Workplace Relations Amendment (A Stronger Safety Net) Bill 2007

No.  , 2007

(Employment and Workplace Relations)

A Bill for an Act to amend the Workplace Relations Act 1996, and for other purposes
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A Bill for an Act to amend the Workplace Relations Act 1996, and for other purposes

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the Workplace Relations Amendment (A Stronger Safety Net) Act 2007.

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

<table>
<thead>
<tr>
<th>Column 1</th>
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<tr>
<td>Provision(s)</td>
<td>Commencement</td>
<td>Date/Details</td>
</tr>
<tr>
<td>1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table</td>
<td>The day on which this Act receives the Royal Assent.</td>
<td></td>
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<tr>
<td>2. Schedule 1</td>
<td>A single day to be fixed by Proclamation.</td>
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<td>However, if any of the provision(s) do not commence within the period of 6 months beginning on the day on which this Act receives the Royal Assent, they commence on the first day after the end of that period.</td>
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<td>3. Schedule 2</td>
<td>A single day to be fixed by Proclamation.</td>
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<td>However, if any of the provision(s) do not commence within the period of 6 months beginning on the day on which this Act receives the Royal Assent, they commence on the first day after the end of that period.</td>
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<td>4. Schedule 3</td>
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1. Note: This table relates only to the provisions of this Act as originally passed by both Houses of the Parliament and assented to. It will not be expanded to deal with provisions inserted in this Act after assent.

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

### 3 Schedule(s)

1. Each Act, and each set of regulations, 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.
(2) The amendment of any regulation under subsection (1) does not prevent the regulation, as so amended, from being amended or repealed by the Governor-General.
Schedule 1—The Fairness Test

Part 1—Main amendments

Workplace Relations Act 1996

1 After Division 5 of Part 8

Insert:

Division 5A—The fairness test

Subdivision A—Preliminary

346B Definitions

(1) In this Division:

designated award, in relation to an employee or employees whose employment is or may be subject to a workplace agreement, means an award determined by the Workplace Authority Director under section 346L, and includes an award taken to be so designated in relation to the employee or employees under section 346K (unless a different award has been designated in relation to the employee or employees under section 346L).

enterprise award means an award that regulates a term or condition of employment of an employee or employees by an employer in a single business specified in the award.

industrial instrument means any of the following:

(a) a pre-reform AWA;
(b) a pre-reform certified agreement (within the meaning of Schedule 7);
(c) a workplace determination;
(d) a section 170MX award (within the meaning of Schedule 7);
(e) an old IR agreement (within the meaning of Schedule 7).

protected award conditions has the same meaning as in subsection 354(4), subject to subsection (2) of this section.
reference award, in relation to an employee whose employment is subject to a workplace agreement, means:

(a) a relevant award in relation to the employee; or
(b) if there is no relevant award in relation to the employee—a designated award in relation to the employee.

relevant award, in relation to an employee whose employment is subject to a workplace agreement, means an award:

(a) that regulates, or would but for a workplace agreement or another industrial instrument regulate, any term or condition of employment of persons engaged in the same kind of work as that performed or to be performed by the employee under the workplace agreement; and

(b) that was binding on the employee’s employer immediately before the day on which the workplace agreement was lodged.

salary means gross basic salary and does not include the following:

(a) incentive-based payments and bonuses;
(b) loadings (other than casual loadings);
(c) monetary allowances;
(d) penalty rates;
(e) employer superannuation contributions;
(f) any other separately identifiable entitlements that are similar to those mentioned in paragraphs (a) to (d).

Note: Section 346G contains provisions relating to this definition.

(2) For the purposes of the definition of protected award conditions in subsection (1), the definition of protected allowable award matters in subsection 354(4) has effect as if it did not include the matter referred to in paragraph (i) of the latter definition.

Note: Paragraph (i) relates to outworker conditions. These conditions cannot be excluded or modified by a workplace agreement to provide a less favourable outcome for an employee in a particular respect—see subsection 354(3).

(3) Unless the contrary intention appears, this Division applies to a workplace agreement as varied in a corresponding way to the way in which it applies to a workplace agreement.
Schedule 1  The Fairness Test
Part 1  Main amendments

346C  When protected award conditions apply to an employee

(1) For the purposes of this Division, protected award conditions apply to an employee whose employment is subject to a workplace agreement:
   (a) if, but for that workplace agreement, a previous workplace agreement or another industrial instrument, the protected award conditions would have effect in relation to the employment of the employee under a relevant award in relation to the employee; or
   (b) in a case where there is no relevant award in relation to the employee—if, assuming that the employee’s employer was bound by a designated award in relation to the employee, the protected award conditions would have effect in relation to the employment of the employee but for the workplace agreement, a previous workplace agreement or another industrial instrument.

(2) Protected award conditions that apply to an employee because of the operation of paragraph (1)(b) are not taken, for the purposes of paragraph 354(1)(b), to be protected award conditions that would have effect in relation to the employment of the employee.

346D  Application of Division to workplace agreements

(1) The obligations imposed on the Workplace Authority Director by this Division in relation to a workplace agreement apply irrespective of whether the workplace agreement is in operation or has ceased to operate.

(2) For the purposes of applying this Division to a workplace agreement that has ceased to operate:
   (a) a reference to an employee whose employment is subject to the workplace agreement is taken to include a reference to an employee whose employment was at any time subject to the workplace agreement; and
   (b) a reference to a person or organisation who is bound by the workplace agreement is taken to include a reference to a person or organisation who was at any time bound by the workplace agreement.
(3) For the purposes of applying this Division to a workplace agreement, a reference to an employee whose employment is subject to the workplace agreement is, so far as the context permits, taken to include a reference to an employee whose employment may at a future time be subject to the workplace agreement.

Subdivision B—Workplace agreements to which the fairness test applies

346E Workplace Authority Director must apply the fairness test to certain workplace agreements

(1) The Workplace Authority Director must decide under section 346M whether an AWA passes the fairness test if:

(a) the AWA is lodged on or after 7 May 2007; and

(b) on the date of lodgment, the employee whose employment is subject to the AWA is employed in an industry or occupation in which the terms and conditions of the kind of work performed or to be performed by the employee:

(i) are usually regulated by an award; or

(ii) would, but for a workplace agreement or another industrial instrument, usually be regulated by an award; and

(c) on the date of lodgment:

(i) in the case of a full-time employee, other than a full-time employee who is paid a piece rate of pay—the annual rate of salary payable to the employee under the AWA is less than $75,000; or

(ii) in the case of a full-time employee who is paid a piece rate of pay—the annual full-time salary payable to the employee under the AWA, worked out in accordance with section 346G, is less than $75,000; or

(iii) in the case of an employee not covered by subparagraph (i) or (ii)—the annual full-time equivalent amount of salary payable to the employee under the AWA, worked out in accordance with section 346G, is less than $75,000; and
(d) the AWA excludes or modifies one or more protected award conditions that apply to the employee under a reference award in relation to the employee.

Note: Paragraph (d) will not be satisfied if there is no reference award in relation to the employee.

(2) The Workplace Authority Director must decide under section 346M whether a collective agreement passes the fairness test if:

(a) the collective agreement is lodged on or after 7 May 2007; and

(b) on the date of lodgment, one or more of the employees whose employment is subject to the collective agreement is employed in an industry or occupation in which the terms and conditions of the kind of work performed or to be performed by the employees:

(i) are usually regulated by an award; or

(ii) would, but for a workplace agreement or another industrial instrument, usually be regulated by an award; and

(c) the collective agreement excludes or modifies one or more protected award conditions that apply to one or more of those employees under a reference award in relation to the employee or employees.

Note: Paragraph (c) will not be satisfied if there is no reference award in relation to the employee.

346F Workplace Authority Director must apply the fairness test to certain workplace agreements as varied

(1) The Workplace Authority Director must decide under section 346M whether an AWA as varied under Division 8 passes the fairness test if:

(a) the variation of the AWA is lodged on or after 7 May 2007; and

(b) on the date of lodgment of the variation, the employee whose employment is subject to the AWA as varied is employed in an industry or occupation in which the terms and conditions of the kind of work performed or to be performed by the employee:

(i) are usually regulated by an award; or
(ii) would, but for a workplace agreement or another industrial instrument, usually be regulated by an award; and

(c) on the date of lodgment of the variation:

(i) in the case of a full-time employee, other than a full-time employee who is paid a piece rate of pay—the annual rate of salary payable to the employee under the AWA as varied is less than $75,000; or

(ii) in the case of a full-time employee who is paid a piece rate of pay—the annual full-time salary payable to the employee under the AWA as varied, worked out in accordance with section 346G, is less than $75,000; or

(iii) in the case of an employee not covered by subparagraph (i) or (ii)—the annual full-time equivalent amount of salary payable to the employee under the AWA as varied, worked out in accordance with section 346G, is less than $75,000; and

(d) the variation excludes or modifies one or more protected award conditions that apply to the employee under a reference award in relation to the employee.

Note: Paragraph (d) will not be satisfied if there is no reference award in relation to the employee.

(2) The Workplace Authority Director must decide under section 346M whether a collective agreement as varied under Division 8 passes the fairness test if:

(a) the variation of the collective agreement is lodged on or after 7 May 2007; and

(b) on the date of lodgment of the variation, one or more of the employees whose employment is subject to the collective agreement as varied is employed in an industry or occupation in which the terms and conditions of the kind of work performed or to be performed by the employees:

(i) are usually regulated by an award; or

(ii) would, but for a workplace agreement or another industrial instrument, usually be regulated by an award; and

(c) the variation excludes or modifies one or more protected award conditions that apply to one or more of those employees under a reference award in relation to the employee or employees.
Schedule 1  The Fairness Test
Part 1  Main amendments

Note: Paragraph (c) will not be satisfied if there is no reference award in relation to the employee.

346G  Provisions about annual rate of salary

(1) The amount mentioned in paragraph 346E(1)(c) or 346F(1)(c) may be increased by the regulations or in the manner prescribed by the regulations.

(2) If an employee is paid a periodic rate of pay, the annual full-time equivalent amount of salary payable to the employee for the purpose of subparagraph 346E(1)(c)(iii) or 346F(1)(c)(iii) is the salary the employee would earn if the employee were employed on a full-time basis and paid at the employee’s periodic rate of pay.

(3) For the purposes of subsection (2), the salary the employee would earn is to be calculated for the 12 month period beginning on the date on which the AWA is lodged.

(4) If an employee is paid a piece rate of pay and the employee is a full-time employee, the annual full-time salary payable to the employee for the purpose of subparagraph 346E(1)(c)(ii) or 346F(1)(c)(ii) is the salary that the employer reasonably estimates the employee would earn.

(5) If an employee is paid a piece rate of pay and the employee is not a full-time employee, the annual full-time equivalent amount of salary payable to the employee for the purpose of subparagraph 346E(1)(c)(iii) or 346F(1)(c)(iii) is the salary that the employer reasonably estimates the employee would earn if the employee were employed on a full-time basis.

(6) The regulations may prescribe one or more methods (whether described, in relation to classes of employees paid piece rates of pay, by the kind of work performed by such employees, or otherwise) by which an employer may reasonably estimate the salary the employee would earn for the purposes of subsections (4) and (5).

(7) For the purpose of subsections (4) and (5), the salary the employee would earn is to be estimated for the 12 month period beginning on the date on which the AWA is lodged.
(8) The regulations may prescribe a different definition of salary for employees paid piece rates of pay.

346H Protected award conditions and designated awards—deemed exclusion or modification

(1) For the purposes of paragraphs 346E(1)(d) and 346F(1)(d), an AWA is taken to exclude or modify one or more protected award conditions that apply to an employee under a designated award in relation to the employee if the condition or conditions:
   (a) do not have effect in relation to the employee under the AWA; or
   (b) have a different effect in relation to the employee than they would have under the designated award.

(2) For the purposes of paragraphs 346E(2)(c) and 346F(2)(c), a collective agreement is taken to exclude or modify one or more protected award conditions that apply to an employee or employees under a designated award in relation to the employee or employees if the condition or conditions:
   (a) do not have effect in relation to the employee or employees under the collective agreement; or
   (b) have a different effect in relation to the employee or employees than they would have under the designated award.

346J Notice requirements

(1) If the Workplace Authority Director is required to decide under section 346M whether a workplace agreement passes the fairness test, the Workplace Authority Director must give a written notice to that effect to:
   (a) the employer in relation to the workplace agreement; and
   (b) if the workplace agreement is an AWA—the employee whose employment is subject to the AWA; and
   (c) if the agreement is a union collective agreement or a union greenfields agreement—the organisation or organisations bound by the agreement.

(2) If the Workplace Authority Director is not required to decide under section 346M whether a workplace agreement passes the fairness
test, the Workplace Authority Director must give a written notice
to that effect to the persons referred to in paragraphs (1)(a), (b) and
(c).

(3) A notice under this section is not required to be given at the same
time as the copy of the receipt is given under section 345 in respect
of the declaration for the workplace agreement concerned.

Note: Section 346ZE requires the employer to inform the employees
concerned of the contents of a notice under this section in relation to a
collective agreement.

346K Designated awards—before a workplace agreement or
variation is lodged

(1) The Workplace Authority Director may, on application by an
employer, determine that an award is a designated award in
relation to an employee or employees of the employer.

Note: For specification by class, see section 46 of the Acts Interpretation Act
1901.

(2) The Workplace Authority Director may make a determination
under this section only if the Workplace Authority Director is
satisfied that:

(a) the employee or employees are or may be employed in an
industry or occupation in which the terms and conditions of
the kind of work performed or to be performed by the
employee or employees:

(i) are usually regulated by an award; or

(ii) would, but for a workplace agreement or another
industrial instrument, usually be regulated by an award;

and

(b) there is no relevant award in relation to the employee or
employees; and

(c) there is an award that satisfies the requirements specified in
subsection (3).

(3) An award or awards determined by the Workplace Authority
Director under this section:

(a) must be an award or awards regulating, or that would, but for
a workplace agreement or another industrial instrument,
regulate, terms or conditions of employment of employees
engaged in the same kind of work as the work performed or to be performed by the employee or employees; and

(b) must, in the opinion of the Workplace Authority Director, be an award or awards that would be appropriate for the purposes referred to in subsection 346L(2) if a workplace agreement or a variation of a workplace agreement were lodged; and

(c) must not be an enterprise award.

Note: An example of a case where paragraph (a) could be satisfied, but the Workplace Authority Director may nevertheless not be satisfied that there is an appropriate award for the purposes of paragraph (b), is where an award regulates terms and conditions of the kind of work performed by employees in a particular industry or occupation in one State only, and terms and conditions of that kind of work are not regulated by awards in other States.

(4) An award determined under this section in relation to an employee or employees is taken to be the designated award determined by the Workplace Authority Director under section 346L in relation to the employee or employees if the employer later lodges a workplace agreement, or a variation of a workplace agreement, in relation to the employee or the employees.

(5) Despite subsection (4), the Workplace Authority Director may determine under section 346L that another award is a designated award in relation to the employee, or in relation to some or all of the employees, if the Workplace Authority Director is satisfied that it is necessary in all the circumstances to do so.

(6) The Workplace Authority Director may determine different awards under subsection (2) in relation to different employees.

(7) In this section, a reference to an employee or employees of an employer includes a reference to a person or persons who may become an employee or employees of the employer.

(8) A determination made under this section is not a legislative instrument.

346L Designated awards—after a workplace agreement or variation is lodged

(1) This section applies to a workplace agreement if:

(a) in the case of an AWA:
(i) the AWA satisfies the requirements set out in paragraphs 346E(1)(a), (b) and (c); and
(ii) there is no relevant award in relation to the employee whose employment is subject to the AWA; or
(b) in the case of a collective agreement:
(i) the collective agreement satisfies the requirements set out in paragraphs 346E(2)(a) and (b); and
(ii) there is no relevant award in relation to one or more employees whose employment is subject to the collective agreement; or
(c) a variation of the workplace agreement was lodged on or after 7 May 2007, and:
(i) if the workplace agreement is an AWA—the AWA as varied satisfies the requirements set out in paragraphs 346F(1)(b) and (c) and subparagraph (a)(ii) of this subsection; or
(ii) if the workplace agreement is a collective agreement—the collective agreement as varied satisfies the requirements set out in paragraph 346F(2)(b) and subparagraph (b)(ii) of this subsection.

(2) The Workplace Authority Director must determine that an award is a designated award in relation to the employee or employees whose employment is subject to the agreement:
(a) to ascertain whether or not the Workplace Authority Director is required to decide under section 346M whether the workplace agreement, or the workplace agreement as varied, passes the fairness test; and
(b) if the Workplace Authority Director is so required, for the purpose of deciding whether the workplace agreement, or the workplace agreement as varied, passes the fairness test; unless the Workplace Authority Director is satisfied that there is no award that satisfies the requirements specified in subsection (3).

Note: For specification by class, see section 46 of the Acts Interpretation Act 1901.

(3) An award or awards determined by the Workplace Authority Director under this section:
(a) must be an award or awards regulating, or that would, but for a workplace agreement or another industrial instrument, regulate, terms or conditions of employment of employees
engaged in the same kind of work as the work performed by
the employee or employees under the workplace agreement
concerned; and
(b) must, in the opinion of the Workplace Authority Director, be
appropriate for the purposes referred to in subsection (2); and
(c) must not be an enterprise award.

Note: An example of a case where paragraph (a) could be satisfied, but the
Workplace Authority Director may nevertheless not be satisfied that
there is an appropriate award for the purposes of paragraph (b), is
where an award regulates terms and conditions of the kind of work
performed by employees in a particular industry or occupation in one
State only, and terms and conditions of that kind of work are not
regulated by awards in other States.

(4) The Workplace Authority Director may determine different awards
under subsection (2) in relation to different employees.

(5) A determination made under this section is not a legislative
instrument.

Subdivision C—The fairness test

346M When does an agreement pass the fairness test?

(1) A workplace agreement passes the fairness test if:

(a) in the case of an AWA—the Workplace Authority Director is
satisfied that the AWA provides fair compensation to the
employee whose employment is subject to the AWA in lieu
of the exclusion or modification of protected award
conditions that apply to the employee; or

(b) in the case of a collective agreement—the Workplace
Authority Director is satisfied that, on balance, the collective
agreement provides fair compensation, in its overall effect on
the employees whose employment is subject to the collective
agreement, in lieu of the exclusion or modification of
protected award conditions that apply to some or all of those
employees.

Note: This section applies to a workplace agreement as varied in a
corresponding way to the way in which it applies to a workplace
agreement—see subsection 346B(3).
(2) In considering whether a workplace agreement provides fair compensation to an employee, or in its overall effect on employees, the Workplace Authority Director must first have regard to:

(a) the monetary and non-monetary compensation that the employee or employees will receive under the workplace agreement, in lieu of the protected award conditions that apply to the employee or employees under a reference award in relation to the employee or employees; and

(b) the work obligations of the employee or employees under the workplace agreement.

(3) In considering whether a workplace agreement provides fair compensation to an employee or in its overall effect on employees, the Workplace Authority Director may also have regard to the personal circumstances of the employee or employees, including in particular the family responsibilities of the employee or employees.

(4) In exceptional circumstances, and if the Workplace Authority Director is satisfied that it is not contrary to the public interest to do so, the Workplace Authority Director may, in addition to the matters specified in subsections (2) and (3), also have regard to the industry, location or economic circumstances of the employer and the employment circumstances of the employee or employees when considering whether a workplace agreement provides fair compensation to an employee or in its overall effect on employees.

(5) An example of a case where the Workplace Authority Director may be satisfied that it is not contrary to the public interest to have regard to the industry, location or economic circumstances of the employer is where the workplace agreement is part of a reasonable strategy to deal with a short-term crisis in, and to assist in the revival of, the employer’s business.

(6) In deciding whether a workplace agreement passes, or does not pass, the fairness test, the Workplace Authority Director may inform himself or herself in any way he or she considers appropriate including (but not limited to) contacting the employer and the employee, or some or all of the employees, whose employment is subject to the workplace agreement.

(7) In this section:
non-monetary compensation, in relation to an employee, means compensation (other than an entitlement to a payment of money):

(a) for which there is a money value equivalent or to which a money value can reasonably be assigned; and

(b) that confers a benefit or advantage on the employee which is of significant value to the employee.

346N  Agreements to be tested as at lodgment date

(1) In deciding whether a workplace agreement passes, or does not pass, the fairness test, the Workplace Authority Director must consider the agreement as in force immediately after lodgment.

(2) In deciding whether a workplace agreement as varied passes, or does not pass, the fairness test, the Workplace Authority Director must consider the agreement as in force immediately after the variation was lodged.

(3) If:

(a) the Workplace Authority Director is required by section 346E to decide under section 346M whether a workplace agreement passes the fairness test; and

(b) before the Workplace Authority Director decides whether the workplace agreement passes the fairness test, the Workplace Authority Director is required by section 346F to decide under section 346M whether the workplace agreement as varied passes the fairness test;

then:

(c) the Workplace Authority Director must consider the workplace agreement and the workplace agreement as varied as part of the same process; and

(d) to avoid doubt, the Workplace Authority Director must consider, and make a separate decision in respect of, both the workplace agreement and the workplace agreement as varied.

346P  Workplace Authority Director must notify of decision

(1) If the Workplace Authority Director decides under section 346M that a workplace agreement passes the fairness test, the Workplace Authority Director must notify the following of the decision:

(a) the employer in relation to the workplace agreement;
(b) if the workplace agreement is an AWA—the employee
whose employment is subject to the AWA;
(c) if the agreement is a union collective agreement or a union
greenfields agreement—the organisation or organisations
bound by the agreement.

(2) If the Workplace Authority Director decides under section 346M
that a workplace agreement does not pass the fairness test, the
Workplace Authority Director must notify the persons referred to
in paragraphs (1)(a), (b) and (c) of the decision.

(3) If the Workplace Authority Director decides under section 346M
that a workplace agreement does not pass the fairness test, the
notice must also:
(a) in the case of a workplace agreement that is in operation on
the date of issue specified in the notice—contain advice as to
how the agreement could be varied to pass the fairness test
(including by way of an undertaking); and
(b) in any case—state that compensation may be payable by the
employer to the employee or employees under
section 346ZD.

(4) If subsection 346N(3) requires the Workplace Authority Director
to consider, and make a separate decision in respect of, both a
workplace agreement and the workplace agreement as varied, the
notice under this section must deal with both agreements.

(5) A notice under this section:
(a) must be in writing; and
(b) must specify the date of issue of the notice.

Note: Section 346ZE requires the employer to inform the employees
concerned of the contents of a notice under this section in relation to a
collective agreement.

Subdivision D—Consequences if a workplace agreement does
not pass the fairness test

346Q Agreement does not pass fairness test—agreement not in
operation

If:
(a) the Workplace Authority Director decides under section 346M that a workplace agreement does not pass the fairness test; and
(b) the workplace agreement is not in operation in relation to any employee immediately before the date of the decision;
the employee or employees whose employment was at any time subject to the workplace agreement are, on and from the date of issue specified in the notice under section 346P in relation to the workplace agreement, entitled to any compensation payable to the employee or employees under section 346ZD.

346R Agreement does not pass fairness test—agreement in operation

(1) This section applies if:
(a) the Workplace Authority Director decides under section 346M that a workplace agreement does not pass the fairness test; and
(b) the workplace agreement is in operation immediately before the date of the decision.

(2) The employer who is bound by the workplace agreement may:
(a) in the case of an AWA—lodge a variation of the AWA with the Workplace Authority Director; or
(b) in the case of an AWA or a collective agreement—lodge a variation of the workplace agreement by giving to the Workplace Authority Director a written undertaking in relation to the AWA or collective agreement.

(3) If the employer does not take the action referred to in subsection (2) within the relevant period in relation to the workplace agreement, then at the end of that period:
(a) the workplace agreement ceases to operate; and
(b) the employee or employees whose employment was at any time subject to the workplace agreement are, after the end of the relevant period in relation to the workplace agreement, entitled to any compensation payable to the employee or employees under section 346ZD.

(4) Despite subsection (3), if:
(a) because of subsection 346N(3), the Workplace Authority Director considered, and made a separate decision in respect of, both a workplace agreement and the workplace agreement as varied; and

(b) the workplace agreement did not pass the fairness test, but the workplace agreement as varied passed the fairness test; the workplace agreement as varied continues in operation, and the employee or employees whose employment was at any time subject to the workplace agreement, whether before or after the variation was lodged are, after the end of the relevant period in relation to the workplace agreement, entitled to any compensation payable to the employee or employees under section 346ZD.

(5) For the purposes of paragraph (2)(a), Division 8 does not apply to the variation of an AWA, except for the following provisions:

(a) subsection 373(1);

(b) section 374.

(6) For the purposes of paragraph (2)(b), Division 8 does not apply to an undertaking given to the Workplace Authority Director in relation to an AWA or a collective agreement.

(7) In this section:

relevant period, in relation to a workplace agreement, means:

(a) the period of 14 days beginning on the date of issue specified in the notice under section 346P in relation to the workplace agreement; or

(b) if a longer period is prescribed by the regulations for the purposes of this paragraph—that period; or

(c) if the period referred to in paragraph (a) or (b) is extended under subsection (8) in relation to the workplace agreement—the period as extended.

(8) The Workplace Authority Director may extend the period referred to in paragraph (7)(a) or (b), as the case requires, in relation to a particular workplace agreement in circumstances prescribed by the regulations.
346S Lodging of variation documents with the Workplace Authority Director

(1) An employer lodges a variation with, or gives an undertaking to, the Workplace Authority Director under section 346R if:
   (a) the employer lodges a declaration under subsection (2); and
   (b) a copy of the variation or undertaking is annexed to the declaration.

(2) An employer lodges a declaration with the Workplace Authority Director if:
   (a) the employer gives it to the Workplace Authority Director;
   and
   (b) it meets the form requirements mentioned in subsection (3).

Note: Sections 137.1 and 137.2 of the Criminal Code create offences for providing false or misleading information or documents.

(3) The Workplace Authority Director may, by notice published in the Gazette, set out requirements for the form of a declaration for the purposes of paragraph (2)(b). The requirements may be different for variations and undertakings.

(4) A declaration is given to the Workplace Authority Director for the purposes of subsection (2) only if the declaration is actually received by the Workplace Authority Director.

Note: This means that section 29 of the Acts Interpretation Act 1901 (to the extent that it deals with the time of service of documents) and section 160 of the Evidence Act 1995 do not apply to lodgment of a declaration.

346T Operation of section 346R variations

(1) A variation of an AWA under paragraph 346R(2)(a) comes into operation when the variation is lodged with the Workplace Authority Director under that paragraph in accordance with section 346S.

(2) A variation of an AWA or a collective agreement by way of an undertaking under paragraph 346R(2)(b) comes into operation when the undertaking is given to the Workplace Authority Director under that paragraph in accordance with section 346S.
(3) For the purposes of this Act, an undertaking given by an employer to the Workplace Authority Director in relation to an AWA or a collective agreement is taken to be a variation of the AWA or collective agreement, as the case may be, lodged by the employer under section 346R.

346U Workplace Authority Director must test varied agreement

(1) If an employer lodges a variation of a workplace agreement under section 346R, the Workplace Authority Director must decide under this section whether the workplace agreement as varied passes the fairness test set out in section 346M.

(2) If the Workplace Authority Director decides under subsection (1) that a workplace agreement as varied passes the fairness test, the Workplace Authority Director must notify the following of the decision:
   (a) the employer in relation to the workplace agreement;
   (b) if the workplace agreement is an AWA—the employee whose employment is subject to the AWA;
   (c) if the agreement is a union collective agreement or a union greenfields agreement—the organisation or organisations bound by the agreement.

(3) If the Workplace Authority Director decides under subsection (1) that a workplace agreement as varied does not pass the fairness test, the Workplace Authority Director must notify the persons referred to in paragraphs (2)(a), (b) and (c) of the decision.

(4) A notice under this section must be in writing and must specify:
   (a) the date of issue of the notice; and
   (b) the effect of the notice.

Note: Section 346ZE requires the employer to inform the employees concerned of the contents of a notice under this section in relation to a collective agreement.

(5) In deciding under this section whether a workplace agreement passes, or does not pass, the fairness test, the Workplace Authority Director may inform himself or herself in any way he or she considers appropriate including (but not limited to) contacting the employer and the employee, or some or all of the employees, whose employment is subject to the workplace agreement.
346V  Effect if varied agreement does not pass fairness test—
agreement not in operation

If:
(a) the Workplace Authority Director decides under subsection 346U(1) that a workplace agreement as varied does not pass the fairness test; and
(b) the workplace agreement is not in operation in relation to any employee immediately before the date of the decision;
the employee or employees whose employment was at any time subject to the workplace agreement are, on and from the date of issue specified in the notice under section 346U in relation to the workplace agreement, entitled to any compensation payable to the employee or employees under section 346ZD.

346W  Effect if varied agreement does not pass fairness test—
agreement in operation

If the Workplace Authority Director decides under subsection 346U(1) that a workplace agreement as varied does not pass the fairness test:
(a) the workplace agreement ceases to operate on the date of issue specified in the notice under that section in respect of the workplace agreement; and
(b) the employee or employees whose employment was at any time subject to the workplace agreement are, on and from the date of issue specified in the notice under section 346U in relation to the workplace agreement, entitled to any compensation payable to the employee or employees under section 346ZD.

346X  Effect if varied agreement passes fairness test—agreement in operation

If the Workplace Authority Director decides under subsection 346U(1) that a workplace agreement as varied passes the fairness test:
(a) the workplace agreement continues in operation; and
(b) the employee or employees whose employment is, or was at any time, subject to the workplace agreement are, on and from the date of issue specified in the notice under...
section 346U in relation to the workplace agreement, entitled
to any compensation payable to the employee or employees
under section 346ZD.

Note: Even though the workplace agreement has been varied so that it passes
the fairness test, compensation may be payable in respect of the period
when the agreement did not pass the fairness test.

346Y Employment arrangements that apply if a workplace
agreement ceases to operate because it does not pass
fairness test

(1) This section applies if, on a particular day (the *cessation day*), a
workplace agreement (the *original agreement*) ceases to operate
under section 346R or 346W because the original agreement does
not pass the fairness test.

(2) The employer and the employee or employees who were bound by
the original agreement immediately before the cessation day are
taken, on and from the cessation day, to be bound by:

(a) the instrument or instruments that, but for the original
agreement having come into operation, would have bound the
employer and the employee or employees on and from the
cessation day; or

(b) if there is no instrument of a kind referred to in paragraph (a)
in relation to the employer and one or more of the
employees—the designated award in relation to that
employee or those employees, to the extent that the
designated award contains protected award conditions.

Note: A workplace agreement binds all persons whose employment is, at
any time when the agreement is in operation, subject to the agreement
(see paragraph 351(b)). A collective agreement may therefore bind an
employer in relation to existing and future employees.

(3) If the original agreement is a workplace agreement as varied under
Division 8, the workplace agreement as in force before the
variation was lodged is, despite section 346ZB, capable of being an
instrument described in paragraph (2)(a).

(4) An instrument that has ceased to operate in relation to an employee
or employees is capable of being an instrument described in
paragraph (2)(a) only if the reason it ceased to operate was because
the original agreement came into operation in relation to the
employee or employees.
(5) In this section:

*instrument* means any of the following:

(a) a workplace agreement;
(b) an award;
(c) a workplace determination;
(d) an employment agreement (within the meaning of section 887);
(e) a pre-reform certified agreement (within the meaning of Schedule 7);
(f) a pre-reform AWA;
(g) a section 170MX award (within the meaning of Schedule 7);
(h) an exceptional matters order (within the meaning of Schedule 7);
(i) an old IR agreement (within the meaning of Schedule 7).

Note: Preserved State agreements and notional agreements preserving State awards are dealt with in Schedule 8.

### 346Z Effect of section 346Y in relation to instruments

If, because of the operation of section 346Y, an employer and an employee or employees, as the case requires, are taken to be bound by an instrument, the instrument is taken, despite any other provision of this Act, to operate again, or to have effect again, as the case requires, in relation to the employer and the employee or employees, on and from the cessation day.

Note 1: Subsections 347(7A), (8A) and (9A) modify the rule that an AWA or a collective agreement that has ceased to operate can never operate again.

Note 2: The following provisions operate in a similar way for other instruments:

(a) subsection 506(5) (workplace determinations);
(b) subsection 890(3) (employment agreements within the meaning of section 887);
(c) subclause 3(5A) of Schedule 7 (pre-reform certified agreements);
(d) subclause 18(5) of Schedule 7 (pre-reform AWAs);
(e) subclause 25(4) of Schedule 7 (section 170MX awards);
(f) subclause 27(2) of Schedule 7 (exceptional matters orders);
(g) subclause 28(5) of Schedule 7 (old IR agreements).
Note 3: An award has no effect in relation to an employee while a workplace agreement operates in relation to the employee (see section 349), but once the workplace agreement has ceased to operate, the award is capable of operating again.

346ZA Redundancy provisions and section 394 undertakings

(1) This section applies if, on a particular day (the cessation day), a workplace agreement (the original agreement) ceases to operate under section 346R or 346W because the original agreement does not pass the fairness test.

(2) If, immediately before the day on which the original agreement was lodged, the employer was bound under a designated provision by a redundancy provision in relation to an employee whose employment was subject to the original agreement, the employer is taken:

(a) to be bound under the designated provision by the redundancy provision in relation to the employee on and from the cessation day; and

(b) to continue to be so bound until the earliest of the following:

(i) the end of the period of 12 months beginning on the first day on which the employer became bound under the designated provision by the redundancy provision;

(ii) the time when the employee ceases to be employed by the employer;

(iii) the time when another workplace agreement comes into operation in relation to the employee and the employer.

(3) If, immediately before the day on which the original agreement was lodged, the employer was bound by an undertaking under subsection 394(1) in relation to an employee whose employment was subject to the original agreement, the employer is taken:

(a) to be bound under section 394 by the undertaking in relation to the employee on and from the cessation day; and

(b) to continue to be so bound until the earlier of the following:

(i) the time when the employee ceases to be employed by the employer;

(ii) the time when another workplace agreement comes into operation in relation to the employee and the employer.

(4) In this section:
designated provision means a redundancy provision within the meaning of any of the following:

(a) section 399A;
(b) clause 6A of Schedule 7;
(c) clause 20A of Schedule 7.

346ZB Operation of workplace agreements

A workplace agreement that has ceased to operate because it does not pass the fairness test can never operate again.

Note: This rule is subject to subsection 346Y(3), which deals with the situation where a workplace agreement as varied under Division 8 does not pass the fairness test.

346ZC Regulations may make provision for operation of provisions of revived instruments

The regulations may make provision for and in relation to the operation of instruments that are taken to bind an employer and the employees because of the operation of section 346Y.

Subdivision E—Entitlement to compensation

346ZD Employee is entitled to compensation in respect of fairness test period

(1) This section applies to an employee who is entitled to compensation under this section on and from a particular day because a workplace agreement binding on the employee’s employer did not pass the fairness test.

Note 1: Sections 346Q, 346R, 346V, 346W and 346X specify the day on which an employee’s entitlement to compensation takes effect.

Note 2: An employee may be able to recover compensation even where a workplace agreement that initially does not pass the fairness test is varied so that it subsequently passes the fairness test—see section 346X.

(2) If the amount worked out under paragraph (a) is less than the amount worked out under paragraph (b), the employer must pay to the employee the amount of the shortfall:

(a) the total value of the entitlements to which the employee became entitled under the workplace agreement in respect of
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one or more periods of employment during the fairness test period for the workplace agreement;
(b) the total value of the entitlements to which the employee would have been entitled, in respect of one or more periods of employment of the employee during the fairness test period, assuming that the employee’s employment had been subject to:
   (i) the instrument or instruments that, but for the workplace agreement, would have bound the employer in relation to that period of employment of the employee; or
   (ii) if there is no such instrument—the designated award in relation to the employee, to the extent that it contains protected award conditions.

(3) An employer breaches this section if the employer does not pay to the employee the amount of the shortfall calculated under subsection (2) within whichever of the following periods is applicable:
   (a) if the employee is entitled to compensation because of the operation of section 346Q in respect of the workplace agreement—the period of 14 days beginning on the date of issue specified in the notice under section 346P in relation to the workplace agreement;
   (b) if the employee is entitled to compensation because of the operation of section 346R in respect of the workplace agreement—the period of 14 days beginning at the end of the relevant period (within the meaning of section 346R) in relation to the workplace agreement;
   (c) if the employee is entitled to compensation because of the operation of section 346V, 346W or 346X in respect of the workplace agreement—the period of 14 days beginning on the date of issue specified in the notice under section 346U in relation to the workplace agreement.

Note: Compliance with this section is dealt with in Part 14—this section is an applicable provision within the meaning of section 717.

(4) In this section:

   fairness test period, in relation to a workplace agreement, means:
   (a) the period:
(i) beginning on the day on which the workplace agreement was lodged; and
(ii) ending on the day on which the workplace agreement ceased to operate (whether because of the operation of this Division or otherwise); or
(b) if the workplace agreement is continued in effect because of the operation of subsection 346R(4) or section 346X—the period:
   (i) beginning on the day on which the workplace agreement was lodged; and
   (ii) ending on the day on which the variation of the workplace agreement was lodged under section 346R or, if the workplace agreement had been varied before that day in such a way as to pass the fairness test, on that earlier day.

*instrument* has the same meaning as in section 346Y.

**Subdivision F—Civil remedy provisions**

**346ZE  Employer must notify employees**

(1) An employer that has received a notice under section 346J, 346P or 346U in relation to a collective agreement must take reasonable steps to ensure that all persons whose employment is subject to the agreement when the employer receives the notice are given a copy of the notice as soon as practicable.

(2) Subsection (1) is a civil remedy provision.

Note: See Division 11 for provisions on enforcement.

**346ZF  Employer not to dismiss etc. employee because agreement does not pass the fairness test**

(1) An employer must not:

(a) dismiss an employee; or

(b) threaten to dismiss an employee;

if the sole or dominant reason for the employer dismissing, or threatening to dismiss, the employee is that a workplace agreement does not, or may not, pass the fairness test.
(2) Subsection (1) is a civil remedy provision.

Note 1: An employee may still be entitled to compensation under section 346ZD if his or her workplace agreement does not pass the fairness test.

Note 2: A breach of this provision is enforceable by a workplace inspector—see Division 11 for provisions on enforcement.

(3) In proceedings alleging a contravention of subsection (1) it is presumed that the employer’s sole or dominant reason was that the workplace agreement did not, or may not, pass the fairness test, unless the employer proves otherwise.

Note: Division 3 of Part 14 contains other provisions relevant to civil remedies.

346ZG Other remedies for the contravention of section 346ZF

(1) The Court, on application by an eligible person, may make one or more of the following orders in relation to an employer who has contravened subsection 346ZF(1):

(a) an order requiring the employer to pay a specified amount to the employee as compensation for damage suffered by the employee as a result of the contravention;

(b) any other order that the Court considers appropriate.

Note: The employee may still be entitled to compensation under section 346ZD if his or her workplace agreement does not pass the fairness test.

(2) The orders that may be made under paragraph (1)(b) include:

(a) injunctions; and

(b) any other orders that the Court considers necessary to stop the conduct or remedy its effects.

(3) In this section:

eligible person means any of the following:

(a) a workplace inspector;

(b) an employee affected by the contravention;

(c) an organisation of employees that:

(i) has been requested in writing, by the employee concerned, to apply on the employee’s behalf; and

(ii) has a member employed by the employee’s employer; and
(iii) is entitled, under its eligibility rules, to represent the industrial interests of the employee in relation to work carried on by the employee for the employer;

(d) a person prescribed by the regulations for the purposes of this paragraph.

(4) A regulation prescribing persons for the purposes of paragraph (d) of the definition of eligible person may provide that a person is prescribed only in relation to circumstances specified in the regulation.

346ZH Employer not to require employee to agree to exclude or modify a protected award condition

(1) An employer must not, in relation to a workplace agreement:

(a) take, or threaten to take, any action; or

(b) refrain, or threaten to refrain, from taking any action; with intent to coerce an existing employee to agree, or not to agree, to excluding or modifying a protected award condition.

(2) Subsection (1) does not apply to protected action (within the meaning of section 435).

(3) Subsection (1) is a civil remedy provision.

Note: A breach of this provision is enforceable by a workplace inspector—see Division 11 for provisions on enforcement.
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2 After paragraph 337(4)(c)

Insert:

(ca) information about the circumstances in which the Workplace Authority Director is required to decide whether the agreement passes the fairness test set out in section 346M; and

3 Subsection 344(5)

After “this Part”, insert “(other than Division 5A)”.

4 After paragraph 347(4)(b)

Insert:

(ba) the Workplace Authority Director decides under section 346M that the agreement does not pass the fairness test and the employer who is bound by the agreement does not take the action referred to in subsection 346R(2) within the relevant period (as defined in subsection 346R(7)) in relation to the agreement; or

(bb) the Workplace Authority Director decides under section 346U that the agreement as varied does not pass the fairness test; or

5 After subsection 347(7)

Insert:

(7A) Despite subsection (7), an AWA that has ceased to operate can operate again if:

(a) the AWA ceased to operate because it was replaced by another AWA (the replacement AWA); and

(b) the replacement AWA later ceased to operate because it did not pass the fairness test.

Note: See sections 346Y and 346Z.

6 After subsection 347(8)
Insert:

(8A) Despite subsection (8), a collective agreement that has ceased to operate can operate again if:

(a) the collective agreement ceased to operate because it was replaced after its nominal expiry date by another collective agreement (the replacement collective agreement); and

(b) the replacement collective agreement later ceased to operate because it did not pass the fairness test.

Note: See sections 346Y and 346Z.

7 After subsection 347(9)

Insert:

(9A) Despite subsection (9), a multiple-business agreement that has ceased to operate in relation to a single business (or part of a single business) can operate again if:

(a) the multiple-business agreement ceased to operate because it was replaced by another collective agreement (the replacement collective agreement) in accordance with subsection (6); and

(b) the replacement collective agreement later ceased to operate because it did not pass the fairness test.

Note: See sections 346Y and 346Z.

8 At the end of subsection 354(2)

Add:

Note: A workplace agreement that excludes or modifies certain protected award conditions is subject to Division 5A (which relates to the fairness test).

9 After paragraph 367(2)(a)

Insert:

(aa) section 346R (which deals with agreements that do not pass the fairness test); or

10 Subsection 377(5)

After “this Part”, insert “(other than Division 5A)”. 

11 At the end of section 394
Add:

(8) Despite subsection (7), undertakings that have ceased to operate can operate again under this section if:

(a) the undertakings ceased to operate because they were replaced by a workplace agreement (the replacement workplace agreement); and

(b) the replacement workplace agreement later ceased to operate because it did not pass the fairness test.

Note: See section 346ZA.

12 At the end subsection 400(6)

Add “, other than in the circumstance described in subsection (6A)”.

13 After subsection 400(6)

Insert:

(6A) The circumstance referred to in subsection (6) is that:

(a) the first person mentioned in subsection (6) is a new employer; and

(b) the new employer requires another person to make an AWA; and

(c) the other person would, if employed by the new employer, be a transferring employee; and

(d) the requirement to make the AWA is a condition of the other person becoming employed in the business being transferred.

14 At the end of section 400

Add:

(8) In this section:

business being transferred has the same meanings as in section 579, clause 72C of Schedule 6 and subclause 4(2) of Schedule 9.

new employer has the same meanings as in section 579 and subclause 4(1) of Schedule 9, and includes a new transitional employer within the meaning of clause 72C of Schedule 6.
transferring employee has the same meanings as in section 579
and clause 3 of Schedule 9, and includes a transferring transitional
employee within the meaning of clause 72C of Schedule 6.

15 After paragraph 407(2)(ja)
   Insert:
   (jb) for subsection 346ZE(1)—30 penalty units;
   (jc) for subsection 346ZF(1)—60 penalty units;
   (jd) for subsection 346ZH(1)—60 penalty units;

16 Paragraph 416(1)(a)
   After “344(2),”, insert “346S(2),”.

17 Paragraph 416(1)(d)
   After “subsection”, insert “346J(1) or (2), 346P(1) or (2), 346U(2) or”.

18 At the end of subsection 416(1)
   Add:
   ; (g) a determination that an award is a designated award made by
   the Workplace Authority Director under section 346K or
   346L.

19 Paragraph 417(1)(a)
   After “344(2),”, insert “346S(2),”.

20 Paragraph 417(1)(g)
   After “paragraph”, insert “346P(3)(a) or”.

21 Paragraph 417(1)(k)
   After “subsection”, insert “346J(1) or (2), 346P(1) or (2), 346U(2) or”.

22 At the end of section 506
   Add:
   (5) To avoid doubt, a workplace determination that has ceased to
   operate because of subsection (4) can operate again if:
   (a) the workplace determination ceased to operate because it was
   replaced by a collective agreement (the replacement
   collective agreement); and
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(b) the replacement collective agreement later ceased to operate because it did not pass the fairness test.

Note: See sections 346Y and 346Z.

23  Section 717 (after paragraph (a) of the definition of applicable provision)

Insert:

(aa) section 346ZD (fairness test compensation); and

24  Subsection 718(1) (after item 5 of the table)

Insert:

5A section 346ZD (fairness test compensation) (a) an employee to whom section 346ZD applies;
(b) an organisation of employees (subject to subsection (6));
(c) an inspector

25  Subsection 718(2)

After “4,” insert “5A.”.

26  After paragraph 718(6)(b)

Insert:

(ba) section 346ZD; or

27  At the end of section 890

Add:

(3) To avoid doubt, an employment agreement that has ceased to be in force because of subsection (2) can come into force again if:
(a) the employment agreement ceased to be in force because it was replaced by a workplace agreement (the replacement workplace agreement); and
(b) the replacement workplace agreement later ceased to operate because it did not pass the fairness test.

Note: See sections 346Y and 346Z.

28  At the end of clause 89 of Schedule 6

Add:

(3) If:
   (a) a workplace agreement binds an employer and employees;
       and
   (b) immediately before the day on which the workplace
       agreement was lodged, a common rule had the effect of
       regulating employers in respect of the employment of their
       employees;

then, Division 5A of Part 8 of this Act (which deals with the
fairness test) has effect in relation to that workplace agreement as
if:
   (c) a reference in that Division to a relevant award included a
       reference to a common rule that has effect, or continues to
       have effect, because of this Subdivision; and
   (d) the definition of instrument in subsection 346Y(5) included a
       reference to a common rule that has effect, or continues to
       have effect, because of this Subdivision.

29 Clause 95 of Schedule 6

Before “A”, insert “(1)”.

30 At the end of clause 95 of Schedule 6

Add:

(2) If:
   (a) a workplace agreement binds an employee or employees; and
   (b) immediately before the day on which the workplace
       agreement was lodged, the employer and employee or
       employees were bound by a transitional Victorian reference
       award in respect of the employee’s or employees’
       employment;

then, Division 5A of Part 8 of this Act (which deals with the
fairness test) has effect in relation to that workplace agreement as
if:
   (c) a reference in that Division to a relevant award included a
       reference to a transitional Victorian reference award; and
   (d) the definition of instrument in subsection 346Y(5) included a
       reference to a transitional Victorian reference award.

31 Clause 102 of Schedule 6
Before “A”, insert “(1)”.

32 At the end of clause 102 of Schedule 6

Add:

(2) If:

(a) a workplace agreement binds an employer and employees;

and

(b) immediately before the day on which the workplace agreement was lodged, a transitional award (other than a Victorian reference award) regulated the employer, being an excluded employer, in respect of the employment of employees in Victoria;

then, Division 5A of Part 8 of this Act (which deals with the fairness test) has effect in relation to that workplace agreement as if:

(c) a reference in that Division to a relevant award included a reference to a transitional award (other than a Victorian reference award) to the extent that the award regulates excluded employers in respect of the employment of employees in Victoria; and

(d) the definition of instrument in subsection 346Y(5) included a reference to a transitional award (other than a Victorian reference award) to the extent that the award regulates excluded employers in respect of the employment of employees in Victoria.

33 After subclause 3(5) of Schedule 7

Insert:

(5A) Despite subclause (5), a pre-reform certified agreement that has ceased to operate because of subclause (1) can operate again if:

(a) the pre-reform certified agreement ceased to operate because it was replaced by a collective agreement (the replacement collective agreement); and

(b) the replacement collective agreement later ceased to operate because it did not pass the fairness test.

Note: See sections 346Y and 346Z.

34 At the end of clause 18 of Schedule 7
Add:

(5) Despite subclause (4), a pre-reform AWA that has ceased to operate because of subclause (1) can operate again if:

(a) the pre-reform AWA ceased to operate because it was replaced by an AWA (the replacement AWA); and

(b) the replacement AWA later ceased to operate because it did not pass the fairness test.

Note: See sections 346Y and 346Z.

35 At the end of clause 25 of Schedule 7

Add:

(4) To avoid doubt, a section 170MX award that has ceased to operate because of subclause (2) can operate again if:

(a) the section 170MX award ceased to operate because it was replaced by a collective agreement (the replacement collective agreement); and

(b) the replacement collective agreement later ceased to operate because it did not pass the fairness test.

Note 1: See sections 346Y and 346Z.

Note 2: Under subclause (1), a section 170MX award has no effect in relation to an employee while an AWA operates in relation to the employee, but once the AWA has for any reason ceased to operate, the section 170MX award is capable of operating again.

36 Clause 27 of Schedule 7

Before “An”, insert “(1)”.

37 At the end of clause 27 of Schedule 7

Add:

(2) To avoid doubt, an exceptional matters order that has ceased to be in force because of subclause (2) can come into force again if:

(a) the exceptional matters order ceased to be in force because it was replaced by a workplace agreement (the replacement workplace agreement); and

(b) the replacement workplace agreement later ceased to operate because it did not pass the fairness test.

Note: See sections 346Y and 346Z.
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38  At the end of clause 28 of Schedule 7
   
   Add:
   
   (5) Despite subclause (4), an old IR agreement that has ceased to operate because of subclause (2) can operate again if:
   
   (a) the old IR agreement ceased to operate because it was replaced by a workplace agreement (the replacement workplace agreement); and
   
   (b) the replacement workplace agreement later ceased to operate because it did not pass the fairness test.

   Note: See sections 346Y and 346Z.

39  At the end of clause 15G of Schedule 8
   
   Add:
   
   (4) Despite subclause (3), a preserved State agreement that has ceased operating because of subclause (2) can operate again if:
   
   (a) the preserved State agreement ceased to operate because it was replaced by a workplace agreement (the replacement workplace agreement); and
   
   (b) the replacement workplace agreement later ceased to operate because it did not pass the fairness test.

   Note: See sections 346Y and 346Z.

40  At the end of clause 38A of Schedule 8
   
   Add:
   
   (5) Despite subclause (4), a notional agreement that has ceased operating because of subclause (2) can operate again if:
   
   (a) the notional agreement ceased to operate because it was replaced by a workplace agreement (the replacement workplace agreement); and
   
   (b) the replacement workplace agreement later ceased to operate because it did not pass the fairness test.

   Note: See sections 346Y and 346Z.

41  At the end of Division 6A of Part 2 of Schedule 8
   
   Add:
25B Application of fairness test where employment was subject to preserved State agreement

(1) If:

(a) a workplace agreement binds an employer and an employee or employees; and
(b) immediately before the day on which the workplace agreement was lodged, the employer and employee or employees were bound by a preserved State agreement in respect of the employee’s or employees’ employment; and
(c) the workplace agreement contains protected preserved conditions because of paragraph 25A(2)(a) of this Schedule;

then, Division 5A of Part 8 of this Act (which deals with the fairness test) has effect in relation to that workplace agreement as if:

(d) a reference in that Division to protected award conditions were a reference to protected preserved conditions; and
(e) a reference in that Division to a relevant award or a reference award were a reference to a relevant preserved State agreement; and
(f) paragraph 346C(1)(a) were substituted with the following paragraph:

“(a) if the protected preserved conditions are taken to be included in the workplace agreement because of paragraph 25A(2)(a) of Schedule 8.”; and

(g) paragraph 346C(1)(b) and subsection 346C(2) were omitted; and

(h) paragraphs 346E(1)(b) and (2)(b) and 346F(1)(b) and (2)(b) were omitted; and

(i) sections 346H, 346K and 346L were omitted; and

(j) paragraph 346Y(2)(b) were substituted with the following paragraph:

“(b) if there is no instrument of a kind referred to in paragraph (a) in relation to the employer and one or more of the employees—protected preserved conditions that were taken to be contained in the original agreement as if those conditions were never excluded or modified by the agreement.”; and

(k) the definition of instrument in subsection 346Y(5) included a reference to a preserved State agreement; and
(l) the definition of designated provision in subsection 346ZA(4) included a reference to clauses 21A and 21D of Schedule 8; and

(m) subparagraph 346ZD(2)(b)(ii) were substituted with the following subparagraph:
“(ii) if there is no such instrument—protected preserved conditions in relation to the employee.”.

(2) For the purpose of paragraph 346Y(2)(b) (as substituted by paragraph (1)(j) of this clause), Parts 6 and 14 of this Act apply to protected preserved conditions as if the conditions were:
(a) if the workplace agreement was an AWA—an AWA in operation; or
(b) if the workplace agreement was a collective agreement—a collective agreement in operation.

(3) In this clause:

protected preserved condition has the same meaning as in subclause 25A(4), subject to subclause (4) of this clause.

relevant preserved State agreement, in relation to an employee whose employment is subject to a workplace agreement, means a preserved State agreement that was binding on the employee’s employer immediately before the day on which the workplace agreement was lodged.

(4) For the purposes of the definition of protected preserved conditions in subclause (3), the definition of protected allowable award matters in subclause 25A(4) has effect as if it did not include the matter referred to in paragraph (i) of the latter definition.

Note: Paragraph (i) relates to outworker conditions. These conditions cannot be excluded or modified by a workplace agreement to provide a less favourable outcome for an employee in a particular respect—see subclause 25A(3).

42 At the end of Division 6 of Part 3 of Schedule 8
Add:
52AAA Application of fairness test where employment was subject to notional agreement preserving State awards

(1) If:

(a) a workplace agreement binds an employer and an employee or employees; and

(b) immediately before the day on which the workplace agreement was lodged, the employer and employee or employees were bound by a notional agreement preserving State awards in respect of the employee’s or employees’ employment; and

(c) the workplace agreement contains protected notional conditions because of paragraph 52(2)(a) of this Schedule;

then, Division 5A of Part 8 of this Act (which deals with the fairness test) has effect in relation to that workplace agreement as if:

(d) a reference in that Division to protected award conditions were a reference to protected notional conditions; and

(e) a reference in that Division to a relevant award or a reference award were a reference to a relevant notional agreement preserving State awards; and

(f) paragraph 346C(1)(b) and subsection 346C(2) were omitted; and

(g) paragraphs 346E(1)(b) and (2)(b) and 346F(1)(b) and (2)(b) were omitted; and

(h) sections 346H, 346K and 346L were omitted; and

(i) paragraph 346Y(2)(b) were omitted; and

(j) the definition of instrument in subsection 346Y(5) included a reference to a notional agreement preserving State awards; and

(k) subparagraph 346ZD(2)(b)(ii) were omitted.

(2) In this clause:

protected notional conditions has the same meaning as in subclause 52(3), subject to subclause (3) of this clause.

relevant notional agreement preserving State awards, in relation to an employee whose employment is subject to a workplace agreement, means a notional agreement preserving State awards.
that was binding on the employee’s employer immediately before
the day on which the workplace agreement was lodged.

(3) For the purposes of the definition of \textit{protected notional conditions}
in subclause (2), the definition of \textit{protected allowable award}
\textit{matters} in subclause 52(3) has effect as if it did not include the
matter referred to in paragraph (h) of the definition.

Note: Paragraph (h) relates to outworker conditions. These conditions cannot
be excluded or modified by a workplace agreement to provide a less
favourable outcome for an employee in a particular respect—see
subclause 52(2A).
Schedule 2—Workplace Authority

Part 1—Main amendments

Workplace Relations Act 1996

1 Part 5 (heading)
Repeal the heading, substitute:

Part 5—Workplace Authority Director

2 Divisions 1 and 2 of Part 5
Repeal the Divisions, substitute:

Division 1—Workplace Authority Director

Subdivision A—Establishment and functions

150A Workplace Authority Director

There is to be a Workplace Authority Director.

150B Functions of Workplace Authority Director

(1) The functions of the Workplace Authority Director are as follows:

(a) to promote an understanding of Commonwealth workplace relations legislation, including by making available to the public general information and guidance about the operation of the legislation;

(b) to provide education, assistance and advice to employees, employers and organisations in relation to their rights and obligations under Commonwealth workplace relations legislation;

(c) to promote the making of workplace agreements;

(d) to provide education, assistance and advice to employees, employers (especially employers in small business) and organisations in relation to workplace agreements;

(e) to accept lodgment of:
Schedule 2  Workplace Authority  
Part 1  Main amendments

(i) workplace agreements; and
(ii) notices about transmission of instruments;
(f) to decide under Division 5A of Part 8 whether workplace agreements pass the fairness test;
(g) to authorise multiple-business agreements in accordance with the regulations;
(h) to analyse workplace agreements;
(i) to refer matters to the Workplace Ombudsman and workplace inspectors;
(j) to perform any other function conferred on the Workplace Authority Director by Commonwealth workplace relations legislation, the Registration and Accountability of Organisations Schedule or another Act.

(2) In performing his or her functions relating to workplace agreements, the Workplace Authority Director must have particular regard to:
(a) the needs of workers in disadvantaged bargaining positions, including, for example, women, people from a non-English speaking background, young people, apprentices, trainees and outworkers; and
(b) encouraging parties to agreement-making to take account of those needs; and
(c) assisting workers to balance work and family responsibilities; and
(d) the need to prevent and eliminate discrimination because of, or for reasons including, race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

150C Minister may give directions to Workplace Authority Director

(1) The Minister may, by legislative instrument, give written directions to the Workplace Authority Director about the performance of his or her functions.

(2) Directions given by the Minister under subsection (1) must be of a general nature only, and cannot relate to a particular case.
(3) The Minister must not direct the Workplace Authority Director in relation to the Workplace Authority Director’s performance of functions, or exercise of powers, as an Agency Head under the Public Service Act 1999.

(4) The Workplace Authority Director must comply with any direction given by the Minister under subsection (1).

(5) Section 42 (Disallowance of legislative instruments) of the Legislative Instruments Act 2003 applies to a direction given under subsection (1) of this section, despite section 44 of that Act.

Subdivision B—Appointment and terms and conditions

151A Appointment of Workplace Authority Director

(1) The Workplace Authority Director is to be appointed by the Governor-General by written instrument.

(2) The Governor-General must not appoint a person as the Workplace Authority Director unless the Minister is satisfied that the person:

   (a) has suitable qualifications or experience; and
   (b) is of good character.

(3) The Workplace Authority Director holds office for the period specified in the instrument of appointment. The period must not exceed 5 years.

(4) The Workplace Authority Director holds office on a full-time basis.

151B Remuneration

(1) The Workplace Authority Director 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 Workplace Authority Director is to be paid the remuneration that is prescribed.

(2) The Workplace Authority Director is to be paid the allowances that are prescribed.

(3) This section has effect subject to the Remuneration Tribunal Act 1973.
151C Leave of absence

(1) The Workplace Authority Director has the recreation leave entitlements that are determined by the Remuneration Tribunal.

(2) The Minister may grant the Workplace Authority Director leave of absence, other than recreation leave, on the terms and conditions as to remuneration or otherwise that the Minister determines.

151D Other terms and conditions

The Workplace Authority Director holds office on the terms and conditions (if any) in relation to matters not covered by this Act that are determined by the Governor-General.

151E Outside employment

The Workplace Authority Director must not engage in paid employment outside the duties of the Workplace Authority Director’s office without the Minister’s approval.

151F Disclosure of interests

The Workplace Authority Director must give written notice to the Minister of all interests, pecuniary or otherwise, that the Workplace Authority Director has or acquires that could conflict with the proper performance of the Workplace Authority Director’s functions.

151G Acting appointments

(1) The Minister may appoint a person to act as the Workplace Authority Director:

(a) during a vacancy in the office of Workplace Authority Director (whether or not an appointment has previously been made to the office); or

(b) during any period, or during all periods, when the Workplace Authority Director is absent from duty or from Australia, or is, for any reason, unable to perform the duties of the office.

(2) The Minister must not appoint a person to act as the Workplace Authority Director unless the Minister is satisfied that the person:

(a) has suitable qualifications or experience; and
(b) is of good character.

(3) Anything done by or in relation to a person purporting to act under an appointment is not invalid merely because:
(a) the occasion for the appointment had not arisen; or
(b) there was a defect or irregularity in connection with the appointment; or
(c) the appointment had ceased to have effect; or
(d) the occasion to act had not arisen or had ceased.

151H Resignation

(1) The Workplace Authority Director may resign his or her appointment by giving the Governor-General a written resignation.

(2) The resignation takes effect on the day it is received by the Governor-General or, if a later day is specified in the resignation, on that later day.

151J Termination of appointment

(1) The Governor-General may terminate the appointment of the Workplace Authority Director for misbehaviour or physical or mental incapacity.

(2) The Governor-General must terminate the appointment of the Workplace Authority Director if:
(a) the Workplace Authority Director:
   (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 his or her creditors; or
   (iv) makes an assignment of his or her remuneration for the benefit of his or her creditors; or
(b) the Workplace Authority Director is absent, except on leave of absence, for 14 consecutive days or for 28 days in any 12 months; or
(c) the Workplace Authority Director engages, except with the Minister’s approval, in paid employment outside the duties of his or her office; or
(d) the Workplace Authority Director fails, without reasonable excuse, to comply with section 151F.

Division 2—Workplace Authority Deputy Directors

152A Workplace Authority Deputy Directors

The Workplace Authority Director is to be assisted by as many Workplace Authority Deputy Directors as are appointed from time to time.

152B Appointment of Workplace Authority Deputy Director

(1) A Workplace Authority Deputy Director is to be appointed by the Minister by written instrument.

(2) The Minister must not appoint a person as a Workplace Authority Deputy Director unless the Minister is satisfied that the person:

(a) has suitable qualifications or experience; and

(b) is of good character.

(3) A Workplace Authority Deputy Director holds office for the period specified in the instrument of appointment. The period must not exceed 5 years.

(4) A Workplace Authority Deputy Director is to be appointed on a full-time or part-time basis.

152C Remuneration

(1) A Workplace Authority Deputy Director 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, a Workplace Authority Deputy Director is to be paid the remuneration that is prescribed.

(2) A Workplace Authority Deputy Director is to be paid the allowances that are prescribed.

(3) This section has effect subject to the Remuneration Tribunal Act 1973.
152D Leave of absence

(1) A full-time Workplace Authority Deputy Director has the recreation leave entitlements that are determined by the Remuneration Tribunal.

(2) The Minister may grant a full-time Workplace Authority Deputy Director leave of absence, other than recreation leave, on the terms and conditions as to remuneration or otherwise that the Minister determines.

(3) The Minister may grant a part-time Workplace Authority Deputy Director leave of absence on the terms and conditions as to remuneration or otherwise that the Minister determines.

152E Other terms and conditions

A Workplace Authority Deputy Director holds office on the terms and conditions (if any) in relation to matters not covered by this Act that are determined by the Minister.

152F Outside employment

(1) A full-time Workplace Authority Deputy Director must not engage in paid employment outside the duties of the Workplace Authority Deputy Director’s office without the Minister’s approval.

(2) A part-time Workplace Authority Deputy Director must not engage in any paid employment that conflicts or may conflict with the proper performance of the Workplace Authority Deputy Director’s duties.

152G Disclosure of interests

A Workplace Authority Deputy Director must give written notice to the Minister of all interests, pecuniary or otherwise, that the Workplace Authority Deputy Director has or acquires that could conflict with the proper performance of the Workplace Authority Deputy Director’s functions.
152H Resignation

(1) A Workplace Authority Deputy Director may resign his or her 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.

152J Termination of appointment

(1) The Minister may terminate the appointment of a Workplace Authority Deputy Director for misbehaviour or physical or mental incapacity.

(2) The Minister must terminate the appointment of a Workplace Authority Deputy Director if:

(a) the Workplace Authority Deputy Director:

(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 his or her creditors; or

(iv) makes an assignment of his or her remuneration for the benefit of his or her creditors; or

(b) the Workplace Authority Deputy Director is appointed on a full-time basis and is absent, except on leave of absence, for 14 consecutive days or for 28 days in any 12 months; or

(c) the Workplace Authority Deputy Director is appointed on a full-time basis and engages, except with the Minister’s approval, in paid employment outside the duties of his or her office; or

(d) the Workplace Authority Deputy Director is appointed on a part-time basis and engages in paid employment that conflicts or could conflict with the proper performance of the duties of his or her office; or

(e) the Workplace Authority Deputy Director fails, without reasonable excuse, to comply with section 152G.
Division 3—Staff, delegations etc.

153A Staff

The staff assisting the Workplace Authority Director in the performance of the Workplace Authority Director’s functions must be persons engaged under the *Public Service Act 1999*.

153B Workplace Authority

(1) The Workplace Authority is established by this subsection.

(2) The Workplace Authority consists of:
   (a) the Workplace Authority Director; and
   (b) the Workplace Authority Deputy Directors; and
   (c) the staff assisting the Workplace Authority Director.

(3) For the purposes of the *Public Service Act 1999*:
   (a) the Workplace Authority Director and the staff assisting the Workplace Authority Director together constitute a Statutory Agency; and
   (b) the Workplace Authority Director is the Head of that Statutory Agency.

153C Delegation

(1) The Workplace Authority Director may, in writing, delegate to a person appointed or employed by the Commonwealth any of the Workplace Authority Director’s powers or functions.

(2) In exercising powers or functions under a delegation, the delegate must comply with any directions of the Workplace Authority Director.

3 Division 3 of Part 5 (heading)

Repeal the heading, substitute:

Division 4—Reporting and disclosing information

4 Before section 165

Insert:
Subdivision A—Reporting

163A Minister may require reports

(1) The Minister may, in writing, direct the Workplace Authority Director to give the Minister specified reports relating to the Workplace Authority Director’s functions.

(2) The Workplace Authority Director must comply with the direction.

(3) A direction made under subsection (1) is not a legislative instrument.

(4) If the report is made in writing, the report is not a legislative instrument.

163B Annual report

The Workplace Authority Director must, as soon as practicable after the end of each financial year, prepare and give to the Minister, for presentation to the Parliament, a report on the operations of the Workplace Authority during that year.

Note: See also section 34C of the Acts Interpretation Act 1901, which contains extra rules about annual reports.

163C Reports not to include information relating to an individual’s affairs

(1) Information relating to the affairs of an individual must not be included in a report under section 163A or 163B if:

(a) the individual is named, or otherwise specifically identified, in the report as the individual to whom the information relates; or

(b) it is reasonably likely that people generally (other than people to whom the individual has disclosed information relating to the individual’s affairs) would be able to work out the identity of the individual to whom the information relates.

(2) For the purposes of applying paragraph (1)(b) to information relating to a particular individual’s affairs, the context in which the information appears, and information that is otherwise publicly available, must be taken into account (as well as any other relevant matter).
Subdivision B—Disclosing information

164A Disclosure of information by workplace agreement officials

Disclosure that is necessary or appropriate

(1) A workplace agreement official may disclose information he or she acquired in the course of exercising powers, or performing functions, as such an official, if he or she considers on reasonable grounds that it is necessary or appropriate to do so in the course of exercising his or her powers, or performing his or her functions, as such an official.

Disclosure to Minister

(2) A workplace agreement official may:
   (a) provide aggregated statistical information to the Minister; and
   (b) give the Minister, in accordance with the regulations, information and copies of documents.

(3) Regulations made for the purposes of paragraph (2)(b) may require that documents given to the Minister are given with such deletions as are necessary to prevent the identification of individuals to whom the documents refer.

Disclosure to Workplace Ombudsman and workplace inspectors

(4) A workplace agreement official may:
   (a) disclose information that relates to the functions of the Workplace Ombudsman to the Workplace Ombudsman in response to requests from the Workplace Ombudsman; and
   (b) disclose information that relates to the functions of workplace inspectors to workplace inspectors in response to requests from workplace inspectors; and
   (c) disclose information to the Workplace Ombudsman or workplace inspectors that the workplace agreement official considers on reasonable grounds is likely to assist the Workplace Ombudsman or workplace inspectors in performing their functions.
Disclosure authorised by regulations to prescribed persons

(5) The regulations may authorise a prescribed workplace agreement official to disclose information of the prescribed kind, to persons of the prescribed kind, for prescribed purposes.

Limits on disclosure

(6) Despite subsections (1), (2) and (4), a prescribed workplace agreement official is not authorised by whichever of those subsections is prescribed to disclose information of the prescribed kind, to persons of the prescribed kind, for prescribed purposes.

(7) Despite subsections (1), (2) and (5), a workplace agreement official is not authorised by any of those subsections to disclose to the Minister information relating to:

(a) a decision under Division 5A of Part 8 whether a particular workplace agreement passes the fairness test; or

(b) whether that Division requires the Workplace Authority Director to decide whether a particular workplace agreement passes the fairness test.

Relationship with the Privacy Act 1988

(8) To avoid doubt, a disclosure in accordance with this section of personal information (within the meaning of the Privacy Act 1988) is taken, for the purposes of that Act, to be authorised by law.

Relationship with section 165

(9) To avoid doubt, a disclosure in accordance with this section of protected information (as defined in section 165) is taken, for the purposes of that section, to be permitted by this Act.
Part 2—Consequential amendments

Division 1—Workplace Relations Act 1996

5 Subsection 4(1) (definition of Employment Advocate)

Repeal the definition.

6 Subsection 4(1)

Insert:

member of the Workplace Authority means a person covered by subsection 153B(2).

7 Subsection 4(1)

Insert:

workplace agreement official means:

(a) the Workplace Authority Director; or
(b) a Workplace Authority Deputy Director; or
(c) a member of the staff assisting the Workplace Authority Director; or
(d) a delegate of the Workplace Authority Director.

8 Subsection 4(1)

Insert:

Workplace Authority Deputy Director means a Workplace Authority Deputy Director holding office under Part 5.

9 Subsection 4(1)

Insert:

Workplace Authority Director means the Workplace Authority Director holding office under Part 5.

10 Paragraph 120(3)(e)

Repeal the paragraph, substitute:

(e) in the case of an appeal under paragraph (1)(d) in relation to an award—by:
(i) an employer, employee or organisation bound by the award; or
(ii) the Workplace Authority Director; and

11 Subsection 165(2) (definition of workplace agreement official)
Repeal the definition.

12 Sections 166, 332, 335, 337, 344, 345, 346A, 357 and 358
Omit “Employment Advocate” (wherever occurring), substitute “Workplace Authority Director”.
Note: The headings to sections 166, 342, 344 and 345 are altered by omitting “Employment Advocate” and substituting “Workplace Authority Director”.

13 Subsection 359(1)
Omit “Employment Advocate”, substitute “Workplace Authority Director”.

14 Subsection 359(2)
Omit “Employment Advocate’s”, substitute “Workplace Authority Director’s”.

Omit “Employment Advocate” (wherever occurring), substitute “Workplace Authority Director”.
Note 1: The headings to sections 360, 363, 375, 377, 378, 388, 389, 390, 395, 396, 603 and 603B are altered by omitting “Employment Advocate” and substituting “Workplace Authority Director”.
Note 2: The headings to subsections 603(4) and 603B(3) are altered by omitting “Employment Advocate” and substituting “Workplace Authority Director”.
Note 3: The heading to section 604 is altered by omitting “Employment Advocate” and substituting “Workplace Authority Director”.

16 Section 6 of Schedule 1 (definition of Employment Advocate)
Repeal the definition.

17 Subparagraph 337A(b)(ii) of Schedule 1
Repeal the subparagraph, substitute:

(ii) a workplace agreement official (as defined in the Workplace Relations Act);

18 Paragraphs 2(2)(m), (n) and (o) of Schedule 2

Repeal the paragraphs, substitute:

(m) paragraph 150B(1)(b);
(n) paragraph 150B(1)(d);

19 Paragraphs 3(2)(f), (g) and (h) of Schedule 2

Repeal the paragraphs, substitute:

(f) paragraph 150B(1)(b);
(g) paragraph 150B(1)(d);

20 Paragraphs 4(2)(m) and (n) of Schedule 2

Repeal the paragraphs, substitute:

(m) section 151E;
(ma) paragraph 151J(2)(c);
(n) subsections 152F(1) and (2);
(na) paragraph 152J(2)(c);
(nb) paragraph 152J(2)(d);

21 Clauses 72B, 72G, 72K and 72L of Schedule 6

Omit “Employment Advocate” (wherever occurring), substitute “Workplace Authority Director”.

Note 1: The heading to clause 72K of Schedule 6 is altered by omitting “Employment Advocate” and substituting “Workplace Authority Director”.

Note 2: The heading to subclause 72K(4) of Schedule 6 is altered by omitting “Employment Advocate” and substituting “Workplace Authority Director”.

Note 3: The heading to clause 72L of Schedule 6 is altered by omitting “Employment Advocate” and substituting “Workplace Authority Director”.

22 Clauses 9 and 15B of Schedule 8

Omit “Employment Advocate”, substitute “Workplace Authority Director”.

23 Subclause 19(1) of Schedule 8
Omit “Employment Advocate”, substitute “Workplace Authority Director”.

### 24 Subclause 19(2) of Schedule 8

Omit “Employment Advocate’s”, substitute “Workplace Authority Director’s”.

### 25 Subclauses 19(3), (5), (9), (10), (11) and (12) of Schedule 8

Omit “Employment Advocate” (wherever occurring), substitute “Workplace Authority Director”.

Note: The headings to subclauses 19(3) and (9) of Schedule 8 are altered by omitting “Employment Advocate” and substituting “Workplace Authority Director”.

### 26 Subclause 42(1) of Schedule 8

Omit “Employment Advocate”, substitute “Workplace Authority Director”.

### 27 Subclause 42(2) of Schedule 8

Omit “Employment Advocate’s”, substitute “Workplace Authority Director’s”.

### 28 Subclauses 42(3), (5), (9), (10), (11) and (12) of Schedule 8

Omit “Employment Advocate” (wherever occurring), substitute “Workplace Authority Director”.

Note: The headings to subclauses 42(3) and (9) of Schedule 8 are altered by omitting “Employment Advocate” and substituting “Workplace Authority Director”.

### 29 Clauses 2, 7, 10, 19, 27A, 29, 29B and 30 of Schedule 9

Omit “Employment Advocate” (wherever occurring), substitute “Workplace Authority Director”.

Note 1: The headings to clauses 29 and 29B of Schedule 9 are altered by omitting “Employment Advocate” and substituting “Workplace Authority Director”.

Note 2: The heading to subclause 29B(3) of Schedule 9 is altered by omitting “Employment Advocate” and substituting “Workplace Authority Director”.

Note 3: The heading to clause 30 of Schedule 9 is altered by omitting “Employment Advocate” and substituting “Workplace Authority Director”.
Division 2—Other legislation

Coal Mining Industry (Long Service Leave Funding) Act 1992

30 Subsection 4(1) (definition of industrial authority)
After “Australian Industrial Relations Commission,”, insert “the Workplace Authority Director,”.

Financial Management and Accountability Regulations 1997

31 At the end of Part 1 of Schedule 1
Add:

Workplace Authority, comprising:
(a) the Workplace Authority Director; and
(b) the Workplace Authority Deputy Directors; and
(c) the staff assisting the Workplace Authority Director.
See Note B
Part 3—Transitional provisions

32 General transitional provision

(1) This item applies to anything done by or in relation to the Employment Advocate before the commencement of this Schedule.

(2) For the purposes of the operation of an Act, or an instrument (including regulations) or agreement made under an Act, in relation to a time on or after the commencement of this Schedule, the thing is taken to have been done by or in relation to the Workplace Authority Director.

(3) Subitem (2) does not affect the time the thing was done.

(4) This item does not affect the following items in this Part.

33 Substitution of parties to proceedings

From the commencement of this Schedule, the Workplace Authority Director is substituted for the Employment Advocate as a party in any proceedings that were pending in any court or tribunal immediately before that commencement.

34 Gazette notices of requirements

(1) This item applies to a requirement that:

(a) was made under any of the following provisions of the Workplace Relations Act 1996:

(i) paragraph 337(4)(d);
(ii) subsection 344(3);
(iii) paragraph 370(4)(d);
(iv) subsection 377(3);
(v) paragraph 384(3)(c);
(vi) subsection 389(3);
(vii) paragraph 392(5)(b);
(viii) paragraph 392(5)(c);
(ix) paragraph 393(5)(c);
(x) paragraph 393(5)(d);
(xi) subsection 395(3); and
(b) was made by notice published in the Gazette before the amendment of the provision by this Schedule; and
(c) was in force immediately before the amendment.

(2) The requirement has effect on and after the amendment as if it had been made under the provision as amended.

(3) This item does not prevent amendment or revocation of the requirement.

35 Workplace agreement officials

(1) For the purposes of the operation of section 165 of the Workplace Relations Act 1996 on and after the amendment of that section by this Schedule, a person is taken to be a workplace agreement official if the person was, at any time before that amendment, a workplace agreement official as defined in that section before that amendment.

(2) Subitem (1) does not limit the definition of workplace agreement official in subsection 4(1) of the Workplace Relations Act 1996 as amended by this Schedule.

36 Annual report on Employment Advocate’s operations

(1) Despite its repeal by this Schedule, section 155 (Annual report) of the Workplace Relations Act 1996 continues to apply in relation to each financial year that:
   (a) is the financial year (the repeal year) in which this Schedule commences or the financial year immediately before the repeal; and
   (b) is a financial year for which the Employment Advocate had not given the Minister a report under that section before the repeal.

(2) However, that section applies as if it required the Workplace Authority Director (instead of the Employment Advocate) to prepare and give the report.
Schedule 3—Workplace Ombudsman

Part 1—Amendments

Division 1—Main amendments

Workplace Relations Act 1996

1 Subsection 4(1)

Insert:

Commonwealth workplace relations legislation means:

(a) this Act; or
(b) the Independent Contractors Act 2006; or
(c) regulations made under the Independent Contractors Act 2006.

Note: The definition of Commonwealth workplace relations legislation does not cover the Registration and Accountability of Organisations Schedule or regulations made under that Schedule, because the definition of this Act excludes them both (although it includes other regulations made under the Act).

2 Subsection 4(1)

Insert:

member of the Office of the Workplace Ombudsman means a person covered by subsection 166P(2).

3 Subsection 4(1) (definition of workplace inspector)

Repeal the definition, substitute:

workplace inspector means a person who is a workplace inspector under section 167.

4 Subsection 4(1)

Insert:

Workplace Ombudsman means the Workplace Ombudsman holding office under Part 5A.
5 After Part 5

Insert:

Part 5A—Workplace Ombudsman

Division 1—Establishment and functions

166A Workplace Ombudsman

There is to be a Workplace Ombudsman.

166B Functions of the Workplace Ombudsman

The functions of the Workplace Ombudsman are as follows:

(a) to assist employees and employers to understand their rights and obligations under Commonwealth workplace relations legislation;

(b) to promote compliance with Commonwealth workplace relations legislation, including by providing assistance and advice and disseminating information;

(c) to monitor compliance with Commonwealth workplace relations legislation;

(d) to investigate suspected contraventions of Commonwealth workplace relations legislation;

(e) to inquire into any act or practice that may be contrary to Commonwealth workplace relations legislation;

(f) to refer matters to relevant authorities;

(g) to institute proceedings to enforce Commonwealth workplace relations legislation;

(h) to appoint workplace inspectors;

(i) to give, as necessary, directions relating to the exercise or performance of appointed workplace inspectors’ powers or functions;

(j) to represent employees who are, or might become, a party to proceedings under this Act, in situations where the Workplace Ombudsman considers that representing the employees will promote compliance with Commonwealth workplace relations legislation;
(k) any other functions conferred on the Workplace Ombudsman by Commonwealth workplace relations legislation.

Note: Among other things, the Workplace Ombudsman has the functions of a workplace inspector because section 167 makes the Workplace Ombudsman a workplace inspector.

166C Minister may give directions to Workplace Ombudsman

(1) The Minister may, by legislative instrument, give written directions to the Workplace Ombudsman about the performance of his or her functions.

(2) Directions given by the Minister under subsection (1) must be of a general nature only, and cannot relate to a particular case.

(3) The Minister must not direct the Workplace Ombudsman in relation to the Workplace Ombudsman’s performance of functions, or exercise of powers, as an Agency Head under the Public Service Act 1999.

(4) The Workplace Ombudsman must comply with any direction given by the Minister under subsection (1).

(5) Section 42 (Disallowance of legislative instruments) of the Legislative Instruments Act 2003 applies to a direction given under subsection (1) of this section, despite section 44 of that Act.

Division 2—Appointment and terms and conditions

166D Appointment of Workplace Ombudsman

(1) The Workplace Ombudsman is to be appointed by the Governor-General by written instrument.

(2) The Governor-General must not appoint a person as the Workplace Ombudsman unless the Minister is satisfied that the person:
   (a) has suitable qualifications or experience; and
   (b) is of good character.

(3) The Workplace Ombudsman holds office for the period specified in the instrument of appointment. The period must not exceed 5 years.

(4) The Workplace Ombudsman holds office on a full-time basis.
166E Remuneration

(1) The Workplace Ombudsman 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 Workplace Ombudsman is to be paid the remuneration that is prescribed.

(2) The Workplace Ombudsman is to be paid the allowances that are prescribed.

(3) This section has effect subject to the Remuneration Tribunal Act 1973.

166F Leave of absence

(1) The Workplace Ombudsman has the recreation leave entitlements that are determined by the Remuneration Tribunal.

(2) The Minister may grant the Workplace Ombudsman leave of absence, other than recreation leave, on the terms and conditions as to remuneration or otherwise that the Minister determines.

166G Other terms and conditions

The Workplace Ombudsman holds office on the terms and conditions (if any) in relation to matters not covered by this Act that are determined by the Governor-General.

166H Outside employment

The Workplace Ombudsman must not engage in paid employment outside the duties of the Workplace Ombudsman’s office without the Minister’s approval.

166J Disclosure of interests

The Workplace Ombudsman must give written notice to the Minister of all interests, pecuniary or otherwise, that the Workplace Ombudsman has or acquires that could conflict with the proper performance of the Workplace Ombudsman’s functions.
166K Acting appointments

(1) The Minister may appoint a person to act as the Workplace Ombudsman:
   (a) during a vacancy in the office of Workplace Ombudsman (whether or not an appointment has previously been made to the office); or
   (b) during any period, or during all periods, when the Workplace Ombudsman is absent from duty or from Australia, or is, for any reason, unable to perform the duties of the office.

(2) The Minister must not appoint a person to act as the Workplace Ombudsman unless the Minister is satisfied that the person:
   (a) has suitable qualifications or experience; and
   (b) is of good character.

(3) Anything done by or in relation to a person purporting to act under an appointment is not invalid merely because:
   (a) the occasion for the appointment had not arisen; or
   (b) there was a defect or irregularity in connection with the appointment; or
   (c) the appointment had ceased to have effect; or
   (d) the occasion to act had not arisen or had ceased.

166L Resignation

(1) The Workplace Ombudsman may resign his or her appointment by giving the Governor-General a written resignation.

(2) The resignation takes effect on the day it is received by the Governor-General or, if a later day is specified in the resignation, on that later day.

166M Termination of appointment

(1) The Governor-General may terminate the appointment of the Workplace Ombudsman for misbehaviour or physical or mental incapacity.

(2) The Governor-General must terminate the appointment of the Workplace Ombudsman if:
   (a) the Workplace Ombudsman:
(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 his or her creditors; or
(iv) makes an assignment of his or her remuneration for the
benefit of his or her creditors; or
(b) the Workplace Ombudsman is absent, except on leave of
absence, for 14 consecutive days or for 28 days in any 12
months; or
(c) the Workplace Ombudsman engages, except with the
Minister’s approval, in paid employment outside the duties of
his or her office; or
(d) the Workplace Ombudsman fails, without reasonable excuse,
to comply with section 166J.

Division 3—Staff, delegations etc.

166N Staff

The staff assisting the Workplace Ombudsman in the performance
of the Workplace Ombudsman’s functions must be persons
engaged under the Public Service Act 1999.

166P Office of the Workplace Ombudsman

(1) The Office of the Workplace Ombudsman is established by this
subsection.

(2) The Office of the Workplace Ombudsman consists of:
(a) the Workplace Ombudsman; and
(b) the staff assisting the Workplace Ombudsman in the
performance of the Workplace Ombudsman’s functions; and
(c) the appointed workplace inspectors.

(3) For the purposes of the Public Service Act 1999:
(a) the Workplace Ombudsman and the staff assisting the
Workplace Ombudsman in the performance of the Workplace
Ombudsman’s functions together constitute a Statutory
Agency; and
(b) the Workplace Ombudsman is the Head of that Statutory
Agency.
Schedule 3  Workplace Ombudsman

Part 1  Amendments

166Q  Delegation

(1) The Workplace Ombudsman may, in writing, delegate to an SES employee, or an acting SES employee, in the Office of the Workplace Ombudsman any of the Workplace Ombudsman’s functions and powers under Commonwealth workplace relations legislation.

(2) In performing functions or exercising powers under a delegation, the delegate must comply with any directions of the Workplace Ombudsman.

(3) Subsection (1) does not apply to the functions and powers of a workplace inspector that the Workplace Ombudsman has because of section 167.

Note: If the Workplace Ombudsman wants an SES employee, or an acting SES employee, in the Office of the Workplace Ombudsman to have any of the functions or powers of a workplace inspector, the Workplace Ombudsman can appoint the SES employee or acting SES employee as a workplace inspector under section 167.

Division 4—Reporting and disclosing information

Subdivision A—Reporting to Minister

166R  Minister may require reports

(1) The Minister may, in writing, direct the Workplace Ombudsman to give the Minister specified reports relating to the Workplace Ombudsman’s functions.

Note: Section 166T restricts the disclosure of personal information in a report.

(2) The Workplace Ombudsman must comply with the direction.

(3) A direction made under subsection (1) is not a legislative instrument.

(4) If the report is made in writing, the report is not a legislative instrument.
166S Annual report

The Workplace Ombudsman must, as soon as practicable after the end of each financial year, prepare and give to the Minister, for presentation to the Parliament, a report on the operations of the Office of the Workplace Ombudsman during that year.

Note: See also section 34C of the Acts Interpretation Act 1901, which contains extra rules about annual reports.

166T Reports not to include information relating to an individual’s affairs

(1) Information relating to the affairs of an individual must not be included in a report under section 166R or 166S if:

(a) the individual is named, or otherwise specifically identified, in the report as the individual to whom the information relates; or

(b) it is reasonably likely that people generally (other than people to whom the individual has disclosed information relating to the individual’s affairs) would be able to work out the identity of the individual to whom the information relates.

(2) For the purposes of applying paragraph (1)(b) to information relating to a particular individual’s affairs, the context in which the information appears, and information that is otherwise publicly available, must be taken into account (as well as any other relevant matter).

Subdivision B—Disclosing information

166U Disclosure of information by members of the Office of the Workplace Ombudsman

Disclosure that is necessary or appropriate

(1) A member of the Office of the Workplace Ombudsman may disclose information acquired by the member in the course of exercising powers, or performing functions, as such a member (including as a delegate of the Workplace Ombudsman), if the member considers on reasonable grounds that it is necessary or appropriate to do so in the course of exercising his or her powers, or performing his or her functions, as such a member.
Disclosure to migration officer

(2) A member of the Office of the Workplace Ombudsman may disclose information to an officer of the Department administered by the Minister who administers the *Migration Act 1958* if the member considers on reasonable grounds that the disclosure of the information is likely to assist the officer in the administration of that Act.

Disclosure authorised by regulations to Commonwealth officers

(3) The regulations may authorise prescribed members of the Office of the Workplace Ombudsman to disclose information of the prescribed kind, to officers of the Commonwealth of the prescribed kind, for prescribed purposes.

Disclosure to State workplace relations official

(4) A member of the Office of the Workplace Ombudsman may disclose information to an officer of a State who has powers, duties or functions that relate to the administration of a workplace relations or other system relating to terms and conditions, or incidents, of employment, if the member considers on reasonable grounds that the disclosure of the information is likely to assist the officer in the administration of that system.

Disclosure to other officials and authorities

(5) A member of the Office of the Workplace Ombudsman may disclose information to:

(a) a person employed by, or appointed to an office of, the Commonwealth, a State or a Territory; or

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

if the member considers on reasonable grounds that the disclosure of the information is likely to assist the person or authority in discharging a responsibility of the person or authority relating to the administration of a law of the Commonwealth, a State or a Territory.
Relationship with other laws

(6) To avoid doubt, a disclosure in accordance with this section of personal information (within the meaning of the Privacy Act 1988) is taken, for the purposes of that Act, to be authorised by law.

166V Directions about exercise of powers to disclose information

(1) The Workplace Ombudsman may, by legislative instrument, give written directions to the members of the Office of Workplace Ombudsman about the disclosure of information under section 166U.

(2) Directions given by the Workplace Ombudsman under subsection (1) must be of a general nature only.

(3) A member of the Office of Workplace Ombudsman must comply with any direction given by the Workplace Ombudsman under subsection (1).

6 After subsection 167(1)

Insert:

(1A) The Workplace Ombudsman is a workplace inspector by force of this subsection.

7 Subsection 167(2)

Omit “Minister”, substitute “Workplace Ombudsman”.

8 Subsections 167(7) and (8)

Repeal the subsections, substitute:

(7) In exercising powers or performing functions as a workplace inspector, a workplace inspector appointed under subsection (2) must comply with any directions of the Workplace Ombudsman.

(8) If a direction under subsection (7) is of general application, the direction is a legislative instrument for the purposes of the Legislative Instruments Act 2003.

(9) If a direction under subsection (7) relates to a particular case, the direction is not a legislative instrument for the purposes of the Legislative Instruments Act 2003.
Schedule 3  Workplace Ombudsman
Part 1  Amendments

9 Subsection 168(1)
Omit “Minister”, substitute “Workplace Ombudsman”.

10 Subsection 168(1)
Omit “prescribed form”, substitute “form approved by the Workplace Ombudsman”.

11 Paragraph 168(3)(b)
Omit “Secretary of the Department”, substitute “Workplace Ombudsman”.

12 Section 170
Repeal the section.

13 Subparagraph 337A(b)(v) of Schedule 1
Repeal the subparagraph, substitute:
  (v) a member of the Office of the Workplace Ombudsman
    (as defined in the Workplace Relations Act); and

14 Before paragraph 2(2)(p) of Schedule 2
Insert:
  (oa) paragraph 166B(a);
  (ob) paragraph 166B(j);

15 Before paragraph 3(2)(i) of Schedule 2
Insert:
  (ha) paragraph 166B(a);

16 Paragraph 4(2)(o) of Schedule 2
Repeal the paragraph, substitute:
  (o) section 166H;
  (oa) paragraph 166M(2)(c);
  (ob) subsection 166U(4);

Division 2—Consequential amendment

Financial Management and Accountability Regulations 1997
### 17 Part 1 of Schedule 1 (after table item 140AA)

Insert:

<table>
<thead>
<tr>
<th>140AAA</th>
<th>Office of the Workplace Ombudsman, comprising:</th>
<th></th>
<th>Workplace Ombudsman</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(a) the Workplace Ombudsman; and</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(b) the staff assisting the Workplace Ombudsman in the performance of the Workplace Ombudsman’s functions; and</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(c) the workplace inspectors appointed under section 167 of the <em>Workplace Relations Act 1996</em>.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

*See Note B*
18 Workplace inspectors

(1) This item applies to an appointment if:
   (a) the appointment was made under subsection 167(2) of the Workplace Relations Act 1996; and
   (b) the appointment was in force immediately before the commencement of this Schedule.

(2) The appointment has effect, after the commencement of this item, as if it had been made under subsection 167(2) of the Workplace Relations Act 1996 as amended by this Schedule.

19 Identity cards

(1) Subitem (2) applies to an identity card if:
   (a) the identity card was issued under subsection 168(1) of the Workplace Relations Act 1996; and
   (b) the identity card was in force immediately before the commencement of this Schedule.

(2) The identity card has effect, after the commencement of this item, as if it had been issued under subsection 168(1) of the Workplace Relations Act 1996 as amended by this Schedule.

(3) The amendment of subsection 168(3) of the Workplace Relations Act 1996 made by this Schedule applies to persons ceasing to be inspectors after the commencement of this Schedule.

20 Disclosures qualifying for whistleblowers’ protection

(1) This item applies to a disclosure of information that qualified for protection under Part 4A of Chapter 11 of Schedule 1 to the Workplace Relations Act 1996, because of subparagraph 337A(b)(v) of that Schedule as in force before the repeal and substitution of that subparagraph by this Schedule.

(2) On and after the commencement of this Schedule, the disclosure qualifies for protection under that Part, despite that repeal and substitution.