prescribed by the regulations.

(2) The regulations may prescribe:
  (a) a fee for making an application to the FWC under section 527F; and
  (b) a method for indexing the fee; and
  (c) the circumstances in which all or part of the fee may be waived or refunded.

Subdivision B—Stop sexual harassment orders

527J Stop sexual harassment orders

(1) If:
  (a) an application made under section 527F includes an application for a stop sexual harassment order; and
  (b) the FWC is satisfied that:
    (i) the aggrieved person has been sexually harassed in contravention of Division 2 by one or more persons; and
    (ii) there is a risk that the aggrieved person will continue to be sexually harassed in contravention of Division 2 by the person or persons;

then the FWC may make any order it considers appropriate (other than an order requiring payment of a pecuniary amount) to prevent the aggrieved person from being sexually harassed in contravention of Division 2 by the person or persons.

Authorised Version C2026C00293 registered 15/07/2026

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

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

(3) In considering the terms of a stop sexual harassment order, the FWC must take into account:

(a) if the FWC is aware of any final or interim outcomes arising out of an investigation into the matter that is being, or has been, undertaken by another person or body—those outcomes; and

(b) if the FWC is aware of any procedure available to the aggrieved person—that procedure; and

(c) if the FWC is aware of any final or interim outcomes arising out of any procedure available to the aggrieved person to resolve grievances or disputes—those outcomes; and

(d) any matters that the FWC considers relevant.

(4) Despite subsection (2), the FWC may dismiss an application made under section 527F, to the extent that it consists of an application for a stop sexual harassment order, if the FWC considers that the application might involve matters that relate to:

(a) Australia's defence; or

(b) Australia's national security; or

(c) an existing or future covert operation (within the meaning of section 12E of the *Work Health and Safety Act 2011*) of the Australian Federal Police; or

(d) an existing or future international operation (within the meaning of section 12E of the *Work Health and Safety Act 2011*) of the Australian Federal Police.

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

Authorised Version C2026C00293 registered 15/07/2026

527K Contravening a stop sexual harassment order

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

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

527L Actions under work health and safety laws permitted

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

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

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

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

(a) Australia's defence; or

(b) Australia's national security; or

(c) an existing or future covert operation (within the meaning of section 12E of the *Work Health and Safety Act 2011*) of the Australian Federal Police; or

(d) an existing or future international operation (within the meaning of section 12E of the *Work Health and Safety Act 2011*) of the Australian Federal Police.

Authorised Version C2026C00293 registered 15/07/2026

527N Declarations by the Chief of the Defence Force

(1) Without limiting section 527M, the Chief of the Defence Force may, by legislative instrument, declare that all or specified provisions of this Subdivision do not apply in relation to a specified activity.

(2) A declaration under subsection (1) may only be made with the approval of the Minister and, if made with that approval, has effect according to its terms.

527P Declarations by the Director-General of Security

(1) Without limiting section 527M, the Director-General of Security may, by legislative instrument, declare that all or specified provisions of this Subdivision do not apply in relation to a person carrying out work for the Director-General.

(2) A declaration under subsection (1) may only be made with the approval of the Minister and, if made with that approval, has effect according to its terms.

527Q Declarations by the Director-General of ASIS

(1) Without limiting section 527M, the Director-General of the Australian Secret Intelligence Service may, by legislative instrument, declare that all or specified provisions of this Subdivision do not apply in relation to a person carrying out work for the Director-General.

(2) A declaration under subsection (1) may only be made with the approval of the Minister and, if made with that approval, has effect according to its terms.

Authorised Version C2026C00293 registered 15/07/2026

Subdivision C—Dealing with sexual harassment disputes in other ways

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

(1) If:

(a) an application is made under section 527F for the FWC to deal with a dispute; and

(b) the application does not consist solely of an application for a stop sexual harassment order;

then the FWC must deal with the dispute (other than by arbitration).

Note: The FWC may deal with a dispute by mediation or conciliation, or by making a recommendation or expressing an opinion (see subsection 595(2)).

(2) Any conference conducted for the purposes of dealing with the dispute (other than by arbitration) must be conducted in private, despite subsection 592(3).

Note: For conferences, see section 592.

(3) If the FWC is satisfied that all reasonable attempts to resolve the dispute (other than by arbitration) have been, or are likely to be, unsuccessful, then:

(a) the FWC must issue a certificate to that effect; and

(b) if the FWC considers, taking into account all the materials before it, that arbitration under section 527S, or a sexual harassment court application, in relation to the dispute would not have a reasonable prospect of success, the FWC must advise the parties accordingly.

527S Dealing with a sexual harassment dispute by arbitration

(1) This section applies if:

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

Authorised Version C2026C00293 registered 15/07/2026

(b) 2 or more of the parties (the ***notifying parties***) jointly notify the FWC that they agree to the FWC arbitrating the dispute; and

(c) the notifying parties include at least one party that is:

(i) an aggrieved person in relation to the dispute; or

(ii) an industrial association that is entitled to represent the industrial interests of a person who is an aggrieved person in relation to the dispute; and

(d) the notifying parties include at least one party that is a respondent in relation to the dispute; and

(e) the notification:

(i) is given to the FWC within 60 days after the day the certificate is issued, or within such period as the FWC allows on an application made during or after those 60 days; and

(ii) complies with any requirements prescribed by the procedural rules.

(2) The FWC must:

(a) remove as a party to the dispute a party that is not one of the notifying parties; and

(b) notify a person who is removed under paragraph (a) of the removal.

(3) After doing so, the FWC may deal with the dispute by arbitration, including by:

(a) making one or more of the following orders:

(i) an order for the payment of compensation to an aggrieved person in relation to the dispute;

(ii) an order for payment of an amount to an aggrieved person in relation to the dispute for remuneration lost;

(iii) an order requiring a person to perform any reasonable act, or carry out any reasonable course of conduct, to redress loss or damage suffered by an aggrieved person in relation to the dispute; and

(b) expressing one or more of the following opinions:

Authorised Version C2026C00293 registered 15/07/2026

(i) an opinion that a respondent in relation to the dispute has sexually harassed one or more aggrieved persons in contravention of Division 2;

(ii) an opinion that a respondent in relation to the dispute has contravened Division 2 because of the operation of subsection 527E(1);

(iii) an opinion that it would be inappropriate for any further action to be taken in the matter.

(4) A person to whom an order under paragraph (3)(a) applies must not contravene a term of the order.

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

527T Limitation on taking a sexual harassment dispute to court

(1) A person who is entitled to apply under section 527F for the FWC to deal with a dispute (whether by making a stop sexual harassment order or otherwise) must not make a sexual harassment court application in relation to the dispute unless:

(a) both of the following apply:

(i) the FWC has issued a certificate under paragraph 527R(3)(a) in relation to the dispute;

(ii) the sexual harassment court application is made within a period specified in subsection (3); or

(b) the sexual harassment court application includes an application for an interim injunction.

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

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

Authorised Version C2026C00293 registered 15/07/2026

(3) For the purposes of subparagraph (1)(a)(ii), the following periods are specified:

(a) 60 days after the day the certificate is issued;

(b) if the person is removed under paragraph 527S(2)(a) as a party to the dispute—14 days after the person is given notice under paragraph 527S(2)(b) of the removal;

(c) such period as the court allows on an application made during or after a period mentioned in paragraph (a) or (b) of this subsection.

Note: For the purposes of paragraph (c), in *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298, the Industrial Relations Court of Australia set down principles relating to the exercise of its discretion under a similarly worded provision of the *Industrial Relations Act 1988*.

Authorised Version C2026C00293 registered 15/07/2026

Part 3-6—Other rights and responsibilities

Division 1—Introduction

528 Guide to this Part

This Part deals with other rights and responsibilities.

Division 2 is about the obligations of a national system employer if a decision is made to dismiss 15 or more employees for reasons of an economic, technological, structural or similar nature.

Subdivision A of Division 2 deals with notifying the Chief Executive Officer of the Commonwealth Services Delivery Agency (Centrelink) about the proposed dismissals.

Subdivision B of Division 2 provides for the FWC to make orders if the employer fails to notify and consult relevant industrial associations.

Subdivision C of Division 2 provides that that Division does not apply in relation to certain employees.

Division 3 is about the obligations of national system employers to make and keep employee records in relation to each of their employees and to give pay slips to each of their employees.

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

529 Meanings of *employee* and *employer*

In this Part, ***employee*** means a national system employee, and ***employer*** means a national system employer.

Authorised Version C2026C00293 registered 15/07/2026

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

Authorised Version C2026C00293 registered 15/07/2026

Division 2—Notification and consultation relating to certain dismissals

Subdivision A—Requirement to notify Centrelink

530 Employer to notify Centrelink of certain proposed dismissals

(1) If an employer decides to dismiss 15 or more employees for reasons of an economic, technological, structural or similar nature, or for reasons including such reasons, the employer must give a written notice about the proposed dismissals to the Chief Executive Officer of the Commonwealth Services Delivery Agency (Centrelink).

(2) The notice must be in the form (if any) prescribed by the regulations and set out:
  (a) the reasons for the dismissals; and
  (b) the number and categories of employees likely to be affected; and
  (c) the time when, or the period over which, the employer intends to carry out the dismissals.

(3) The notice must be given:
  (a) as soon as practicable after making the decision; and
  (b) before dismissing an employee in accordance with the decision.

(4) The employer must not dismiss an employee in accordance with the decision unless the employer has complied with this section.

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

(5) The orders that may be made under subsection 545(1) in relation to a contravention of subsection (4) of this section:
  (a) include an order requiring the employer not to dismiss the employees in accordance with the decision, except as permitted by the order; but

Authorised Version C2026C00293 registered 15/07/2026

(b) do not include an order granting an injunction.

Subdivision B—Failure to notify or consult registered employee associations

531 FWC may make orders where failure to notify or consult registered employee associations about dismissals

(1) The FWC may make an order under subsection 532(1) if it is satisfied that:

(a) an employer has decided to dismiss 15 or more employees for reasons of an economic, technological, structural or similar nature, or for reasons including such reasons; and

(b) the employer has not complied with subsection (2) (which deals with notifying relevant registered employee associations) or subsection (3) (which deals with consulting relevant registered employee associations); and

(c) the employer could reasonably be expected to have known, when he or she made the decision, that one or more of the employees were members of a registered employee association.

Notifying relevant registered employee associations

(2) An employer complies with this subsection if:

(a) the employer notifies each registered employee association of which any of the employees was a member, and that was entitled to represent the industrial interests of that member, of the following:

(i) the proposed dismissals and the reasons for them;

(ii) the number and categories of employees likely to be affected;

(iii) the time when, or the period over which, the employer intends to carry out the dismissals; and

(b) the notice is given:

(i) as soon as practicable after making the decision; and

Authorised Version C2026C00293 registered 15/07/2026

(ii) before dismissing an employee in accordance with the decision.

Consulting relevant registered employee associations

(3) An employer complies with this subsection if:

(a) the employer gives each registered employee association of which any of the employees was a member, and that was entitled to represent the industrial interests of that member, an opportunity to consult the employer on:

(i) measures to avert or minimise the proposed dismissals; and

(ii) measures (such as finding alternative employment) to mitigate the adverse effects of the proposed dismissals; and

(b) the opportunity is given:

(i) as soon as practicable after making the decision; and

(ii) before dismissing an employee in accordance with the decision.

532 Orders that the FWC may make

(1) The FWC may make whatever orders it considers appropriate, in the public interest, to put:

(a) the employees; and

(b) each registered employee association referred to in paragraph 531(2)(a) or (3)(a);

in the same position (as nearly as can be done) as if the employer had complied with subsections 531(2) and (3).

(2) The FWC must not, under subsection (1), make orders for any of the following:

(a) reinstatement of an employee;

(b) withdrawal of a notice of dismissal if the notice period has not expired;

(c) payment of an amount in lieu of reinstatement;

(d) payment of severance pay;

Authorised Version C2026C00293 registered 15/07/2026

(e) disclosure of confidential information or commercially sensitive information relating to the employer, unless the recipient of such information gives an enforceable undertaking not to disclose the information to any other person;

(f) disclosure of personal information relating to a particular employee, unless the employee has given written consent to the disclosure of the information and the disclosure is in accordance with that consent.

533 Application for an FWC order

The FWC may make the order only on application by:

(a) one of the employees; or

(b) a registered employee association referred to in paragraph 531(2)(a) or (3)(a); or

(c) any other registered employee association that is entitled to represent the industrial interests of one of the employees.

Subdivision C—Limits on scope of this Division

534 Limits on scope of this Division

(1) This Division does not apply in relation to any of the following employees:

(a) an employee employed for a specified period of time, for a specified task, or for the duration of a specified season;

(b) an employee who is dismissed because of serious misconduct;

(c) a casual employee;

(d) an employee (other than an apprentice) to whom a training arrangement applies and whose employment is for a specified period of time or is, for any reason, limited to the duration of the training arrangement;

(e) a daily hire employee working in the building and construction industry (including working in connection with

Authorised Version C2026C00293 registered 15/07/2026

the erection, repair, renovation, maintenance, ornamentation or demolition of buildings or structures);

(f) a daily hire employee working in the meat industry in connection with the slaughter of livestock;

(g) a weekly hire employee working in connection with the meat industry and whose dismissal is determined solely by seasonal factors;

(h) an employee prescribed by the regulations as an employee in relation to whom this Division does not apply.

(2) Paragraph (1)(a) does not prevent this Division from applying in relation to an employee if a substantial reason for employing the employee as described in that paragraph was to avoid the application of this Division.

Authorised Version C2026C00293 registered 15/07/2026

Division 3—Employer obligations in relation to employee records and pay slips

535 Employer obligations in relation to employee records

(1) An employer must make, and keep for 7 years, employee records of the kind prescribed by the regulations in relation to each of its employees.

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

(2) The records must:

(a) if a form is prescribed by the regulations—be in that form; and

(b) include any information prescribed by the regulations.

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

(3) The regulations may provide for the inspection of those records.

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

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

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

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

536 Employer obligations in relation to pay slips

(1) An employer must give a pay slip to each of its employees within one working day of paying an amount to the employee in relation to the performance of work.

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

Authorised Version C2026C00293 registered 15/07/2026

Note 2: Section 80 of the *Paid Parental Leave Act 2010* requires an employer to give information to an employee to whom the employer pays an instalment under that Act.

(2) The pay slip must:

(a) if a form is prescribed by the regulations—be in that form; and

(b) include any information prescribed by the regulations; and

(c) not include any information prescribed by the regulations in relation to paid family and domestic violence leave; and

(d) comply with any requirements prescribed by the regulations in relation to the reporting of paid family and domestic violence leave.

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

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

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

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

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

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

Authorised Version C2026C00293 registered 15/07/2026

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

536AA Employer obligations in relation to advertising rates of pay

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

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

(a) this Act;

(b) a fair work instrument.

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

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

(2) If:

(a) an employer advertises, or causes to be advertised, that the employer is offering employment as a pieceworker; and

(b) the employee would be entitled to a periodic rate of pay, if the advertised employment occurred;

the advertisement must:

(c) specify that rate of pay (or a higher rate of pay); or

(d) include a statement to the effect that a periodic rate of pay is payable in relation to the employment.

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

Reasonable excuse

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

Authorised Version C2026C00293 registered 15/07/2026

Part 3-7—Corrupting benefits

Division 1—Introduction

536A Guide to this Part

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

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

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

536B Meanings of employee and employer

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

536C Concurrent operation of State and Territory laws

(1) This Part does not exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with this Part.

(2) Without limiting subsection (1), this Part does not exclude or limit the concurrent operation of a law of a State or Territory to the extent that:

(a) the law makes an act or omission:

(i) an offence; or

(ii) subject to a civil penalty; and

(b) that (or any similar) act or omission is also an offence against a provision of this Part.

Authorised Version C2026C00293 registered 15/07/2026

(3) Subsection (2) applies even if the law of the State or Territory does any one or more of the following, in relation to the offence or civil penalty:

(a) provides for a penalty that differs from the penalty provided for in this Part;

(b) provides for fault elements that differ from the fault elements applicable to the offence created by this Part;

(c) provides for defences or exceptions that differ from the defences or exceptions applicable to the offence created by this Part.

536CA Dishonesty

(1) For the purposes of this Part, ***dishonest*** means:

(a) dishonest according to the standards of ordinary people; and

(b) known by the defendant to be dishonest according to the standards of ordinary people.

(2) In a prosecution for an offence against this Part, the determination of dishonesty is a matter for the trier of fact.

Authorised Version C2026C00293 registered 15/07/2026

Division 2—Giving, receiving or soliciting corrupting benefits

536D Giving, receiving or soliciting a corrupting benefit

Giving a corrupting benefit

(1) A person (the ***defendant***) commits an offence if:

(a) the defendant dishonestly:

(i) provides a benefit to another person; or

(ii) causes a benefit to be provided to another person; or

(iii) offers to provide, or promises to provide, a benefit to another person; or

(iv) causes an offer of the provision of a benefit, or a promise of the provision of a benefit, to be made to another person; and

(b) the defendant does so with the intention of influencing a registered organisations officer or employee (who may be the other person):

(i) in the performance of his or her duties or functions as such an officer or employee; or

(ii) in the exercise of his or her powers or performance of his or her functions under this Act or the Registered Organisations Act; or

(iii) to give an advantage of any kind in connection with the relevant affairs, which would not be legitimately due, to the defendant, a spouse (within the meaning of the Registered Organisations Act) or associated entity of the defendant, or a person who has a prescribed connection with the defendant.

Penalty:

(a) for an individual—imprisonment for 10 years or 5,000 penalty units, or both; or

(b) for a body corporate—25,000 penalty units.

Authorised Version C2026C00293 registered 15/07/2026

Receiving or soliciting a corrupting benefit

(2) A person (the ***defendant***) commits an offence if:

(a) the defendant dishonestly:

(i) requests (whether or not expressly and whether or not by threats); or

(ii) receives or obtains; or

(iii) agrees to receive or obtain;

a benefit from a person (the ***provider***) for the defendant or another person; and

(b) the defendant does so with the intention that, or the intention that the provider believes that, the receipt, or expectation of the receipt, of the benefit will influence a registered organisations officer or employee (who may be the defendant):

(i) in the performance of his or her duties or functions as such an officer or employee; or

(ii) in the exercise of his or her powers or performance of his or her functions under this Act or the Registered Organisations Act; or

(iii) to give an advantage of any kind in connection with the relevant affairs, which would not be legitimately due, to the provider, a spouse (within the meaning of the Registered Organisations Act) or associated entity of the provider, or a person who has a prescribed connection with the provider.

Penalty:

(a) for an individual—imprisonment for 10 years or 5,000 penalty units, or both; or

(b) for a body corporate—25,000 penalty units.

No need for actual influence etc.

(3) For the purposes of paragraphs (1)(b) and (2)(b):

(a) the defendant's intention does not need to be in relation to a particular registered organisations officer or employee; and

Authorised Version C2026C00293 registered 15/07/2026

(b) the defendant's intention does not need to be in relation to a registered organisations officer or employee performing or exercising duties, functions or powers in a particular way, or giving a particular advantage to a particular person; and

(c) the provider mentioned in subsection (2) does not need to actually believe anything; and

(d) it is not necessary that any person actually be influenced.

Giving an advantage which would not be legitimately due

(4) In a prosecution for an offence against subsection (1) or (2), the determination of whether an advantage would not be legitimately due is a matter for the trier of fact.

(5) For the purposes of subparagraphs (1)(b)(iii) and (2)(b)(iii), an advantage may be given in any way, including by doing or not doing a thing, or causing or influencing another person to do or not do a thing.

(6) In working out whether an advantage would not be legitimately due to a person, disregard:

(a) whether the advantage might be, or be perceived to be, customary, necessary or required in the situation; and

(b) the value of the advantage; and

(c) any official tolerance of the advantage.

Meaning of benefit in this section

(7) In this section:

benefit includes any advantage and is not limited to property.

536E Meaning of registered organisations officer or employee

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

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

Authorised Version C2026C00293 registered 15/07/2026

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

Authorised Version C2026C00293 registered 15/07/2026

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

536F Giving a cash or in kind payment

Giving a cash or in kind payment

(1) A person (the ***defendant***) commits an offence if:

(a) the defendant is a national system employer other than an employee organisation; and

(b) the defendant:

(i) provides a cash or in kind payment to another person; or

(ii) causes a cash or in kind payment to be provided to another person; or

(iii) offers to provide, or promises to provide, a cash or in kind payment to another person; or

(iv) causes an offer of the provision of a cash or in kind payment, or a promise of the provision of a cash or in kind payment, to be made to another person; and

(c) the other person is an employee organisation or a prohibited beneficiary in relation to an employee organisation; and

(d) the defendant, a spouse (within the meaning of the Registered Organisations Act) or associated entity of the defendant, or a person who has a prescribed connection with the defendant, employs a person who is, or is entitled to be, a member of the organisation and whose industrial interests the organisation is entitled to represent.

Penalty:

(a) for an individual—imprisonment for 2 years or 500 penalty units, or both; or

(b) for a body corporate—2,500 penalty units.

(3) Subsection (1) does not apply to the following cash or in kind payments:

(a) a payment to the organisation:

Authorised Version C2026C00293 registered 15/07/2026

(i) made by deduction from the wages of an employee of the defendant who has agreed in writing to become a member of the organisation; and

(ii) made for a membership fee payable by the employee;

(b) a benefit provided and used for the sole or dominant purpose of benefiting the defendant's employees, or the defendant's former employees in relation to their former employment;

(c) a gift or contribution deductible under section 30-15 of the *Income Tax Assessment Act 1997* and used in accordance with the law;

(ca) a benefit of nominal value (meaning no more than 2 penalty units) associated with travel or hospitality during consultation, negotiation or bargaining;

(cb) a benefit of nominal value (meaning no more than 2 penalty units) that is:

(i) a token gift, an event invitation or a similar benefit; and

(ii) given in accordance with common courteous practice among employers and organisations;

(d) a payment made, at no more than market value, for goods or services supplied to the defendant in the ordinary course of the organisation's business;

(e) a payment made under or in accordance with a law of the Commonwealth, or a law of a State or Territory;

(f) a benefit provided in accordance with an order, judgment or award of a court or tribunal, or in settlement of a matter before the FWC or a genuine legal dispute;

(g) a non-corrupting benefit prescribed by, or provided in circumstances prescribed by, the regulations.

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

Meaning of cash or in kind payment

(4) A ***cash or in kind payment*** is a benefit that is:

(a) in cash or any other money form; or

(b) goods or services; or

Authorised Version C2026C00293 registered 15/07/2026

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

Meaning of prohibited beneficiary

(5) A person is a ***prohibited beneficiary*** in relation to an employee organisation if the person is any of the following:
(a) an entity controlled by the organisation;
(b) a registered organisations officer or employee in relation to the organisation;
(c) a spouse of, or entity controlled by, such an officer or employee;
(d) a person or entity to whom the organisation or a prohibited beneficiary of the organisation requests or directs the defendant to provide a cash or in kind payment;
(e) a person who has a prescribed connection with the organisation or a prohibited beneficiary of the organisation.

(6) In subsection (5), ***control***, ***entity*** and ***spouse*** have the same meanings as in the Registered Organisations Act.

Meaning of national system employer

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

536G Receiving or soliciting a cash or in kind payment

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

Authorised Version C2026C00293 registered 15/07/2026

(b) the defendant is an employee organisation or an officer (within the meaning of the Registered Organisations Act) or employee of an employee organisation; and

(c) the provider is a national system employer other than an employee organisation; and

(d) the provider, a spouse (within the meaning of the Registered Organisations Act) or associated entity of the provider, or a person who has a prescribed connection with the provider, employs a person who is, or is entitled to be, a member of the organisation and whose industrial interests the organisation is entitled to represent.

Penalty:

(a) for an individual—imprisonment for 2 years or 500 penalty units, or both; or

(b) for a body corporate—2,500 penalty units.

(2) Subsection (1) does not apply to a cash or in kind payment mentioned in subsection 536F(3).

536H Implied freedom of political communication

(1) This Division does not apply to the extent (if any) that it would infringe any constitutional doctrine of implied freedom of political communication.

(2) Subsection (1) does not limit the application of section 15A of the *Acts Interpretation Act 1901*.

Authorised Version C2026C00293 registered 15/07/2026

Chapter 3A—Minimum standards for regulated workers

Part 3A-1—Core provisions for this Chapter

Division 1—Introduction

536J Guide to this Part

This Part is about the coverage and operation of the provisions of this Chapter.

Division 2 sets out when minimum standards orders, minimum standards guidelines and collective agreements cover regulated workers and regulated businesses.

Division 3 specifies the rules relating to the interaction of the provisions of this Chapter with State and Territory laws.

Division 3A deals with deferral and suspension of minimum standards orders by the Minister and deferral and suspension of road transport minimum standards orders by the FWC.

Division 3B deals with consultation before varying or revoking road transport minimum standards orders after deferral.

Division 3C deals with consultation before varying or revoking employee-like worker minimum standards orders after deferral.

536JA Meaning of employee and employer

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

Authorised Version C2026C00293 registered 15/07/2026

Division 2—Provisions relating to coverage and operation of minimum standards orders, minimum standards guidelines and collective agreements

Subdivision A—Coverage and operation of minimum standards orders and guidelines

536JB Contravening a minimum standards order

A person must not contravene a term of a minimum standards order.

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

Note 2: A person does not contravene a term of a minimum standards order unless the order applies to the person: see subsection 536JC(1).

536JC The significance of a minimum standards order applying to a person

(1) A minimum standards order does not impose obligations on a person, and a person does not contravene a term of a minimum standards order, unless the order applies to the person.

(2) A minimum standards order does not give a person an entitlement unless the order applies to the person.

536JD When a minimum standards order *applies* to a person

*When a minimum standards order **applies** to a regulated worker*

(1) A minimum standards order ***applies*** to a regulated worker if:
  (a) the minimum standards order covers the regulated worker; and
  (b) the minimum standards order is in operation; and

Authorised Version C2026C00293 registered 15/07/2026

(c) no other provision of this Act provides, or has the effect, that the minimum standards order does not apply to the regulated worker.

*When an employee-like minimum standards order **applies** to a digital labour platform operator*

(2) An employee-like minimum standards order ***applies*** to a digital labour platform operator if:

(a) the employee-like minimum standards order covers the digital labour platform operator; and

(b) the employee-like minimum standards order covers employee-like workers; and

(c) the digital labour platform operator:

(i) directly or indirectly engages, under services contracts, employee-like workers covered by the employee-like minimum standards order who perform work through or by means of a digital labour platform operated by the digital labour platform operator; or

(ii) arranges or facilitates services contracts through or by means of a digital labour platform operated by the digital labour platform operator, under which work is performed by employee-like workers covered by the employee-like minimum standards order; and

(d) the employee-like minimum standards order is in operation; and

(e) no other provision of this Act provides, or has the effect, that the employee-like minimum standards order does not apply to the digital labour platform operator.

*When a road transport minimum standards order **applies** to a road transport business*

(3) A road transport minimum standards order ***applies*** to a road transport business if:

(a) the road transport minimum standards order covers the road transport business; and

Authorised Version C2026C00293 registered 15/07/2026

(b) the road transport minimum standards order covers regulated road transport contractors; and

(c) the road transport business receives the services under a services contract of a regulated road transport contractor covered by the road transport minimum standards order; and

(d) the road transport minimum standards order is in operation; and

(e) no other provision of this Act provides, or has the effect, that the road transport minimum standards order does not apply to the road transport business.

Minimum standards order applies in relation to services contracts

(4) A reference in this Act to a minimum standards order applying to a regulated worker is a reference to the order applying to the regulated worker in relation to a services contract.

536JE When a minimum standards order *covers* a regulated worker or a regulated business

(1) A minimum standards order ***covers*** a regulated worker or a regulated business if the order is expressed to cover the regulated worker or the regulated business.

Effect of other provisions of this Act, FWC orders or court orders on coverage

(2) A minimum standards order also ***covers*** a regulated worker or a regulated business if any of the following provides, or has the effect, that the order covers the regulated worker or the regulated business:

(a) a provision of this Act;

(b) an FWC order made under a provision of this Act;

(c) an order of a court.

(3) Despite subsections (1) and (2), a minimum standards order does not cover a regulated worker or a regulated business if any of the

Authorised Version C2026C00293 registered 15/07/2026

following provides, or has the effect, that the order does not cover the regulated worker or the regulated business:

(a) a provision of this Act;

(b) an FWC order made under a provision of this Act;

(c) an order of a court.

Minimum standards orders that have ceased to operate

(4) Despite subsections (1) and (2), a minimum standards order that has ceased to operate does not cover a regulated worker or a regulated business.

536JF When a minimum standards order is in operation

When a minimum standards order comes into operation

(1) A minimum standards order comes into operation on the day specified in the order.

(2) The specified day must not be earlier than the day on which the minimum standards order is made.

(2A) The specified day for an employee-like worker minimum standards order must be a day that the FWC is satisfied will provide sufficient time for the FWC to undertake a reasonable period of consultation after the relevant notice of intent for the order was published, having regard to the unique nature of digital platform work.

(3) The specified day for a road transport minimum standards order must not be earlier than 12 months after the relevant notice of intent for the order was published.

(3A) Despite subsection (3), the specified day may be a day not earlier than 6 months after the relevant notice of intent for the order was published, if the FWC is satisfied that there are circumstances that urgently require specifying such a day.

Authorised Version C2026C00293 registered 15/07/2026

When a determination varying or revoking a minimum standards order comes into operation

(4) A determination varying or revoking a minimum standards order 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.

Minimum standards orders operate until revoked

(6) A minimum standards order continues in operation until it is revoked.

(6A) The ***relevant notice of intent*** for an employee-like worker minimum standards order is the notice of intent published under subsection 536KAA(1) at the same time as the draft of the employee-like worker minimum standards order is made.

(7) The ***relevant notice of intent*** for a road transport minimum standards order is the notice of intent published under subsection 536KB(1) at the same time as the draft of the road transport minimum standards order is made.

536JG When minimum standards guidelines *cover* a regulated worker or a regulated business

(1) Minimum standards guidelines ***cover*** a regulated worker or a regulated business if the guidelines are expressed to cover the regulated worker or the regulated business.

Effect of other provisions of this Act, FWC orders or court orders on coverage

(2) Minimum standards guidelines also ***cover*** a regulated worker or a regulated business if any of the following provides, or has the effect, that the guidelines cover the regulated worker or the regulated business:

(a) a provision of this Act;

Authorised Version C2026C00293 registered 15/07/2026

(b) an FWC order made under a provision of this Act;
(c) an order of a court.

(3) Despite subsections (1) and (2), minimum standards guidelines do not cover a regulated worker or a regulated business if any of the following provides, or has the effect, that the guidelines do not cover the regulated worker or the regulated business:
(a) a provision of this Act;
(b) an FWC order made under a provision of this Act;
(c) an order of a court.

Minimum standards guidelines that have ceased to operate

(4) Despite subsections (1) and (2), minimum standards guidelines that have ceased to operate do not cover a regulated worker or a regulated business.

536JH When minimum standards guidelines are in operation

When minimum standards guidelines come into operation

(1) Minimum standards guidelines come into operation on the day specified in the guidelines.

(2) The specified day must not be earlier than the day on which the minimum standards guidelines are made.

When a determination varying or revoking minimum standards guidelines comes into operation

(3) A determination varying or revoking minimum standards guidelines comes into operation on the day specified in the determination.

(4) The specified day must not be earlier than the day on which the determination is made.

Authorised Version C2026C00293 registered 15/07/2026

Minimum standards guidelines operate until revoked

(5) Minimum standards guidelines continue in operation until they are revoked.

Subdivision B—Coverage and operation of collective agreements

536JJ Contravening a collective agreement

A person must not contravene a term of a collective agreement.

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

Note 2: A person does not contravene a term of a collective agreement unless the agreement applies to the person: see section 536JK.

536JK The significance of a collective agreement applying to a person

(1) A collective agreement does not impose obligations on a person, and a person does not contravene a term of a collective agreement, unless the agreement applies to the person.

(2) A collective agreement does not give a person an entitlement unless the agreement applies to the person.

536JL When a collective agreement *applies* to a person

*When a collective agreement **applies** to a regulated worker*

(1) A collective agreement ***applies*** to a regulated worker if:
  (a) the collective agreement covers the regulated worker; and
  (b) the collective agreement is in operation; and
  (c) no other provision of this Act provides, or has the effect, that the collective agreement does not apply to the regulated worker.

Authorised Version C2026C00293 registered 15/07/2026

*When a collective agreement **applies** to a regulated business*

(2) A collective agreement ***applies*** to a regulated business if:

(a) the collective agreement covers the regulated business; and

(b) the collective agreement covers regulated workers; and

(c) if the regulated business is a digital labour platform operator:

(i) the digital labour platform operator directly or indirectly engages, under services contracts, employee-like workers covered by the collective agreement who perform work through or by means of a digital labour platform operated by the digital platform operator; or

(ii) the digital labour platform operator arranges or facilitates services contracts, through or by means of a digital labour platform operated by the digital platform operator, under which work is performed by employee-like workers covered by the collective agreement; and

(d) if the regulated business is a road transport business—the road transport business receives services under services contracts under which the regulated road transport contractors perform work; and

(e) no other provision of this Act provides, or has the effect, that the collective agreement does not apply to the regulated business.

Collective agreement applies in relation to services contracts

(3) A reference in this Act to a collective agreement applying to a regulated worker is a reference to the collective agreement applying to the regulated worker in relation to a services contract.

536JM When a collective agreement *covers* a regulated worker, a regulated business or an organisation

(1) A collective agreement ***covers*** a regulated worker, a regulated business or an organisation if the agreement is expressed to cover the regulated worker, the regulated business or the organisation.

Authorised Version C2026C00293 registered 15/07/2026

Effect of other provisions of this Act, FWC orders or court orders on coverage

(2) A collective agreement also ***covers*** a regulated worker, a regulated business or an organisation if any of the following provides, or has the effect, that the agreement covers the regulated worker, the regulated business or the organisation:
  (a) a provision of this Act;
  (b) an FWC order made under a provision of this Act;
  (c) an order of a court.

(3) Despite subsections (1) and (2), a collective agreement does not cover a regulated worker, a regulated business or an organisation if any of the following provides, or has the effect, that the agreement does not cover the regulated worker, the regulated business or the organisation:
  (a) a provision of this Act;
  (b) an FWC order made under a provision of this Act;
  (c) an order of a court.

Collective agreements that have ceased to operate

(4) Despite subsections (1) and (2), a collective agreement that has ceased to operate does not cover regulated worker, a regulated business or an organisation.

536JN When a collective agreement is in operation

When a collective agreement comes into operation

(1) A collective agreement comes into operation:
  (a) on the day that is it is registered under subsection 536MS(1); or
  (b) if a later day is specified in the collective agreement—on that later day.

Authorised Version C2026C00293 registered 15/07/2026

Section 536JN

When a collective agreement is terminated

(2) A collective agreement is terminated:
  (a) at the end of the period of operation specified in the collective agreement as required by paragraph 536MS(3)(a); or
  (b) if an earlier day is specified in a termination notice in relation to the collective agreement that is registered under subsection 536MW(1)—on that day.

Collective agreements operate until terminated

(3) A collective agreement continues in operation until it is terminated.

Interaction with minimum standards orders, etc.

(4) A term of a collective agreement has no effect in relation to a regulated worker in respect of a matter to the extent that the term is detrimental to the regulated worker in any respect, when compared to a minimum standards order or a law of a State or Territory that applies to the regulated worker in relation to that matter.

References to State and Territory laws

(5) Without limiting any other provision of this Act, a reference in this section to a law of a State or Territory:
  (a) includes a reference to a regulation, rule or other instrument (however described) made pursuant to, or for the purposes of, a law of a State or Territory; and
  (b) is a reference to a law of a State or Territory as in force from time to time.

Authorised Version C2026C00293 registered 15/07/2026

Division 3—Exclusion of certain State and Territory laws

536JP Exclusion of certain State and Territory laws

(1) For the purposes of this Chapter, the rights, entitlements, obligations and liabilities of a regulated worker, a regulated business or a party to a services contract are not affected by a law of a State or Territory to the extent that the law would otherwise do one or more of the following:

(a) take or deem the regulated business, regulated worker or party to be an employer or employee, or otherwise treat the regulated business, regulated worker or party as if the regulated business, regulated worker or party, as the case requires, were an employer or employee, for the purposes of a law that relates to one or more workplace relations matters (or provide a means for the regulated business, regulated worker or party to be so taken, deemed or treated);

(b) confer or impose rights, entitlements, obligations or liabilities on the regulated business, regulated worker or party in relation to matters that, in an employment relationship, would be workplace relations matters (or provide a means for rights, entitlements, obligations or liabilities in relation to such matters to be conferred or imposed on the regulated business, regulated worker or party);

(c) without limiting paragraphs (a) and (b)—expressly provide for a court, commission or tribunal to do any of the following in relation to a services contract on an unfairness ground:

(i) make an order or determination (however described) setting aside, or declaring to be void or otherwise unenforceable, all or part of the services contract;

(ii) make an order or determination (however described) amending or varying all or part of the services contract.

Note 1: For the meaning of ***workplace relations matter***, see section 536JQ.

Note 2: For the meaning of ***unfairness ground***, see section 536JR.

Authorised Version C2026C00293 registered 15/07/2026

(2) The rights, entitlements, obligations and liabilities of a regulated business, a regulated worker or a party to a services contract are not affected by a law of a State or Territory that is specified in regulations made for the purposes of this subsection, to the extent that the law is so specified.

(3) Subsection (1) does not apply in relation to:

(a) a law of a State or Territory, to the extent that the law deals with matters relating to outworkers (including entry of a representative of a trade union to premises for a purpose connected with outworkers), other than matters mentioned in paragraph (1)(c); or

(b) any of the following laws:

(i) Chapter 6 of the *Industrial Relations Act 1996* (NSW) (and any other provision of that Act to the extent that it relates to, or has effect for the purposes of, a provision of Chapter 6);

(ii) the *Owner Drivers and Forestry Contractors Act 2005* (Vic.); or

(c) a law of a State or Territory that is specified in regulations made for the purposes of this paragraph, to the extent that the law is so specified.

Note: For interaction of these laws with minimum standards orders, see section 536JS.

(4) To avoid doubt, subsection (2) has effect even if a law specified in regulations made under that subsection:

(a) is a law referred to in paragraph (3)(a) or (3)(b); or

(b) deals with matters that, because of subsection 536JQ(2), are not workplace relations matters.

(5) Without limiting any other provision of this Act, a reference in this section to a law of a State or Territory:

(a) includes a reference to a regulation, rule or other instrument (however described) made pursuant to, or for the purposes of, a law of a State or Territory; and

Authorised Version C2026C00293 registered 15/07/2026

(b) is a reference to a law of a State or Territory as in force from time to time.

536JQ What are *workplace relations matters*

(1) Subject to subsection (2), for the purposes of this Chapter, ***workplace relations matter*** means any of the following matters:

(a) remuneration, allowances or other amounts payable to employees;

(b) leave entitlements of employees;

(c) hours of work of employees;

(d) enforcing or terminating contracts of employment;

(e) making, enforcing or terminating agreements (not being contracts of employment) determining terms and conditions of employment;

(f) disputes between employees and employers, or the resolution of such disputes;

(g) industrial action by employees or employers;

(h) any other matter that is substantially the same as a matter that relates to employees or employers and that is dealt with by or under:

(i) this Act; or

(ii) the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*; or

(iii) a State or Territory industrial law;

unless the matter is specified in regulations made for the purposes of this paragraph;

(i) any other matter specified in regulations made for the purposes of this paragraph.

(2) For the purposes of subsection (1), none of the following is a ***workplace relations matter***:

(a) prevention of discrimination or promotion of equal employment opportunity, but only if the State or Territory law concerned is neither a State or Territory industrial law nor contained in such a law;

Authorised Version C2026C00293 registered 15/07/2026

(b) superannuation;
(c) workers' compensation;
(d) occupational health and safety;
(e) child labour;
(f) the observance of a public holiday, except the rate of payment of an employee for the public holiday;
(g) deductions from wages or salaries;
(h) industrial action affecting essential services;
(i) attendance for service on a jury;
(j) professional or trade regulation;
(k) consumer protection;
(l) taxation;
(m) any other matter specified in regulations made for the purposes of this paragraph.

536JR What is an *unfairness ground*

(1) Subject to subsection (2), for the purposes of this Chapter, each of the following grounds is an ***unfairness ground*** in relation to a services contract:
(a) the services contract is unfair;
(b) the services contract is harsh or unreasonable;
(c) the services contract is unjust;
(d) the services contract is against the public interest;
(e) the services contract is designed to, or does, avoid the provisions of:
(i) this Act; or
(ii) the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*; or
(iii) a State or Territory industrial law; or
(iv) an award, agreement or other instrument made under a law referred to in subparagraph (i), (ii) or (iii);
(f) the services contract provides for remuneration at a rate that is, or is likely to be, less than the rate of remuneration for an employee performing similar work;

Authorised Version C2026C00293 registered 15/07/2026

(g) any other ground that is substantially the same as a ground specified in any of paragraphs (a) to (f);

(h) any other ground specified in regulations made for the purposes of this paragraph.

(2) A ground specified in subsection (1) is not an ***unfairness ground*** in relation to a services contract to the extent that the ground relates to matters that, because of subsection 536JQ(2), are not workplace relations matters.

536JS Interaction of minimum standards orders with State and Territory laws

(1) A minimum standards order prevails over a law of a State or Territory, to the extent of any inconsistency.

(1A) It is the intent of the Parliament that, for an employee-like worker or digital labour platform operator to whom an employee-like worker minimum standards order applies in relation to a services contract, this Chapter applies to the exclusion of the laws described in subsection 536JP(3) to the extent that those laws would otherwise affect the rights, entitlements, obligations and liabilities of the employee-like worker or digital labour platform operator in relation to the services contract.

(2) Despite subsections (1) and (1A), a term of a minimum standards order applies subject to the following:

(a) a law of a State or Territory specified in regulations made for the purposes of this paragraph, to the extent that the law is so specified;

(b) a law of a State or Territory that provides for rights or remedies by reference to a law described in paragraph (a).

(3) Without limiting any other provision of this Act, a reference in this section to a law of a State or Territory:

(a) includes a reference to a regulation, rule or other instrument (however described) made pursuant to, or for the purposes of, a law of a State or Territory; and

Authorised Version C2026C00293 registered 15/07/2026

(b) is a reference to a law of a State or Territory as in force from time to time.

536JT Authorisation of conduct for the purposes of the *Competition and Consumer Act 2010*

Conduct in accordance with order or collective agreement

(1) For the purposes of subsection 51(1) of the *Competition and Consumer Act 2010*, and the Competition Code within the meaning of that Act, anything done in accordance with a minimum standards order, minimum standards guidelines or a collective agreement by a person or entity covered by the order, guidelines or agreement is specified in and specifically authorised by this Act.

Making a collective agreement

(2) For the purposes of subsection 51(1) of the *Competition and Consumer Act 2010*, and the Competition Code within the meaning of that Act, making a collective agreement by a person or entity is specified in and specifically authorised by this Act.

Conduct in preparation for or incidental to making or applying for registration of a collective agreement

(3) For the purposes of subsection 51(1) of the *Competition and Consumer Act 2010*, and the Competition Code within the meaning of that Act, anything done by a person or entity in preparation for, or incidental to, making, or applying for registration of, a collective agreement is specified in and specifically authorised by this Act.

Certain conduct not protected

(4) Despite subsections (1), (2) and (3), conduct referred to in those subsections is not specified in or specifically authorised by this Act if the conduct is:

(a) making a contract or arrangement, or arriving at an understanding, that is or contains a cartel provision that satisfies the purpose condition in either

Authorised Version C2026C00293 registered 15/07/2026

paragraph 45AD(3)(a) or 45AD(3)(b) of the *Competition and Consumer Act 2010* or the Competition Code within the meaning of that Act; or

(b) boycott conduct within the meaning of subsection 87AA(2) of the *Competition and Consumer Act 2010* or the Competition Code within the meaning of that Act; or

(c) done in accordance with a term of a collective agreement, to the extent that the term has no effect because of subsection 536MX(1) or (2) of this Act (about matters in respect of which a collective agreement may not be made, or that are primarily of a commercial nature).

Authorised Version C2026C00293 registered 15/07/2026

Part 3A-2—Minimum standards for regulated workers

Division 1—Introduction

536JV Guide to this Part

This Part is about setting minimum standards for certain regulated workers, specifically, employee-like workers and regulated road transport contractors.

Division 2 of this Part sets out the minimum standards objective to which the FWC must have regard when performing a function or exercising a power under this Part.

Division 3 empowers the FWC to make minimum standards orders for regulated workers, which set minimum standards to which they are entitled in relation to certain matters including payment terms and working time.

Division 4 empowers the FWC to make minimum standards guidelines for regulated workers.

Division 5 provides for regulations to be made in relation to internal review of certain decisions.

536JW Meaning of employee and employer

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

Authorised Version C2026C00293 registered 15/07/2026

Division 2—The minimum standards objective

536JX The minimum standards objective

In performing a function or exercising a power under this Part, the FWC must take into account the need for an appropriate safety net of minimum standards for regulated workers, having regard to the following:

(a) the need for standards that:

(i) are clear and simple; and

(ii) are fair and relevant; and

(iii) recognise the perspectives of regulated workers, including their skills, the value of the work they perform and their preferences about their working arrangements; and

(iv) do not change the form of the engagement of regulated workers from independent contractor to employee; and

(v) do not give preference to one business model or working arrangement over another; and

(vi) are tailored to the relevant industry, occupation or sector and the relevant business models; and

(vii) are tailored to the type of work, working arrangements and regulated worker preferences; and

(viii) reflect the differences in the form of engagement of regulated workers as independent contractors to the form of engagement of employees; and

(ix) have regard to the ability of regulated workers to perform work under services contracts for multiple businesses, and the fact that the work may be performed simultaneously;

(b) in addition to the other matters provided for in this subsection, the need for standards that deal with minimum rates of pay that:

Authorised Version C2026C00293 registered 15/07/2026

(i) take into account costs necessarily incurred by regulated workers directly arising from the performance of a services contract; and

(ii) take into account safety net minimum standards that apply to employees performing comparable work; and

(iii) do not change the form of the engagement of regulated workers;

(c) the need to avoid unreasonable adverse impacts upon the following:

(i) sustainable competition among industry participants;

(ii) business costs, regulatory burden, sustainability, innovation, productivity or viability;

(iii) administrative and compliance costs for industry participants;

(iv) the national economy;

(v) persons or bodies that use or rely on the work performed by regulated workers, or the services received under services contracts for the performance of that work;

(d) the need to consider other orders or instruments (however described) made under this Chapter and to avoid unnecessary overlap of such orders or instruments.

This is the ***minimum standards objective***.

Authorised Version C2026C00293 registered 15/07/2026

Division 3—Minimum standards orders

Subdivision A—General matters

536JY Minimum standards orders

(1) The FWC may make an order (a ***minimum standards order***) that sets standards for:
  (a) employee-like workers; or
  (b) regulated road transport contractors.

(2) A minimum standards order for employee-like workers is an ***employee-like worker minimum standards order***.

(3) A minimum standards order for regulated road transport contractors is a ***road transport minimum standards order***.

  Note: The FWC must be constituted by an Expert Panel for the purposes of making a road transport minimum standards order (see subsection 617(10B)).

(4) The FWC may make a minimum standards order under this section:
  (a) on its own initiative; or
  (b) on application under subsection 536JZ(1).

536JZ Applications for minimum standards orders

(1) Any of the following may apply to the FWC for the making of a minimum standards order:
  (a) an organisation that is entitled to represent the industrial interests of one or more regulated workers who would be covered by the proposed minimum standards order;
  (b) an organisation that is entitled to represent the industrial interests of one or more of the regulated businesses that would be covered by the proposed minimum standards order;

Authorised Version C2026C00293 registered 15/07/2026

(c) a regulated business that is included in a class of regulated businesses that would be covered by the proposed minimum standards order;

(d) the Minister.

Note: An Expert Panel can hear applications under this Act for the road transport industry together: see subsection 582(4).

Matters to be specified in an application

(2) An application under subsection (1) must specify whether it is an application for an employee-like worker minimum standards order or a road transport minimum standards order.

(3) An application for the making of a minimum standards order must specify the class of regulated workers to be covered by the order.

(3A) An application for the making of a minimum standards order must specify the class of regulated businesses to be covered by the order.

(4) Without limiting the way in which a class may be described for the purposes of subsection (3) or (3A), the class may be described by reference to a particular industry or sector, or part of an industry or sector, or particular kinds of work.

Subdivision B—Matters relating to employee-like worker minimum standards orders

536K Particular matters FWC must take into account in making a decision on an employee-like worker minimum standards order

(1) This section applies to a decision to make or vary, or not to make or vary, an employee-like worker minimum standards order, other than a decision of the FWC to refuse to consider an application to make or vary such an order.

(2) Before making a decision to which this section applies, the FWC must consider whether, on the whole, the persons included (or purportedly included) in the class of employee-like workers to be

Authorised Version C2026C00293 registered 15/07/2026

covered by the order, or the order as proposed to be varied, are employee-like workers.

(3) If the FWC is not satisfied that, on the whole, the persons included (or purportedly included) in the class of employee-like workers to be covered by the minimum standards order, or the order as proposed to be varied, are employee-like workers, the FWC must decide to refuse to consider the application, or not to make or vary the order, as the case requires.

(4) The FWC:

(a) must not make or vary the employee-like worker minimum standards order unless there has been genuine engagement with the parties to be covered; and

(b) must not make or vary the employee-like worker minimum standards order unless the consultation process set out in Subdivision BA has been followed; and

(c) must have regard to choice and flexibility in working arrangements in making or varying the employee-like worker minimum standards order.

Subdivision BA—Consultation process for employee-like worker minimum standards orders

536KAA FWC to prepare and publish a draft of an employee-like worker minimum standards order

(1) Before making an employee-like worker minimum standards order, the FWC must:

(a) publish a notice (a ***notice of intent***) stating that the FWC proposes to make an employee-like worker minimum standards order; and

(b) publish a draft of the proposed employee-like worker minimum standards order.

(2) The FWC must publish the notice of intent and the draft of the employee-like worker minimum standards order on the FWC's website and by any other means the FWC considers appropriate.

Authorised Version C2026C00293 registered 15/07/2026

536KAB Affected entities to have a reasonable opportunity to make submissions on a draft employee-like worker minimum standards order

(1) The FWC must ensure that affected entities have a reasonable opportunity to make written submissions to the FWC for its consideration in relation to the draft of an employee-like worker minimum standards order published under subsection 536KAA(1)(b), having regard to the unique nature of digital platform work.

(2) The FWC must publish submissions made to the FWC.

(3) However, if a submission made by an entity includes information that is claimed by the entity to be confidential or commercially sensitive, and the FWC is satisfied that the information is confidential or commercially sensitive, the FWC:

(a) may decide not to publish the information; and

(b) may instead publish:

(i) a summary of the information which contains sufficient detail to allow a reasonable understanding of the substance of the information (without disclosing anything that is confidential or commercially sensitive); or

(ii) if the FWC considers that it is not practicable to prepare a summary that would comply with subparagraph (i)—a statement that confidential or commercially sensitive information in the submission has not been published.

(4) The publishing of material under subsections (2) and (3) must be on the FWC's website and by any other means the FWC considers appropriate.

(5) A reference in this Act (other than in this section) to a submission under this section includes a reference to a summary or statement referred to in paragraph (3)(b).

Authorised Version C2026C00293 registered 15/07/2026

(6) For the purposes of subsection (1), an ***affected entity***, in relation to a draft employee-like worker minimum standards order published under paragraph 536KAA(1)(b), is:

(a) a person or body likely to be affected by the making of an employee-like worker minimum standards order based on the draft; or

(b) a person or body prescribed by the regulations, or belonging to a class of persons or bodies prescribed by the regulations.

536KAC Hearings in relation to draft order

The FWC may, but is not required to, hold a hearing in relation to a draft employee-like worker minimum standards order.

536KAD Finalising draft order

(1) The FWC may make any changes it thinks appropriate to a draft employee-like worker minimum standards order.

(2) If changes made under subsection (1) are significant, the FWC must:

(a) decide not to make the employee-like worker minimum standards order based on the draft; and

(b) publish a subsequent notice of intent under subsection 536KAA(1) in relation to the revised draft employee-like worker minimum standards order, and publish the revised draft; and

(c) follow the process set out in section 536KAB in relation to the revised draft employee-like worker minimum standards order, with the period of consultation under that section to be a period that the FWC is satisfied is a reasonable period of consultation, having regard to the unique nature of digital platform work.

536KAE Decision not to make order based on the draft

The FWC may decide that no employee-like worker minimum standards order is to be made based on the draft. If the FWC does

Authorised Version C2026C00293 registered 15/07/2026

so, the FWC must publish notice of the decision on its website and by any other means the FWC considers appropriate.

Subdivision C—Matters relating to road transport minimum standards orders

536KA Particular matters FWC must take into account in making a decision on a road transport minimum standards order

(1) This section applies if:

(a) an application is made for a road transport minimum standards order under subsection 536JZ(1) or for a variation of a road transport minimum standards order under section 536KP; or

(b) the FWC is considering making or varying a minimum standards order on its own initiative.

(2) The FWC:

(a) must not make or vary the road transport minimum standards order unless there has been genuine engagement with the parties to be covered; and

(b) must not make or vary the road transport minimum standards order unless the Road Transport Advisory Group has been consulted; and

(c) must not make or vary the road transport minimum standards order unless the consultation process set out in Subdivision D has been followed; and

(d) must have regard to the commercial realities of the road transport industry; and

(e) must be satisfied that making or varying the road transport minimum standards order will not unduly affect the viability and competitiveness of owner drivers or other similar persons.

Authorised Version C2026C00293 registered 15/07/2026

Subdivision D—Consultation process for road transport minimum standards orders

536KB FWC to prepare and publish a draft of a road transport minimum standards order

(1) Before making a road transport minimum standards order, the FWC must:

(a) publish a notice (a ***notice of intent***) stating that the FWC proposes to make a road transport minimum standards order; and

(b) publish a draft of the proposed road transport minimum standards order.

(2) The FWC must publish the notice of intent and the draft of the road transport minimum standards order on the FWC's website and by any other means the FWC considers appropriate.

536KC Affected persons and bodies to have a reasonable opportunity to make and comment on a draft road transport minimum standards order

(1) The FWC must ensure that affected entities have a reasonable opportunity to make written submissions to the FWC for its consideration in relation to the draft of a road transport minimum standards order published under subsection 536KB(2).

(2) The FWC must publish submissions made to the FWC.

(3) However, if a submission made by an entity includes information that is claimed by the entity to be confidential or commercially sensitive, and the FWC is satisfied that the information is confidential or commercially sensitive, the FWC:

(a) may decide not to publish the information; and

(b) may instead publish:

(i) a summary of the information which contains sufficient detail to allow a reasonable understanding of the substance of the information (without disclosing

Authorised Version C2026C00293 registered 15/07/2026

anything that is confidential or commercially sensitive); or

(ii) if the FWC considers that it is not practicable to prepare a summary that would comply with subparagraph (i)—a statement that confidential or commercially sensitive information in the submission has not been published.

(4) The publishing of material under subsections (2) and (3) must be on the FWC's website and by any other means the FWC considers appropriate.

(5) A reference in this Act (other than in this section) to a submission under this section includes a reference to a summary or statement referred to in paragraph (3)(b).

(6) For the purposes of subsection (1), an ***affected entity***, in relation to a draft road transport minimum standards order published under paragraph 536KB(1)(b) is:

(a) a person or body likely to be affected by the making of a road transport minimum standards order based on the draft; or

(b) a person or body prescribed by the regulations, or belonging to a class of persons or bodies prescribed by the regulations.

536KD Hearings in relation to draft order

The FWC may, but is not required to, hold a hearing in relation to a draft road transport minimum standards order.

536KE Finalising draft order

(1) The FWC may make any changes it thinks appropriate to a draft road transport minimum standards order.

(2) If changes made under subsection (1) are significant, the FWC must:

(a) decide not to make the road transport minimum standards order based on the draft; and

(b) publish a subsequent notice of intent under subsection 536KB(1) in relation to the revised draft road

Authorised Version C2026C00293 registered 15/07/2026

transport minimum standards order, and publish the revised draft; and

(c) follow the process set out in section 536KC in relation to the revised draft road transport minimum standards order (with the period of consultation under that section to be no shorter than 12 months starting when the subsequent notice of intent and the revised draft required by paragraph (b) of this subsection were published).

536KF Decision not to make order based on the draft

The FWC may decide that no road transport minimum standards order is to be made based on the draft. If the FWC does so, the FWC must publish notice of the decision on its website and by any other means the FWC considers appropriate.

Subdivision E—Decisions on minimum standards orders

536KG Decisions on applications for minimum standards orders

(1) If an application for a minimum standards order is made to the FWC under subsection 536JZ(1), the FWC may decide to:

(a) refuse to consider the application; or

(b) make a minimum standards order; or

(c) not make a minimum standards order; or

(d) if the FWC considers it appropriate to do so, instead make minimum standards guidelines under section 536KR, as if the application had been an application under subsection 536KS(1) for minimum standards guidelines in relation to the regulated workers covered by the application under subsection 536JZ(1).

(2) Without limiting subsection (1), the FWC may refuse to consider the application if it is not consistent with a direction of the President under section 582(4D) (prioritisation).

Authorised Version C2026C00293 registered 15/07/2026

536KH Terms that must be included in an employee-like worker minimum standards order

Terms relating to coverage

(1) An employee-like worker minimum standards order must include terms setting out in accordance with this section:
  (a) the digital platform work covered by the employee-like worker minimum standards order; and
  (b) the digital labour platform operators covered by the employee-like worker minimum standards order; and
  (c) the employee-like workers covered by the employee-like worker minimum standards order.

(2) An employee-like worker minimum standards order must be expressed to cover:
  (a) specified digital labour platform operators; and
  (b) specified employee-like workers who:
    (i) are engaged through or by means of a digital labour platform operated by a digital platform operator covered by the employee-like worker minimum standards order; or
    (ii) perform work under a contract arranged or facilitated through or by means of a digital labour platform operated by a digital platform operator covered by the employee-like worker minimum standards order.

(3) An employee-like worker minimum standards order must specify the digital labour platform operators that are primarily responsible for providing the entitlements of specified employee-like workers.

(4) For the purposes of subsections (1), (2) and (3):
  (a) digital labour platform operators must be specified by inclusion in a specified class or specified classes; and
  (b) employee-like workers must be specified by inclusion in a specified class or specified classes.

Authorised Version C2026C00293 registered 15/07/2026

(5) Without limiting the way in which a class may be described for the purposes of subsection (4), the class may be described by reference to a particular industry or sector, or part of an industry or sector, or particular kinds of work.

536KJ Terms that must be included in a road transport minimum standards order

Terms relating to coverage

(1) A road transport minimum standards order must include terms setting out in accordance with this section:
   (a) the work in the road transport industry covered by the road transport minimum standards order; and
   (b) the regulated road transport contractors covered by the road transport minimum standards order; and
   (c) the road transport businesses covered by the road transport minimum standards order.

(2) A road transport minimum standards order must be expressed to cover:
   (a) specified road transport businesses; and
   (b) specified regulated road transport contractors.

(3) For the purposes of subsection (2):
   (a) road transport businesses must be specified by inclusion in a specified class or specified classes; and
   (b) regulated road transport contractors must be specified by inclusion in a specified class or specified classes.

(4) Without limiting the way in which a class may be described for the purposes of subsection (3), the class may be described by reference to a particular industry or sector, or part of an industry or sector, or particular kinds of work.

Authorised Version C2026C00293 registered 15/07/2026

536KK Term about settling disputes must be included in a minimum standards order

A minimum standards order must include a term that provides a procedure for settling disputes about any matters arising under the order.

536KL Terms that may be included in a minimum standards order

(1) A minimum standards order may include terms about any of the following matters:

(a) payment terms;

(b) deductions;

(d) record-keeping in relation to matters covered by or required by this Act, or by an order or instrument made under this Act, being matters that concern regulated workers or regulated businesses;

(e) insurance;

(f) consultation;

(g) representation;

(h) delegates' rights;

(i) cost recovery.

(2) The matters listed in subsection (1) do not limit the terms that may be included in a minimum standards order.

536KM Terms that must not be included in a minimum standards order

(1) A minimum standards order must not include terms about any of the following matters:

(a) overtime rates;

(b) rostering arrangements;

(c) matters that are primarily of a commercial nature that do not affect the terms and conditions of engagement of regulated workers covered by the minimum standards order;

Authorised Version C2026C00293 registered 15/07/2026

(d) a term that would change the form of the engagement or the status of regulated workers covered by the minimum standards order including, but not limited to, a term that deems a regulated worker to be an employee;

(e) a matter relating to work health and safety that is otherwise comprehensively dealt with by a law of the Commonwealth, a State or a Territory;

(f) a matter prescribed by the regulations, or belonging to a class of matter prescribed by the regulations for the purposes of this paragraph.

(3) For the purposes of paragraph (1)(e):

(a) the regulations may specify that a particular matter, or a matter included in a class of matters, is, or is not, dealt with comprehensively by a law of the Commonwealth, a State or a Territory; and

(b) the regulations may prescribe one or more laws of the Commonwealth, a State or a Territory to which that paragraph does, or does not, not apply.

536KMA Further terms that must not be included in an employee-like worker minimum standards order

(1) In addition to the matters in section 536KM, an employee-like worker minimum standards order must not include terms about any of the following matters:

(a) penalty rates for work performed at particular times or on particular days (including, but not limited to, loadings and shift allowances);

(b) payment for:

(i) time before the acceptance of an engagement on a digital labour platform; or

(ii) time in between the completion of an engagement and the commencement of the next engagement on a digital labour platform;

(c) minimum periods of engagement or a minimum payment referable to a period of minimum engagement.

Authorised Version C2026C00293 registered 15/07/2026

(2) Despite subsection (1), a term about a matter mentioned in subsection (1) may be included in an employee-like worker minimum standards order if the FWC is satisfied that the inclusion of the term is appropriate, having regard to:

(a) the type of work performed by the employee-like workers covered by the employee-like worker minimum standards order; and

(b) the digital labour platform operators covered by the employee-like worker minimum standards order.

536KN Further terms that must not be included in a road transport minimum standards order

(1) In addition to the matters in section 536KM, a road transport minimum standards order must not include terms about any of the following matters:

(a) a matter relating to road transport that is otherwise comprehensively dealt with:

(i) by the Heavy Vehicle National Law as set out in the Schedule to the *Heavy Vehicle National Law Act 2012* (Qld); or

(ii) by another law of the Commonwealth, a State or a Territory;

(b) a matter prescribed by the regulations, or belonging to a class of matter prescribed by the regulations.

(2) For the purposes of paragraph (1)(b):

(a) the regulations may specify that a particular matter, or a matter included in a class of matters, is, or is not, dealt with comprehensively by the Heavy Vehicle National Law as set out in the Schedule to the *Heavy Vehicle National Law Act 2012* (Qld) or another law of the Commonwealth, a State or a Territory; and

(b) the regulations may prescribe one or more laws of the Commonwealth, a State or a Territory to which subparagraph (1)(a)(ii) does, or does not, not apply.

Authorised Version C2026C00293 registered 15/07/2026

536KO Achieving the minimum standards objective

A minimum standards order 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 minimum standards objective.

536KP Applications to vary or revoke minimum standards orders

Any of the following may apply to the FWC for a determination varying or revoking a minimum standards order:

(a) an organisation that is entitled to represent, or another body that represents, the industrial interests of one or more regulated workers covered by the minimum standards order or who would be covered by the minimum standards order as proposed to be varied;

(b) an organisation that is entitled to represent, or another body that represents, the industrial interests of one or more of the regulated businesses covered by the minimum standards order, or that would be covered by the minimum standards order as proposed to be varied;

(c) a regulated business covered by the minimum standards order or that would be covered by the proposed minimum standards order as proposed to be varied;

(ca) a national or State council or federation that is effectively representative of a significant number of organisations or bodies mentioned in paragraph (a) or (b);

(d) the Minister.

536KQ FWC may vary or revoke minimum standards orders if consistent with the minimum standards objective

(1) The FWC may make a determination varying or revoking a minimum standards order if the FWC is satisfied that making the determination is consistent with the minimum standards objective.

Note: In the case of a road transport minimum standards order, the FWC must also consider the road transport objective.

Authorised Version C2026C00293 registered 15/07/2026

(2) The FWC may make a determination varying a minimum standards order in such a way that not all of the elements of the variation sought in an application under section 536KP are implemented, including by refusing to make a variation to the extent that it would result in the order covering persons who are not regulated workers.

(3) The FWC may make a determination varying a minimum standards order to remove an ambiguity or uncertainty or to correct an error.

(4) The FWC may make a determination varying or revoking a minimum standards order:
  (a) on its own initiative; or
  (b) on application under section 536KP.

(5) The FWC may also make a determination under subsection (1) varying or revoking a minimum standards order to give effect to a decision under paragraph 536KQS(2)(a) or (b) to vary or revoke the minimum standards order.

Note: Subsection 536KQS(1) requires the FWC to consider whether to vary or revoke a minimum standards order after a deferral declaration, a deferral determination, a suspension declaration or a suspension determination is made in relation to the order.

Authorised Version C2026C00293 registered 15/07/2026

Division 3A—Deferral and suspension of minimum standards orders

Subdivision A—Ministerial declarations to defer or suspend minimum standards orders

536KQA Minister may make a declaration deferring the operation or application of a minimum standards order

(1) If the Minister considers it is in the public interest to do so, the Minister may, by notifiable instrument, make a declaration (a ***deferral declaration***) that defers:

(a) the coming into operation of a minimum standards order; or

(b) the application of:

(i) all of the terms of a minimum standards order to a specified class or specified classes of persons; or

(ii) specified terms of a minimum standards order to a specified class or specified classes of persons; or

(iii) specified terms of a minimum standards order to all persons.

(2) A deferral declaration made under paragraph (1)(a) is a ***full deferral declaration***, and a deferral declaration made under paragraph (1)(b) is a ***part deferral declaration***, in relation to the minimum standards order to which the deferral declaration relates.

(3) A deferral declaration in relation to a minimum standards order:

(a) comes into operation on the day on which it is made; and

(b) ceases to be in operation on the day on which the FWC decides under subsection 536KQS(2) whether or not to vary or revoke the minimum standards order.

(4) Without limiting the way in which a class may be described for the purposes of subsection (1), the class may be described by reference to a particular industry or sector, or part of an industry or sector, or particular kinds of work.

Authorised Version C2026C00293 registered 15/07/2026

(5) The Secretary of the Department must publish a deferral declaration on the Department's website as soon as practicable after the deferral declaration is made.

536KQB Limitations on making a deferral declaration

No deferral of minimum standards order that is in operation

(1) The Minister must not make a deferral declaration in relation to a minimum standards order that has already come into operation.

Only one full deferral declaration is permitted etc.

(2) The Minister:
  (a) may only make one full deferral declaration in relation to a particular minimum standards order; and
  (b) must not make a full deferral declaration in relation to a particular road transport minimum standards order if a deferral determination (whether a full deferral determination or a part deferral determination) has previously been made by the FWC in relation to the road transport minimum standards order.

Note: The FWC may make deferral determinations in relation to road transport minimum standards orders under Subdivision B of this Division.

More than one part deferral declaration is permitted

(3) Subject to subsection (4), the Minister may make more than one part deferral declaration in relation to a particular minimum standards order.

(4) If more than one part deferral declaration or part deferral determination is made in relation to the same minimum standards order as permitted by subsection (3) of this section or subsection 536KQK(3), a later part deferral declaration must not have the effect of deferring, or purporting to defer, the application of a term or terms to any person:

Authorised Version C2026C00293 registered 15/07/2026

(a) to whom the terms already apply when the later part deferral declaration is made; or
(b) in relation to whom the application of the terms has previously been deferred.

536KQC Operation of a minimum standards order during deferral

A minimum standards order:

(a) is not in operation during any period when a full deferral declaration in relation to the minimum standards order is in operation; and
(b) is in operation during any period when a part deferral declaration in relation to the minimum standards order is in operation.

Note: Although a minimum standards order is in operation when a part deferral declaration is in operation in relation to the order, the order as a whole will not apply to specified classes of persons, or specified terms of the order will not apply to all persons or specified classes of persons, during that period.

536KQD Minister may make a declaration suspending a minimum standards order

(1) If the Minister considers it is in the public interest to do so, the Minister may, by notifiable instrument, make a declaration (a ***suspension declaration***):
  (a) suspending the operation of a minimum standards order; or
  (b) suspending the application of:
    (i) all of the terms of a minimum standards order to a specified class or specified classes of persons; or
    (ii) specified terms of a minimum standards order to a specified class or specified classes of persons; or
    (iii) specified terms of a minimum standards order to all persons.

(2) A suspension declaration made under paragraph (1)(a) is a ***full suspension declaration***, and a suspension declaration made under paragraph (1)(b) is a ***part suspension declaration***, in relation to the

Authorised Version C2026C00293 registered 15/07/2026

minimum standards order to which the suspension declaration relates.

Suspension declaration must specify period of suspension

(3) A suspension declaration must specify the period of the suspension, which:
  (a) must not be longer than 12 months; and
  (b) must not start before the day on which the suspension declaration is made.

When period of suspension ends

(4) Subject to subsection (5), a period of suspension specified in a suspension declaration ends immediately after the end of the period specified in the suspension declaration under subsection (3).

(5) If a period of suspension has not already ended under subsection (3) when the FWC makes a decision under subsection 536KQS(2) as to whether to vary or revoke the minimum standards order, the period of suspension ends on whichever of the following days is applicable:
  (a) if the FWC decides to vary or revoke the minimum standards order—on the day that the determination made under subsection 536KQ(1) varying or revoking the minimum standards order comes into operation, which must not be later than 12 months after the day on which the suspension declaration was made;
  (b) if the FWC decides not to vary or revoke the minimum standards order:
    (i) 7 days after the day on which the decision is made; or
    (ii) if a 7-day period would result in the suspension lasting longer than 12 months—such shorter period as is specified in the decision, which must be a period that would result in the suspension lasting 12 months or less.

Authorised Version C2026C00293 registered 15/07/2026

Classes

(6) Without limiting the way in which a class may be described for the purposes of subsection (1), the class may be described by reference to a particular industry or sector, or part of an industry or sector, or particular kinds of work.

Orders

(7) If the Minister makes a suspension declaration, the FWC may make any orders it considers appropriate to ensure that no person is unfairly affected by the suspension.

Publication

(8) The Secretary of the Department must publish a suspension declaration on the Department's website as soon as practicable after the suspension declaration is made.

Accrued rights etc.

(9) The making of a suspension declaration does not affect any right or liability that a person acquired, accrued or incurred before the suspension declaration is made.

536KQE Suspension declaration must be made within 12 months of certain dates

Full suspension declaration timing

(1) A full suspension declaration in relation to a minimum standards order must be made within 12 months of the day on which the minimum standards order came into operation.

Part suspension declaration timing

(2) A part suspension declaration in relation to a minimum standards order must be made within 12 months of whichever of the following days is applicable:

Authorised Version C2026C00293 registered 15/07/2026

(a) if the part suspension declaration suspends the application of all of the terms of the minimum standards order to a specified class of persons—the day on which all of the terms of the minimum standards order first applied to the specified class of persons;

(b) if the part suspension declaration suspends the application of all of the terms of the minimum standards order to 2 or more specified classes of persons—the day on which all of the terms of the minimum standards order first applied to at least one of the specified classes of persons (even if all of the terms of the order did not apply to all of the specified classes on that day);

(c) if the part suspension declaration suspends the application of specified terms of the minimum standards order to a specified class of persons—the day on which the specified terms first applied to the specified class of persons;

(d) if the part suspension declaration suspends the application of specified terms of the minimum standards order to 2 or more specified classes of persons—the day on which the specified terms of the minimum standards order first applied to at least one of the specified classes of persons (even if the order did not apply to all of the specified classes on that day);

(e) if the part suspension declaration suspends the application of specified terms of the minimum standards order to all persons—the day on which the specified terms first applied to all persons.

536KQF Operation of a minimum standards order during suspension

A minimum standards order:

(a) is not in operation during any period when a full suspension declaration in relation to the minimum standards order is in operation; and

(b) is in operation during any period when a part suspension declaration in relation to the minimum standards order is in operation.

Authorised Version C2026C00293 registered 15/07/2026

Note: Although a minimum standards order is in operation during a period when a part suspension declaration is in operation in relation to the order, the order as a whole will not apply to specified classes of persons, or specified terms of the order will not apply to all persons or specified classes of persons, during that period.

536KQG Consultation requirements

The Minister is not required to consult any person or body before making a deferral declaration or a suspension declaration.

Subdivision B—FWC may defer or suspend road transport minimum standards orders

536KQH Applications for a deferral determination for a road transport minimum standards order

(1) An application may be made to the FWC for a determination under subsection 536KQJ(1) (a ***deferral determination***) in relation to a road transport minimum standards order.

(2) An application may be made under subsection (1) by any of the following:
  (a) an organisation that is entitled to represent the industrial interests of one or more regulated road transport contractors covered by the road transport minimum standards order;
  (b) an organisation that is entitled to represent the industrial interests of one or more of the road transport businesses covered by the road transport minimum standards order;
  (c) a road transport business covered by the road transport minimum standards order.

Note: An Expert Panel can hear applications under this Act for the road transport industry together: see subsection 582(4).

(3) An application for a deferral determination must not be made in relation to a road transport minimum standards order that has already come into operation.

Authorised Version C2026C00293 registered 15/07/2026

Note: If the road transport minimum standards order concerned comes into operation before the FWC considers the application, the FWC may treat it as a suspension application, see subsection 536KQL(2).

536KQJ FWC may make a determination deferring the operation or application of a road transport minimum standards order

(1) The FWC may, on application under subsection 536KQH(1), make a deferral determination:

(a) that defers the coming into operation of a road transport minimum standards order; or

(b) that defers the application of:

(i) all of the terms of a road transport minimum standards order to a specified class or specified classes of persons; or

(ii) specified terms of a road transport minimum standards order to a specified class or specified classes of persons; or

(iii) specified terms of a road transport minimum standards order to all persons.

(2) A deferral determination made under paragraph (1)(a) is a ***full deferral determination***, and a deferral determination made under paragraph (1)(b) is a ***part deferral determination***, in relation to the road transport minimum standards order to which the deferral determination relates.

(3) A deferral determination in relation to a road transport minimum standards order:

(a) comes into operation on the day on which it is made; and

(b) ceases to be in operation on the day on which the FWC decides under subsection 536KQS(2) whether or not to vary or revoke the road transport minimum standards order.

(4) Without limiting the way in which a class may be described for the purposes of subsection (1), the class may be described by reference to a particular industry or sector, or part of an industry or sector.

Authorised Version C2026C00293 registered 15/07/2026

536KQK Limitations on making a deferral determination

No deferral of road transport minimum standards order that is in operation

(1) The FWC must not make a deferral determination in relation to a road transport minimum standards order that has already come into operation.

Only one full deferral determination is permitted etc.

(2) The FWC:

(a) may only make one full deferral determination in relation to a particular road transport minimum standards order; and

(b) must not make a full deferral determination in relation to a particular road transport minimum standards order if a deferral declaration (whether a full deferral declaration or a part deferral declaration) has previously been made by the Minister in relation to the road transport minimum standards order.

Note: The Minister may make deferral declarations in relation to minimum standards orders under Subdivision A of this Division

More than one part deferral determination is permitted

(3) Subject to subsection (4), the FWC may make more than one part deferral determination in relation to a particular road transport minimum standards order.

(4) If more than one part deferral determination or part deferral declaration is made in relation to the same road transport minimum standards order as permitted by subsection (3) of this section or subsection 536KQB(3), a later part deferral determination must not have the effect of deferring, or purporting to defer, the application of a term to any person or class of persons:

(a) to whom the term already applies when the later part deferral determination is made; or

Authorised Version C2026C00293 registered 15/07/2026

(b) in relation to whom the application of the terms has previously been deferred.

536KQL Decision on an application for a deferral determination in relation to a road transport minimum standards orders

(1) If an application for a deferral determination in relation to a road transport minimum standards order is made, the FWC must:
  (a) consider the application as soon as practicable; and
  (b) consult the Road Transport Advisory Group before making a decision on the application.

(2) If the road transport minimum standards order concerned comes into operation before the FWC makes a decision on the application, the FWC may treat the application as if it were an application for a suspension determination.

(3) The FWC may:
  (a) make the deferral determination under subsection 536KQJ(1); or
  (b) decide not to make the deferral determination.

(4) The FWC must make the deferral determination if, and must not make the deferral determination unless, the FWC is satisfied that:
  (a) the applicant has provided significant new facts or evidence that was not available at the time the FWC decided to make the road transport minimum standards order; and
  (b) the significant new facts or evidence demonstrate that the road transport minimum standards order will not provide, or has not provided, an appropriate safety net of minimum standards for parties in the road transport industry, having regard to the minimum standards objective and the road transport objective.

(5) In considering whether the FWC is satisfied as mentioned in subsection (4), the FWC may have regard to whether one or more previous applications for variation or revocation of the road

Authorised Version C2026C00293 registered 15/07/2026

transport minimum standards order concerned have previously been made.

(6) The FWC must publish a deferral determination on the FWC's website and by any other means the FWC considers appropriate as soon as practicable after making the determination.

536KQM Operation of a road transport minimum standards order during deferral

A road transport minimum standards order:

(a) is not in operation during any period when a full deferral determination in relation to the road transport minimum standards order is in operation; and

(b) is in operation during any period when a part deferral determination is in operation in relation to the road transport minimum standards order.

Note: Although a road transport minimum standards order is in operation during a period when a part deferral determination is in operation in relation to the order, the order as a whole will not apply to specified classes of persons, or specified terms of the order will not apply to all persons or specified classes of persons, during that period.

536KQN Applications for a suspension determination for a road transport minimum standards order

(1) An application may be made to the FWC for a determination (a ***suspension determination***) under subsection 536KQP(1) in relation to a road transport minimum standards order.

(2) An application may be made under subsection (1) by any of the following:

(a) an organisation that is entitled to represent the industrial interests of one or more regulated road transport contractors covered by the road transport minimum standards order;

(b) an organisation that is entitled to represent the industrial interests of one or more of the road transport businesses covered by the road transport minimum standards order;

Authorised Version C2026C00293 registered 15/07/2026

(c) a road transport business covered by the road transport minimum standards order.

Note: An Expert Panel can hear applications under this Act for the road transport industry together: see subsection 582(4).

Timing of application for full suspension determination

(3) An application for a full suspension determination in relation to a road transport minimum standards order must be made within 12 months of the day on which the order came into operation.

Timing of application for part suspension determination

(4) An application for a part suspension determination must be made within 12 months of whichever of the following days is applicable:

(a) if the part suspension determination will suspend the application of all of the terms of the road transport minimum standards order to a specified class—the first day on which all of the terms of the road transport minimum standards order applied to the class of person;

(b) if the part suspension determination will suspend the application of all of the terms of the road transport minimum standards order to 2 or more specified classes of persons—the day on which all of the terms of the road transport minimum standards order first applied to at least one of the specified classes of persons (even if all of the terms of the order did not apply to all of the specified classes on that day);

(c) if the part suspension determination will suspend the application of specified terms of the road transport minimum standards order to a specified class of persons—the first day on which the specified terms applied to the specified class of persons;

(d) if the part suspension determination will suspend the application of specified terms of the road transport minimum standards order to 2 or more specified classes of persons—the day on which the specified terms of the road transport minimum standards order first applied to at least one of the

Authorised Version C2026C00293 registered 15/07/2026

specified classes of persons (even if the order did not apply to all of the specified classes on that day);

(e) if the part suspension determination will suspend the application of specified terms of the road transport minimum standards order to all persons—the first day on which the specified terms applied to all persons.

536KQP FWC may make a determination suspending a road transport minimum standards order

(1) The FWC may, on application under subsection 536KQN(1), make a suspension determination:

(a) suspending the operation of a road transport minimum standards order; or

(b) suspending:

(i) the application of a road transport minimum standards order to a specified class or specified classes of persons; or

(ii) the application of specified terms of a road transport minimum standards order to a specified class or specified classes of persons; or

(iii) the application of specified terms of road transport minimum standards order to all persons.

Note 1: A person may also apply for a variation or revocation of a road transport minimum standards order under section 536KP.

Note 2: Judicial review of decisions of the FWC is available—see paragraph 39B(1A)(c) of the *Judiciary Act 1903*.

(2) A suspension determination made under paragraph (1)(a) is a ***full suspension determination***, and a suspension determination made under paragraph (1)(b) is a ***part suspension determination***, in relation to the road transport minimum standards order to which the suspension determination relates.

Authorised Version C2026C00293 registered 15/07/2026

Suspension determination must specify period of suspension

(3) If the FWC makes a suspension determination in relation to a road transport minimum standards order, the suspension determination must specify the period for which the order is suspended, which:
  (a) must not be a period of more than 12 months; and
  (b) must not start before the day on which the determination is made.

When period of suspension ends

(4) Subject to subsection (5), a period of suspension specified in a suspension determination ends immediately after the end of the period specified in the suspension determination under subsection (3).

(5) If the period of suspension has not already ended under subsection (4) when the FWC makes a decision under subsection 536KQS(2) as to whether to vary or revoke the road transport minimum standards order, the period of suspension ends on whichever of the following days is applicable:
  (a) if the FWC decides to vary or revoke the road transport minimum standards order—on the day that the determination made under subsection 536KQ(1) varying or revoking the minimum standards order comes into operation, which must not be later than 12 months after the day on which the suspension determination was made;
  (b) if the FWC decides not to vary or revoke the road transport minimum standards order:
    (i) 7 days after the day on which the decision is made; or
    (ii) if a 7-day period would result in the suspension lasting longer than 12 months—such shorter period as is specified in the decision, which must be a period that would result in the suspension lasting 12 months or less.

Authorised Version C2026C00293 registered 15/07/2026

Classes

(6) Without limiting the way in which a class may be described for the purposes of subsection (1), the class may be described by reference to a particular industry or sector, or part of an industry or sector.

536KQQ Decision on an application for a suspension determination in relation to a road transport minimum standards orders

(1) If an application for a suspension determination in relation to a road transport minimum standards order is made, the FWC must:
  (a) consider the application as soon as practicable; and
  (b) consult the Road Transport Advisory Group before making a decision on the application.

(2) The FWC may:
  (a) make the suspension determination under subsection 536KQP(1); or
  (b) decide not to make the suspension determination.

(3) The FWC must make the suspension determination if, and must not make the suspension determination unless, the FWC is satisfied that:
  (a) the applicant has provided significant new facts or evidence that was not available at the time the FWC decided to make the road transport minimum standards order; and
  (b) the significant new facts or evidence demonstrate that the road transport minimum standards order will not provide, or has not provided, an appropriate safety net of minimum standards for parties in the road transport industry, having regard to the minimum standards objective and the road transport objective.

(4) In considering whether the FWC is satisfied as mentioned in subsection (3), the FWC may have regard to whether one or more previous applications for variation or revocation of the minimum standards order have previously been made.

Authorised Version C2026C00293 registered 15/07/2026

(5) If the FWC makes the suspension determination, the FWC may make any orders it considers appropriate to ensure that no person is unfairly affected by the suspension.

(6) The FWC must publish a suspension determination on the FWC's website and by any other means the FWC considers appropriate as soon as practicable after making the determination.

(7) The making of a suspension determination does not affect any right or liability that a person acquired, accrued or incurred before the suspension determination is made.

536KQR Operation of a road transport minimum standards order during suspension

A road transport minimum standards order:

(a) is not in operation during any period when a full suspension determination in relation to the road transport minimum standards order is in operation; and

(b) is in operation during any period when a part suspension determination is in operation in relation to the road transport minimum standards order.

Note: Although a road transport minimum standards order is in operation during a period when a part deferral determination is in operation in relation to the order, the order as a whole will not apply to specified classes of persons, or specified terms of the order will not apply to all persons or specified classes of persons, during that period.

Subdivision C—FWC must consider and decide whether or not to vary or revoke a deferred or suspended minimum standards order

536KQS FWC must consider whether to vary or revoke a minimum standards order that has been deferred or suspended

(1) This section applies if:

(a) the Minister makes a deferral declaration or a suspension declaration in relation to a minimum standards order; or

Authorised Version C2026C00293 registered 15/07/2026

(b) the FWC makes a deferral determination or a suspension determination in relation to a road transport minimum standards order.

(2) The FWC must, as soon as practicable, consider whether or not to vary or revoke the minimum standards order. The FWC must:

(a) vary the minimum standards order under subsection 536KQ(1); or

(b) revoke the minimum standards order under subsection 536KQ(1); or

(c) decide not to vary or revoke the minimum standards order.

General preconditions for variation or revocation

(3) The FWC:

(a) must not vary or revoke the minimum standards order unless there has been genuine engagement with the parties to be covered; and

(b) in the case of a road transport minimum standards order—must not vary or revoke the road transport minimum standards order unless the Road Transport Advisory Group has been consulted; and

(c) in the case of a road transport minimum standards order—must have regard to the commercial realities of the road transport industry; and

(d) in the case of a road transport minimum standards order—must be satisfied that the variation or revocation of the minimum standards order will not unduly affect the viability and competitiveness of owner drivers or other similar persons; and

(e) in the case of an employee-like worker minimum standards order—must have regard to choice and flexibility in working arrangements.

Authorised Version C2026C00293 registered 15/07/2026

Special preconditions for variation or revocation: road transport minimum standards order

(4) In addition to the matters mentioned in subsection (3), the FWC must not vary or revoke a road transport minimum standards order in relation to which a deferral declaration or a deferral determination has been made unless the FWC has followed the process set out in Division 3B of this Part in relation to the variation or revocation.

Special preconditions for variation or revocation: employee-like worker minimum standards order

(5) In addition to the matters mentioned in subsection (3), the FWC must not vary or revoke an employee-like worker minimum standards order in relation to which a deferral declaration or a deferral determination has been made unless the FWC has followed the process set out in Division 3C of this Part in relation to the variation or revocation.

Publication requirements

(6) The FWC must publish notice of the FWC's decision under subsection (2) on the FWC's website and by any other means the FWC considers appropriate.

End of suspension period does not affect obligations under this section

(7) The end of a period of suspension of a minimum standards order under subsection 536KQD(4) or (5) or 536KQP(4) or (5) does not affect the FWC's obligation to consider whether or not to vary or revoke the minimum standards order.

Authorised Version C2026C00293 registered 15/07/2026

Division 3B—Consultation before varying or revoking road transport minimum standards order after deferral

536KQT FWC to prepare and publish a notice relating to proposed variation or revocation of a road transport minimum standards order

(1) Before deciding to vary or revoke a road transport minimum standards order in relation to which a deferral declaration or a deferral determination has been made, the FWC must:

(a) publish a notice (a ***notice of intent***) stating that the FWC proposes to vary or revoke the road transport minimum standards order; and

(b) if the proposal is to vary the road transport minimum standards order—publish a draft of the road transport minimum standards order as proposed to be varied.

(2) The FWC must publish the notice of intent and the draft of the road transport minimum standards order as proposed to be varied (if applicable) on the FWC's website and by any other means the FWC considers appropriate as soon as practicable after making the determination.

536KQU Affected entities to have a reasonable opportunity to make submissions and comment on a proposed variation or revocation of a road transport minimum standards order

(1) The FWC must ensure that affected entities have a reasonable opportunity to make written submissions to the FWC for its consideration in relation to the proposed variation or revocation of a road transport minimum standards order in relation to which a notice of intent has been published under paragraph 536KQT(1)(a).

(2) The FWC must publish submissions made to the FWC.

Authorised Version C2026C00293 registered 15/07/2026

(3) However, if a submission made by an entity includes information that is claimed by the entity to be confidential or commercially sensitive, and the FWC is satisfied that the information is confidential or commercially sensitive, the FWC:
  (a) may decide not to publish the information; and
  (b) may instead publish:
    (i) a summary of the information which contains sufficient detail to allow a reasonable understanding of the substance of the information (without disclosing anything that is confidential or commercially sensitive); or
    (ii) if the FWC considers that it is not practicable to prepare a summary that would comply with subparagraph (i)—a statement that confidential or commercially sensitive information in the submission has not been published.

(4) The publishing of material under subsections (2) and (3) must be on the FWC's website and by any other means the FWC considers appropriate.

(5) A reference in this Act (other than in this section) to a submission under this section includes a reference to a summary or statement referred to in paragraph (3)(b).

(6) For the purposes of subsection (1), an ***affected entity***, in relation to a proposed variation or revocation of a road transport minimum standards order in relation to which a notice of intent has been published under paragraph 536KQT(1)(a), is:
  (a) a person or body likely to be affected by the proposed variation or revocation; or
  (b) a person or body prescribed by the regulations, or belonging to a class of persons or bodies prescribed by the regulations.

(7) The FWC may, but is not required to, hold a hearing in relation to the following:
  (a) a draft road transport minimum standards order as proposed to be varied;

Authorised Version C2026C00293 registered 15/07/2026

(b) a proposed revocation of a road transport minimum standards order.

536KQV Finalising draft order

(1) The FWC may make any changes it thinks appropriate to a draft road transport minimum standards order as proposed to be varied.

(2) If changes proposed to be made under subsection (1) are significant, the FWC must:

(a) decide not to vary the road transport minimum standards order based on the draft; and

(b) publish a subsequent notice of intent under subsection 536KQT(1)(a) in relation to the revised draft road transport minimum standards order, and publish the revised draft; and

(c) follow the process set out in section 536KQU in relation to the revised draft road transport minimum standards order (with the period of consultation under that section to be no shorter than 12 months starting when the subsequent notice of intent and the revised draft required by paragraph (b) of this subsection were published).

Authorised Version C2026C00293 registered 15/07/2026

Division 3C—Consultation process before varying or revoking employee-like worker minimum standards orders after deferral

536KQW FWC to prepare and publish a notice relating to a proposed variation or revocation of an employee-like worker minimum standards order

(1) Before deciding to vary or revoke an employee-like worker minimum standards order in relation to which a deferral declaration or a deferral determination has been made, the FWC must:

(a) publish a notice (a ***notice of intent***) stating that the FWC proposes to vary or revoke the employee-like worker minimum standards order; and

(b) if the proposal is to vary the employee-like worker minimum standards order—publish a draft of the proposed employee-like worker minimum standards order as proposed to be varied.

(2) The FWC must publish the notice of intent and the draft of the employee-like worker minimum standards order as proposed to be varied (if applicable) on the FWC's website and by any other means the FWC considers appropriate.

536KQX Affected entities to have a reasonable opportunity to make submissions and comment on a proposed variation or revocation of an employee-like worker minimum standards order

(1) The FWC must ensure that affected entities have a reasonable opportunity to make written submissions to the FWC for its consideration in relation to the proposed variation or revocation of an employee-like worker minimum standards order in relation to which a notice of intent has been published under

Authorised Version C2026C00293 registered 15/07/2026

paragraph 536KQW(1)(a), having regard to the unique nature of digital platform work.

(2) The FWC must publish submissions made to the FWC.

(3) However, if a submission made by an entity includes information that is claimed by the entity to be confidential or commercially sensitive, and the FWC is satisfied that the information is confidential or commercially sensitive, the FWC:

(a) may decide not to publish the information; and

(b) may instead publish:

(i) a summary of the information which contains sufficient detail to allow a reasonable understanding of the substance of the information (without disclosing anything that is confidential or commercially sensitive); or

(ii) if the FWC considers that it is not practicable to prepare a summary that would comply with subparagraph (i)—a statement that confidential or commercially sensitive information in the submission has not been published.

(4) The publishing of material under subsections (2) and (3) must be on the FWC's website and by any other means the FWC considers appropriate.

(5) A reference in this Act (other than in this section) to a submission under this section includes a reference to a summary or statement referred to in paragraph (3)(b).

(6) For the purposes of subsection (1), an ***affected entity***, in relation to a proposed variation or revocation of an employee-like worker minimum standards order in relation to which a notice of intent has been published under paragraph 536KQW(1)(a), is:

(a) a person or body likely to be affected by the proposed variation or revocation; or

(b) a person or body prescribed by the regulations, or belonging to a class of persons or bodies prescribed by the regulations.

Authorised Version C2026C00293 registered 15/07/2026

(7) The FWC may, but is not required to, hold a hearing in relation to the following:
  (a) a draft employee-like worker minimum standards order as proposed to be varied;
  (b) a proposed revocation of an employee-like worker minimum standards order.

536KQY Finalising draft order

(1) The FWC may make any changes it thinks appropriate to a draft employee-like worker minimum standards order as proposed to be varied.

(2) If changes proposed to be made under subsection (1) are significant, the FWC must:
  (a) decide not to vary the employee-like worker minimum standards order based on the draft; and
  (b) publish a subsequent notice of intent under paragraph 536KQW(1)(a) in relation to the revised draft employee-like worker minimum standards order, and publish the revised draft; and
  (c) follow the process set out in section 536KQX in relation to the revised draft employee-like worker minimum standards order (with the period of consultation under that section to be a period that the FWC is satisfied is reasonable having regard to the unique nature of digital platform work).

Authorised Version C2026C00293 registered 15/07/2026

Division 4—Minimum standards guidelines

536KR Minimum standards guidelines

(1) The FWC may make minimum standards guidelines under this section that set standards for regulated workers performing work under a services contract.

(2) Minimum standards guidelines for employee-like workers are ***employee-like worker guidelines***.

(3) Minimum standards guidelines for regulated road transport contractors are ***road transport guidelines***.

(4) The FWC may make minimum standards guidelines under this section:
  (a) on its own initiative; or
  (b) on application under section 536KS.

536KS Applications for minimum standards guidelines

(1) Any of the following may apply to the FWC for the making of minimum standards guidelines:
  (a) an organisation that is entitled to represent the industrial interests of one or more regulated workers who would be covered by the proposed minimum standards guidelines;
  (b) an organisation that is entitled to represent the industrial interests of one or more of the regulated businesses that would be covered by the proposed minimum standards guidelines;
  (c) a regulated business that is included in a class of regulated businesses that would be covered by the proposed minimum standards guidelines;
  (d) the Minister.

Authorised Version C2026C00293 registered 15/07/2026

Matters to be specified in an application

(2) An application for the making of minimum standards guidelines must specify the class of regulated workers to be covered by the guidelines.

(2A) An application for the making of minimum standards guidelines must specify the class of regulated businesses to be covered by the guidelines.

(3) Without limiting the way in which a class may be described for the purposes of subsection (2) or (2A), the class may be described by reference to a particular industry or sector, or part of an industry or sector, or particular kinds of work.

536KT Initial matter to be considered for employee-like worker minimum standards guidelines

(1) This section applies to a decision to make or vary, or not to make or vary, employee-like worker guidelines, other than a decision of the FWC to refuse to consider an application to make or vary such guidelines.

(2) Before making a decision under section 536KU, the FWC must consider whether, on the whole, the persons included (or purportedly included) in the class of employee-like workers to be covered by the minimum standards guidelines, or the guidelines as proposed to be varied, are employee-like workers.

(3) If the FWC is not satisfied that, on the whole, the persons included (or purportedly included) in the class of employee-like workers to be covered by the minimum standards guidelines, or the guidelines as proposed to be varied, are employee-like workers, the FWC must decide to refuse to consider the application, or not to make or vary the guidelines, as the case requires.

536KU Decisions on applications for minimum standards guidelines

(1) If an application for minimum standards guidelines is made to the FWC under subsection 536KS(1), the FWC may decide to:

Authorised Version C2026C00293 registered 15/07/2026

(a) refuse to consider the application; or
(b) make minimum standards guidelines; or
(c) not make minimum standards guidelines; or
(d) if the FWC considers it appropriate to do so, instead make a minimum standards order under subsection 536JY(1) instead, as if the application had been an application under subsection 536JZ(1) for a minimum standards order in relation to the regulated workers covered by the application under subsection 536KS(1).

(2) Without limiting subsection (1), the FWC may refuse to consider the application if it is not consistent with a direction of the President under subsection 582(4D) (prioritisation).

536KV Minimum standards guidelines not to be made if a minimum standards order is in operation

The FWC must not make minimum standards guidelines that cover the same regulated workers and the same regulated businesses in relation to the same matters as a minimum standards order that is in operation.

536KW Terms that must be included in minimum standards guidelines

Minimum standards guidelines must include terms setting out the same matters in relation to minimum standards orders as set out in the following:

(a) in the case of employee-like worker guidelines—in section 536KH;
(b) in the case of road transport guidelines—in section 536KJ.

536KX Terms that may be included in minimum standards guidelines

Minimum standards guidelines may include terms about any of the matters that may be included in minimum standards orders under section 536KL.

Authorised Version C2026C00293 registered 15/07/2026

536KY Terms that must not be included in minimum standards guidelines

Minimum standards guidelines must not include terms about any of the matters that must not be included in minimum standards orders as set out in the following:

(a) in the case of employee-like worker minimum standards orders and road transport minimum standards orders—in section 536KM;

(aa) in the case of employee-like worker minimum standards orders—in section 536KMA;

(b) in the case of road transport minimum standards orders—in section 536KN.

536KZ FWC may vary or revoke minimum standards guidelines if consistent with the minimum standards objective and the road transport objective

(1) The FWC may make a determination varying or revoking minimum standards guidelines if the FWC is satisfied that making the determination is consistent with:

(a) the minimum standards objective; and

(b) if the President considers that the determination might relate to the road transport industry—the road transport objective.

(2) The FWC may make a determination varying minimum standards guidelines in such a way that not all of the elements of the variation sought in an application under section 536L are implemented, including by refusing to make a variation to the extent that it would result in the guidelines covering persons who are not regulated workers.

(3) The FWC may make a determination varying minimum standards guidelines to remove an ambiguity or uncertainty or to correct an error.

(4) The FWC may make a determination varying or revoking minimum standards guidelines:

Authorised Version C2026C00293 registered 15/07/2026

(a) on its own initiative; or
(b) on application under section 536L.

(5) If the FWC makes a minimum standards order that covers the same regulated workers and the same regulated businesses in relation to the same matters as minimum standards guidelines, the FWC must revoke the minimum standards guidelines with effect on and from the day on which the minimum standards order comes into operation.

(6) If the FWC makes a minimum standards order that covers some or all of the same regulated workers and the same regulated businesses in relation to some or all of the same matters as minimum standards guidelines, the FWC must vary the minimum standards guidelines so that the guidelines do not cover the regulated workers, regulated businesses or matters covered by the order, with effect on and from the day on which the order comes into operation.

536L Applications to vary or revoke minimum standards guidelines

Any of the following may apply to the FWC for a determination varying or revoking minimum standards guidelines:

(a) an organisation that is entitled to represent the industrial interests of one or more regulated workers covered by the minimum standards guidelines, or who would be covered by the minimum standards guidelines as proposed to be varied;
(b) an organisation that is entitled to represent the industrial interests of one or more of the regulated businesses covered by the minimum standards guidelines, or that would be covered by the minimum standards guidelines as proposed to be varied;
(c) a regulated business covered by the minimum standards guidelines, or that would be covered by the minimum standards order as proposed to be varied;
(d) the Minister.

Authorised Version C2026C00293 registered 15/07/2026

Part 3A-3—Unfair deactivation or unfair termination of regulated workers

Division 1—Introduction

536LB Guide to this Part

This Part is about:

(a) unfair deactivation from digital labour platforms of employee-like workers; and

(b) unfair termination of the services contracts of regulated road transport contractors.

Division 2 sets out when a person is protected from unfair deactivation or unfair termination.

Division 3 sets out the elements that make up unfair deactivation or unfair termination.

Division 4 sets out the remedies that the FWC can grant for unfair deactivation or unfair termination.

Division 5 is about the procedural aspects of getting remedies for unfair deactivation or unfair termination.

536LC Object of this Part

(1) The object of this Part is:

(a) to establish a framework for dealing with unfair deactivation of employee-like workers, and unfair termination of regulated road transport contractors, that balances:

(i) the needs of regulated businesses; and

(ii) the needs of regulated workers; and

Authorised Version C2026C00293 registered 15/07/2026

(b) to establish procedures for dealing with unfair deactivation and unfair termination that:

(i) are quick, flexible and informal; and

(ii) address the needs of regulated businesses and regulated workers; and

(c) to provide remedies if a deactivation or termination is found to be unfair, with an emphasis on reactivation or reinstatement, as the case requires.

(2) The procedures and remedies referred to in paragraphs (1)(b) and (c), and the manner of deciding on and working out such remedies, are intended to ensure that a "fair go all round" is accorded to both the regulated businesses and regulated workers concerned.

Note: The expression "fair go all round" was used by Sheldon J in *in re Loty and Holloway v Australian Workers' Union* [1971] AR (NSW) 95.

Authorised Version C2026C00293 registered 15/07/2026

Division 2—Protection from unfair deactivation or unfair termination

536LD When a person is protected from unfair deactivation

A person is ***protected from unfair deactivation*** at a time if, at that time:

(a) the person is an employee-like worker; and

(b) the person:

(i) performs work through or by means of a digital labour platform operated by a digital labour platform operator; or

(ii) performs work under a services contract arranged or facilitated through or by means of a digital labour platform operated by a digital labour platform operator; and

(c) the person has been performing work through or by means of that digital labour platform, or under a contract, or a series of contracts, arranged or facilitated through or by means of the digital labour platform, on a regular basis for a period of at least 6 months.

536LE When a person is protected from unfair termination

A person is ***protected from unfair termination*** at a time if, at that time:

(a) the person is a regulated road transport contractor; and

(b) a road transport business receives services under a services contract (whether or not the business is a party to the services contract) under which the person performs work in the road transport industry; and

(c) the person has been performing work in the road transport industry under a services contract, or a series of services contracts, under which that road transport business receives services for a period of at least 6 months.

Authorised Version C2026C00293 registered 15/07/2026

Division 3—What is an unfair deactivation or unfair termination

Subdivision A—Unfair deactivation

536LF What is an unfair deactivation

A person has been ***unfairly deactivated*** if the FWC is satisfied that:

(a) the person has been deactivated from a digital labour platform; and

(b) the deactivation was unfair; and

(c) the deactivation was not consistent with the Digital Labour Platform Deactivation Code.

536LG Meaning of *deactivated*

A person has been ***deactivated*** from a digital labour platform if:

(a) the person performed digital platform work through or by means of the digital labour platform; and

(b) the digital labour platform operator modified, suspended, or terminated the person's access to the digital labour platform; and

(c) the person is no longer able to perform work under an existing or prospective services contract, or the ability of the person to do so is so significantly altered that in effect the person is no longer able to perform such work.

536LH Criteria for considering whether a deactivation was unfair etc.

(1) In considering whether it is satisfied that a person's deactivation was unfair, the FWC must take into account:

(a) whether there was a valid reason for the deactivation related to the person's capacity or conduct; and

Authorised Version C2026C00293 registered 15/07/2026

(b) whether any relevant processes specified in the Digital Labour Platform Deactivation Code were followed; and

(c) any other matters that the FWC considers relevant.

(2) Despite subsection (1) and any other provision of this Part, a deactivation that occurs because of serious misconduct of the person who was deactivated is not unfair.

(3) Despite subsection (1) and any other provision of this Part, a deactivation of a person from a digital labour platform is not unfair if:

(a) the deactivation is constituted by the modification or suspension of the person's access to the digital labour platform for a period of not more than 7 business days; and

(b) the FWC is satisfied that the digital labour platform operator concerned believes on reasonable grounds that one or more of the matters in subsection (4) is applicable.

(4) For the purposes of subsection (3), the matters are as follows:

(a) that the deactivation of the person is necessary to protect the health and safety of a user of the digital labour platform or member of the community;

(b) that the person has engaged in fraudulent or dishonest conduct including, but not limited to, by misrepresenting or falsifying information provided to the digital labour platform operator;

(c) that the person has not complied with licensing and accreditation requirements imposed by or under a law of the Commonwealth, a State or a Territory, whether:

(i) the requirements relate to the licensing or accreditation of the person; or

(ii) the requirements relate to the licensing or accreditation of the digital labour platform operator, and the person's conduct causes, or may cause, the digital labour platform operator to breach the requirements;

(d) that the deactivation of the person is necessary to enable the digital labour platform operator to do one or more of the

Authorised Version C2026C00293 registered 15/07/2026

following in relation to a matter specified in paragraph (a), (b) or (c):

(i) conduct an investigation;

(ii) refer the matter to a law enforcement agency (however described) for the purposes of conducting an investigation.

536LJ Minister to make a Digital Labour Platform Deactivation Code

(1) The Minister must, by legislative instrument, make code to be known as the Digital Labour Platform Deactivation Code.

(2) Without limiting the matters covered by the Digital Labour Platform Deactivation Code, the code must deal with the following matters:

(a) the circumstances in which work is performed on a regular basis;

(b) matters that constitute or may constitute a valid reason for deactivation;

(c) rights of response to deactivations;

(d) the internal processes of digital labour platform operators in relation to deactivation;

(e) communication between the employee-like worker and the digital labour platform operator in relation to deactivation;

(f) the accessibility in practice of the internal processes of digital labour platform operators in relation to deactivation;

(g) the treatment of data relating to the work performed by employee-like workers.

(2A) Before the Minister makes a code under subsection (1), the Minister must be satisfied that there has been such public consultation in relation to the development of the code as the Minister considers appropriate.

(2B) The Minister may, by legislative instrument, vary or revoke the Digital Labour Platform Deactivation Code.

Authorised Version C2026C00293 registered 15/07/2026

(2C) Before the Minister varies or revokes the Digital Labour Platform Deactivation Code under subsection (2B), the Minister must be satisfied that there has been such public consultation in relation to the variation or revocation as the Minister considers appropriate.

(2D) Subsection (2C) does not apply in relation to a variation if the Minister considers the variation is minor or technical.

(3) A person's deactivation was ***consistent with the Digital Labour Platform Deactivation Code*** if, at the time of the deactivation, the digital labour platform operator complied with the Digital Labour Platform Deactivation Code in relation to the deactivation.

Subdivision B—What is an unfair termination

536LK What is an unfair termination

A person has been ***unfairly terminated*** if:

(a) the person was performing work in the road transport industry; and

(b) the person has been terminated; and

(c) the termination was unfair; and

(d) the termination was not consistent with the Road Transport Industry Termination Code.

536LL Meaning of *terminated*

A person has been ***terminated*** if:

(a) the person performed work as a regulated road transport contractor under a services contract; and

(b) a road transport business received services under the services contract; and

(c) the services contract was terminated by, or as a result of conduct of, the road transport business.

Authorised Version C2026C00293 registered 15/07/2026

536LM Criteria for considering whether a termination was unfair etc.

(1) In considering whether it is satisfied that a termination was unfair, the FWC must take into account:

(a) whether there was a valid reason for the termination related to the person's capacity or conduct; and

(b) whether any relevant processes specified in the Road Transport Industry Termination Code were followed; and

(c) any other matters that the FWC considers relevant.

(2) Despite subsection (1) and any other provision of this Part, a termination that occurs because of serious misconduct of the person who was deactivated is not unfair.

536LN Minister to make Road Transport Industry Termination Code

(1) The Minister may, by legislative instrument, make a code to be known as the Road Transport Industry Termination Code.

(2) Without limiting the matters covered by the Road Transport Industry Termination Code, the code must deal with the following matters:

(a) matters that constitute or may constitute a valid reason for termination;

(b) rights of response to terminations;

(c) the internal processes of road transport businesses in relation to a termination;

(d) communication between the regulated road transport contractor and road transport business in relation to a termination.

(3) A person's termination was ***consistent with the Road Transport Industry Termination Code*** if, immediately before the time of the termination, or at the time the person was given notice of the termination (whichever happened first), the regulated road transport business that terminated the services contract concerned

Authorised Version C2026C00293 registered 15/07/2026

or as a result of whose conduct the services contract concerned was terminated, complied with the Road Transport Industry Termination Code.

Authorised Version C2026C00293 registered 15/07/2026

Division 4—Remedies

Subdivision A—Remedies for unfair deactivation

536LP When the FWC may order remedy for unfair deactivation

(1) Subject to subsection (3), the FWC may order a person's reactivation if:

(a) the FWC is satisfied that the person was protected from unfair deactivation (see section 536LD) at the time of being deactivated; and

(b) the person has been unfairly deactivated (see Division 2).

(2) The FWC may make the order only if the person has made an application under section 536LU.

(3) The FWC must not order the payment of compensation to the person.

Note: Division 5 deals with procedural matters such as applications for remedies.

536LQ Remedy—reactivation etc.

Reactivation

(1) An order for a person's reactivation must be an order that the digital labour platform operator who operated the digital labour platform at the time of the deactivation take measures to restore the person to the position they would have been in but for the deactivation, including as follows:

(a) if the person's access to the digital labour platform was suspended—by removing the suspension;

(b) if the person's access to the digital labour platform was terminated—by reinstating the person's access to the digital labour platform;

(c) by modifying the person's access to the digital labour platform so that the access is as it was before the person's

Authorised Version C2026C00293 registered 15/07/2026

access to the digital labour platform was terminated or suspended.

(2) If:

(a) the digital labour platform (the ***original digital labour platform***) from which the person was deactivated no longer exists; and

(b) a similar digital labour platform (the ***second digital labour platform***) is operated by an associated entity of the operator of the original digital labour platform;

the order under subsection (1) may be an order to the associated entity to provide access to the second digital labour platform on terms and conditions no less favourable than those immediately before the person's access to the original digital labour platform was terminated or suspended.

Order to restore lost pay

(3) If the FWC makes an order under subsection (1) and considers it appropriate to do so, the FWC may also make any order that the FWC considers appropriate to cause the digital labour platform operator or the associated entity to pay to the person an amount for the remuneration lost, or likely to have been lost, by the person because of the deactivation.

(4) In determining an amount for the purposes of an order under subsection (3), the FWC must take into account:

(a) the amount of any remuneration earned by the person from work of any kind during the period between the deactivation and the making of the order for reactivation; and

(b) the amount of any remuneration reasonably likely to be so earned by the person during the period between the making of the order for reactivation and the actual reactivation.

Authorised Version C2026C00293 registered 15/07/2026

Subdivision B—Remedies for unfair termination

536LR When the FWC may order remedy for unfair termination

(1) Subject to subsection (3), the FWC may order that a new contract be entered into, or the payment of compensation to a person, if:
  (a) the FWC is satisfied that the person was protected from unfair termination (see section 536LE) at the time of being terminated; and
  (b) the person has been unfairly terminated (see Division 3).

(2) The FWC may make the order only if the person has made an application under section 536LU.

(3) The FWC must not order the payment of compensation to the person unless:
  (a) the FWC is satisfied that entering into a new services contract would be inappropriate; and
  (b) the FWC considers an order for payment of compensation is appropriate in all the circumstances of the case.

Note: Division 5 deals with procedural matters such as applications for remedies.

536LS Remedy—new contract, etc.

Reinstatement

(1) An order for a new contract must be an order that the road transport business at the time of the termination enter into a new contract in the same terms as the services contract at the time of the termination or with such variations as the FWC considers appropriate.

(2) If:
  (a) the road transport business at the time of the termination is no longer a road transport business; and
  (b) an associated entity of the road transport business is a road transport business;

Authorised Version C2026C00293 registered 15/07/2026

the order under subsection (1) may be an order to the associated entity to enter into a new contract on terms and conditions no less favourable than the services contract immediately before the termination, with such variations as the FWC considers appropriate.

Order to restore lost pay

(3) If the FWC makes an order under subsection (1) and considers it appropriate to do so, the FWC may also make any order that the FWC considers appropriate to cause the road transport business to pay to the person an amount for the remuneration lost, or likely to have been lost, by the person because of the termination.

(4) In determining an amount for the purposes of an order under subsection (3), the FWC must take into account:
  (a) the amount of any remuneration earned by the person from work of any kind during the period between the termination and the making of the order that the road transport business enter into a new services contract with the person; and
  (b) the amount of any remuneration reasonably likely to be so earned by the person during the period between the making of the order that the road transport business enter into a new services contract with the person and when the new services contract is entered into.

536LT Remedy—compensation

Compensation

(1) An order for the payment of compensation to a person must be an order that the road transport business at the time of the termination pay compensation to the person in lieu of entering into a new services contract.

Authorised Version C2026C00293 registered 15/07/2026

Criteria for deciding amounts

(2) In determining an amount for the purposes of an order under subsection (1), the FWC must take into account all the circumstances of the case including:

(a) the effect of the order on the viability of the road transport business; and

(b) the remuneration that the person would have received, or would have been likely to receive, if the person had not been terminated; and

(c) the efforts of the person (if any) to mitigate the loss suffered because of the termination; and

(d) the amount of any remuneration earned by the person from work of any kind during the period between the termination and the making of the order for compensation; and

(e) the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation; and

(f) any other matter that the FWC considers relevant.

Misconduct reduces amount

(3) If the FWC is satisfied that misconduct of a person contributed to the road transport business's decision to terminate the person, the FWC must reduce the amount it would otherwise order under subsection (1) by an appropriate amount on account of the misconduct.

Shock, distress etc. disregarded

(4) The amount ordered by the FWC to be paid to a person under subsection (1) must not include a component by way of compensation for shock, distress or humiliation, or other analogous hurt, caused to the person by the manner of the person's termination.

Authorised Version C2026C00293 registered 15/07/2026

Compensation cap

(5) The amount ordered by the FWC to be paid to a person under subsection (1) must not exceed the lesser of:

(a) the amount worked out under subsection (6); and

(b) half the amount of the contractor high income threshold immediately before the termination.

(6) The amount is the total amount of remuneration received by the person or to which the person was entitled (whichever is higher) for any period during which the person performed work under the services contract during the 26 weeks immediately before the termination.

Authorised Version C2026C00293 registered 15/07/2026

Division 5—Procedural matters

536LU Application for unfair deactivation or unfair termination remedy

(1) A person who has been deactivated or terminated may apply to the FWC for an order under Division 4 granting a remedy.

Note 1: Division 4 sets out when the FWC may order a remedy for unfair deactivation or unfair termination.

Note 2: For application fees, see section 536LV.

Note 3: Part 6-1 may prevent an application being made under this Part in relation to a deactivation or termination if an application or complaint has been made in relation to the deactivation or termination other than under this Part.

(2) A person must not make an application under subsection (1) unless the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the contractor high income threshold.

(3) The application must be made:

(a) within 21 days after the deactivation or termination took effect; or

(b) within such further period as the FWC allows under subsection (4).

(4) The FWC may allow a further period for the application to be made by a person under subsection (1) if the FWC is satisfied that there are exceptional circumstances, taking into account:

(a) the reason for the delay; and

(b) whether the person first became aware of the deactivation or termination after it had taken effect; and

(c) any action taken by the person to dispute the deactivation or termination; and

(d) prejudice to the regulated business (including prejudice caused by the delay); and

Authorised Version C2026C00293 registered 15/07/2026

(e) the merits of the application; and
(f) fairness as between the person and other regulated workers in a similar position; and
(g) any processes specified in the Digital Labour Platform Deactivation Code or the Road Transport Industry Termination Code, as the case requires.

536LV Application fees

(1) An application to the FWC under this Division must be accompanied by any fee prescribed by the regulations.

(2) The regulations may prescribe:
(a) a fee for making an application to the FWC under this Division; and
(b) a method for indexing the fee; and
(c) the circumstances in which all or part of the fee may be waived or refunded.

536LW Initial matters to be considered before merits

The FWC must decide the following matters relating to an application for an order under Division 4 before considering the merits of the application:
(a) whether the application was made within the period required in subsection 536LU(3);
(b) whether the person was protected from unfair deactivation or unfair termination, as the case requires;
(c) whether the deactivation or termination was consistent with the Digital Labour Platform Deactivation Code or the Road Transport Industry Termination Code, as the case requires.

536LX Matters involving contested facts

The FWC must conduct a conference or hold a hearing in relation to a matter arising under this Part if, and to the extent that, the matter involves facts the existence of which is in dispute.

Authorised Version C2026C00293 registered 15/07/2026

536LY Conferences

(1) This section applies in relation to a matter arising under this Part if the FWC conducts a conference in relation to the matter.

(2) Despite subsection 592(3), the FWC must conduct the conference in private.

(3) The FWC must take into account any difference in the circumstances of the parties to the matter in:
  (a) considering the application; and
  (b) informing itself in relation to the application.

(4) The FWC must take into account the wishes of the parties to the matter as to the way in which the FWC:
  (a) considers the application; and
  (b) informs itself in relation to the application.

536LZ Hearings

(1) The FWC must not hold a hearing in relation to a matter arising under this Part unless the FWC considers it appropriate to do so, taking into account:
  (a) the views of the parties to the matter; and
  (b) whether a hearing would be the most effective and efficient way to resolve the matter.

(2) If the FWC holds a hearing in relation to a matter arising under this Part, it may decide not to hold the hearing in relation to parts of the matter.

(3) The FWC may decide at any time (including before, during or after conducting a conference in relation to a matter) to hold a hearing in relation to the matter.

Authorised Version C2026C00293 registered 15/07/2026

536M Dismissing applications

(1) The FWC may, subject to subsection (2), dismiss an application for an order under Division 4 if the FWC is satisfied that the applicant has unreasonably:

(a) failed to attend a conference conducted by the FWC, or a hearing held by the FWC, in relation to the application; or

(b) failed to comply with a direction or order of the FWC relating to the application; or

(c) failed to discontinue the application after a settlement agreement has been concluded.

Note 1: For another power of the FWC to dismiss applications for orders under Division 4, see section 587.

Note 2: The FWC may make an order for costs if the applicant's failure causes the other party to the matter to incur costs (see section 536MB).

(2) The FWC may exercise its power under subsection (1) on application by a regulated business.

(3) This section does not limit when the FWC may dismiss an application.

536MA Appeal rights

(1) Despite subsection 604(2), the FWC must not grant permission to appeal from a decision made by the FWC under this Part unless the FWC considers that it is in the public interest to do so.

(2) Despite subsection 604(1), an appeal from a decision made by the FWC in relation to a matter arising under this Part can only, to the extent that it is an appeal on a question of fact, be made on the ground that the decision involved a significant error of fact.

536MB Costs orders against parties

(1) The FWC may make an order for costs against a party to a matter arising under this Part (the ***first party***) for costs incurred by the other party to the matter if the FWC is satisfied that the first party caused those costs to be incurred because of an unreasonable act or

Authorised Version C2026C00293 registered 15/07/2026

omission of the first party in connection with the conduct or continuation of the matter.

(2) The FWC may make an order under subsection (1) only if the other party to the matter has applied for it in accordance with section 536MD.

(3) This section does not limit the FWC's power to order costs under section 611.

536MC Costs orders against lawyers and paid agents

(1) This section applies if:
  (a) an application for an unfair deactivation or unfair termination remedy has been made under section 536LU; and
  (b) a person who is a party to the matter has engaged a lawyer or paid agent (the ***representative***) to represent the person in the matter; and
  (c) under section 596, the person is required to seek the FWC's permission to be represented by the representative.

(2) The FWC may make an order for costs against the representative for costs incurred by the other party to the matter if the FWC is satisfied that the representative caused those costs to be incurred because:
  (a) the representative encouraged the person to start, continue or respond to the matter and it should have been reasonably apparent that the person had no reasonable prospect of success in the matter; or
  (b) of an unreasonable act or omission of the representative in connection with the conduct or continuation of the matter.

(3) The FWC may make an order under this section only if the other party to the matter has applied for it in accordance with section 536MD.

(4) This section does not limit the FWC's power to order costs under section 611.

Authorised Version C2026C00293 registered 15/07/2026

536MD Applications for costs orders

An application for an order for costs under section 611 in relation to a matter arising under this Part, or for costs under section 536MB or 536MC, must be made within 14 days after:

(a) the FWC determines the matter; or

(b) the matter is discontinued.

536ME Schedule of costs

(1) A schedule of costs may be prescribed in relation to items of expenditure likely to be incurred in relation to matters that can be covered by an order:

(a) under section 611 in relation to a matter arising under this Part; or

(b) under section 536MB or 536MC;

including expenses arising from the representation of a party by a person or organisation other than on a legal professional basis.

(2) If a schedule of costs is prescribed for the purposes of subsection (1), then, in awarding costs under section 611 in relation to a matter arising under this Part, or awarding costs under section 536MB or 536MC, the FWC:

(a) is not limited to the items of expenditure appearing in the schedule; but

(b) if an item does appear in the schedule—must not award costs in relation to that item at a rate or of an amount that exceeds the rate or amount appearing in the schedule.

536MF Security for costs

The procedural rules may provide for the furnishing of security for the payment of costs in relation to matters arising under this Part.

Authorised Version C2026C00293 registered 15/07/2026

536MG Contravening orders under this Part

A person to whom an order under this Part applies must not contravene a term of the order.

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

Authorised Version C2026C00293 registered 15/07/2026

Part 3A-4—Collective agreements for regulated workers

Division 1—Introduction

536MH Guide to this Part

This Part is about collective agreements. A collective agreement is made between a regulated business, specifically a digital labour platform operator or a road transport business, and an organisation.

A collective agreement provides terms and conditions for the regulated workers to whom it applies.

Division 2 deals with the making of collective agreements and provides for the giving of consultation notices, and for the notification of regulated workers.

Division 3 deals with the registration of collective agreements by the FWC.

Division 4 deals with the variation of collective agreements.

Division 5 deals with the termination of collective agreements.

Division 6 deals with terms of a collective agreement that are of no effect.

536MJ Object of this Part

The object of this Part is to provide a simple, flexible and fair framework that enables collective agreements to be made by consent for:

(a) employee-like workers;

(b) regulated road transport contractors.

Authorised Version C2026C00293 registered 15/07/2026

Division 2—Regulated workers and regulated businesses may make collective agreements

536MK Making a collective agreement

(1) This section provides for the making of an agreement (a ***collective agreement***) between a regulated business and an organisation that is entitled to represent the industrial interests of one or more regulated workers.

Collective agreement for employee-like workers

(2) A collective agreement may be made between a digital labour platform operator and an organisation that is entitled to represent the industrial interests of one or more employee-like workers, in respect of the following:

(a) the terms and conditions on which employee-like workers covered by the collective agreement perform digital platform work:

(i) under a services contract to which the digital labour platform operator is a party; or

(ii) under a services contract arranged or facilitated through or by means of the digital labour platform operated by the digital labour platform operator;

(b) how the collective agreement will operate.

Note: For when a collective agreement ***covers*** a digital labour platform operator, an employee-like worker or an organisation, see section 536JM.

Collective agreement for regulated road transport contractors

(3) A collective agreement may be made between a road transport business and an organisation that is entitled to represent the industrial interests of one or more regulated road transport contractors, in respect of the following:

Authorised Version C2026C00293 registered 15/07/2026

(a) the terms and conditions on which regulated road transport contractors covered by the collective agreement perform work under services contracts to which the road transport business is a party;

(b) how the collective agreement will operate.

Note: For when a collective agreement ***covers*** a road transport business, a regulated road transport contractor or an organisation, see section 536JM.

(4) A collective agreement referred to in subsection (2) is an ***employee-like worker collective agreement***.

(5) A collective agreement referred to in subsection (3) is a ***road transport collective agreement***.

536ML Notice of consultation period for a proposed collective agreement

(1) The following entities may initiate a consultation period for a proposed collective agreement by giving a notice under this section (a ***consultation notice*** for the agreement):

(a) a regulated business that will be covered by the proposed collective agreement;

(b) an organisation that is entitled to represent the industrial interests of one or more regulated workers who will be covered by the proposed collective agreement.

General matters to be specified in a consultation notice

(2) A consultation notice for a proposed collective agreement must specify the following:

(a) that the entity giving the notice (the ***notifying entity***) proposes to try to make a collective agreement under this Part;

(b) whichever of the following is applicable:

(i) if the notifying entity is a regulated business—the name of the organisation to which the consultation notice is given;

Authorised Version C2026C00293 registered 15/07/2026

(ii) otherwise—the name of the organisation giving the consultation notice;

(c) the matters that are to be dealt with by the proposed collective agreement;

(d) the regulated business that will be covered by the proposed collective agreement;

(e) the class of regulated workers who will be covered by the proposed collective agreement.

536MM Consultation notice to be given to FWC, etc.

(1) A consultation notice for a proposed collective agreement must be given on the same day:

(a) to the FWC; and

(b) to whichever of the following is applicable:

(i) if the notifying entity is a regulated business—to an organisation that is entitled to represent the industrial interests of the regulated workers who will be covered by the proposed collective agreement;

(ii) otherwise—to the regulated business that will be covered by the agreement.

(2) The notifying entity for a consultation notice, and the entity to which the consultation notice is given, are the ***negotiating entities*** for the proposed collective agreement.

(3) The FWC must publish a copy of the consultation notice on the FWC's website.

536MN Notice to be given to regulated workers

(1) After a consultation notice has been given for a proposed collective agreement, either negotiating entity for the agreement must, with the consent of the other negotiating entity, make reasonable efforts to give a notice under this section to whichever of the following is applicable:

Authorised Version C2026C00293 registered 15/07/2026

(a) for a proposed employee-like worker collective agreement—each eligible employee-like worker for the proposed collective agreement (see subsection (3));

(b) for a proposed road transport collective agreement—each eligible regulated road transport contractor for the proposed collective agreement (see subsection (4)).

(2) A notice given under subsection (1) must specify the following:

(a) the regulated business that will be covered by the proposed collective agreement;

(b) the class of regulated workers that will be covered by the proposed collective agreement, and that the regulated worker to whom the notice is given is included in that class;

(c) the organisation that will sign the proposed collective agreement on behalf of the regulated workers;

(d) the matters proposed to be dealt with in the proposed collective agreement.

(3) For the purposes of this section, an ***eligible employee-like worker*** for a proposed employee-like worker collective agreement is an employee-like worker who, at any time during the period of 28 days before the consultation notice was given, was performing work under a services contract:

(a) through or by means of a digital labour platform operated by the digital labour platform operator that will be covered by the proposed collective agreement; or

(b) arranged or facilitated through or by means of a digital labour platform operated by the digital labour platform operator that will be covered by the proposed collective agreement.

(4) For the purposes of this section, an ***eligible regulated road transport contractor*** for a proposed road transport collective agreement is a regulated road transport contractor who, at any time during the period of 28 days before the consultation notice was given, was performing work under a services contract to which a road transport business that will be covered by the proposed collective agreement is a party.

Authorised Version C2026C00293 registered 15/07/2026

536MP Application for the FWC to deal with a dispute

(1) If the negotiating entities for a proposed collective agreement are unable to resolve a dispute about the making of the agreement, either negotiating entity may apply to the FWC for the FWC to deal with the dispute.

(2) If an application is made under subsection (1), the FWC must deal with the dispute (other than by arbitration).

Note: For the purposes of this section, 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)).

(3) The FWC may dismiss an application under subsection (1) if the FWC is satisfied that there are no reasonable prospects of the negotiating entities for the proposed collective agreement making a collective agreement.

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

536MQ Negotiating entity may request that other negotiating entity sign a proposed collective agreement

(1) A negotiating entity for a proposed collective agreement may request the other negotiating entity for the agreement to sign the agreement.

(2) A request under subsection (1) must not be made earlier than 30 days after the last day on which a notice was given to an employee-like worker or a regulated road transport contractor, as the case requires, under subsection 536MN(1) in relation to the proposed collective agreement.

(3) The collective agreement is ***made*** when both of the negotiating parties for the agreement sign the agreement.

Authorised Version C2026C00293 registered 15/07/2026

Division 3—Registration of collective agreements by the FWC

536MR Application to the FWC to register a collective agreement

(1) If a collective agreement is made, a negotiating entity for the agreement that signed the agreement may, with the consent of the other negotiating entity for the agreement, apply to the FWC to register the agreement.

Material to accompany the application

(2) The application must be accompanied by a signed copy of the collective agreement, which must identify the following:
  (a) the regulated business covered by the collective agreement;
  (b) the organisation covered by the collective agreement;
  (c) the class of regulated workers covered by the collective agreement.

(3) The application must be accompanied by a declaration signed by the regulated business and the organisation covered by the collective agreement, which must:
  (a) state that the regulated business and the organisation explained the terms of the agreement and their effect to the regulated workers covered by the agreement, and a description of the explanation; and
  (b) state that the regulated business or the organisation, as the case requires, made reasonable efforts to give a notice under paragraph 536MN(1)(a) or (b) to the regulated workers referred to in whichever of those paragraphs is applicable; and
  (c) state that none of the following were subject to any form of duress in relation to the making of the collective agreement:
    (i) the regulated business covered by the collective agreement;
    (ii) the organisation covered by the collective agreement;

Authorised Version C2026C00293 registered 15/07/2026

(iii) a regulated worker to whom a notice was given under paragraph 536MN(1)(a) or (b); and

(e) if a minimum standards order is in operation that covers the same class of regulated workers as the collective agreement covers—specify:

(i) the minimum standards order; and

(ii) in relation to each matter dealt with by a term of the collective agreement that is also dealt with by a term of the minimum standards order—how the term of the collective agreement is more beneficial to the regulated workers covered by the collective agreement in relation to that matter than the term of the order in relation to that matter.

(4) The application must be accompanied by any other declaration required by the procedural rules.

536MS FWC must register collective agreement

(1) If an application for the registration of a collective agreement is made under subsection 536MR(1), the FWC must register the agreement if the requirements of section 536MR and subsections (2), (3) and (3A) of this section are met in relation to the agreement.

(2) The FWC must be satisfied that the collective agreement includes a term that provides a procedure that requires or allows the FWC, or another person who is independent of the persons covered by the agreement, to settle disputes:

(a) about any matters arising under the collective agreement; and

(b) that allows for the representation of regulated workers covered by the collective agreement for the purposes of that procedure.

(3) The FWC must be satisfied that the collective agreement includes the following:

(a) a term that provides for its period of operation;

Authorised Version C2026C00293 registered 15/07/2026

(b) a term that provides for requirements in relation to terminating the collective agreement before the end of that period.

(3A) The FWC must be satisfied that the operation of the agreement would not be contrary to the public interest, taking into account the object of this Part set out in section 536MJ.

(4) The FWC must publish a copy of the collective agreement and the declaration referred to in subsection 536MR(3) on the FWC's website.

Authorised Version C2026C00293 registered 15/07/2026

Division 4—Variation of collective agreements

536MT Application for variation of a collective agreement

(1) The following may apply for a variation of a collective agreement that is in operation:

(a) the regulated business covered by the collective agreement;

(b) the organisation covered by the collective agreement.

Material to accompany the application

(2) The application must be accompanied by a signed copy of the collective agreement as proposed to be varied, which must identify the following:

(a) the regulated business covered by the collective agreement;

(b) the organisation covered by the collective agreement;

(c) the class of regulated workers covered by the collective agreement as proposed to be varied.

(3) The application must be accompanied by a declaration signed by the regulated business and the organisation covered by the collective agreement, which must:

(a) state that the regulated business and the organisation explained the terms of the agreement and their effect to the regulated workers covered by the agreement as proposed to be varied, and a description of the explanation; and

(b) if a minimum standards order is in operation that covers the same class of regulated workers as the collective agreement as proposed to be varied—specify:

(i) the minimum standards order; and

(ii) in relation to each matter dealt with by a term of the collective agreement as proposed to be varied that is also dealt with by a term of the minimum standards order—how the term of the collective agreement as proposed to be varied is more beneficial to the regulated workers covered by the collective agreement as

Authorised Version C2026C00293 registered 15/07/2026

proposed to be varied, in relation to that matter, than the term of the order in relation to that matter; and

(c) that no regulated worker, regulated business or organisation covered by the collective agreement as proposed to be varied was subject to any form of duress in relation to the variation.

(4) The application must be accompanied by any other declaration required by the procedural rules.

536MU FWC must vary collective agreement

(1) If an application for a variation of a collective agreement is made under subsection 536MT(1), the FWC must register the agreement as varied if the requirements of section 536MT and subsection (1A) of this section are met in relation to the variation.

(1A) The FWC must be satisfied that variation of the agreement would not be contrary to the public interest, taking into account the object of this Part set out in section 536MJ.

(2) The FWC must publish a copy of the collective agreement as varied and the declaration referred to in subsection 536MT(3) on the FWC's website.

(3) The variation comes into operation when the agreement as varied is registered.

Authorised Version C2026C00293 registered 15/07/2026

Division 5—Termination of collective agreements

536MV FWC must be notified of termination

(1) This section applies if a collective agreement has been terminated in accordance with the process specified in the agreement for terminating the agreement before the end of its period of operation.

(2) The regulated business or the organisation covered by the collective agreement must, with the consent of the other, notify the FWC of the termination on the date the agreement is terminated.

Declaration that must accompany application

(3) The notice under subsection (2) must be accompanied by a declaration signed by the regulated business and the organisation covered by the collective agreement:
  (a) stating that the collective agreement has been terminated in accordance with the process; and
  (b) specifying the date of effect of the termination.

(4) The notice must be accompanied by any other declaration required by the procedural rules.

536MW FWC must register termination notice

(1) If a notice is given to the FWC under subsection 536MV(2) in relation to a collective agreement, the FWC must register the termination by publishing a notice on the FWC's website:
  (a) stating that the collective agreement has been terminated; and
  (b) specifying the date of effect of the termination specified in the declaration under paragraph 536MV(3)(b).

(2) The collective agreement ceases to operate on the date of effect of the termination specified in the declaration under paragraph 536MV(3)(b).

Authorised Version C2026C00293 registered 15/07/2026

Division 6—Other matters

536MX Terms of a collective agreement that are of no effect

(1) A term of a collective agreement has no effect to the extent that it is a term about a matter other than a matter mentioned in subsection 536MK(2) or (3).

(2) A term of a collective agreement has no effect to the extent that it deals with matters that are primarily of a commercial nature that do not affect the terms and conditions of engagement of regulated workers covered by the agreement.

(3) However, if a collective agreement includes a term that has no effect because of subsection (1) or (2), the inclusion of the term does not prevent the agreement from being a collective agreement.

Authorised Version C2026C00293 registered 15/07/2026

Part 3A-5—Unfair contract terms of services contracts

Division 1—Introduction

536MY Guide to this Part

This Part is about unfair contract terms of services contracts.

It provides a framework for dealing with unfair contract terms.

536MZ Meaning of employee and employer

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

Authorised Version C2026C00293 registered 15/07/2026

Division 2—Object of Part

536N Object of Part

(1) The object of this Part is:

(a) to establish a framework for dealing with unfair contract terms of services contracts that:

(i) balances the needs of principals and the needs of independent contractors; and

(ii) addresses the need for a level playing field between independent contractors and principals by creating disincentives to the inclusion of unfair contract terms in services contracts; and

(iii) recognises and protects the freedom of independent contractors to enter into services contracts; and

(b) to establish procedures for dealing with unfair contract terms that:

(i) are quick, flexible and informal; and

(ii) address the needs of principals and independent contractors; and

(c) to provide appropriate remedies if a term of a services contract is found to be unfair.

(2) The procedures and remedies referred to in paragraphs (1)(b) and (c), and the manner of deciding on and working out such remedies, are intended to ensure that a "fair go all round" is accorded to both the principals and independent contractors concerned.

Note: The expression "fair go all round" was used by Sheldon J in *re Loty and Holloway v Australian Workers' Union* [1971] AR (NSW) 95.

Authorised Version C2026C00293 registered 15/07/2026

Division 3—Orders in relation to unfair contract terms of services contracts

536NA When the FWC may make an order in relation to an unfair contract term of a services contract

(1) The FWC may make an order under this Part in relation to a services contract if the FWC is satisfied that the services contract includes one or more unfair contract terms which, in an employment relationship, would relate to workplace relations matters.

(2) The FWC may make the order only if a person has made an application under section 536ND in relation to the services contract.

(3) The FWC must take into account fairness between the parties concerned in deciding whether to make an order under this Division, and the kind of order to make.

536NB Matters to be considered in deciding whether a term of a services contract is an unfair contract term

(1) In determining whether a term of a services contract is an unfair contract term, the FWC may take into account the following matters:

(a) the relative bargaining power of the parties to the services contract;

(b) whether the services contract as a whole displays a significant imbalance between the rights and obligations of the parties;

(c) whether the contract term under consideration is reasonably necessary to protect the legitimate interests of a party to the contract;

Authorised Version C2026C00293 registered 15/07/2026

(d) whether the contract term under consideration imposes a harsh, unjust or unreasonable requirement on a party to the contract;

(e) whether the services contract as a whole provides for a total remuneration for performing work that is:

(i) less than regulated workers performing the same or similar work would receive under a minimum standards order or minimum standards guidelines; or

(ii) less than employees performing the same or similar work would receive;

(f) any other matter the FWC considers relevant.

(2) The matters in paragraphs (1)(b) to (f) are to be assessed as at the time the FWC considers the application.

536NC Remedy—order to set aside etc. contract

The FWC may make an order under this section:

(a) setting aside all or part of a services contract which, in an employment relationship, would relate to a workplace relations matter; or

(b) amending or varying all or part of a services contract which, in an employment relationship, would relate to a workplace relations matter.

Authorised Version C2026C00293 registered 15/07/2026

Division 4—Procedural matters

536ND Application for unfair contract term remedy

(1) A person who is party to a services contract, or an organisation that represents the industrial interests of a person who is party to a services contract, may apply to the FWC for an order under Division 3 granting a remedy on the basis that the services contract contains a term that is unfair.

(2) An application must not be made in relation to a services contract unless, in the year the application is made, the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the contractor high income threshold.

Note: Division 3 sets out when the FWC may order a remedy for an unfair contract term.

536NE Application fees

(1) An application to the FWC under this Division must be accompanied by any fee prescribed by the regulations.

(2) The regulations may prescribe:
(a) a fee for making an application to the FWC under this Division; and
(b) a method for indexing the fee; and
(c) the circumstances in which all or part of the fee may be waived or refunded.

536NF Conferences

(1) This section applies in relation to a matter arising under this Part if the FWC conducts a conference in relation to the matter.

(2) Despite subsection 592(3), the FWC must conduct the conference in private.

Authorised Version C2026C00293 registered 15/07/2026

(3) The FWC must take into account any difference in the circumstances of the parties to the matter in:
  (a) considering the application; and
  (b) informing itself in relation to the application.

(4) The FWC must take into account the wishes of the parties to the matter as to the way in which the FWC:
  (a) considers the application; and
  (b) informs itself in relation to the application.

536NG Hearings

(1) The FWC must not hold a hearing in relation to a matter arising under this Part unless the FWC considers it appropriate to do so, taking into account:
  (a) the views of the parties to the matter; and
  (b) whether a hearing would be the most effective and efficient way to resolve the matter.

(2) If the FWC holds a hearing in relation to a matter arising under this Part, it may decide not to hold the hearing in relation to parts of the matter.

(3) The FWC may decide at any time (including before, during or after conducting a conference in relation to a matter) to hold a hearing in relation to the matter.

536NH Dismissing applications

(1) The FWC may, subject to subsection (2), dismiss an application for an order under Division 3 if the FWC is satisfied that the applicant has unreasonably:
  (a) failed to attend a conference conducted by the FWC, or a hearing held by the FWC, in relation to the application; or
  (b) failed to comply with a direction or order of the FWC relating to the application; or
  (c) failed to discontinue the application after a settlement agreement has been concluded.

Authorised Version C2026C00293 registered 15/07/2026

Note: For another power of the FWC to dismiss applications for orders under Division 3, see section 587.

(2) The FWC may exercise its power under subsection (1) on application by a party to the matter or an organisation entitled to represent the industrial interests of a party to the matter.

(3) This section does not limit when the FWC may dismiss an application.

536NJ Appeal rights

(1) Despite subsection 604(2), the FWC must not grant permission to appeal from a decision made by the FWC under this Part unless the FWC considers that it is in the public interest to do so.

(2) Despite subsection 604(1), an appeal from a decision made by the FWC in relation to a matter arising under this Part can only, to the extent that it is an appeal on a question of fact, be made on the ground that the decision involved a significant error of fact.

536NK Contravening orders under this Part

A person must not contravene an order under this Part.

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

Authorised Version C2026C00293 registered 15/07/2026