EXPLANATORY STATEMENT

Select Legislative Instrument 2006 No. 52

Issued by the authority of the Minister for Employment and Workplace Relations.

Workplace Relations Act 1996
Workplace Relations Amendment (Work Choices) Act 2005

Workplace Relations Regulations 2006

The *Workplace Relations Amendment (Work Choices) Act 2005* (Work Choices Act), which amends the *Workplace Relations Act 1996* (WR Act), received Royal Assent on 14 December 2005. The key provisions of the Work Choices Act will commence on a day fixed by proclamation. A separate Minute recommends that these provisions commence on 27 March 2006.

Section 359 of the WR Act provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Act.

Item 1 of Schedule 4 to the Work Choices Act provides, in part, that the Governor-General may make regulations dealing with matters of a transitional, saving or application nature relating to amendments made by the Work Choices Act. Subitem 1(2) of Schedule 4 provides that, despite the restriction specified in subsection 12(2) of the *Legislative Instruments Act 2003*, regulations made under subitem 1(1) of Schedule 4 may be expressed to take effect from a date before the regulations are registered under that Act.

The purpose of the *Workplace Relations Regulations 2006* is to repeal and replace the *Workplace Relations Regulations 1996* to accommodate the amendments to the WR Act introduced by the Work Choices Act. The Regulations are largely machinery or transitional in nature and necessary for the effective operation of the WR Act as amended by the Work Choices Act. Some of the Regulations, however, replicate, with appropriate amendments, the current provisions in the *Workplace Relations Regulations 1996*.

The Regulations are divided into eight Chapters.

Chapter 1 repeals the *Workplace Relations Regulations 1996*. It also contains preliminary matters, such as the name of the regulations, definitions and the commencement provisions.

Chapter 2 contains general regulations for purposes of the WR Act. The key provisions:

- exclude certain persons who are insufficiently connected with Australia from the operation of the WR Act (Division 1 of Part 1);
- prescribe the relationship between certain State and Territory laws and the WR Act or instruments made pursuant to the WR Act (Divisions 2 and 3 of Part 1);

- provide for certain powers and procedures of the Australian Industrial Relations Commission such as the convening of compulsory conferences (Part 3);
- set out aspects of operation of the Australian Industrial Registry (eg. office hours, lodgement of documents, signing of documents, etc. (Part 4);
- provide for general matters relating to workplace inspectors (eg. period of appointment, identity cards) (Part 6);
- prescribe what constitutes a more favourable outcome in certain respects for operation of the Australian Fair Pay and Conditions Standard (the Standard) (Part 7);
- set out prohibited content for the purposes of workplace agreements (Part 8);
- set out procedures for secret ballots on protected action (Part 9);
- set out how to determine whether an employee's entitlement under a preserved award term is 'more generous' than the corresponding Standard entitlement (Part 10);
- provide dispute resolution processes to be used for particular disputes between employers and employees at the workplace level (Part 13);
- establish a small claims procedure for the recovery of wages etc. (including a prescribed maximum amount for recovery) (Part 14);
- provide for the making, retention and inspection of employee records and the issue of pay slips (Part 19); and
- establish a system of infringement notices to be issued by workplace inspectors in certain circumstances (Part 19B).

Chapter 3 provides transitional arrangements for parties bound by federal awards for the purposes of new Schedule 6 to the WR Act, which deals with transitional arrangements for those parties.

Chapter 4 provides for the amendment of clauses 2, 3 and 4 of Schedule 2 to the WR Act (which explain when a reference in the WR Act to 'an employee', 'an employer' or 'employment' has its ordinary meaning).

Chapter 5 provides for the transitional treatment of aspects of State employment agreements and State awards for the purposes of Schedule 8 to the WR Act, which deals with the transitional treatment of those instruments.

Chapter 6 provides for the regulation of certain aspects of transitionally registered associations for the purposes of Schedule 10 to the WR Act, including the modification of Schedule 1, Registration and Accountability of Organisations, for transitionally registered associations.

Chapter 7 provides for matters of a transitional, saving or application nature relating to amendments made by the Work Choices Act for item 1 of Schedule 4 to that Act (for example, part-heard matters before State courts or tribunals).

Chapter 8 provides for certain miscellaneous provisions, including the availability of actions for defamation in certain cases.

Changes to the federal workplace relations system have been the subject of extensive debate and public consideration.

On 26 May 2005, the Government announced proposed workplace relations reforms.

On 9 October 2005 the Government released a 64-page Work Choices booklet which further explained the proposed legislative reforms, including some aspects of the Regulations, such as prohibited content in workplace agreements.

The Workplace Relations Amendment (Work Choices) Bill 2005 (the Work Choices Bill) was introduced in the House of Representatives on 2 November 2005 and was the subject of extensive debate in the Commonwealth Parliament.

Upon introduction, the Work Choices Bill was immediately referred to the Senate Employment, Workplace Relations and Education Committee for inquiry. The Committee received 202 major submissions, as well as over 5000 small submissions or expressions of interest, and conducted 5 days of public hearings. Many of the submissions canvassed issues dealt with the Regulations.

On 1 December 2005 the Government tabled over 300 Government amendments to the Work Choices Bill. Many of these amendments were responses to submissions made to the Committee and representations made by stakeholders.

Details of the proposed Regulations are in the Attachment.

The WR and Work Choices Acts do not impose any conditions that need to be satisfied before the powers to make the Regulations may be exercised.

The Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulations commenced on the proclamation of Schedule 5 to the Work Choices Act.

Chapter 1 – Preliminary

Regulation 1.1 – Name of Regulations

1. This regulation sets out the name of the Regulations as the *Workplace Relations Regulations 2006*.

Regulation 1.2 – Commencement

2. This regulation provides that these Regulations commence on the commencement of Schedule 5 to the *Workplace Relations Amendment (Work Choices) Act 2005* (the Work Choices Act).

Regulation 1.3 – Definitions

3. This regulation defines a number of terms used in these Regulations, unless the contrary intention appears. These definitions include:

- "Act". This refers to the *Workplace Relations Act 1996* (the Act), as amended by the Work Choices Act, but not including Schedule 1 to the Act or regulations made under that Schedule.
- "pre-reform Act". This means the Act as in force just before the commencement of Schedule 1 to the Work Choices Act (reform commencement).
- "pre-reform Regulations" This means the *Workplace Relations Regulations 1996* as in force just before the reform commencement.
- "Work Choices Act". This means the Workplace Relations Amendment (Work Choices) Act 2005.

Regulation 1.4 – Definition of *employing authority* in subsection 4(1) of the Act - prescribed persons and bodies

4. This regulation prescribes persons or bodies for the purposes of the definition of "employing authority" in subsection 4(1), by reference to information set out in the

table in Schedule 2 to the Regulations. For each item in column 1 of the table the persons or bodies specified in column 3 of that item is prescribed as the employing authority for the class of employees specified in column 2 of that item.

Regulation 1.5 – Definition of *public sector employment* in subsection 4(1) of the Act – prescribed laws and persons

5. This regulation prescribes various laws and classes of persons for the purposes of the definition of "public sector employment" in subsection 4(1). For example subregulation 1.5(1) prescribes the *Naval Defence Act 1910* for the purposes of paragraph 4(1)(g).

6. Subregulation 1.5(2) prescribes the classes of persons for the purposes of paragraph 4(1)(h), for example members of the Defence Force and persons employed by or in the service of a Commonwealth authority referred to Schedule 3.

7. Subregulation 1.5(3) prescribes the *Prisons (Correctional Services) Act 1980* of the Northern Territory for the purposes of paragraph 4(1)(i).

Regulation 1.6 – Repeal of *Workplace Relations Regulations 1996*

8. This regulation repeals the *Workplace Relations Regulations 1996*.

Chapter 2 – General Regulations for the *Workplace Relations Act 1996*

Part 1 – Preliminary

Division 1 ─ Exclusion of persons insufficiently connected with Australia

Regulation 1.1 – Crew members of commercial vessels

9. Section 12 authorises the making of regulations to exempt persons or entities from any provision of the Act where the Minister is satisfied that there is not a sufficient connection between those persons or entities and Australia.

10. Subregulation 1.1(1) exempts non-citizen crew members of a commercial vessel operating under a permit granted under section 286 of the *Navigation Act 1912* ('permit ship') and the foreign corporations who employ them from all provisions of the Act other than section 16 (exclusion of State and Territory laws). The purpose of this provision is to ensure that non-citizen crew members of permit ships and any foreign corporations who employ them are not subject to either Federal or State or Territory workplace relations laws.

11. Subregulation 1.1(2) defines the terms 'non-citizen' and 'permit ship' by reference to the *Migration Act 1958* and the *Navigation Act 1912*, respectively.

12. Subregulation 1.1(2) also ensures that the exemption will apply to non-citizens only while the permit is in force.

Division 2 – Act excludes some State and Territory laws

Regulation 1.2 – State and Territory laws that are not excluded by the Act - general

13. Regulation 1.2 provides that certain State and Territory laws are prescribed, to the extent set out in regulation 1.2, for the purposes of paragraph 16(2)(b).

14. Subsection 16(1) provides that the Act applies to the exclusion of certain laws of a State and Territory so far as they would otherwise apply in relation to an *employee* or *employer* within the meaning of subsection 5(1) or 6(1).

15. The effect of paragraph 16(2)(b) is that subsection 16(1) does not apply to a law of a State or Territory in so far as the law is prescribed under paragraph 16(2)(b).

16. Regulation 1.2 provides the State and Territory laws that are prescribed for the purposes of paragraph 16(2)(b):

- a State or Territory law (including a law relating to appeal provisions) to the extent to which it relates to compliance with an obligation (under that law or another law of a State or Territory) which would otherwise be excluded by subsection 16(1) and in respect of an act or omission which occurred prior to the reform commencement – but not to the extent that the State or Territory law provides for the granting of an injunction in relation to future conduct (subregulations 1.2(2) and (3));

- a State or Territory law (including a law relating to appeal provisions) to the extent to which it relates to a termination of employment that occurred before the reform commencement (subregulation 1.2(4));

- a State or Territory law (including a law relating to appeal provisions) to the extent to which it relates to proceedings that commenced before the reform commencement and to the extent that the State or Territory law provides for the variation or setting aside of rights and obligations under a contract of employment, or another arrangement for employment, that a court or tribunal finds is unfair – for the purposes of this subregulation, proceedings might be commenced by, for example, the filing of an application in the relevant court or tribunal under the relevant law of the State or Territory (subregulation 1.2(5));

- a State or Territory law (including a law relating to appeal provisions) to the extent to which it relates to a transmission, succession or assignment

of a business, or part of a business, that occurred before the reform commencement (subregulation 1.2(6));

17. Subregulation 1.2(2) will apply to compliance with obligations, and the enforcement of accrued rights, which exist at the reform commencement under, for example, State and Territory industrial laws and instruments made under such laws. For example, if an employer failed to pay an employee in accordance with a State award prior to the reform commencement, then the employee may bring proceedings under the relevant State or Territory law to enforce the employer's award obligation. This is consistent with the approach taken (for repeals of Commonwealth laws) in paragraph 8(c) of the *Acts Interpretation Act 1901* in relation to rights, privileges, obligations or liabilities which were acquired, accrued or incurred under a repealed Act before the Act was repealed.

18. To the extent that a State or Territory law is within the scope of subsection 16(1), and is not prescribed under this regulation or otherwise saved by subsections 16(2) and 16(3), the State or Territory law will be excluded in relation to an *employee* or *employer* within the meaning of subsections 5(1) or 6(1). The effect of this is that, for example, the State and Territory industrial laws will cease to apply in relation to an *employee* or *employer* within the meaning of subsection 5(1) or 6(1) for the following kinds of matters:

- matters about state awards (other than compliance with award obligations before the reform commencement), including the making or variation of an award;

- matters about wages (other than compliance with wage obligations before the reform commencement), including applications to vary awards to amend wages provisions, State wage cases, and applications for general orders to apply to a State or industry in a State, relating to wages;

- matters about agreements between employers and employees, and employers and unions (other than compliance with agreement obligations

before the reform commencement), including certification, registration and variation;

- matters involving workplace dispute resolution ;
- matters about industrial action, including strike pay (other than compliance with award obligations before the reform commencement) – except for industrial action affecting essential services (which is a non-excluded matter under paragraph 16(3)(k));
- matters about terminations of employment that occur after the reform commencement;
- matters where proceedings have not yet commenced at the reform commencement, where the applicant seeks the variation or setting aside of rights and obligations under a contract of employment, or another arrangement for employment, that a court or tribunal finds is unfair; and
- matters about a transmission, succession or assignment of a business, or part of a business, that occurs after the reform commencement.

19. Section 16 does not affect the operation of State and Territory laws in so far as they apply to employees or employers other than employees and employers within the meaning of subsection 5(1) or 6(1), respectively.

20. Consistent with sections 17 and 18, regulation 1.2 is not intended to limit the circumstances in which the Act (other than section 16), and instruments made under the Act, are intended to apply to the exclusion of, or prevail over, laws of the States and Territories or instruments made under those laws.

Regulation 1.3 – State and territory laws are not excluded by the Act – specified laws

Industrial Relations Act 1999 of Queensland

21. To avoid doubt, paragraph 1.3(a) and (b) expressly preserves the operation of paragraph 73(2)(f) and any other provision of the *Industrial Relations Act 1999* (QLD) (IR Act) which gives effect to, or facilitates paragraph 73(2)(f), to the extent that it provides a remedy for the dismissal of a person for the making or a belief that a person has, or may make:

- a public interest disclosure under the *Whistleblowers Protection Act 1994* (QLD); or
- a complaint under the Health Rights Commission Act 1991 (QLD).

22. To avoid doubt, paragraph 1.3(c) expressly preserves the operation of a provision of the IR Act which gives effect to section 74 of the *Workplace Health and Safety Act 1995* (QLD).

23. This regulation is made pursuant to section 846 and paragraph 16(2)(b).

24. This means that for these three purposes only, the IR Act is not excluded by the operation of the Act.

Regulation 1.4 – Exclusion of prescribed State and Territory laws

Contracts Review Act of New South Wales

25. Regulation 1.4 prescribes a State law which is expressly excluded by the operation of the Act.

26. Regulation 1.4 prescribes the law under subsection 16(4) and section 846.

27. Paragraph 1.4(1)(a) prescribes the *Contracts Review Act 1980* (NSW) to exclude its operation in relation to a contract that involves an employer and employee

(within the definitions provided in subsections 5(1) and 6(1) and their employment relationship.

28. Paragraph 1.4(1)(b) clarifies that this regulation only deals with matters that occur after reform commencement.

Division 3 – Awards, agreements and Commission orders prevail over State and Territory law etc.

Regulation 1.5 – Laws about training arrangements

29. Subsection 17(1) provides that an award or workplace agreement prevails over the law of a State or Territory, a State award or a State employment agreement to the extent of any inconsistency. Subsection 17(2) provides that an award or workplace agreement that deals with the matters of occupational health and safety, workers compensation and training arrangements is subject to a law of a State or Territory. However, subsection 17(2) provides an exception to this by allowing regulations to be made prescribing laws that deal with the matters in subsection 17(2) which, despite the listing of the matter in subsection 17(2), are to be subject to awards and workplace agreements.

30. This regulation would prescribe a number of State and Territory laws dealing with training arrangements that are to be subject to federal awards or workplace agreements. The intention is that those instruments would override any State or Territory training law or instrument made under a State or Territory training law that, in essence, prescribes terms and conditions of employment that can be regulated under the Act. State and Territory laws would continue to operate in relation to the structure and regulation of the system for training arrangements.

- For example, using training arrangements, a State might prescribe that for successful completion of a cabinet-making apprenticeship, an apprentice must work at least 2 years with a qualified cabinet-maker, achieve a certain number of competencies and become certified by an industry body. Any provision of the State Act seeking to prescribe wages and annual leave for that apprentice would only have effect to the

extent that it was not inconsistent with any federal award or workplace agreement.

Regulation 1.6 – Laws about prevailing awards, agreements and Commission orders

31. Subsection 17(2) provides that an award or workplace agreement that deals with certain matters, such as occupational health and safety or workers compensation operates subject to State or Territory law dealing with those matters.

32. Paragraph 17(2)(d) enables regulations to be made to prescribe additional matters for the purposes of section 17.

33. Subsection 17(2) also allows regulations to be made prescribing laws that deal with the matters in subsection 17(2) which are (despite the listing of the matter in subsection 17(2)) to be subject to awards and workplace agreements.

34. Subregulation 1.6(1) preserves the operation of (in addition to those matters already listed in subsection 17(2)):

- child labour;
- discrimination; and
- EEO.

35. This means that a term of an award or agreement that deals with these matters will not prevail over a State or Territory law that deals with the matter. However, subregulation 1.6(1) must be read in conjunction with subregulation 1.6(2).

36. Subregulation 1.6(2) provides that a term of an award or agreement will prevail over a State or Territory industrial law that deals with discrimination or EEO. 'State or Territory industrial law' has the same meaning as in section 4.

37. This means that where an award or agreement deals with discrimination or EEO it will not prevail over a State or Territory law that deals with the matter, unless it is a State or Territory industrial law.

38. The note informs that matters already listed under subsection 17(2) are:

- occupational health and safety;
- workers compensation; and
- training arrangements.

Part 3 – Australian Industrial Relations Commission

Division 1 – Establishment of Commission

Regulation 3.1 – Prescribed State industrial authorities- section 67 and subsections 71(2) and 696(1), (2) and (5) of the Act

39. Regulation 3.1 prescribes State industrial authorities for the purposes of the provisions relating to cooperation with the States in appointments to the Australian Industrial Relations Commission (the Commission) and State industrial authorities.

40. It prescribes the list of State industrial authorities for the purposes of provisions relating to dual federal and state appointments under section 67, the tenure of Commission members under subsection 71(2) and joint proceedings under subsections 696(1), (2) and (5).

41. This regulation replicates regulation 5 of the pre-reform Regulations.

Regulation 3.2 – Prescribed tribunals – subsections 69(1), 69(2) and 79(5) of the Act

42. Regulation 3.2 prescribes the Commonwealth and Territory tribunals for the purposes of provisions relating to dual federal appointments under subsections 69(1) and 69(2), and remuneration and allowances of a member of the Commission and a Commonwealth tribunal under subsection 79(5).

43. This regulation replicates regulation 6 of the pre-reform Regulations.

Division 3 – Representation and intervention

Regulation 3.3 – Representation of employing authorities before the Commission or Court

44. Regulation 3.3 relates to the representation of employing authorities before the Commission or Court (defined under the Act as the Federal Court).

45. It provides the persons that are a prescribed person who may represent an employing authority in certain circumstances before the Commission or Court for the purposes of subsections 100(5) and 854(4).

46. This regulation replicates regulation 7 of the pre-reform Regulations.

Regulation 3.4 – Representation of certain persons by unregistered associations

47. Regulation 3.4 relates to representation of certain persons by unregistered associations.

48. The regulation provides that an employer party to proceedings before the Commission may be represented by an officer or employee of an unregistered association of which the party is a member. The regulation also provides that a party to proceedings before the Commission who is a member of the Australian International Flight Engineers' Association may be represented by an officer or employee of that Association.

49. This regulation replicates regulation 8 of the pre-reform Regulations.

Division 4 – General matters relating to the powers and procedures of the Commission

Regulation 3.5 – Compulsory conferences

50. Regulation 3.5 provides for the payments that must be paid by the Commonwealth to a person who is directed to attend a compulsory conference. The regulation specifies that the payment must not be made unless it has been certified by a Registrar.

51. This regulation replicates regulation 13 of the pre-reform Regulations.

Regulation 3.6 – Power to override certain laws affecting public sector employment

52. Regulation 3.6 relates to the power to override certain laws affecting public sector employment.

53. It prescribes the laws which the Commission may override when making an award or order in relation to an industrial dispute involving public sector employment for the purposes of paragraph 116(2)(b).

54. This regulation replicates regulation 14 of the pre-reform Regulations.

Division 6 – Miscellaneous

Regulation 3.7 – President must provide certain information etc. to the Minister

55. Regulation 3.7 relates to the requirement that the President of the Commission provide certain information to the Minister.

56. Subregulation 3.7(1) sets out the information that the President must provide to the Minister and the time and form in which the information and copies of documents must be given to the Minister for the purposes of subsections 125(1) and (2).

57. Subregulation 3.7(2) provides that the President is not prevented from including other relevant information with information given to the Minister in electronic form.

58. Subregulation 3.7(3) provides that the documents in paper form are to be posted to the address notified and that information, and copies of documents in electronic form are to be emailed to the address notified. It also provides that the President must ensure that the documents to be given to the Minister are given at the same time each week.

Regulation 3.8 – Power of Commission to waive procedural requirements and effect of non-compliance

59. Regulation 3.8 relates to the power of the Commission to waive procedural requirements and the effect of non-compliance with procedural requirements.

60. Subregulation 3.8(1) provides that the Commission may in special circumstances waive the procedural requirements of the Regulations.

61. Subregulations 3.8(2) and (3) also provide that non-compliance with any of these Regulations will not render void any proceedings before the Commission but the Commission has the discretion to set aside, amend or otherwise deal with proceedings.

62. This regulation replicates regulation 133 of the pre-reform Regulations.

Part 4 – Australian Industrial Registry

63. The regulations under this Part concern the powers and functions of the Australian Industrial Registry and the Industrial Registrar. These regulations reflect the provisions of the pre-reform Regulations dealing with these matters.

Regulation 4.1 – Office hours

64. This regulation prescribes the office hours of the Industrial Registry, and provides that where time in relation to an act or proceeding to be done or taken at a registry expires on a day that the registry is closed, that act shall be held to have been done or taken within time if done on the next day on which the registry is open.

Regulation 4.2 – Lodgment of documents in Industrial Registry

65. For documents required under Part 15 of the Act or under Part 15 of these Regulations this regulation provides for the methods of lodgement of documents in the Industrial Registry.

Regulation 4.3 – Endorsement of documents

66. This regulation provides that documents lodged in connection with any matter before a Registrar shall be endorsed with the name and address for service of the party lodging it, unless a form prescribed or made under the Act, associated regulations or Commission Rules provides otherwise.

Regulation 4.4 – Inspection of documents

67. This regulation provides that a document lodged under Part 15 of the Act or under Part 15 of these regulations may be inspected at a registry during office hours and that a person may on application obtain a copy of the document.

Regulation 4.5 – Power to waive procedural requirements and effect of non-compliance

68. This regulation allows a Registrar, subject to the Act, to exempt a person from compliance with procedural requirements of these regulations in relation to any

proceeding before the Registrar. Subject to the Act, non-compliance with any of these regulations does not render void any proceedings before a Registrar but the proceedings may be set aside as irregular, amended or otherwise dealt with as the Registrar thinks fit.

Regulation 4.6 – Use of previous evidence

69. This regulation prescribes that evidence given before a Court, the Commission or a Registrar may, at the discretion of the Registrar and subject to any terms or conditions as he or she determines, be used in any subsequent proceedings before that Registrar. Subregulation 4.6(2) provides that a person who is a party to subsequent proceedings may object to the use in those proceedings of any evidence given in the original proceedings if not a party to the original proceedings. Subregulation 4.6(3) provides that the Registrar must have regard to any such objection when exercising his or her discretion. Subregulation 4.6(4) provides that where evidence has been given orally this regulation does not authorise its subsequent use unless a written record is available for the use of the Registrar and the Registrar is satisfied that that record is a true record of the evidence.

Regulation 4.7 – Recovery of cost of providing copies of documents

70. This regulation provides that the Registrar may recover the cost of providing copies of documents before providing them to a person.

Regulation 4.8 – Custody and use of seals of the Industrial Registry

71. This regulation provides that the seal of the Industrial Registry and duplicates of the seal kept at each registry in accordance with section 131 must be kept in custody and used in accordance with the directions of the Industrial Registrar.

Regulation 4.9 – General powers of Registrar

72. This regulation provides general powers to the Industrial Registrar for the purpose of giving effect to the Act, including the power to summon a person to appear to give evidence or produce documents, to take evidence on oath, to adjourn any matter or hearing, to give directions and to order costs.

73. Subregulation 4.9(4) provides that the Registrar may exercise these powers on such terms, as to fees or costs that the Registrar thinks just.

74. Subregulation 4.9(2) provides for an offence for refusing or failing to comply with a summons to appear before the Registrar with a penalty of 5 penalty units.

75. Subregulation 4.9(3) provides that strict liability applies to the physical element 'failing to comply' described in subregulation 4.9(2). A standard note referring to section 6.1 of the *Criminal Code*, which governs strict liability, is included after this provision.

76. Subregulation 4.9(4) provides that the defence of 'reasonable excuse' is available in relation to subregulation 4.9(2). A standard note advising that a defendant bears an evidentiary burden is included after this provision.

Regulation 4.10 – Signing of documents etc on behalf of persons, organisations etc

77. Regulation 4.10 prescribes who is authorised to sign documents on behalf of persons, organisations, branches, companies or committees of management where the Act or the Regulations require the document in relation to proceedings with which the Registrar is authorised to deal.

Regulation 4.11 – Application of the Criminal Code

78. Regulation 4.11 provides that Chapter 2 of the *Criminal Code* applies to civil penalties in Part 4 as if those penalties were offences.

Part 5 The Employment Advocate

Division 1 Functions, powers etc of the Employment Advocate

Regulation 5.1 – Functions of the Employment Advocate – giving Minister information and documents

79. Section 151 requires the Employment Advocate to give to the Minister information and copies of documents in accordance with the Regulations.

80. Subregulation 5.1(1) prescribes the kinds of information and copies of documents and the form and time frame within which such documents should be provided by reference to information set out in a table in Schedule 5 to these regulations. For each item of the table the information or copy of document specified in column 2 against that item must be given to the Minister within the time specified in column 3 for that item.

81. Subregulation 5.1(2) requires the deletion or obliteration of the names of the parties to an AWA from information related to an AWA or a copy of an AWA.

Division 2 Appointment, conditions of appointment etc. of Employment Advocate

Regulation 5.2 - Remuneration and allowances

82. Subsection 157(2) provides that the Employment Advocate is to be paid such allowances as are prescribed by the Regulations. This regulation provides that the Employment Advocate is to be paid the allowances payable to a Senior Executive Service employee as defined in section 34 of the *Public Service Act 1999*.

Division 3 Miscellaneous

Regulation 5.3 - Identity of parties to AWAs not to be disclosed

83. Section 165 protects the confidentiality of persons party to an AWA, prohibiting disclosure of information by a "workplace agreement official" that will

identify a party to an AWA (or information that the person disclosing has reasonable grounds to believe will disclose the identity of a party to an AWA). A "workplace agreement official" is defined to mean the Employment Advocate, a delegate of the Employment Advocate or a member of staff assisting the Employment Advocate under section 153.

84. This regulation is designed to allow appropriate reporting on bargaining outcomes and the bargaining process, while limiting access to information that will identify a party to an AWA.

85. Paragraph 165(2)(e) allows regulations to be made authorising disclosure. This regulation allows disclosure of information to "authorised persons" for the limited purposes of providing analyses of trends in agreement making and for preparing reports on enterprise bargaining required by section 844.

86. An "authorised person" is the Employment Advocate, a person authorised in writing by the Employment Advocate, and in relation to preparing the reports required by section 844 (but not otherwise), a person authorised in writing by the Minister for Employment and Workplace Relations.

Part 6 Workplace inspectors

Regulation 6.1 – Period of appointment

87. Subsection 167(2) allows for the appointment by the Minister of a workplace inspector. Paragraph 167(2)(a) provides for the appointment of a person who has been appointed or who is employed by the Commonwealth. Paragraph 167(2)(b) provides for the appointment of a person who has not been appointed and who is not employed by the Commonwealth.

88. Subsection 167(3) provides that a person appointed under paragraph 167(2)(a) is appointed for the period specified by the Regulations. Subregulation 6.1(1) prescribes a period of 2 years for such an appointment.

89. Subsection 167(4) provides that a person appointed under paragraph 167(2)(b) is appointed for a period specified in the person's instrument of appointment which must not be longer than the period specified by regulations. Subregulation 6.1(2) prescribes a maximum period of 2 years for such an appointment

Regulation 6.2 – Advice about rights and obligations

90. Subregulation 6.2(1) deals with the provision of advice by a workplace inspector about rights and obligations of a party under the Act. It provides that if a workplace inspector:

- exercises his or her powers, or performs his or her functions, under the Act; and
- is requested to provide advice to a party to whom an award, agreement or other stated matter relates about their rights and obligations; or
- considers it necessary or appropriate to give advice of that kind;

he or she is authorised to give the advice and must explain the party's rights and the manner in which the industrial award, agreement or other matter is to be observed.

Regulation 6.3 – Notification of failure to observe requirements

91. Subregulation 6.3(1) provides that if a workplace inspector is satisfied that a person has failed to observe a requirement imposed by a listed industrial instrument, provision, determination, undertaking or order, the workplace inspector may issue a written notice:

- advising the person of that failure;
- requiring that person to take action to rectify the failure;
- requiring the person to advise the workplace inspector of action taken; and
- advising the person of the consequence for failure to comply with the notice.

Regulation 6.4 – Identity cards

92. Subsection 168(1) provides that the Minister may issue to a workplace inspector an identity card in a prescribed form. Regulation 6.4 provides that the form of an identity card for a workplace inspector is set out in Schedule 6 to the Regulations.

Regulation 6.5 – Taking of samples

93. Subparagraph 169(2)(b)(ii) provides that a workplace inspector may as prescribed take a sample of any goods or substance from a premises. Regulation 6.5 provides that a workplace inspector may take such a sample after informing the listed persons of the inspector's intention to do so.

Regulation 6.6 – Disclosure of information

94. Subsection 170(3) provides that the Regulations may authorise workplace inspectors to disclose information of a prescribed kind to prescribed persons for prescribed purposes.

95. Subregulation 6.6(1) prescribes to whom a workplace inspector is authorised to disclose information acquired in the course of exercising powers or performing functions as a workplace inspector.

96. Subregulation 6.6(2) prescribes the purpose for which the workplace inspector is authorised to disclose the information under subregulation 6.6(1).

Part 7 – The Australian Fair Pay and Conditions Standard

Division 1 – Preliminary

97. The Australian Fair Pay and Conditions Standard (the Standard) provides guaranteed minimum entitlements for employees employed by employers within the meaning of sections 5 and 6. Where an employee's terms and conditions of employment are subject to an award, workplace agreement or contract, an issue will arise about the interaction of those conditions with the Standard.

98. The interaction of the annual leave, personal/carer's leave and parental leave guarantees in the Standard with preserved award terms is governed by the *more generous* test (section 530). Division 3 of Part 10 of the Regulations deals with the meaning of *more generous*.

99. The Standard also underpins workplace bargaining and employment contracts.

100. The Standard prevails over inconsistent contracts, or agreements made after reform commencement, to the extent that it is more favourable in a particular respect (section 172). The regulations in this Division provide more guidance in applying this 'more favourable' comparison.

101. Section 172 provides for the making of regulations that may prescribe:

- what a particular respect is or is not for the purposes of subsections 172(2) and 172(3); or
- the circumstances in which the Standard provides or does not provide a more favourable outcome in a particular respect.

102. The purpose of the Regulations in this Division is to determine the circumstances in which entitlements in a workplace agreement or contract of employment are more or less favourable 'in a particular respect' when compared with the Standard. The regulations will aid and facilitate agreement making by clarifying and providing examples of some of the respects in which an agreement may provide for

differing arrangements to the Standard without breaching the relevant wages, hours and leave guarantees.

Regulation 7.1 – Operation of the Australian Fair Pay and Conditions Standard – provision of more favourable outcome

103. Regulation 7.1 explains:

- what a particular respect is for the purpose of subsections 172(2) or 172(3); and
- the circumstances in which the Standard provides or does not provide a more favourable outcome in the particular respect.

Wages

104. Subregulation 7.1(2) provides that the *guaranteed basic periodic rate of pay* and the *guaranteed basic piece rate of pay* are each a particular respect for the purpose of subsections 172(2) and 172(3).

105. The terms *basic periodic rate of pay* and *basic piece rate of pay* are defined in section 178 of Division 2 of Part 7 of the Act.

106. Section 182 sets out the wages guarantee. The provision guarantees a *basic periodic rate of pay* and a *guaranteed basic piece rate of pay* for each *guaranteed hour* for most employees covered by the federal system.

107. Section 183 sets out when hours worked are guaranteed hours.

108. In addition, section 189 guarantees employees a frequency of payment. Paragraph 189(2)(e) provides that an employer must pay an employee on the basis of fortnightly payments in arrears if there are no frequency of payment provisions contained in an Australian Pay and Classification Scale (APCS), workplace agreement or contract of employment (this is the default payment period).

109. Subregulations 7.1(3) to 7.1(5) explain the circumstances in which the Standard provides or does not provide a more favourable outcome with respect to the wages guarantee in Division 2 of Part 7 of the Act described above.

Compliance with the wages guarantee over a period

110. Subregulation 7.1(3) relates to compliance with the wages guarantee over a particular period.

111. The subregulation provides that if a workplace agreement or contract of employment provides for a period of no greater than 12 months over which the wages guarantee will be complied with, this would not provide a less favourable outcome than the Standard.

112. In practice, some employees are paid a regular amount each week (or fortnight) - based on a particular number of hours work that would ordinarily meet the wages guarantee. However, there will be situations were employees are paid a standard rate that, in effect, offsets additional hours worked in one pay period against lesser hours worked in another. For example, workers whose hours are subject to significant seasonal variations, and are required to work more hours during peak season and less in the off season. Employees with variable hours of work may also fall within this circumstance.

113. This subregulation allows employers and employees to agree to a period of up to 12 months over which there will be compliance with the wages guarantee, without this being less favourable than the Standard. Such an arrangement would not override any obligation under the Standard to pay unpaid wages in the event of the employee leaving the employer's employment (for example, by termination of employment or resignation).

Salary sacrifice arrangements

114. Subregulation 7.1(4) relates to salary sacrifice arrangements.

115. The subregulation clarifies that it is not a less favourable outcome for the employee if, but for an arrangement with the employer whereby the employer is required to pay or withhold an amount for the purpose of a salary sacrifice arrangement, the employee would have received the appropriate amount of pay to satisfy the wages guarantee.

Recovery of overpayment of wages

116. Subregulation 7.1(5) relates to the recovery of an overpayment in wages.

117. There may be instances where an employer is contractually entitled to deduct an overpayment of wages to an employee in a subsequent pay period (or number of pay periods). Such a deduction may result in a reduction of an employee's wage below the level required to meet the Standard despite the fact that, but for the deduction, the wage guarantee would have been met.

118. The subregulation clarifies that where there is an overpayment of wages and the employer is rectifying the overpayment in a particular pay period (or number of periods) in accordance with the terms of a law, workplace agreement or contract, that this circumstance is a 'particular respect' in which the Standard is not taken to provide a more favourable outcome to the employee.

Leave

119. Subregulation 7.1(6) provides that the types of paid and unpaid leave provided for in the Standard are each a particular respect for the purpose of subsections 172(2) and 172(3).

120. Subregulation 7.1(7) provides that each of the matters listed in subregulation 7.1(6) has the same meaning as in Divisions 4 to 6 of the Standard.

121. Subregulations 7.1(8) to 7.1(11) explain the circumstances in which the Standard provides or does not provide a more favourable outcome with respect to the each of the types of paid and unpaid leave provided for in Divisions 4 to 6 of Part 7 of the Act.

Amounts of leave

122. Subregulation 7.1(8) provides that the Standard provides a more favourable outcome for the employee in respect of each of the forms of paid and unpaid leave mentioned in subregulation 7.1(6) where it provides a greater amount of the relevant form of leave. In such circumstances the entitlement in the Standard entitlement would prevail over the workplace agreement or contract in that particular respect.

123. Treating paid and unpaid leave each as a 'particular respect' in subregulation 7.1(6) ensures that an agreement or contract of employment does not reduce paid leave entitlements below the level guaranteed by the Standard by increasing access to unpaid leave at the expense of paid leave.

Expression of leave

124. Subregulation 7.1(9) relates to how leave is expressed (for example, whether the entitlement to leave is expressed in hours, days or weeks).

125. The Standard expresses leave entitlements in hours to take account of employees who work variable hours. For example, annual leave is calculated on the basis of nominal hours worked (defined in section 229), which is used for the purposes of calculating the annual leave guarantee in section 232. This entitlement is expressed to be the number of hours accrued during the previous completed four-week period.

126. Workplace agreements and contracts of employment may express leave entitlements in days or weeks.

127. Subregulation 7.1(9) clarifies that the manner in which an entitlement is expressed is not something that of itself results in an entitlement being less favourable than the Standard – rather it is the actual total quantum of the entitlement that is relevant.

Adjustment of annual leave payments and duration

128. Subregulation 7.1(10) relates to the ability of employers and employees to agree on arrangements to provide for longer periods of annual leave with a proportionate reduction in payment.

129. The Standard does not prescribe the way in which annual leave must be taken.

130. For example, there is no prohibition on a period of annual leave being taken at half pay over double the duration. There is no maximum or minimum limit on the amount of annual leave that an employer may authorise an employee to take (subsection 236(2)).

131. Subregulation 7.1(10) would make clear that an employer and employee may agree to spread payment for annual leave over a longer period and increase the duration of annual leave by an equivalent amount (for example, taking twice the duration of annual leave at half pay), and this is a particular respect which would not be less favourable than the Standard.

Cap on carer's leave

132. Subregulation 7.1(11) relates to the amount of personal leave that may be taken as carer's leave in a 12 month period.

133. Section 249 of the Standard provides that an employee is not entitled to take more than the equivalent of 10 days of personal leave as paid carer's leave during a 12 month period from the date of employment. This cap is based on the conciliated position in the Family Provisions Case (8 August 2005 – PR082005).

134. Subregulation 7.1(11) clarifies that providing a higher cap on the amount of personal/carer's leave that may be used for caring purposes in a particular year is a particular respect in which a workplace agreement or contract of employment would provide a more favourable outcome to an employee.

Accruing and crediting of leave

135. Subregulation 7.1(12) relates to the accrual and crediting of leave.

136. The Standard distinguishes between the accrual and crediting of leave entitlements. For example, section 234 provides the rules for the accrual, crediting and accumulation of annual leave. An employee may only take paid annual leave under the Standard once an entitlement to such leave has been accrued and credited in accordance with this section.

137. Workplaces may have different arrangements in place which set out the manner in which leave accrues or is credited to an employee. These arrangements are usually explicitly set out in a workplace agreement or contract of employment.

138. Subregulation 7.1(12) provides that the way in which the particular amounts of leave in subregulation 7.1(6) are accrued and credited are each particular respects for the purpose of subsection 172(2). The effect of this is that more frequent accrual or crediting than the Standard would not be less favourable to the employee while less frequent accrual or crediting than the Standard would be less favourable.

Statutory declarations for parental leave

139. Subregulation 7.1(13) provides that the content of a statutory declaration is a particular respect for the purpose of section 172.

140. Subregulation 7.1(14) provides that the matters to be attested in a statutory declaration for the purpose of parental leave are a particular respect and that additional requirements in a statutory declaration would not result in a less favourable outcome to the employee.

Division 2 – Wages

Subdivision A – Preliminary

Regulation 7.2 – Definitions for Division 2 of the Act – pre-reform federal wage instrument

141. Regulation 7.2 prescribes certain Commonwealth instruments as *pre-reform federal wage instruments* as in force immediately before the reform commencement for

purposes of the subparagraph (d)(ii) definition of that term in section 178 under Division 2 of Part 7 of the Act, including:

- a Victorian minimum wage order made under sections 501 or 501A of the pre-reform Act (subregulation 7.2(1));
- an instrument (commonly referred to as a 'Slow Worker Permit') issued by a particular person or authority (eg Australian Industrial Registry or Board of reference established under section 131 of the pre-reform Act) pursuant to a federal award provision made under section 123 of the pre-reform Act (paragraph 7.2(2)(a)); and
- a certificate of exemption issued under section 509 of the pre-reform Act (paragraph 7.2(2)(b)).

142. Subregulation 7.2(3) provides that subregulation 7.2(2) ceases to have effect at the end of two years after reform commencement. This ensures that these *pre-reform State wage instruments* under subregulation 7.2(2) cease to be prescribed after two years and any preserved APCSs derived from these prescribed instruments would cease to have effect.

Regulation 7.3 – Definitions for Division 2 of the Act – pre-reform State wage instrument

143. Regulation 7.3 prescribes certain State instruments as *pre-reform State wage instruments* as in force immediately before the reform commencement for purposes of the subparagraph (d)(ii) definition of that term in section 178, including:

- an instrument issued to a person under a State law because of the person's age, infirmity or slowness, that set out an enforceable minimum rate of pay for that person (commonly referred to as a 'Slow Worker Permit') (paragraph 7.3(1)(a)); and
- an arrangement made in writing under section 9 of the *Minimum Conditions of Employment Act 1993* (WA) for an employee who is

'either permanently or temporarily mentally or physically disabled' (paragraph 7.3(1)(b)).

144. Subregulation 7.3(2) provides that subregulation 7.3(1) ceases to have effect at the end of two years after reform commencement. This ensures that these *pre-reform State wage instruments* under subregulation 7.3(2) cease to be prescribed after two years and any preserved APCSs derived from these prescribed instruments would cease to have effect.

Subdivision I Australian Pay and Classification Scales: preserved APCSs

Regulation 7.4 – Deriving preserved APCSs from pre-reform wage instruments – supported employment services

145. Regulation 7.4 provides that a preserved APCS derived from a *pre-reform wage instrument* allows for the phasing-in of minimum wages for employees with disabilities employed by the employment service provided that the employment service:

- entered into an agreement with the Australian Government to phase in minimum wages for employees with disabilities (paragraph 7.4(1)(a)); and
- complies with the phase-in obligations of that agreement (paragraph 7.4(1)(b)).

146. Regulation 7.4 ensures continuity of employment arrangements made under these types of provisions for affected employees.

Regulation 7.5 – Notional adjustments – general

147. Regulation 7.5 provides guidance for the conversion of certain rates of pay in preserved APCSs to 'equivalent monetary hourly rates'. In order to convert rates to basic hourly rates of pay, which is a mandatory 'notional adjustment' under subsection 211(1), it is necessary to work out the employee's specified hours of work.

148. Subregulation 7.5(2) provides that an employee's specified hours of work must be determined by reference to:

- the relevant provisions of the pre-reform wage instrument from which the preserved APCS was derived (subparagraph 7.5(2)(a)(i)); or
- a law, or provision of a law (subparagraphs 7.5(2)(a)(ii) – (iii)).

that determined the hours of work per week for the employee immediately before the reform commencement.

149. If the employee's specified of hours per week cannot be determined in this way, then paragraph 7.5(2)(b) provides that the employee's hours are taken to be 38 hours per week.

150. Subregulation 7.5(3) provides guidance for the conversion of annualised rates of pay into 'equivalent monetary hourly rates' for purposes of the notional adjustment under subsection 211(1).

151. Subregulation 7.5(3) provides that the annualised rate may be converted by, or by reference to, any provisions of the pre-reform wage instrument (from which the preserved APCS was derived) that provide for the conversion of annualised rates of pay.

152. If the formula provides for the conversion of annualised rates of pay to fortnightly rates, the resulting fortnightly rate may be divided by 2 (to produce a weekly rate), and the employee's specified hours of work per week (as determined by subregulation 7.5(2)) to work out the employee's 'equivalent monetary hourly rate'. In these circumstances, the hourly rate may be calculated without using the default formula provided for in proposed paragraph 7.5(3)(b).

153. In the absence of an applicable formula, paragraph 7.5(3)(b) provides a default formula for the conversion of annualised rates of pay to 'equivalent monetary hourly rates'.

Regulation 7.6 – Notional adjustments – Victorian minimum wage orders

154. Regulation 7.6 clarifies the application of preserved APCSs derived from Victorian minimum wage orders (made under section 501 or 501A of the pre-reform Act).

155. Under the Act, each Victorian minimum wage order will be prescribed as a *pre-reform federal wage instrument* under:

- subregulation 7.2(1) – in relation to the employment of any 'employee' as defined in subsection 5(1); and
- paragraph 861(1)(e) – in relation to the employment of any 'employee' in Victoria, within the meaning of section 858 (Victorian referral employee).

156. This arrangement is necessitated by the terms of the referral of power to the Commonwealth under the *Commonwealth Powers (Industrial Relations) Act 1996* (Vic). It effectively means that two sets of preserved APCSs will be derived from Victorian minimum wage orders on reform commencement under section 208. Each set will apply to a mutually exclusive group of employees in Victoria.

157. Subregulation 7.6(1) notionally adjusts the coverage provisions of each preserved APCS derived from an instrument prescribed under subregulation 7.2(1) (Minimum wage order) to make it clear that the preserved APCS may apply in relation to the employment of any 'employee' as defined in subsection 5(1).

158. Subregulation 7.6(2) notionally adjusts the coverage provisions of each preserved APCS derived from an instrument prescribed deemed to be a pre-reform federal wage instrument under paragraph 861(1)(e) to make it clear that the preserved APCS may apply in relation to the employment of Victorian referral employees.

Subdivision L Adjustments to incorporate 2005 Safety Net Review etc.

Regulation 7.7 – Adjustments to incorporate 2005 Safety Net Review – other matters

159. Regulation 7.7 ensures that State awards (as defined in subsection 4(1) of the pre-reform Act) that would have received a 2005 safety net increase under the relevant State industrial authority's decision, but for the establishment of the Australian Fair Pay Commission (the AFPC), will receive that increase (if they have not already) at the AFPC's first wage adjustment.

160. Subregulation 7.7(1) requires the AFPC to adjust certain preserved APCSs derived from State awards to increase the rate provisions consistent with the relevant State industrial authority's decision on the Commission's 2005 Safety Net Review (2005 SNR) decision [Print PR002005].

161. Under paragraph 7.7(1)(a), the AFPC must make the adjustment unless it considers the adjustment inappropriate because of the effect of subsection 208(3) (which relates to the phasing-in of wage increases on work value and/or pay equity grounds). Under paragraph 7.7(1)(b), the AFPC is required to make the adjustment as part of its first exercise of wage-setting powers under Division 2 of Part 7 of the Act.

162. Subregulation 7.7(2) provides that the adjustment under subregulation 7.7(1) must only be made to a preserved APCS derived from:

- a State award that has not already received a 2005 safety net increase, whether by general order, ruling or otherwise (paragraph 7.7(2)(a)); and either
  - the State award has received a 2004 safety net review increase (as determined by the State industrial authority) (subparagraph 7.7(2)(b)(i)); or

- the State award came into effect after the State industrial authority's decision regarding the 2004 safety net review increase (subparagraph 7.7(2)(b)(ii)).

163. Subregulation 7.7(2) provides that where the rate provisions of a preserved APCS have been adjusted under subregulation 7.7(1), the guarantee against reductions below a pre-reform basic periodic rate of pay under section 190 applies to the adjusted rate provisions.

Division 5 – Personal leave

Regulation 7.8 – Medical certificates issued by registered health practitioners

164. Sections 254 and 256 allow, but do not require, an employer to request a medical certificate from an employee if the employee is taking a period of sick leave or carer's leave. The certificate must be obtained from a registered health practitioner, as defined in section 240.

165. Regulation 7.8 provides that that a registered health practitioner can only issue a medical certificate in respect of the area of practice in which they are registered or licensed under a law of a State or Territory.

166. The regulation is intended to clarify that a medical certificate may only be obtained from a health practitioner registered or licensed under a law of a State or Territory, in relation to health issues within that person's professional competence. The Act does not of itself authorise health practitioners to issue medical certificates where they would otherwise be unable to do so under State or Territory legislation.

167. This regulation is made pursuant to section 846 of the WR Act.

Part 8 – Workplace Agreements

168. These regulations give effect to the changes made to the Act by the Work Choices Act. Part 8 of the Act describes the types of workplace agreements which may be made, and the procedures which must be followed to make that agreement.

169. Part 8 of the Regulations sets out regulations relating to authorising multiple-business agreements, the operation of workplace agreements and the content of workplace agreements.

Division 2 – Types of workplace agreements

Regulation 8.1 – Authorisation of multiple-business agreements

170. Subsection 332(1) provides that an employer may apply to the Employment Advocate for an authorisation to make a multiple business agreement. Subsection 332(2) provides that the regulation may set a procedure for applying to the Employment Advocate for the authorisation.

171. Pursuant to this section, subregulation 8.1(1) provides that:

- the application must be in writing (paragraph 8.1(1)(a));
- a copy of the proposed multiple-business agreement must be attached to the application (paragraph 8.1(1)(b));
- the application must identify each employer that will be bound by the proposed agreement (paragraph 8.1(1)(c));
- the application must identify the business, or part of the business, of the employer or employers that will be covered by the proposed agreement (paragraph 8.1(1)(d)); and
- the application must provide reasons which support the request for authorisation (paragraph 8.1(1)(e)).

172. Section 332 allows for the variation of an existing multiple-business agreement, including the removal of an employer, or the inclusion of a new employer, to a multiple-business agreement as long as this is authorised by the Employment Advocate. Subregulation 8.1(2) provides a similar procedure to that in subregulation 8.1(1) that relates to where an employer is applying to the Employment Advocate for authorisation to vary an existing multiple-business agreement:

- the application must be in writing (paragraph 8.1(2)(a));
- a copy of the proposed variation must be attached to the application (paragraph 8.1(2)(b));
- the application must, if the variation relates to the parties to the multiple-business agreement, identify the proposed new employers (sub-subparagraph 8.1(2)(c)(i)(A));
- where the variation relates to the parties to the agreement, the application must identify the business or part of the business of the new employers (sub-subparagraph 8.1(2)(c)(i)(B));
- where the variation relates to any other matter, the application must identify the proposed variations to the agreement (subparagraph 8.1(2)(c)(ii)); and
- the application must include reasons which support the request for authorisation (paragraph 8.1(2)(d)).

173. Subregulation (3) provides that after the Employment Advocate has considered an application, the Employment Advocate must give the applicant a notice in writing stating whether the authorisation is granted.

Division 6 – Operation of workplace agreements and persons bound

174. Section 350 of Division 6 of the Act provides that a workplace agreement displaces certain prescribed conditions of employment specified in certain

Commonwealth laws. Section 350 provides that these conditions of employment and Commonwealth laws are prescribed by the Regulations. This means that if a workplace agreement is in operation in relation to an employee, these prescribed conditions do not apply in relation to that employee.

Regulation 8.2 – Workplace agreement displaces certain Commonwealth laws – prescribed conditions of employment

Regulation 8.3 – Workplace agreement displaces certain Commonwealth laws – prescribed Commonwealth laws

175. Regulations 8.2 and 8.3 prescribe certain conditions of employment and Commonwealth laws for the purposes of section 350.

Division 7.1 – Prohibited content under section 356 of the Act

176. Part 1 contains regulations made under section 356. The regulations specify matters that are prohibited content for the purpose of workplace agreements made under Part 8 of the Act.

Subdivision A – Preliminary

Regulation 8.4 – Purpose of Division

177. Regulation 8.4 provides that this Part will specify the matters that under section 356 are prohibited content for the purposes of the Act. Section 358 provides that a term of a workplace agreement which contains prohibited content is void. A number of penalties in the Act apply to conduct associated with including prohibited content in a workplace agreement. For example, subsection 357(1) provides that an employer who recklessly lodges a workplace agreement which contains prohibited content will be in breach of the subsection.

Subdivision B – Various matters that are prohibited content

Regulation 8.5 – Various matters

178. Regulation 8.5 provides that various matters are prohibited content when inserted into workplace agreements.

179. Paragraphs 8.5(1)(a) and (b) prohibit terms in workplace agreements that require an employer to provide payroll deduction facilities for union membership subscriptions or dues.

180. Paragraph 8.5(1)(c) prohibits terms that require an employer to provide leave, whether paid or otherwise, to an employee to attend training provided by a trade union.

181. Paragraph 8.5(1)(d) prohibits terms that require employers to provide employees with paid leave to attend union meetings.

182. Paragraph 8.5(1)(e) prohibits terms that require persons bound to the agreement to negotiate and/or conclude a future agreement.

183. Paragraph 8.5(1)(f) prohibits terms that provide an organisation of employers or employees with a right to be involved in dispute resolution procedures unless an employer or employee requests the organisation to do so.

184. Paragraph 8.5(1)(g) prohibits terms that provide rights to an organisation of employees or employers to enter the premises of the employer bound by the agreement. All rights to entry are provided for under Part 15 of the Act. It is not intended that workplace agreements provide any rights beyond those.

185. Paragraphs 8.5(1)(h) and (i) prohibit terms that restrict the engagement of independent contractors and labour hire workers or seek to regulate conditions on their engagement. A note at the end of paragraph 8.5(1)(k) provides that subsection 4(2) defines independent contract more broadly than a natural person. Subregulation 8.5(9) provides a definition of ‘labour hire agency’ and ‘labour hire worker’.

186. Paragraph 8.5(1)(j) prohibits terms that purport to require an employee to forgo an entitlement to a period of annual leave. The Australian Fair Pay and Conditions Standard permits workplace agreements to include a term allowing an employee to request to cash out up to two weeks of their accrued annual leave entitlement in a 12 month period. Section 233 provides that an employer is prohibited from requiring an employee to cash out an entitlement to annual leave, or exerting undue influence or undue pressure on an employee in relation to a decision about whether or not to cash out a period of annual leave. The effect of this paragraph is to ensure that all workplace agreements comply with the Australian Fair Pay and Conditions Standard in this respect.

187. Paragraph 8.5(1)(k) prohibits terms that require an employer to supply information about employees bound by an agreement to a trade union or to an official, member acting in a representative capacity or employee of such a union. The exception to this is if the provision of the information is required or authorised by law. Examples of such information include names of employees, addresses, classifications and records that the employer is required to keep under the Act.

188. Paragraphs 8.5(2)(a) and (b) prohibit terms which encourage or discourage membership of an industrial association. This includes terms which require all persons bound to the agreement to indicate whether they support or do not support members of an industrial association.

189. Subregulation 8.5(3) prohibits terms which permit parties to the agreement to engage in or organise industrial action. The regulation does not affect the operation of provisions in Part 9 of the Act allowing protected industrial action after the nominal expiry date of an agreement has passed and in accordance with the requirements of the Act.

190. Subregulation 8.5(4) prohibits terms that disallow or restrict parties from disclosing the details of an agreement.

191. Subregulation 8.5(5) prohibits terms in workplace agreements that confer a right or remedy in relation to termination of employment. This would include a term which provides for Commission involvement in a termination of employment matter.

192. Subregulation 8.5(6) clarifies that a term in a workplace agreement is not prohibited merely because it contains a process for managing an employee's performance or conduct. Such internal processes are not inconsistent with the Act's restrictions or access to unfair dismissal remedies to certain types of employees, including employees employed by an employer with 100 employees or fewer.

193. Subregulation 8.5(7) prohibits objectionable provisions in workplace agreements. This subregulation would insert a note that section 810 deals with objectionable provisions. Section 810 defines an 'objectionable provision'. Section 810 is in Part 16 which protects freedom of association.

194. Subregulation 8.5(8) provides for the prohibition of terms in collective agreements that prohibit a party bound to a collective agreement from making an Australian Workplace Agreement (AWA).

195. Subregulation 8.5(9) defines 'labour hire agency' and 'labour hire worker' for the purposes of paragraph 8.5(1)(i).

Regulation 8.6 – Discriminatory terms

196. Subregulation 8.6(1) prohibits terms being included in a workplace agreement that discriminate against an employee on certain grounds. The list includes: race, colour, age, family responsibilities and political opinion.

197. Subregulation 8.6(2) provides three exceptions to subregulation 8.6(1).

198. The first exception is contained in paragraph 8.6(2)(a) which provides that terms which comply with the APCS or a special Federal Minimum Wage (FMW) are not discriminatory terms under subregulation 8.6(1). A note at the end of regulation 8.6 to provide a reference to the APCS and the special FMW.

- 'Comply' means 'equal to or greater than' the rate/rates in the APCS or special FMW.

199. The second exception is contained in paragraph 8.6(2)(b) which provides that a term does not discriminate against an employee if it establishes an essential need for it based on the inherent requirements of the particular employment.

200. The third exception in paragraph 8.6(2)(c) provides that a term does not discriminate against an employee if it avoids offending adherents of a particular religion or creed. This would only potentially apply to instances where a particular religion or creed is followed at an institution.

Subdivision C – Matters that do not pertain to the employment relationship are prohibited content

Regulation 8.7 – Matters that do not pertain to the employment relationship are prohibited content

201. Subregulation 8.7(1) prohibits terms that do not pertain to the employment relationship.

202. However, subregulation 8.7(2) provides that a term of a workplace agreement that does not pertain to the employment relationship is not prohibited content if it is:

- incidental or ancillary to a matter contained in the agreement; or
- a machinery matter; or
- so trivial that it should be disregarded as insignificant.

203. The effect of this term is to import the reasoning of the majority decision of the High Court in *Electrolux Home Products v The Australian Workers Union and Others* [2004] HCA 40 (Electrolux). The High Court found that an agreement could not be certified under the pre-reform Act if it contained matters that did not pertain to the relationship between an employer and persons employed in the business of the

employer. In Electrolux, the issue was whether a bargaining agent's fee claim was such a matter.

204. Subregulation 8.7(3) provides a definition of 'pertains to the employment relationship'. This would define the employment relationship as, in the case of a collective agreement, the relationship between an employer and persons employed by the employer who are bound by the agreement. In the case of an AWA, it is the relationship between an employer and an employee bound by the same agreement.

Division 7.2 – Prohibited content under Schedule 8 to the Act

205. This part prescribes prohibited content for preserved individual State agreements, preserved collective State agreements and notional agreements preserving State awards (NAPSAs).

206. Clauses 9, 15B and 37 of Schedule 8 to the Act are the sources of power for these regulations.

Regulation 8.8 – Prohibited content

207. Subregulation 8.8(1) provides that any term in a preserved individual State agreement, a collective State agreement or a NAPSA that is an anti–AWA term is prohibited content for the purposes of clauses 9, 15B and 37 of Schedule 8 to the Act.

208. An anti–AWA term is a term that stops, hinders or impedes an employer bound by an agreement from making an AWA. This would include a term that provides, for example, that an employer may only make an AWA with a union, or may only make an AWA that contains the same terms and conditions of employment as the original agreement.

209. Subregulation 8.8(2) provides that any term of a NAPSA that restricts the range or duration of training arrangements is prohibited content for the purposes of clause 37 of Schedule 8 to the Act.

210. This means for example, that a term of a NAPSA that provides that an apprenticeship is of four years duration will be prohibited content.

211. Subregulation 8.8(3) provides that a preserved individual State agreement, a preserved collective State agreement, and NAPSAs have the same meanings as the definitions given in Schedule 8 to the Act.

Subdivision B – Prohibited content

212. Subsection 357(1) provides that an employer must not lodge a workplace agreement that contains prohibited content. Subsection 357(2) provides that an employer has not contravened subsection 357(2) if the Employment Advocate advised the employer that the agreement did not contain prohibited content, and that the advice be in the form specified in the Regulations.

213. Regulation 8.9 prescribes the form of Employment Advocate's advice for the purposes of paragraph 357(2)(b). The regulation requires the advice to:

- be in writing (paragraph 8.9(a));
- be signed by the Employment Advocate (paragraph 8.9(b));
- state the date, or dates, on which the advice was provided (paragraph 8.9(c));
- identify the content of the workplace agreement that was considered by the Employment Advocate (paragraph 8.9(d));
- if the Employment Advocate concludes that the content is prohibited - include an explanation, with appropriate detail, of the Employment Advocate's reasons (paragraph 8.9(e)); and
- if the Employment Advocate is unable to conclude whether the content is prohibited or not – an explanation of the Employment Advocate's reasons (paragraph 8.9(f)).

Division 12 – Miscellaneous

Regulation 8.10 – Qualifications and appointment of bargaining agents

214. For the purposes of paragraph 418(b), regulation 8.10 sets out the requirements for the qualification and appointment of bargaining agents for the making of an AWA, employee collective agreement or employer greenfields agreement.

215. Subregulation 8.10(1) provides that this regulation applies to bargaining agents for the making of an AWA, employee collective agreement or an employer greenfields agreement.

216. Subregulation 8.10(2) provides that a person is excluded from being appointed as a bargaining agent if the person:

- has been appointed as the bargaining agent for the other party to the agreement (paragraph 8.10(2)(a)); or
- is bankrupt, or is applying to take the benefit of a law for relief of a bankrupt or insolvent debtor (paragraph 8.10(2)(b)); or
- has not attained the age of 18 years (paragraph 8.10(2)(c)).

217. Subregulation 8.10(3) provides that a person is excluded from being appointed or holding an appointment as a bargaining agent, for a 5 year period if the person:

- has been convicted of an offence against a Commonwealth, State or Territory law punishable by imprisonment for 1 year or longer (paragraph 8.10(3)(a)); or
- has been convicted of an offence against a Commonwealth, State or Territory law that involves dishonesty and is punishable by imprisonment for 6 months or longer (paragraph 8.10(3)(b)); or
- has been subject of an order by a Court or the Federal Magistrates Court in relation to a civil remedy provision in connection with the negotiation

of a workplace agreement, or a State agreement under a State law (paragraph 8.10(3)(c)); or

- has been convicted of an offence under the Act or the *Criminal Code* (paragraph 8.10(3)(d)).

218. Subregulation 8.10(4) provides that a person who has been excluded from being a bargaining agent under subregulation 8.10(3), may apply to the Court for leave to be appointed as a bargaining agent. In granting leave, the Court may impose any conditions or restricts it thinks fit (subregulation 8.10(5)). The Court is also able to revoke its granting of leave, at any time (subregulation 8.10(6)).

219. Subregulation 8.10(7) provides that, where an organisation, or other incorporated body, is appointed as a bargaining agent, it is a condition of that appointment that each individual who carries out the functions of a bargaining agent on its behalf is, at all material times, a person who is not excluded from being a bargaining agent under this regulation.

Regulation 8.11 – Required form of workplace agreements

220. Paragraph 418(c) provides that the Regulations may make provision for the required form of workplace agreements lodged under Part 8 of the Act.

221. For the purposes of this section, regulation 8.11 specifies that a workplace agreement must:

- be in the English language (paragraph 8.11(a));
- be printed in legible typescript (paragraph 8.11(b)); and
- include the full name and address of each person who signs the agreement (paragraph 8.11(c)).

222. Subregulation 8.11(2) provides that strict liability applies to the physical elements in subregulation 8.11(1). A note refers the reader to section 6.1 of the *Criminal Code* for the meaning of strict liability.

223. Subregulation 8.11(3) provides that an employer is liable to a civil remedy for contravening subregulation 8.11(1). A note to this regulation refers the reader to subsection 846(2) which sets out the maximum amounts for contraventions of civil penalties in the Regulations.

Regulation 8.12 – Witnessing of signatures on AWAs

224. Paragraph 418(d) provides that the Regulations may make provision for the witnessing of signatures on AWAs. For the purposes of this section, subregulation 8.12(1) provides that a person who signs an AWA as a witness must also include his or her full name and address.

225. Subregulation 8.12(2) provides that certain persons are not entitled to witness a party's signature to an AWA, being:

- the other party to the AWA (paragraph 8.12(2)(a));
- the bargaining agent of the other party to the AWA (paragraph 8.12(2)(b)); or
- if the other party is a corporation - a director or day to day manager of that corporation (paragraph 8.12(2)(c)).

Regulation 8.13 – Signing of workplace agreements

226. For the purposes of paragraph 418(e), regulation 8.13 provides that an employer must ensure that a workplace agreement includes the following signatures:

- for all workplace agreements – the employer, or employers' signatures (paragraph 8.13(1)(a); and
- if the workplace agreement is an employee collective agreement – the signature of a representative of the employees, or the signature of the appointed bargaining agent (subparagraph 8.13(1)(b)(i)); or

- if the workplace agreement is a union collective agreement – the signature of the organisation or organisations of employees with which the employer made the agreement (subparagraph 8.13(1)(b)(ii)); or

- if the workplace agreement is a union greenfields agreement – the signature of the organisation or organisations of employees with which the employer made the agreement (subparagraph 8.13(1)(b)(iii)).

227. Subregulation 8.13(2) provides that a signature to a workplace agreement must be accompanied by:

- the full name and address of each person signing the workplace agreement in accordance with subregulation 8.13(1) (paragraph 8.13(2)(a)); and

- an explanation of the person's authority to sign the agreement (paragraph 8.13(2)(b).

228. A note to regulation 8.13 refers the reader to the requirements for the signing of an AWA in section 340.

229. Subregulation 8.13(3) provides that strict liability applies to the physical elements in subregulation (1). A note refers the reader to the *Criminal Code* for the meaning of strict liability.

230. Subregulation 8.13(4) provides that an employer is liable to a civil penalty for contravening the requirements of subregulation 8.13(1) and (2). Subregulation 8.13(5) provides that the validity of a workplace agreement is not affected by a failure to comply with subregulations 8.13(1) and (2).

Regulation 8.14 – Retention of signed workplace agreement

231. For the purposes of paragraph 418(f), subregulation 8.14(1) provides that an employer must retain a signed copy of a workplace agreement for the duration of the

workplace agreement (paragraph 8.14(1)(a)), and for 7 years after it is terminated (paragraph 8.14(1)(b)).

232. Subregulation 8.14(2) provides that regulation 19.20 applies in relation to a signed workplace agreement. This means that an employer must give a copy of the signed agreement to an employee bound to the agreement, or a workplace inspector, if requested. The employer will be liable to a civil penalty for failing to give a signed copy in accordance with regulation 19.20.

233. Subregulation 8.14(3) provides that strict liability applies to the requirement to retain a copy of the agreement in subregulation 8.14(1). A note refers the reader to the *Criminal Code* for the meaning of strict liability.

234. Subregulation 8.14(4) provides that subregulation 8.14(1) does not apply if the employer has a reasonable excuse. An example of a reasonable excuse would be where the organisation or organisations of employees with which the employer made a union collective agreement did not sign the agreement, even though it was approved by employees in accordance with section 340. A note refers the reader to the defendant bearing the evidential burden in relation to the matter in subregulation 8.14(1).

235. Subregulation 8.14(5) provides that subregulation 8.14(1) is a civil penalty provision. A note refers the reader to subsection 846(2) for the maximum penalties for a contravention of this regulation.

Regulation 8.15 – Application of the Criminal Code

236. Regulation 8.15 provides that Chapter 2 of the *Criminal Code* applies to civil penalties in Part 8 as if those penalties were offences.

Part 9 – Industrial Action

237. Part 9 of the Act as amended by the Work Choices Act deals with industrial action. It provides remedies against certain forms of industrial action. Part 9 also provides legal immunity for parties that take industrial action in support of claims for a workplace agreement, provided that the action complies with certain requirements. This is known as protected action.

238. Some of the key requirements for taking protected action include that a bargaining period has been initiated (section 435) and that the nominal expiry date of any applicable workplace agreement has passed (section 440). Where employees are proposing to take protected action, there is an additional requirement that the action must first be authorised by a protected action ballot (section 445). The requirements for protected action ballots are broadly set out in Division 4 of Part 9.

239. While Part 9 provides comprehensive regulation of many matters relating to industrial action, it also provides for the Regulations to prescribe certain matters. The regulations prescribe:

- the qualifications and appointment of agents acting for parties involved in industrial action (subsection 424(3) and paragraph 493(a));
- the employee entitlements which an employer's protected action must not affect (subsection 435(5));
- the detail of protected action ballot processes (sections 450 and 474, subsections 453(5) and 483(4), and paragraphs 493(b), (c) and (d) and 846(a) and (b)); and
- standing for civil remedy provisions relating to taking industrial action prior to the nominal expiry date of a workplace agreement (subsections 494(7) and 495(6)).

This attachment provides a detailed explanation of each of these proposed measures.

Division 2 Bargaining periods

Regulation 9.1 – Employee may appoint agent to initiate bargaining period – qualifications for appointment

240. Section 424 provides employees to initiate bargaining periods anonymously by appointing an agent. Subsection 424(3) provides for that the Regulations may prescribe the qualifications for appointment of these agents.

241. Regulation 9.1 provides for the qualifications and appointment of agents to initiate bargaining periods.

242. Subregulation 9.1(1) provides that this regulation sets out the qualifications of a person appointed as an agent to initiate a bargaining period.

243. Subregulation 9.1(2) provides that a person is excluded from being appointed as an agent if the person has been appointed as the agent for another party to the agreement.

244. Subregulation 9.1(3) provides that a person is excluded from being appointed as an agent if the person is bankrupt, or is applying to take the benefit of a law for relief of a bankrupt or insolvent debtor or has not attained the age of 18 years.

245. Subregulation 9.1(4) provides that a person is excluded from being appointed or holding an appointment as an agent, for a 5 year period if the person:

- has been convicted of an offence against a Commonwealth, State or Territory law punishable by imprisonment for 1 year or longer (paragraph 9.1(4)(a)); or
- has been convicted of an offence against a Commonwealth, State or Territory law that involves dishonesty and is punishable by imprisonment for 6 months or longer (paragraph 9.1(4)(b)); or
- has been subject of an order by a Court or the Federal Magistrates Court in relation to a civil remedy provision in connection with the negotiation

of a workplace agreement, or a State agreement under a State law (paragraph 9.1(4)(c)); or

- has been convicted of an offence under the Act or the *Criminal Code* (paragraph 9.1(4)(d)).

246. Subregulation 9.1(5) provides that a person who has been excluded from being an agent under subregulations 9.1(2) or (4), may apply to the Court for leave to be appointed as an agent. In granting leave, the Court may impose any conditions or restricts it thinks fit (subregulation 9.1(7)). The Court is also able to revoke its granting of leave, at any time (subregulation 9.1(8)).

Regulation 9.2 – Employee may appoint agent to initiate bargaining period – appointment

247. Regulation 9.2 provides special qualifications for agents that are organisations of employees or other incorporated bodies.

Division 3 Protected action

Regulation 9.3 – protected action

248. Subsection 435(5) provides that an employer's industrial action will not be protected action unless the industrial action does not affect the continuity of the employees' employment, for such purposes as are prescribed in the Regulations. Regulation 9.3 prescribes those purposes as:

- superannuation (paragraph 9.3(a));
- authorised leave entitlements (paragraph 9.3(b));
- remuneration and promotion, as affected by seniority (paragraph 9.3(c)); and
- an entitlement (if any) to notice on termination of employment (paragraph 9.3(d)).

Division 4 – Secret ballots on proposed protected action

Subdivision A – General

Regulation 9.4 – Declaration envelope

249. Section 450 provides definitions for the purposes of Division 4 of Part 9 of the Act. Relevantly, section 450 provides that *declaration envelope* means an envelope in the form prescribed by the Regulations.

250. Regulation 9.4 prescribes the form of declaration envelopes for the purposes of section 450, as one which protects the identity of a person voting by postal ballot in a protected action ballot.

Regulation 9.5 – Employee may appoint agent to apply for ballot order – qualifications for appointment

251. Paragraph 451(3)(b) provides that any employee who is a negotiating party to a proposed collective agreement, or group of employees, may apply to the Commission for an order to hold a protected action ballot. This is known as a ballot order. Subsection 451(5) provides for an employee, or group of employees, applying for a ballot order to do so anonymously by appointing an agent. Paragraph 493(a) provides that the Regulations may prescribe the qualifications for appointment of these agents.

252. Regulation 9.5 provides for the qualifications and appointment of agents to apply for ballot orders.

253. Subregulation 9.5(1) provides that this regulation sets out the qualifications of a person appointed as an agent to represent another person in making an application for an order for a protected action ballot to be held.

254. Subregulation 9.5(2) provides that a person is excluded from being appointed as an agent if the person has been appointed as the agent for the other party to the agreement.

255. Subregulation 9.5(3) provides that a person is excluded from being appointed as an agent if the person is bankrupt, or is applying to take the benefit of a law for relief of a bankrupt or insolvent debtor or has not attained the age of 18 years.

256. Subregulation 9.5(4) provides that a person is excluded from being appointed or holding an appointment as a scrutineer, for a 5 year period if the person:

- has been convicted of an offence against a Commonwealth, State or Territory law punishable by imprisonment for 1 year or longer (paragraph 9.5(4)(a)); or
- has been convicted of an offence against a Commonwealth, State or Territory law that involves dishonesty and is punishable by imprisonment for 6 months or longer (paragraph 9.5(4)(b)); or
- has been subject of an order by a Court or the Federal Magistrates Court in relation to a civil remedy provision in connection with the negotiation of a workplace agreement, or a State agreement under a State law (paragraph 9.5(4)(c)); or
- has been convicted of an offence under the Act or the *Criminal Code* (paragraph 9.5(4)(d)).

257. Subregulation 9.5(5) provides that a person who has been excluded from being an agent under subregulations 9.5(2) or (4), may apply to the Court for leave to be appointed as an agent. In granting leave, the Court may impose any conditions or restricts it thinks fit (subregulation 9.5(7)). The Court is also able to revoke its granting of leave, at any time (subregulation 9.5(8)).

Regulation 9.6 – Employee may appoint agent to apply for ballot order – appointment

258. Regulation 9.2 provides special qualifications for agents that are organisations of employees or other incorporated bodies.

Subdivision B – Application for order for protected action ballot to be held

Regulation 9.7 – Material to accompany application

259. Section 453 sets out the material that must accompany an application for a ballot order. Together, paragraph 453(1)(c) and subsection 453(4) require the application to be accompanied by a declaration from the applicant that the proposed industrial action is not to support claims to include prohibited content in the proposed agreement. Subsection 453(5) requires the declaration to be in the form prescribed by the Regulations. Regulation 9.7 prescribes the form of declaration as required by subsection 453(5).

Subdivision C – Secret ballots on proposed protected action

260. The note below the heading to Subdivision C refers to section 493. Section 493 provides for the Regulations to prescribe a number of matters relating to protected action ballots including:

- procedures to be followed in relation to the conduct of a ballot, or class of ballot (paragraph 493(b));
- the qualifications, appointment, powers and duties of scrutineers (paragraph 493(c)); and
- the powers and duties of authorised independent advisors (paragraph 493(d)).

Regulation 9.8 – Notifying employees of ballot

261. Regulation 9.8 provides for employees to be notified of certain information relating to a protected action ballot. The information is intended to ensure that employees are aware that a protected action ballot is to occur and what their rights are in relation to that ballot.

Regulation 9.9 – Information relevant to roll of voters

262. Sections 465 and 466 deal with compiling the roll of voters for a protected action ballot. Subsection 465(1) provides that the Commission may order the employer, the applicant or both to provide a list of employees and other information that may assist in the compilation of the roll of voters. Section 466 requires the Commission to compile the roll of voters or order the authorised ballot agent to do so.

263. Regulation 9.9 provides for how information necessary for compiling the roll of voters must be dealt with. The power for regulation 9.9 arises from paragraph 846(1)(b), which provides for regulations to prescribe matters necessary or convenient to be prescribed for carrying out or giving effect to the Act.

264. Regulation 9.9 is intended to ensure that the roll of voters is accurate while upholding the intention of section 486. Section 486 provides penalties for persons, including authorised ballot agents, who disclose information which could identify certain employees as:

- applying for a ballot order;
- supporting an application for a ballot order;
- being on the roll of voters (and, therefore, likely to be a union member); or
- being party to an AWA.

265. Subregulations 9.9(1), (2) and (3) ensure the accuracy of the information provided for compiling the roll of voters while subregulation 9.9(4) ensures that identities are protected.

Regulation 9.10 – Form of ballot paper

266. Section 474 sets out what must be included in a ballot paper for a protected action ballot. Section 474 also provides that the ballot paper must be in the prescribed

form. Regulation 9.10 provides that a ballot paper for a protected action ballot must be in accordance with Form 1, which is located in Schedule 1 to these regulations.

Regulation 9.11 – Conduct of ballot – access to workplace

267. Regulation 9.11 provides for an authorised ballot agent to gain access to an employer's premises in order to prepare for and conduct a protected action ballot. It is intended that a ballot agent would usually only need access to an employer's premises to display notices under paragraph 9.8(3)(a) or where an attendance ballot is ordered, rather than a postal ballot.

268. Regulation 9.11 provides that an employer commits an offence if the employer does not allow the authorised ballot agent access to the workplace without a reasonable excuse and gives examples of reasonable excuses.

269. Regulation 9.11 is intended to ensure that authorised ballot agents can gain access to workplaces to fulfil their roles. But regulation 9.11 also intends to ensure that authorised ballot agents do not engage in activities beyond those which are necessary for their role, for example to campaign for a particular outcome for the ballot, or to circumvent the Act's right of entry provisions in Part 15 of the Act.

Regulation 9.12 – Directions about ballot paper

270. Regulation 9.12 provides for the authorised ballot agent to provide directions and notes to employees voting in protected action ballot to ensure that those votes comply with these regulations and assist in ensuring that irregularities do not occur.

Regulation 9.13 – Issuing of ballot papers – attendance voting

271. Regulation 9.13 provides for how ballot papers are to be distributed for attendance voting.

Regulation 9.14 – Duplicate ballot papers – attendance voting

272. Regulation 9.14 provides for the issuing of duplicate ballot papers for attendance voting in circumstances where the original ballot has been spoilt.

Regulation 9.15 – Dispatch of ballot papers – postal voting

273. Regulation 9.1 provides for how ballot papers are to be distributed for postal voting.

Regulation 9.16 – Duplicate ballot paper etc – postal voting

274. Regulation 9.16 provides for the issuing of duplicate ballot papers for postal voting in circumstances where the ballot was not received by the member, was lost or destroyed or has been spoilt.

Regulation 9.17 – Manner of voting – postal voting

275. Regulation 9.17 prescribes the manner of voting for postal voting.

Regulation 9.18 – Scrutiny

276. Regulation 9.18 provides for how the authorised ballot agent must conduct the scrutiny of a protected action ballot and determine its result.

Regulation 9.19 – appointment of scrutineers

277. Regulation 9.19 provides that the employer and the applicant or applicants may appoint scrutineers, in writing, to perform the functions listed in regulation 9.22.

Regulation 9.20 – Qualifications of scrutineers

278. Paragraph 493(c) provides for the Regulations to prescribe the qualifications of scrutineers.

279. Regulation 9.20 prescribes the qualifications and appointment of scrutineers.

280. Subregulation 9.20(1) provides that this regulation sets out the qualifications of a person appointed as a scrutineer.

281. Subregulation 9.20(2) provides that a person is excluded from being appointed as a scrutineer if the person has been appointed as a scrutineer for another other party to the agreement.

282. Subregulation 9.20(3) provides that a person is excluded from being appointed as a scrutineer if the person is bankrupt, or is applying to take the benefit of a law for relief of a bankrupt or insolvent debtor or has not attained the age of 18 years.

283. Subregulation 9.20(4) provides that a person is excluded from being appointed or holding an appointment as a scrutineer, for a 5 year period if the person:

- has been convicted of an offence against a Commonwealth, State or Territory law punishable by imprisonment for 1 year or longer (paragraph 9.20(4)(a)); or
- has been convicted of an offence against a Commonwealth, State or Territory law that involves dishonesty and is punishable by imprisonment for 6 months or longer (paragraph 9.20(4)(b)); or
- has been subject of an order by a Court or the Federal Magistrates Court in relation to a civil remedy provision in connection with the negotiation of a workplace agreement, or a State agreement under a State law (paragraph 9.20(4)(c)); or
- has been convicted of an offence under the Act or the *Criminal Code* (paragraph 9.20(4)(d)).

284. Subregulation 9.20(5) provides that a person who has been excluded from being a scrutineer under subregulations 9.20(2) or (4), may apply to the Court for leave to be appointed as a scrutineer. In granting leave, the Court may impose any conditions or restricts it thinks fit (subregulation 9.20(7)). The Court is also able to revoke its granting of leave, at any time (subregulation 9.20(8)).

Regulation 9.21 – Scrutineers – appointment

285. Regulation 9.21 provides special qualifications for agents that are organisations of employees or other incorporated bodies.

Regulation 9.22 – Functions of scrutineers

286. Paragraph 493(c) provides for the Regulations to prescribe the powers and duties of scrutineers.

287. Regulation 9.22 provides scrutineers powers and duties for a protected action ballot. The powers and duties of scrutineers are limited to keep certain employees' identities confidential and avoid the possibility of them suffering negative consequences for:

- applying for a ballot order;
- supporting an application for a ballot order;
- being on the roll of voters (and, therefore, likely to be a union member); or
- being party to an AWA.

Regulation 9.23 – Powers and duties of authorised independent advisers

288. Subsection 480(4) provides that the Commission must appoint an authorised independent adviser if it is satisfied that the person proposed to be the authorised ballot agent is not sufficiently independent of the applicant. Paragraph 493(d) provides that the Regulations may prescribe the powers and duties of authorised independent advisors. Regulation 9.23 sets out these powers and duties.

Division 5 – Industrial action not be engaged in before nominal expiry date of workplace agreement or workplace determination

Regulation 9.24 – Industrial action etc. must not be taking before the nominal expiry date of collective agreement or workplace determination

289. Section 494 provides penalties against persons that take industrial action prior to the nominal expiry date of a collective agreement or workplace determination. Paragraphs 494(7)(d) and 494(8)(e) provide for the Regulations to prescribe additional

persons that have standing to bring an action under section 494. Regulation 9.24 provides certain persons with this standing.

Regulation 9.25 – Industrial action etc. must not be taking before the nominal expiry date of collective agreement or workplace determination

290. Section 495 provides penalties for persons that take industrial action prior to the nominal expiry date of an Australian Workplace Agreement. Paragraphs 494(7)(d) and 494(8)(e) provide for the Regulations to prescribe additional persons that have standing to bring an action under section 494. Regulation 9.25 provides certain persons with this standing.

Regulation 9.26 – Application of the Criminal Code

291. Regulation 9.26 provides that Chapter 2 of the *Criminal Code* applies to civil penalties in Part 9 of these regulations as if those penalties were offences.

Part 10 Awards

Division 2 – Terms that may be included in awards

Subdivision D – Regulations relating to part-time employees

Regulation 10.1 – Award conditions for part-time employees

292. Paragraph 526(1)(b) enables regulations to be made to provide for an award to have effect so that conditions to which a part-time employee is otherwise entitled under the award are adjusted in proportion to the hours worked by the part-time employee.

293. Regulation 10.1 provides for pro-rata award conditions to be applied to certain part-time employees.

294. Subregulation 10.1(1) provides for the application of the regulation in relation to:

- an award that does not provide for part-time employment as a type of employment under the award; or
- an award that provides for part-time employment as a type of employment but limits the application of pro-rata conditions for part-time employees to:
  - a period of part-time employment after parental leave (eg an award term that limited part-time employment to any time from the seventh week after the birth of a child until its second birthday); or
  - a specified class of work.

295. A note under subregulation 10.1(1) makes clear that 'a specified class of work' could be identified in an award by reference to the nature of the work, for example a cleaner or a truck driver, or work within particular classifications, such as those related to clerical office employees.

296. Where an award limits the application of pro-rata conditions to specified part-time employees, the regulation operates so that all other part-time employees outside the class would be affected by the regulation.

297. Regulation 10.1(2) provides for awards to which these arrangements apply to have effect so that an award-reliant part-time employee's entitlements (other than a part-time employee affected by sub-subparagraph 10.1(1)(b)(ii) (A) or (B)) are adjusted in proportion to the hours worked by the part-time employee.

298. Regulation 10.1(3) sets out the principles to be applied in making this pro-rata adjustment.

Division 3 – Preserved award entitlements

299. The regulations in Division 3 address the interaction between an employee's entitlement under a *preserved award term* and the Standard.

300. Subsection 527(2) provides that annual leave, personal/carer's leave and parental leave (among others) are *preserved award terms*. Subsection 529(2) provides that if an employee's entitlement under a preserved award term is more generous than the employee's entitlement to a corresponding matter under the Standard, the employee's preserved award entitlement has effect. Otherwise, the employee's entitlement under the Standard has effect.

301. Whether an entitlement under a preserved award term is 'more generous' than an entitlement under a corresponding matter under the Standard is to be determined either:

- by the Regulations (paragraph 530(1)(a)); or
- if the Regulations do not deal with a matter, in accordance with the ordinary meaning of the term *more generous* (paragraph 530(1)(b)).

302. Regulation 10.3 sets out the circumstances in which preserved award provisions for annual leave, personal/carer's leave and/or parental leave are taken to be more generous than the Standard.

303. Subsection 527(8) enables regulations to be made to ensure that certain specified entitlements – that are dealt with under the Standard - are not encompassed by preserved award terms about personal/carer's leave and parental leave. The effect of this is that the terms of the Standard that deal with these matters apply irrespective of the more generous comparison.

304. These regulations are contained in regulation 10.2.

305. Sections 531 and 532 enable regulations to be made to provide that certain specified forms of leave encompassed by preserved award terms about personal/carer's leave and parental leave are to be treated as separate being about matters. The effect of this is that the matters that are treated as separate continue to operate in awards unaffected by the more generous comparison.

306. These regulations are contained in regulations 10.4 and 10.5.

Regulation 10.2 – Preservation of certain award terms

307. Regulation 10.2 prescribes, for the purpose of subsection 527(8), that parental leave and personal/carer's leave do not include:

- special maternity leave (within the meaning of section 265);
- the entitlement under section 268 to transfer to a safe job or to take paid leave;
- compassionate leave (within the meaning of section 257); and
- unpaid carer's leave (within the meaning of section 244).

308. The effect of excluding the matters listed from the 'more generous' comparison between the preserved award term and the Standard is to ensure that

employees are entitled to the relevant provisions of the Standard. The regulation ensures that the comparison of entitlements for the 'more generous' test does not result in employees losing access to certain elements of the Standard that are not generally part of the award framework. The Notes confirm the effect of excluding these terms from the more generous comparison.

Regulation 10.3 – Meaning of more generous

309. Regulation 10.3 sets out the basis of the 'more generous' test - a comparison of the overall quantum of the entitlement (for example, the number of weeks of paid annual leave or the number of days of paid personal/carer's leave).

310. Subregulation 10.3(1) explains how to determine whether an employee's entitlement under a preserved award term relating to annual leave, personal/carer's leave, or parental leave is more generous than the Standard.

311. Subregulation 10.3(2) provides that the 'more generous' test is based on the comparison between each individual employee's entitlement with the Standard, rather than on a 'global' basis. That is, the test is not determined on the basis of applying preserved award entitlements across a particular workplace – the test focuses on each employee's individual entitlements and determines what is 'more generous' from the perspective of the employee.

312. Subregulation 10.3(3) provides that the 'more generous' test is based on a comparison of the total quantum of entitlements under the preserved award term and the Standard. Where the total quantum of a preserved award term is more generous than the Standard, the whole of the award term applies to the exclusion of the Standard – including any associated administrative arrangements set out in the award relating to that leave entitlement (subregulation 10.3(4)). For example, where the preserved award term for personal/carer's leave is 'more generous' than the Standard, then the terms of the award governing both the amount of entitlement and the rules governing access to the entitlement (like requirements for medical certificates) would apply.

313. The Table sets out examples of how the 'more generous' test is applied in practice. For example, item 3 of the Table provides that a preserved award term providing 52 weeks of unpaid parental leave with a right to request additional leave (one of the outcomes of the Family Provisions Case decision of 8 August 2005) is more generous than the Standard, as the total quantum of parental leave under the preserved award term is potentially greater than the maximum of 52 weeks provided under the Standard.

Regulation 10.4 – Modifications in relation to personal/carer's leave

Regulation 10.5 – Modifications in relation to parental leave

314. Regulations 10.4 and 10.5 provide that aspects of preserved award terms about personal/carer's leave under subsection 531(1) (war service sick leave, infectious diseases sick leave and other like forms of sick leave) and parental leave under subsection 532(1) (paid parental leave) are to be treated as separate matters for the purpose of the 'more generous' test. The effect of this is that these aspects are not included in the 'more generous' comparison (because the Standard does not make provision for these forms of leave) and continue to operate.

315. This is necessary to ensure that, in applying the more generous test (based on overall quantum of entitlement) specific entitlements under the preserved award terms that apply to some employees are not lost. The effect of regulations 10.4 and 10.5 is to ensure that in respect of those matters, there would be no comparable matter against which an assessment with the Standard could be made – meaning that the award entitlement continues to apply.

Division 4 – Award rationalisation and award simplification

Subdivision A – Award rationalisation

Regulation 10.6 – Award rationalisation request to be published

316. Regulation 10.6 provides the requirements related to the publication of an award rationalisation request. These requirements would not prevent the Registrar from

publishing the award rationalisation request in any other manner the Registrar considers appropriate.

Division 6 – Binding additional employers, employees and organisations to awards

Regulation 10.7 – Process for valid majority of employees

317. Regulation 10.7 provides the process for determining whether a valid majority of the employees of an employer, or a class of employees of the employer is found for the purpose of binding additional employers, employees and organisations to awards under Division 6 of Part 10 of the Act. The process for determining a valid majority with respect to the employees of an employer, or a class of employees of an employer, are the same. Each process would require:

- the employees to receive at least 7 days notice to consider the application to be bound by the award; and
- the employer to make copies of the award readily available to the employee for at least the period of the notice (7 days) (this would include making copies available electronically); and
- if the decision is made by vote – a majority of the employees that cast a valid vote decide they want to be bound by the award, or, otherwise – a majority of the employees decide that they want to be bound by the award.

Part 12 – Minimum entitlements of employees

Division 1 – Entitlement to meal breaks

Regulation 12.1 – Displacement of entitlement to meal breaks

318. Regulation 12.1 prescribes that, for paragraph 608(c), the following industrial agreements are prescribed:

- a pre-reform certified agreement (within the meaning of Schedule 7 to the Act);
- a preserved State agreement (within the meaning of Schedule 8 to the Act);
- a transitional award (within the meaning of Schedule 6 to the Act);
- a notional agreement preserving State awards (within the meaning of Schedule 8 to the Act);
- an old IR agreement (within the meaning of Schedule 7 to the Act);
- a pre-reform AWA (within the meaning of Schedule 7 to the Act); or
- a common rule continued in effect by clause 82 of Schedule 6 to the Act.

319. The effect of regulation 12.1 and of paragraph 608(c) is that section 607 (which provides a meal break entitlement to certain employees) will not apply to employees covered by one of the industrial instruments referred to above.

320. This regulation is made pursuant to sections 608 and 846.

Division 4 – Termination of employment

Regulation 12.2 – Interpretation for Division 4

321. Subregulation 12.2(1) prescribes definitions, for the purposes of Division 4 of Part 12 of the Regulations, of the terms *authorised leave* and *industrial instrument*.

322. Other than the addition of the Australian Fair Pay and Conditions Standard, changes in cross-referencing and new terminology, the definition of *authorised leave* is identical to that contained in pre-reform regulation 30A.

323. Subregulation 12.2(2) prescribes that, for the purposes of Division 4 of Part 12 of the Regulations, a word or expression that is defined in the Termination of Employment Convention (contained at Schedule 4 to the Act) has the meaning given by that Convention.

324. This regulation is made pursuant to section 846.

Regulation 12.3 – Specified rate

325. Regulation 12.3 prescribes that the specified rate of remuneration for the purposes of paragraphs 638(6)(b) and 638(7)(b) is $94,900, subject to annual indexation in accordance with regulation 12.6. The effect of regulation 12.3, together with paragraphs 638(1)(f), 638(6)(b) and 638(7)(b), is that an employee whose rate of remuneration is more than $94,900 and who is not employed under *award-derived conditions* (within the meaning of subsection 642(6)) is excluded from the operation of the termination of employment provisions (except for those relating to termination of employment for a reason prohibited by section 659).

326. Other than changes in cross-referencing and the updating of the relevant amount to reflect the indexed amount as at 1 July 2005, this regulation is identical to pre-reform regulation 30BB.

327. This regulation is made pursuant to sections 638 and 846.

Regulation 12.4 – Rate of remuneration per year

328. Regulation 12.4 prescribes the method for calculating an employee's rate of remuneration for the purposes of paragraph 638(7)(b).

329. Other than changes in cross-referencing, this regulation is identical to pre-reform regulation 30BC.

330. This regulation is made pursuant to sections 638 and 846.

Regulation 12.5 – Amount taken to have been received by the employee

331. Regulation 12.5 prescribes that for the purposes of paragraphs 654(11)(b) and 665(3)(b), an employee is taken to have received the remuneration that the employee would ordinarily have received during the period of leave if the employee had not been on leave without pay or without full pay.

332. This regulation differs from pre-reform regulation 30BE in the following ways:

- a reference to paragraph 665(4)(b) is added; and
- changes in cross-referencing.

333. This regulation is made pursuant to sections 654, 665 and 846.

Regulation 12.6 – Annual indexation of certain amounts

334. Regulation 12.6 prescribes a formula for the annual variation of the amounts mentioned in:

- regulation 12.3 ($94,900 as of 1 July 2005);
- paragraph 654(12)(b) ($47,500 as of 1 July 2005); and
- paragraph 665(4)(b) ($47,500 as of 1 July 2005).

335. This regulation differs from pre-reform regulation 30BF in the following ways:

- for regulation 12.3, the base date for calculations is 1 July 2005 instead of 1 July 1996;
- a reference to paragraph 665(4)(b) is added; and
- changes in cross-referencing.

336. The change in base year for the calculation of the amount mentioned in regulation 12.3 is necessary because regulation 12.3 states that the relevant amount is $94,900 as of 1 July 2005 (hence a base date of 1 July 2005 applies), whereas pre-reform regulation 30BB stated the relevant amount as at 1 July 1996.

337. The amounts referred to in paragraphs 654(12)(b) and 665(4)(b) are stated as at 1 July 1996 – therefore for these rates indexing from the base date of 1 July 1996 is still appropriate.

338. This regulation is made pursuant to sections 638, 654, 665 and 846.

Regulation 12.7 – Schedule of costs (Act, s 658)

339. Regulation 12.7 prescribes rules relating to the costs provisions of the Act relating to termination of employment as set out in Schedule 7 to these regulations. It also provides that the Commission may allow for additional costs, for example allowing more than one counsel (subregulation 12.7(2)) or applying the schedule of costs to a person who is not a solicitor (paragraph 12.7(3)(a)).

340. Other than changes in cross-referencing, this regulation is identical to pre-reform regulation 30BG.

341. This regulation is made pursuant to sections 658 and 846.

Regulation 12.8 – Temporary absence because of illness or injury

342. Regulation 12.8 prescribes the conditions which must be satisfied for an employee's absence from work because of illness or injury to be regarded as a temporary absence for the purposes of paragraph 659(2)(a). The effect of regulation 12.8 and paragraph 659(2)(a) is that an employer must not terminate an employee's employment for the reason that, or for reasons including the reason that, the employee is temporarily absent form work because of illness or injury within the meaning of regulation 12.8.

343. This regulation differs from pre-reform regulation 30C in the following ways:

- in paragraph (1)(b), the list of industrial instruments is replaced with the defined term '*industrial instrument*' – this term is defined by regulation 12.2;

- paragraph (1)(c) is inserted, which provides that an employee's absence from work because of illness or injury is a temporary absence if the employee has provided the employer with a *required document* in accordance with section 254;

- pre-reform subregulation 30C(2), which defined *medical certificate* for the purposes of the regulation and *medical practitioner* for the purposes of that definition, is replaced with subregulation 12.8(3) which provides that for the purposes of regulation 12.8 *medical certificate* has the meaning given by section 240; and

- changes in cross-referencing.

344. This regulation is made pursuant to sections 659 and 846.

Regulation 12.9 – Prescribed notice of intended terminations — subsection 660(2) of the Act

345. Regulation 12.9 prescribes that, for subsection 660(2), the prescribed body is Centrelink and the prescribed form is Form 4 of the Regulations (contained in Schedule 1 to the Regulations). The effect of regulation 12.9 and section 660 is that an employer that decides to terminate the employment of 15 or more employees for reasons of an economic, technological, structural or similar nature, or reasons including such reasons, must as soon as practicable after so deciding and before terminating an employee's employment provide to Centrelink a notice in the form of Form 4, setting out the matters in subsection 660(2).

346. Other than changes in cross-referencing, this regulation is identical to pre-reform regulation 30CE.

347. This regulation is made pursuant to sections 660 and 846.

Regulation 12.10 – Required period of notice — exception for serious misconduct

348. Regulation 12.10 prescribes what is included within the meaning of 'serious misconduct' for the purposes of paragraph 661(1)(c), relieving the employer from the obligation to provide notice of termination, or payment in lieu of notice, as required in section 661.

349. Other than changes in cross-referencing, this regulation is identical to pre-reform regulation 30CA.

350. This regulation is made pursuant to sections 661 and 846.

Regulation 12.11 – Required period of notice — ascertaining period of continuous service

351. Regulation 12.11 prescribes what actions and events must be disregarded in ascertaining an employee's period of continuous service, for the purposes of subsection 661(3). This calculation is necessary in determining what period of notice of termination of employment, or what payment in lieu of notice, is required under section 661.

352. This regulation is made pursuant to sections 661 and 846.

Regulation 12.12 – Compensation in lieu of required period of notice — commission or piece rates employees

353. Regulation 12.12 prescribes what amount is taken to be payable under an employee's contract of employment to an employee whose remuneration is determined wholly or partly on the basis of commission or piece rates, for the purposes of paragraph 661(5)(c).

354. Other than changes in cross-referencing, this regulation is identical to pre-reform regulation 30CC.

355. This regulation is made pursuant to sections 661 and 846.

Regulation 12.13 – Inapplicability of section 661 of the Act — succession, assignment or transmission of business

356. Regulation 12.13 prescribes the circumstances in which a termination of employment that occurs because of the succession, assignment or transmission of the business of the employer to another person is excluded from the operation of section 661.

357. Other than changes in cross-referencing, this regulation is identical to pre-reform regulation 30CD.

358. This regulation is made pursuant to sections 661 and 846.

Part 13 – Dispute resolution processes

Division 2 – Model dispute resolution process

Regulation 13.1 – Alternative dispute resolution process — parties cannot agree on a provider

359. This regulation prescribes the information that the Industrial Registrar is required by subsection 696(4) to provide all parties to a dispute upon being notified that those parties are unable to agree on the process through which dispute resolution will be attempted.

Division 3 – Alternative dispute resolution process conducted by Commission under model dispute resolution process

Regulation 13.2 – Dispute resolution processes — application

360. This regulation sets out the form to be used when any of the following applications are made to the Commission:

- under the model dispute resolution process (Division 3 of Part 13 of the Act);
- regarding negotiations for a proposed collective agreement (Division 4 of Part 13 of the Act); and
- in accordance with an alternative dispute resolution process contained in a workplace agreement (Division 5 of Part 13 of the Act).

361. The prescription of a form for the above applications is authorised by paragraphs 699(2)(a), 704(2)(a), and 709(2)(a), respectively. The form prescribed by this regulation (Form 5 – Application to the Commission to have a dispute resolution process conducted) will assist the Commission to determine whether it has jurisdiction to deal with the dispute that is notified in the application. Form 5 is in Schedule 1.

Part 14 Compliance

Division 2 – Penalties and other remedies for contravention of applicable provisions

Regulation 14.1 – Recovery of wages etc – small claims procedure

362. Where a person starts an action under section 720 in a magistrate's court, section 724 provides that if the person indicates in a manner prescribed by regulations that he or she wants a small claims procedure to apply, the action is to be dealt with under section 725. In the absence of rules of court prescribing the manner regulation 14.1 sets out the manner by which a person indicates that he or she wants such a small claims procedure to apply.

Regulation 14.2 – Recovery of small claims under award, order, AWA or certified agreement – maximum amount

363. Section 725 sets out the small claims procedure to be followed in relation to certain small claims actions. Paragraph 725(2)(a) provides that the Court may not award an amount exceeding $5000 or a higher prescribed amount. Regulation 14.2 prescribes the amount of $10000 as the maximum amount.

Part 15 – Right of Entry

Division 1 – Preliminary

Regulation 15.1 – Definitions - OHS law

364. The Work Choices Act imposes additional conditions on Right of Entry for union officials under State and Territory Occupational Health and Safety legislation (an OHS law). Section 737 provides that what constitutes an OHS Law for the purposes of these provisions is to be prescribed by the Regulations.

365. Regulation 15.1 provides the laws that are prescribed for the definition of "OHS law" in section 737.

Division 2 – Issue of Permits

Regulation 15.2 – Issue of permit- form of application

Regulation 15.3 – Issue of permit- form of permit

366. This regulation is made pursuant to paragraph 740(4)(a).

367. Regulation 15.2 provides for the form of an application when, for the purposes of paragraph 740(4)(a), an application for the issue of a permit to an official of an organisation is made.

368. This regulation provides that the application must be in writing, be signed by a member of the committee of management of the organisation or of the appropriate branch of the organisation, state the name of the official in whose name the permit is to be issued and state the capacity in which the person is an official.

369. Regulation 15.3 provides that the form of a permit issued to an official of an organisation is set out in Form 1 in Schedule 1.

Division 3– Expiry, revocation, suspension, etc of permits

Regulation 15.4 – Revocation, suspension etc. by Registrar- application for revocation of a permit

370. This regulation is made pursuant to subsection 744(1).

371. Subsection 744(1) provides that the application for revocation or suspension of a permit or the imposition of conditions on a permit must be made in accordance with the Regulations.

372. Regulation 15.4 sets out the requirements for an application by a workplace inspector under subsection 744(1) for the revocation or suspension of a permit or for the imposition of conditions on the permit.

373. This regulation provides that the application must be made in writing, be signed by the workplace inspector and state the grounds on which the application is made.

Division 4 – Right of entry to investigate suspected breaches

Regulation 15.5 – Exemption from requirement to provide entry notice- form of application

Regulation 15.6 – Exemption from requirement to provide entry notice- form of exemption certificate

374. This regulation is made pursuant to paragraph 750(4)(a).

375. Regulation 15.5 provides, for the purposes of paragraph 750(4)(a), the form that an application by an organisation for an exemption certificate in respect of the entry onto premises under section 747 must take.

376. This regulation provides that the application must be made in writing, identify the organisation, identify the premises to which the application relates, set out particulars of the suspected breach or breaches to which the application relates and state

the grounds on which the allegation is based. It would also provide that the application must be signed by the organisation.

377. Regulation 15.6 provides that the form for an exemption certificate is set out in Form 3 in Schedule 1.

Division 6 – Right of Entry to hold discussions with employees

Regulation 15.7 – Limitation on rights- conscientious objection certificates

378. Regulation 15.7 retains and amends the existing regulation 109D. This regulation is made pursuant to section 846.

379. Regulation 15.7 provides that an application under section 762(2) for a conscientious objection certificate must contain a declaration signed by the employer.

380. This declaration must state that no more than 20 employees are employed to work at the premises and none of the employees employed at the premises is a member of an organisation. It must also state that the employer is a practising member of a religious society or order whose doctrines or beliefs preclude membership of an organisation or body other than the religious society or order of which the employer is a member.

381. The effect of a conscientious objection certificate is that an organisation cannot enter the premises the subject of the certificate.

Division 9 – Powers of the Commission

Regulation 15.8 – Unreasonable requests by occupier or affected employee

382. This regulation is made pursuant to subsection 771(4).

383. Regulation 15.8 provides for the form and content of applications under subsection 771(4) in relation to unreasonable requests by the occupier or affected employer when union officials seek right of entry. The application would be for an

order in respect of the rights of an organisation, or officials of an organisation, to investigate breaches, enter premises under an OHS law or to hold discussions with employees.

384. This regulation provides that the application must be in writing, be signed by an official of the organisation or a permit holder and state the grounds on which the application is made.

Part 19 - Records relating to employees and pay slips

385. Subsection 836(1) provides for the Regulations in relation to the making and retention by employers of records relating to the employment of employees and for the inspection of such records. Subsection 836(2) provides that the Regulations may require employers to issue pay slips to those employees.

Division 1 - Preliminary

386. Division 1 sets out the purpose of Part 19, its operation, and provides for the application of the *Criminal Code* to its civil penalties.

Regulation 19.1 - Purpose of Part

Regulation 19.1 sets out the purpose of Part 19 which is to provide for:

- the making and retention of records by employers relating to the employment of employees (paragraph 19.1(1)(a));
- the inspection of records by workplace inspectors (paragraph 19.1(1)(b));
- issuing pay slips to employees (paragraph 19.1(1)(c));
- civil penalties for contraventions of the record keeping requirements (subregulation 19.1(2)); and
- transitional matters arising out of the reform commencement (subregulation 19.1(3)).

Regulation 19.2 - Operation of Part

387. Regulation 19.2 provides that Part 19 applies to:

- employees and employers within the meaning of subsection 5(1) and 6(1) (paragraph 19.2(1)(a));
- employees and employers within the meaning of section 858 (paragraphs 19.2(2)(a) and 19.2(2)(b));

- employment within the meaning of subsection 7(1) (paragraph 19.2(1)(b)); and

- employment within the meaning of Schedule 6 to the Act (paragraph 19.2(2)(c)).

388. This means that all employers will be required to keep records in accordance with Part 19 if they are within the constitutional coverage of the Act.

389. The note to regulation 19.2 refers the reader to regulation making powers that extend section 836 to Victorian employers and employees within the meaning of section 858, and to transitional employers and employees within the meaning in Schedule 6 to the Act.

Regulation 19.3 - Application of the Criminal Code

390. Regulation 19.3 provides that Chapter 2 of the *Criminal Code* applies to civil penalties in Part 19 as if those penalties were offences.

Division 2 - Rules concerning keeping records

391. Division 2 sets out employers' obligations to make and keep records relating to employees, that these records must show whether the employees' conditions of employment are being complied with, and the form the records must be kept in.

Regulation 19.4 - Obligation to make and keep records relating to employees

392. Regulation 19.4 sets out:

- the obligations on employers to make and keep records relating to employees in accordance with Divisions 3 and 4; and

- how long an entry in a record must be kept for.

393. Subregulations 19.4(3) and 19.4(4) provide that the obligations are subject to a civil penalty and that strict liability applies to the physical elements of the obligations.

394. A note to subregulation 19.4(3) refers the reader to section 6.1 of the *Criminal Code* for the definition of strict liability.

Regulation 19.5 - Records to show whether relevant conditions complied with

395. Subregulation 19.5(1) provides that a record that relates to an employee must be in a condition that allows a workplace inspector to determine the employee's entitlements and whether the employee is receiving those entitlements.

396. Subregulations 19.5(2) and 19.5(3) provide that the obligation is subject to a civil penalty and that strict liability applies to the physical elements of the obligation.

Regulation 19.6 - Form of records

397. Subregulation 19.6(1) provides that a record must be in a legible form in the English language (paragraph 19.6(1)(a)) and in a form that is readily accessible to a workplace inspector (paragraph 19.6(1)(b)).

398. Subregulations 19.6(2) and 19.6(3) provide that the obligations are subject to a civil penalty and that strict liability applies to the physical elements of the obligation.

Division 3 - Contents of records

399. Division 3 sets out the contents that must be contained in records relating to employees.

Regulation 19.7 - Content requirement for records

400. Regulation 19.7 provides that the record relating to the employee must contain the matters specified in the provisions of Divisions 3 and 4 of this Part, to the extent that they apply to the employee.

Regulation 19.8 - Contents of records – general

401. Regulation 19.8 sets out the general content requirements for records relating to employees, including:

- the name of the employer and the employee (paragraphs 19.8(1)(a) and (b));
- the name of each instrument under which the employee derives entitlements of employment (paragraph 19.8(1)(d));
- the classification of the employee under each such instrument (paragraph 19.8(1)(e));
- whether the employee's employment is full-time or part time (subparagraphs 19.8(1)(f)(i) and (ii)) and the number of hours to be worked by the employee per week (paragraph 19.8(1)(g));
- whether the employee's employment is permanent, temporary or casual (subparagraphs 19.8(1)(h)(i), (ii) and (iii));
- the date on which the employee's employment began (paragraph 19.8(1)(i)).

402. Subregulations 19.8(2) and 19.8(3) provide that the content requirements are subject to a civil penalty and that strict liability applies to the physical elements of the requirements.

Regulation 19.9 - Contents of records – hours worked

403. Regulation 19.9 sets out the following content requirements for records with respect to the hours worked by employees:

- the employee's daily starting and finishing times (paragraph 19.9(1)(a));
- the total number of hours worked by the employee during each day (paragraph 19.9(1)(b));
- the employee's nominal hours and any variations to those hours (paragraph 19.9(1)(c)).

404. Subregulations 19.9(2) and 19.9(3) provide that the content requirements are subject to a civil penalty and that strict liability applies to the physical elements of the requirements.

Regulation 19.10 - Contents of records – reasonable additional hours

405. Subregulation 19.10(1) provides that if the employer and employee agree, in writing, to an averaging of the employee's hours or work under section 226, the employer must keep a copy of that agreement.

406. Subregulations 19.10(2) and 19.10(3) provide that the obligation is subject to a civil penalty and that strict liability applies to the physical elements of the obligation.

Regulation 19.11 - Contents of records – pay

407. Regulation 19.11 sets out the contents that records must contain in respect to an employee's pay or remuneration, including:

- the basis on which the employee's rate of pay is determined (paragraph 19.11(1)(a));
- details of any incentive-based payment, bonus, loading, penalty rate or other separately identifiable entitlement that the employee is entitled to (paragraph 19.11(1)(c));
- the period to which the payment relates (paragraph 19.11(1)(d)), the total remuneration received by the employee during that period, including the gross and net amounts (paragraph 19.11(1)(e)) and the dates on which the employee was paid (paragraph 19.11(1)(f));
- the deductions (if any) made from that remuneration and the name of the fund or account into which the deductions were paid (paragraph 19.11(1)(g)).

408. Subregulations 19.11(2) and 19.11(3) provide that the content requirements are subject to a civil penalty and that strict liability applies to the physical elements of the requirements.

Regulation 19.12 - Contents of records– annual leave

Regulation 19.13 - Contents of records – personal leave

Regulation 19.14 - Contents of records – other leave

409. Regulations 19.12, 19.13 and 19.14 set out the type of records that an employer must retain in relation to annual leave, personal leave or other leave (eg parental and long service leave), including:

- the rate of accrual (paragraphs 19.12(1)(a), 19.13(1)(a) and 19.14(1)(b));
- the date on which the employee's leave balance was credited with leave (paragraphs 19.12(1)(b), 19.13(1)(b) and 19.14(1)(c));
- the employee's leave balance (paragraphs 19.12(1)(c), 19.13(1)(c) and 19.14(1)(d)); and
- any amount of leave (and in relation to personal leave, or other leave, the type of leave taken) taken by an employee, including the rate of payment (or in relation to other forms of leave whether the leave is unpaid) (paragraphs 19.12(1)(d), 19.13(1)(d) and 19.14(1)(a)).

410. Subregulation 19.12(2) requires an employer to retain a copy of an employee's written election to forgo an amount of annual leave, in accordance with section 233.

411. Under subregulation 19.12(3), employers must retain additional records for employees who are shift workers for the purpose of the additional annual leave shift workers are entitled to (as defined in section 227). An employer must keep a record of the periods in which the employee was a shift worker, and the date on which the employee was last credited with the additional annual leave entitlement.

412. The above content requirements are subject to a civil penalty and the Regulations make it clear that strict liability applies to the physical elements of the requirements.

Regulation 19.15 - Contents of records – superannuation contributions

413. Regulation 19.15 sets out the contents that a record must contain if the employer is required to make superannuation contributions for the benefit of an employee including:

- the amount of the contributions made (paragraph 19.15(1)(a));
- the period over which the contributions were made (paragraph 19.15(1)(b));
- the dates on which the contributions were made (paragraph 19.15(1)(c));
- the name of any fund to which the contributions were made (paragraph 19.15(1)(d)); and
- the basis on which the employer became liable to make the contributions (paragraph 19.15(1)(e).

414. Subregulations 19.15(2) and 19.15(3) provide that the content requirements are subject to a civil penalty and that strict liability applies to the physical elements of the requirements.

415. Subregulation 19.15(4) provides that an employer does not have to include within the record contributions to a defined benefit superannuation fund within the meaning of the *Superannuation Industry (Supervision) Act 1993.*

Regulation 19.16 – Contents of records – Termination of employment

416. Regulation 19.16 provides that if the employee's employment is terminated, the record relating to the employee must contain information on how the employment was terminated and the name of the person who acted to terminate the employment.

Division 4 – Transmission of business

417. Division 4 deals with the obligations and rights of old and new employers with respect to their record keeping obligations where there is a succession, transmission or assignment (transmission) of a business.

Regulation 19.17 - Transmission of business

418. Regulation 19.17 sets out the record-keeping requirements in relation to a new employer who employs a transferring employee and is a successor, transmittee or assignee of a whole or part of a business of an old employer, including:

- requiring an old employer to give a new employer all records in relation to any transferring employee, which the old employer was required to keep at the time of transmission under these Regulations (subregulation 19.17(2)), or in the case of the Commonwealth, providing copies of those records (subregulation 19.17(3));

- requiring a new employer to request records from an old employer, in relation to a transferring employee that the new employer employs within two months of transmission and requiring an old employer to comply with the request (subregulations 19.17(4) and 19.17(5)); and

- transferring the obligations to keep a transferring employee's records to the new employers (subregulation 19.17(6)).

419. Subregulation 19.17(7) clarifies that a new employer has no obligation to make records in relation to a transferring employee's employment with the old employer.

420. Subregulations 19.17(8) and 19.17(9) provide that the above obligations are subject to a civil penalty and that strict liability applies to the physical elements of the obligations.

421. For the purposes of regulation 19.17, 'transferring employee' has the same meaning as in the Act. The definition also includes a transferring transitional employee (within the meaning of the Act) (paragraph 19.17(1)(b)).

Division 5 – Penalties

422. Division 5 sets out various obligations that an employer has in relation to a record, and prescribes certain conduct that the employer must not do in relation to a record.

Regulation 19.18 - Alteration and correction of a record

423. Regulation 19.18 provides that an employer must:

- not alter a record, or allow a record to be altered, unless he or she does so in accordance with subregulations 19.18(2) and (3).
- correct any error in a record as soon as the employer becomes aware of that error and record the nature of the error when correcting an error.

424. Subregulations 19.18(4) and 19.18(5) provide that the above obligations are subject to a civil penalty and that strict liability applies to the physical elements of the obligations.

Regulation 19.19 - False or misleading entry in a record

425. Subregulation 19.19(1) provides that a person must not make, or make use of, an entry in any record required to be kept under Part 19 if the person does so knowing that the entry is false or misleading.

426. Subregulations 19.19(2) and 19.19(3) provide that the above obligations are subject to a civil penalty and that strict liability applies to the physical elements of the obligations.

Regulation 19.20 - Inspection and copying of a record

427. Regulation 19.20 provides for the inspection and copying of records. Subregulation 19.20(1) provides that an employer must make a copy of a record available on request by an employee, or former employee, to whom the record relates (paragraph 19.20(1)(a)), or a workplace inspector (paragraph 19.20(1)(b)).

428. The regulations also set out the form in which the copy of the record must be and the time frame in which that copy must be made available (subregulations 19.20(2) and (3)).

429. A note to subregulation 19.20(1) refers the reader to Divisions 4 and 5 of Part 15 of the Act which deal with a registered organisation's right to inspect records in relation to employment.

430. Subregulations 19.20(4) and 19.20(5) provide that the above obligations are subject to a civil penalty and that strict liability applies to the physical elements of the obligations.

Regulation 19.21 - Information concerning a record

431. Subregulation 19.21(1) provides that an employer who has received a request to inspect or copy records under regulation 19.20 must tell the person entitled to inspect and copy the records where the records relating to the employee, or a class of employees, are kept.

432. Subregulation 19.21(2) provides that the person may interview the employer, or their representative, at any time during ordinary working hours, about a record made or required to be made by the employer. Subregulation 19.21(3) provides that the employer must give reasonable assistance to the person in the conduct of the interview.

433. Subregulations 19.21(4) and (5) provide that the above obligations are subject to a civil penalty and that strict liability applies to the physical elements of the obligations.

Division 6 – Pay slips

434. Subsection 836(2) provides that the Regulations may require employers of employees to issue pay slips to employees. Division 6 sets out the obligations on employers to issue such pay slips to employees and what must be contained in these pay slips.

Regulation 19.22 - Pay slips – subsection 836(2) of the Act

435. Subregulations 19.22(1) and (2) provide that an employer must issue written pay slips to employees relating to each payment by the employer within 1 day of making the payment to the employee. The pay slips must contain the particulars set out in regulation 19.23 (subregulation 19.22(3)).

436. Subregulations 19.22(4) and (5) provide that the above obligations are subject to a civil penalty and that strict liability applies to the physical elements of the obligations.

Regulation 19.23 - Contents of pay slips

437. Subregulation 19.23(1) sets out the details required in pay slips, including:

- the name of the employer and employee (paragraphs 19.23(1)(a) and (b));
- the classification of the employee under each instrument that the employee derives entitlements of employment (paragraph 19.23(1)(c));
- the date on which the payment to which the pay slip relates was made (paragraph 19.23(1)(d)), and the period to which that pay slip relates (paragraph 19.23(1)(e));
- the employee's hourly rate and the amount paid (subparagraphs 19.23(1)(f)(i) and (iii)) and the number of hours in that period for which the employee was employed at that rate (subparagraph 19.23(1)(f)(ii));

- the gross and net amounts of the payment (paragraphs 19.23(1)(h) and (i));
- any amount paid that is an incentive-based payment, loading, penalty or other separately identifiable entitlement that the employee has (paragraph 19.23(1)(j));
- details of each amount deducted from the gross amount, including the name, or the name and number, of the fund or account into which the deduction was paid (paragraph 19.23(1)(k)); and
- if the employer is required to make superannuation contributions for the benefit of the employee, the record must state the amount of each contribution made during the period to which the pay slip relates (subparagraph 19.23(1)(l)(i)) and the name of any fund to which that contribution was made (subparagraph 19.23(1)(l)(ii)).

438. Subregulations 19.23(2) and (3) provide that the above obligations are subject to a civil penalty, and that strict liability applies to the physical elements of the obligation.

439. Subregulation 19.23(4) provides that an employer does not have to include within the record contributions to a defined benefit superannuation fund within the meaning of the *Superannuation Industry (Supervision) Act 1993.*

Division 7 - Contravention of civil remedy provisions

440. Division 7 outlines the consequences of contravening a civil remedy provision under Part 19 of the Regulations, and provides for workplace inspectors to have standing to commence proceedings for a contravention before the Court or the Federal Magistrates Court.

Regulation 19.24 - Standing for civil remedies

441. Regulation 19.24 provides that a workplace inspector may apply to the Court or the Federal Magistrates Court for an order under regulation 19.25 for a contravention of a civil penalty provision if the contravention occurs on or after 20 September 2006. This means that an employer will not be liable to a penalty for contravention of Part 19 of the Regulations between reform commencement and 20 September 2006.

Regulation 19.25 - Court may order pecuniary penalty

442. Regulation 19.25 provides that the Court or the Federal Magistrates Court may order a person who contravened a civil penalty provision of Part 19 to pay a maximum penalty of:

- 5 penalty units – in the case of an individual (paragraph 19.25(a)); or
- 25 penalty units – in the case of a body corporate (paragraph 19.25(b)).

Regulation 19.26 - Crown not liable to penalty for contravention of civil remedy provision

443. Regulation 19.26 provides that the Crown in right of the Commonwealth, a State or a Territory is not liable to proceedings for a contravention of a civil remedy provision in this Part.

Division 8 - Transitionals

444. Division 8 sets out the transitional arrangements that apply following the repeal of Parts 9A and 9B of the pre-reform Regulations. This division details the effect of the repeal of the pre-reform Regulations, the application of the Regulations after a transitional award ceases to operate, and the continued operation of certificates issued under regulations 131P and 131PA of the pre-reform Regulations.

Regulation 19.27 - Effect of repeal of pre-reform Regulations

445. Regulation 19.27 provides that the repeal of Parts 9A and 9B of the pre-reform Regulations does not affect:

- a right under those Parts which accrued before the reform commencement (paragraph 19.27(1)(a)); and

- a cause of action under those Parts which had not been finally determined before the reform commencement (paragraph 19.27(1)(b)).

446. This regulation ensures that:

- the penalty provisions specified in Parts 9A and 9B of the pre-reform Regulations continue to apply in relation to a failure to make or keep a record that was required to be made or kept under that Part (paragraphs 19.27(2)(a) and 19.27(3)(a));

- a record that was required to be kept for a period of time under that Part is retained for the relevant period of time (paragraph 19.27(2)(b)); and

- a workplace inspector has the powers set out in Part IV of the pre-reform Regulations in respect of the offence provisions specified in Parts 9A and 9B of the pre-reform Regulations (paragraphs 19.27(2)(c) and 19.27(3)(b)).

Regulation 19.28 - Application of provisions after transitional award ceases to operate

447. Regulation 19.28 provides that after a transitional award ceases to be in force, Part IV and Parts 9A and 9B of the pre-reform Regulations are taken to continue to apply to the extent necessary to ensure that:

- a record that was required to be kept for a period of time under that Part of the pre-reform Regulations is retained for the relevant period of time (paragraph 19.28(1)(a));

- the penalty provisions specified in Part 9A and 9B of the pre-reform Regulations continue to apply in relation to records made before the reform commencement, a failure to keep those records or requirement in relation to pay slips (paragraphs 19.28(1)(b) and 19.28(2)(a)); and

- a workplace inspector has the powers set out in Part IV of the pre-reform Regulations in respect of the offence provisions specified in Parts 9A and 9B of the pre-reform Regulations (paragraphs 19.28(1)(c) and 19.28(2)(b)).

448. Subregulation 19.28(3) provides that for the purposes of this regulation, transitional award has the meaning given in Division 2 of Schedule 6 to the Act.

Regulation 19.29 - Certificates issued under repealed regulations

449. Subregulation 19.29(1) provides that a certificate issued by the Commission or the Employment Advocate under regulations 131P or 131PA of the pre-reform Regulations before the reform commencement in relation to a pre-reform award, pre-reform certified agreement, a pre-reform AWA, an old IR agreement or a transitional award has effect for a period of six months from reform commencement or, if the pre-reform award, the pre-reform certified agreement, pre-reform AWA, old IR agreement or transitional award operates for a lesser period than six months from reform commencement– for that lesser period.

450. Subregulation 19.29(2) provides that at the end of the period for which the certificate has effect, the certificate ceases to operate and the requirements of Part 19 of the Regulations apply. For example, a particular pre-reform award may be revoked within six months after reform commencement and any certificate issued before the reform commencement in relation to that pre-reform award would cease to have effect at the time the pre-reform award is revoked. Persons bound by the pre-reform award that had previously relied on satisfying only the award record keeping requirements because of a certificate issued under regulation 131P of the pre-reform Regulations must satisfy the new record keeping requirements contained in Part 19 of the Regulations.

451. Subregulation 19.29(3) provides that the extended meaning of ‘record’ under regulation 131Q of the pre-reform Regulations continues to have effect for the period that a certificate issued under regulation 131P or 131PA of the pre-reform Regulations has effect.

452. Subregulation 19.29(4) references the meaning of an old IR agreement, pre-reform award, pre-reform AWA, pre-reform certified agreement and transitional award for the purpose of regulation 19.29.

Part 19A - Record-keeping – contract outworkers in Victoria in the textile, clothing and footwear industry

453. Part 19A prescribes record keeping requirements relating to contract outworkers in the textile, clothing and footwear industry in Victoria, within the scope of Part 22 of the Act.

454. The regulations in Part 19A are made pursuant to sections 846 and 913.

Division 1 – Preliminary

Regulation 19.30 – Operation of Part

455. Regulation 19.30 provides that Part 19A of the Regulations deals with record keeping requirements in relation to contract outworkers in the Victorian textile, clothing and footwear industry, within the scope of Part 22 of the Act.

456. In addition, regulation 19.30 provides that Part 19A of the Regulations provides civil penalties for contraventions of the Part.

Regulation 19.31 – Application of Part

457. Regulation 19.31 is an application provision. It provides that Part 19A of Chapter 2 of the Regulations apply to a person who is a party to a contract of services referred to in subsection 905(1) and who is obliged to pay for work carried out under the contract of services. Such a person is called a ***record keeper***. The work referred to is ***contract work*** within the meaning of subsection 905(1).

458. A note tells the reader that subregulations 19.27(2) and (3) apply to a record keeper who was required to keep records under Division 4 of Part 9A of the pre-reform Regulations.

Division 2 - Records

Regulation 19.32 – Obligation to make and keep outworker records relating to contract work

459. Subregulation 19.32(1) requires a record keeper to make outworker records in accordance with this Division. A record keeper must keep the records for seven years after the latest of the following dates:

- the date on which the entry is made (paragraph 19.32(2)(a));
- the date on which the entry is changed (paragraph 19.32(2)(b)); or
- the date on which payment is made to the contract outworker for the contract work (paragraph 19.32(2)(c)).

460. Subregulations 19.32(3) and (4) provide that the above obligations are subject to a civil penalty, and that strict liability applies to the physical elements of the obligations.

Regulation 19.33 - Form of outworker record

461. Regulation 19.33 provides that, even if the Regulations do not prescribe a particular record requirement, all outworker records must be kept in a form that would enable a workplace inspector to determine whether the payment made to the contract outworker complies with the Act.

462. Subregulation 19.33(1) provides that an outworker record relating to contract work must be in a condition that allows an inspector to ascertain whether the payment made to the contract outworker complies with the Act.

463. Subregulation 19.33(2) provides that records must be in a legible form in the English language, and in a form that is readily accessible to a workplace inspector.

464. Subregulations 19.33(3) and (4) provide that the above obligations are subject to civil penalties, and that strict liability applies to the physical elements of the obligations

Regulation 19.34 - Contents of outworker record - general

465. Regulation 19.34 provides that an outworker record must contain a number of specified particulars, including:

- the name of the record keeper and contract outworker (paragraphs 19.34(1)(a) and 19.34(1)(b));
- the name of any individual who is not a party to the contract, who performs the contract work (paragraph 19.34(1)(c)); and
- details of the contract work performed, including starting and completion dates (paragraphs 19.34(1)(d), 19.34(1)(e) and 19.34(1)(f)).

466. Subregulations 19.34(2) and (3) provide that the above obligations are subject to a civil penalty and that strict liability applies to the physical elements of the obligations.

Regulation 19.35 - Contents of outworker record - payments to contract outworker

467. Regulation 19.35 provides that the outworker record must contain a number of specified particulars relating to payment for the contract work, including:

- the contract price for the work (paragraph 19.35(1)(a));
- the rate or basis at which the price for the work is determined (paragraph 19.35(1)(b));
- the hours worked in relation to the contract work, if the record keeper knows (paragraph 19.35(1)(c));
- the amount paid for the contract work (paragraph 19.35(1)(d));
- the dates of those payments (paragraph 19.35(1)(e)); and
- the name of the account into which the payments were made (paragraph 19.35(1)(f)).

468. Subregulations 19.35(2) and (3) provide that the above obligations are civil penalties and that strict liability applies to the physical elements of the obligations.

Division 3 - Transmission of business

469. These regulations are made pursuant to sections 846 and 913.

Regulation 19.36 - Transmission of business

470. Regulation 19.36 provides for the transfer of outworker records, upon the succession, transmission or assignment of the business, or part of the business, for which contract work was performed by a particular contract outworker. The party to the contract for services, referred to in subsection 905(1), who is obliged to pay for the work before the succession, transmission or assignment is called the ***old record keeper***. The party to the contract for services referred to in subsection 905(1), who is obliged to pay for the work after the succession, transmission or assignment is called the ***new record keeper***.

471. Regulation 19.36 provides that the old record keeper must transfer to the new record keeper all outworker records relating to the particular contract outworker, and the new record keeper must retain the outworker records and comply with all other obligations that would apply if the outworker records had originally been made by the new record keeper. Other than retaining the transferring records and fulfilling those other obligations, the new record keeper is not required to make new outworker records relating to work performed for the old record keeper.

472. If the old record keeper is a Commonwealth authority, the old record keeper complies with its obligations under this regulation by providing a copy of the outworker records to the new record keeper (subregulation 19.36(3)). This subregulation is made to ensure consistency with the *Archives Act 1983*, which contains retention requirements for certain documents held by Commonwealth authorities.

473. Subregulations 19.36(6) and (7) provide that the above obligations are subject to a civil penalty, and strict liability applies to the physical elements of those obligations.

Division 4 - Penalties

Regulation 19.37 - Alteration and correction of outworker records

474. Subregulation 19.37(1) provides that a record keeper must not alter, or allow to be altered, an outworker record except to correct an error in an outworker record. The record keeper must correct an outworker record as soon as the record keeper becomes aware of the error and must also record the nature of the error (subregulations 19.37(2) and (3)).

475. Subregulations 19.37(4) and (5) provide that the above obligations are subject to civil penalties, and that strict liability applies to the physical elements of the obligations.

Regulation 19.38 - False or misleading entry in an outworker record

476. Regulation 19.38 provides that a person must not make an entry in an outworker record, or make use of an entry in an outworker record, if the person does so knowing that the entry is false or misleading (subregulation 19.38(1)).

477. Subregulations 19.38(2) and 19.38(3) provide that the obligation is subject to a civil penalty, and that strict liability applies to the physical elements of the obligation.

Regulation 19.39 - Inspection and copying of outworker record

478. Regulation 19.39 provides for the inspection and copying of records. The regulation provides that a record keeper must make a copy of a record available on request by a contract outworker to whom the record relates, or to a workplace inspector (subregulation 19.39(1)). The regulation also sets out the form in which the copy of the record must be and the time frame in which that copy must be made available (subregulations 19.39(2) and (3)).

479. Subregulations 19.39(4) and (5) provide that the above obligations are subject to civil penalties and that strict liability applies to the physical elements of the obligations.

Regulation 19.40 - Information concerning outworker records

480. Subregulation 19.40(1) requires a record keeper to tell a person who makes a request under regulation 19.39 where the relevant outworker records are kept.

481. Subregulation 19.40(2) provides that the person may interview the record keeper, or their representative, at any time during ordinary working hours, about a record made or to be made by the record keeper. Subregulation 19.40(3) provides that the record keeper must give reasonable assistance to the person in the conduct of the interview.

482. Subregulations 19.40(4) and 19.40(5) provide that the obligations in subregulations 19.40(1), 19.40(2) and 19.40(3) are subject to a civil penalty and that strict liability applies to the physical elements of the obligations in subregulations 19.40(1) and 19.40(2).

Division 5 - Contravention of civil remedy provisions

483. Division 5 provides machinery provisions for the enforcement of civil remedy provisions relating to the making and retention of outworker records.

Regulation 19.41 - Standing for civil remedies

484. Regulation 19.41 provides that a workplace inspector may apply to the Court or the Federal Magistrates Court, for orders under regulation 19.42, which relate to the enforcement of civil remedy provisions relating to the making and retention of outworker records.

Regulation 19.42 - Standing for civil remedies

485. Regulation 19.42 provides that the Court or the Federal Magistrates Court may order a person who contravened a civil remedy provision in Part 19A to pay a maximum penalty of:

- 5 penalty units – in the case of an individual (paragraph 19.42(a)); or
- 25 penalty units – in the case of a body corporate (paragraph 19.42(b)).

Regulation 19.43 - Crown not liable for contravention of civil remedy provision

486. Regulation 19.43 sets out that the Crown in right of the Commonwealth, a State or a Territory is not liable to proceedings for a contravention of a civil remedy provision in this Part.

Part 19B - Infringement notices

487. Subsection 846(7) provides that the Regulations may make provisions which allows for a person who is alleged to have contravened a civil remedy provision, which consists of or includes a pecuniary penalty, to pay to the Commonwealth a specified penalty, as an alternative to defending court proceedings. In accordance with this subsection, Part 19B sets out an infringement notice scheme for contraventions of the record keeping and payslip requirements set out in Part 19.

Division 1 - Preliminary

Regulation 19.44 - Purposes of Part

488. Subregulation 19.44(1) provides that the purpose of the Part is to set up a system of infringement notices for alleged contraventions of infringement notice penalties (as defined in regulation 19.45), as an alternative to the institution of proceedings.

489. Where an alleged contravention of an infringement notice penalty has occurred, subregulation 19.44(2) provides that Part 19B does not:

- require an infringement notice to be issued to a person for an alleged contravention of an infringement notice penalty (paragraph 19.44(2)(a));
- affect the liability of a person to proceedings for contravention of an infringement notice penalty if an infringement notice is not issued to the person for the alleged contravention (paragraph 19.44(2)(b));
- prevent 2 or more infringement notices being issued to a person for an alleged contravention (paragraph 19.44(2)(c));
- affect the liability of a person to proceedings for the contravention of an infringement notice penalty if the person does not comply with an infringement notice (paragraph 19.44(2)(d)); or

- limit or otherwise affect the penalty that may be imposed a court on a person for a contravention (paragraph 19.44(2)(e)).

Regulation 19.45 - Definitions

490. Regulation 19.45 sets out the definitions for Part 19B.

491. Subregulation 19.45(2) provides that an infringement notice penalty is one which is a civil penalty provision in Part 19 or Part 19A and to which strict liability applies to the physical elements of that provision.

Division 2 - Infringement notices

492. Division 2 sets out the details of the infringement notice scheme including:

- when an infringement notice penalty can be issued;
- the required contents of an infringement notice;
- the penalty that can be specified for an alleged contravention of an infringement notice penalty;
- when the penalty must be paid by;
- how an extension of time to pay the penalty can be sought;
- the effect of paying the penalty;
- how a person issued with an infringement notice can seek to have an infringement notice withdrawn; and
- that any penalty paid before an infringement notice is withdrawn must be refunded.

Regulation 19.46 - When an infringement notice can be given

493. Regulation 19.46 sets out the circumstances in which a workplace inspector can issue an infringement notice. It provides that a workplace inspector can issue an

infringement notice if he or she has reasonable grounds to believe that a person has contravened an infringement notice penalty (subregulation 19.46(1)).

494. A workplace inspector must issue an infringement notice within 12 months after the alleged contravention took place (subregulation 19.46(2)).

495. Subregulation 19.46(3) provides that 2 or more infringement notices cannot be issued to a person for contraventions of an infringement notice penalty that are alleged to have occurred on the same day.

496. Subregulation 19.46(4) provides that a workplace inspector may only issue an infringement notice in respect of a contravention that occurs on or after 20 September 2006.

Regulation 19.47 - Contents of infringement notice

497. Subregulation 19.47(1) sets out the content requirements of an infringement notice, including:

- the name of the workplace inspector who issued it (paragraph 19.47(1)(a));
- the date it is issued on (paragraph 19.47(1)(b));
- the full name, or the surname and initials, and the address, of the person alleged to have contravened the infringement notice penalty (the recipient) (paragraph 19.47(1)(c));
- brief details of the alleged contravention for which it is issued, including the regulation allegedly contravened (paragraph 19.47(1)(d));
- the penalty for the alleged contravention payable under the notice (paragraph 19.47(1)(e));
- how the penalty can be paid (paragraph 19.47(1)(f));

- the effect of paying the penalty within the time required (as set out in regulation 19.51) (paragraph 19.47(1)(g));
- the maximum penalty that the Court or the Federal Magistrates Court could impose on the recipient for the alleged contravention (paragraph 19.47(1)(h));
- to whom the recipient can apply (the nominated person) to have the notice withdrawn or be allowed more time to pay the penalty (paragraph 19.47(1)(i)); and
- the signature of the workplace inspector who issued the notice (paragraph 19.47(1)(j)).

498. Subregulation 19.47(2) provides that an infringement notice can contain any other information that the workplace inspector who issues it thinks is necessary.

Regulation 19.48 - Amount of penalty if infringement notice issued

499. Paragraph 846(2)(h) provides that civil penalties for contraventions of the Regulations must not exceed 5 penalty units for an individual, and 25 penalty units for a body corporate. Regulation 19.48 provides that the penalty for an alleged contravention payable under an infringement notice is:

- for an individual - one-tenth of the maximum penalty that the Court or the Federal Magistrates Court could impose for the contravention (paragraph 19.48(a)); or
- for a body corporate – one-tenth of the maximum penalty that the Court or the Federal Magistrates Court could impose for the contravention (paragraph 19.48(b)).

Regulation 19.49 - Time for payment of penalty

500. Paragraph 19.49(a) provides that an infringement notice penalty must be paid within 28 days after the day on which the notice is served on the recipient.

501. If the recipient applies for an extension of time to pay the penalty under regulation 19.50, and the extension is granted, the recipient must pay the penalty within the time allowed by the extension (paragraph 19.49(b)). If the recipient's application for an extension of time to pay is refused, the recipient must pay the penalty within 7 days after the notice of the refusal is served on the recipient (paragraph 19.49(c)).

502. If the recipient applies to have the infringement notice withdrawn in accordance with regulation 19.52, and the application is refused, the recipient must pay the penalty within 28 days after the notice of the refusal is served on the person (paragraph 19.49(d)).

Regulation 19.50 - Extension of time to pay penalty

503. Regulation 19.50 sets out the procedure by which the recipient of an infringement notice may apply in writing for an extension of time to pay the specified penalty.

Regulation 19.51 - Effect of payment of penalty

504. Regulation 19.51 provides that if the infringement notice is not withdrawn, and the recipient pays the penalty:

- any liability of the recipient for the alleged contravention is discharged (paragraph 19.51(a));
- no proceedings can be brought for the alleged contravention (paragraph 19.51(b));
- the recipient is not taken to have admitted guilt in respect of the alleged contravention (paragraph 19.51(c)); and
- the recipient is not taken to have been convicted of the contravention (paragraph 19.51(d)).

Regulation 19.52 - Withdrawal of infringement notice

505. Regulation 19.52 sets out the procedure under which an infringement notice can be withdrawn after it has been issued.

506. Subregulations 19.52(1) and 19.52(2) provides that a recipient of an infringement notice may apply to have the notice withdrawn.

507. Subregulation 19.52(3) makes it clear that if the nominated person has not approved, or refused to approve the withdrawal of the notice in accordance with subregulation 19.52(2), the application for withdrawal is taken to have been refused.

508. Subregulation 19.52(4) provides that a workplace inspector can withdraw an infringement notice without an application having been made.

Regulation 19.53 - Notice of withdrawal of infringement notices

509. Regulation 19.53 provides that a notice withdrawing an infringement notice must be served on the recipient and must:

- include the full name, or surname and initials, and address of the recipient (subparagraph 19.53(a)(i));
- include the date of issue of the infringement notice (subparagraph 19.53(a)(ii)); and
- state that the notice is withdrawn (paragraph 19.53(b)).

Regulation 19.54 - Refund of penalty

510. Regulation 19.54 provides for the refund of an infringement notice penalty by the Commonwealth if the penalty was paid and the infringement notice is subsequently withdrawn.

Part 21 – Matters referred by Victoria

Regulation 21.1 - Additional effect of Act — workplace agreements (related provisions)

511. Regulation 21.1 prescribes that the following provisions of the Act are *related provisions* for the purposes of section 869, in so far as they apply or refer to a *workplace agreement*, an *AWA* or a *collective agreement* (as defined by section 4):

- section 17;
- paragraph 120(1)(e);
- paragraph 120(3)(f);
- section 151;
- section 152;
- section 165;
- section 166;
- section 169;
- subsection 172(2);
- section 173;
- paragraph 174(4)(c);
- paragraph 174(5)(c);
- Part 13;
- Part 14;

- Part 15, subject to the limitations provided by section 882;
- section 831; and
- section 844.

512. This regulation is made pursuant to sections 846 and 869.

Regulation 21.2 - Workplace agreements — mandatory term about basic periodic rate of pay

513. Regulation 21.2 prescribes the method for determining the relevant rate of pay for the purposes of paragraph 870(2)(b), if the circumstances set out in subparagraphs 870(2)(b)(i) and (ii) are satisfied. This rate of pay is relevant to the mandatory term that must be included in every *workplace agreement* that applies to an *employee* and *employer* in Victoria (within the meaning of section 858).

514. For a junior employee, employee with a disability or employee to whom a training arrangement applies, the relevant rate of pay or method of calculation will be:

- if a *transitional award* (within the meaning of clause 2 of Schedule 6 to the Act) would, but for the existence of the *workplace agreement*, apply to the *employment* of that *employee* (within the meaning of section 858), and if that *transitional award* provides a rate of pay or method of calculation that would apply to the *employee* – that rate of pay or method of calculation;
- if the circumstances in the preceding paragraph do not apply, then the rate of pay or method of calculation set out in any relevant special FMW under subsection 194(2), (3) or (4) that would apply to the *employee* if he or she were an *employee* within the meaning of subsection 5(1).

515. If an employee is covered by more than one of the relevant factors, the following rates will apply:

- for a junior employee who also is an employee with a disability: the rate or method for employees with a disability will apply; or
- for a junior employee who also is an employee to whom a training arrangement applies: the rate or method for employees to whom a training arrangement applies will apply; or
- for a junior employee who also is an employee with a disability and to whom a training arrangement applies: the rate or method for employees with a disability will apply; or
- for an employee with a disability to whom a training arrangement applies: the rate or method for employees with a disability will apply.

516. This regulation is made pursuant to sections 846 and 870.

Regulation 21.3 - Relationship between employment agreements and Australian Fair Pay and Conditions Standard

517. Regulation 21.3 prescribes, for the purposes of section 896, certain matters in relation to whether an *employment agreement* (within the meaning of section 887) provides a more favourable outcome for an *employee* (within the meaning of section 887) than the Standard.

518. This regulation will apply in a similar way to regulation 7.1 of Chapter 2 of these Regulations, relating to whether a *workplace agreement* (within the meaning of section 4) or contract of employment provides a more favourable outcome for an *employee* (within the meaning of subsection 5(1)).

This regulation is made pursuant to sections 846 and 896.

Part 22 – Contract outworkers in Victoria in the textile, clothing and footwear industry

Division 2 – New Commonwealth provisions

Regulation 22.1 - Plaintiffs may choose small claims procedure in magistrates courts — small claims procedure

519. Regulation 22.1 prescribes the manner in which a person who is a contract outworker in the textile, clothing and footwear industry in Victoria and who has commenced a proceeding under section 908 in a magistrates court may indicate, for the purposes of subsection 911(1), that he or she wants a small claim procedure to apply to the magistrates court proceeding, unless the court's rules prescribe a manner for indicating that he or she wants a small claims procedure to apply.

520. Subregulation 22.1(1) provides that the person may indicate he or she wants a small claims procedure to apply to the proceeding by:

- endorsing the papers initiating the proceeding with a statement that he or she wants the small claims procedure to apply (subparagraph 22.1(1)(a)(i)); or
- lodging with the magistrates court a paper that identifies the proceeding and states that he or she wants a small claims procedure to apply (subparagraph 22.1(a)(ii))

521. The person initiating the small claims procedure must also give a copy of the papers initiating the proceeding and any paper referred to in subparagraph 22.1(1)(a)(ii) to every other party to the proceeding (paragraph 22.1(1)(b)).

522. Subregulation 22.1(2) provides that subregulation 22.1(1) does not apply if rules of a magistrates court in which the proceeding has been brought prescribe the manner in which the person indicates that he or she wants a small claims procedure to apply to the action.

523. This regulation is made pursuant to sections 846 and 911.

Regulation 22.2 – Plaintiffs may choose small claims procedure in magistrates courts - maximum amount

524. Regulation 22.2 provides, for the purposes of subsection 911(2), the prescribed maximum amount that can be recovered by a contract outworker in the textile, clothing and footwear industry in Victoria using a small claims procedure is $10,000.

525. Other than a change in cross-referencing, this regulation is in the same terms as pre-reform regulation 32AC.

526. This regulation is made pursuant to sections 846 and 911.

Chapter 3– Transitional arrangements for parties bound by federal awards

Part 3 – Powers and procedures of the Commission for dealing with industrial disputes

Division 2 – Variation and revocation of transitional awards

Regulation 3.1 – Variation of transitional awards – dealing with industrial dispute

527. Subclauses 29(3) and (4) of Schedule 6 to the Act provide for regulations to be made with respect to certain terms of a transitional award. These regulations specify the matters and the circumstances within which the Commission may vary a transitional award with respect to rates of pay for part-time transitional employees, junior transitional employees or transitional employees to whom training arrangements apply.

528. Regulation 3.1 provides that the Commission may, if it considers it appropriate, vary a transitional award about any of the allowable transitional award matters in subclause 17(1) of Schedule 6 to the Act in respect of rates of pay for part-time transitional employees, junior transitional employees or transitional employees to whom training arrangements apply. However, this is only where:

- the Commission is, for the first time, introducing rates of pay into a transitional award for a class of part-time transitional employees; and
- the transitional award does not already specify the basis on which the conditions of the award are to apply to the class of part-time transitional employees.

Part 7 – Matters relating to Victoria

Division 1 – Matters referred by Victoria

Subdivision A - Introduction

Regulation 7.1 – Definitions for Part 7

529. Regulation 7.1 provides that, for Part 7 of Chapter 3 of the Regulations, ***employee*** has the meaning provided by section 858.

Subdivision B – Industrial disputes

Regulation 7.2 - Industrial disputes — prescribed laws of Victoria

530. Regulation 7.2 prescribes that, for the purposes of subclause 75(2) of Schedule 6 to the Act, the following laws of Victoria are prescribed:

- the *Police Regulation Act 1958* (Vic); and
- all regulations, standing orders and instructions made or issued under that Act.

531. The effect of regulation 7.2, together with subclause 75(2) of Schedule 6 to the Act, is that the *Police Regulation Act 1958* (Vic) and all regulations, standing orders and instructions made or issued under that Act will prevail to the extent of any inconsistency with a *transitional Victorian reference award* (within the meaning of clause 73 of Schedule 6 to the Act) in respect of an *industrial dispute* (within the meaning of subclause 75(1) of Schedule 6 to the Act) concerning employment in the Victorian public sector.

532. This regulation is made pursuant to section 846 and clause 75 of Schedule 6 to the Act.

Subdivision D – Preserved transitional award terms – transitional Victorian reference awards

Regulation 7.3 - Preserved transitional award terms

Regulation 7.4– Meaning of *more generous*

Regulation 7.5 – Modifications in relation to personal/carer's leave

Regulation 7.6 – Modifications in relation to parental leave

533. Subdivision D prescribes how the *preserved transitional award terms* and *more generous* provisions in Subdivision D of Division 1 of Part 7 of Schedule 6 to the Act apply to *transitional Victorian reference awards* (within the meaning of clause 73 of Schedule 6 to the Act). These regulations will apply in a similar way to the Regulations at Division 3 of Part 10 of Chapter 2 of these Regulations relating to the *preserved award terms* in Division 3 of Part 10 of the Act. The regulations would ensure that if an employee's preserved transitional award provisions for annual leave, personal/carer's leave and/or parental leave are *more generous* than the Standard, the employee would continue to receive the transitional award entitlement.

534. These regulations are made pursuant to section 846 and Subdivision D of Division 1 of Part 7 of Schedule 6 to the Act.

Subdivision E – Common Rules

Regulation 7.7 - Proposed variation of common rules — notice of hearing by the Commission

535. Regulation 7.7 prescribes the requirements for the giving of notice under subclause 85(2) of Schedule 6 to the Act in relation to an application to vary a *transitional award* that is a common rule in Victoria for an industry.

536. The effect of regulation 7.7 is that the Registrar must give notice of a hearing in respect of an application to vary a *transitional award* that is a common rule in Victoria for an industry to:

- the person or organisation (if any) that made an application for the variation of the term;
- the Victorian Employers' Chamber of Commerce and Industry;

- the Australian Council of Trade Unions;
- the Australian Industry Group;
- the Victorian Trades Hall Council; and
- any other person or organisation that the Commission considers appropriate.

537. Further, the effect of regulation 7.7 is that the notice provided by the Registrar must be in accordance with the approved form and given by serving a copy of the notice on the relevant person or body.

538. This regulation is made pursuant to section 846 and clause 85 of Schedule 6 to the Act.

Regulation 7.8 - Publication of a notice inviting objections to a variation

539. Regulation 7.8 prescribes the requirements for the publishing of a notice under subclause 85(3) of Schedule 6 to the Act (or subsection 142(4) of the pre-reform Act as it continues to apply because of clause 84 of Schedule 6 to the Act), inviting persons or organisations to lodge a notice of objection to the variation of a *transitional award* that is a common rule in Victoria for an industry binding that person or organisation.

540. The effect of regulation 7.8 is that the Registrar must publish the relevant notice:

- in the approved form;
- in the *Gazette*;
- in a newspaper or newspapers circulating in Victoria; and
- in any other publication circulating in Victoria that the Commission considers appropriate.

541. This regulation is made pursuant to section 846, clause 85 of Schedule 6 to the Act, and section 142 of the pre-reform Act (as that section is saved by clause 84 of Schedule 6 to the Act).

Regulation 7.9 - Notice of declaration that a variation is not binding on the organisation or person

542. Regulation 7.9 prescribes the requirements for the publishing of a notice under subclause 85(5) of Schedule 6 to the Act (or subsection 142(6) of the pre-reform Act as it continues to apply because of clause 84 of Schedule 6 to the Act), publishing the details of a declaration that a variation to a *transitional award* that is a common rule in Victoria for an industry is not binding on a particular person or organisation.

543. The effect of regulation 7.9 is that the Registrar must publish the relevant notice:

- in the approved form; and
- in the *Gazette*.

544. This regulation is made pursuant to section 846, clause 85 of Schedule 6 to the Act, and section 142 of the pre-reform Act (as that section is saved by clause 84 of Schedule 6 to the Act).

Division 2 – Other matters

Subdivision B – Preserved transitional award terms – transitional awards (other than transitional Victorian reference awards) in respect of employees in Victoria

Regulation 7.10 - Preserved transitional award terms

Regulation 7.11– Meaning of *more generous*

Regulation 7.12 – Modifications in relation to personal/carer's leave

Regulation 7.13 – Modifications in relation to parental leave

545. Subdivision B prescribes how the *preserved transitional award terms* and *more generous* provisions in Subdivision B of Division 2 of Part 7 of Schedule 6 to the Act apply to *transitional awards* (within the meaning of clause 2 of Schedule 6 to the Act) other than *transitional Victorian reference awards* (within the meaning of clause 73 of Schedule 6 to the Act) that apply to *employees* in Victoria (within the meaning of section 858). These regulations will apply in a similar way to the Regulations at Division 3 of Part 10 of Chapter 2 of these Regulations relating to *preserved award terms* in Division 3 of Part 10 of the Act. The regulations would ensure that if an employee's preserved transitional award provisions for

annual leave, personal/carer's leave and/or parental leave are *more generous* than the Standard, the employee would continue to receive the transitional award entitlement.

546. These regulations are made pursuant to section 846 and Subdivision B of Division 2 of Part 7 of Schedule 6 to the Act.

Chapter 4 – Extra provisions relating to definitions

547. Chapter 4 informs the reader that Schedule 2 to the Act contains more provisions relating to the definitions in the Act.

548. The note clarifies that this regulation should be read in conjunction with sections 4, 5, 6 and 7 of the Act.

Regulation 1.1 – Purpose of Chapter 4

549. Regulation 1.1 provides that these regulations are made under subclause 5(1) of Schedule 2 to the Act.

550. The regulation amends clauses 2, 3 and 4 of Schedule 2 to the Act, as set out in Schedule 8.

551. The note explains that Clauses 2, 3 and 4 of Schedule 2 contain references to employee, employer and employment which should be read as having their ordinary meaning in the Act.

Chapter 5 – Transitional treatment of State employment agreements and State awards

Part 3 – Notional agreements preserving State awards

Division 5 – Preserved notional terms and preserved notional entitlements

Regulation 3.1 - Preserved notional terms of notional agreements

Regulation 3.2– Meaning of *more generous*

Regulation 3.3 – Modifications in relation to personal/carer's leave

Regulation 3.4 – Modifications in relation to parental leave

552. Division 5 of Part 3 prescribes how *preserved notional terms* operate in relation to an employee bound by *notional agreements preserving State awards (*NAPSA*)* (within the meaning of subclause 1(1) of Schedule 8 to the Act).

553. The regulations in this Division apply in the same way as regulations 10.2 to 10.5 (in Division 3 of Part 10 of Chapter 2of the Regulations) relating to *preserved award terms* (in Division 3 of Part 10 of the Act).

554. The regulations ensure that if an employee's *preserved notional terms* for annual leave, personal/carer's leave and/or parental leave are more generous than the Standard, the employee would continue to receive the entitlement in the notional agreement preserving State awards.

Chapter 6 – Transitionally registered associations

Part 1 Preliminary

Regulation 1.1 – Definitions

555. Regulation 1.1 sets out definitions for Chapter 6.

Part 2 – Representation rights of transitionally registered associations of employees

556. Part 2 of Chapter 6 of the Regulations enables the Commission to make orders in relation to the representation rights of transitionally registered associations of employees (TRAs).

557. Part 2 is made under clause 4 of Schedule 10 to the Act.

Division 1 – Orders about representation rights of transitionally registered associations – no prior order in relation to State-registered association

Regulation 2.1 – Order

Regulation 2.2 – Variation of order

Regulation 2.3 – Organisations and transitionally registered association must comply with order

558. Regulation 2.1 empowers the Commission to make orders about the right of TRAs to represent or not represent the industrial interests of particular classes or groups of employees.

559. Regulation 2.1 applies where a representation order is sought in relation to a TRA that was, immediately before the reform commencement:

- a State registered association (SRA) (subparagraph 2.1(1)(b)(i)); and
- not subject to a State demarcation order similar to the order being sought in relation to the TRA (subparagraph 2.1(1)(b)(ii)).

560. Subregulation 2.1(1) provides that an organisation, a TRA, an employer or the Minister may make an application for representation orders in relation to such a TRA. Subparagraphs 2.1(1)(i), (ii) and (iii) specify the kind of orders which may be sought.

561. Subregulation 2.1(3) provides that the Commission may only make the order if satisfied that the conduct or threatened conduct of a TRA or an organisation (or an officer, member or employee) is preventing or interfering with the performance of work or is harming the business of an employer or that such consequences have ceased but are likely to recur or are imminent.

562. Subregulation 2.1(4) requires the Commission, in considering whether to make an order, to have regard to the various matters specified. Those matters include the wishes of employees who are affected by the dispute, the effect of any order on the operations of certain employers and the consequences for any employer, employee, TRA or organisation involved in the dispute of not making an order.

563. Subregulation 2.1(5) provides that the powers of the Commission under Division 1 of Part 2 of Chapter 6 of these Regulations may only be exercised by a Full Bench or a Presidential Member.

564. Regulation 2.2 provides that the Commission, on application by an organisation, a TRA, an employer or the Minister, may vary an order made under Division 1.

565. Regulation 2.3 provides that a TRA or organisation must comply with an order made under Division 1 and gives the Court jurisdiction to make orders to ensure compliance.

Division 2 – Orders about representation rights of transitionally registered associations –prior order in relation to State-registered association

Regulation 2.4 – Order

Regulation 2.5 – Order may be subject to limits or alterations

Regulation 2.6 – Organisations and transitionally registered association must comply with order

566. Regulation 2.4 requires the Commission to make an order about the right of a TRA to represent or not represent the industrial interests of particular classes or groups of employees if certain conditions are satisfied in relation to a TRA that will be subject to the order.

567. An organisation, a TRA, an employer or the Minister may make an application for such an order in relation to such a TRA (subregulation 2.4(1)). Subparagraphs 2.4(1)(i), (ii) and (iii) specify the kind of orders which may be sought.

568. The TRA must also have been immediately before the reform commencement:

- a State registered association (SRA) (subparagraph 2.4(1)(b)(i)); and
- subject to a State demarcation order similar to the order being sought in relation to the TRA (subparagraph 2.4(1)(b)(ii)).

569. If these conditions are satisfied, the Commission must make an order to the same effect as the State order which applied to the TRA.

570. Subregulation 2.4(3) provides that the Commission, on application by an organisation, a TRA, an employer or the Minister, may vary an order made under Division 2.

571. Subregulation 2.5(1) provides that an order made under Division 2 may be subject to conditions or limitations.

572. Subregulation 2.5(2) provides that an order made under Division 2:

- may adopt the language of the State order, but with such changes the Commission considers necessary to reflect the language and content of the Act and Schedule 1 (paragraph 2.5(2)(a)); but

- must be the same in substance as the State order (paragraph 2.5(2)(b)).

573. Regulation 2.6 provides that a TRA or organisation must comply with an order made under Division 2 and gives the Court jurisdiction to make orders to ensure compliance.

Division 3 – Proceedings regarding the representation rights in a State or Territory immediately before the reform commencement

Regulation 2.7 – Representation rights – evidence in prior proceedings

574. Regulation 2.7 applies to a TRA that was a State-registered association that was a party to proceedings:

- concerning representation rights under a State law (subparagraph 2.7(1)(a)(i)); and

- in which no order regarding those rights had been made immediately before the reform commencement (subparagraph 2.7(a)(ii)).

575. Where such a TRA is involved in proceedings before the Commission concerning the dispute which gave rise to the State proceedings, the Commission is required to have regard to any evidence given in the State proceedings (subregulation 2.7(2)). A note states that the Commission may treat such evidence as being before the Commission.

Part 3 – Cancellation of transitional registration

576. Part 3 is made under clause 5 of Schedule 10 to the Act.

Regulation 3.1 – Application for cancellation of transitional registration by Commission – form of application

577. Regulation 3.1 provides that an application by an association under paragraph 5(5)(a) of Schedule 10 to cancel its transitional registration must be in writing, state the grounds on which the cancellation is sought and be made by an officer of the association authorised to make the application.

Regulation 3.2 – Application for cancellation of transitional registration by Commission – registration by mistake

Regulation 3.3 – Application for cancellation of transitional registration by Commission – association no longer State-registered association

578. Paragraph 5(5)(b) of Schedule 10 provides that the Commission may cancel the transitional registration of an association on application by a person interested or the Minister if the Commission is satisfied, as prescribed, that the association:

- was registered by mistake (subparagraph 5(5)(b)(i)); or
- is no longer a State-registered association (subparagraph 5(5)(b)(ii)).

579. Regulation 3.2 provides that the Commission will be satisfied an association was registered by mistake if, after giving the association an opportunity to be heard, it considers that the association did not satisfy subclause 2(1) of Schedule 10 at the time the association was granted transitional registration. Subclause 2(1) sets out the criteria for transitional registration under Schedule 10.

580. Regulation 3.3 provides that the Commission will be satisfied an association is no longer a State-registered association if, after giving the association an opportunity to be heard, it considers that the association is no longer registered under applicable State industrial relations legislation.

Part 4 – Modification of Registration and Accountability of Organisations Schedule for transitionally registered associations

581. Part 4 is made under clause 7 of Schedule 10 to the Act.

Regulation 4.1 – Modifications

Regulation 4.2 – Provisions not to apply

582. Regulation 4.1 provides that Part 3 of Chapter 6 of the Regulations explains how section 19 of Schedule 1 to the Act applies to TRAs. Section 19 sets out the criteria for registration under Schedule 1 of employer and employee associations, other than enterprise associations.

583. Paragraph 19(1)(j) and subsections 19(2) and 19(3) of Schedule 1 constitute what is generally referred to as the 'conveniently belong to rule' which limits the capacity of associations to register under Schedule 1 if there is already an organisation:

- to which the members of the association could more conveniently belong; and
- that would more effectively represent those members.

584. In order to ensure that the conveniently belong rule does not apply in relation to TRAs seeking registration as an organisation, regulation 3.2 provides that paragraph 19(1)(j) and subsections 19(2) and 19(3) do not apply to TRAs which apply for registration under Schedule 1.

Regulation 4.3 – Other criteria for registration of transitionally registered association

585. Regulation 4.3 provides that a transitionally registered association which is, in substance, the same as the state Branch of an existing federally registered organisation will not be eligible for registration as an organisation.

586. This reflects the fact that a State branch of an organisation will often be in a practical sense indistinguishable from a State registered association. For example, they may:

- share the same premises;
- have identical officers and personnel;
- use the same equipment and stationery;
- represent the same types of employees; or
- be otherwise practically indistinguishable.

587. To avoid two substantially identical entities both being registered under Schedule 1, subregulation 4.3(1) provides that the Commission must refuse to grant an application for registration made by a TRA if the TRA is substantially identical to another organisation (subparagraph 4.3(1)(a)(ii)) or a State branch or other constituent part of an organisation (subparagraphs 4.3(1)(a)(i) and 4.3(1)(a)(iii)),

588. The only exception to this is where a significant number of the members of the TRA would not be able to join the organisation or constituent part of the organisation which is substantially identical to the TRA because of differing eligibility rules (subregulation 4.3(2)).

Chapter 7 – Transitional and other provisions for the Work Choices Act

Part 1 – Preliminary

Regulation 1.1 – Purpose of Chapter 7

589. This regulation sets out the purpose of Chapter 7 which is to provide for matters of a transitional, saving or application nature relating to the Work Choices Act.

Part 2 – Regulations for transitional etc provisions and consequential amendments – Act

Division 1 – Repeal of Part XV of the pre-reform Act

Regulation 2.1 – Effect of repeal

590. Part XV of the pre-reform Act applied certain provisions to certain employers and employees in Victoria, and contained other provisions in relation to certain employers and employees in Victoria.

591. Regulation 2.1 provides that the repeal of Part XV of the pre-reform Act (by item 240 of Schedule 1 to the Work Choices Act) is not taken to affect:

- an entitlement under Part XV of the pre-reform Act which had accrued before the reform commencement; or
- a cause of action under that Part XV of the pre-reform Act which had not been finally determined before the reform commencement.

592. This saving provision would include a cause of action under, for example, sections 506 and 533 of the pre-reform Act which deal with the contravention of penalty provisions.

593. This saving provision would also preserve an entitlement which had accrued before the reform commencement under Schedule 1A to the pre-reform Act which applied in accordance with Part XV of the pre-reform Act.

594. Subregulation 2.1(2) provides that the causes of action mentioned in paragraph 2.1(1)(b) include the ability to bring proceedings under section 178 or 179 of the pre-reform Act, in accordance with section 506 of the pre-reform Act.

595. This regulation is made pursuant to item 1 of Schedule 4 to the Work Choices Act.

Division 2 – Transmission of transitional awards

Regulation 2.2 – Succession, transmission or assignment of a business before the reform commencement – application of Part 7 of Schedule 6 to the Act

596. Regulation 2.2 is an application regulation made under subclause 1(1) of Schedule 4 to the Work Choices Act.

597. Regulation 2.2 provides that Part 7 of Schedule 6 to the Act does not apply in relation any succession, transmission or assignment of a business, or part of a business that occurs before the reform commencement.

Division 3 – Matters relating to Victoria – transmission of business (transitional Victorian reference awards)

Regulation 2.3 – Transmission of business – application of Subdivision F of Division 1 of Part 7 of Schedule 6 to the Act

598. Regulation 2.3 is an application regulation made under subclause 1(1) of Schedule 4 to the Work Choices Act.

599. Regulation 2.3 provides that Subdivision F of Division 1 of Part 7 of Schedule 6 to the Act does not apply in relation any succession, transmission or assignment of a business, or part of a business, that occurs before the reform commencement.

Division 4 – Matters relating to Victoria – transmission of business (transitional awards other than Victorian reference awards)

Regulation 2.4 – Transmission of business – application of Subdivision BA of Division 2 of Part 7 of Schedule 6 to the Act

600. Regulation 2.4 is an application regulation made under subclause 1(1) of Schedule 4 to the Work Choices Act.

601. Regulation 2.4 provides that Subdivision BA of Division 2 of Part 7 of Schedule 6 to the Act does not apply in relation any succession, transmission or assignment of a business, or part of a business, that occurs before the reform commencement.

Division 5 – Succession, transmission or assignment of a business before the reform commencement

602. Division 5 sets out what provisions apply to a succession, transmission or assignment of a business that occurs before the reform commencement.

Regulation 2.5 – Application of pre-reform Act

603. Regulation 2.5 is an application and savings regulation made under subclause 1(1) of Schedule 4 to the Work Choices Act.

604. Subregulation 2.5(1) provides that Division 5 applies if a succession, transmission or assignment (transmission) of a business, or part of a business, occurred prior to the reform commencement.

605. Subregulation 2.5(2) provides that the following provisions of the pre–reform Act apply in relation to a transmission of a business, or part of a business, that occurred prior to the reform commencement:

- paragraph 149(1)(d) (provision relating to awards);
- section 170MB (provision relating to certified agreements);
- section 170MBA (provision relating to certified agreements); and

- section 170VS (provision relating to AWAs).

606. Subregulation 2.5(3) limits orders made by the Commission under paragraph 149(1)(d) of the pre–reform Act, made under subregulation 2.5(2).

607. In particular, paragraph 2.5(3)(a) provides that an order will bind a successor, assignee or transmittee of the business, or part of the business to an award, as if the order had been made immediately before the reform commencement.

608. However, any obligation or entitlement arising from the award will have effect from the date specified in the order. The date specified must not be earlier than the date of the order.

609. This regulation will ensure that an employee's award entitlements are preserved from the date of reform commencement, which is relevant to the wages and leave guarantees under the Standard.

610. However, paragraph 2.5(3)(b) is intended to ensure that the effect of such a decision will be prospective in that obligations and entitlements under the award only accrue from the date specified in the Commission's order, which cannot be backdated to an earlier date.

Division 6 – Amendment of Part VIA of the pre-reform Act

Regulation 2.6 – Effect of amendments – equal remuneration for work of equal value

611. Subregulation 2.6(1) provides that the amendments to Division 2 of Part VIA of the pre-reform Act, made by items 74 to 80 of Schedule 1 to the Work Choices Act (which amend the equal remuneration provisions of the Act), apply to an application for equal remuneration orders where that application was made prior to the reform commencement but the Commission had not yet made an order. The effect of this is that the amendments made to the 'equal remuneration for work of equal value' provisions will apply to applications for equal remuneration orders where those applications are on foot at the reform commencement.

612. Subregulation 2.6(2) provides that, for the avoidance of doubt, subregulation 2.6(1) does not affect the enforceability of an order made by the Commission under Division 2 of Part VIA of the pre-reform Act (that is, an order that an employer pay equal remuneration for work of equal value) before the reform commencement.

613. This regulation is made pursuant to item 1 of Schedule 4 to the Work Choices Act.

Regulation 2.7 – Effect of amendments – parental leave (repeal of pre-reform leave provisions)

614. Regulation 2.7 provides transitional provisions to determine whether, at a particular period in time, an employee is covered by pre- or post-reform parental leave provisions.

615. Regulation 2.7 covers employees who have applied for parental leave or commenced a period of parental leave before the reform commencement, and who would therefore at the outset be covered by the pre-reform leave provisions. However, regulation 2.7 does not apply to employees while they are excluded from the operation of Division 6 of Part 7 of the Act because of:

- section 529 (the application of the more generous test in relation to an *award*);
- clause 78 or 98 of Schedule 6 to the Act (the application of the more generous test in relation to a *transitional award* applying to certain employees in Victoria);
- paragraph 30(a), (b) or (c) of Schedule 7 to the Act (which provide that the Australian Fair Pay and Conditions Standard does not apply to an employee who is subject to a *pre-reform certified agreement, pre-reform AWA* or *section 170MX award*);
- clause 15E of Schedule 8 to the Act (which provides that the Australian Fair Pay and Conditions Standard does not apply to an employee who is subject to a *preserved State agreement*);

- clause 46 of Schedule 8 to the Act (the application of the more generous test in relation to a *notional agreement preserving State awards*); or

- item 18 of Schedule 4 to the Work Choices Act (which provides that Division 6 of Part 12 of the Act does not apply in relation to an employee who is covered by a *pre-reform certified agreement, notional agreement preserving State awards, preserved State agreement, old IR agreement, pre-reform* AWA, *170MX award* or *transitional award*).

616. Regulation 2.7 provides that, in relation to an employee within the scope of the regulation, the pre-reform leave provisions would continue to apply until a particular 'milestone event' occurs in relation to that employee. After the occurrence of a 'milestone event', the employee will no longer be covered by the pre-reform leave provisions and will instead be covered by the provisions of Division 6 of Part 7 of the Act.

617. This approach will ensure that, at all times, an employee within the scope of regulation 2.7 will be covered by the pre-reform leave provisions, or Division 6 of Part 7 of the Act, but not both sets of provisions concurrently.

618. The regulations are necessary to:

- in the case of employees who have commenced or applied for parental leave prior to reform commencement – specify how long the pre-reform provisions relating to parental leave will continue to apply; and

- provide for employees to transition to the new parental leave provisions as quickly as practicable.

619. Subregulation 2.7(1) prescribes the scope of regulation 2.7, as discussed above, and sets out what are the pre-reform leave provisions (at paragraph 2.7(1)(d)).

620. Subregulation 2.7(2) prescribes the 'milestone events' that apply to an employee who has applied for parental leave before the reform commencement, as the occurrence of the following events under a pre-reform leave provision:

- the employee commences a period of leave including (or constituted by) maternity, paternity or adoption leave of a type covered by sections 265, 282 or 300;

- each of the following occurs: the employee is pregnant; and the employee has a pregnancy related illness; and the employee takes a period of special maternity leave (of a type covered by subsection 265(1));

- each of the following occurs: the employee is pregnant; and the pregnancy ends otherwise than by the birth of a living child; and the employee takes a period of special maternity leave of a type covered by subsection 265(1);

- the employee is required to transfer to a safe job in circumstances of a type covered by section 268;

- the employee takes paid leave in circumstances of a type covered by section 268;

- a placement of the employee's adopted child occurs in circumstances of a type covered by section 300;

- a placement of the employee's adopted child is cancelled before it starts in circumstances of a type covered by paragraph 310(1)(a).

621. Subregulation 2.7(3) prescribes the 'milestone events' that apply to an employee who has commenced a period of leave before the reform commencement, as the occurrence of the following events under a pre-reform leave provision:

- the employee is required to give notice to the employer to give effect to a return to work guarantee of a type covered by sections 278, 296 or 314;

- the employee is given notice by the employer to return to work to give effect to a return to work guarantee of a type covered by sections 278, 296 or 314;

- the employee applies to vary or extend the period of leave including (or constituted by) maternity, paternity or adoption leave and the application is of a type covered by sections 278, 294 or 312;

- each of the following occur:

  – an employee (or the employee's spouse) gives birth to a living child; either: the employee has started a period of ordinary maternity leave in relation to the child's birth or (if the employee's spouse gives birth) the employee has started a period of paternity leave in relation to the child's birth; and

  – the child later dies, in circumstances of a type covered by sections 276 or 292;

- the employee ceases to be the child's primary care-giver and the cessation is of a type covered by sections 277, 293 or 311;

- both of the following occurs: the pregnancy ends otherwise than by the birth of a living child in circumstances of a type covered by section 275 or 291; and the employee who would have been entitled to a period of ordinary maternity leave becomes entitled to take a period of special maternity leave;

- the employee terminates his or her employment during a period of maternity, paternity or adoption leave and the termination is of a type covered by sections 279, 295 or 313;

- an adoption placement starts but is later discontinued for any reason in circumstances of a type covered by paragraph 310(1)(b).

622. Subregulation 2.7(4) provides that when the employee's coverage under the pre-reform leave provisions ceases, Division 6 of Part 7 of the Act applies in relation to the employee's parental leave entitlements. This applies in relation to the 'milestone events' in subregulations 2.7(2) and (3).

623. Subregulation 2.7(5) provides that any conduct engaged in prior to the occurrence of the first 'milestone event', which is taken in accordance with the pre-reform leave provisions, is taken to be an action taken in accordance with the equivalent provisions of Division 6 of Part 7.

624. Subregulation 2.7(6) provides that a dispute about the application of a pre-reform leave provision, as it continues to apply under regulation 2.7, shall be taken to be a dispute about entitlements under Division 6 of Part 7 of the Act for the purposes of section 175. The effect of this subregulation is that the model dispute resolution process in Part 13 of the Act will apply to such a dispute. In addition, as Note 2 to the subregulation indicates, a dispute about whether, as a result of this subregulation, Division 6 of Part 7 applies, would be a dispute that could be dealt with under the model dispute resolution process in Part 13 of the Act.

625. This regulation is made pursuant to item 1 of Schedule 4 to the Work Choices Act.

Regulation 2.8 – Replacement employees

626. Regulation 2.8 provides that any act undertaken by an employer in accordance with the pre-reform leave provisions set out below, relating to the engagement of employees to replace employees taking parental leave, is taken to be in accordance with sections 281, 297 or 315:

- clause 25 of pre-reform Schedule 14 of the pre-reform Act;
- regulation 30ZB of the pre-reform Regulations; or
- clause 15, 27 and 40 of Schedule 1A to the pre-reform Act.

627. Replacement employee provisions generally refer to the actions and obligations of an employer – rather than the employee entitled to parental leave – and so do not fall within the context of a 'milestone event' (which are dealt with in regulation 2.7). Regulation 2.8 is therefore required as a transitional arrangement for actions taken by an employer under a pre-reform provision to the corresponding provision under Division 6 of Part 7 of the Act.

628. This regulation is made pursuant to item 1 of Schedule 4 to the Work Choices Act.

Division 7 ─ Operation of matters relating to permit ships

Regulation 2.9 ─ Awards in relation to permit ships

629. Regulation 2.9 provides that any award or award variation which applies to non-citizen crew members working on permit ships or the foreign corporations who employ them will, from commencement of the Regulations, cease to have that effect. However, any entitlement that accrued before commencement of the Regulations will not be affected.

630. This regulation is made in consequence of the amendments contained in regulation 1.1 (crew members of commercial vessels) of Division 1 of Part 1 of Chapter 2 of the Regulations.

Division 8 – Amendment of Part XII of the pre-reform Act

Regulation 2.10 – Costs only where proceeding instituted vexatiously etc.

631. Regulation 2.10 provides that the amendments to section 347 of the pre-reform Act (renumbered as section 824) made by items 205 to 208 of Schedule 1 to the Work Choices Act, do not apply in relation to an action or omission that occurred before the reform commencement.

632. The effect of this regulation is that, in respect of an action or omission that occurred before the reform commencement, section 347 of the pre-reform Act will apply to applications for costs orders in a matter arising under the Act (other than under section 663).

633. This regulation is made pursuant to item 1 of Schedule 4 to the Work Choices Act.

Division 9 – Amendment of Part XIII of the pre-reform Act

Regulation 2.11 – Signature on behalf of body corporate

634. Regulation 2.11 provides that section 827, which was inserted by item 208 of Schedule 1 to the Work Choices Act, and provides for documents to be signed on behalf of as body corporate, applies only in relation to the signing of a document on or after the reform commencement. The effect of this regulation is that a party may not rely upon section 827 in respect of the signing of a document before the reform commencement.

635. This regulation is made pursuant to item 1 of Schedule 4 to the Work Choices Act.

Division 10 ─ Application of Act and Regulations to Australia's exclusive economic zone and continental shelf

Regulation 2.12 ─ Application of Act and Regulations

636. International law imposes limitations on the extent to which Australia can regulate the activities of:

- foreign-flagged ships and aircraft in the exclusive economic zone (EEZ); and
- foreign nationals, vessels and aircraft beyond 200 nautical miles unless those entities are involved in the exploration of the resources of the seabed and subsoil.

637. In addition, some areas of the continental shelf are affected by Australia's treaty obligations. For this reason, the Act is applied in a limited way (i.e. only to Australian employers) in Australia's EEZ and does not apply to work in the area of the continental shelf outside the EEZ (unless regulations prescribe its application in this area).

638. It is possible, however, that some industrial instruments (awards, certified agreements or Australian workplace agreements) made before the reform

commencement extend to certain employees working in the EEZ and in the area of the continental shelf outside the EEZ who, because of the amendments made by the Work Choices Act, would cease to be subject to the Act after the reform commencement.

639. Regulation 2.12 continues, for a period of 12 months, the operation of existing industrial instruments made before the reform commencement that apply to employees working in the EEZ and in the area of the continental shelf outside the EEZ who would not otherwise continue to be covered by the amended Act. The regulation preserves the status quo in terms of employment obligations in these areas for a limited period of 12 months from the date of commencement of the Regulations. The existing instruments are preserved in their pre-reform form and the provisions of the amended Act, other than provisions relating to compliance (Part 14) as amended by the Work Choices Act, do not apply to the parties (e.g. they could not vary the agreement by application to the Commission). This is an interim measure to enable a more detailed assessment of whether specific regulations need to be made covering employees in these areas.

640. The regulation does not preclude the operation of State laws in the case of persons who, after reform commencement, will no longer be part of the federal scheme, e.g. employees of non-constitutional corporations.

Division 11 – Application of pre-reform Act in relation to certain pre-reform certified agreements and pre-reform AWAs

641. Division 11 sets out transitional arrangement for applications in relation to certain pre-reform certified agreements or pre-reform AWAs, which were made to the Commission, or filed with the Employment Advocate, before the reform commencement. These provide that these matters will continue to be dealt with under the provisions of the pre-reform Act.

642. These regulations are made under subclause 1(1) of Schedule 4 to the Work Choices Act.

Regulation 2.13 – Application of the pre-reform Act

643. Subregulation 2.13(1) sets out particular applications which, if filed with the Employment Advocate, or lodged with the Commission, before the reform commencement, will continue to be dealt with in accordance with the provisions of the pre-reform Act.

644. Subregulation 2.13(2) provides that, if one of the following matters in relation to a pre-reform AWA or pre-reform certified agreement occurred before the reform commencement, but was not finally decided by the Commission or the Employment Advocate before the reform commencement, it will continue to be determined in accordance with the pre-reform Act provisions:

- a written agreement to vary the nominal expiry date of a pre-reform AWA filed with the Employment Advocate under subsection 170VH(3) of the pre-reform Act (subparagraph 2.13(1)(a)(i));
- a written agreement to vary the terms of a pre-reform AWA filed with the Employment Advocate under subsection 170VL(1) of the pre-reform Act (subparagraph 2.13(1)(a)(ii));
- a written agreement to terminate a pre-reform AWA filed with the Employment Advocate under subsection 170VM(1) of the pre-reform Act (subparagraph 2.13(1)(a)(iii));
- an application to terminate a pre-reform AWA was made to the Commission under subsection 170VM(3) of the pre-reform Act (subparagraph 2.13(1)(a)(iv));
- a termination notice under subsection 170VM(6) of the pre-reform Act was filed for approval with the Employment Advocate under subsection 170VM(6) of the pre-reform Act (subparagraph 2.13(1)(a)(v)).

- an application lodged with the Commission in relation to a dispute over the application of a pre-reform certified agreement under section 170LW of the pre-reform Act (subparagraph 2.13(1)(a)(vi));

- an application lodged with the Commission to approve an extension of the nominal expiry date of a pre-reform certified agreement for subsection 170MC(2) of the pre-reform Act (subparagraph 2.13(1)(a)(vii));

- an application lodged with the Commission to approve a variation of a pre-reform certified agreement for subsection 170MD(2) of the pre-reform Act (subparagraph 2.13(1)(a)(viii));

- an application lodged with the Commission to vary a pre-reform certified agreement for subsection 170MD(6) of the pre-reform Act (subparagraph 2.13(1)(a)(ix));

- an application lodged with the Commission to approve the termination of a pre-reform certified agreement for subsection 170MG(2) of the pre-reform Act (subparagraph 2.13(1)(a)(x));

- an application lodged with the Commission to approve the termination of a pre-reform certified agreement for subsection 170MH(4) of the pre-reform Act (subparagraph 2.13(1)(a)(xi));

- an application lodged with the Commission to approve the termination of a pre-reform certified agreement for subsection 170MHA(4) of the pre-reform Act (subparagraph 2.13(1)(a)(xii)).

Division 12 – Workplace Inspectors

Regulation 2.14 – Powers of workplace inspectors in relation to investigation of alleged breaches of pre-reform Act or pre-reform Regulations

645. Subsection 167(7) provides that a workplace inspector must comply with directions given by the Minister specifying the manner in which, and any conditions and

qualifications subject to which, powers or functions conferred on workplace inspectors are to be exercised or performed.

646. Regulation 2.14 provides that despite the amendments to the pre-reform Act and the repeal of the pre-reform Regulations, a workplace inspector may institute or give evidence in any criminal proceedings, or conduct or assist in any criminal prosecution, in respect of an alleged breach of a matter under the pre-reform Act or the pre-reform Regulations, subject to any directions given by the Minister under subsection 167(7).

Regulation 2.15 – Repeal of Part IVA of the pre-reform Act – other functions and powers of pre-reform authorised officers in relation to investigation of alleged breaches not started before the reform commencement

647. Section 83BH of the pre-reform Act provides that an authorised officer may enter premises and carry out an inspection for the purpose of ascertaining whether the terms of a pre-reform AWA, the provisions of Part VID or Part XA of the pre-reform Act, or other prescribed provisions of the pre-reform Act have been complied with, or are being complied with.

648. Regulation 2.15 provides that if

- an alleged breach of a matter under the pre-reform Act or the pre-reform Regulations occurred before the reform commencement; and
- an investigation had not been commenced for the compliance purposes mentioned in section 83BH of the pre-reform Act before the reform commencement,

a workplace inspector is authorised to investigate the alleged breach and to exercise the workplace inspector's powers, and perform the workplace inspector's functions, under the Act in relation to the alleged breach.

649. Subregulation 2.15(3) clarifies that the pre-reform Act and pre-reform Regulations are taken to apply to criminal proceedings dealing with the imposition of a penalty in respect of the alleged breach.

Regulation 2.16 – Repeal of Part IVA of the pre-reform Act – other functions and powers of pre-reform authorised officers in relation to investigation of alleged breaches started before the reform commencement

650. Section 83BH of the pre-reform Act provides that an authorised officer may enter premises and carry out an inspection for the purpose of ascertaining whether the terms of a pre-reform AWA, the provisions of Part VID or Part XA of the pre-reform Act, or other prescribed provisions of the pre-reform Act have been complied with, or are being complied with.

651. Regulation 2.16 provides that if

- an investigation had been commenced for the compliance purposes mentioned in section 83BH of the pre-reform Act before the reform commencement; and
- the investigation had not been completed before the reform commencement,

a workplace inspector is authorised to investigate the alleged breach and to exercise the workplace inspector's powers, and perform the workplace inspector's functions, under the Act in relation to the alleged breach.

652. Subregulation 2.16(3) clarifies that the pre-reform Act and pre-reform Regulations are taken to apply to proceedings dealing with the imposition of a penalty in respect of the alleged breach.

Regulation 2.17 – Disclosure of information

653. Section 170 provides that the Regulations may authorise workplace inspectors to disclose information of a prescribed kind to certain persons for prescribed purposes.

654. Subregulation 2.17(1) provides that if a pre-reform authorised officer acquired information in accordance with the pre-reform Act before the reform commencement, section 170 is taken to authorise a workplace inspector to disclose any information acquired by the pre-reform authorised officer in the course of that investigation, in accordance with section 170.

655. Subregulation 2.17(2) provides that if a pre-reform inspector acquired information in accordance with the pre-reform Act before the reform commencement, section 170 is taken to authorise a workplace inspector to disclose any information acquired by the pre-reform inspector in the course of that investigation, in accordance with that section.

Division 13 – Compliance

Regulation 2.18 – Repeal of Part VA – review by Commonwealth Ombudsman

656. Section 88AA of the pre-reform Act sets out the powers of the Secretary of the Department to obtain information relevant to a building industry investigation.

657. Section 88AI of the pre-reform Act provides that the Commonwealth Ombudsman must conduct an annual review of the use of the power given by section 88AA of the pre-reform Act.

658. Subregulation 2.18(2) provides that despite the repeal of Part VA of the pre-reform Act, section 88AI of the pre-reform Act continues to apply in relation to the period starting on 13 January 2005 and ending on 12 January 2006.

659. Subregulation 2.18(1) clarifies that regulation 2.18 applies in addition to item 14 of Schedule 4 to the Act.

Regulation 2.19 – Enforcement of rights and obligations

660. Regulation 2.19 provides that unless a contrary intention appears in

- the Act;
- the Work Choices Act; or
- the Regulations made under those Acts.

the amendments made by the Work Choices Act do not affect the enforcement in a court of rights and obligations that arose under the pre-reform Act, whether or not proceedings had been commenced before the reform commencement.

Division 14 – Interpretation of transitional instruments

661. Division 14 gives the Court and the Federal Magistrate's Court (the Courts) jurisdiction to interpret transitional instruments.

662. The regulations contained in Division 14 are made under subclause 1(1) and subclause (1)(2) of Schedule 4 to the Work Choices Act.

663. The regulations preserve the jurisdiction of the Court in relation to the interpretation of certified agreements.

664. The regulations are also necessary to extend the jurisdiction of the Court to interpret newly created State transitional instruments.

665. To be consistent with the jurisdiction given to interpret instruments under the Act, the Regulations also extend jurisdiction to the Federal Magistrates Court.

Regulation 2.20 – Interpretation of transitional instruments

666. Subregulation 2.20(1) provides when the Courts can interpret a transitional instrument. That is, the Courts may give an interpretation of an instrument on application by:

- the Minister;
- an organisation or person bound by the transitional instrument (e.g. an employer or employer association); or
- an employee whose employment is subject to the transitional instrument.

667. Subregulation 2.20(2) provides that a decision of the Courts in relation to the interpretation of an instrument is final and conclusive. The decision will bind any of the following persons who have been heard, or given an opportunity to be heard:

- the organisations and persons bound by the transitional instrument (e.g. a union or employer); and

- the employees whose employment is subject to the transitional instrument.

668. Subregulation 2.20(3) defines transitional instrument for the purposes of Division 14.

669. Transitional instrument means any of the following instruments (and only these instruments):

- a pre-reform certified agreement within the meaning of clause 1 of Schedule 7 to the Act; and
- a notional agreement preserving State awards within the meaning of subclause 1(1) of Schedule 8 to the Act; and
- a preserved State agreement within the meaning of subclause 1(1) of Schedule 8 to the Act.

Division 15 – Industrial action before nominal expiry date of workplace agreement or workplace determination

Regulation 2.21 – Industrial Action

670. This regulation provides that section 494 and 495 are taken to apply in relation to a pre-reform certified agreement or pre-reform AWA as if the instruments were mentioned in those sections.

Part 3 – Regulations for transitional etc. provisions and consequential amendments — pre-reform Regulations

Division 1 – Repeal of Division 2 of Part 5A of pre-reform Regulations

Regulation 3.1 – Effect of repeal

671. Regulation 3.1 prescribes that, despite the repeal of Division 2 of Part 5A of the pre-reform Regulations (by regulation 1.6 of Chapter 1 of these Regulations which repeals the pre-reform Regulations in their entirety), that Division 2 (relating to

adoption leave under Division 5 of Part VIA of the pre-reform Act) is taken to continue to apply to the extent that Division 5 of Part VIA of the pre-reform Act continues to apply because of subclause18(2) of Schedule 4 to the Work Choices Act.

672. The effect of this regulation is that persons who remain covered by the parental leave provisions of the pre-reform Act will also remain covered by the parental leave provisions of the pre-reform Regulations.

673. This regulation is made pursuant to item 1 of Schedule 4 to the Work Choices Act and section 846.

Division 2 – Matters referred by Victoria

Regulation 3.2 – Effect of repeal of regulation 132G

674. Regulation 3.2 prescribes that, despite the repeal of regulation 132G of the pre-reform Regulations (by regulation 1.6 of Chapter 1 of these Regulations, which repeals the pre-reform Regulations in their entirety), that regulation (which states that an inspector is a prescribed person of section 533 of the pre-reform Act) is taken to continue to apply to the extent that section 533 of the pre-reform Act continues to apply because of regulation 2.1 of the Chapter 7 of the Regulations. For the purposes of that continued effect, the reference in regulation 132G of the pre-reform Regulations is taken to be a reference to a *workplace inspector* within the meaning of the Act.

675. This regulation is made pursuant to item 1 of Schedule 4 to the Work Choices Act and section 846.

Part 4 – Regulations for transitional etc. provisions and consequential amendments – part-heard matters

676. These regulations are made under subclause 1(1) of Schedule 4 to the Work Choices Act, which enables regulations to be made dealing with matters of a transitional, saving or application nature relating to the amendments made by the Work Choices Act.

Division 1 – Interpretation

Regulation 4.1 – Definitions

677. Regulation 4.1 sets out relevant definitions. These reflect the definitions of employer and transitional employer in subsection 6(1) and subclause 2(1) of Schedule 6 to the Act. Appeals are defined to include applications for leave to appeal.

Division 2 – Appeals under Part VI of the pre-reform Act

678. The regulations prescribe the circumstances in which appeals instituted before the reform commencement may or may not continue after the date of reform commencement. The regulations are framed with a view to ensuring that parties are placed in the correct position at the date of reform commencement (in the event of an error in a decision at first instance), while not prolonging matters that are no longer relevant under the new workplace relations system.

- Under the Work Choices Act the Commission will no longer have a role in settling industrial disputes by way of conciliation and arbitration insofar as constitutional corporations and other employers caught by the definition in subsection 6(1) are involved, but it will continue to do so in relation to transitional employers not captured by subsection 6(1) as provided for in Schedule 6 to the Act.

- In this context the Regulations differentiate as necessary between appeals concerning employers (which will lapse on reform commencement) and transitional employers (which may continue after reform commencement). This differentiation reflects the new constitutional underpinning of Australia's workplace relations laws, which are now primarily based on the corporations power (rather than the power to conciliate and arbitrate industrial disputes).

Regulation 4.2 – Appeals against findings in relation to industrial disputes

679. Regulation 4.2 provides for appeals instituted before the reform commencement under paragraph 45(1)(a) of the pre-reform Act against findings concerning the existence of an industrial dispute to lapse on reform commencement to

the extent that they relate to employers. This reflects the fact that the new workplace relations system is no longer based on the conciliation and arbitration power. However, such appeals may continue to the extent that they relate to employers covered by the transitional system established by Schedule 6 to the Act (which is based on this constitutional power).

Regulation 4.3 – Appeals against awards or orders

Regulation 4.4 – Appeals against decisions not to make orders or awards

680. Regulations 4.3 and 4.4 provide for the continuation of appeals instituted before the reform commencement against awards or orders (or decisions not to make awards or orders) under paragraphs 45(1)(b) or 45(1)(c) of the pre-reform Act. Appeals are to be determined according to the provisions of the pre-reform Act. Subregulations 4.3(3) and (4), and 4.4(3) and (4), will ensure that, for the purposes of determining an employee's preserved wage or award entitlements, or parties bound to the award, any award variation resulting from the concluded appeal is to be taken to form part of an award or transitional award as if the variation was made immediately before the reform commencement.

- For example, a concluded appeal that results in a variation to the wage rates or leave entitlements in an award or transitional award would comprise the employee's wages under the preserved Australian Pay and Classification Scale or preserved award entitlements from reform commencement, to ensure that the employee's entitlements cannot fall below the varied level under the Australian Fair Pay and Conditions Standard.

- However, paragraphs 4.3(3)(b) and (4)(b), and 4.4(3)(b) and (4)(b) are intended to ensure that the effect of such a decision will be prospective in that the revised wage rate or entitlement in the award or transitional award only becomes payable from the date specified in the Commission's order, which cannot be backdated to an earlier date.

681. The note to this regulation is intended to clarify that while any variation to, or making of, an award is taken to have occurred immediately before the reform

commencement, the instrument as varied or made by operation of these regulations after reform commencement is either:

- a pre-reform award, because of the operation of subclause 4(3) of Schedule 4 to the Work Choices Act to the extent that it relates to an employer; or
- a transitional award continued in force by operation of clause 4 of Schedule 6 to the Act to the extent that it relates to an excluded employer.

Regulation 4.5 – Appeals against decisions under paragraph 111(1)(g) of pre-reform Act

682. Regulation 4.5 provides for the cessation of appeals instituted before the reform commencement (to the extent that they concern an employer) against decisions under paragraph 45(1)(d) of the pre-reform Act, which relate to the dismissal of matters under paragraph 111(1)(g) on the grounds that:

- an industrial dispute is trivial;
- being dealt with by a State industrial authority;
- is unnecessary in the public interest; or
- because a party is hindering settlement of an industrial dispute or has breached an award, direction or recommendation of the Commission.

683. To the extent that such appeals relate to transitional employers, they may continue.

Regulation 4.6 – Appeals against decisions under Division 5 of Part VI of pre-reform Act

684. Regulation 4.6 provides for the continuation of appeals instituted before the reform commencement against declarations under paragraph 45(1)(da) of the pre-reform Act that an award is a common rule in a Territory, in Victoria (by operation of section

493A) or for public sector employment. As with regulations 4.3 and 4.4, this regulation provides that for the purposes of determining an employee's preserved wage or award entitlements, or who is bound by the declaration, any variation resulting from the concluded appeal is to be taken to form part of the common rule as if the variation was made immediately before the reform commencement.

Regulation 4.7 – Appeals against decisions not to certify agreements

Regulation 4.8 – Appeal against decision to certify agreement

Regulation 4.9 – Appeal against decision to vary, or not to vary, award or certified agreement (objectionable provision)

685. Regulations 4.7, 4.8 and 4.9 allow for the continuation of appeals in relation to paragraphs 45(1)(e), 45(1)(eaa) and 45(1)(eba) of the pre-reform Act.
Paragraphs 45(1)(e) and 45(1)(eaa) relate to appeals against a decision to certify or not to certify an agreement under Division 4 of Part VIB of the pre-reform Act. Paragraph 45(1)(eba) relates to appeals against a decision to vary or not to vary an award or certified agreement to remove objectionable provisions (those contravening the freedom of association provisions of Part XA of the pre-reform Act).

686. The note to regulation 4.9 (and to regulation 4.10) is intended to clarify that while any variation to an award is taken to have occurred immediately before the reform commencement, after reform commencement the instrument as varied by operation of these regulations is either:

- a pre-reform award, because of the operation of clause 4(3) of Schedule 4 to the Work Choices Act to the extent that it relates to an employer; or

- a transitional award continued in force by operation of clause 4 of Schedule 6 to the Act to the extent that it relates to an excluded employer.

Regulation 4.10 – Appeal against decision to vary, or not to vary, award or certified agreement (sex discrimination)

687. Regulation 4.10 provides for the continuation of appeals under paragraph 45(1)(ed) of the pre-reform Act against a decision by the Commission to vary, or not to vary, an award that has been referred to the Commission under section 46PW of the *Human Rights and Equal Opportunity Commission Act 1986* for removal of discriminatory provisions.

Regulation 4.11 – Appeal against decision in relation to jurisdiction

688. Regulation 4.11 provides for the continuation of appeals instituted before the reform commencement under paragraph 45(1)(g) of the pre-reform Act against a decision that the Commission has jurisdiction, or has failed to exercise jurisdiction, in a matter under the Act. However (consistent with regulation 4.2), the regulation also provides that an appeal relating to an employer concerning the existence of an industrial dispute will lapse on reform commencement. To the extent that such appeals involve transitional employers, they may continue.

Regulation 4.12 – Appeals relating to matters arising under Registration and Accountability of Organisations Schedule

689. Regulation 4.12 allows for the continuation of existing appeals relating to matters arising under the Registration and Accountability of Organisations Schedule.

Regulation 4.13 – Time within which appeals may be instituted

690. Regulation 4.13 sets out the time within which appeals may be brought after the reform commencement in respect of decisions made prior to reform commencement. Appeals may be instituted within 21 days of the date of the award, order or decision being appealed against, or within 21 days after a statement of reasons (if requested) was given. This will preserve the ability of a party to appeal decisions that are made in the period leading up to reform commencement. No extensions of time after reform commencement will be permissible.

Regulation 4.14 – General rules relating to continuing appeals

691. Subregulation 4.14(2) gives the Commission discretion as to whether or not to continue hearing an appeal after reform commencement, depending on whether or not its final decision in the matter either could, or could not, be effectively implemented or will, or will not, have a practical application under the provisions of the Act.

- For example, if the appeal related to the variation of a term of an award that would cease to have effect after reform commencement because it would not be an allowable award matter under section 525, then the Commission could decide that the appeal should not continue.

692. Subregulation 4.14(3) provides that appeals will lapse if not finally determined within 6 months of the reform commencement.

693. For the purposes of determining appeals, subregulation 4.14(4) preserves the provisions of:

- section 45 relating to leave to appeal (subsection 45(2))
- who may appeal (subsection 45(3))
- leave for a Minister of Victoria to appeal in relation to certain decisions (subsection 45(3A) and (3B))
- stay orders (subsection 45(4))
- simultaneous appeals (subsection 45(5))
- evidence (subsection 45(6))
- Commission's powers on appeal (subsection 45(7))
- report by a member to a Full Bench (subsection 45(8)), and
- extension of the Act's provisions to the hearing of an appeal (subsection 45(9)).

Division 3 – Registrar – references and appeals

Regulation 4.15 – Reference to Commission by Registrar

694. Regulation 4.15 relates to matters, or a question arising in a matter, referred by the Registrar to the Commission for decision under section 79 of the pre-reform Act. The regulation provides that where the matter has been referred before the reform commencement the Commission may continue to hear, and determine, the appeal under that section as if the pre-reform Act had not been amended. The Commission may determine that a matter or question to which this regulation applies should not be dealt with if the Commission believes that:

- a decision made in dealing with the matter or question could not be effectively implemented under the Act as amended, or
- the matter or question has no practical application under the Act as amended.

Regulation 4.16 – Removal of matter before Registrar

695. Regulation 4.16 provides that where the President of the Commission has ordered that a matter be heard and determined by the Commission under section 80 of the pre-reform Act before the reform commencement, the Commission may (subject to the discretion outlined above) deal with the matter under that section as if the pre-reform Act had not been amended.

Regulation 4.17 – Appeal from Registrar to Commission

696. Regulation 4.17 provides that where an appeal has been instituted against a decision of the Registrar to the Commission under section 81 of the pre-reform Act the Commission may (subject to the discretion outlined above) continue to hear, and determine, the appeal under that section as if the pre-reform Act had not been amended.

Regulation 4.18 – Reference to Court by Registrar

697. Regulation 4.18 provides that if a question of law has been referred for the opinion of the Court in relation to references to a Court by the Registrar under section

82 of the pre-reform Act, the Court may give its opinion under that section as if the pre-reform Act had not been amended.

698. The regulation provides that the Court may determine that a question to which this regulation applies should not be dealt with under section 82 of the pre-reform Act, if:

- the Court's opinion could not be effectively implemented under the amended Act, or
- the question has no practical application under the amended Act.

Division 4 – Dispute prevention and settlement

699. The regulations prescribe the circumstances in which part-heard proceedings at first instance relating to industrial disputes notified before the reform commencement are to lapse or continue after reform commencement. With certain exceptions, the Regulations differentiate between matters concerning employers (which will lapse on reform commencement) and transitional employers (which may continue after reform commencement). As noted above, this differentiation reflects the new constitutional underpinning of Australia's workplace relations laws. The regulations have been framed with a view to introducing the new system as quickly as possible, and minimising scope for uncertainty about the Commission's post-reform jurisdiction.

700. The regulations are also intended to put beyond doubt the circumstances in which part-heard matters can continue, consistent with the '*Darwalla'* decision (*Attorney-General for Queensland v Australian Industrial Relations Commission and others* (2002) 213 CLR 485) in which the High Court held that, in the absence of specific legislative provision to the contrary, there is no accrued right to have part-heard claims determined on the basis of pre-existing legislation.

Regulation 4.19 – Review of certain awards

701. Regulation 4.19 provides for reviews of awards under section 89B of the pre-reform Act containing clauses providing for tallies in the meat industry to lapse on the date of reform commencement.

Regulation 4.20 – Dealing with disputes

702. Subregulations 4.20(1) and (4) provide for the cessation of part-heard proceedings instituted before the reform commencement, to the extent they involve employers, concerning the notification, finding, conciliation and arbitration of industrial disputes under sections 99, 100, 102, 103 and 104 of the pre-reform Act. Such proceedings may continue under subregulation 4.20(3) to the extent that they involve a transitional employer and are to be dealt with according to the procedures, and the Commission's powers, under Schedule 6 to the Act.

- This means that in a matter involving a transitional employer that has not been concluded at the date of reform commencement, the Commission would not be able to bind additional parties or create new awards, would not be able to conciliate disputes relating to the matters listed in subclauses 18-21 of Schedule 6, and would only be able to arbitrate disputes insofar as they concerned matters in subclause 29(2) which relate to wages and monetary entitlements, but not other allowable award matters.

703. Subregulation 4.20(2) provides that where conciliation proceedings (involving an employer) are underway at the reform commencement date, the Commission may continue to endeavour to resolve differences concerning the application of awards, meal breaks, public holidays or parental leave, in accordance with its powers under the Model Dispute Resolution process (the Commission's powers in this context are set out in section 701).

Regulation 4.21 – Principles about making or varying awards in relation to allowable award matters

704. Regulation 4.21 discontinues the Commission's power under subsection 106(1) of the pre-reform Act to establish principles for the making or variation of awards in relation to allowable award matters after the reform commencement. This function will be replaced with a new process for award rationalisation and simplification under Division 4 of Part 10 of the Act.

Regulation 4.22 – References of disputes to Full Bench

Regulation 4.23 – Proceedings being dealt with by President

705. Regulations 4.22 and 4.23 provide, to the extent they involve an employer, for:

- the cessation of references of disputes to a Full Bench of the Commission under section 107 of the pre-reform Act; and
- the cessation of proceedings being dealt with by the President of the Commission.

Such matters may continue insofar as they relate to a transitional employer.

Regulation 4.24 – Review on application by Minister

706. Regulation 4.24 provides for the continuation of applications made by the Minister for review of an award or order under section 109 of the pre-reform Act. Similar to the provisions in relation to appeals, the regulation provides that:

- appeals may be instituted within 21 days of the date of the award, order or decision being appealed against, or within 21 days after a statement of reasons (if requested) was given;
- no extensions of time after reform commencement will be permissible; and
- the Commission will have a discretion as to whether or not it continues to hear such applications after reform commencement, having regard to whether or not its final decision in the matter either could, or could not, be effectively implemented or will, or will not, have a practical application under the provisions of the Act.

Regulation 4.25 – Particular powers of Commission

707. Subregulation 4.25(1) provides that the Commission has power, to the extent that a proceeding at first instance relates to an employer, to make orders to the extent necessary for the disposition of proceedings under these regulations after reform

commencement. However, under subregulation 4.25(2) the Commission will not have power to:

- make, vary or set aside awards under paragraphs 111(1)(b), (e) or (f) or 113(1) of the pre-reform Act during such proceedings; or
- dismiss matters under paragraph 111(1)(g) on the grounds that an industrial dispute is trivial, is being dealt with by a State industrial authority, is unnecessary in the public interest or because a party is hindering settlement of an industrial dispute or has breached an award, direction or recommendation of the Commission.

708. Subregulation 4.25(3) is intended to ensure that subregulation 4.25(2) does not affect the Commission's power to make or vary awards for the purposes of determining appeals (as opposed to first instance proceedings).

709. Under subregulation 4.25(4), to the extent that proceedings relate to industrial disputes concerning transitional employers, the Commission will be able to exercise the powers set out in clauses 31 and 46 of Schedule 6 to the Act.

Regulation 4.26 – Commission to cease dealing with industrial dispute in certain circumstances

710. Regulation 4.26 provides that proceedings brought before the reform commencement will lapse where the Commission is considering whether, under section 111AAA of the pre-reform Act, to cease dealing with an industrial dispute on the basis that a State award or employment agreement governs the conditions of particular employees whose employment is the subject of an industrial dispute. On reform commencement, the Commission will only have power to deal with industrial disputes to the extent that they involve transitional employers under Schedule 6 to the Act. State awards and agreements will be brought into the federal system and preserved under schedule 8 to the Act, to the extent that they relate to employers as defined in subsection 6(1). In this context the continuation of such proceedings would not be appropriate.

Regulation 4.27 – Recommendations by consent

711. Regulation 4.27 provides that to the extent that a conciliation proceeding involves an employer, the Commission must not conduct hearings or make orders about a particular matter by consent of the parties. To the extent that a proceeding involves a transitional employer, the Commission may make such orders according to the provisions of clause 47 of Schedule 6 to the Act.

Regulation 4.28 – Varying awards (ambiguity or uncertainty)

Regulation 4.29 – Varying awards (removal of discrimination)

Regulation 4.30 – Varying certified agreements (removal of discrimination)

Regulation 4.31 – Varying awards (change of name)

712. Regulations 4.28, 4.29, 4.30 and 4.31 provide that proceedings begun before the reform commencement to vary awards for the purposes of correcting ambiguity under subsection 113(2), to vary awards or certified agreements to remove sex discrimination under subsection 113(2A), or to change the name of a party bound by an award under subsection 113(3) may continue to the extent that the matter involves:

- an employer, the Commission may deal with these matters under section 554 (relating to awards) or subclause 3(6) of Schedule 14 to the Act (relating to pre-reform certified agreements); or
- a transitional employer, the Commission may deal with the matter under subclause 30(1) of Schedule 6 to the Act.

Regulation 4.32 – Varying awards (junior rates of pay)

713. Regulation 4.32 will lapse employer-related proceedings brought before the reform commencement to vary an award to include, vary or remove a junior rate of pay. Such proceedings may continue to the extent that they involve transitional employers and be dealt with under paragraph 29(2)(a) of Schedule 6 to the Act.

- Regulation 3.1 of Chapter 3 provides that the Commission may vary a transitional award in respect of rates of pay for part-time transitional

employees, junior transitional employees or transitional employees to whom training arrangements apply. However, the Commission may only do so where it is, for the first time, introducing rates of pay into a transitional award for a class of part-time transitional employees and the transitional award does not already specify the basis on which award conditions are to apply.

Regulation 4.33 – Enterprise flexibility provisions

714. Regulation 4.33 will lapse all proceedings brought before the reform commencement concerning the inclusion of enterprise flexibility provisions in awards under section 113A of the pre-reform Act, or variation of awards to give effect to such provisions under section 113B of the pre-reform Act. This reflects the fact that such provisions will become unenforceable under sections 519 and 525, and that employers and employees will have opportunities for greater workplace flexibility under the agreement-making provisions of the Act.

Regulation 4.34 – Compulsory conferences

Regulation 4.35 – Exceptional matters orders

715. Regulation 4.34 provides that directions to attend compulsory conferences made under section 119 of the pre-reform Act will lapse on reform commencement. Regulation 4.35 provides that the Commission must not make an exceptional matters order (that is, on a matter allowed to be included in an industrial dispute) under section 120A of the pre-reform Act after reform commencement.

Regulation 4.36 – Orders to stop or prevent industrial action

716. Regulation 4.36 relates to proceedings for an order to stop or prevent industrial action under subsection 127(1) of the pre-reform Act or an interim order to stop or prevent industrial action under subsection 127(3A) of the pre-reform Act. Where proceedings have been instituted but not finally determined before the reform commencement, they continue and are to be determined under the pre-reform Act as if that Act had not been amended.

717. This regulation provides that:

- an order under these sections continues to have effect after the reform commencement;

- an application for an injunction to compel compliance with a subsection 127(1) order under subsection 127(6) made before the reform commencement continues and should be determined according to the pre-reform Act provisions; and

- an application under subsection 127(6) may be made after the reform commencement and should be determined according to the pre-reform Act provisions.

Regulation 4.37 – Unfair contracts

718. Regulation 4.37 provides that if an application was made before the reform commencement to the Court to review a contract on the grounds that it was unfair or harsh under subsection 127A(2) of the pre-reform Act, the Court may continue to review, and form an opinion in relation to, the contract under section 127A of the pre-reform Act. The Court may also make an order under section 127B of the pre-reform Act in relation to the opinion.

Regulation 4.38 – Orders restraining State authorities from dealing with disputes

719. Regulation 4.38 preserves orders made by, and part-heard proceedings in, the Commission under section 128 of the pre-reform Act to restrain state industrial authorities from dealing with a matter that is before the Commission, to the extent that such orders or proceedings would be permissible under section 117. This means that to the extent that the order or proceeding relates to an employer and involves an industrial dispute, the order or proceeding as it affects an industrial dispute lapses on reform commencement. The Commission may make such orders in relation to industrial disputes to the extent that the proceeding involves a transitional employer in accordance with paragraph 46(1)(e) of Schedule 6 to the Act.

Regulation 4.39 – Reference of dispute to local industrial board

720. Regulation 4.39 will lapse references of industrial disputes under section 130 of the pre-reform Act to a local industrial board for investigation. Regulation 4.40 provides for the continuation of the Commission's ability under section 131 of the pre-reform Act to appoint a board of reference under an award and assign to it certain functions. After reform commencement, such orders are to be made in accordance with:

- in the case of an employer – section 895; or
- in the case of a transitional employer – clause 26 of Schedule 6 to the Act.

Regulation 4.40 – Boards of reference

721. Regulation 4.40 provides for the continuation of the Commission's ability to appoint and assign certain functions to boards of reference. In relation to employers, such appointments are to be made in accordance with section 895. In relation to transitional employers, such appointments are to be made in accordance with clause 26 of Schedule 6 to the Act.

Division 5 – Ballots ordered by the Commission

Regulation 4.41 – Secret ballots – industrial disputes

722. Subregulation 4.41(1) provides that an order of the Commission that a vote of members of an organisation be taken by secret ballot to determine their attitudes to an industrial dispute under subsection 135(1) of the pre-reform Act lapses on the reform commencement.

723. Subregulation 4.41(2) provides transitional arrangements for parties covered by Schedule 6 to the Act. An order under subsection 135(1) of the pre-reform Act in relation to an industrial dispute would have effect after the reform commencement as if it were an order under subclause 52(1) of Schedule 6.

Regulation 4.42 – Secret ballots- industrial action

724. Regulation 4.42 provides that an order under subsection 135(2) of the pre-reform Act that a vote of members be taken by secret ballot for the purpose of finding out member attitudes to the industrial action lapses on the reform commencement.

Regulation 4.43 – Secret ballots- approval of certified agreements

725. Subregulation 4.43(1) provides that an order under subsection 135(2A) and Part VIB of the pre-reform Act that a vote be taken by secret ballot for approval of an agreement continues to have effect after the reform commencement as if that subsection and Part had not been repealed. Subregulation 4.43(2) provides that the Commission may revoke an order under subsection 135(2A).

Regulation 4.44 – Secret ballots- industrial action during bargaining period

726. Regulation 4.44 provides that an order under subsection 135(2B) of the pre-reform Act for a secret ballot to determine attitudes in relation to industrial action lapses on the reform commencement.

Regulation 4.45 – Application for secret ballot

727. Subregulation 4.45(1) provides that an application made to the Commission for an order under subsection 136(1) of the pre-reform Act for a secret ballot where members of an organisation have been directed or requested to engage in industrial action lapses on the reform commencement. Subregulation 4.45(2) provides that an order of the Commission for a secret ballot under subsection 136(2) of the pre-reform Act lapses on the reform commencement.

Division 6 – Common rules

Regulation 4.46 – Common rules

728. Regulation 4.46 provides that the Commission must not make a declaration after reform commencement under section 141 of the pre-reform Act that a term of an award is a common rule in a territory, in Victoria (by operation of section 493A of the pre-reform Act), or for public sector employment. Applications for such declarations

under section 141A of the pre-reform Act will also lapse after reform commencement. However, subregulation 4.46(3) provides for the continuation and determination of an application made by an employer prior to reform commencement to object to being bound by a variation of a term of a common rule award, provided the objection was lodged within times prescribed by the Commission rules.

Division 7 – Awards of Commission

Regulation 4.47 - Review of operation of awards

729. Regulation 4.47 will lapse proceedings for the review by the Registrar of awards that may no longer have any continuing operation. This function will be replaced with a new process for award rationalisation and simplification under Division 4 of Part 10 of the Act.

Division 8 – Boycotts

Regulation 4.48 - Disputes relating to boycotts

730. Regulation 4.48 will lapse proceedings underway prior to reform commencement under sections 157 and 158 of the pre-reform Act for the conciliation of disputes involving boycott conduct under the *Trade Practices Act 1974*.

Regulation 4.49 - Restriction on certain actions in tort

731. Regulation 4.49 preserves the statutory bar to the bringing of an action in tort against an organisation of employees (or an officer, member or employee of an association) unless a certificate under pre-reform section 166A has been issued by the Commission, in relation to conduct that occurred before the reform commencement. Under pre-reform section 166A, the Commission was required to issue a certificate if it had attempted to stop the conduct but had failed to do so. Subregulation 4.49(2) provides that if an employer had provided notice of its intention to take an action in tort against an organisation, and the Commission had not yet stopped the conduct or issued a certificate under section 166A of the pre-reform Act at the reform commencement, the Commission will be taken to have issued a certificate immediately before the reform commencement.

Division 9 – Cancellation and suspension of awards and orders

Regulation 4.50 - Cancellation and suspension of awards and orders

732. Regulation 4.50 enables the continuation of part-heard applications instituted before the reform commencement under section 187 of the pre-reform Act for cancellation or suspension of the terms of an award or order on the basis that:

- an organisation has contravened the pre-reform Act;
- a substantial number of an organisation's members refuse to accept employment at all or in accordance with existing awards or orders; or
- if for any other reason an award or order of the Commission should be suspended in whole or in part.

Division 10 – Right of Entry

Regulation 4.51 - Civil penalty proceedings

733. Regulation 4.51 deals with civil penalties in relation to breaches of the Right of Entry provisions.

734. Regulation 4.51 provides that where an application for a civil penalty or injunction for the breach of the Right of Entry provisions under subsections 285F(2) or 285F(5) was made, but not finally determined, then the application continues.

735. The applications are to be determined as if subsections 285F(2) and 285F(5) of the pre-reform Act had not been amended.

Regulation 4.52 - Powers of Commission

736. Regulation 4.52 provides for the continuation of the Commission's powers to prevent and settle disputes about the operation of the right of entry provisions and to revoke permits for the purpose of settling such disputes under section 285G of the pre-reform Act where proceedings have been commenced.

737. If proceedings under the pre-reform Act were begun but not finally determined then those proceedings continue and are to be determined under the provisions relating to disputes about the operation of the Commission's powers under section 772 as amended.

Division 11 – Freedom of Association

Regulation 4.53 - Remedies for breaches

738. Regulation 4.53 provides for the continuation of applications in respect of a contravention of the Freedom of Association provisions.

739. The regulation provides that where an application has been made for an order in respect of a contravention of the Freedom of Association provisions under section 298T of the pre-reform Act then the application continues. The Court is able to make an order if it considers it to be appropriate under section 298U of the pre-reform Act as if that Act had not been amended.

Regulation 4.54 - Removal of objectionable provisions

740. Regulation 4.54 provides for the continuation of applications for the removal of objectionable provisions from awards and pre-reform Act agreements.

741. This regulation provides that if an application was made to the Commission under section 298Z of the pre-reform Act, but was not finally determined, the application continues and is to be determined under that section as if the pre-reform Act had not been amended.

Division 12 State laws

Regulation 4.55 Appeal rights under State laws

742. Regulation 4.55 prescribes State or Territory laws relating to appeals to State industrial tribunals for the purposes of paragraph 16(2)(b), and makes transitional provision for the effect of any resulting appeal decision.

743. Subregulation 4.55(1) provides that a law of a State or Territory that allows for or relates to an appeal to a State industrial authority against a decision to make or vary a State award, is not excluded by section 16(1). A decision to make or vary a State award expressly includes a decision which binds (or ceases to bind) an employer, employee or industrial association to a State award. Note that State industrial authority and State award are defined in section 4 of the Act.

744. This means, for example, that the Act will not prevent a federal system employer (after reform commencement) from appealing a decision by a State industrial tribunal binding it to a State award made before reform commencement, where the employer would otherwise be able to do so under the relevant State law.

745. Subregulation 4.55(2) provides that subregulation (1) ceases to operate 6 months after reform commencement. Therefore, after the 6 month period, State and Territory laws relating to appeals will no longer be preserved by paragraph 16(2)(b). From this time, federal system employers and employees (as defined by section 5(1) and 6(1)) will be unable to appeal a decision varying or making a State award in a State tribunal. Additionally, any proceedings on foot, but not determined within 6 months after reform commencement, will lapse.

746. Subregulation 4.55(3) provides what happens when a State industrial authority, as a result of an appeal decision, makes, sets aside or varies a State award after reform commencement. This subregulation applies only to the extent that the award relates to a federal system employer.

747. Subregulation 4.55(3) expressly extends to decisions which have the effect of binding an employer, employee or industrial association to a State award, or alternatively, stop an employer, employee or industrial association from being bound to a State award.

748. Paragraph 4.55(3)(a) provides that a decision by a State tribunal will operate retrospectively for the purposes of Part 7, Division 2, Subdivision E (the Wage Guarantee), Subdivision I (Australian Pay and Classification Structures) of the Act, and

Schedule 8 (State transitional agreements) to the Act. The decision will have effect as if made immediately before reform commencement.

749. For example, where an appeal decision determines that a federal system employer is bound to a State award, the decision will have effect as if it was made immediately before reform commencement. It is being bound to a State award at this point in time which results in an employer becoming bound to a notional agreement preserving state awards (NAPSA) under Schedule 8. Therefore, the employer will be taken to have been bound to the State award immediately before commencement resulting in the parties becoming bound by the NAPSA that was derived from the State award.

750. Likewise, the level of the wage guarantee for federal system employees previously covered by the State award would be affected by any increase or decrease in wages under the State award as a result of the appeal decision. This is because the increase or decrease would be taken into consideration as if it had been in force immediately before reform commencement which is the point in time at which the wage guarantee is determined.

751. Paragraph 4.55(3)(b) provides that where a decision of a State tribunal has an effect on the wage guarantee or Schedule 8 because of the operation of paragraph 4.55(a), then the change to the entitlement does not take effect on reform commencement. Rather, the change to the entitlement will take effect from either a date specified in the decision, or the date on which the appeal was determined, whichever is the later.

752. In other words, the combined effect of paragraphs 4.55(3)(a) and (b) is that any change to the wage guarantee in an Australian Pay and Classification Scale or to the terms and conditions set by the Schedule 8 transitional agreement is deemed by paragraph 4.55(3)(a) to take effect at reform commencement. This is so the variation can be incorporated into a federal instrument which is derived from a State award at reform commencement. But there will be no obligation to provide the varied entitlement until the date of the appeal decision or a later date specified by the State tribunal. This ensures that parties will not be in breach of a federal instrument where

they have complied with the terms of the instrument as they existed during the period from commencement to appeal decision.

753. Subregulation 4.55(4) provides that industrial association has the same meaning as in section 779.

Chapter 8 – Miscellaneous provisions

Regulation 1.1 – Ballots conducted by the Australian Electoral Commission – no unauthorised action

754. Regulation 1.1 provides that a person other than an authorised ballot agent or a person authorised or directed by an authorised ballot agent must not do or purport do any act in the conduct of ballot.

755. This is a civil penalty provision and strict liability applies to the physical element of the prohibition

Regulation 1.2 – No action for defamation in certain cases.

756. Regulation 1.2 provides no action for defamation against the Commonwealth or an electoral official conducting a ballot on behalf of the Australian Electoral Commission in relation to any document printed or issued by the official or by another person who printed the document.

Regulation 1.3 – Application of the Criminal Code

757. Regulation 1.3 provides that Chapter 2 of the *Criminal Code* applies to civil penalties in Part 8 as if those penalties were offences

Schedule 1 – Forms

758. This schedule prescribes various forms for the purposes of these regulations. These are:

- Form 1 – Ballot paper in respect of protected action ballot under regulation 9.10
- Form 2 – Permit to enter and inspect premises under regulation 15.3
- Form 3 – Permit to enter and inspect premises under regulations (exemption certificate)

- Form 4 – Notice of proposed terminations under section 660 and regulation 12.9

- Form 5 - Application to the Commission to have a dispute resolution process conducted under Part 13 and regulation 13.2

Schedule 2 – Employing authorities (Act, subsection 4(1))

759. Regulation 1.4 in Chapter 1 prescribes persons or bodies for the purposes of the definition of "employing authority" in subsection 4(1), by reference to information set out in the table in Schedule 2 to these Regulations.

760. For each item in column 1 of the table the persons or bodies specified in column 3 against that item is prescribed as the employing authority for the class of employees specified in column 2 of that item.

Schedule 3 – Commonwealth authorities (definition of public sector employment)

761. Paragraph 1.5(2)(c) prescribes the classes of persons for the purposes of paragraph 4(1)(h) and provides that persons employed by or in the service of a Commonwealth authority referred to in Schedule 3 are prescribed.

Schedule 4 – Information and copies of documents to be given to Minister by Commission

762. Section 125 provides that President of the Commission must provide certain information to the Minister.

763. Regulation 3.7 prescribes the kinds of information and copies of documents and the form and time frame that such documents should be provided by reference to information set out in a table in Schedule 5 to these Regulations. For each item of the table the information or copy of document specified in column 2 against that item must be given to the Minister within the time specified in column 3 for that item.

Schedule 5 Information and copies of documents to be given to Minister by Employment Advocate

764. Subparagraph 151(1)(i) provides that one of the functions of the Employment Advocate is to give information and copies of documents to the Minister in accordance with the Regulations.

765. Subregulation 5.1(1) prescribes the kinds of information and copies of documents and the form and time frame that such documents should be provided by reference to information set out in a table in Schedule 5 to these Regulations. For each item of the table the information or copy of document specified in column 2 against that item must be given to the Minister within the time specified in column 3 for that item.

Schedule 6 – Workplace inspectors – form of identity card

766. This Schedule prescribes the form of the identity card as specified in regulation 6.4 of Chapter 2.

Schedule 7 – Schedule of costs

767. This Schedule sets out a scale of costs in accordance with regulation 12.7 of Chapter 2.

Schedule 8 – Further provisions relating to definitions

768. Schedule 8 to the Regulations supplements sections 4, 5, 6 and 7 (the definition provisions).

769. Subclause 5(1) of Schedule 2 to the Act provides that regulations may be made to amend clauses 2, 3 and 4 of Schedule 2 to the Act.

Part 1 Amendments of clause 2 of Schedule 2 to the Act

770. The note explains that clause 2 of Schedule 2 to the Act provides a list of references to ‘employee’ in the Act, where it has its ordinary meaning.

771. A standard note about the treatment of these regulations for the purposes of the *Amendments Incorporation Act 1905* is also included.

Clause 2

772. Item 2 omits paragraph 2(f) from clause 2 to Schedule 2 to the Act. This means references to 'employee' in section 204 do not have their ordinary meaning.

773. Item 3 provides a list of provisions in the Act where the term 'employee' should be read as having its ordinary meaning (as opposed to the definition of employee provided in subsection 5(1)) in addition to those already provided in Clause 2 of Schedule 2 to the Act.

Part 2 Amendments of clause 3 of Schedule 2 to the Act

774. The note explains that clause 3 of Schedule 2 to the Act provides a list of references to 'employer' in the Act where it has its ordinary meaning.

775. A standard note about the treatment of these regulations for the purposes of the *Amendments Incorporation Act 1905* is also included.

Clause 3

776. Item 5 omits paragraph 3(d) from clause 3 to Schedule 2 of the Act. This means references to employer in section 204 do not have their ordinary meaning.

777. Item 6 provides a list of provisions in the Act where the term 'employer' should be read as having its ordinary meaning (as opposed to the definition of employer provided in subsection 6(1)).

Part 3 Amendments of clause 4 of Schedule 2 to the Act

778. The note explains that clause 4 of Schedule 2 to the Act provides a list of references in the Act to employer where it has its ordinary meaning.

779. A standard note about the treatment of these regulations for the purposes of the *Amendments Incorporation Act 1905* is also included.

Clause 4

780. Item 8 omits paragraph 4(d) from clause 4 to Schedule 2 to the Act. This means references to employment in section 204 do not have their ordinary meaning.

781. Item 9 provides a list of provisions in the Act where the term 'employment' should be read as having its ordinary meaning (as opposed to the definition of employment provided in subsection 7(1)).