



Fair Work Legislation Amendment (Closing Loopholes) Act 2023

No. 120, 2023

An Act to amend the law relating to workplace relations, work health and safety, workers' compensation and rehabilitation, certain independent contractors, the Asbestos Safety and Eradication Agency and registered organisations, and for related purposes

Note: An electronic version of this Act is available on the Federal Register of Legislation (<https://www.legislation.gov.au/>)

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[Assented to 14 December 2023]

The Parliament of Australia enacts:

1 Short title

This Act is the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023*.

2 Commencement

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

| Commencement information | | |
|---|--|---|
| Column 1 | Column 2 | Column 3 |
| Provisions | Commencement | Date/Details |
| 1. Sections 1 to 4 and anything in this Act not elsewhere covered by this table | The day this Act receives the Royal Assent. | 14 December 2023 |
| 3. Schedule 1, Part 2 | The day after this Act receives the Royal Assent. | 15 December 2023 |
| 7. Schedule 1, Part 6 | The day after this Act receives the Royal Assent. | 15 December 2023 |
| 8. Schedule 1, Part 7, Division 1 | The day after this Act receives the Royal Assent. | 15 December 2023 |
| 10. Schedule 1, Part 8 | The day after this Act receives the Royal Assent. | 15 December 2023 |
| 18. Schedule 1, items 213 to 222 | The later of: (a) 1 January 2025; and (b) the day after the first time the Minister declares a Voluntary Small Business Wage Compliance Code under subsection 327B(1) of the <i>Fair Work Act 2009</i> . However, the provisions do not commence at all if the event mentioned in paragraph (b) does not occur. | 1 January 2025 (paragraph (a) applies) |
| 19. Schedule 1, | The day after the end of the period of 6 | 14 June 2024 |

| Commencement information | | |
|----------------------------------|---|---|
| Column 1 | Column 2 | Column 3 |
| Provisions | Commencement | Date/Details |
| items 223 and 224 | months beginning on the day this Act receives the Royal Assent. | |
| 20. Schedule 1, items 225 to 236 | At the same time as the provisions covered by table item 18. | 1 January 2025 |
| 20A. Schedule 1, Part 14A | The day after this Act receives the Royal Assent. | 15 December 2023 |
| 22A. Schedule 1, Part 16A | The day after this Act receives the Royal Assent. | 15 December 2023 |
| 24. Schedule 1, Part 18 | The day after this Act receives the Royal Assent. | 15 December 2023 |
| 25. Schedule 2 | The day after this Act receives the Royal Assent. | 15 December 2023 |
| 26. Schedule 3, Part 1 | The day after this Act receives the Royal Assent. | 15 December 2023 |
| 26A. Schedule 3, Part 2 | The day after the end of the period of 6 months beginning on the day this Act receives the Royal Assent. | 14 June 2024 |
| 27. Schedule 4, Part 1 | 1 July 2024. | 1 July 2024 |
| 28. Schedule 4, Parts 2 to 6 | The day after this Act receives the Royal Assent. | 15 December 2023 |
| 29. Schedule 4, Part 7 | The later of: (a) at the same time as the provisions covered by table item 28; and (b) immediately after the commencement of the <i>Work Health and Safety Amendment Act 2023</i> . | 15 December 2023 (paragraph (a) applies) |
| 30. Schedule 4, Part 8 | The day after this Act receives the Royal Assent. | 15 December 2023 |

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

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- (2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

3 Schedules

Legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

4 Review of operation of amendments

- (1) The Minister must cause a review to be conducted of the operation of the amendments made by this Act.
- (2) Without limiting the matters that may be considered when conducting the review, the review must:
- (a) consider whether the operation of the amendments made by this Act is appropriate and effective; and
 - (b) identify any unintended consequences of the amendments made by this Act; and
 - (c) consider whether amendments of the *Fair Work Act 2009*, or any other legislation, are necessary to:
 - (i) improve the operation of the amendments made by this Act; or
 - (ii) rectify any unintended consequences identified under paragraph (b).
- (3) The review must start no later than 2 years after this section commences.
- (4) The persons who conduct the review must give the Minister a written report of the review within 6 months of the commencement of the review.
- (5) The Minister must cause a copy of the report of the review to be tabled in each House of the Parliament within 15 sitting days of that House after the Minister receives the report.

4A Review of operation of Part 16A of Schedule 1

- (1) The Minister must cause a review to be conducted of the operation of the amendments made by Part 16A of Schedule 1 to this Act.
- (2) Without limiting the matters that may be considered when conducting the review, the review must:
 - (a) consider whether the operation of the amendments made by that Part is appropriate and effective; and
 - (b) identify any unintended consequences of the amendments made by that Part; and
 - (c) consider whether amendments of the *Fair Work Act 2009*, or any other legislation, are necessary to:
 - (i) improve the operation of the amendments made by that Part; or
 - (ii) rectify any unintended consequences identified under paragraph (b).
- (3) The review must start no later than 9 months after that Part commences.
- (4) The persons who conduct the review must give the Minister a written report of the review within 6 months of the commencement of the review.
- (5) The Minister must cause a copy of the report of the review to be tabled in each House of the Parliament within 15 sitting days of that House after the Minister receives the report.

Schedule 1—Main amendments

Part 2—Small business redundancy exemption

Fair Work Act 2009

26 Section 12 (definition of *appointment*)

Repeal the definition, substitute:

appointment:

- (a) of a bargaining representative means an appointment of a bargaining representative under paragraph 176(1)(c) or (d) or 177(c); and
- (b) of an insolvency practitioner includes a person becoming an insolvency practitioner:
 - (i) by taking possession or control of property; or
 - (ii) by operation of law.

27 Section 12

Insert:

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

- (a) applying of its own force; or
- (b) applying, with or without modifications, because of a law of the Commonwealth, a State or a Territory.

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

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

- (a) applying of its own force; or
- (b) applying, with or without modifications, because of a law of the Commonwealth, a State or a Territory.

insolvency practitioner for an employer means:

- (a) a liquidator of the employer; or

- (b) an administrator of the employer appointed under the *Corporations Act 2001*; or
- (c) a restructuring practitioner for the employer appointed under that Act; or
- (d) a person appointed as a receiver of property of the employer; or
- (e) a person who has possession or control of property of the employer for the purpose of enforcing:
 - (i) a charge; or
 - (ii) a mortgage; or
 - (iii) a lien; or
 - (iv) a pledge; or
 - (v) a security interest, within the meaning of the *Personal Property Securities Act 2009*, to which that Act applies, other than a transitional security interest within the meaning of that Act; or
- (f) a bankruptcy trustee of the employer.

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

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

28 At the end of section 121

Certain small businesses to pay redundancy pay

- (4) Despite subsection (1), an employee whose employment is terminated is entitled to be paid redundancy pay in accordance with this Division if:
 - (a) at the time of the termination, section 119 did not apply to the termination because the employer was a small business employer; and
 - (b) the employer is bankrupt or in liquidation (other than only because of a members' voluntary winding up); and
 - (c) the employer is a small business employer because the employment of one or more employees was terminated; and
 - (d) those terminations occurred:

- (i) on or after the day that is 6 months before the employer became bankrupt or went into liquidation; or
 - (ii) if there was an insolvency practitioner (the ***last insolvency practitioner***) for the employer on the business day before the employer became bankrupt or went into liquidation—on or after the day that is 6 months before the insolvency practitioner was appointed; or
 - (iii) if, before the last insolvency practitioner was appointed, other insolvency practitioners for the employer were appointed without any intervening business days between any of those appointments—on or after the day that is 6 months before the first of those insolvency practitioners was appointed; or
 - (iv) due to the insolvency of the employer.
- (5) A ***members' voluntary winding up*** is a winding up under section 495 of the *Corporations Act 2001*.

Time of liquidation—members' voluntary winding up where company turns out to be insolvent

- (6) If a liquidator takes action under section 496 of the *Corporations Act 2001* (company turns out to be insolvent) in relation to a small business employer whose liquidation began as a members' voluntary winding up, then, for the purposes of subparagraph (4)(d)(i), the time the employer goes into liquidation is the time the employer goes into liquidation because of the members' voluntary winding up.

Application to partnerships

- (7) For the purposes of subsection (4), a small business employer that is a partnership is not bankrupt or in liquidation unless each partner of the partnership is bankrupt or in liquidation, as the case requires.

Part 6—Closing the labour hire loophole

Fair Work Act 2009

71 After paragraph 5(8)(a)

Insert:

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

72 Section 12

Insert:

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

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

covered employment instrument means:

- (a) an enterprise agreement; or
- (b) a workplace determination; or
- (c) a determination under section 24 of the *Public Service Act 1999* that applies to a class of APS employees in an Agency (within the meaning of that Act); or
- (d) an instrument made under any other law of the Commonwealth (other than this Act), or of a State or a Territory, that provides for the terms and conditions of employment for a class of national system employees of:
 - (i) the Commonwealth or a State or Territory; or
 - (ii) an authority of the Commonwealth or of a State or Territory; or
- (e) any other instrument relating to the employment of a class of national system employees that:
 - (i) is made under a law of the Commonwealth (other than this Act) or a State or Territory; and
 - (ii) is prescribed by the regulations.

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

protected rate of pay: see section 306F.

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

regulated employee: see subsection 306E(5).

regulated host: see section 306C.

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

72A At the end of section 201

Add:

Approval decision to note that enterprise agreement to be new host employment instrument for regulated labour hire arrangement order

(5) If:

- (a) the FWC approves an enterprise agreement; and
- (b) the enterprise agreement will become the host employment instrument covered by a regulated labour hire arrangement order because of section 306EB;

the FWC must note in its decision to approve the agreement that the agreement will be the host employment instrument covered by the order.

Note: Certain notification requirements also apply if the enterprise agreement will be the host employment instrument covered by a regulated labour hire arrangement order (see section 306EC).

73 After Part 2-7

Insert:

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:

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

far as work is performed for the person in connection with the activity carried on in the Territory; or

- (g) a person, so far as work is performed for the person in a Territory in Australia; or
- (h) any person in a State that is a referring State because of Division 2A or 2B of Part 1-3.

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

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

- (1) A reference in this Part to work of a kind includes a reference to work that is substantially of that kind.
- (2) A reference in this Part to work performed for a person includes a reference to work performed wholly or principally for the benefit of:
 - (a) the person; or
 - (b) an enterprise carried on by the person; or
 - (c) a joint venture or common enterprise engaged in by the person and one or more other persons.
- (3) To avoid doubt, in determining for the purposes of this Part whether work is or is to be performed for a person by an employee of an employer, it does not matter whether there is or will be any agreement between the person and the employer relating to the performance of the work.

Division 2—Regulated labour hire arrangement orders

Subdivision A—Making regulated labour hire arrangement orders

306E FWC may make a regulated labour hire arrangement order

Regulated labour hire arrangement order

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

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

- (1A) Despite subsection (1), the FWC must not make the order unless it is satisfied that the performance of the work is not or will not be for the provision of a service, rather than the supply of labour, having regard to the matters in subsection (7A).
- (2) Despite subsection (1), the FWC must not make the order if the FWC is satisfied that it is not fair and reasonable in all the circumstances to do so, having regard to any matters in subsection (8) in relation to which submissions have been made.
- (3) For the purposes of paragraph (1)(a), it does not matter:
 - (a) whether the supply is the result of an agreement, or one or more agreements; or
 - (b) if there are one or more agreements relating to the supply—whether an agreement is between:
 - (i) the regulated host and the employer; or

- (ii) the regulated host and a person other than the employer;
or
 - (iii) the employer and a person other than the regulated host;
or
 - (iv) any 2 persons who are neither the regulated host nor the employer; or
- (c) whether the regulated host and employer are related bodies corporate.

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

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

Regulated employee and host employment instrument

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

Who may apply for an order

- (7) The following persons may apply for the order:
- (a) a regulated employee;
 - (b) an employee of the regulated host;
 - (c) an employee organisation that is entitled to represent the industrial interests of an employee mentioned in paragraph (a) or (b);
 - (d) the regulated host.

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

- (7A) For the purposes of subsection (1A), the matters are as follows:

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

Matters to be considered if submissions are made

- (8) For the purposes of subsection (2), the matters are as follows:
 - (a) the pay arrangements that apply to employees of the regulated host (or related bodies corporate of the regulated host) and the regulated employees, including in relation to:
 - (i) whether the host employment instrument applies only to a particular class or group of employees; and
 - (ii) whether, in practice, the host employment instrument has ever applied to an employee at a classification, job level or grade that would be applicable to the regulated employees; and
 - (iii) the rate of pay that would be payable to the regulated employees if the order were made;
 - (c) the history of industrial arrangements applying to the regulated host and the employer;
 - (d) the relationship between the regulated host and the employer, including whether they are related bodies corporate or engaged in a joint venture or common enterprise;
 - (da) if the performance of the work is or will be wholly or principally for the benefit of a joint venture or common

enterprise engaged in by the regulated host and one or more other persons:

- (i) the nature of the regulated host's interests in the joint venture or common enterprise; and
 - (ii) the pay arrangements that apply to employees of any of the other persons engaged in the joint venture or common enterprise (or related bodies corporate of those other persons);
- (e) the terms and nature of the arrangement under which the work will be performed, including:
- (i) the period for which the arrangement operates or will operate; and
 - (ii) the location of the work being performed or to be performed under the arrangement; and
 - (iii) the industry in which the regulated host and the employer operate; and
 - (iv) the number of employees of the employer performing work, or who are to perform work, for the regulated host under the arrangement;
- (f) any other matter the FWC considers relevant.

What an order must specify

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

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

What an order may specify

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

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

306EA Regulated labour hire arrangement order may cover additional arrangements

Determination that application covers additional employers and employees

- (1) If an application for a regulated labour hire arrangement order is made in relation to a regulated host, an employer and one or more employees of the employer, the FWC may determine that the application is taken to also relate to:

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

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

- (2) The FWC may make the determination:
- (a) on its own initiative; or
 - (b) on application by any of the following:
 - (i) the applicant for the order or any other person who could have applied for the order (see subsection 306E(7));
 - (ii) the employer mentioned in paragraph 306E(1)(a);
 - (iii) an employer that supplies or will supply employees as referred to in paragraph (1)(a) of this section;
 - (iv) a person who is such an employee;
 - (v) an employee organisation that is entitled to represent the industrial interests of such an employee.

- (3) If the FWC makes such a determination, the FWC must seek the views of the following before deciding whether to make the regulated labour hire arrangement order:
- (a) the additional regulated employees;
 - (b) employee organisations that are entitled to represent the industrial interests of the additional regulated employees;
 - (c) the additional employers.

Additional employers and employees in regulated labour hire arrangement order

- (4) Subject to subsections (5) and (6), if the FWC makes a determination under subsection (1) in relation to an application for a regulated labour hire arrangement order, the FWC may specify in the regulated labour hire arrangement order (if made) that, in addition to the persons referred to in paragraphs 306E(9)(b) and (c), the order also covers:
- (a) any or all of the additional employers; and
 - (b) additional regulated employees of those employers.
- (5) The FWC must not specify an additional employer or additional regulated employees of the employer under subsection (4) unless:
- (a) the FWC is satisfied of the matters mentioned in subsection 306E(1) in relation to the additional employer and the additional regulated employees; and
 - (b) the FWC is satisfied that the covered employment instrument that would apply to the additional regulated employees, as referred to in paragraph 306E(1)(b), is the host employment instrument covered by the order; and
 - (c) the FWC is satisfied that the performance of the work by the additional regulated employees is not or will not be for the provision of a service, rather than the supply of labour, having regard to the matters in subsection 306E(7A) in relation to the additional employer and the additional regulated employees.
- (6) The FWC must not specify an additional employer or additional regulated employees of the employer under subsection (4) if the FWC is satisfied that it is not fair and reasonable in all the circumstances to do so, having regard to:

- (a) the views (if any) of persons referred to in subsection (3);
and
- (b) any matters mentioned in subsection 306E(8) in relation to which submissions are made, to the extent the submissions relate to the additional employer and the additional regulated employees.

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

- (1) This section applies if:
 - (a) a regulated labour hire arrangement order is in force; and
 - (b) the host employment instrument covered by the order ceases to apply to the regulated host covered by the order, or to a class of employees of the regulated host covered by the order, in connection with another covered employment instrument (the *new instrument*) starting to apply to the regulated host or those employees; and
 - (c) the new instrument would apply to the regulated employees covered by the order if the regulated host were to employ the employees to perform work of a kind to which the order relates.
- (2) From the time the new instrument starts to apply to the regulated host or the class of employees mentioned in paragraph (1)(b), the order has effect (and may be dealt with) as if the new instrument were the host employment instrument covered by the order.
- (3) For the purposes of paragraph (1)(c), in determining whether a covered employment instrument would apply to the employees, it does not matter on what basis the employees are or would be employed.

306EC Notification requirements in relation to new covered employment instrument

Notification by regulated host

- (1) If a regulated labour hire arrangement order in force covers a regulated host and an event mentioned in subsection (2) occurs, the

regulated host must, as soon as practicable after the event occurs, give written notice to any employers covered by the order of:

- (a) the event; and
- (b) the effect that the event will have or would have in relation to the order.

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

- (2) The events are the following:
 - (a) approval, by employees, of a covered employment instrument that will, if it comes into operation, become the host employment instrument covered by the order because of section 306EB;
 - (b) any other approval or making of a covered employment instrument that will, if it comes into operation, become the host employment instrument covered by the order because of section 306EB, other than an approval by the FWC of an enterprise agreement (see subsection (3) of this section).

Notification by FWC

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

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

- (1) This section applies if:
 - (a) a regulated labour hire arrangement order that covers a regulated host and one or more employers, and relates to a kind of work, is in force or has been made but is not yet in force; and
 - (b) one or more other employers (each of which is a *new employer*) start or will start to supply employees (each of whom is a *relevant regulated employee*) to perform work of

that kind for the regulated host, in a manner referred to in paragraph 306E(1)(a); and

- (c) the new employers are not covered by any regulated labour hire arrangement order (whether in force, or made but not yet in force) that covers or will cover the relevant regulated employees in relation to the performance of that work; and
- (d) the FWC did not make a determination under subsection 306EA(1) in relation to the new employers and the application for the regulated labour hire arrangement order.

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

Regulated host must make application

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

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

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

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

FWC must decide whether to make variation order

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

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

When variation order comes into force

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

Interim arrangements before FWC decides application

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

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

- (1) This section applies if:
- (a) a regulated host is covered by a regulated labour hire arrangement order that is in force or has been made but is not yet in force; and
 - (b) a tender process is conducted:
 - (i) by or on behalf of the regulated host; or
 - (ii) for the purposes of a joint venture or common enterprise engaged in by the regulated host and one or more other persons.
- (2) If it could reasonably be expected that one or more employers would, as a result of the tender process, become covered by the regulated labour hire arrangement order because of section 306ED, the regulated host must ensure that, from the start of the tender process, all prospective tenderers are advised, in writing, that if one or more tenderers are successful in the process:
- (a) one or more employers could become covered by the regulated labour hire arrangement order; and
 - (b) the employers could be required to pay employees of the employers who perform work for the regulated host, in accordance with this Part, in connection with the work.

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

- (3) If the regulated host is required to apply to the FWC in relation to one or more employers under subsection 306ED(2) as a result of the tender process, the regulated host must, as soon as practicable after the end of the tender process, advise the successful tenderer or tenderers in that process (whether or not they are the employers), in writing, of the following:
- (a) that the regulated host is required to make the application;
 - (b) the effect of subsection 306ED(11) in relation to the application;
 - (c) that if the FWC decides to vary the order under section 306ED to cover those employers, and the order is in force or comes into force, the employers will be required to pay employees of the employers who perform work for the regulated host, in accordance with this Part, in connection with the work.

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

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

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

Application of section

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

Employer must not pay less than protected rate of pay

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

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

Exceptions

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

Meaning of protected rate of pay

- (4) Unless subsection (5) applies, the **protected rate of pay** for the regulated employee is the full rate of pay that would be payable to the employee if the host employment instrument covered by the regulated labour hire arrangement order were to apply to the employee.
- (5) If the regulated employee is a casual employee, and there is no covered employment instrument that applies to the regulated host that provides for work of that kind to be performed by casual employees, the **protected rate of pay** for the regulated employee is the full rate of pay that would be payable to the employee if:

- (a) the employee were an employee other than a casual employee and the host employment instrument covered by the regulated labour hire arrangement order were to apply to the employee; and
 - (b) the base rate of pay that would be payable to the employee, in the circumstances referred to in paragraph (a), were increased by 25%.
- (6) Despite subsections (4) and (5), if the employer is a national system employer only because of section 30D or 30N, the ***protected rate of pay*** for the regulated employee does not include any amount that relates to an excluded subject matter within the meaning of subsection 30A(1) or 30K(1).
- Note: Sections 30D and 30N extend the meaning of ***national system employer***.
- (7) If the regulated employee is a pieceworker and paragraph 16(2)(b) would apply to the employee were the host employment instrument to apply to the employee, the base rate of pay that would be payable to the employee for the purposes of subsection (5) of this section is taken to be the base rate of pay that would be referred to in that paragraph.
- (8) If the regulated employee is a pieceworker and paragraph 18(2)(b) would apply to the employee were the host employment instrument to apply to the employee, the full rate of pay that would be payable to the employee for the purposes of subsections (4) and (5) of this section is taken to be the full rate of pay that would be referred to in that paragraph.
- (9) To avoid doubt, this section does not require that a regulated employee referred to in subsection (5) be taken to be an employee other than a casual employee for the purposes of determining entitlements to kinds of leave, or any other purpose, except determining the protected rate of pay for the regulated employee.

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

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

- (a) a fair work instrument (other than an instrument made by the FWC under this Part) that applies to the regulated employee; or
 - (b) a covered employment instrument (other than a fair work instrument) that applies to the regulated employee; or
 - (c) the regulated employee's contract of employment;
- that provides for a rate of pay for the regulated employee that is less than the protected rate of pay for the regulated employee.

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

306G Exceptions from requirement to pay protected rate of pay

Training arrangements

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

Certain short-term arrangements

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

- (3) However, if the regulated employee does in fact perform the work for longer than the maximum period applicable under paragraph (2)(b), as a result of a variation to or the making of one or more agreements, section 306F applies to the regulated employee on and after the day the agreements are varied or made.

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

Application of this section

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

Ability to request information regarding protected rate of pay

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

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

Manner of complying with request

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

Subdivision C—Short-term arrangements

306J Determination altering exemption period for short-term arrangements

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

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

306K Determination of recurring extended exemption period

- (1) This section applies if:
 - (a) a regulated labour hire arrangement order is in force that covers a regulated host, one or more employers and one or more regulated employees performing work for the regulated host; or

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

306L Making and effect of determinations under this Subdivision

Who may apply for determination

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

Time for making determination

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

Requirements for making determination

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

- (4) The FWC may make the determination only if satisfied that there are exceptional circumstances that justify making it, having regard to:
- (a) whether the purpose of the proposed exemption period or recurring extended exemption period relates to satisfying a seasonal or short-term need for workers; and
 - (b) the industry in which the work is performed or is to be performed; and
 - (c) the circumstances of:
 - (i) the regulated host; and
 - (ii) any relevant employers covered by the regulated labour hire arrangement order; and
 - (d) the views (if any) of any persons or organisations mentioned in subsection (1); and
 - (e) for a determination made for the purposes of paragraph 306J(2)(c)—the principle that the longer the period to be specified in the determination, the greater the justification required; and
 - (f) for a determination that a period is a recurring extended exemption period for a regulated host for a kind of work—the principle that the longer the period to be specified in the determination, and the greater the number of recurrences of that period to be specified, the greater the justification required; and
 - (g) any other matter the FWC considers relevant.

When determination comes into force

- (5) The determination comes into force on the later of the day the regulated labour hire arrangement order comes into force, and the following:
- (a) for a determination under section 306J that there is no exemption period for the purposes of section 306G—the day it is made;
 - (b) for a determination under section 306J that there is an exemption period of more than, or less than, 3 months for the purposes of section 306G—the day it is made or a later day specified in the determination;

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

Subdivision D—Alternative protected rate of pay orders

306M Making an alternative protected rate of pay order

Application of this section

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

Alternative protected rate of pay order

- (2) The FWC may make an order (an ***alternative protected rate of pay order***) specifying:
 - (a) how the rate of pay at which the employer must pay the regulated employee in connection with the work is to be worked out; and
 - (b) that the employer must pay the rate of pay worked out in that way to the regulated employee in connection with the work.

Rate of pay

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

instead references to a specified covered employment instrument that:

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

Who may apply

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

Time for making

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

Criteria for making etc.

- (6) The FWC must not make the order unless satisfied that:
 - (a) it would be unreasonable for the requirement in section 306F, that the employer pay the regulated employee at no less than the protected rate of pay, to apply in connection with that work (including, for example, because the rate would be insufficient or would be excessive); and
 - (b) there is a covered employment instrument of the kind referred to in paragraph (3)(a) or (b).
- (7) Before deciding whether to make the order, the FWC must seek the views of the following:
 - (a) the employer;
 - (b) the regulated host;
 - (c) the employer to which a covered employment instrument to be specified in the order for the purposes of subsection (3) applies (if not the regulated host);
 - (d) the employee;

- (e) employees to whom the covered employment instrument to be specified in the order for the purposes of subsection (3) applies;
 - (f) organisations entitled to represent the industrial interests of any of the persons referred to in paragraphs (a) to (e).
- (8) In deciding whether to make the order, the FWC must have regard to:
- (a) whether the host employment instrument covered by the regulated labour hire arrangement order applies only to a particular class or group of employees; and
 - (b) whether, in practice, the host employment instrument has ever applied to an employee at a classification, job level or grade that would be applicable to the regulated employee; and
 - (c) the views (if any) of any persons or organisations mentioned in subsection (7);
 - (d) the rate of pay that would be payable to the regulated employee in connection with the work if the order were made; and
 - (e) any other matter the FWC considers relevant.

Exception for short-term arrangements

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

306N Effect of alternative protected rate of pay order

When alternative protected rate of pay order comes into force

- (1) An alternative protected rate of pay order comes into force:
- (a) if the order is made before the regulated labour hire arrangement order to which the order relates comes into force:

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

Effect of alternative protected rate of pay order

- (2) If:
- (a) a regulated labour hire arrangement order is in force that covers a regulated host, an employer and work performed by a regulated employee of the employer; and
 - (b) an alternative protected rate of pay order is made in relation to the regulated labour hire arrangement order;
- then:
- (c) the alternative protected rate of pay order applies in relation to so much of the work as is performed during the period that the alternative protected rate of pay order is in force; and
 - (d) during that period, the alternative protected rate of pay order has effect despite section 306F (protected rate of pay payable to employees if a regulated labour hire arrangement order is in force), and despite any provision of the following that provides for a lower rate of pay than that worked out in accordance with the order:
 - (i) a fair work instrument that applies to the regulated employee;
 - (ii) a covered employment instrument (other than a fair work instrument) that applies to the regulated employee;
 - (iii) the regulated employee's contract of employment.

Person must not contravene an alternative protected rate of pay order

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

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

Subdivision E—Termination payments

306NA Determining amounts of payments relating to termination of employment

Application of this section

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

Determining amounts of payments relating to termination of employment

- (2) Subject to subsection (5), if an amount that the employee's employer is required to pay to the employee (or to a person on the employee's behalf) in relation to the termination of the employment is to be determined wholly or partly on the basis of a rate of pay in relation to the employee, the rate of pay for the purposes of determining the amount is:
- (a) if the employee is covered by subsection (3) in relation to the amount—the applicable rate of pay that results from the operation of this Part; or
 - (b) in any other case—the applicable rate of pay to which the employee is entitled apart from the operation of this Part.
- (3) This subsection covers the employee in relation to the amount if:
- (a) immediately before the termination of the employment occurs or is to occur, the employee is or will be covered by a regulated labour hire arrangement order in force in relation to work performed by the employee for a regulated host; and
 - (b) the termination of the employment occurs or is to occur during a period in which the employee is performing work for the regulated host, including a period when the employee is taking paid or unpaid leave, or is absent, in connection with that work and the leave or absence is authorised:
 - (i) by the employee's employer; or

- (ii) by or under a term or condition of the employee's employment; or
 - (iii) by or under a law of the Commonwealth, a State or a Territory, or an instrument in force under such a law; and
 - (c) the rate of pay mentioned in paragraph (2)(a) is higher than the rate mentioned in paragraph (2)(b); and
 - (d) unless the amount is a payment in lieu of notice of termination—the employee has not performed work for any other regulated host in relation to the employee's employment with the employer.
- (4) If the performance of the work for the regulated host relates to a joint venture or common enterprise engaged in by the regulated host and one or more other persons, then for the purposes of paragraph (3)(d), disregard any work that is taken to be performed for those other persons because of the operation of paragraph 306D(2)(c).

Excluded subject matters

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

Interaction with fair work instruments etc.

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

Division 3—Dealing with disputes

306P Disputes about the operation of this Part

When this Division applies to a dispute

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

Parties must attempt to resolve dispute at workplace level

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

How the FWC deals with dispute

- (5) If a party to the dispute makes an application under subsection (4):
 - (a) the FWC must first deal with the dispute by means other than arbitration, unless there are exceptional circumstances; and
 - (b) the FWC may deal with the dispute by arbitration in accordance with section 306Q.

Note: For the purposes of paragraph (a), the FWC may deal with the dispute as it considers appropriate, including by mediation, conciliation,

making a recommendation or expressing an opinion (see subsection 595(2)).

Representatives

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

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

Joinder of other employees to disputes

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

306Q Dealing with disputes by arbitration

- (1) The FWC may deal with the dispute by arbitration, including by making an order (an *arbitrated protected rate of pay order*) determining:
- (a) how the rate of pay at which the employer must pay the employee in connection with the work is to be worked out; and
 - (b) that the employer must pay the rate of pay worked out in that way to the employee in connection with the work.
- (2) If the employer is a national system employer only because of section 30D or 30N, the rate of pay for the purposes of paragraph (1)(a) of this section must not include any amount that relates to an excluded subject matter within the meaning of subsection 30A(1) or 30K(1).

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

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

Effect of arbitrated protected rate of pay order

- (6) If the FWC makes an arbitrated protected rate of pay order in relation to the dispute, the order has effect, in relation to so much of the work as is performed during the period to which the order applies, despite the following:
 - (a) section 306F (protected rate of pay payable to employees if a regulated labour hire arrangement order is in force);
 - (b) any provision of the following that provides for a lower rate of pay than that worked out in accordance with the order:
 - (i) a fair work instrument that applies to the employee;
 - (ii) a covered employment instrument (other than a fair work instrument) that applies to the employee;
 - (iii) the employee's contract of employment.
- (7) A person must not contravene a term of an arbitrated protected rate of pay order.

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

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

306R Application fees

- (1) An application under subsection 306P(4) must be accompanied by any fee prescribed by the regulations.
- (2) The regulations may prescribe:
- (a) a fee for making an application to the FWC under that subsection; and
 - (b) a method for indexing the fee; and
 - (c) the circumstances in which all or part of the fee may be waived or refunded.

Division 4—Anti-avoidance

306S Preventing making of regulated labour hire arrangement orders

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

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

(2) In this section:

scheme means:

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

306SA Avoidance of application of regulated labour hire arrangement orders

(1) A person contravenes this section if:

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

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

(2) In this section:

scheme means:

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

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

306T Short-term arrangements—engaging other employees

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

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

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

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

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

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

employee at a rate determined under or in accordance with this Part.

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

306V Engaging independent contractors

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

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

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

Division 5—Other matters

306W Guidelines

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

74 Subsection 539(2) (after table item 9)

Insert:

Part 2-7A—Regulated labour hire arrangement orders

| | | | | |
|----|----------|------------------|-----------------|---------------|
| 9A | 306EC(1) | (a) an employee; | (a) the Federal | for a serious |
| | 306ED(2) | (b) an employee | Court; | contravention |
| | 306ED(4) | organisation; | (b) the Federal | —600 penalty |
| | 306EE(2) | (c) an inspector | Circuit and | units; or |
| | 306EE(3) | | Family Court | otherwise—60 |
| | 306F(2) | | of Australia | penalty units |
| | 306H(3) | | (Division 2); | |
| | 306N(3) | | (c) an eligible | |
| | 306Q(7) | | State or | |
| | 306S(1) | | Territory court | |
| | 306SA(1) | | | |
| | 306T | | | |
| | 306U | | | |
| | 306V | | | |

75 After paragraph 557(2)(f)

Insert:

- (fa) subsection 306F(2) (which deals with the protected rate of pay payable to employees covered by a regulated labour hire arrangement order);
- (fb) subsection 306H(3) (which deals with the obligations of regulated hosts covered by a regulated labour hire arrangement order);
- (fc) subsection 306N(3) (which deals with the contravention of alternative protected rate of pay orders);
- (fd) subsection 306Q(7) (which deals with the contravention of arbitrated protected rate of pay orders);

76 After paragraph 576(1)(f)

Insert:

- (fa) regulated labour hire arrangement orders (Part 2-7A);

Part 7—Workplace delegates' rights

Division 1—Amendments commencing day after Royal Assent

Fair Work Act 2009

77 Section 12

Insert:

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

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

workplace delegate: see subsection 350C(1).

78 At the end of Subdivision C of Division 3 of Part 2-3

Add:

149E Workplace delegates' rights

A modern award must include a delegates' rights term for workplace delegates covered by the award.

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

79 Section 169 (paragraph about Division 5)

Omit "and consultation requirements", substitute ", consultation requirements and the rights of workplace delegates".

80 After subsection 201(1)

Insert:

Approval decision to note modern award delegates' rights term included in an enterprise agreement

(1A) If:

- (a) the FWC approves an enterprise agreement; and
 - (b) a delegates' rights term in a modern award is taken to be a term of the enterprise agreement because of subsection 205A(2):
- the FWC must note in its decision to approve the agreement that the term is so included in the agreement.

81 At the end of Division 5 of Part 2-4

Add:

205A Enterprise agreements to include a delegates' rights term etc.

- (1) An enterprise agreement must include a delegates' rights term for workplace delegates to whom the agreement applies.

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

When modern award term prevails

- (2) However, if, when the agreement is approved, the delegates' rights term is less favourable than the delegates' rights term in one or more modern awards that cover the workplace delegates:
 - (a) the term in the enterprise agreement has no effect; and
 - (b) the most favourable term of those in the modern awards, as determined by the FWC, is taken to be a term of the enterprise agreement.
- (3) To avoid doubt, if the delegates' rights term of a modern award is taken to be a term of an enterprise agreement, the term does not change if the modern award changes.

82 At the end of section 273

Add:

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.

83 Section 334 (paragraph about Division 4)

Repeal the paragraph, substitute:

Division 4 protects freedom of association, involvement in lawful industrial activities, and the exercise of workplace delegates' rights.

84 At the end of Division 4 of Part 3-1

Add:

350A Protection for workplace delegates

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

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

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

Exception—conduct required by law

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

350C Workplace delegates and their rights

Meaning of workplace delegate

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

Rights of workplace delegates

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

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

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

85 Subsection 539(2) (table item 11, column 1)

After “350(2)”, insert “350A(1)”.

Part 8—Strengthening protections against discrimination

Fair Work Act 2009

94 Subsection 153(1)

After “family or carer’s responsibilities,” insert “subjection to family and domestic violence,”.

95 Subsection 195(1)

After “family or carer’s responsibilities,” insert “subjection to family and domestic violence,”.

96 Subsection 351(1)

After “family or carer’s responsibilities,” insert “subjection to family and domestic violence,”.

97 Section 578

After “family or carer’s responsibilities,” insert “subjection to family and domestic violence,”.

98 Paragraph 772(1)(f)

After “family or carer’s responsibilities,” insert “subjection to family and domestic violence,”.

99 Before section 789HA

Insert:

Division 1—Breastfeeding, gender identity and intersex status

100 Section 789HA (heading)

Omit “Part”, substitute “Division”.

101 Section 789HA

Omit “Part”, substitute “Division”.

102 At the end of Part 6-4E

Add:

Division 2—Family and domestic violence

789HC Constitutional basis of this Division

This Division relies on the Commonwealth's legislative powers under paragraph 51(xxix) (external affairs) of the Constitution as it relates to giving effect to Australia's obligations under:

- (a) the ILO Convention (No. 111) concerning Discrimination in respect of Employment and Occupation, done at Geneva on 25 June 1958; and
- (b) the ILO Convention (No. 190) concerning the elimination of violence and harassment in the world of work, done at Geneva on 21 June 2019.

Note: The Conventions could in 2023 be viewed in the Australian Treaties Library on the AustLII website (<http://www.austlii.edu.au>).

789HD Extension of anti-discrimination rules

- (1) Subsection (3) applies for the purposes of the operation of the provisions identified in subsection (2) in relation to family and domestic violence.
- (2) The provisions are as follows:
 - (a) section 153;
 - (b) section 172A;
 - (c) section 195;
 - (d) section 351.
- (3) In applying sections 30H and 30S in relation to that operation of the provisions identified in subsection (2), assume that:
 - (a) the matter to which that operation of those provisions relates is not an excluded subject matter for the purposes of:
 - (i) the State's referral law mentioned in sections 30H and 30S; and
 - (ii) Divisions 2A and 2B of Part 1-3; and

- (b) the referral of that matter by that referral law results in the Parliament of the Commonwealth having sufficient legislative power for those provisions (to the extent of that operation) to have effect.

Part 14—Wage theft

Fair Work Act 2009

213 Section 12

Insert:

Australian government: see subsection 794A(2).

contravene this Act, or a provision of this Act, includes contravene any of the following:

- (a) a civil remedy provision;
- (b) a provision of this Act that creates an offence;
- (c) a related offence provision.

cooperation agreement: see subsection 717B(1).

engage in conduct means:

- (a) do an act; or
- (b) omit to perform an act.

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

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

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

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

related offence provision means:

- (a) section 6 of the *Crimes Act 1914*; or
- (b) a provision of Part 2.4 of the *Criminal Code*;

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

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

underpayment amount:

- (a) in relation to a contravention of a civil remedy provision—see subsection 546A(2); and
- (b) in relation to the commission of an offence against subsection 327A(1)—see subsection 327A(7).

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

214 At the end of subsection 37(2)

Add “, except as provided for by subsection (3)”.

215 At the end of section 37

Add:

- (3) The Crown in right of the Commonwealth is liable to be prosecuted for an offence against any of the following provisions:
 - (a) subsection 327A(1);
 - (b) a related offence provision, to the extent that the related offence provision relates to an offence against subsection 327A(1).
- (4) The Crown, in each of its capacities and to the extent the Commonwealth’s legislative power permits, is liable to be the subject of proceedings for a contravention of a civil remedy provision.

216 Section 321 (after the paragraph relating to Division 2)

Insert:

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.

217 Before section 323

Insert:

Subdivision A—Civil remedy provisions relating to payment of wages etc.

218 Subsection 324(1) (note 1)

Omit “Division”, substitute “Subdivision”.

219 Section 327 (heading)

Omit “Division”, substitute “Subdivision”.

220 At the end of Division 2 of Part 2-9

Add:

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).

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*.

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
 - (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.
- (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.

221 Paragraph 682(1)(c)

Omit “any act”, substitute “any conduct”.

222 Paragraph 682(1)(c)

After “this Act”, insert “, a related offence provision”.

223 After paragraph 682(1)(d)

Insert:

- (da) to publish a compliance and enforcement policy, including guidelines relating to the circumstances in which the Fair Work Ombudsman will, or will not:
 - (i) accept or consider accepting undertakings under section 715; or

- (ii) enter or consider entering into cooperation agreements under section 717B;

224 At the end of section 682

Add:

- (3) Before publishing a compliance and enforcement policy under paragraph (1)(da), the Fair Work Ombudsman must consult with the National Workplace Relations Consultative Council about the guidelines referred to in that paragraph.

225 Paragraph 706(1)(a)

After “this Act”, insert “, a related offence provision”.

226 Subsection 711(1)

Omit “a civil remedy provision”, substitute “this Act”.

227 Paragraph 712AA(1)(a)

After “this Act”, insert “, a related offence provision”.

228 At the end of section 713

Add:

Employee records and pay slips

- (4) Subsections (2) and (3) do not apply to:
- (a) an employee record in relation to an employee that is made under section 535; or
 - (b) a copy of a pay slip created in relation to an employee.

229 Section 713A

Before “The following are not admissible”, insert “(1)”.

230 At the end of section 713A

Add:

- (2) Subsection (1) does not apply to:
- (a) an employee record in relation to an employee that is made under section 535; or

- (b) a copy of a pay slip created in relation to an employee.

231 After Subdivision DD of Division 3 of Part 5-2

Insert:

Subdivision DE—Cooperation agreements

717A Effect of cooperation agreement

- (1) While a cooperation agreement is in force between the Fair Work Ombudsman and a person, the Fair Work Ombudsman must not refer conduct engaged in by the person that is covered by the agreement to the Director of Public Prosecutions or the Australian Federal Police for action in relation to a possible offence.

Note: See subsection 717B(1) for the definition of *cooperation agreement*.

- (2) Subsection (1) does not prevent:
- (a) an inspector instituting or continuing civil proceedings in relation to the conduct; or
 - (b) conduct engaged in by any other person from being referred to the Director of Public Prosecutions or the Australian Federal Police for action in relation to a possible offence.

717B Entry into cooperation agreement

- (1) The Fair Work Ombudsman may enter into a written agreement (a *cooperation agreement*) with a person covering specified conduct engaged in by the person that the person has reported to the Fair Work Ombudsman as amounting to the possible commission by the person of an offence, or at least the physical elements of an offence, against either or both of the following:
- (a) subsection 327A(1) (failing to pay amounts as required);
 - (b) a related offence provision, to the extent that the offence created by the provision relates to an offence against subsection 327A(1).
- (2) The Fair Work Ombudsman must have regard to the following matters in deciding whether to enter into a cooperation agreement with a person in relation to conduct:

- (a) whether in the Fair Work Ombudsman's view the person has made a voluntary, frank and complete disclosure of the conduct, and the nature and level of detail of the disclosure;
 - (b) whether in the Fair Work Ombudsman's view the person has cooperated with the Fair Work Ombudsman in relation to the conduct;
 - (c) the Fair Work Ombudsman's assessment of the person's commitment to continued cooperation in relation to the conduct, including by way of providing the Fair Work Ombudsman with comprehensive information to enable the effectiveness of the person's actions and approach to remedying the effects of the conduct to be assessed;
 - (d) the nature and gravity of the conduct;
 - (e) the circumstances in which the conduct occurred;
 - (f) the person's history of compliance with this Act;
 - (g) any other matters prescribed by the regulations.
- (3) The regulations may prescribe matters in relation to the content of cooperation agreements.

717C When a cooperation agreement is in force

A cooperation agreement is in force:

- (a) from the time it is entered into or any later time specified in the agreement; and
- (b) until the earliest of the following:
 - (i) the Fair Work Ombudsman terminates the agreement in accordance with section 717D;
 - (ii) the person withdraws from the agreement in accordance with section 717E;
 - (iii) the expiry date (if any) specified in the agreement.

717D Termination of cooperation agreement by Fair Work Ombudsman

- (1) The Fair Work Ombudsman may terminate a cooperation agreement with a person at any time, by written notice to the person, if the Fair Work Ombudsman is satisfied that any of the following grounds exist:

- (a) the person has contravened a term of the agreement;
 - (b) the person has, in relation to the agreement, given information or produced a document to the Fair Work Ombudsman, an inspector, or a person referred to in subsection 712AA(2) that:
 - (i) is false or misleading; or
 - (ii) for information—omits any matter or thing without which the information is misleading;whether the person gave the information or produced the document before the agreement was entered into or since;
 - (c) any other ground prescribed by the regulations.
- (2) If the Fair Work Ombudsman is satisfied that a ground exists for terminating a cooperation agreement with a person, the Fair Work Ombudsman may, instead of terminating the agreement, apply to the Federal Court, the Federal Circuit and Family Court of Australia (Division 2) or an eligible State or Territory Court for an order under subsection (3).
- (3) If the court is satisfied that the ground exists, the court may make one or more of the following orders:
- (a) an order directing the person to comply with a term of the cooperation agreement, or to give or produce correct and complete information or documents;
 - (b) an order awarding compensation for loss that a person has suffered because of matters constituting the ground for terminating the agreement;
 - (c) any other order that the court considers appropriate.

717E Withdrawal from cooperation agreement

A person that is party to a cooperation agreement with the Fair Work Ombudsman may withdraw from the agreement, but only with the consent of the Fair Work Ombudsman.

717F Variation of cooperation agreement

The parties to a cooperation agreement may vary the agreement, by mutual consent and in writing.

717G Relationship with other powers

- (1) Whether a cooperation agreement is in force in relation to particular conduct does not affect:
 - (a) the power of the Fair Work Ombudsman to accept an enforceable undertaking under section 715 in relation to the conduct; or
 - (b) the power of an inspector to give a notice under section 716 in relation to the conduct; or
 - (c) any other power or function of the Fair Work Ombudsman or an inspector that is not mentioned in subsection 717A(1).
- (2) However:
 - (a) an enforceable undertaking has no effect to the extent that it is inconsistent with a cooperation agreement; and
 - (b) a compliance notice has no effect to the extent that an action specified in the notice is inconsistent with a cooperation agreement.

This subsection has effect regardless of whether the undertaking or notice was given before or after the cooperation agreement comes into force.

232 Subsections 793(1) and (2)

After “for the purposes of this Act”, insert “(subject to subsection (3A))”.

233 After subsection 793(3)

Insert:

Exception—offence relating to failure to pay amounts

- (3A) Subsections (1) and (2) do not apply for the purposes of:
 - (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).

234 At the end of subsection 793(4)

Add “, other than an offence against a provision referred to in paragraph (3A)(a) or (b) of this section”.

235 After section 794

Insert:

794A Liability of Australian governments under civil remedy provisions

Scope

- (1) This section applies for the purposes of applying a civil remedy provision, or any other provision of this Act in so far as it relates to a civil remedy provision, in relation to an Australian government.
- (2) Each of the following is an ***Australian government***:
 - (a) the Commonwealth;
 - (b) a State;
 - (c) the Australian Capital Territory;
 - (d) the Northern Territory.

Conduct of Australian governments

- (3) Any conduct engaged in on behalf of an Australian government by an officer, employee or agent (an ***official***) of the government within the scope of the official’s actual or apparent authority is taken, for the purposes of this Act and the procedural rules, to have been engaged in also by the government.

State of mind of Australian governments

- (4) If, for the purposes of this Act or the procedural rules, it is necessary to establish the state of mind of an Australian government in relation to particular conduct, it is enough to show:
 - (a) that the conduct was engaged in by an official of the government; and
 - (b) that the official had that state of mind.

Note: For ***state of mind***, see subsection 793(3).

Determining penalty amounts for Australian governments

- (5) If an Australian government contravenes a civil remedy provision, the pecuniary penalty that government may be ordered to pay under a pecuniary penalty order is the penalty applicable to a body corporate.

Modifications

- (6) This section applies in relation to an Australian government subject to any modifications prescribed by the regulations.

*Meaning of **employee***

- (7) In this section, **employee** has its ordinary meaning.

794B Liability of the Commonwealth for certain offences

- (1) Part 2.5 of the *Criminal Code* applies in relation to the Commonwealth, for the purposes of an offence against:
- (a) subsection 327A(1) (offence for failing to pay amounts as required) of this Act; or
 - (b) a related offence provision, to the extent that the related offence provision relates to an offence against subsection 327A(1) of this Act;
- in the same way as that Part applies in relation to a body corporate.
- (2) It so applies:
- (a) as if sections 12.4 and 12.5 of the *Criminal Code* were omitted; and
 - (b) with the following modifications:
 - (i) the modifications set out in the following table (subject to subparagraph (iii));
 - (ii) such other modifications as are made necessary by the fact that criminal liability is being imposed on a body politic rather than a body corporate (subject to subparagraph (iii));
 - (iii) any modifications prescribed by the regulations.

Application of Part 2.5 of the *Criminal Code* to the Commonwealth

| Item | Part 2.5 of the <i>Criminal Code</i> applies as if a reference to ... | were a reference to ... |
|-------------|--|---|
| 1 | a body corporate's board of directors | the governing body of the agency of the Commonwealth (the relevant agency) whose officer, employee or agent engaged in conduct constituting a physical element of the offence |
| 2 | a high managerial agent of a body corporate | a person who is an officer, employee or agent of the Commonwealth with duties of such responsibility that the person's conduct may fairly be assumed to represent the policy of the relevant agency |
| 3 | the corporate culture of a body corporate | one or more attitudes, policies, rules, courses of conduct or practices existing within the relevant agency or a part of the relevant agency |

Determining penalty amounts for the Commonwealth

- (3) If the Commonwealth is guilty of an offence against a provision mentioned in paragraph (1)(a) or (b), the penalty to be imposed on the Commonwealth is the penalty applicable to a body corporate.

*Meaning of **employee***

- (4) In this section, **employee** has its ordinary meaning.

*Meaning of **governing body***

- (5) The **governing body** of an agency of the Commonwealth is the body, or group of members of the agency, with primary responsibility for the governance of the agency.

794C Responsible agencies for Australian governments

- (1) If proceedings are brought against:
(a) an Australian government in relation to a contravention of a civil remedy provision of this Act; or

- (b) the Commonwealth for an offence against:
- (i) subsection 327A(1) (offence for failing to pay amounts as required); or
 - (ii) a related offence provision, to the extent that the related offence provision relates to an offence against subsection 327A(1);
- the responsible agency in relation to the contravention, or the commission of the offence, may be specified in any document initiating, or relating to, the proceedings.
- (2) The responsible agency in relation to the contravention, or the commission of the offence, is entitled to act in the proceedings and, subject to any relevant rules of court, the procedural rights and obligations of:
- (a) if paragraph (1)(a) applies—the Australian government as the respondent in the proceedings; or
 - (b) if paragraph (1)(b) applies—the Commonwealth as the accused in the proceedings;
- are conferred or imposed on the responsible agency.
- (3) With the court’s leave, the following person may change the responsible agency during the proceedings:
- (a) if paragraph (1)(a) applies—the person bringing the proceedings;
 - (b) if paragraph (1)(b) applies—the person prosecuting the offence.
- (4) The **responsible agency** in relation to a contravention of a civil remedy provision by an Australian government, or the commission of an offence by the Commonwealth, is:
- (a) for a contravention of a civil remedy provision by an Australian government—the agency of that government whose officer, employee or agent engaged in conduct constituting the contravention; or
 - (b) for the commission of an offence by the Commonwealth—the agency of the Commonwealth whose officer, employee or agent engaged in conduct constituting a physical element of the offence; or
 - (c) if the agency referred to in paragraph (a) or (b) has ceased to exist—the agency of the Australian government or the

Commonwealth (as the case requires) that is the successor of that agency; or

- (d) if there is no responsible agency under whichever of paragraph (a) or (b) applies, or paragraph (c)—the agency of the Australian government or the Commonwealth (as the case requires) that the court declares to be the responsible agency.

- (5) This section applies in relation to:

- (a) an Australian government in relation to a contravention of a civil remedy provision; and
- (b) the Commonwealth in relation to the commission of an offence;

subject to any modifications that are prescribed by the regulations.

794D Liability of the Commonwealth to pay civil and criminal penalties

- (1) This section applies if:

- (a) the Commonwealth contravenes a civil remedy provision and a court makes a pecuniary penalty order that the Commonwealth pay all or part of a pecuniary penalty to itself; or
- (b) the Commonwealth is given an infringement notice under the regulations in relation to an alleged contravention of a civil remedy provision; or
- (c) the Commonwealth is convicted of an offence against either of the following provisions and the court imposes a pecuniary penalty on the Commonwealth in respect of the offence:
 - (i) subsection 327A(1) (offence for failing to pay amounts as required);
 - (ii) a related offence provision, to the extent that the related offence provision relates to an offence against subsection 327A(1).

- (2) While the Commonwealth is not liable to pay a pecuniary penalty to itself, it is the Parliament's intention that the Commonwealth should be notionally liable to pay such a penalty.

- (3) The Finance Minister may give such written directions as are necessary or convenient for carrying out or giving effect to subsection (2) and, in particular, may give directions in relation to the transfer of money from an account operated by the responsible agency under section 794C for the contravention or for the commission of the offence to another account operated by the Commonwealth.
- (4) Directions under subsection (3) have effect, and must be complied with, despite any other Commonwealth law.

Federal Court of Australia Act 1976

236 After paragraph 23AB(4)(a)

Insert:

- (ab) an indictable offence against the *Fair Work Act 2009*;

Schedule 1 Main amendments

Part 14A Amendments relating to mediation and conciliation conference orders made under section 448A of the Fair Work Act 2009

Part 14A—Amendments relating to mediation and conciliation conference orders made under section 448A of the Fair Work Act 2009

Fair Work Act 2009

236A Subsection 409(6A)

Repeal the subsection, substitute:

- (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.

236B Subsection 411(3)

After “The employer”, insert “mentioned in subsection (2)”.

Part 16A—Right of entry—assisting health and safety representatives

Fair Work Act 2009

306A At the end of section 494

Add:

Assisting health and safety representatives

- (4) Subsection (1), and sections 495 to 498, do not apply to an official of an organisation assisting a health and safety representative on request under a provision of a State or Territory OHS law equivalent to paragraph 68(2)(g) of the *Work Health and Safety Act 2011*.
- (5) However, sections 499 to 504 do apply in relation to the official:
 - (a) whether or not the official is a permit holder; and
 - (b) for the purposes of sections 499 to 502—if the official is not a permit holder, as if the official were a permit holder; and
 - (c) as if giving the assistance to the health and safety representative were authorised by this Part, or were the exercise of rights under this Part (as the case requires); and
 - (d) for the purposes of section 504—as if that section prohibited the use of information or a document obtained in giving the assistance other than for a purpose related to the exercise or performance of the powers or functions of the health and safety representative (subject to the exceptions set out in that section).

Part 18—Application and transitional provisions

Fair Work Act 2009

308 In the appropriate position in Schedule 1

Insert:

Part 15—Amendments made by the Fair Work Legislation Amendment (Closing Loopholes) Act 2023

Division 1—Definitions

91 Definitions

In this Part:

amended Act means this Act as amended by the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023*.

amending Act means the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023*.

Division 2—Amendments made by Part 2 of Schedule 1 to the amending Act

92 Application—section 121

Despite the amendment made by item 28 of Part 2 of Schedule 1 to the amending Act, section 121, as in force immediately before the commencement of that item, continues to apply in relation to the termination of an employee's employment if any of the following occurred before that commencement:

- (a) the termination of the employee;
- (b) any other termination covered by that section as amended that caused the employer to become a small business employer.

Division 3—Amendments made by Part 6 of Schedule 1 to the amending Act

93 Application of amendments—regulated labour hire arrangement orders

Application of requirement to pay protected rate of pay

- (1) Section 306F of the amended Act (protected rate of pay payable to employees if a regulated labour hire arrangement order is in force) applies on and after 1 November 2024 regardless of whether any agreement resulting in the performance of work by a regulated employee is entered into before, on or after that day.

Anti-avoidance provisions apply retrospectively in relation to certain conduct and schemes

- (2) Division 4 of Part 2-7A of the amended Act (anti-avoidance) applies, on and after the introduction day, in relation to:
 - (a) conduct engaged in; or
 - (b) a scheme that is entered into, begun to be carried out or carried out;on or after the introduction day.

- (3) In this section:

introduction day means the day on which the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* was introduced into the Parliament.

Division 4—Amendments made by Part 7 of Schedule 1 to the amending Act

94 Application of section 149E of amended Act

- (1) Section 149E (delegates' rights terms) of the amended Act applies in relation to a modern award that is in operation on or after 1 July 2024, whether or not the award was made before that day.
- (2) However, a modern award is not invalid on or after 1 July 2024 only because it does not include a delegates' rights term.

95 FWC to vary certain modern awards

- (1) This clause applies in relation to a modern award if the award:
 - (a) is made before 1 July 2024; and
 - (b) is to be in operation on that day.
- (2) The FWC must, by 30 June 2024, make a determination varying the modern award to include a delegates' rights term.
- (3) A determination made under subclause (2) comes into operation on (and takes effect from) 1 July 2024.
- (4) Section 168 applies to a determination made under subclause (2) as if it were a determination made under Part 2-3.

96 Application of section 205A of amended Act

- (1) Section 205A (enterprise agreements to include delegates' rights terms etc.) of the amended Act does not apply in relation to an enterprise agreement if:
 - (a) before 1 July 2024, the employer concerned asks the employees to approve the agreement by voting for it; and
 - (b) by that vote, the employees approve the agreement; and
 - (c) the FWC approves the agreement.
- (2) In deciding, after 1 July 2024, whether to approve the agreement mentioned in subclause (1) (in that form), the FWC must disregard section 205A.

97 Application of subsections 273(6) and (7) of amended Act

- (1) Subsections 273(6) and (7) (delegates' rights terms) of the amended Act apply in relation to a workplace determination made on or after 1 July 2024.
- (2) However, a workplace determination is not invalid on or after 1 July 2024 only because it does not include a delegates' rights term.

Division 5—Amendments made by Part 14 of Schedule 1 to the amending Act

98 Offence relating to failure to pay certain amounts as required

Subsection 327A(1) of the amended Act applies in relation to conduct that occurs after the commencement of Part 14 of Schedule 1 to the amending Act, including conduct that occurs after that commencement that is part of a course of conduct that began before that commencement.

Division 6—Amendments made by Part 14A of Schedule 1 to the amending Act

99 Application of amendments

- (1) The amendment of subsection 409(6A) of this Act made by Part 14A of Schedule 1 to the amending Act applies in relation to industrial action to the extent that the industrial action occurs, or is to occur, on or after the commencement of that Part.
- (2) However, the amendment does not apply in relation to doing any of the following before that commencement in relation to industrial action, even if the industrial action occurs, or was to occur, on or after that commencement:
 - (a) organising the industrial action;
 - (b) threatening to engage in the industrial action;
 - (c) threatening to organise the industrial action;
 - (d) engaging in any other conduct in relation to the industrial action.
- (3) For the purposes of subsection 409(6A) of this Act, as amended by Part 14A of Schedule 1 to the amending Act, it does not matter whether a contravention of an order made under section 448A of this Act occurred before, on or after the commencement of that Part.

Schedule 2—Amendment of the Asbestos Safety and Eradication Agency Act 2013

Part 1—Main amendments

Asbestos Safety and Eradication Agency Act 2013

1 Title

Omit “Asbestos”, substitute “Asbestos and Silica”.

2 Section 1

Omit “*Asbestos Safety and Eradication Agency Act 2013*”, substitute “*Asbestos and Silica Safety and Eradication Agency Act 2013*”.

Note: This item amends the short title of the Act. If another amendment of the Act is described by reference to the Act’s previous short title, that other amendment has effect after the commencement of this item as an amendment of the Act under its amended short title (see section 10 of the *Acts Interpretation Act 1901*).

3 Section 2A

Repeal the section, substitute:

2A Object of this Act

The object of this Act is to establish the Asbestos and Silica Safety and Eradication Agency to lead coordinated and national action to eliminate asbestos-related diseases and silica-related diseases in Australia by:

- (a) fostering collaboration between:
 - (i) persons and bodies involved in the regulation, management and control of asbestos safety and silica safety; and
 - (ii) persons and bodies involved in dealing with issues related to asbestos-related diseases and silica-related diseases; and
- (b) supporting and monitoring the implementation of the National Strategic Plans by the Commonwealth and State, Territory and local governments; and

- (c) promoting national consistency in relation to asbestos safety, asbestos-related diseases, silica safety and silica-related diseases; and
- (d) improving the state of knowledge and awareness of issues relating to asbestos safety, asbestos-related diseases, silica safety and silica-related diseases.

4 Section 3 (definition of Agency)

Repeal the definition, substitute:

Agency means the Asbestos and Silica Safety and Eradication Agency referred to in section 6.

5 Section 3

Insert:

Asbestos and Silica Safety and Eradication Agency means the Agency referred to in section 6.

Asbestos and Silica Safety and Eradication Council means the Council referred to in section 28.

Asbestos National Strategic Plan has the meaning given by section 5A.

6 Section 3 (definition of Asbestos Safety and Eradication Council)

Repeal the definition.

7 Section 3 (definition of Chair)

Omit “Asbestos Safety and Eradication”.

8 Section 3

Insert:

Council means the Asbestos and Silica Safety and Eradication Council.

9 Section 3 (definition of Council member)

Omit “Asbestos Safety and Eradication”.

10 Section 3 (definition of *National Strategic Plan*)

Repeal the definition.

11 Section 3

Insert:

National Strategic Plans means the Asbestos National Strategic Plan and the Silica National Strategic Plan.

Silica National Strategic Plan has the meaning given by section 5B.

silica safety includes, but is not limited to, matters relating to awareness, education and information sharing in relation to respirable crystalline silica and products that contain silica.

12 Part 1A

Repeal the Part, substitute:

Part 1A—National Strategic Plans

5A Asbestos National Strategic Plan

- (1) The *Asbestos National Strategic Plan* is the plan with that name that:
 - (a) aims:
 - (i) to eliminate asbestos-related diseases in Australia by preventing exposure to asbestos fibres; and
 - (ii) to support workers and others who are affected by asbestos-related diseases; and
 - (b) represents a commitment to implement an agreed set of strategic actions and national targets focussing on:
 - (i) identifying asbestos and preventing exposure risks, including through prioritised safe removal and effective waste management; and
 - (ii) improving awareness of asbestos safety and asbestos-related diseases; and

- (iii) improving research and national data in relation to asbestos safety and asbestos-related diseases; and
- (iv) facilitating international collaboration in relation to asbestos safety and asbestos-related diseases; and
- (v) any other relevant priorities.

Note: The *Asbestos National Strategic Plan* is available on the Agency's website.

- (2) The plan referred to in subsection (1) represents a commitment to implement an agreed set of strategic actions and national targets focussing on the priorities referred to in subparagraphs (1)(b)(i) to (v) only if the plan has been agreed to by at least 6 of the governments of the Commonwealth and each State and Territory.

5B Silica National Strategic Plan

- (1) The *Silica National Strategic Plan* is the plan with that name that:

- (a) aims:

- (i) to eliminate silica-related diseases in Australia by preventing exposure to respirable crystalline silica; and
- (ii) to support workers and others who are affected by silica-related diseases; and

- (b) represents a commitment to implement an agreed set of strategic actions and national targets focussing on:

- (i) eliminating or minimising exposure to respirable crystalline silica in workplaces; and
- (ii) improving awareness of silica safety and silica-related diseases; and
- (iii) improving research and national data in relation to silica safety and silica-related diseases; and
- (iv) facilitating international collaboration in relation to silica safety and silica-related diseases; and
- (v) any other relevant priorities.

- (2) The plan referred to in subsection (1) represents a commitment to implement an agreed set of strategic actions and national targets focussing on the priorities referred to in subparagraphs (1)(b)(i) to (v) only if the plan has been agreed to by at least 6 of the governments of the Commonwealth and each State and Territory.

13 Part 2 (heading)

Repeal the heading, substitute:

Part 2—Asbestos and Silica Safety and Eradication Agency

14 Section 6

Repeal the section, substitute:

6 Asbestos and Silica Safety and Eradication Agency

The body known immediately before the commencement of this section as the Asbestos Safety and Eradication Agency is continued in existence with the new name, Asbestos and Silica Safety and Eradication Agency.

Note: See also section 25B of the *Acts Interpretation Act 1901*.

15 Subsection 8(1)

Repeal the subsection, substitute:

- (1) The Agency has the following functions:
 - (a) to encourage, coordinate, monitor and report on the implementation of the National Strategic Plans;
 - (b) to review, amend or replace, publish and promote the National Strategic Plans;
 - (c) to provide advice to the Minister about asbestos safety, asbestos-related diseases, silica safety and silica-related diseases;
 - (d) to collaborate with Commonwealth, State, Territory, local and other governments, agencies or bodies (including international governments, agencies and bodies) about:
 - (i) the development, implementation, review and amendment of the National Strategic Plans; and
 - (ii) asbestos safety, asbestos-related diseases, silica safety and silica-related diseases;
 - (e) to conduct, commission, monitor and promote research about asbestos safety, asbestos-related diseases, silica safety and silica-related diseases;

- (f) to raise awareness of asbestos safety, asbestos-related diseases, silica safety and silica-related diseases, including by developing and promoting materials on asbestos safety, asbestos-related diseases, silica safety and silica-related diseases;
- (g) to collect and analyse data required for measuring progress on preventing exposure to asbestos fibres, or respirable crystalline silica, and for informing evidence-based policies and strategies;
- (h) to promote consistent messages, policies and practices in relation to asbestos safety, asbestos-related diseases, silica safety and silica-related diseases;
- (i) such other functions as are conferred on the Agency by or under this Act, the rules or any other law of the Commonwealth;
- (j) to do anything incidental or conducive to the performance of any of the above functions.

16 Subsection 8(3)

Omit “performing it”, substitute “performing its”.

17 Subsection 8(3)

Omit “National Strategic Plan”, substitute “National Strategic Plans”.

17A At the end of section 8

Add:

Relationship with Financial Framework (Supplementary Powers) Act 1997

- (5) To avoid doubt, the power of the Commonwealth to spend amounts for the purposes of this section must be disregarded for the purpose of paragraph 32B(1)(a) of the *Financial Framework (Supplementary Powers) Act 1997*.

Note: The effect of this subsection is to make clear that this section does not effectively limit the operation of section 32B of the *Financial Framework (Supplementary Powers) Act 1997*. The Commonwealth has the power to make, vary or administer an arrangement or grant under that section whether the Commonwealth also has the power to spend amounts for the purposes of this section.

18 After section 8

Insert:

8A Annual reports in relation to National Strategic Plans

Annual report in relation to Asbestos National Strategic Plan

- (1) The Agency must, before the end of 31 December in each financial year, prepare a written report relating to the progress made by the Commonwealth and State and Territory governments in implementing the Asbestos National Strategic Plan during the previous financial year. The report may also include information relating to any other matter the Agency considers relevant.
- (2) As soon as practicable after the Agency has prepared a report under subsection (1), the Agency must give a copy of the report to the following:
 - (a) the Minister who administers this Act;
 - (b) the Minister who administers the *National Health Act 1953*;
 - (c) the Minister who administers the *Environment Protection and Biodiversity Conservation Act 1999*;
 - (d) each State or Territory Minister who is responsible, or principally responsible, for matters relating to work health and safety in the State or Territory;
 - (e) each State or Territory Minister who is responsible, or principally responsible, for matters relating to health in the State or Territory;
 - (f) each State or Territory Minister who is responsible, or principally responsible, for matters relating to the protection of the environment in the State or Territory.

Annual report in relation to Silica National Strategic Plan

- (3) The Agency must, before the end of 31 December in each financial year, prepare a written report relating to the progress made by the Commonwealth and State and Territory governments in implementing the Silica National Strategic Plan during the previous financial year. The report may also include information relating to any other matter the Agency considers relevant.

- (4) As soon as practicable after the Agency has prepared a report under subsection (3), the Agency must give a copy of the report to the following:
- (a) the Minister who administers this Act;
 - (b) the Minister who administers the *National Health Act 1953*;
 - (c) each State or Territory Minister who is responsible, or principally responsible, for matters relating to work health and safety in the State or Territory;
 - (d) each State or Territory Minister who is responsible, or principally responsible, for matters relating to health in the State or Territory.

Annual reports must be publicly available

- (5) The Agency must make each report prepared under subsection (1) or (3) publicly available.

Example: A report may be published on the Agency’s website.

19 Section 12 (heading)

Omit “Asbestos Safety and Eradication”.

20 Subsections 12(1), (1A) and (2)

Omit “Asbestos Safety and Eradication”.

21 At the end of Division 1 of Part 3

Add:

14A CEO may obtain information

- (1) This section applies to a person if:
- (a) the CEO believes on reasonable grounds that the person has information that is relevant to the performance of any of the functions of the Agency referred to in paragraphs 8(1)(a), (b) and (g); and
 - (b) the CEO is satisfied that the information:
 - (i) is necessary for the performance of that function; and
 - (ii) is not otherwise available to the CEO.

- (2) The CEO may, by written notice given to the person, request the person to give to the CEO, within the period and in the manner and form specified in the notice, any such information.
- (3) A period specified under subsection (2) must not be shorter than 14 days after the notice is given.
- (4) A manner specified in a notice under subsection (2) must involve the use of a service to which paragraph 51(v) of the Constitution applies.
- (5) A person may comply with a request under subsection (2).
- (6) Subsection (5) has effect despite anything in:
 - (a) a law of the Commonwealth (other than this Act); or
 - (b) a law of a State or Territory.

22 Subsection 23A(1)

After “functions or powers”, insert “under this Act (other than section 14A which confers power on the CEO to obtain information in certain circumstances)”.

23 Paragraph 24(1)(b)

Omit “Asbestos Safety and Eradication”.

24 Part 5 (heading)

Repeal the heading, substitute:

Part 5—Asbestos and Silica Safety and Eradication Council

25 Division 1 of Part 5 (heading)

Omit “Asbestos Safety and Eradication”.

26 Section 28

Repeal the section, substitute:

28 Asbestos and Silica Safety and Eradication Council

The body known immediately before the commencement of this section as the Asbestos Safety and Eradication Council is continued in existence with the new name, Asbestos and Silica Safety and Eradication Council.

Note: See also section 25B of the *Acts Interpretation Act 1901*.

27 Section 29 (heading)

Omit “Asbestos Safety and Eradication”.

28 Subsection 29(1)

Omit “Asbestos Safety and Eradication”.

29 Paragraph 29(1)(b)

After “safety”, insert “, asbestos-related diseases, silica safety and silica-related diseases”.

30 Paragraphs 29(1)(c) and (d)

Omit “National Strategic Plan”, substitute “National Strategic Plans”.

31 Subsections 29(2), (2A) and (3)

Omit “Asbestos Safety and Eradication”.

32 Section 30 (heading)

Omit “Asbestos Safety and Eradication”.

33 Subsections 30(1) and (2)

Omit “Asbestos Safety and Eradication”.

34 Subsections 30A(1), (2) and (3)

Omit “Asbestos Safety and Eradication”.

35 Division 2 of Part 5 (heading)

Omit “Asbestos Safety and Eradication”.

36 Section 31

Omit “Asbestos Safety and Eradication”.

37 Paragraph 31(d)

Omit “1 member”, substitute “2 members”.

38 Paragraph 31(e)

Omit “1 member”, substitute “2 members”.

39 After paragraph 31(e)

Insert:

- (ea) 1 member who has expertise relevant to asbestos safety, asbestos-related diseases, silica safety or silica-related diseases; and

40 Subsection 32(3)

Repeal the subsection, substitute:

- (3) A person is eligible for appointment as a Council member under paragraph 31(a), (d), (e) or (f) only if the Minister is satisfied that:
 - (a) the person has knowledge or experience in one or more of the following:
 - (i) asbestos safety;
 - (ii) public health issues relating to asbestos;
 - (iii) asbestos-related diseases;
 - (iv) the representation of, or the provision of support to, persons with asbestos-related diseases and their families;
 - (v) silica safety;
 - (vi) silica-related diseases;
 - (vii) the representation of, or the provision of support to, persons with silica-related diseases and their families;
 - (viii) financial management;
 - (ix) corporate governance; or
 - (b) the person:
 - (i) has, or has had, an asbestos-related disease; or
 - (ii) has lived experience as a family member, carer or advocate in providing support to a person who has, or has had, an asbestos-related disease; or
 - (iii) has, or has had, a silica-related disease; or

- (iv) has lived experience as a family member, carer or advocate in providing support to a person who has, or has had, a silica-related disease.

41 Paragraph 40(d)

Omit “Asbestos Safety and Eradication”.

42 Division 4 of Part 5 (heading)

Omit “Asbestos Safety and Eradication”.

43 Section 41 (heading)

Omit “Asbestos Safety and Eradication”.

44 Subsection 41(1)

Omit “Asbestos Safety and Eradication”.

45 Subsection 41A(1)

Omit “Asbestos Safety and Eradication”.

46 Paragraph 41A(1)(b)

Omit “4”, substitute “6”.

47 Paragraph 41A(2)(a)

Omit “Asbestos Safety and Eradication”.

48 Sections 41B, 41C, 41D and 41E

Omit “Asbestos Safety and Eradication” (wherever occurring).

49 Subparagraph 41F(a)(ii)

Omit “Asbestos Safety and Eradication”.

50 Paragraph 41F(b)

Omit “Asbestos”, substitute “Asbestos and Silica”.

51 Subparagraph 41F(e)(iii)

Omit “Asbestos Safety and Eradication”.

52 Subsection 42(3)

Omit “the National Strategic Plan”, substitute “either of the National Strategic Plans”.

53 At the end of section 42

Add:

- (4) The annual operational plan is taken to be a corporate plan for the purposes of the *Public Governance, Performance and Accountability Act 2013*.

54 Section 47

Repeal the section, substitute:

47 Review of the Agency’s role and functions

- (1) The Minister must cause a review of the Asbestos and Silica Safety and Eradication Agency’s ongoing role and functions to be conducted.
- (2) The review must:
 - (a) start 5 years after the commencement of this section; and
 - (b) be completed within 6 months.
- (3) The Minister must cause a written report about the review to be prepared.
- (4) The Minister must cause a copy of the report to be laid before each House of Parliament within 15 sitting days after the completion of the report.

Part 2—Application, saving and transitional provisions

55 Definitions

In this Part:

amended Act means the *Asbestos Safety and Eradication Agency Act 2013*, as in force after the commencement day.

commencement day means the day this Part commences.

Silica Plan agreement day means the day after the day the Silica National Strategic Plan has been agreed to by at least 6 of the governments of the Commonwealth and each State and Territory.

56 Functions of the Agency—Silica National Strategic Plan

Paragraphs 8(1)(a) and (b) and subsection 8(3) of the amended Act apply to the Asbestos and Silica Safety and Eradication Agency in relation to the Silica National Strategic Plan on and after the Silica Plan agreement day.

57 Functions of the Agency—annual report relating to implementation of Asbestos National Strategic Plan

General

- (1) Subsection 8A(1) of the amended Act applies in relation to the Asbestos and Silica Safety and Eradication Agency subject to subitems (2) and (3) of this item.

First annual report after commencement day

- (2) If the commencement day is before 1 September 2024, the first report prepared by the Asbestos and Silica Safety and Eradication Agency under subsection 8A(1) of the amended Act must:
 - (a) relate to progress made by the Commonwealth and State and Territory governments in implementing the Asbestos National Strategic Plan during the period beginning on 1 January 2024 and ending at the end of 30 June 2024; and
 - (b) be prepared before the end of 31 December 2024.

- (3) If the commencement day is on or after 1 September 2024, the first report prepared by the Asbestos and Silica Safety and Eradication Agency under subsection 8A(1) of the amended Act must:
- (a) relate to progress made by the Commonwealth and State and Territory governments in implementing the Asbestos National Strategic Plan during the period (the ***first reporting period***) beginning on 1 January 2024 and ending at the end of the financial year that includes the commencement day; and
 - (b) be prepared before the end of 31 December in the financial year beginning after the end of the first reporting period.
- (4) Subsections 8A(2) and (5) of the amended Act apply in relation to a report prepared under subitem (2) or (3) of this item as if the report were a report prepared under subsection 8A(1) of the amended Act.

58 Functions of the Agency—annual report relating to implementation of Silica National Strategic Plan

General

- (1) Subject to subitems (2), (3) and (4) of this item, subsections 8A(3) and (4) of the amended Act apply in relation to the Asbestos and Silica Safety and Eradication Agency on and after the Silica Plan agreement day.

First annual report after Silica Plan agreement day

- (2) If the Silica Plan agreement day is between 1 July and 31 December in a financial year (the ***first financial year***), the first report prepared by the Asbestos and Silica Safety and Eradication Agency under subsection 8A(3) of the amended Act must:
- (a) instead of relating to the matters referred to in that subsection, include information relating to:
 - (i) the matters covered by the Silica National Strategic Plan; and
 - (ii) the activities undertaken by the Commonwealth and State and Territory governments in relation to the implementation of the Silica National Strategic Plan during the period (the ***first reporting period***) beginning on the Silica Plan agreement day and ending at the end of the first financial year; and

- (iii) any other matter the Agency considers relevant; and
 - (b) be prepared before the end of 31 December in the financial year beginning after the end of the first reporting period.
- (3) If the Silica Plan agreement day is between 1 January and 30 June in a financial year (the ***first financial year***), the first report prepared by the Asbestos and Silica Safety and Eradication Agency under subsection 8A(3) of the amended Act must:
 - (a) relate to progress made by the Commonwealth and State and Territory governments in implementing the Silica National Strategic Plan during the period (the ***first reporting period***) beginning on the Silica Plan agreement day and ending at the end of the next financial year after the first financial year; and
 - (b) be prepared before the end of 31 December in the financial year beginning after the end of the first reporting period.
- (4) Subsections 8A(4) and (5) of the amended Act apply in relation to a report prepared under subitem (2) or (3) of this item as if the report were a report prepared under subsection 8A(3) of the amended Act.

59 CEO of the Agency

The person holding office as the CEO of the Asbestos Safety and Eradication Agency under section 15 of the *Asbestos Safety and Eradication Agency Act 2013* immediately before the commencement day continues, on and after the commencement day, to hold office as the CEO of the Asbestos and Silica Safety and Eradication Agency:

- (a) on the terms and conditions that applied to the person immediately before the commencement day; and
- (b) for the balance of the person's term of appointment that remained immediately before the commencement day.

60 Functions of the CEO of the Agency—annual operational plan

Subsection 42(3) of the amended Act applies to the CEO of the Asbestos and Silica Safety and Eradication Agency in relation to the Silica National Strategic Plan on and after the Silica Plan agreement day.

61 Functions of the Council—Silica National Strategic Plan

Paragraphs 29(1)(c) and (d) of the amended Act apply to the Asbestos and Silica Safety and Eradication Council in relation to the Silica National Strategic Plan on and after the Silica Plan agreement day.

62 Members of the Council

A person holding office as a member of the Asbestos Safety and Eradication Council under section 32 of the *Asbestos Safety and Eradication Agency Act 2013* immediately before the commencement day continues, on and after the commencement day, to hold office as a member of the Asbestos and Silica Safety and Eradication Council:

- (a) on the terms and conditions that applied to the person immediately before the commencement day; and
- (b) for the balance of the person's term of appointment that remained immediately before the commencement day.

Schedule 3—Amendment of the Safety, Rehabilitation and Compensation Act 1988

Part 1—Post-traumatic stress disorder

Safety, Rehabilitation and Compensation Act 1988

1 Before subsection 7(8)

Insert:

Diseases suffered by firefighters

2 At the end of section 7

Add:

Post-traumatic stress disorder suffered by certain employees

(11) If:

- (a) an employee has been diagnosed by a legally qualified medical practitioner or psychologist as suffering, or having suffered, from post-traumatic stress disorder in accordance with the diagnostic criteria in:
 - (i) the *Diagnostic and Statistical Manual of Mental Disorders*, fifth edition text revision (DSM-5-TR), published by the American Psychiatric Association in 2022; or
 - (ii) if a later edition of the *Diagnostic and Statistical Manual of Mental Disorders* is specified by the Minister by legislative instrument—that later edition of the Manual; and
- (b) at any time before symptoms of post-traumatic stress disorder became apparent, the employee:
 - (i) was employed as a first responder in accordance with subsection (13); or
 - (ii) was a member of a class of employees declared by the Minister, by legislative instrument made under

subsection (13A), to be a class to which this subparagraph applies;

the employee's employment as a first responder or as a member of the class of employees declared under subsection (13A) is, for the purposes of this Act, taken to have contributed, to a significant degree, to the contraction of the post-traumatic stress disorder, unless the contrary is established.

- (13) For the purposes of subparagraph (11)(b)(i), an employee was employed as a first responder at a time if, at that time, the employee:
- (a) was the Commissioner of the Australian Federal Police, a Deputy Commissioner of the Australian Federal Police or an AFP employee (all within the meaning of the *Australian Federal Police Act 1979*); or
 - (b) was employed as a firefighter; or
 - (c) was employed as an ambulance officer (including as a paramedic); or
 - (d) was employed as an emergency services communications operator; or
 - (e) was a member of an emergency service (within the meaning of the *Emergencies Act 2004* (ACT)); or
 - (f) was the Australian Border Force Commissioner; or
 - (g) was an APS employee in the Australian Border Force.
- (13A) If the Minister is satisfied that the incidence of post-traumatic stress disorder among a class of employees is significantly greater than the incidence of post-traumatic stress disorder among the general public, the Minister may, by legislative instrument, declare that class of employees to be a class of employees to which subparagraph (11)(b)(ii) applies.
- (14) Subsection (11) does not limit, and is not limited by, subsections (1) and (2).

3 Application of amendments

The amendments made by this Part apply in relation to an injury, being a disease or an aggravation of a disease, that is sustained by an employee after the commencement of this Part.

Part 2—Rehabilitation assessments and examinations

Safety, Rehabilitation and Compensation Act 1988

4 Subsection 4(1)

Insert:

approved Rehabilitation Assessments and Examinations Guide
means:

- (a) the document prepared by Comcare in accordance with section 57A, titled “Guide for Arranging Rehabilitation Assessments and Requiring Examinations”, that has been approved by the Minister and is for the time being in force; or
- (b) if an instrument varying that document has been approved by the Minister—that document as so varied.

5 After subsection 36(3)

Insert:

- (3A) In deciding whether to arrange for an assessment under subsection (1) or to require an examination under subsection (3), the rehabilitation authority must comply with the approved Rehabilitation Assessments and Examinations Guide.

Note: The Guide is prepared by Comcare under section 57A.

6 After subsection 57(1)

Insert:

- (1A) In deciding whether to require an examination under subsection (1), the relevant authority must comply with the approved Rehabilitation Assessments and Examinations Guide.

Note: The Guide is prepared by Comcare under section 57A.

7 Subsection 57(6)

Repeal the subsection.

8 After section 57

Insert:

57A Guide for Arranging Rehabilitation Assessments and Requiring Examinations

- (1) Comcare must, in consultation with the Commission, prepare a written document to be called the “Guide for Arranging Rehabilitation Assessments and Requiring Examinations” (the *Guide*).
- (2) The object of the Guide is to support ethical, transparent and accountable decision-making in relation to arranging a rehabilitation assessment of an employee under subsection 36(1), or requiring an employee to undergo an examination under subsection 36(3) or 57(1), including appropriate consideration of the employee’s personal circumstances.
- (3) The Guide must:
 - (a) provide that, for the purposes of a rehabilitation assessment or examination of an employee:
 - (i) information in relation to the employee should be sought from the employee’s treating practitioner; and
 - (ii) the employee’s treating practitioner and the information (if any) provided by the treating practitioner should be relied on as much as possible before a referral is made to an independent medical practitioner, or other qualified person, in relation to the employee; and
 - (b) specify the circumstances in which it is appropriate to require an employee to undergo a rehabilitation assessment or examination; and
 - (c) specify limitations on the frequency and number of rehabilitation assessments or examinations that an employee may be required to undergo; and
 - (d) specify the qualifications of the person or, if required under section 36, the panel of persons who may conduct a rehabilitation assessment or an examination of an employee; and
 - (e) require the rehabilitation authority or the relevant authority (as the case requires) to seek, and take into account, the

views of an employee, who is required to undergo a rehabilitation assessment or examination, about the selection of the person or, if required under section 36, the panel of persons who are to conduct the rehabilitation assessment or examination; and

- (f) require that an employee who is required to undergo a rehabilitation assessment or examination be given a notice of the employee's rights relating to the rehabilitation assessment or examination.

Note 1: For the purposes of paragraph (a), an employee's treating medical practitioner may be nominated to conduct a rehabilitation assessment or examination of the employee.

Note 2: For the purposes of paragraphs (d) and (e), if a relevant authority requires an employee to undergo an examination under subsection 57(1), the examination must be conducted by one legally qualified medical practitioner nominated by the relevant authority.

- (4) The Guide may provide for any other relevant matter.
- (5) Comcare may, in consultation with the Commission, prepare a written document varying or revoking the approved Guide.
- (6) A Guide prepared under subsection (1), and a document prepared under subsection (5), must be approved by the Minister.
- (7) A Guide prepared under subsection (1) is a legislative instrument made by the Minister on the day on which the Guide is approved by the Minister.
- (8) A document prepared under subsection (5) is a legislative instrument made by the Minister on the day on which the document is approved by the Minister.

9 Subsection 60(1) (definition of *determination*)

Omit "37 or 39", substitute "37, 39 or 57".

10 Application of amendments

The amendments made by this Part apply in relation to:

- (a) a rehabilitation assessment of an employee that is arranged under subsection 36(1) of the *Safety, Rehabilitation and Compensation Act 1988*, if the assessment is conducted after the commencement of this Part (regardless of when the

employee sustained the relevant injury, or when the assessment was arranged); and

- (b) an examination that an employee is required to undergo under subsection 36(3) or 57(1) of the *Safety, Rehabilitation and Compensation Act 1988*, if the examination is conducted after the commencement of this Part (regardless of when the employee sustained the relevant injury, or when the requirement to undergo the examination was made).

Schedule 4—Amendment of the Work Health and Safety Act 2011

Part 1—Industrial manslaughter

Work Health and Safety Act 2011

1 After section 30

Insert:

30A Industrial manslaughter

- (1) A person commits an offence if:
- (a) the person is:
 - (i) a person conducting a business or undertaking; or
 - (ii) an officer of a person conducting a business or undertaking; and
 - (b) the person has a health and safety duty; and
 - (c) the person intentionally engages in conduct; and
 - (d) the conduct breaches the health and safety duty; and
 - (e) the conduct causes the death of an individual; and
 - (f) the person was reckless, or negligent, as to whether the conduct would cause the death of an individual.

Note: There is no limitation period for bringing proceedings for an offence against this subsection (see subsection 232(2A)).

Penalty:

- (a) In the case of an offence committed by an individual—25 years imprisonment.
- (b) In the case of an offence committed by a body corporate—\$18,000,000.

When conduct causes death

- (2) For the purposes of subsection (1), a person's conduct **causes** a death if the conduct substantially contributes to the death.

No substitution of pecuniary penalty for imprisonment

- (3) Subsection 4B(2) of the *Crimes Act 1914* does not apply in relation to an offence against subsection (1) of this section.

Alternative verdicts

- (4) If, in proceedings for an offence (the **prosecuted offence**) against subsection (1), the trier of fact:

- (a) is not satisfied that the person is guilty of the prosecuted offence; and
(b) is satisfied that the person is guilty of an offence (the **alternative offence**) that is a Category 1 offence or a Category 2 offence;

the trier of fact may find the person not guilty of the prosecuted offence but guilty of the alternative offence, so long as the person has been accorded procedural fairness in relation to that finding of guilt.

No limitation period in relation to alternative verdicts

- (5) For the purposes of subsection (4), it does not matter whether the proceedings mentioned in that subsection were brought at a time when, or in circumstances in which, bringing proceedings for the alternative offence would have been permitted under section 232 (limitation period for prosecutions).

2 Subsection 216(2)

Omit “for a contravention”, substitute “in relation to a contravention”.

3 At the end of subsection 216(2)

Add “or an offence against subsection 30A(1) (industrial manslaughter)”.

4 Subparagraphs 231(1)(a)(i) and (ii)

Omit “or a Category 2 offence”, substitute “, a Category 2 offence or an offence against subsection 30A(1) (industrial manslaughter)”.

5 Subsection 231(3)

Omit “a Category 1 or Category 2 offence”, substitute “a Category 1 offence, a Category 2 offence or an offence against subsection 30A(1) (industrial manslaughter)”.

6 Before subsection 232(2)

Insert:

Exceptions

7 After subsection 232(2)

Insert:

(2A) Despite subsection (1), proceedings for an offence against subsection 30A(1) (industrial manslaughter) may be brought at any time.

8 Before subsection 232(3)

Insert:

Definitions

9 Application provision

Section 30A of the *Work Health and Safety Act 2011*, as inserted by this Part, applies in relation to conduct engaged in on or after the commencement of this Part.

Part 2—Category 1 offence

Work Health and Safety Act 2011

10 Paragraph 31(1)(b)

Repeal the paragraph, substitute:

- (b) the person, without reasonable excuse, engages in conduct that:
 - (i) exposes an individual to whom the duty is owed to a risk of death or serious injury or illness; or
 - (ii) if the person is an officer of a person conducting a business or undertaking—exposes an individual, to whom the person conducting a business or undertaking owes a health and safety duty, to a risk of death or serious injury or illness; and

Part 3—Corporate criminal liability

Work Health and Safety Act 2011

11 Section 4

Insert:

authorised person, for a body corporate, in Division 4 of Part 13—
see section 244.

board of directors, of a body corporate, in Division 4 of Part 13—
see section 244.

fault element, in relation to an offence, has the same meaning as in
the *Criminal Code*.

physical element, in relation to an offence, has the same meaning
as in the *Criminal Code*.

12 Before subsection 12F(1)

Insert:

Application of the Crimes Act 1914

13 Before subsection 12F(2)

Insert:

Application of the Criminal Code

14 At the end of section 12F

Add:

- (4) Part 2.5 of the *Criminal Code* (which deals with corporate criminal
responsibility) does not apply to an offence against this Act.

Note: For the purposes of this Act, corporate criminal responsibility is dealt
with by Division 4 of Part 13 of this Act.

15 Section 244

Repeal the section, substitute:

244 Definitions

In this Division:

authorised person, for a body corporate, means an officer, employee or agent of the body corporate acting within the officer's, employee's or agent's actual or apparent authority.

board of directors, of a body corporate, means the body, whatever it is called, exercising the executive authority of the body corporate.

244A Physical elements

The conduct constituting the physical element of an offence is taken to have been engaged in by a body corporate if the conduct is engaged in by:

- (a) the body corporate's board of directors; or
- (b) one or more authorised persons for the body corporate; or
- (c) one or more persons acting at the direction of or with the express or implied agreement or consent of:
 - (i) an authorised person for the body corporate; or
 - (ii) the body corporate's board of directors.

244B Fault elements other than negligence

- (1) If it is necessary to establish that a body corporate had a state of mind in relation to a physical element of an offence, it is sufficient to show that:
 - (a) the body corporate's board of directors:
 - (i) engaged in the conduct constituting the offence and had that state of mind in relation to the physical element of the offence; or
 - (ii) expressly, tacitly or impliedly authorised or permitted the conduct constituting the offence; or
 - (b) an authorised person for the body corporate:
 - (i) engaged in the conduct constituting the offence and had that state of mind in relation to the physical element of the offence; or

- (ii) expressly, tacitly or impliedly authorised or permitted the conduct constituting the offence; or
 - (c) a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to the conduct constituting the offence.
- (1A) For the purposes of subsection (1), having a state of mind in relation to a physical element of an offence does not include being negligent with respect to that physical element.
- Note: For how negligence applies in relation a body corporate, see section 244BA.
- (2) For the purposes of subsection (1):
- (a) paragraphs (1)(b) and (c) do not apply if the body corporate proves it took reasonable precautions to prevent the conduct constituting the offence; and
 - (b) subparagraph (1)(b)(ii) does not apply if the body corporate proves it took reasonable precautions to prevent the authorised person authorising or permitting the conduct constituting the offence.
- (3) Factors relevant to the application of paragraph (1)(c) include:
- (a) whether authority or permission to engage in the conduct constituting an offence, of the same or a similar character, had previously been given by a corporate officer of the body corporate; and
 - (b) whether the person who engaged in the conduct constituting the offence believed on reasonable grounds, or had a reasonable expectation, that a corporate officer of the body corporate would have authorised or permitted the conduct.
- (4) In this section:

corporate culture, within a body corporate, means one or more attitudes, policies, rules, courses of conduct or practices existing within the body corporate generally or in the part of the body corporate in which the relevant activity takes place.

corporate officer, of a body corporate, means an officer of the body corporate within the meaning of section 9 of the *Corporations Act 2001*.

244BA Negligence

- (1) The test of negligence for a body corporate is that set out in section 5.5 of the *Criminal Code*.
- (2) If:
 - (a) negligence is a fault element in relation to a physical element of an offence; and
 - (b) no individual employee, agent or officer of the body corporate has that fault element;that fault element may exist on the part of the body corporate if the body corporate's conduct is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents or officers).
- (3) Negligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:
 - (a) inadequate management, control or supervision of the conduct of one or more of the body corporate's employees, agents or officers; or
 - (b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

244C Mistake of fact

If mistake of fact is relevant to determining liability for an offence, a body corporate may rely on mistake of fact only if:

- (a) the employee, agent or officer of the body corporate who engaged in the conduct constituting the offence was under a mistaken but reasonable belief about facts that, had they existed, would have meant the conduct would not have constituted the offence; and
- (b) the body corporate proves it took reasonable precautions to prevent the conduct.

244D Failure to take reasonable precautions

For the purposes of subsection 244B(2) and paragraph 244C(b), a failure to take reasonable precautions may be evidenced by the fact that the conduct constituting the offence was substantially attributable to:

- (a) inadequate management, control or supervision of the conduct of one or more of the body corporate's employees, agents or officers; or
- (b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

244E How this Division applies to public authorities

If a body corporate is a public authority, this Division applies in relation to the body corporate in accordance with section 251.

Part 4—Commonwealth criminal liability

Work Health and Safety Act 2011

16 Section 4

Insert:

authorised person, for the Commonwealth, in Division 5 of Part 13—see section 245.

executive, of an agency of the Commonwealth, in Division 5 of Part 13—see section 245.

17 Section 4 (definition of *officer*)

Repeal the definition, substitute:

officer, of an entity, means:

- (a) if the entity is the Commonwealth—an officer of the Commonwealth within the meaning of section 247; or
- (b) if the entity is a public authority—an officer of the public authority within the meaning of section 252; or
- (c) in Division 5 of Part 13, if the entity is an agency of the Commonwealth—an officer of the agency within the meaning of section 245; or
- (d) if paragraphs (a), (b) and (c) of this definition do not apply—an officer of the entity within the meaning of section 9 of the *Corporations Act 2001* other than, if the entity is a partnership, a partner in the partnership;

but does not include, if the entity is a local authority, an elected member of the local authority acting in that capacity.

18 Section 245

Repeal the section, substitute:

245 Definitions

In this Division:

authorised person, for the Commonwealth, means an officer, employee or agent of the Commonwealth acting within the officer's, employee's or agent's actual or apparent authority.

executive, of an agency of the Commonwealth, means the person or body, whatever the person or body is called, exercising the executive authority of the agency.

officer, of an agency of the Commonwealth, means a person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business or undertaking of the agency.

245A Offences and the Commonwealth—physical elements

The conduct constituting the physical element of an offence is taken to have been engaged in by the Commonwealth if the conduct is engaged in by:

- (a) the executive of an agency of the Commonwealth; or
- (b) one or more authorised persons for the Commonwealth; or
- (c) one or more persons acting at the direction of or with the express or implied agreement or consent of:
 - (i) an authorised person for the Commonwealth; or
 - (ii) the executive of an agency of the Commonwealth.

245B Offences and the Commonwealth—fault elements other than negligence

- (1) If it is necessary to establish that the Commonwealth had a state of mind in relation to a physical element of an offence, it is sufficient to show that:
 - (a) the executive of an agency of the Commonwealth:
 - (i) engaged in the conduct constituting the offence and had that state of mind in relation to the physical element of the offence; or
 - (ii) expressly, tacitly or impliedly authorised or permitted the conduct constituting the offence; or
 - (b) an authorised person for the Commonwealth:
 - (i) engaged in the conduct constituting the offence and had that state of mind in relation to the physical element of the offence; or

- (ii) expressly, tacitly or impliedly authorised or permitted the conduct constituting the offence; or
 - (c) a corporate culture existed within an agency of the Commonwealth that directed, encouraged, tolerated or led to the conduct constituting the offence.
- (1A) For the purposes of subsection (1), having a state of mind in relation to a physical element of an offence does not include being negligent with respect to that physical element.
 - Note: For how negligence applies in relation to the Commonwealth, see section 245BA.
- (2) For the purposes of subsection (1):
 - (a) paragraphs (1)(b) and (c) do not apply if the Commonwealth proves it took reasonable precautions to prevent the conduct constituting the offence; and
 - (b) subparagraph (1)(b)(ii) does not apply if the Commonwealth proves it took reasonable precautions to prevent the authorised person authorising or permitting the conduct constituting the offence.
- (3) Factors relevant to the application of paragraph (1)(c) include:
 - (a) whether authority or permission to engage in the conduct constituting an offence, of the same or a similar character, had previously been given by an officer of the agency; and
 - (b) whether the person who engaged in the conduct constituting the offence believed on reasonable grounds, or had a reasonable expectation, that an officer of the agency would have authorised or permitted the conduct.

Definitions

- (4) In this section:

corporate culture, within an agency of the Commonwealth, means one or more attitudes, policies, rules, courses of conduct or practices existing within the agency generally or in the part of the agency in which the relevant activity takes place.

245BA Offences and the Commonwealth—negligence

- (1) The test of negligence for the Commonwealth is that set out in section 5.5 of the *Criminal Code*.
- (2) If:
 - (a) negligence is a fault element in relation to a physical element of an offence; and
 - (b) no individual employee, agent or officer of the Commonwealth has that fault element;that fault element may exist on the part of the Commonwealth if the conduct of the Commonwealth is negligent when viewed as a whole (that is, by aggregating the conduct of any number of the employees, agents or officers of the Commonwealth).
- (3) Negligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:
 - (a) inadequate management, control or supervision of the conduct of one or more employees, agents or officers of the Commonwealth; or
 - (b) failure to provide adequate systems for conveying relevant information to relevant persons in the Commonwealth.

245C Offences and the Commonwealth—mistake of fact

If mistake of fact is relevant to determining liability for an offence, the Commonwealth may rely on mistake of fact only if:

- (a) the employee, agent or officer of the Commonwealth who engaged in the conduct constituting the offence was under a mistaken but reasonable belief about facts that, had they existed, would have meant the conduct would not have constituted the offence; and
- (b) the Commonwealth proves it took reasonable precautions to prevent the conduct.

245D Offences and the Commonwealth—failure to take reasonable precautions

For the purposes of subsection 245B(2) and paragraph 245C(b), a failure to take reasonable precautions may be evidenced by the fact

that the conduct constituting the offence was substantially attributable to:

- (a) inadequate management, control or supervision of the conduct of one or more employees, agents or officers of the Commonwealth; or
- (b) failure to provide adequate systems for conveying relevant information to relevant persons in the Commonwealth.

245E Offences and the Commonwealth—penalties

If the Commonwealth is guilty of an offence against this Act, the penalty to be imposed on the Commonwealth is the penalty applicable to a body corporate.

Part 5—Criminal liability of public authorities

Work Health and Safety Act 2011

19 Section 251

Repeal the section, substitute:

251 Offences and public authorities

- (1) Division 4 of this Part (which deals with offences by bodies corporate) applies in relation to a public authority that is a body corporate in the same way that the Division applies in relation to any other body corporate, subject to subsection (2) of this section.
- (2) For the purposes of the application of Division 4 of this Part in relation to a public authority that is a body corporate:
 - (a) each reference in that Division to an officer of a body corporate is taken to be a reference to an officer of the public authority (within the meaning of section 252); and
 - (b) the references in paragraphs 244B(3)(a) and (b) to a corporate officer of the body corporate are taken to be references to an officer of the public authority (within the meaning of section 252).

Part 6—Penalties

Division 1—Definitions

Work Health and Safety Act 2011

20 Section 4

Insert:

category 1 monetary penalty—see clause 1 of Schedule 4.

category 2 monetary penalty—see clause 1 of Schedule 4.

category 3 monetary penalty—see clause 1 of Schedule 4.

tier A monetary penalty—see clause 2 of Schedule 4.

tier B monetary penalty—see clause 2 of Schedule 4.

tier C monetary penalty—see clause 2 of Schedule 4.

tier D monetary penalty—see clause 2 of Schedule 4.

tier E monetary penalty—see clause 2 of Schedule 4.

tier F monetary penalty—see clause 2 of Schedule 4.

tier G monetary penalty—see clause 2 of Schedule 4.

tier H monetary penalty—see clause 2 of Schedule 4.

tier I monetary penalty—see clause 2 of Schedule 4.

WHS civil penalty provision tier 1—see clause 3 of Schedule 4.

WHS civil penalty provision tier 2—see clause 3 of Schedule 4.

WHS civil penalty provision tier 3—see clause 3 of Schedule 4.

WHS civil penalty provision tier 4—see clause 3 of Schedule 4.

Division 2—Categorised monetary penalties for offences

Work Health and Safety Act 2011

21 Subsection 31(1) (penalty)

Repeal the penalty, substitute:

Penalty:

- (a) In the case of an individual—the category 1 monetary penalty or 15 years imprisonment or both.
- (b) In the case of a body corporate—the category 1 monetary penalty.

22 Section 32 (penalty)

Repeal the penalty, substitute:

Penalty: The category 2 monetary penalty.

23 Section 33 (penalty)

Repeal the penalty, substitute:

Penalty: The category 3 monetary penalty.

Division 3—Tier A monetary penalties for offences

Work Health and Safety Act 2011

24 Subsections 104(1), 107(1), 108(1) and 109(1) (penalty)

Repeal the penalty, substitute:

Penalty: The tier A monetary penalty.

25 Section 197 (penalty)

Repeal the penalty, substitute:

Penalty: The tier A monetary penalty.

Division 4—Tier B monetary penalties for offences

Work Health and Safety Act 2011

26 Section 41 (penalty)

Repeal the penalty, substitute:

Penalty: The tier B monetary penalty.

27 Subsection 99(2) (penalty)

Repeal the penalty, substitute:

Penalty: The tier B monetary penalty.

28 Section 190 (penalty)

Repeal the penalty, substitute:

Penalty:

- (a) In the case of an individual—the tier B monetary penalty or imprisonment for 2 years or both.
- (b) In the case of a body corporate—the tier B monetary penalty.

29 Section 193 (penalty)

Repeal the penalty, substitute:

Penalty: The tier B monetary penalty.

30 Subsection 200(1) (penalty)

Repeal the penalty, substitute:

Penalty: The tier B monetary penalty.

31 Section 219 (penalty)

Repeal the penalty, substitute:

Penalty: The tier B monetary penalty.

32 Subsection 242(1) (penalty)

Repeal the penalty, substitute:

Penalty: The tier B monetary penalty.

Division 5—Tier C monetary penalties for offences

Work Health and Safety Act 2011

33 Subsections 42(1) and (2), 43(1) and (2) and 44(1) and (2) (penalty)

Repeal the penalty, substitute:

Penalty: The tier C monetary penalty.

34 Section 45 (penalty)

Repeal the penalty, substitute:

Penalty: The tier C monetary penalty.

35 Section 46 (penalty)

Repeal the penalty, substitute:

Penalty: The tier C monetary penalty.

36 Subsection 47(1) (penalty)

Repeal the penalty, substitute:

Penalty: The tier C monetary penalty.

Division 6—Tier D monetary penalties for offences

Work Health and Safety Act 2011

37 Subsections 38(1) and 39(1) (penalty)

Repeal the penalty, substitute:

Penalty: The tier D monetary penalty.

38 Subsection 52(5) (penalty)

Repeal the penalty, substitute:

Penalty: The tier D monetary penalty.

39 Subsection 56(2) (penalty)

Repeal the penalty, substitute:

Penalty: The tier D monetary penalty.

40 Subsection 61(4) (penalty)

Repeal the penalty, substitute:

Penalty: The tier D monetary penalty.

41 Subsections 70(1) and (2), 71(2) and 72(7) (penalty)

Repeal the penalty, substitute:

Penalty: The tier D monetary penalty.

42 Subsections 79(1), (3) and (4) (penalty)

Repeal the penalty, substitute:

Penalty: The tier D monetary penalty.

43 Subsection 155(5) (penalty)

Repeal the penalty, substitute:

Penalty: The tier D monetary penalty.

44 Subsection 165(2) (penalty)

Repeal the penalty, substitute:

Penalty: The tier D monetary penalty.

45 Subsections 171(6) and 177(2) and (6) (penalty)

Repeal the penalty, substitute:

Penalty: The tier D monetary penalty.

46 Subsection 185(4) (penalty)

Repeal the penalty, substitute:

Penalty: The tier D monetary penalty.

47 Sections 188 and 189 (penalty)

Repeal the penalty, substitute:

Penalty: The tier D monetary penalty.

48 Subsections 271(2) and (4) (penalty)

Repeal the penalty, substitute:

Penalty: The tier D monetary penalty.

Division 7—Tier F monetary penalties for offences

Work Health and Safety Act 2011

49 Subsection 38(7) (penalty)

Repeal the penalty, substitute:

Penalty: The tier F monetary penalty.

50 Subsection 75(1) (penalty)

Repeal the penalty, substitute:

Penalty: The tier F monetary penalty.

51 Subsections 97(1) and (2) (penalty)

Repeal the penalty, substitute:

Penalty: The tier F monetary penalty.

52 Subsections 210(1) and (2) (penalty)

Repeal the penalty, substitute:

Penalty: The tier F monetary penalty.

53 Section 273 (penalty)

Repeal the penalty, substitute:

Penalty: The tier F monetary penalty.

Division 8—Tier H monetary penalties for offences

Work Health and Safety Act 2011

54 Subsections 53(1) and (2) (penalty)

Repeal the penalty, substitute:

Penalty: The tier H monetary penalty.

55 Subsections 57(1) and (2) (penalty)

Repeal the penalty, substitute:

Penalty: The tier H monetary penalty.

56 Subsection 74(1) (penalty)

Repeal the penalty, substitute:

Penalty: The tier H monetary penalty.

Division 9—Penalties for WHS civil penalty provisions

Work Health and Safety Act 2011

57 Subsection 118(3) (penalty)

Repeal the penalty (not including the heading), substitute:

Penalty: The WHS civil penalty provision tier 2.

58 Section 123 (penalty)

Repeal the penalty (not including the heading), substitute:

Penalty: The WHS civil penalty provision tier 1.

59 Sections 124 to 126, 128 and 129 (penalty)

Repeal the penalty (not including the heading), substitute:

Penalty: The WHS civil penalty provision tier 2.

60 Section 143 (penalty)

Repeal the penalty (not including the heading), substitute:

Penalty: The WHS civil penalty provision tier 2.

61 Subsection 144(1) (penalty)

Repeal the penalty (not including the heading), substitute:

Penalty: The WHS civil penalty provision tier 2.

62 Sections 145 and 146 (penalty)

Repeal the penalty (not including the heading), substitute:

Penalty: The WHS civil penalty provision tier 2.

63 Subsection 147(1) (penalty)

Repeal the penalty (not including the heading), substitute:

Penalty: The WHS civil penalty provision tier 2.

64 Section 148 (penalty)

Repeal the penalty (not including the heading), substitute:

Penalty: The WHS civil penalty provision tier 2.

65 Subsection 149(1) (penalty)

Repeal the penalty (not including the heading), substitute:

Penalty: The WHS civil penalty provision tier 4.

66 Section 150 (penalty)

Repeal the penalty (not including the heading), substitute:

Penalty: The WHS civil penalty provision tier 3.

67 Paragraphs 254(1)(a) and (2)(a)

Omit “1 or more amounts by way of monetary penalty are”, substitute
“a penalty, expressed as a WHS civil penalty provision tier, is”.

68 Subsection 259(2)

Omit “maximum”.

69 Application provision

The amendments of the *Work Health and Safety Act 2011* made by this Division apply in relation to a contravention of a WHS civil penalty provision that occurs on or after the commencement of this Division.

Division 10—Penalties prescribed by the regulations

Work Health and Safety Act 2011

70 Paragraph 276(3)(h)

Repeal the paragraph, substitute:

- (h) prescribe any of the following as the penalty for an offence under the regulations:
 - (i) a tier E monetary penalty;
 - (ii) a tier F monetary penalty;
 - (iii) a tier G monetary penalty;
 - (iv) a tier H monetary penalty;
 - (v) a tier I monetary penalty; or

71 Transitional provision—existing penalty provisions

- (1) This item applies to a provision (an *existing penalty provision*) in the *Work Health and Safety Regulations 2011* if, immediately before the commencement of this Division, the provision prescribed a monetary penalty for an offence against those regulations.
- (2) Despite the amendment of paragraph 276(3)(h) of the *Work Health and Safety Act 2011* by this Division, but subject to subitem (3) of this item, an existing penalty provision continues in force on and after the commencement of this Division.
- (3) An existing penalty provision may, on or after the commencement of this Division, be repealed or amended by regulations made under section 276 of the *Work Health and Safety Act 2011*.

Division 11—Penalty amounts

Work Health and Safety Act 2011

72 At the end of the Act

Add:

Schedule 4—Penalty amounts

1 Monetary penalties—categories 1 to 3

A penalty referred to in column 1 of an item of the following table, for a person referred to in the heading to another column of the table, is the amount specified in that other column of that item, as indexed under clause 4 and rounded under clause 5.

| Monetary penalties—categories 1 to 3 | | | | |
|---|--|---|---|-------------------------|
| Item | Column 1 | Column 2 | Column 3 | Column 4 |
| | Kind of penalty | An individual who commits an offence as: (a) a person conducting a business undertaking; or (b) an officer of a person conducting a business undertaking | An individual who commits an offence (other than as mentioned in column 2) | A body corporate |
| 1 | the <i>category 1 monetary penalty</i> | \$3,000,000 | \$1,500,000 | \$15,000,000 |
| 2 | the <i>category 2 monetary penalty</i> | \$418,000 | \$209,000 | \$2,090,000 |
| 3 | the <i>category 3 monetary penalty</i> | \$140,000 | \$70,000 | \$700,000 |

2 Monetary penalties—tiers A to I

A penalty referred to in column 1 of an item of the following table, for a person referred to in the heading to another column of the table, is the amount specified in that other column of that item, as indexed under clause 4 and rounded under clause 5.

| Monetary penalties—tiers A to I | | | |
|--|------------------------------------|----------------------|-------------------------|
| Item | Column 1 | Column 2 | Column 3 |
| | Kind of penalty | An individual | A body corporate |
| 1 | the <i>tier A monetary penalty</i> | \$139,000 | \$695,000 |
| 2 | the <i>tier B monetary penalty</i> | \$70,000 | \$350,000 |
| 3 | the <i>tier C monetary penalty</i> | \$28,000 | \$140,000 |
| 4 | the <i>tier D monetary penalty</i> | \$14,000 | \$70,000 |
| 5 | the <i>tier E monetary penalty</i> | \$8,400 | \$42,000 |
| 6 | the <i>tier F monetary penalty</i> | \$7,000 | \$35,000 |
| 7 | the <i>tier G monetary penalty</i> | \$5,000 | \$25,000 |
| 8 | the <i>tier H monetary penalty</i> | \$2,800 | \$14,000 |
| 9 | the <i>tier I monetary penalty</i> | \$1,700 | \$8,500 |

3 Monetary penalties—WHS civil penalty provision—tiers 1 to 4

A penalty referred to in column 1 of an item of the following table, for a person referred to in the heading to another column of the table, is the amount specified in that other column of that item, as indexed under clause 4 and rounded under clause 5.

| WHS civil penalty provision—tiers 1 to 4 | | | |
|---|---|----------------------|-------------------------|
| Item | Column 1 | Column 2 | Column 3 |
| | Kind of penalty | An individual | A body corporate |
| 1 | the <i>WHS civil penalty provision tier 1</i> | \$28,000 | \$140,000 |
| 2 | the <i>WHS civil penalty provision tier 2</i> | \$14,000 | \$70,000 |
| 3 | the <i>WHS civil penalty provision tier 3</i> | \$7,000 | \$35,000 |
| 4 | the <i>WHS civil penalty provision tier 4</i> | \$2,800 | \$14,000 |

4 Indexation of penalty amounts

- (1) The amount of each monetary penalty set out in clause 1, 2 or 3 must be indexed for the year commencing on 1 July 2024, and for each subsequent year, in accordance with this clause.
- (2) The amount of a monetary penalty applying in each year is to be calculated as follows:

$$A \times \frac{B}{C}$$

where:

A is the amount of the monetary penalty set out in clause 1, 2 or 3.

B is the CPI number for the March quarter in the year immediately preceding the year for which the amount is calculated.

C is the CPI number for the March quarter of 2022.

Note: For *CPI number* and *year*, see clause 7.

- (3) If the amount of a monetary penalty calculated for a year is less than the amount that applied in the previous year, then the amount for the previous year continues to apply.

5 Rounding of penalty amounts

If, after indexation under clause 4, the amount of a monetary penalty applying in a year is:

- (a) less than \$10,000 and not a multiple of \$100:
 - (i) the amount must be rounded to the nearest \$100; and
 - (ii) an amount of \$50 is rounded down; or
- (b) more than \$10,000 and not a multiple of \$1,000:
 - (i) the amount must be rounded to the nearest \$1,000; and
 - (ii) an amount of \$500 is rounded down.

6 Public notification of adjusted penalty amounts

As soon as practicable after publication by the Australian Statistician of the CPI number for the March quarter in a year, the regulator must, by notifiable instrument, give notice of the amount of each monetary penalty calculated under this Schedule.

7 Definitions

In this Schedule:

CPI number means the All Groups Consumer Price Index number, that is, the weighted average of the 8 Australian capital cities, published by the Australian Statistician.

year means a period of 12 months starting on 1 July.

Part 7—Tied amendments

Work Health and Safety Act 2011

73 Subsections 272A(1) and 272B(1) (penalty)

Repeal the penalty, substitute:

Penalty: The tier B monetary penalty.

Part 8—Family and Injured Workers Advisory Committee

Work Health and Safety Act 2011

74 After Part 3 of Schedule 2

Insert:

Part 3A—Family and Injured Workers Advisory Committee

3A Definitions for this Part

In this Part:

Advisory Committee means the Family and Injured Workers Advisory Committee established under clause 3B.

Advisory Committee member means a member of the Advisory Committee and includes the Co-Chairs.

Co-Chair means a Co-Chair of the Advisory Committee.

first Co-Chair means the Co-Chair appointed in accordance with subclause 3E(5).

second Co-Chair means the Co-Chair appointed in accordance with subclause 3E(6).

serious work-related incident means the death of a person, or a serious injury or illness of a person, arising out of the conduct of a business or undertaking.

3B Establishment of the Family and Injured Workers Advisory Committee

The Minister must establish a committee called the Family and Injured Workers Advisory Committee. The Advisory Committee

must be established before the end of the period of 12 months beginning on the day this Part commences.

3C Functions of the Advisory Committee

The functions of the Advisory Committee are as follows:

- (a) to give advice, and make recommendations, to the Minister about the needs of persons affected, directly or indirectly, by serious work-related incidents;
- (b) to give advice to Comcare about, and contribute to the development and review of, Comcare's policies, practices and strategies for liaising with, and providing information to, persons affected, directly or indirectly, by serious work-related incidents that arise out of the conduct of a business or undertaking by the Commonwealth, a public authority or a non-Commonwealth licensee;
- (c) to give advice to the Australian Maritime Safety Authority about, and contribute to the development and review of, the Authority's policies, practices and strategies for liaising with, and providing information to, persons affected, directly or indirectly, by serious work-related incidents that arise on a prescribed ship (within the meaning of the *Occupational Health and Safety (Maritime Industry) Act 1993*) or a prescribed unit (within the meaning of that Act) that is engaged in trade or commerce of the kind referred to in subsection 6(1) of that Act;
- (d) to give advice to the National Offshore Petroleum Safety and Environmental Management Authority about, and contribute to the development and review of, the Authority's policies, practices and strategies for liaising with, and providing information to, persons affected, directly or indirectly, by serious work-related incidents that arise:
 - (i) at a facility (within the meaning of Schedule 3 to the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*) located in Commonwealth waters (within the meaning of that Schedule); or
 - (ii) out of the conduct of a business or undertaking in the Commonwealth offshore area (within the meaning of the *Offshore Electricity Infrastructure Act 2021*);
- (e) such other functions as are prescribed by the regulations.

3D Membership of the Advisory Committee

The Advisory Committee consists of the following members:

- (a) 2 Co-Chairs;
- (b) at least 3 other members.

3E Appointment of Advisory Committee members

- (1) Each Advisory Committee member is to be appointed by the Minister, by written instrument, on a part-time basis.

Note: An Advisory Committee member may be reappointed (see section 33AA of the *Acts Interpretation Act 1901*).

- (2) The instrument of appointment of an Advisory Committee member must specify whether the member is appointed as the first Co-Chair, second Co-Chair or another member.

Period of appointment

- (3) An Advisory Committee member holds office for the period specified in the member's instrument of appointment. The period must not be more than 3 years.
- (4) An Advisory Committee member is eligible for reappointment but must not hold office for a total of more than 9 years.

Eligibility for appointment as Advisory Committee member (including first Co-Chair but not including second Co-Chair)

- (5) A person is eligible for appointment as an Advisory Committee member (including the first Co-Chair, but not including the second Co-Chair) only if the Minister is satisfied that:
 - (a) the person has, or has had, a serious injury or illness that arose out of the conduct of a business or undertaking; or
 - (b) the person has lived experience as family member or carer of another person who:
 - (i) has died, if the person's death arose out of the conduct of a business or undertaking; or
 - (ii) has, or has had, a serious injury or illness that arose out of the conduct of a business or undertaking; or

- (c) the person has been affected, directly or indirectly, by a serious work-related incident suffered by another person.

Note: Examples of persons for the purposes of paragraph (c) are friends and co-workers.

Eligibility for appointment as second Co-Chair

- (6) A person is eligible for appointment as the second Co-Chair only if the Minister is satisfied that the person has relevant skills and experience in relation to trauma and group facilitation.

Additional member

- (7) Without limiting this clause, if the Advisory Committee already has at least 5 members (including the first Co-Chair and the second Co-Chair), the Minister may appoint an additional Advisory Committee member under subclause (1) who has relevant skills and experience in relation to trauma and grief.

3F Invited participants

- (1) A Co-Chair may, after consulting the other members of the Advisory Committee, invite a person, body or organisation to participate in a meeting.
- (2) A Co-Chair may terminate the invitation at any time, including during a meeting.
- (3) The participation of a person in a meeting does not make the person a member.
- (4) A person invited to participate in a meeting:
- (a) is entitled to payment of travel allowance prescribed by the regulations for the purposes of this paragraph; and
 - (b) must comply with any requirements prescribed by the regulations for the purposes of this paragraph.
- (5) Regulations made for the purposes of subclause (4) may identify a rate by reference to the rate of travelling allowance that is payable to a particular class of office holders under a determination of the Remuneration Tribunal as in force at a particular time, or as in force from time to time.

Note: This subclause is not intended to be an exhaustive statement of the ways in which a rate could be identified.

- (6) The regulations may provide for or in relation to persons invited to participate in a meeting.

3G Acting appointments

- (1) The Minister may, by written instrument, appoint an Advisory Committee member (other than the second Co-Chair) to act as the first Co-Chair:
- (a) during a vacancy in the office of the first Co-Chair (whether or not an appointment has previously been made to the office); or
 - (b) during any period, or during all periods, when the first Co-Chair:
 - (i) is absent from duty or from Australia; or
 - (ii) is, for any reason, unable to perform the duties of the office.

Note: For rules that apply to acting appointments, see sections 33AB and 33A of the *Acts Interpretation Act 1901*.

- (2) The Minister may, by written instrument, appoint an Advisory Committee member (other than the first Co-Chair), or any other person, to act as the second Co-Chair:
- (a) during a vacancy in the office of the second Co-Chair (whether or not an appointment has previously been made to the office); or
 - (b) during any period, or during all periods, when the second Co-Chair:
 - (i) is absent from duty or from Australia; or
 - (ii) is, for any reason, unable to perform the duties of the office.
- (3) A person is not eligible for appointment under subclause (2) unless the person is eligible for appointment as the second Co-Chair under subclause 3E(6).

Note: For rules that apply to acting appointments, see sections 33AB and 33A of the *Acts Interpretation Act 1901*.

- (4) The Minister may, by written instrument, appoint a person to act as an Advisory Committee member (other than a Co-Chair):
- (a) during a vacancy in the office of an Advisory Committee member (other than a Co-Chair) (whether or not an appointment has previously been made to the office); or
 - (b) during any period, or during all periods, when an Advisory Committee member (other than a Co-Chair):
 - (i) is absent from duty or from Australia; or
 - (ii) is, for any reason, unable to perform the duties of the office.
- (5) A person is not eligible for appointment under subclause (4) unless the person is eligible for appointment as an Advisory Committee member under subclause 3E(5).

Note: For rules that apply to acting appointments, see sections 33AB and 33A of the *Acts Interpretation Act 1901*.

3H Remuneration and allowances

- (1) An Advisory Committee member is to be paid the remuneration that is determined by the Remuneration Tribunal. If no determination of that remuneration by the Tribunal is in operation, the Advisory Committee member is to be paid the remuneration that is prescribed by the regulations.
- (2) An Advisory Committee member is to be paid the allowances that are prescribed by the regulations.
- (3) This clause has effect subject to the *Remuneration Tribunal Act 1973*.

3J Leave of absence

- (1) The Minister may grant leave of absence to a Co-Chair on the terms and conditions that the Minister determines.
- (2) A Co-Chair may grant leave of absence to an Advisory Committee member (other than a Co-Chair) on the terms and conditions that the Co-Chair determines.

3K Disclosure of interests to the Minister

An Advisory Committee member must give written notice to the Minister of all interests, pecuniary or otherwise, that the member has or acquires and that conflict or could conflict with the proper performance of the member's functions.

3L Disclosure of interests to the Advisory Committee

- (1) An Advisory Committee member who has an interest, pecuniary or otherwise, in a matter being considered or about to be considered by the Advisory Committee must disclose the nature of the interest to a meeting of the Advisory Committee.
- (2) The disclosure must be made as soon as possible after the relevant facts have come to the Advisory Committee member's knowledge.
- (3) The disclosure must be recorded in the minutes of the meeting.

3M Resignation

- (1) An Advisory Committee member may resign the member's appointment by giving the Minister a written resignation.
- (2) The resignation takes effect on the day it is received by the Minister or, if a later day is specified in the resignation, on that later day.

3N Termination of appointment

- (1) The Minister may terminate the appointment of an Advisory Committee member:
 - (a) for misbehaviour; or
 - (b) if the Advisory Committee member is unable to perform the duties of the office because of physical or mental incapacity.
- (2) The Minister may terminate the appointment of an Advisory Committee member if:
 - (a) the Advisory Committee member:
 - (i) becomes bankrupt; or
 - (ii) applies to take the benefit of any law for the relief of bankrupt or insolvent debtors; or

- (iii) compounds with the member's creditors; or
 - (iv) makes an assignment of the member's remuneration for the benefit of the member's creditors; or
 - (b) the Advisory Committee member fails, without reasonable excuse, to comply with clause 3K or 3L (which deal with disclosure of interests).
- (3) The Minister must terminate the appointment of an Advisory Committee member if the Advisory Committee member is absent, except on leave of absence, from 3 consecutive meetings of the Advisory Committee.

3P Other terms and conditions

An Advisory Committee member holds office on the terms and conditions (if any) in relation to matters not covered by this Act that are determined by the Minister.

3Q Meetings and procedures

- (1) The regulations may prescribe the procedures to be followed at, or in relation to, meetings of the Advisory Committee, including matters relating to the following:
- (a) convening meetings;
 - (b) the number of Advisory Committee members who are to constitute a quorum at a meeting;
 - (c) the selection of an Advisory Committee member to preside at a meeting in the absence of a Co-Chair;
 - (d) the manner in which questions arising at a meeting are to be decided;
 - (e) inviting persons with appropriate expertise or technical knowledge to attend meetings;
 - (f) keeping minutes of meetings.
- (2) A resolution is taken to have been passed at a meeting of the Advisory Committee if:
- (a) without meeting, a majority of Advisory Committee members indicate agreement with the resolution in accordance with the method determined by the Advisory Committee under subclause (3); and

- (b) all Advisory Committee members were informed of the proposed resolution, or reasonable efforts had been made to inform all Advisory Committee members of the proposed resolution.
- (3) Subclause (2) applies only if the Advisory Committee:
 - (a) determines that it applies; and
 - (b) determines the method by which Advisory Committee members are to indicate agreement with resolutions.

3R Administrative support

The Secretary of the Department must ensure that the Advisory Committee has the necessary administrative and other support to enable the Advisory Committee to perform its functions efficiently and effectively.

*[Minister's second reading speech made in—
House of Representatives on 4 September 2023
Senate on 4 December 2023]*

(105/23)
