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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

FAIR WORK BILL 2008

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Employment and Workplace Relations, the Honourable Julia Gillard MP)

FAIR WORK BILL 2008

OUTLINE

The Fair Work Bill 2008 (the Bill) creates a national workplace relations system that is fair to working people, flexible for business and promotes productivity and economic growth.

The Bill implements the following major reforms:

- it establishes a simple and stable safety net comprising:
  - the NES, which will apply to all employees and guarantee:
    - maximum weekly hours of work;
    - a right to request flexible working arrangements;
    - parental leave and related entitlements;
    - annual leave;
    - personal/carer's leave and compassionate leave;
    - community service leave;
    - long service leave;
    - public holidays;
    - notice of termination and redundancy pay; and
    - provision of a Fair Work Information Statement.
  - modern awards, which provide flexibility and stability for employers and their employees and which may include:
    - additional minimum terms and conditions of employment (such as minimum wages, overtime and penalty rates, allowances, representation and dispute settlement) tailored to the needs of the particular industry or occupation to which the award relates; and
    - terms which supplement the NES.
  - national minimum wage orders that apply to award/agreement free employees
- It establishes a new institutional framework for the administration of the new workplace relations system comprising:

- FWA, an independent, statutory body with a range of functions and powers, including:
    - facilitating collective bargaining;
    - approving enterprise agreements;
    - adjusting minimum wages and award conditions;
    - dealing with unfair dismissal claims;
    - dealing with industrial action; and
    - settling workplace disputes
- the Fair Work Ombudsman, whose key function is to promote harmonious and cooperative workplace relations and compliance with the Bill through education, assistance and advice and, where necessary, undertake enforcement activities, such as investigation, issuing compliance notices and initiating court proceedings.

- It promotes productivity and fairness through enterprise agreements that are tailored to suit the needs of businesses and the needs of employees, including by:
    - providing employees and employers with the right to appoint persons of their choice to represent them in negotiations for a proposed agreement;
    - enabling FWA to facilitate good faith bargaining and the making of agreements, including through making bargaining orders and dealing with bargaining disputes where the parties request assistance; and
    - ensuring that employees covered by an agreement are better off overall against the new safety net.
- It provides a framework for dealing with terms and conditions of employment where there is a transfer of business that balances the protection of employees' terms and conditions of employment and the interests of employers in running their enterprises efficiently.
- It promotes fairness and representation at the workplace through streamlined and simple general protections dealing with workplace and industrial rights, including the rights to freedom of association and protection against discrimination, unlawful termination and sham arrangements (which disguise employment arrangements as independent contractor arrangements).
- It provides genuine unfair dismissal protections for employees with a quick, flexible and informal process, an emphasis on re-instatement and a Fair Dismissal Code for small businesses.

- It retains clear, tough rules against industrial action, with the right to take protected industrial action during bargaining in support of claims in relation to a new enterprise agreement following a fair and democratic secret ballot. This includes empowering FWA to make orders to stop industrial action and sets out restrictions on payment to employees during periods of industrial action.

- It retains a fair and balanced framework for right of entry for officials of organisations and empowers FWA to deal with abuses of rights by officials, unreasonable requests by employers and disputes.

- It provides a default right for employers to stand down employees in defined circumstances.

- It enhances compliance with the new workplace relations system by providing a single, accessible compliance system, including:

  - the ability of the Fair Work Divisions of the Federal Court or the Federal Magistrates Court to make any order considered appropriate to remedy a contravention;

  - the right to enforce entitlements under a contract of employment that relate to the same subject-matters as the NES or a modern award in the Federal Court and the Federal Magistrates Court and by inspectors in eligible State and Territory courts; and

  - a new small claims procedure in the Federal Magistrates Court.

FINANCIAL IMPACT STATEMENT

The financial impact is yet to be determined in consultation with the Department of Finance and Deregulation and once agreed will be included in the relevant appropriation bills.

REGULATORY ANALYSIS

r.1. This document analyses the regulatory implications of the key legislative proposals contained in the Fair Work Bill 2008 (the Bill). The analysis has been prepared by the Department of Education, Employment and Workplace Relations (the Department). The Prime Minister and the Minister for Finance and Deregulation have agreed to the inclusion of this analysis in the Explanatory Memorandum to the Bill and note that the Office of Best Practice Regulation (OBPR) agrees that this analysis has effectively documented the regulatory implications of the legislative proposals, compared with arrangements which existed under the legislative framework of the previous Government.

r.2. The Prime Minister granted an exceptional circumstances exemption for these proposals at the decision making stage. Consistent with best practice regulation requirements, the Australian Government (the Government) commits to undertaking a post-implementation review within two years of the full implementation of these proposals on 1 January 2010.

INTRODUCTION

r.3. The current legislative provisions contained in the *Workplace Relations Act 1996* (WR Act) are complex and amount to some 1,500 pages in length. This compares with the simpler provisions of this Bill which amount to fewer than 600 pages.

r.4. As the means for fulfilling the election commitments made by the Government in *Forward with Fairness*, released April 2007, and *Forward with Fairness – Policy Implementation Plan*, released August 2007, this Bill provides a much needed opportunity to reconceptualise the legislation from first principles and ensure that Australia's workplace relations legislation:

- provides a clear and stable framework of rights and obligations;
- is simple and straightforward to understand in terms of structure, organisation and expression; and
- reduces the compliance burden on business (for example, by avoiding 'micro-regulation' and overly prescriptive provisions and by conferring broad functions and appropriate discretion on Fair Work Australia).

Key Elements of the New System

r.5. The new workplace relations system will be built on:

- a strong safety net of 10 legislated National Employment Standards for all employees;
- a modern, simple award system that complements the National Employment Standards, providing certainty, flexibility and stability for employers and their employees;
- an enterprise-level collective bargaining system focused on promoting productivity;

- unfair dismissal laws which balance the rights of employees to be protected from unfair dismissal with the need for employers, particularly small business, to fairly and efficiently manage their workforce; and
- a 'one-stop-shop', Fair Work Australia (incorporating the Fair Work Ombudsman), for advice and support on all workplace relations issues and enforcement of legal entitlements.

Regulatory Implications

r.6. The proposed legislation will have a regulatory impact. The new arrangements pose significant implications for employees, employers and the broader community. The new provisions centre on six key policy areas:

(i) Legislated Minimum Employment Standards;

(ii) Modern Awards;

(iii) Bargaining Framework;

(iv) Unfair Dismissal;

(v) Industrial Action; and

(vi) Institutional Framework.

Summary

r.7. Pending the development of a national workplace relations system, the Department estimates that up to approximately 85 per cent of Australian employees will be covered by the federal workplace relations system. The remaining employees will be covered by a state industrial relations system in New South Wales, Queensland, Western Australia, South Australia or Tasmania.

r.8. The Government's policy is to enter into new arrangements with state governments to ensure a uniform workplace relations system for private sector employers and employees.

r.9. The Bill sets out provisions that provide minimum employment standards and provide an industrial framework for employers and employees in the federal workplace relations system. These provisions are designed to strike a balance between the needs of employers and employees and to promote fair and productive workplaces.

r.10. Each of the sections of this analysis discusses this in detail.

r.11. The new legislated minimum employment standards, known as the National Employment Standards (NES), contain provisions that provide increased access to leave (particularly unpaid leave), provide flexible working arrangements and simplify the rules by which the entitlements of employees are accrued. Where additional entitlements (including unpaid entitlements) are provided under the NES, this will benefit employees but may, depending on circumstances, impose a cost on an employer. The increased access to flexible

working arrangements is designed to assist employees to balance their work and personal lives. However, businesses are able to refuse access to these provisions on reasonable business grounds, which will minimise the disruption of these provisions to business. The simplified rules for accruing leave are designed to benefit both employers and employees.

r.12. The bargaining framework contained in the Bill entails significant regulatory change. These include the introduction of good faith bargaining, changes to the content of agreements, the creation of a single stream of agreement-making, a streamlined process for the approval of agreements and the introduction of Fair Work Australia-facilitated bargaining for the low paid. These regulations are focused on facilitating bargaining where employers and employees are not successfully able to bargain together. As a number of the elements of the bargaining framework are new to the federal workplace relations system and do not have parallels elsewhere, the impact of a number of elements of the bargaining framework is difficult to quantify at this stage.

r.13. The new legislation will expand access to unfair dismissal provisions. Approximately 100 000 additional previously exempt businesses, with around 3 million employees, will become part of the unfair dismissal system. Businesses have 6 or 12 months to assess their employees before the employees would be able to contemplate an unfair dismissal claim, claims must be lodged within 7 days of dismissal and small businesses can avoid defending claims altogether by following the new Fair Dismissal Code. While there is likely to be more unfair dismissal claims, they should be easier and cheaper to resolve. The unfair dismissal system will provide definite benefits for employees in terms of job security and mitigate adverse impacts on employers.

r.14. Industrial action can have a negative impact, particularly in terms of productivity. Regulations that encourage industrial action can have a negative impact on the ability of employers to operate their business and on the take home pay of employees. Bargaining participants should have the right to take protected industrial action and an employer should have a right to provide a proportionate response. The provisions in the Bill largely retain previous rules on industrial action, with some provisions streamlined and simplified.

r.15. The institutional framework of the new workplace relations system will be a 'one-stop-shop' – Fair Work Australia (FWA). FWA will replace seven separate agencies that currently span the institutional framework in the federal workplace relations system. The Department is not able to directly quantify the impact of the changes to the institutional framework in the creation of FWA. However, the Department anticipates that employers and employees will benefit from this regulatory change by having a central point of contact for workplace relations issues, as opposed to spending time and resources ascertaining the appropriate institution to contact in relation to their issue.

r.16. The impact of modern awards is difficult to quantify at this stage. The Australian Industrial Relations Commission (AIRC) is currently undertaking an award modernisation process to create modern awards to come into effect on 1 January 2010. The impact of award modernisation rests on the final content of these awards. However, the intention of award modernisation is to create modern awards that reduce regulation, are relevant to the needs of employers and employees, provide (along with the NES) the definition of minimum wages and conditions of employment and are fewer in number.

r.17. The Department does not anticipate that the impact of these regulations will be differential across industries, occupations and regions. The Bill creates a federal workplace relations system that provides consistent minimum conditions and industrial frameworks for all employers and employees within the system.

r.18. As mentioned above, the Government is committed to monitoring the impact of the provisions contained in the Bill through a post-implementation review. This review will provide a comprehensive analysis of how the Government's new workplace relations system is operating and its impact on employers, employees, the community and governments. The review will assess if the provisions in the Bill have led to any differential impacts across regions, industries and occupations.

Consultation

r.19. In *Forward with Fairness* the Government committed to taking a measured and consultative approach to developing its substantive workplace relations legislation. As detailed in Table A1 of Attachment A, the Government consulted extensively with a wide range of stakeholders, including peak union and employer bodies and state and territory workplace relations ministers. To summarise, the key stakeholder groups that have provided valuable input to the development of the Bill are:

- *Workplace Relations Ministers' Council* (WRMC), a council of federal, state and territory ministers responsible for workplace relations matters in their respective jurisdictions. The New Zealand Minister is invited to attend WRMC as an observer.
- *High Level Officials Group* (HLOG) consists of officials from the federal government and each state and territory. It was established at the WRMC meeting on 1 February 2008 to facilitate collaboration on the development of the new national workplace relations system for the private sector.
- *National Workplace Relations Consultative Council* (NWRCC) is a tripartite body comprised of seven representatives from the Australian Council of Trade Unions (ACTU) and seven employer representatives. It is chaired by the Deputy Prime Minister and under the NWRCC Act is required to meet at least once every six months on a confidential basis to consider workplace relations matters on a national level.
- *Committee on Industrial Legislation* (COIL) is a sub-committee of NWRCC that considers workplace relations and related legislative matters.
- *Business Advisory Group* (BAG) was established on 20 February 2008 and is chaired by Mr John Denton, Managing Partner, Corrs Chambers Westgarth. It involves representatives from the construction, mining, transport, hospitality, retail, banking, labour hire and the media industries meeting on a confidential basis to discuss key issues relating to the Bill.
- *Workers Advisory Group* (WAG) was established on 20 February 2008 and is chaired by the Deputy Prime Minister. It consists of high-level union representatives meeting on a confidential basis to discuss key issues relating to the Bill.

- *Small Business Working Group* (SBWG) was established on 20 February 2008 and is chaired by the Hon Dr Craig Emerson MP, Minister for Small Business, Independent Contractors and the Service Economy. It involves representatives of small businesses, including peak small business organisations, meeting on a confidential basis to provide advice to the Government on the development of the Fair Dismissal Code.

- *Union Working Group on the Fair Dismissal Code* (UWG) was established on 20 February 2008 and is chaired by the Hon Dr Craig Emerson MP, Minister for Small Business, Independent Contractors and the Service Economy.

Consultation on National Employment Standards

r.20. The Government has also undertaken extensive consultation on the proposed NES. The Government released the NES and invited submissions on the NES exposure draft and discussion paper on 14 February 2008. A total of 129 submissions were subsequently received from a wide range of stakeholders, including employer and employee representatives, community groups, businesses, state governments and interested individuals. After consideration of the submissions received, the Government released the proposed NES on 16 June 2008.

Outline

r.21. This document is structured to provide an analysis of the regulatory implications of the Bill in accordance with the six key policy areas noted above. Each section begins with an outline of the arrangements in place under the system that applied at the time the Government assumed office. This includes the 'Work Choices' amendments to the WR Act. Each section then includes details on how the Government's new policies will operate, followed by an impact analysis of these new arrangements. The analysis concludes with details on how the Government will review and monitor the new provisions.

1. LEGISLATED MINIMUM EMPLOYMENT STANDARDS

Current Arrangements

r.22. The current safety net of legislated minimum employment standards under the WR Act came into effect with Work Choices and the implementation of the Australian Fair Pay and Conditions Standard (the Standard). The Standard contains five basic entitlements, detailed as follows:

- *Basic rates of pay and casual loadings*: prescribed in Australian Pay and Classification Scales (Pay Scales), the Federal Minimum Wage or special Federal Minimum Wages for junior employees, employees to whom training arrangements apply and employees with a disability.

- *Maximum ordinary hours of work*: employees cannot be required or requested to work more than 38 hours per week plus reasonable additional hours; or, an average of 38 hours per week over a period of up to 12 months (if the employee and the employer agree in writing) and reasonable additional hours.

- *Annual leave*: all employees, other than casual employees, have a minimum paid entitlement to annual leave based on their calculated 'nominal hours' worked. For an employee who works 38 hours or more per week for 12 months, the entitlement to annual leave is four weeks. For shift workers the entitlement is five weeks of leave per year if they worked 38 hours per week.

- *Personal leave (includes sick leave, carer's leave and compassionate leave)*: an employee is entitled to ten days of paid personal leave per annum after 12 months of service for an employee who works 38 hours per week. This entitlement is pro-rated for employees who have not completed 12 months service. A further entitlement of two days of unpaid carer's leave per occasion in the event of an unexpected emergency for employees who have exhausted their personal leave entitlement or are casual.

- *Parental leave and related entitlements*: separate provision is made for maternity, paternity, adoption and related kinds of leave. The primary entitlement is to 12 months' unpaid leave, to be shared between both parents. Leave must be taken separately in a single continuous period, except for a one-week period around the birth of the child (three weeks in the case of adoption) which may be taken concurrently.

r.23. These five standard entitlements apply to all employers and employees subject to the WR Act. While the specific nature of the application varies depending on the relevant industrial instrument, the five entitlements generally prevail unless a more favourable outcome is provided in a preserved award (for annual leave, personal/carer's leave and parental leave), workplace agreement or common law contract of employment.

r.24. The current provisions include both the entitlement and machinery provisions about how the entitlement is determined or calculated.

Government's Policy on Legislated Minimum Employment Standards

r.25. The Government's key objective is to address public concern about the adequacy of the safety net under the current workplace relations system by providing a safety net which is fair for employers and employees and supports productive workplaces. The NES is structured in a way that ensures the provisions are easy to understand and apply for employers and employees at the workplace.

Proposed Changes

r.26. The NES provisions, as proposed in the Bill, will apply to all employees covered by the federal system and will come into effect from 1 January 2010. Minimum wages are not included in the NES as they will be provided in modern awards. The ten NES are:

- *Maximum weekly hours of work*: the NES will provide for the same quantum of maximum ordinary hours of work (38 hours for full time employees) as provided under the Standard while making additional provisions of maximum ordinary hours for part-time employees.

  The Standard allows for averaging of hours, provided there is agreement in writing and the averaging period is no longer than 12 months. Under the Standard, hours worked in excess of 38 hours in a week are not considered additional (or subject to the reasonableness factor) if these hours are worked in accordance with an averaging agreement.

  Under the proposed NES, a modern award or enterprise agreement may provide for averaging of hours of work. An employee not covered by an award or an agreement may agree in writing to average hours over 6 months or less. A key change is that where additional hours worked are based on an averaging arrangement, they will be subject to reasonableness factors. The averaging provision/arrangement will be taken into account in considering whether additional hours are reasonable.

- *Requests for flexible working arrangements*: the Standard does not provide an entitlement to request flexible working arrangements. The NES will provide a new legislated entitlement for parents of, or having responsibility for the care of, a child under school age to request a change in working arrangements to assist with the care of the child. An employer will only be able to refuse this request on reasonable grounds. The employer's decision will not be subject to review.

- *Parental leave and related entitlements*: both the Standard and the NES provide for maternity, paternity and adoption leave. The NES will provide both parents with the right to separate periods of up to 12 months unpaid parental leave. Alternatively, one parent will have the right to request an additional 12 months of leave, which employers will only be able to refuse on reasonable business grounds. This builds on the previous entitlement under the Standard of 12 months unpaid leave, shared between parents.

- *Annual leave*: both the Standard and the NES provide the same coverage and quantum of annual leave entitlement. A key change under the NES is a simpler manner of accrual and the concept of 'service' for calculating the entitlement. Paid annual leave

will accrue and then be taken on the basis of an employee's ordinary hours of work. The NES will enable modern awards to supplement the NES if the effect of those terms is not detrimental. This could include provisions that, for example, allow an employee to take twice the annual leave required by the NES but at half the rate of pay. The cashing out of annual leave may be provided in modern awards and by enterprise agreements, subject to a remaining entitlement balance of 4 weeks leave. Award and agreement free employees may also cash out their annual leave, as long as 4 weeks leave remains.

- *Personal/carer's leave and compassionate leave*: the NES will not change the quantum of the entitlement to personal/carer's leave and compassionate leave but will extend unpaid compassionate leave to casual employees. In addition, the number of paid carer's leave days which can be used is no longer capped at 10 days per year. The NES will also replace complex rules about the accrual and crediting of paid personal/carer's leave with a single, simple rule that consolidates notice and evidence rules for taking leave. The NES will enable modern awards to make provision for the cashing out of personal/carer's leave as long as 15 days' leave balance remains. Employees not covered by an award or agreement will not be able to agree to cash out personal/carer's leave.

- *Community service leave*: there is no current entitlement to any kind of community services leave under the WR Act, although it is unlawful to terminate an employee's employment if they are temporarily absent due to a voluntary emergency management activity. Employees currently rely on an employer's discretion and provisions in awards and agreements. The NES will enable employees to take unpaid leave to undertake an eligible community service activity such as jury service or voluntary emergency management. The NES contains provisions for employers to provide make up payments for full and part time employees undertaking jury duty for a period of up to ten days (at the base rate of pay for ordinary hours of work). This is different from the current situation, where employees rely on provisions in state and territory legislation, awards and agreements for jury make up pay.

- *Long service leave*: an entitlement to long service leave is currently provided by state and territory legislation, awards and agreements. Initially, the NES will draw on current state and territory arrangements for long service leave in providing this entitlement. Meanwhile, the Government is working with state and territory governments to develop nationally consistent long service leave entitlements.

- *Public holidays*: the NES and the Standard both provide an entitlement for an employee to be absent on prescribed public holidays. The NES provides for payment at their base rate of pay for ordinary hours if absent on a public holiday. Under the NES, the Queen's birthday holiday is prescribed. The current provisions of the WR Act do not prescribe this as a holiday. Under the NES, an employer may make a reasonable request for an employee to work on a public holiday. However, an employee may refuse to work if they have reasonable grounds.

- *Notice of termination and redundancy pay*: the NES will provide for written notice of termination and redundancy pay. The current provision for notice of termination is

provided under the WR Act but through provisions separate to the Standard. The substantive change under the proposed reforms is for the employer's notice to be in writing. The NES provides a new entitlement to redundancy pay, depending on the level of continuous service by an employee. This NES does not apply to employees of a small business. Modern awards may include industry specific redundancy entitlements. These entitlements will provide more comprehensive protection for employees.

- *Fair Work Information Statement*: from 1 January 2010 an employer will be required to give the Fair Work Australia Information Statement to all new employees. However, unlike the Workplace Relations Fact Sheet, there will no longer be a statutory requirement to give the statement to existing employees.

r.27. The Bill does not identify what may, or may not, comprise 'reasonable business grounds' for the refusal of a request under the NES. Rather, the reasonableness of the grounds is to be assessed in the circumstances that apply when the request is made. Reasonable business grounds may include, for example:

- the effect on the workplace and the employer's business of approving the request, including the financial impact of doing so and the impact on efficiency, productivity and customer service***;***
- the inability to organise work among existing staff; or
- the inability to recruit a replacement employee or the practicality or otherwise of the arrangements that may need to be put in place to accommodate the employee's request.

It is envisaged that FWA will provide guidance on this issue.

Impact Analysis

r.28. Changes to minimum employment standards will impact on those employers and employees that have their employment arrangements based on these minimum employment conditions. The changes will directly affect those parties that rely on minimum standards currently available through legislation, awards or collective agreements which include minimum employment conditions as part of the agreement. In establishing the impact of these changes to minimum employment standards the first step is to identify how many employers and employees are affected.

How many employers and employees are affected?

r.29. In terms of awards, ABS data from May 2006 (most recent data available) show that 19.0 per cent of employees were paid their exact award rate of pay. However, a larger number of employees rely on awards to form the basis of their minimum entitlements. There are no data available on the proportion of employees who rely on minimum conditions in awards.

r.30. It is difficult to identify the number of employees covered by collective agreements that utilise minimum employment conditions as many agreements include conditions over and above the minimum requirements. Nevertheless, the following analysis includes data on the incidence

of employment conditions in federally registered collective agreements where available and appropriate.

Impact on employees and employers

r.31. Changes to minimum employment standards can afford a benefit to employees if they are increased, in which case they would impose a cost on business that has to pay for the increased standard. Or if a standard is reduced then this affords a benefit to business that has a lowered cost, but imposes a cost on employees who have a reduction in their standards. Therefore, it can be seen that changes to employment standards result in a transfer or redistribution between employers and workers.

r.32. What matters when assessing the impact of the change to employment standards is:

- the equity effect of any transfer or redistribution between employers and employees; and
- the behavioural responses of employers and employees to a change in employment standards.

Equity effect

r.33. It is not possible to measure scientifically the equity effect of transfers between different parties in an economy. However, it is important to acknowledge that these equity considerations will play a part in the impact of changes to minimum employment standards.

r.34. It is important to also consider the role of government in taxing the payments that are made to workers. This could mean that where an employment standard may, for example, result in employers paying a higher salary to workers, the workers will not receive the full benefit because part of it will go to the government through taxation.

Behavioural responses

r.35. Changes to employment standards may result in employers or employees changing their behaviour. The main behavioural response from employers is their propensity to hire workers in response to changes in costs of employing staff caused by changes in employment standards. For example, if new employment standards are increased to a degree that substantially increases the marginal cost of employing staff to above the marginal benefit, then in this case it is likely that business will have a reduced incentive to employ staff. Conversely, individuals may be more willing to work if they receive more compensation for that work. This could improve participation rates.

r.36. The behavioural responses of employers to changes in employment standards may also affect the type of staff that they employ. For example, some employers may recruit employees that are unlikely to take unpaid leave over other potential employees who are more likely to take unpaid leave. However, equal opportunity legislation is designed to prevent this from occurring.

r.37. The following sections will analyse in more detail the impact of changes to specific employment standards. In assessing the impact of the changes in legislated minimum entitlements, the Department used Australian Bureau of Statistics (ABS) data where available.

r.38. The Department also compared the NES provisions with conditions provided in a sample of 50 awards and a census of federally registered collective agreements to determine if they provided a lesser, equal or higher entitlement.

r.39. The sample of awards is not a random sample. The sample was drawn mainly from the list of industries and occupations prioritised by the AIRC for award modernisation but also included non-priority industries, such as road transport. These are important awards with significant employee coverage.

r.40. The census of federally registered collective agreements was conducted using the Department's Workplace Agreement Database (WAD). The WAD provides details on a range of employment conditions for various types of agreements including union collective, employer collective, union greenfields and employer greenfields agreements.

Maximum weekly hours

ABS data

r.41. Data from the ABS Labour Force survey show that over the year to August 2008, an average of 43.6 per cent of all employees worked 40 or more hours a week (actual hours).[1]

Award and agreement data

r.42. The average maximum weekly hours of current federal collective agreements is 37.5 hours or just below the 38 hour maximum requirement.

r.43. In current federal collective agreements, averaging of hours over more than a one month period is relatively common. The accommodation, cafés and restaurants industry has the highest level of averaging in current collective agreements at 39.3 per cent of all agreements in the sector. Other sectors in which more than 20 per cent of all current agreements average hours over more than one month include personal and other services (27.5 per cent), agriculture, forestry and fishing (26.5 per cent), property and business services (25.2 per cent), communication services (24.0 per cent) and retail trade (22.2 per cent).

Impact

r.44. Therefore, the Department expects a negligible impact of this provision.

Requests for flexible working arrangements

ABS data

r.45. The Department estimates that there are potentially 96,000 eligible mothers who could take advantage of this provision at any one time. This is calculated by taking the number of

[1] ABS, *Labour Force* (Cat No 6202.0), unpublished data.

mothers with a youngest child aged 0-4 who were employed in full-time work whose partner, if they were in a couple family, was also employed full-time (142,700)[2], adjusting it by both the number of full-time employed females in child bearing age (95.4 per cent)[3] and the share of those employees who have not been with their employer for under twelve months (70.5 per cent).[4]

Administrative burden

r.46. The consideration of a request for flexible working hours may involve some minor administrative cost, primarily the time spent by management and/or human resources staff to consider a request and prepare a written response to the employee. However, the department does not expect this requirement to be onerous for the vast majority of businesses and therefore these costs are likely to be minimal.

r.47. Furthermore, any costs incurred by businesses in considering requests for flexible working arrangements where industrial instruments did not offer such flexibility may be offset by the benefits to employers such as increased staff retention and loyalty. Indeed, businesses that are able to offer flexible working arrangements may benefit by being viewed favourably as an 'employer of choice'.

Agreement data

r.48. WAD data show that 43.0 per cent of all current federal collective agreements provide for flexible working arrangements through changes related to hours of work. Flexible working arrangements are most common for employees in the retail trade industry (88 per cent of employees covered by federal agreements). The lowest proportion of employees covered by a collective agreement providing flexible working arrangements by industry, is in the wholesale trade industry (24 per cent of employees covered).

Impact

r.49. Therefore, as this provision in the NES will be a new entitlement for a number of employees, the Department expects that there will be a moderate increase in compliance costs associated with the processes involved in requesting flexible working arrangements. However, this NES contains provisions that ensure that the right to request flexible working arrangements will not impede the competitiveness and viability of businesses.

Parental leave

ABS data

r.50. The analysis of this NES does not include any estimate of the costs of training an employee to replace an employee who is on parental leave.

[2] ABS, *Labour Force, Australia: Labour Force Status and Other Characteristics of Families* (Cat No 6224.0.55.001) - Electronic Delivery, June 2008.
[3] ABS, *Labour Force, Australia, Detailed, Quarterly* (Cat No 6291.0.55.003), May 2008, seasonally adjusted.
[4] ABS, *Career Experience, Australia* (Cat No 6254.0), November 2002, Table 1.

r.51. The Department estimates that a maximum of 26,238 women who had taken leave of 12 months or more in the absence of extended parental leave, would potentially take the full entitlement of 104 weeks. This is calculated by taking the number of live births and adoptions (285,200)[5], adjusting it both by the share of eligible female employees aged 15-44 years who had been with their current employer for 12 months or more (40 per cent)[6] and the share of female employees who took unpaid parental leave for a period of one year or more (23 per cent)[7].

Simultaneous unpaid parental leave

r.52. The NES increases the amount of leave that can be taken concurrently by both parents (in relation to both birth-related and adoption leave) from 1 week to 3 weeks.

r.53. The ABS *Career Experience* survey asks employed males about their leave experience when their youngest child was born. Only 6 per cent of employed males with children aged under six years take unpaid parental leave when their youngest child is born.[8] Men are most likely to take recreational /holiday/annual leave (68 per cent) on the birth of their youngest child.[9] On the other hand, all men who used unpaid parental leave did so for a period less than six weeks.[10]

r.54. International studies show that male use of parental leave is generally low.[11] Where men do use this leave, they only use a small proportion of the total number of days of leave available to them.[12] Figure 1 shows that, at November 2002 (most recent data), a total of 22,000 men with children under 6 years took unpaid parental leave when their youngest child was born. Of these, all took leave for a period of less than 6 weeks.

Same-sex couples

r.55. The proposed parental leave NES extends parental leave entitlements to same-sex couples for the first time. Data from the ABS *Labour Force* survey show that there were 31,100 same-sex couple families in June 2007. Of these, 915 (3.7 per cent) were same-sex couple

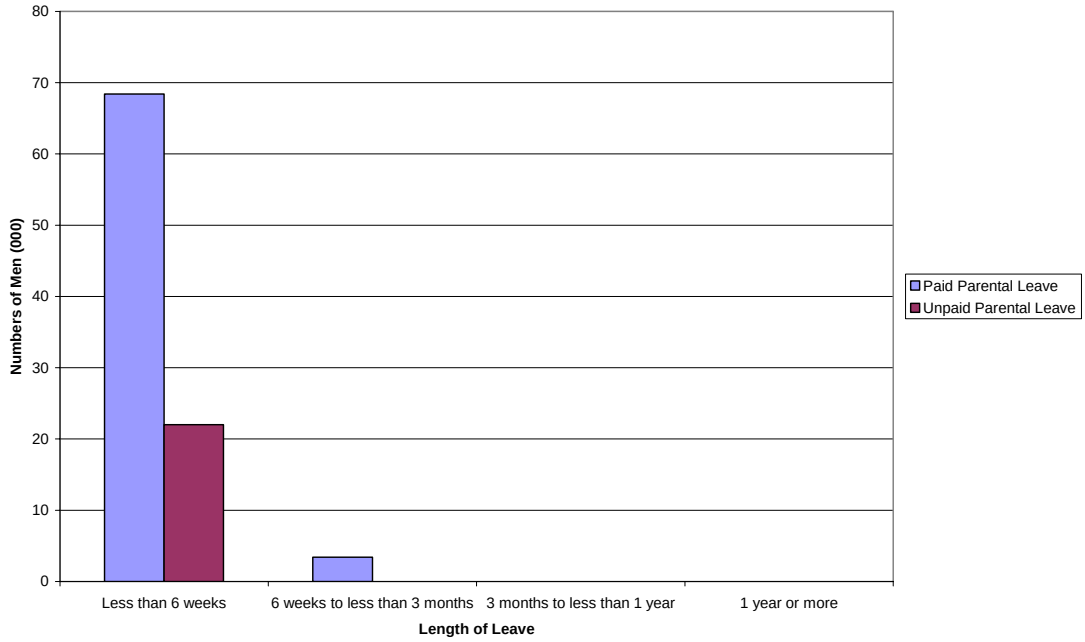
[5] ABS, *Births, Australia* (Cat No 3301.0), 2007.
[6] Data from the most recent *Career Experience, Australia* survey (Cat No 6254.0) for November 2002 show that there were 1,701,100 female employees aged 15-44 years who had been with their current employer for 12 months or more in November 2002. This represents approximately 40 per cent of the female civilian population aged 15-44 years (4,286,271) in the ABS *Population by Age and Sex* publication (Cat No 3201.0), June 1997 - June 2002, Table 11.
[7] ABS, *Career Experience, Australia* (Cat No 6254.0), November 2002, unpublished data.
[8] ABS, *Career Experience, Australia* (Cat No 6254.0), November 2002, Table 14.
[9] ABS, *Career Experience, Australia* (Cat No 6254.0), November 2002, Table 14.
[10] ABS, *Career Experience, Australia* (Cat No 6254.0), November 2002, unpublished data.
[11] J Buchanan and L Thornthwaite, 'Paid work & parenting: Charting a new course for Australian families', ACIRRT, University of Sydney, August 2001, page 44; Haas and Hwang cited in L Thornthwaite, 'Work-family balance: international research on employee preferences', Working Paper 79, ACIRRT, University of Sydney, September 2002, page 33; E M Dermott, 'New fatherhood in practice? – parental leave in the UK', *International Journal of Sociology and Social Policy*, 2001, Volume 21, Issue 4-6; E Pylkkanen and N Smith, 'Career Interruptions due to Parental Leave: A Comparative Study of Denmark and Sweden', OECD, 2003, page 20; M Bittman, S Hoffman and D Thompson, 'Men's uptake of family friendly employment provisions', Research Paper Number 22, Department of Family and Community Services, 2004, page 31.
[12] OECD, 'Babies and Bosses: Reconciling Work and Family Life – Volume 1: Australia, Denmark and the Netherlands', OECD, 2002, page 14; M Bittman, S Hoffman and D Thompson, 'Men's uptake of family friendly employment provisions', Research Paper Number 22, Department of Family and Community Services, Canberra, 2004. For the US, see J Waldfogel 'Family and medical leave: evidence from the 2000 surveys', *Monthly Labor Review*, September 2001, page 18.

families with dependants where the youngest child was aged up to 4 years in June 2007. In total, there were approximately 2,300 (9.3 per cent) same sex couples with dependant children in June 2007.[13]

Agreement data

r.56. Of current federal collective agreements, 25 per cent provide parental leave provisions consistent with the current Standard. Simultaneous leave is provided in 10.2 per cent of agreements. Only 6.2 per cent of agreements provide for extended unpaid parental leave. The ability to extend unpaid parental leave from 12 to 24 months is a more generous provision than currently provided in 93.8 per cent of current federal collective agreements. However, it is important to note that a business has the right to refuse the extra 12 months leave on reasonable business grounds.

Figure 1: Employed males with children under 6 years who took parental leave when youngest child born, November 2002



Source: ABS, *Career Experience Survey* (Cat No 6254.0), November 2002, unpublished data.

Annual leave

r.57. The NES will not change the coverage or quantum of the annual leave entitlement. However, the NES will replace complex formulae in the current Standard about the accrual and crediting of paid annual leave with a simplified system – paid annual leave simply accrues and is taken on the basis of an employee's 'ordinary hours of work'. The NES enables modern awards to make provision for additional leave for shift workers and for cashing out of annual leave with appropriate safeguards.

[13] ABS, *Labour Force, Australia: Labour Force Status and Other Characteristics of Families* (Cat No 6224.0.55.001) - Electronic Delivery, June 2008.

r.58. As noted above, the major regulation change under this NES is to simplify complex rules around annual leave accrual. The Department is unable to quantify the regulation impact of the simplification of these rules and formulae.

Personal/carer's leave

ABS Data

r.59. The proposed NES extends unpaid compassionate leave entitlements to casual employees. However, only limited data are currently available, making it difficult to calculate the expected take up of this provision.

r.60. The ABS offers three different measures of the incidence of casual employment - the *Employee Earnings, Benefits and Trade Union Membership (EEBTUM)*[14], *Forms of Employment (FoES)*[15] and *Labour Market Statistics*[16] publications.

r.61. ABS EEBTUM data show that casual employee incidence was 24.7 per cent (2,061,000 employees) in August 2007.[17] The Department believes that this is the most accurate estimate of casual employment.

r.62. Quantifying the potential take-up of this provision by casuals is problematic. Because casuals are classified as employees without leave entitlements for statistical purposes, data on the leave taken by casuals is very limited. Other potential methodologies, for example, estimating leave based on the propensity of non-casual employees to take compassionate leave, are also frustrated by a lack of suitable data.

Award and agreement data

r.63. All awards sampled provided personal/carer's leave for full-time and part-time employees in varying amounts (from 5 to 15 days). Methods of accrual varied across the instruments, with some instruments requiring a minimum length of service prior to accrual of this entitlement.

r.64. In all awards sampled, compassionate leave was available on bereavement only. There was only one example of bereavement leave for casuals (*Metalliferous Mining and Processing Award [AN170065 – Tas]*. There was one example of casuals entitled to unpaid carer's leave (*Clerks' (South Australia) Award [AN150039 – SA]*). The lack of pre-reform award/Notional Agreement Preserving State Award (NAPSA) provisions in the sample providing casuals with compassionate leave suggests some limited regulatory impact of this provision.

r.65. Personal/carer's leave is also a common entitlement in federal collective agreements – 92.9 per cent of current agreements provide for paid personal leave.

[14] ABS *Employee Earnings, Benefits and Trade Union Membership, Australia*, (Cat No 6310.0), August 2006.
[15] ABS *Forms of Employment, Australia* (Cat No 6359.0), November 2006 (Reissue), page 3.
[16] ABS *Australian Labour Market Statistics*, (Cat No 6105.0), July 2008.
[17] ABS *Employee Earnings, Benefits and Trade Union Membership, Australia*, (Cat No 6310.0), August 2006.

Community Service Leave

Jury service

r.66. As noted above, the NES contains provisions for employers to provide make up payments for all permanent full and part time employees undertaking jury duty for a period of up to ten days (at the base rate of pay for ordinary hours of work). At present, relevant legislation for each state and territory prescribes how much each state and territory government will pay employees for each day of jury service. Of all the states and territories, only Victoria and Queensland currently require employers to pay a make-up payment to employees for jury service.

r.67. Jury service is a community benefit. It is the Government's view that employees who provide jury service should not suffer a financial burden due to their participation in jury service. Employees currently not entitled to make-up pay for jury service are likely to be more inclined to try and avoid service, potentially making juries less representative overall than they would otherwise be.

r.68. The following analysis provides estimates of the total net additional annual impost on employers under this NES.

Data

r.69. National estimates of the proportions of employees undertaking jury service are derived using data from the AIRC's 2004 decision to vary the *Grocery Products Manufacture – Manufacturing Grocers Award 2003* in respect of jury leave entitlements for Victoria in financial year 2003-04.[18] ABS Labour Force and Average Weekly Total Earnings data are also used. The key annual derived estimates are:

- 0.190 per cent of permanent adult employees will be empanelled (serve as jurors), serving an average of seven days; and
- 0.433 per cent of permanent adult employees will be required to attend a jury room, for an average of 2 days.
- Based on these estimates, Australia-wide 12,896 permanent adult employees would have been empanelled in financial year 2007-08, and 29,414 would have attended the jury room but not been empanelled.

r.70. The additional costs to employers for each state and territory are then estimated by calculating the total wages cost of the days of attendance at jury rooms and jury service [19] and subtracting the payments already required to be made according to the legislation applicable in each state and territory. The estimated net additional cost to employers Australia-wide is $7,793,524.

[18] The decision was handed down in Melbourne on 11 October 2004. Data provide numbers of persons required to attend the jury room by whether empanelled, and the average days attendance for empanelled and not empanelled.
[19] (Average weekly total earnings)/7 x (Total estimated days service)

r.71. It should be noted that this is likely to be an over-estimate of the total cost for several reasons. Firstly, the average length of time for all jurors is seven days, which presumable includes many cases which extend past ten days, after which time the NES does not require make-up pay. Thus, the average estimated duration for empanelled jurors is probably too high. Secondly, the estimated number of days non-empanelled jurors spend in the jury room was rounded up to two days, inflating the estimated costs. Lastly, WAD data show that 44.9 per cent of current federal agreements (covering 59 per cent of employees) already provide for jury service make-up pay, leading to an over estimate of the additional costs to employers.

r.72. Nevertheless, while the additional Australia-wide cost is therefore minimal on an economy-wide basis, it could have a modest impact on some firms, particularly small businesses.

Emergency services leave

ABS data

r.73. According to the ABS *Voluntary Work* survey 2006, 34.1 per cent (5.2 million persons) of the Australian population aged 18 years and over participated in voluntary work in 2006. Column 2 of Table 1 shows the estimated number of employee volunteers as at May 2008, by the type of organisation.[20] In terms of the relevant group of interest who may take advantage of the NES entitlement, an estimated 104,000 employees volunteered in emergency services as at May 2008.

[20] The ABS defines a volunteer as someone who willingly gave unpaid help, in the form of time, service or skills to or through an organisation or group. The reimbursement of expenses in full or part (for example, token payments) or small gifts (for example, sports club T-shirts or caps) was not regarded as payment of salary, and people who received these were still included as voluntary workers. However, people who received payment in kind for the work they did (for example receiving farm produce as payment for work done on a farm, rather than cash) were not included as volunteers.

Table 1: Estimated number and percentage of employees volunteering as at May 2008, by type of organisation[21]

Type of organisation	Volunteer Rate (%)	Employees (000s)
Arts/heritage	1.4	132.2
Community/welfare	7.3	689.2
Education/training	9.1	859.1
Emergency services	1.1	103.9
Environment/animal welfare	1.1	103.9
Health	3.1	292.7
Parenting/children/youth	2.0	188.8
Religious	6.7	632.5
Sport/physical recreation	11.2	1057.4
Other recreation/interest	1.6	151.1
Other[22]	1.8	169.9
Total	**34.1**	**3219.4**

Source: ABS *Voluntary Work, Australia* (Cat No 4441.0), 2006, Table 20. The employee figures (column 2) were derived by multiplying the relevant volunteer rate (column 1) by 9,440,915, the number of employees as at May 2008 (ABS *Labour Force, Australia, Detailed, Quarterly* (Cat No 6291.0.55.003), May 2008.

Award and agreement data

r.74. WAD data show that 34 per cent of all employees covered by current collective agreements are provided with emergency services leave.

Impact

r.75. Given that emergency services leave is unpaid and there is not a large group of employees engaged in this activity, the Department expects a minimal impact from this provision.

Long Service Leave

r.76. An entitlement to long service leave is currently provided by state and territory legislation, awards and agreements. The NES will preserve current arrangements for long service leave. Meanwhile, the Government is working with the states and territories to develop nationally consistent long service leave entitlements.

r.77. Given that the overwhelming majority of employees currently have access to long service leave, the Department expects a minimal impact from this NES.

[21] The volunteer rate (column 1) refers to the percentage of the adult population (people aged 18 years and over), volunteering for the specified activity type.
[22] Other includes: Business/professional/union, International aid/development, Law/justice/political and 'Other' unspecified.

ABS data

r.78. The department is not aware of any data on the usage of long service leave. As noted above, there are divergent entitlements to long service leave in awards, agreements and state and territory legislation. However, an indication of the entitlement to long service leave is the number of employees with 10 years service or over. Table 2 displays ABS data that show an estimated 21.3 per cent of employees (2.2 million) were employed by their current employer/business for 10 years or more.

Table 2: Employees by duration with employer/business by industry, as at August 2008

Industry	Under 12 months	1 and under 2 years	2 and under 3 years	3 and under 5 years	5 and under 10 years	10 years and over	Proportion 10 years and over	Total
Agriculture, forestry and fishing	37.6	18.3	20.1	26.0	36.2	158.8	46.9%	297.0
Mining	27.1	18.4	15.7	15.2	18.4	24.1	17.8%	118.8
Manufacturing	185.7	102.0	92.2	130.1	182.7	248.1	23.1%	940.6
Electricity, gas, water and waste services	16.4	6.2	10.8	14.0	14.9	32.4	30.0%	94.6
Construction	191.8	103.8	91.7	133.8	133.8	210.0	21.3%	864.7
Wholesale trade	70.0	45.3	40.2	57.6	62.0	85.6	20.8%	360.6
Retail trade	287.9	164.4	139.6	147.1	156.4	149.5	12.5%	1044.8
Accommodation and food services	244.4	97.9	73.0	75.1	58.2	47.7	7.0%	596.4
Transport, postal and warehousing	100.0	47.4	43.2	59.4	85.6	131.1	24.6%	466.7
Information media and telecommunications	41.4	22.6	22.3	21.6	31.2	51.2	23.6%	190.2
Financial and insurance services	76.1	47.3	37.3	49.7	79.4	70.6	17.2%	360.3
Rental, hiring and real estate services	41.6	20.3	20.1	25.3	29.0	32.7	17.0%	168.8
Professional, scientific and technical services	143.9	87.4	92.9	95.8	119.8	142.5	18.3%	682.3
Administrative and support services	91.6	42.1	37.1	39.6	44.6	41.0	12.1%	295.8
Public administration and safety	84.4	45.9	51.3	64.2	102.7	181.8	30.1%	530.2
Education and training	94.1	59.3	51.5	94.6	134.6	235.9	30.9%	670.1
Health care and social assistance	177.3	108.4	89.0	133.7	183.8	262.8	24.1%	955.0
Arts and recreation services	35.8	20.8	16.8	22.7	26.7	38.2	20.9%	160.9
Other services	86.5	52.1	47.4	60.2	73.8	87.7	18.9%	407.8
Total	**2033.4**	**1109.8**	**991.9**	**1265.2**	**1574.0**	**2231.6**	**21.3%**	**9205.9**

Note: These data were derived by multiplying the number of persons by duration with employer/business as at February 2008, by 87.7 per cent - the average percentage of the workforce who were employees (aged 15 years and over) as at August 2008.

Source*:* ABS *Labour Mobility* (Cat No 6209.0), February 2008, Table 4, and ABS *Labour Force, Australia, Detailed Quarterly* (Cat No 6291.0.55.003), August 2008.

Public Holidays

r.79. The NES and the Standard both provide an entitlement for an employee to be absent on prescribed public holidays.

r.80. The NES provides for payment at their base rate of pay for ordinary hours if absent on a public holiday. Under the NES, the Queen's birthday holiday is prescribed. The current WR Act does not prescribe this as a holiday. However, in practice, employees have been receiving the Queen's Birthday as a public holiday.

r.81. Therefore, the Department does not expect an impact from this NES.

Notice of Termination and Redundancy Pay

r.82. The NES will provide for written notice of termination and redundancy pay. These are currently awards-based entitlements, which will be legislated to provide more comprehensive protection for employees and extend redundancy pay to award-free employees.

r.83. The Department does not have any reliable data on the number of award-free employees nor their redundancy experience. Therefore, the Department is unable to assess the impacts analysis of this NES.

r.84. However, Table 3 displays the proportion of employees who ceased a job involuntarily in February 2008 (most recent data) by the duration of their last job.

Table 3: Employees who ceased a job involuntarily by duration of last job

Duration of last job	Employees who ceased a job involuntarily ('000)
Under 12 months	89.3
1 and under 2 years	32.9
2 and under 3 years	20.3
3 and under 5 years	22.9
5 and under 10 years	16.9
10 and under 20 years	13.8
20 years and over	6.5
Total	**202.6**

Source: ABS *Labour Mobility* (Cat. No. 6209.0), February 2008

Award and agreement data

r.85. Analysis of awards revealed that awards in some industries provided a higher level of redundancy pay, for example mining and coal mining (one week per year of service).

r.86. In summary, the Department expects only a minor impact from extending notice of termination and redundancy provisions to currently award-free employees.

Table 4: Employer and employee views on new legislated minimum employment standard provisions

Employer Stakeholders	Employers expressed a wide range of views on the NES. The various employer groups have concerns with the operation and content of the NES. Some groups also felt that some of the provisions of the NES were too generous or too broad, such as the provisions for the right to request flexible work hours and or the number of days available for personal and community leave. Some felt there should be limitations to the provision of redundancy pay based on the number of full time employees in the business. Some felt redundancy and long service leave provisions should remain in awards. Most employer groups agree that wages should be inserted into the NES, that the cashing out of annual leave should be allowed, and that the proposed definition for hours of work be amended. Most felt that the NES should be reviewed within 12 to 18 months after it commences on 1 January 2010.
Employee Stakeholders	Most unions support the provisions contained in the NES, believing that they will benefit workers in work that do not have access to awards or agreements. However, unions generally support a wider number of entitlements. Unions particularly want stronger entitlements in place for the proposed standards, such as flexible working arrangements that carry obligations on employers when refusing a request. Unions are concerned that a number of provisions, such as the right for parents to request flexible working arrangements, need strong enforcement by Fair Work Australia.

2. MODERN AWARDS

Current Arrangements

r.87. As a result of the Work Choices changes to the WR Act, award arrangements are best examined by looking at minimum wages and award conditions separately.

Minimum wages

r.88. Under Work Choices, minimum wages were taken out of awards and set up under separate notional instruments known as Australian Pay and Classification Scales (Pay Scales). The establishment of this separate system of minimum wages has given rise to a number of concerns.

r.89. One of the key issues is that it has resulted in two different points of reference for employee safety net entitlements. This has caused confusion among many Australians used to minimum wages being contained in awards. The separation of minimum wages from awards also resulted in uncertainty over exactly what wage-related provisions are now contained in Pay Scales and what have remained in awards. While wage-related allowances provide a straight forward example of this, having remained in awards, the complex and detailed nature of awards as they currently stand, means that it has not always been clear which provisions have actually moved into Pay Scales and which have remained in awards.

r.90. The main problems, however, with the establishment of Pay Scales is that they have not been published as legally enforceable instruments. While the Workplace Authority has produced around 425 Pay Scale summaries, these have applied only to the most common Pay Scales. In addition, Pay Scales were created under the WR Act as notional instruments implying, in effect, that the summaries are not legally enforceable. Given that there is a total of around 4,000 Pay Scales, employers and employees have therefore been left with no legal certainty as to the correct rates of pay and, in many instances, where Pay Scale summaries have not been available, they have had no information at all to reference for minimum wage information.

Award conditions

r.91. Under Work Choices, awards were only permitted to deal with certain allowable matters (such as ordinary hours of work, public holidays, monetary allowances, overtime and shift work loadings, penalty rates and redundancy pay), various other matters (annual leave, personal/carer's leave, parental leave, long service leave, jury service, notice of termination and superannuation) were 'preserved' in awards.

r.92. Also under Work Choices, some allowable award provisions (including rest breaks, public holidays, allowances, penalty rates, overtime and shift work loadings) were designated as 'protected' in the course of agreement making even though agreements could specifically modify or remove them. Although Work Choices provided for awards to be rationalised and simplified, this process was not undertaken.

Government's Policy on Modern Awards

r.93. The AIRC is currently preparing modern awards in line with the Minister for Employment and Workplace Relation's award modernisation request pursuant to s. 576C(1) of

the WR Act. Along with the National Employment Standards, modern awards will form a safety net for employees in the federal workplace relations system from 1 January 2010.

r.94. Modern awards will provide a fair and relevant safety net for employees. They will be simple and promote a certain and sustainable modern award system.

r.95. The aim of the award modernisation process is to create a comprehensive set of awards. As set out in section 576A of the WR Act, modern awards:

(a) must be simple to understand and easy to apply, and must reduce the regulatory burden on business; and

(b) together with any legislated employment standards, must provide a fair minimum safety net of enforceable terms and conditions of employment for employees; and

(c) must be economically sustainable, and promote flexible modern work practices and the efficient and productive performance of work; and

(d) must be in a form that is appropriate for a fair and productive workplace relations system that promotes collective enterprise bargaining but does not provide for statutory individual employment agreements; and

(e) must result in a certain, stable and sustainable modern award system for Australia.

r.96. The AIRC will ensure awards are simple to understand so that employees and employers have certainty regarding their rights and obligations. The AIRC will also ensure awards promote the efficient performance of work having regard to the nature of the work and the characteristics of the workforce covered by the award. Finally, awards will encourage employers and employees to maintain work-family balance.

Proposed Changes

r.97. The *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (the Transition Act) paved the way for modernisation of awards. As a result of the process, new modern awards will come into effect with the new system.

r.98. Currently, s. 576J of the WR Act provides 10 matters that may be dealt with by modern awards. These are:

- minimum wages and classifications;
- types of employment;
- arrangements for when work is performed;
- overtime rates;
- penalty rates;
- annualised wage or salary arrangements;

- allowances;
- leave related matters;
- superannuation; and
- procedures for consultation, representation and dispute settlement.

r.99. The award modernisation request provides detailed direction to the AIRC on how to undertake the award modernisation process. Among other things, the request requires that the AIRC include the following matters in modern awards:

- an award flexibility term;
- a dispute resolution term;
- terms providing ordinary hours of work;
- terms about rates of pay for pieceworkers (where necessary);
- terms identifying shift workers eligible for five week's of annual leave under the NES; and
- terms facilitating the automatic variation of allowances.

r.100. The WR Act also provides that a modern award must not include terms:

- that breach freedom of association provisions;
- about right of entry, terms that are discriminatory; and
- that contain state based differences.

r.101. All of these parameters, and the Minister's award modernisation request, are guiding the AIRC in the process of modernisation. The objectives of award modernisation include ensuring that awards are simple to understand, easy to apply and reduce the regulatory burden on business.

r.102. Modern awards will contain a flexibility clause enabling employers and employees to agree on flexible arrangements varying how modern awards work. This will ensure that the needs of employers and employees are met. It will assist employees in balancing their work and family responsibilities and improve retention and participation of employees in the workforce. The simplification and increased flexibility associated with modernised awards, together with the reduced regulatory burden on business, are all consistent with the Government's agenda of increasing productivity.

r.103. Modern awards will not cover employees earning over $100,000 a year (indexed) who will be free to agree to their own pay and conditions without reference to awards. This will provide flexibility for employers and employees. The Government believes that these workers

can negotiate their own arrangements and do not require the same level of safety net protection as lower paid employees.

r.104. Fair Work Australia (FWA) will undertake four yearly reviews of each modern award to maintain a relevant and fair minimum safety net. This will be the main vehicle for varying modern awards (except minimum wages). The first review will take place in 2014, four years after modern awards commence on 1 January 2010.

r.105. FWA will be guided by criteria which take into account public, social interest and economic aspects when considering whether and how to vary the content of modern awards. Outside of the four yearly review, FWA will have limited power to vary awards. FWA will be able to vary an award to remove ambiguity, uncertainty and discriminatory terms. To ensure awards provide a fair minimum safety net for employees, anyone covered by an award will be able to apply to have the award varied in exceptional circumstances. FWA will be able to adjust awards for 'work value' reasons.

Impact Analysis

r.106. The making of modern awards is a significant change for employees, employers and their representatives. This will require them to adjust and become familiar with the form, arrangement, content and new processes associated with modern awards.

r.107. Stakeholder consultation by the AIRC – including through the exposure draft process – provides employers, employees and their representatives with the opportunity to start this familiarisation process. This process will continue until modern awards commence on 1 January 2010. The simplicity of modern awards will assist the parties in this phase and also in their future involvement in award related processes.

r.108. As award modernisation is currently in progress, estimating the future content and impact of modern awards, which are either currently in the exposure draft phase or are yet to be drafted, cannot be undertaken with sufficient accuracy to provide a basis for meaningful analysis of the proposed changes. Therefore, this section does not include an impact analysis of award modernisation. However, as noted later in this analysis, the Government has committed to reviewing the new workplace relations system.

r.109. The inclusion of minimum wages in modern awards will provide employees and employers with a single point of reference for verifying their rights and obligations with regard to minimum wages and conditions of employment. These new streamlined arrangements will reduce confusion and apprehension among users about where to go for information on safety net entitlements, improving the accessibility to and ease of use of this information by key stakeholders. The new streamlined arrangements will also reduce the regulatory burden imposed on government, both in terms of the direct costs associated with administering two separate systems as well as the indirect costs arising from having to resolve discrepancies across the two arrangements.

r.110. The clear legal enforceability of minimum wages in the new system will also reduce the regulatory burden imposed on key stakeholders, providing them with legal certainty on minimum wage protections. The legal certainty will not only reduce the vulnerability and hardship experienced by some employees while reducing the compliance costs of the majority of

employers committed to observing minimum wage protections for their employees. By reducing the potential for breaches of minimum wage protections in this way, the new arrangements will also reduce the regulatory impact on government leading to significant savings in terms of the monitoring and enforcement of minimum wage protections.

r.111. The proposed changes in the minimum wage-setting arrangements are designed to improve the regulatory framework. The streamlining of responsibility for reviewing and adjusting minimum wages will reduce confusion and uncertainty among employers and employees about which body is responsible for the determination of minimum wages relevant to their particular circumstances.

r.112. Annual minimum wage reviews, particularly in requiring that any adjustments take effect on the same date of 1 July each year, will provide greater certainty for employers and employees, especially in terms of accounting for these adjustments in their business plans and household budgets. This increased certainty will be further reinforced by the requirement that any updated wage rates be published by the 1 July date of effect. Moreover, the improved transparency of the process will help ensure that the decisions of the Fair Work Australia Minimum Wages Panel are fair and independent of bias, thereby facilitating greater acceptance of and compliance with its minimum wage rulings.

Table 5: Employer and employee views on new award provisions

Employer Stakeholders	Employer groups broadly support modern awards, but are wary that the timetable for developing and implementing them would be difficult to achieve. Some are concerned that the award modernisation process may become a 'levelling-up' exercise that increases costs for employers. Most employer groups support having individual flexibility clauses within awards. The various employer groups also support a monetary threshold on the application of awards.
Employee Stakeholders	As with employer groups, unions also believe that the timetable for the award modernisation process is ambitious. Although unions support the creation of modern awards, they are concerned that the award modernisation process may undercut the pay and conditions for award-dependent workers, particularly non-union workers. Unions believe that no upper monetary threshold should exist for the application of awards.

3. BARGAINING FRAMEWORK

r.113. Under the Bill, the Government proposes important changes to the collective bargaining framework. These changes include: the introduction of good faith bargaining; less regulation regarding the content of agreements; the creation of a single stream of agreement making; a streamlined process for the approval of agreements; and the introduction of Fair Work Australia facilitated bargaining for the low paid.

r.114. The proposed bargaining arrangements will be simpler than the current system. The Bill is drafted to reduce the regulation of the bargaining framework in acknowledgement that most employers and employees in Australia voluntarily and successfully bargain collectively. Where there is new regulation it is focused on facilitating the bargaining processes in situations where an employer and their employees are unable to successfully bargain together.

r.115. This section will assess the regulatory impact of these changes in contrast to the current system under the WR Act.

r.116. In some instances changes to the 'current system' were made by the 2008 amendments to the WR Act under the Transition Act. When discussing these amendments to the WR Act the Transition Act will be specifically mentioned.

Current Arrangements

Agreement types

r.117. The current system allows for multiple streams of agreement making, including Individual Transitional Employment Agreements (ITEAS), introduced in the Transition Act to replace the use of Australian Workplace Agreements (AWAs) during the transition to the proposed framework), union collective agreements, employee collective agreements, union greenfields agreements, employee collective greenfields agreements and multi-employer agreements. The existence of multiple streams of agreement making has the capacity to create disputes over which industrial instrument to use.

r.118. The occurrence of such disputes is quite common. For example, the Cochlear company has been involved in a protracted industrial dispute due to the company's desire to create a non-union collective agreement. Similarly, Boeing was involved in a dispute for over 9 months, including over 70 days of strike action, because the company refused to negotiate a union collective agreement against the preference of its aircraft maintenance engineers.

r.119. In addition, prior to the Transition Act, the workplace relations system allowed for 'take it or leave it' AWAs which could undercut the safety net and collective bargaining processes.

r.120. In many industries characterised by low skilled, low paid employment, such as cleaning and retail trade, the shift towards individual agreements on a 'take it or leave it' basis expanded managerial prerogative.[23] As such, it allowed some businesses to put downwards pressure on

[23] B Ellem, M Baird, R Cooper and R Lansbury 'Work Choices, Myth Making at Work', *Journal of Australian Political Economy*, 56, December 2005, pages 13-31.

wages and conditions, reflected in studies showing that 89 per cent of pre-Fairness Test AWAs removed at least one protected award condition.[24]

Content of agreements

r.121. The current workplace relations system extensively regulates what can be included in enterprise agreements. The extent of current regulation adds significant obstacles to genuine agreement making.

r.122. An agreement must include a nominal expiry date (NED) and dispute settlement procedure. If no dispute settlement procedure is specified the model dispute settlement procedure contained in legislation applies. If no NED is specified, the agreement will have a NED of one year from commencement for employer Greenfields agreements, 31 December 2009 for an ITEA and five years from the date of issue for other agreements.

r.123. The WR Act introduced a concept of prohibited content which lists some 30 matters which are not to be included in workplace agreements. This includes matters that do not pertain to the employment relationship between the employer and the employees covered by the agreement. 'Objectionable provisions' that breach freedom of association provisions, that provide remedies for unfair dismissal or restrict the use of independent contractors or labour hire workers are also prohibited.

r.124. Other prohibited content relates specifically to union-related clauses. This includes deductions from wages for union membership or dues, employees receiving trade union training leave, employees receiving paid leave to attend union meetings, the renegotiation of a workplace agreement, and the foregoing of annual, compassionate or personal leave for pay or another entitlement.

r.125. Prohibited content in an agreement is unenforceable but does not render the agreement invalid. The Workplace Authority Director is able to remove such clauses from agreements with significant penalties of up to $33,000 applying for recklessly including prohibited content in an agreement, and for making misrepresentations about prohibited content.

r.126. The extensive regulation of what can and cannot be included in agreements complicates the bargaining process, with many parties unsure of what clauses were allowable content. It has also exposed employers to penalties for contravening the WR Act. Employers have sought to avoid this by seeking a statement from the Workplace Authority that there is no prohibited content included in the agreement prior to lodging the agreement. This has further lengthened the agreement making process.

r.127. There is anecdotal evidence that another result of this regulation is the frequent use of 'side deals' between an employer and employees and the relevant union. Such side deals have unclear legal status and unnecessarily complicate the bargaining process.

[24] The Hon Julia Gillard MP, Minister for Employment and Workplace Relations, 'AWA Data the Liberals Claim Never Existed' Media Release, 20 February 2008.

Approval of agreements

r.128. Prior to the Transition Act, the Workplace Authority was required to apply a Fairness Test to agreements. The Fairness Test added a substantial regulatory burden on businesses and was plagued with inefficiencies.[25] The implementation of the Fairness Test resulted in a considerable backlog of agreements needing to be approved.[26]

r.129. Currently (since the introduction of the Transition Act), the Workplace Authority applies a no-disadvantage test to agreements. The Workplace Authority Director has described the no-disadvantage test as a more measured approach to agreement testing that has resulted in better results and faster approvals.[27]

r.130. However, both the Fairness Test and the no-disadvantage test are reliant on the current award system or, in the case of ITEAs, an existing collective agreement that would otherwise cover the employee.

r.131. The complex nature of the existing award system has made the approval process detailed and heavily bureaucratic, requiring assessors to apply a series of formulas to determine the overall value of an agreement to an employee. This requires prescribing a monetary value to non-monetary entitlements, which was criticised as inherently inaccurate.[28]

r.132. Furthermore, under the Fairness Test, a series of secondary considerations could potentially form part of the test, drawing out the assessment process. These considerations require written submissions from employers and employees as to the benefits of modified conditions and working arrangements.

r.133. Where an agreement did not pass the Fairness Test, the Workplace Authority could request an undertaking and provide examples of changes that could be made in order to allow the agreement to pass the test. This process took considerable time and resources to develop and required the Workplace Authority to reassess an agreement when an undertaking was received from the employer.

r.134. As such, the Fairness Test employed complex approval processes with criticism of its application and processing times.

Bargaining, including in good faith

r.135. The WR Act provides no avenues of assistance for employers or employees in the circumstances where collective bargaining breaks down other than where both parties agree to use the AIRC or a private dispute resolution provider to help them settle a dispute. As such, the existing bargaining framework does not actively encourage employers and employees to bargain and reach agreement.

[25] C Sutherland and J Riley 'Industrial Legislation in 2007', *Journal of Industrial Relations*, 50(3), pages 417-428.
[26] B Bennett, address to 7th Annual Workforce 2008 Conference, Melbourne, 8-9 September 2008.
[27] B Bennett, address to 7th Annual Workforce 2008 Conference, Melbourne, 8-9 September 2008.
[28] C Sutherland and J Riley 'Industrial Legislation in 2007', *Journal of Industrial Relations*, 50(3), pages 417-428.

r.136. Without the capacity to determine whether majority support exists for collective bargaining, employers can simply refuse to negotiate with employees, often resulting in protracted disputes. Examples of these disputes include those at *Boeing* and *Cochlear*.

r.137. Currently, the only test to ensure the parties are genuinely bargaining occurs if an application is made for a secret ballot for industrial action. This means that it is possible for parties to act capriciously or unfairly in bargaining without repercussions.

r.138. An employer's ability to object to secret ballot orders on grounds that the union has not genuinely sought to reach agreement has created a mechanism for employers to ask the AIRC, albeit indirectly, to impose good faith bargaining requirements on employee representatives.[29] However, there is no reciprocal right for employees to impose good faith bargaining requirements on employers, creating an imbalance.

r.139. As a result 'employees [that are] unhappy with employer intransigence in bargaining must resort to industrial action'.[30] The current system may, therefore, exacerbate industrial disputes.

Bargaining for the low paid

r.140. The WR Act does not contain provisions to assist the low paid beyond the five minimum entitlements of the Standard.

Proposed Changes

Agreement types

r.141. Under the Bill there will be no distinction between union and non-union agreements. The Bill will provide for the creation of a single stream of collective, enterprise agreements that are to be made between an employer or employers and employees. A union that is entitled to represent the industrial interests of an employee and was a bargaining representative for a proposed agreement may notify FWA in writing that it wants to be covered by the agreement. When an employee organisation is covered by an agreement, it will have certain entitlements that it would not otherwise have. For example, an employee organisation that is covered by an agreement would be able to enforce the agreement to ensure that the employer is meeting its obligations. A single stream will remove the capacity for disputes over which type of agreement to enter into.

r.142. The Bill will maintain the capacity for employers to make greenfields agreements to establish terms and conditions of employment for a genuine new enterprise. However, the Bill will require that greenfields agreements must be made with one or more unions that would be eligible to represent the employees who will be employed in the enterprise.

r.143. The proposed system ensures that employers can tailor agreements to the requirements of their business by focusing on agreement making at the enterprise level. However it will

[29] G Orr and S Murugesan 'Mandatory Secret Ballots Before Employee Industrial Action' *Australian Journal of Labour Law*, 20(3), November 2007.
[30] G Orr and S Murugesan 'Mandatory Secret Ballots Before Employee Industrial Action' *Australian Journal of Labour Law*, 20(3), November 2007, page 292.

maintain a strong safety net for employees that cannot be undercut and builds the inherent protections of collective bargaining into all enterprise agreements.

Content of Agreements

r.144. The proposed workplace relations framework expands what matters an enterprise agreement can be made about to one or more of the following:

(a) matters pertaining to the relationship between the employer or employers that will be covered by the agreement and the employees who will be covered by the agreement;

(b) matters pertaining to the relationship between the employer or employers, and the employee organisation or employee organisations, that will be covered by the agreement;

(c) deductions from salary for any purpose authorised by an employee who will be covered by the agreement;

(d) how the agreement will operate.

r.145. This content rule retains the 'matters pertaining' formulation established in case law and ensures that matters that clearly fall within 'managerial prerogative', that are outside the employer's control or are unrelated to employment arrangements are not subject to bargaining and industrial action. The continuation of the familiar 'matters pertaining' formulation provides certainty to employers as to what matters can be included in enterprise agreements.

r.146. The content rule will cut regulation so that matters that historically have been included in agreements which encompass the relationship between an employer and a union but were prohibited under Work Choices can be included where agreed to, for example, union consultation clauses or leave to attend union training. The formulation also makes it clear that provisions for payroll deductions such as salary sacrifice and union fees can be included in agreements.

r.147. The capacity to include more issues in agreements where the parties agree will make side agreements between employers and unions unnecessary.

r.148. Provisions that would be inconsistent with, or seek to override provisions in, the new legislation on matters such as freedom of association, unfair dismissal and industrial action would be classed as unlawful content. For example, the payment of union bargaining fees, provisions that purport to 'contract out' of unfair dismissal protections and provisions that purport to allow industrial action during the life of an agreement would be unlawful. FWA will not approve agreements that contain unlawful content.

r.149. Provisions that breach occupational health and safety laws will also be unlawful subject to interaction rules between state and territory laws. Provisions which are discriminatory will also be classed as unlawful content.

r.150. Other matters currently classed as prohibited content may be included in agreements where they meet the content rule. There will be no concept of 'prohibited content' in the Bill.

r.151. In order to facilitate more flexible employment relationships, enterprise agreements will also be required to include an individual flexibility arrangement and a consultation clause where major change is considered. Where no such provisions are included, the respective model term prescribed by the regulations is taken to be a term of the agreement. It is intended that the model term to be prescribed will be based upon the model flexibility term developed by the AIRC for inclusion in modern awards. These provisions will allow employers to enter into individual flexibility arrangements with employees where this is to the benefit of the employer and the employee.

r.152. In addition, before approving an agreement, FWA must be satisfied that the agreement includes a term that provides a procedure that requires or allows FWA or another person who is independent of the employers, employees or employee organisations covered by the agreement, to settle disputes about any matters arising under the agreement; and in relation to the NES. Such term must allow for the representation of employees covered by the agreement for the purposes of the dispute settlement procedure.

r.153. Agreements will have a NED of no later than four years after the date of operation.

r.154. The removal of complex regulation surrounding the content of agreements will simplify the agreement making process, offer employers and employees genuine flexibility and remove harsh financial penalties for including content in agreements that is outside the content rule.

Approval of agreements

r.155. Under the Bill, all enterprise agreements must be lodged with FWA for approval before they commence operation. The approval process is a simple, point in time assessment of the enterprise agreement and the circumstances under which it was made.

r.156. Once an agreement has received employee approval, FWA will ensure that:

- there is genuine agreement;
- the group of employees covered by the agreement was fairly chosen;
- the agreement passes the 'Better Off Overall Test' (BOOT);
- the agreement contains a nominal expiry date and dispute settlement clause;
- the agreement does not contain terms that contravene the NES; and
- the agreement does not contain unlawful content.

r.157. The approval process under the Bill will simplify many of the procedures previously applied as part of the Fairness Test.

r.158. At the time of agreement lodgement bargaining representatives will be required to submit a statutory declaration setting out details of the agreement. The agreement will need to be signed by the employer and a representative of the employees.

r.159. FWA will apply the BOOT to ensure that each employee covered by the agreement is better off overall in comparison to the relevant modern award. The use of modern awards as reference instruments will further simplify the approval process in comparison to the current, complex minimum standards arrangements.

r.160. The BOOT will be an 'on the papers' assessment of the pay and entitlements of an agreement and will avoid the complicated assessment procedures adopted for the Fairness Test, such as accepting written submissions from employees on the personal value of intangible benefits. Undertakings will not be a feature of the approval process except where FWA is satisfied that the effect of accepting the undertaking is not likely to cause financial detriment to any employee covered by the agreement or result in substantial changes to the agreement. Before accepting an undertaking FWA must seek the views of bargaining representatives for the agreement.

r.161. Minimum wage provisions in awards or the National Minimum Wage will override less generous minimum wage provisions in an enterprise agreement. This will mean that where minimum award rates increase during the life of an agreement to above the agreement rates, employers will have to make up any difference, thereby protecting the integrity of the safety net.

r.162. An agreement will come into operation seven days after it is approved by FWA or on a later date if one is specified in the agreement.

Good faith bargaining

r.163. The proposed good faith bargaining system recognises that most employers and employees voluntarily and successfully bargain collectively in good faith and that most employers respect their employees' right to bargain collectively.

r.164. If no issues arise in bargaining, the Bill will only regulate the bargaining process by requiring employers to advise employees of their right to be represented at the commencement of bargaining. Bargaining representatives will be able to bargain and create an agreement and will not be required to interact with FWA until the agreement is submitted for approval.

r.165. The proposed system will include a number of processes designed to facilitate agreement making and assist bargaining representatives to bargain effectively when it is required.

r.166. There are times where a majority of employees at a workplace want to collectively bargain and this choice is not respected by their employer. If an employer refuses to bargain with their employees, FWA will have the power to test the support amongst the employees to which the agreement will apply in a manner it considers suitable, for example, using evidence of union membership, petitions or a ballot of employees. If a majority of the employees wish to collectively bargain, their employer will be required to bargain with them.

r.167. Under this Bill, if bargaining representatives are not effectively bargaining together, FWA will have the power to issue bargaining orders requiring representatives to bargain in good faith.

r.168. The good faith bargaining requirements over which FWA can make bargaining orders relate to procedural matters only and not the content of the agreement. These requirements will be defined through an exhaustive list which will require attending and participating in meetings at reasonable times; disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner; responding to proposals made by other bargaining representatives in a timely manner; giving genuine consideration to the proposals of other bargaining representatives and providing reasons for responses to those proposals; and refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining.

r.169. Good faith bargaining requirements aim to ensure that all bargaining representatives act in an appropriate and productive manner when working towards a collective agreement. The requirements also facilitate improved communication between bargaining representatives, which is expected to reduce the likelihood of industrial action.

r.170. During agreement making, where representatives are failing to bargain in good faith, the good faith bargaining requirements will act to avoid protracted disputes by allowing FWA to make orders. This facilitation of agreement making is in the interests of both bargaining representatives and the general public.

r.171. Where one bargaining representative believes another representative is not negotiating in good faith, they must notify the offending representative of their concerns and give them a reasonable time to respond. This will stop capricious claims that representatives are not bargaining in good faith as FWA will only be able to make bargaining orders if it is satisfied that this notification was made.

r.172. To uphold the integrity of existing agreements, FWA will not be able to make good faith bargaining orders until 90 days before the nominal expiry date of an existing collective agreement if the employer has not offered employees a new agreement.

r.173. Bargaining orders will not require bargaining representatives to make concessions or sign up to an agreement where they do not agree to the terms of the agreement. If FWA believes that there have been serious and sustained breaches of bargaining orders by a bargaining representative and those breaches have significantly undermined bargaining for the agreement, it will have the power to make a workplace determination. In this context FWA must be satisfied that all other reasonable alternatives to reach agreement have been exhausted and that agreement will not be reached in the foreseeable future.

r.174. Where bargaining representatives cannot agree regarding agreement content, they will be able to jointly walk away (in which case the workplace arrangements already in place would remain in force), take protected industrial action or jointly seek FWA's assistance in determining a settlement. A bargaining representative can also seek FWA's assistance through mediation or conciliation.

r.175. Good faith bargaining requirements protect employers from unfair bargaining processes. Analysis of secret ballot applications by unions to the AIRC indicates that, in many cases, employers raise objections about whether a union is engaging in genuine bargaining or

not. During the period March 2006 to May 2007 there were at least 28 objections to secret ballot applications on the grounds of unions failing to genuinely trying to reach agreement.

r.176. Many businesses will be familiar with the concept of good faith bargaining, reducing the uncertainty that could arise upon its introduction. Under the federal workplace relations system the concept of bargaining in good faith was set out in the *Industrial Relations Act 1988* as amended by the *Industrial Relations Reform Act 1993*.

Facilitated bargaining for the low-paid

r.177. Under the Bill, FWA will be able to facilitate multiple employer bargaining for employees who are low-paid and those who have not historically had access to the benefits of collective bargaining.

r.178. Currently there are no provisions to assist the low paid beyond the five minimum entitlements of the Standard and an annual minimum wage review. Enterprise level bargaining has been a central feature of workplace relations since the early 1990s. However, over that time not all employers and employees have participated in enterprise bargaining. This may have occurred because employees in low-paid sectors lack the skills and bargaining power to negotiate for improved wages and conditions at the single enterprise level. Similarly, some individual employers in low-paid sectors may lack the time, skills and resources to bargain collectively with their employees. Some of these employees are unable to negotiate above minimum award rates and conditions because a third party (such as a head contractor) effectively sets their pay and conditions, not their direct employer.

- Parties will have the benefit of access to FWA to help them negotiate the making of a multi-employer agreement. Examples of assistance by FWA include the ability to call compulsory conferences to bring the parties together and to take a more hands-on role in facilitating the negotiations. FWA will also be able to require a third party to attend a conference in certain circumstances, if this is necessary to advance negotiations. This might include a head contractor who actually determines the terms and conditions that apply.

r.179. The Bill will provide access to a separate multi-employer bargaining stream for the low-paid. Bargaining representatives may apply on behalf of employers or employees for a low paid authorisation which will allow for FWA to facilitate bargaining for a specified list of employers.

r.180. FWA will consider a range of factors to determine if the proposed bargaining is in the public interest. These factors include the history of bargaining in the industry where the employees work and whether the granting of the authorisation would assist in identifying improvements to productivity and service delivery at the enterprises to which the agreement relates. Further, FWA must take into account the views of employers and employees who will be covered by the agreement and the extent to which the applicant is prepared to respond reasonably to the needs of individual employees.

r.181. FWA will be able to facilitate bargaining in this stream by the use of compulsory conferences and good faith bargaining orders which would not otherwise be available in multi employer bargaining. Protected industrial action will not be available.

r.182. If the bargaining representatives for an agreement in the low paid bargaining stream are unable to reach agreement on the terms that should be included in the agreement, employee representatives and one or more of the employers could seek a workplace determination by consent. There will also be capacity for FWA to make a workplace determination on the application of only one party. Under this category, FWA would apply a set of threshold criteria to decide whether the arbitration should proceed including that the parties had genuinely tried to reach agreement, and that making the determination will promote productivity and efficiency in the enterprises concerned.

Impact **Analysis**

r.183. The introduction of a new bargaining system may involve some transitional costs as the parties adjust to a new set of legislative provisions. Some features of the new system may also impose new or additional obligations and regulations on employers and employees. This is an inevitable result of a major overhaul of current workplace relations laws.

r.184. However, the Government believes that the new bargaining system will deliver benefits that offset these costs. The new system is designed to provide a fair and simple framework for employees and employers to determine their working arrangements in a way that encourages productivity at the enterprise level. While some features of the new system may have some regulatory impact, they will also help to make the bargaining process run more efficiently and smoothly.

r.185. A fair and balanced bargaining framework that properly recognises the interests of both employees, employers, and their representatives is also more likely to achieve broad support from all parties. This will help ensure a more stable and enduring system that allows employers to get on with the job of running their business, and employees to perform their work productively.

r.186. This Bill will place collective bargaining at the enterprise level at the heart of the workplace relations system.

r.187. Enterprise agreements can ensure that increases in pay and entitlements are linked to productivity increases at the enterprise. This is due to negotiations at the level of the enterprise better reflecting the financial situation of the enterprise. Furthermore, collective bargaining will shift the focus of negotiations towards boosting productivity.

r.188. Collective bargaining under the Bill will be less bound by regulation and red tape and is designed to have a positive impact on labour productivity.

r.189. The post-implementation review of the new system will be an important means of assessing the effectiveness of the new bargaining system.

Individual agreements

r.190. The Transition Act removed the capacity for employers and employees to enter into AWAs. It introduced ITEAs, which were solely designed to be transitional instruments with a nominal expiry date no later than 31 December 2009. As these agreements are not the subject of provisions in this Bill, there is no impact analysis of statutory individual agreements.

Approval of agreements

r.191. The Australian Human Resources Institute (AHRI) published 1 001 responses to an online survey about the take-up of the WR Act and whether it was achieving benefits.[31] The majority of responses regarding the Fairness Test indicated frustration with its complexity which tended to complicate agreement making and increased administrative costs.

r.192. The BOOT will simplify agreement processing. Enterprise agreements will be assessed 'on the papers' against modern awards, providing for a simpler comparison compared to the current assessment against the old award system. The BOOT will also be a point in time assessment.

r.193. The removal of the capacity to make individual statutory agreements under the proposed framework will substantially improve the approval process. As at September 2009, 80 per cent of all agreements being processed were individual statutory agreements, [32] so the removal of these forms of agreements will dramatically reduce the volume of agreements lodged for approval.

Evidence on the effects of collective bargaining on productivity

r.194. Collective bargaining at the level of the enterprise is a productive form of agreement making that allows employer and employees to examine the way they work, discover new ways to improve productivity and efficiency and communicate to make workplaces more flexible. Research by the Melbourne Institute and Productivity Commission links productivity gains to collective bargaining.

r.195. In 1999, the Productivity Commission conducted case studies into the factors affecting productivity growth. The case studies included industries such as the whitegoods, automotive, textile clothing and footwear, NSW rail freight and wholesale and retail trade industries.[33] The main findings from these studies were that flexibility in work arrangements increased through collective agreements.

r.196. More specifically, the Productivity Commission found that workplace bargaining provided a framework in assisting the redesign of working arrangements and ensuring workers were employed more productively. Productivity improvement was therefore found to be an explicit feature of many of these agreements.

r.197. Furthermore, Tseng and Wooden found that firms with employees on collective agreements experienced a 9 per cent increase in productivity levels, when compared to firms with employees on awards.[34] The authors point out, however, that their results do not prove that

[31] Australian Human Resources Institute (AHRI), *Work Choices: Its impact within Australian Workplaces*, Survey Findings, 23 August 2007.
[32] B Bennett, Address to 7th Annual Workforce 2008 Conference, Melbourne, 8-9 September 2008.
[33] Productivity Commission, *Microeconomic Reforms and Australian Productivity: Exploring the Links, Volume 2: Case Studies*, Research Paper, AusInfo, Canberra, 1999; and A Johnston, D Porter, T Cobbold and R Dolamore, *Productivity in Australia's Wholesale and Retail Trade*, Productivity Commission Staff Research Paper, AusInfo, Canberra, 2000.
[34] Y-P Tseng and M Wooden, *Enterprise Bargaining and Productivity: Evidence from the Business Longitudinal Survey*, Melbourne Institute Working Paper No. 8/01, July 2001, page 28.

collective bargaining causes higher productivity (though they imply that it may) but that rather, collective bargaining and higher productivity are correlated.

r.198. Fry, Jarvis and Loundes, also found that organisations entering into collective agreements with their workers, reported substantially higher levels of self-assessed labour productivity relative to their competitors.[35]

Good faith bargaining

r.199. Good faith bargaining provisions currently operate in the Queensland and Western Australian workplace relations systems. Consultations with state government representatives indicate that these state systems do not impose onerous additional obligations on employers. The Department is not aware of any concerns with these good faith bargaining systems among state-based employer representatives.

r.200. For example, in the entire Queensland bargaining system in 2006-07 there was only one application to arbitrate a bargaining dispute to determine whether negotiations were conducted in good faith. In Western Australian bargaining system, there were only 4 requests for good faith bargaining orders between 2002 and 2006. This period was prior to the commencement of the Work Choices amendments to the WR Act when the jurisdiction of the state industrial relations systems was considerably larger.

r.201. It is advanced that good faith bargaining requirements will serve to facilitate more effective agreement making without unnecessarily imposing regulation and outcomes on bargaining representatives.

Facilitating bargaining for the low paid

r.202. The provisions for multi-employer bargaining for low paid sectors in this Bill are designed to assist those that typically find it difficult to bargain to enter into enterprise agreement making. This will facilitate employees working in areas such as child care, aged care, community services, security and cleaning, who are often paid the relevant minimum wage rate entering into the bargaining stream, with associated productivity benefits.

r.203. Table 6 below displays the rates of pay for occupations closely linked with those discussed above. In all occupations, employees on collective agreements earn more than those who are paid the award rate of pay.

[35] T Fry, K Jarvis and J Loundes, *Are Pro-Reformers Better Performers?*, Melbourne Institute Working Paper No. 18/02, September 2002.

Table 6: Average hourly ordinary time cash earnings (AHOTE) for adult non-managerial employees by select occupation codes and pay-setting method, Australia

Occupation (ANZSCO 3-digit code)	Award-only	Collective agreement	Difference
	($)	($)	($)
Health and Welfare Support Workers (411)	22.10	25.30	3.20
Child Carers (421)	16.80	18.00	1.20
Personal Carers and Assistants (423)	19.80	20.80	1.00
Prison and Security Officers (442)	20.00	24.20	4.20
Cleaners and Laundry Workers (811)	17.00	18.60	1.60
Food Process Workers (831)	16.30	20.50	4.20
Packers and Product Assemblers (832)	16.30	18.20	1.90

Notes: Differences in earning are statistically significant.
Source: ABS *Employee Earnings and Hours* (Cat No 6306.0), May 2006, unpublished data

r.204. The capacity for one party to apply for a workplace determination where there has been a failure to reach agreement in this stream could potentially lead to arbitrated wage outcomes that are not linked to factors at the workplace. Importantly, however, the provisions contained in this Bill ensure that this will only occur where genuine productivity and efficiency gains have been identified to offset any increases.

Table 7: Employer and employee views on the new bargaining framework provisions

Employer Stakeholders	Employer groups support a voluntary bargaining framework where workers may seek a collective agreement, but employers are not compelled to bargain collectively with their workforce. Employer groups are generally accepting of the proposed good faith bargaining framework, in particular the specific provision that Fair Work Australia will not have the power to force bargaining representatives to make concessions during the bargaining process. Employer groups want restrictions on the content that can be bargained for and contained in agreements. Most are satisfied with the retention of the 'matters pertaining formulation.' However, some are concerned that the expansion of the content rule to relate to employee associations as well as the removal of 'prohibited content'. Employer groups are generally satisfied that industrial action is not available for multi-employer agreements and that arbitration is only for low paid workers. Some groups are concerned with the expanded formula for matters pertaining to the employment relationship and their implications for delegates' rights.
Employee Stakeholders	Unions support the collective bargaining framework. They also want a strong industrial umpire to enforce the framework through the capacity to arbitrate outcomes. They want this framework to come into effect immediately. Unions are particularly concerned that there are restrictions on the content that can be bargained. Some unions believe that there will be disputes over whether the content being bargained is a matter pertaining to the employment relationship. Unions support the bargaining stream for low paid workers. Unions believe that workers in this stream must have the right to access arbitration by an umpire, as well as have access to industrial action in pursuit of claims.

4. UNFAIR DISMISSAL

Current Arrangements

r.205. The current unfair dismissal laws, under the WR Act, apply only to employees working in businesses with more than 100 staff and who have met a six month qualifying period of employment. Within this group, certain categories of employees are also exempt, including:

- employees dismissed for 'genuine operational reasons';
- short term casual employees (with less than 12 months regular and systematic employment), fixed term and fixed task employees, trainees, probationers and seasonal workers; and
- employees not employed under award-derived conditions whose remuneration exceeds a rate specified in regulations.[36]

r.206. Applications for unfair dismissal relief are made to the AIRC and must be on the grounds that the dismissal was harsh, unjust or unreasonable. Applications must also be lodged within 21 days of the dismissal, although the AIRC has the discretion to accept late applications.

r.207. Once lodged, the AIRC will first attempt to conciliate the claim. If this is unsuccessful, the case will then move to arbitration and a binding order will be made. The AIRC's order may be for reinstatement or compensation. Compensation is capped and the amount cannot include any component for shock, distress, humiliation or other similar hurt caused by the termination.

r.208. Parties in unfair dismissal claims may, with leave from the AIRC, be represented by a legal practitioner or other, non-legal representative or adviser. Appeals may also be granted by the AIRC except for certain matters. These include orders relating to the eligibility of an applicant to make a claim as well as those relating to whether a claim is frivolous, vexatious or lacking in substance. Decisions made by the AIRC to allow an extension of time on applications lodged after 21 days, are also exempt from appeal.

Unfair dismissal under Work Choices

r.209. Criticisms of the current unfair dismissal system revolve around two issues. The first is the reduction in unfair dismissal protections imposed by Work Choices (i.e. the 100 employee and genuine operational reasons exclusions). The second is the burden on business, particularly small business, of defending an unfair dismissal claim.

r.210. The Work Choices legislation introduced exclusions from complying with unfair dismissal laws for businesses with 100 employees or less, removing unfair dismissal protection from approximately 4.6 million (or 56 per cent) of employees. Work Choices also stipulated that an unfair dismissal claim could not be made if the employee was dismissed for genuine operational reasons, or for reasons that include genuine operational reasons. These changes were introduced to reduce the administrative burden of defending an unfair dismissal claim for businesses that needed to make operational changes to the business structure but had the effect of

[36] From 1 July 2008, this amount was $106,400.

significantly reducing the protections available to employees in businesses of 100 or more employees.

r.211. Employer organisations asserted that for many businesses, the cost of defending a claim would often exceed the cost of paying out an employee that threatened to make a claim, leading to the practice of paying "go away" money.[37]

Proposed Changes

r.212. The new system will remove the 100 employee exemption introduced under Work Choices and instead introduce new qualifying periods that have to be met before an unfair dismissal claim can be made - 12 months for employees of businesses with fewer than 15 employees and six months for employees in businesses with 15 or more employees. Casual employees will no longer be excluded but will have to meet the same qualifying periods as permanent employees, provided that they have been employed on a regular and systematic basis for the requisite period and they had a reasonable expectation of continuing employment by the employer.

r.213. Employees not covered by a modern award or employed under collective agreements whose remuneration exceeds the high income threshold[38] and employees dismissed due to genuine redundancy will be excluded from making an unfair dismissal claim. Employees who are under a contract of employment for a specified period of time, for a specified task or for a specified season are also excluded from making a claim when their employment ends on the completion of the specified period, task or season. Similarly, an employee to whom a training agreement applies and whose employment is limited to the duration of that agreement is excluded from making a claim where their employment ends on completion of that training agreement.

r.214. Applications for relief on the grounds that the termination was harsh, unjust or unreasonable must be lodged with Fair Work Australia (FWA) within 7 days. FWA will have discretion to accept late applications in exceptional circumstances.

r.215. FWA will be able to consider matters such as whether the employee has completed the minimum qualifying period or whether the employer has complied with the Small Business Fair Dismissal Code in an informal and 'inquisitorial' manner. For example, FWA may gather information via telephone discussions with the parties, FWA may ask the parties for written information, or FWA may convene a face-to-face conference, either at the employer's premises or at FWA. Where there are contested facts between the parties, FWA will be required to either hold a conference or conduct a hearing.

r.216. Any face-to-face conference will be informal with formal written submissions or cross examination not necessarily required. Only matters that are considered appropriate by FWA will be referred to a full public hearing. In considering what is appropriate FWA must have regard to

[37] See, for example, Australian Chamber of Commerce and Industry (ACCI) "Unfair dismissal law – doing more harm than good" Press Release, August 2005.

[38] The high income threshold for exemption from modern awards will be $100,000 for full time employees, indexed from 27 August 2007, and adjusted in July each year in line with annual growth in average weekly ordinary time earnings for full-time adult employees.

the views of the parties and whether a hearing would be the most effective and efficient way to resolve the matter.

r.217. In any matter being considered by FWA, the parties will be able to be supported by a non-legal representative or agent. Legal representation will only be allowed where FWA deems it appropriate.

r.218. Reinstatement will be the preferred remedy. However, if it is not in the interests of the employee or the employer's business, compensation in lieu of reinstatement may be ordered. Compensation will be capped at half of the high income threshold (i.e. 6 months pay) immediately before the dismissal or worked out from the total remuneration received by the person or to which they were entitled during the 26 weeks immediately before the dismissal. The factors for determining compensation within the maximum amount will be specified.

r.219. There will also be a Small Business Fair Dismissal Code (the Code) for businesses with fewer than 15 employees (small business employers). The Code will set out the steps a small business employer needs to take in order for the dismissal to be fair. If an employee of a small business employer makes an unfair dismissal claim, FWA will first determine if the employer has complied with the Code. If so the dismissal will be considered fair. If the employer has not complied with the Code, the claim will treated in the same way as any other unfair dismissal claim, and FWA will go on to determine whether the dismissal was harsh, unjust or unreasonable.

How does it overcome the disadvantages of the old system?

r.220. Abolishing the 100 employee exemption and replacing it with qualifying periods of 6 and 12 months (depending on the size of the employer) will allow many more employees to access unfair dismissal laws – estimated to be 6.7 million (or 80 per cent of employees) compared with 3.7 million (or 44 per cent of employees) under Work Choices.

r.221. There are several aspects of the new system that should make compliance easier for businesses.

r.222. For example, under the new system, the time limit to lodge an unfair dismissal claim will be reduced from 21 days to 7 days. The aim of the new time limit is to promote quick resolution of claims and increase the feasibility of reinstatement as an option. FWA will have discretion to accept late applications in exceptional circumstances.

r.223. Similarly, employers will still be able to dismiss an employee in cases of genuine redundancy.

r.224. There will also be special assistance for small business employers through the Small Business Fair Dismissal Code and a 12 month qualifying period for small business employees. Therefore, small businesses will have 12 months in which to assess the performance of an employee and terminate their employment if necessary. This will be adequate time for a small business to assess the performance of an employee.

r.225. Small businesses tend not to have the resources to employ dedicated human resources professionals to help them manage dismissals. By providing a clear process and guidance to

follow when dismissing an employee, the Code may help to mitigate any increase in unfair dismissal claims from small business employees, and provide certainty to small business when they need to dismiss an employee.

r.226. The new system administered by FWA will be simpler and easier for all parties to use. Under the current system, an unfair dismissal claim must go through an initial conciliation stage, which goes on to arbitration if not able to be conciliated. In the new system, FWA will be able to respond to claims in a flexible and informal manner. This includes through initial inquisitorial inquiries, and where there are contested facts, an informal conference or hearing. FWA will be able to make binding decisions following a conference, without the need for a formal, public hearing. Where conferences are held, they will be able to be conducted at alternative venues, such as the employer's place of business, which will minimise the cost in time and lost earnings an employer may face in defending a claim.

r.227. Overall the new system has more of a focus on early intervention and informal processes over the previous system. It will increase access to unfair dismissal remedies for employees while still imposing certain conditions on access that will benefit business, particularly small business.

Impact **Analysis**

r.228. The unfair dismissal provisions in the Bill will increase the number of businesses and employees covered by unfair dismissal laws with the removal of the current exemption for firms employing less than 100 employees. In addition, there will be changes to the process of resolving claims. The net regulatory effect will depend largely on the impact on employees who will be covered by unfair dismissal laws and the impact on employers employing less than 100 employees.

Impact on employees

r.229. The major impact for workers will be that a larger number will be covered by unfair dismissal laws. It is estimated that with the removal of the exemption for firms employing less than 100 employees there will be an increase of 3 million workers covered by unfair dismissal laws in the federal workplace relations system, subject to them meeting certain qualifying periods.

r.230. For these workers, the major benefit is that it provides reinstatement (or compensation) for those who are unfairly dismissed. This compensation will be capped at six months of salary. In addition:

- The sense of justice could be an important benefit for those workers who are dismissed unfairly, although this benefit is difficult to estimate accurately.
- There would also be a benefit to employees in having an option to have their case heard. Again, this benefit is difficult to estimate.
- It could reduce the number of unfair dismissals – the presence of the law will provide an incentive for employers not to unfairly dismiss workers because of the legal consequences of doing so.

- However, for employees who bring an unfair dismissal claim there is the cost of preparing and presenting their case, which in unusual cases, could include the hiring of a legal representative.

Impact on employers

r.231. For employers the major impact is the cost of dealing with an unfair dismissal case and this is not just limited to the cost of paying compensation.

- There is the cost of defending unfair dismissal cases, which involves time and possibly the cost of hiring legal representatives. However, under these provisions, legal representatives will only be allowed where FWA deems it appropriate.

- As is currently the case, where an employer has been found to have unfairly dismissed an employee they will be required to reinstate or pay compensation to the dismissed employee.

- It is also possible that employers will continue to employ an inefficient employee because of the possibility of that employee bringing an unfair dismissal claim, although the Bill provides additional time for an employer to assess the performance of an employee which mitigates against this.

r.232. If employers perceive that there is a risk of an unfair dismissal claim being made, then this could increase the cost of employing workers and may reduce the incentive of businesses to employ workers.

r.233. Another possible response from some employers may be to avoid compliance with the regulations, for example, it may increase the incentive for some employers to sack staff just before the qualifying periods or employing more staff on a contract basis. This type of behaviour is unlikely to be widespread given the costs of excessive staff turnover. Moreover, the time-based approach allows employers to ensure that the employee is right for the job before the probation period is over.

r.234. Such a response is difficult to predict in advance but can be subject to monitoring and review. However, the Fair Dismissal Code is designed to provide small business employers and employees with clear guidelines to minimise the extent of unfair dismissal action.

Community-wide effect

r.235. For the community, there is the cost of running the unfair dismissal process through FWA. The change in this cost will largely depend on how many unfair dismissal claims are made. This issue is discussed later in this section.

r.236. Overall, the unfair dismissal laws will have a positive impact if the equity effect of reinstating or compensating those employees who are dismissed unfairly outweighs the cost borne by employers and employees in preparing and participating in the unfair dismissal process and the government to run it and any possible negative employment effect.

r.237. The following sections provide empirical evidence on the size of these effects, starting with the possible impact on employment levels.

OECD Analysis of Employment Protection Legislation

r.238. The OECD ranked Australia sixth in 2006 in terms of how strict its employment protection legislation (EPL) is compared with other OECD countries.[39] A relatively high ranking such as this implies a country's EPL is not too strict and that an employee can be dismissed without too much difficulty. The US and the UK, with the least strict EPL, had rankings of 1 and 2 respectively in 2006.[40]

r.239. The precise relationship between EPL and employment is still unclear. The OECD stated in its 1999 *Employment Outlook* that:

> *Simple, cross-country comparisons suggest that EPL has little or no effect on overall unemployment, but may affect its demographic composition. In countries where EPL is stricter, unemployment tends to be lower for prime-age men but higher for other groups, especially younger workers. However, this latter finding must be regarded as tentative, since it is not supported by the evidence from the multivariate regressions, except in the case of stricter EPL having a negative impact on the unemployment of prime-age men.* [41]

r.240. More recently, the OECD stated in its 2007 *Going for Growth* publication that:

> *While some studies have found negative effects of stringent EPL on aggregate employment,[42] other evidence, including OECD research, finds no significant impact[43].* [44]

r.241. In looking at the link between employment protection legislation and productivity, the OECD stated that the available literature is inconclusive about the direction of the overall effect.[45] In examining the specific issue of employment protection legislation and worker effort, the OECD noted that "layoff protection might reduce worker effort (thus productivity) because there is a lower threat of layoff in response to poor work performance or absenteeism" but "alternatively, layoff regulations could provide additional job security for workers, increasing

[39] OECD *Going for Growth 2007*
[40] Australia's EPL ranking has remained unchanged since OECD reports from 1999 and 2003 despite changes to unfair dismissal legislation during that time. According to the OECD, changes EPL made in a few countries, such as Australia, France, Germany and Sweden, are not captured by the OECD indicator. The main reason is that while the indicator is based on the extent of protection for a "typical" worker, reforms made in recent years have often taken the form of new clauses targeted at specific groups of workers, in particular those employed in small firms.
[41] OECD *Employment Outlook*, June 1999, Chapter 2, page 50.
[42] Using cross-country time-series macroeconomic data, Elmeskov et al. (1998) and Scarpetta (1996) find that strict EPL increases unemployment in OECD countries. Certain microeconomic studies have also found negative effects of EPL on employment for non-OECD countries (see in particular the collection of papers in Heckman and Pagés, 2003).
[43] Nickell (1997), Nickell et al. (2005) and Nunziata (2002) obtain no significant unemployment effect of EPL. New research reported the in OECD *Employment Outlook* 2006 and Bassanini and Duval (2006) finds no significant impact either. This difficulty in identifying effects using macroeconomic data may to some extent reflect the difficulties in capturing the many dimensions of EPL – e.g. its enforcement and predictability – in simple indicators. However, certain microeconomic studies do not find any aggregate employment effects of EPL either (see for instance Autor et al., 2006, or Kugler and Pica, 2005).
[44] OECD *Going for Growth 2007*, page 134.
[45] OECD *Employment Outlook 2007*, page 70.

job tenure and work commitment and making firms and workers more likely to invest in firm or job-specific human capital".[46]

Australian academic studies

r.242. There are two Australian studies that attempted to estimate the employment impact of the unfair dismissal laws operating early this decade (Harding[47] and Freyens and Oslington[48]). The Harding study reports on a survey commissioned by the (then) Department of Employment and Workplace Relations under the previous Government. Although both studies found a negative employment effect, the extent of the impact differed significantly between the two studies and, subsequently, the authors of these studies have both contested the validity of each others' methodology.

r.243. These studies are not considered relevant in assessing the current changes because the employment impact is based on the previous unfair dismissal laws that are different in their design and operation. For example, previous laws did not include a fair dismissal code for small business or the same qualifying periods that are afforded to employers to assess staff performance.

Number of businesses impacted

r.244. The proposal to remove the current 100-employee exemption from unfair dismissal laws will impact primarily on businesses with 15-100 employees. As noted above, businesses with fewer than 15 employees will have access to the Fair Dismissal Code and will have a 12 month qualifying period before an unfair dismissal claim can be made. As noted earlier, small business has been consulted extensively in the development of the Fair Dismissal Code.

r.245. The ABS Counts *of Australian Businesses, including Entries and Exits* publication provides information on the count of businesses by number of employees. The latest data are for June 2007. Unpublished data from this publication show that there were 101,188 businesses with 15-99 employees in June 2007.

r.246. Data on the proportion of businesses who reported that they have had an employee or former employee take action or threaten to take action relating to unfair dismissal are available from the Sensis *Business Index* survey for August 2005. The Sensis *Business Index* is one of the most extensive and regular surveys of small businesses in Australia.[49]

r.247. Unpublished data from the August 2005 Sensis *Business Index* show that around 35 per cent of businesses with 15-100 employees reported having an employee or former employee take action relating to unfair dismissal, 10 per cent reported that they have been threatened with

[46] Ibid, page 70.
[47] D Harding, 'Identifying and measuring the economic effects of unfair dismissal laws', 2005.
[48] P Oslington and B Freyens, 'Dismissal Costs and Their Impact on Employment: Evidence from Australian Small and Medium Enterprises', University of New South Wales, 2005 downloaded from Munich Personal RePEc Archive (MPRA), Paper No 961, posted 7 November 2007.
[49] Historically, the Sensis *Business Index* has focused specifically on businesses employing 19 people or fewer. In November 2000 it was expanded to cover the medium business sector, while the regional and industrial sectors were also enhanced. The August 2005 Sensis *Business Index* results are based on telephone interviews conducted with 1,800 small and medium business proprietors. The sample size is divided between 1,400 small businesses and 400 medium businesses (the latter defined as businesses employing between 20 and 199 people).

action and 57 per cent reported they had neither had action taken or been threatened with action.[50]

r.248. Importantly, these proportions relate to all threats or actions relating to unfair dismissals that have been made or taken by employees ever, rather than those that occurred during a specific period. The proportion of businesses who face threats or action relating to unfair dismissals each year would therefore be far lower than those reported in the Sensis *Business Index*. However, some businesses may have faced multiple unfair dismissal threats or action.

AIRC data

r.249. Data from the AIRC 2004-05 Annual Report (the last full year before the commencement of Work Choices) show that 19.7 per cent of unfair dismissal claims are withdrawn, settled or otherwise discontinued prior to conciliation.[51] The data also show that 77 per cent of claims went to conciliation and were settled in 2004-05, while around 5.4 per cent of cases proceeded to arbitration.[52]

r.250. The AIRC 2004-05 Annual Report data also show that there were only 6,707 lodgements of matters concerning termination in 2004-05.[53] As this figure includes both unfair dismissal and unlawful termination applications (these data were not disaggregated until 2006), this figure is an overestimate of the number of unfair dismissal cases in that year.

r.251. While the 6,707 figure was at a time prior to the expansion of the federal system under Work Choices, the department expects this figure to remain relatively stable due to the introduction of the Small Business Fair Dismissal Code and the reduction of the time limit to lodge an unfair dismissal claim from 21 days to 7 days which will contract the window of opportunity for dismissed employees to lodge a claim.

Estimates of the costs of dismissal action

r.252. Estimates of the costs of dismissal action are available from Oslington and Freyens[54]. The authors estimated that the average cost of an uncontested dismissal for employers under the old pre-Work Choices system is $3,044, representing 10.3 per cent of annual wage cost, $9,780 for a dismissal that reached conciliation and $12,818 for an arbitrated dismissal. This comprises:

- time spent writing warnings;
- obtaining managerial and legal advice;
- gathering evidence and documenting the dismissal action; and

[50] Together, these proportions add up to greater than 100 per cent. Some businesses have reported that they were both threatened with action and had action taken against them relating to unfair dismissals.
[51] AIRC, *Annual Report 2004-05*, page 15. Based on average rate between 31/12/96 to 30/06/05.
[52] AIRC *Annual Report 2004-05*, page 16.
[53] AIRC *Annual Report 2004-05*, page 13.
[54] P Oslington and B Freyens, 'Dismissal Costs and Their Impact on Employment: Evidence from Australian Small and Medium Enterprises', University of New South Wales, 2005 downloaded from Munich Personal RePEc Archive (MPRA), Paper No 961, posted 7 November 2007.

- meeting with the employee to guarantee the employee's right to respond to the charges and meeting with union delegates (It may also include the time originally needed to take a decision with respect to poor performance or misbehaviour).

r.253. These costs are based on the previous process in the AIRC. As noted above, the process for dealing with unfair dismissal claims will be far simpler and more efficient under FWA resulting in minimal costs to employers. Therefore, the Oslington and Freyens figures cannot be used to reliably estimate the potential cost to employers of the system proposed in the Bill.

Benefits to employees

r.254. The removal of the 100-employee exemption for unfair dismissal laws carries is likely to provide significant benefits to a large number of employees. Indeed, survey data show that employees strongly support unfair dismissal laws because of the protection they offer via increased job security and a reduced feeling of vulnerability in the workplace.

r.255. The March 2008 Sensis *Consumer Report* found that 26 per cent of Australians felt Work Choices has had a negative impact on them compared with 13 per cent who felt Work Choices had a positive impact (the report includes responses by business operators), resulting in an overall net negative impact of 13 per cent.

r.256. In terms of unfair dismissal related concerns, the Sensis *Consumer Report* found that the main reasons given for Work Choices having a negative impact were: a view that employees were more vulnerable (21 per cent), a feeling that it was negative in general (10 per cent), a feeling that the impact would be negative (6 per cent).

r.257. For details on employee coverage of unfair dismissal laws please see Attachment B.

Table 8: Employer and employee stakeholder views on the new unfair dismissal legislation

Employer Stakeholders	Almost all employer groups welcome the Fair Dismissal Code's simplicity, clarity, and ease in application. Employer groups want to ensure that speculative or frivolous unfair dismissal claims could not be lodged, and that the proposed provisions take into account the needs of small businesses. Employer groups want to retain the current exemptions for unfair dismissal claims. Some also consider the six month compensation cap to be too high.
Employee Stakeholders	Most support the existence of the Fair Dismissal Code and other additional protections afforded under unfair dismissal provisions, but they want these provisions to be implemented immediately, and want them administered by a strong umpire. Unions believe that workers in small businesses should have the same access to unfair dismissal provisions as those in large businesses.

5. INDUSTRIAL ACTION

Current Arrangements

Protected industrial action - employees

r.258. The concepts of protected action and a limited right to strike within a bargaining period were introduced in the *Industrial Relations Reform Act 1993*. The WR Act introduced prohibitions on action during the life of an agreement and payment during strikes and restored the prohibition against secondary boycotts.

r.259. Protected employee industrial action may only be taken by an employee who is a negotiating party to the proposed agreement or an employee who is a member of a union that applied for a ballot order authorising the action.

r.260. Employee industrial action is not protected if it is:

- taken in support of prohibited content;
- taken while a bargaining period is suspended;
- taken, or organised by, persons who are not protected for that industrial action;
- taken in support of pattern bargaining;
- taken during the life of an agreement;
- not authorised by a protected action ballot or taken in response to employer industrial action;
- taken before the required notice has been given;
- taken, or organised by, an employee or union who have not complied with Commission orders and directions; or
- taken by a union but not authorised according to the union's rules.

r.261. The prohibited content rules, introduced as part of the Work Choices amendments, restricted the matters over which employees could take protected industrial action.

Occupational Health and Safety (OHS) Exception

r.262. Action taken by an employee because of a 'reasonable' concern of an imminent risk to his or her own health or safety is not classified as industrial action. Therefore, the employee is not susceptible to orders, sanctions or strike pay provisions. Currently, the onus of proof falls on an employee claiming this exemption.

Protected industrial action - employers

r.263. Prior to the Work Choices amendments, the WR Act defined industrial action as 'the performance of work in a manner different from that in which it is customarily performed' and

included bans, limitations or restrictions on the performance of work, or on acceptance of or offering for work [s.4(1)]. Until 2004, the AIRC took the view that the pre-Work Choices WR Act definition applied to action by employers, and on a number of occasions issued s127 orders that employer industrial action cease. In 2004, the Full Bench of the AIRC ruled, in a matter commonly known as *The Age* case, that termination of employment or giving notice of a termination could not be considered industrial action.[55]

r.264. Work Choices limited the definition of employer industrial action to lockouts. Section 420(3) defines a lockout as: 'an employer locks out employees from their employment if the employer prevents the employees from performing work under their contracts of employment without terminating those contracts (except to the extent that this would be an expansion of the ordinary meaning of that expression)'.

r.265. The narrowing of the definition ended the symmetry in the treatment of employer industrial action and employee industrial action under the WR Act.

r.266. Protected employer industrial action may be taken by employers for the purpose of responding to employee industrial action or taken proactively to support or advance claims made in respect of a proposed agreement. Industrial action by an employer is not protected if the employer has not genuinely tried to reach agreement.

Strike pay

r.267. The "no work-as-directed, no pay" principle has been part of the common law for more than 20 years. Since 1996, the WR Act has prohibited employers from making a payment to an employee in relation to a period in which the employee takes industrial action. It is also prohibited for employees to demand or accept such a payment from an employer.

r.268. Work Choices introduced the 'four hour rule' whereby an employer must withhold four hours pay for a period of industrial action less than four hours in a day. For industrial action longer than four hours, the employer must not pay the employee for the total duration of the action on that day. The four hour rule applies to both protected and unprotected action.

r.269. The four hour rule has been a source of confusion for some stakeholders and, it could be argued, in some cases, has resulted in employees taking action for longer periods than otherwise planned. The deduction of four hours pay for very short periods of industrial action is arguably punitive in nature for protected industrial action. For example, the breadth of the industrial action definition means the provisions technically require the docking of fours hours pay where employees return to work slightly late after a meeting during an unpaid period. There have been cases where workers have been docked four hours pay for holding brief meetings with little impact on an employer's business. In relation to overtime bans, the rule could arguably operate to prohibit payment for ordinary hours worked (for example, a 30 minute overtime ban could result in a loss of 3.5 hours of ordinary pay).

Protected action ballots

[55] AIRC, Full Bench Decision, PR946290, 11 May 2004, www.airc.gov.au/alldocuments/PR946290.htm

r.270. The current protected action ballot process is set out in detail in the WR Act, running to some 44 sections. The process is complicated and prescriptive. The protected action ballot provisions in the WR Act impose the following requirements:

- the application must have the support of at least the prescribed number of relevant employees;
- the nominal expiry date of the relevant collective agreement(s) must have passed;
- a copy of the application must be given to the other party and any person nominated to conduct the application within 24 hours; and
- the application must include:
  - **the question or questions to be asked;**
  - **details on the types of employees to be balloted;**
  - **any details required by the Rules of the Commission;**
  - **a copy of the notice to initiate bargaining;**
  - **a declaration that the industrial action to which the application relates is not for the purpose of supporting or advancing claims for prohibited content; and**
  - **written notice that the application has been duly authorised according with the union's rules (if the application is by a union); or**
  - **a document containing the name of each employee applicant (if the application is by a group of employees).**

r.271. Currently, a ballot order may only be issued by the AIRC if it is satisfied that the applicant:

- has, during the bargaining period, genuinely tried to reach agreement with the employer; and
- is genuinely continuing to attempt to reach agreement with the employer; and
- is not engaged in pattern bargaining.

r.272. The AIRC has discretion to refuse an application if granting it would be inconsistent with the objects of the protected action ballots division.

r.273. Protected industrial action is available for 30 days after the declaration of the ballot result. The AIRC may, on application by the ballot applicant and the employer, extend this period by up to 30 days.

r.274. Currently, a ballot may be conducted by the AEC or another qualified ballot agent. The applicant must pay 20 per cent of protected action ballot costs, with the Commonwealth funding the remaining 80 per cent, regardless of who conducts the ballot. To date, only one application

for a ballot order has been made by an employee and that application was made with the assistance of a union. There is an argument that this is likely due to the complexity of the process and the liability of the applicant to meet 20 per cent of the costs of the ballot.

r.275. It is currently an offence to breach the protected action ballot provisions, although there have not been any criminal prosecutions to date.

r.276. If a party challenges an order for a protected action ballot, the order can be stayed until the challenge is determined. This delays the conduct of the ballot and in some cases, has led to the ballot order expiring while the challenge is still being heard.

Suspending and terminating industrial action/a bargaining period

r.277. The AIRC must order unprotected industrial action to stop, not occur or not be organised. Such an application must, as far as practicable, be heard and determined within 48 hours. If the AIRC is unable to do so, it must make an interim order.

r.278. The AIRC must make an order to suspend or terminate a bargaining period (and therefore end access to protected action that is occurring or being organised) if it is satisfied that:

- a party has failed to genuinely try and reach agreement with other parties;
- there has been a failure to comply with an AIRC direction or order;
- a union is organising industrial action in relation to employees who are not eligible to be members;
- the industrial action relates to a demarcation dispute;
- pattern bargaining is taking place; or
- the industrial action is adversely affecting, or would adversely affect, the employer or employees; and is threatening or would threaten:
  - **to endanger the life, the personal safety or health or the welfare, of the population or part of it ; or**
  - **to cause significant damage to the Australian economy or any part of it.**

r.279. The AIRC also has power to suspend a bargaining period if:

- a party is taking protected industrial action and the Commission considers that a cooling off suspension is appropriate and would assist the parties to resolve the dispute; or
- the action is adversely affecting the employer or employees and third parties are directly threatened with significant harm from the industrial action.

r.280. The Federal Court may grant an injunction against industrial action if pattern bargaining is occurring or industrial action is taken during the life of an agreement.

r.281. Ministerial power to terminate a bargaining period (which ends access to protected industrial action) applies if industrial action (or proposed action) adversely affects the negotiating parties and threatens, or would threaten:

- the life, safety, health or welfare of the population (or part of it); or
- significant damage to the Australian economy or an important part of it.

r.282. If a bargaining period has been terminated by the AIRC or the Minister due to a threat to the life, safety, healthy or welfare of the population or the economy, a negotiating period applies in which the parties must attempt to settle the matters at issue. If the parties have not settled the matters by the end of the negotiating period (21 days), a Full Bench of the AIRC must make a workplace determination. The workplace determination applies as if it were a collective agreement.

Proposed **Changes**

Protected industrial action

r.283. Protected industrial action will continue to be available only during negotiations for an enterprise agreement.

r.284. A pre-condition for taking protected industrial action will be that the participants are genuinely trying to reach agreement and are complying with any good faith bargaining orders in place.

r.285. The requirement to hold a mandatory secret ballot authorising industrial action will be retained. However, provisions will be streamlined and simplified, impacting positively on users of the system. Further details are provided below.

r.286. The protected action provisions will also be changed so that an “unprotected” person joining protected action will be subject to orders and penalties, but the action and its protected participants will not. This change will address any actual or perceived inequities in the current arrangements.

r.287. These requirements are aimed at ensuring that industrial action is only taken during genuine bargaining and not for spurious reasons. This is consistent with minimising the economic impact of industrial action.

OHS Exception

r.288. The reverse onus of proof regarding the health and safety exception to the definition of industrial action, introduced under Work Choices, will be removed – restoring the position that existed pre Work Choices. While employees will not be able to use the OHS exception as justification for action taken for industrial reasons, the burden will no longer be on the employee to demonstrate that he or she acted out of a reasonable concern for his or her health or safety.

r.289. The few published decisions that considered the operation of the pre-Work Choices OHS exception make clear that it was not sufficient for an employee to simply assert that the action was based on a reasonable concern about an imminent risk to his or her safety. In these

matters, the AIRC in effect required employees to establish the reasonableness of their concern as a defence to the employer's claim. Generally employees did not succeed.

Protected action ballots

r.290. When making an application for a secret ballot, there will still be a requirement for applicants to be genuinely trying to reach agreement, but the current complex and prescriptive procedural requirements will be streamlined reducing the red tape burden on applicants, Fair Work Australia (FWA), the Australian Electoral Commission (AEC) and alternative approved ballot agents.

r.291. Protected action ballots may be conducted by the AEC or alternative approved ballot agents. The Commonwealth will bear the full cost of conducting all the ballots conducted by the AEC.

r.292. For ballots conducted by alternative ballot agents, the applicant will meet the full cost of conducting the ballot. As only a small number of ballots have been conducted by agents other than the AEC since the commencement of the secret ballot provisions.

r.293. This measure will provide additional flexibility for ballot applicants. Stakeholders indicate that where a very small number of employees are to be balloted, some applicants find using an alternative provider to be quicker than the AEC. Applicants, such as non-union employee representatives who may lack funds to utilise an alternative approved ballot agent will no longer have any actual or perceived disincentive to apply for a ballot order, as they will be able to utilise the AEC, with the Government funding the total costs of conducting the ballot.

r.294. Alternative ballot agents, and applicants choosing to use alternative ballot agents, will need to comply with regulations dealing with alternative ballot agents, including matters relating to the conduct of the ballot. For ballots not conducted by AEC, FWA will have the appropriate power to issue directions relating to the conduct of the ballot, including the timetable, compilation of roll and reports about the conduct of ballots. This should ensure that such ballots meet accountability expectations.

r.295. FWA will no longer be able to stay protected action ballot orders in the event of a challenge to the application by an employer. Employers will still have recourse to FWA if industrial action is taken after the ballot and it is found that the other (non-ballot) requirements for protected action have not been met (for example, the party taking action is not genuinely trying to reach agreement). This will reduce delays in the protected action ballot process and prevent parties from having to re-apply for ballot orders that have expired during a challenge. The requirement that 50 per cent of employees must vote in a ballot to take industrial action and 50 per cent of these employees must support industrial action remains.

r.296. Industrial action will continue to be protected if taken within 30 days after the result of the ballot has been declared. FWA may extend the period by up to 30 days upon application by the applicant. As employers will no longer be required to consent to this application, employee access to protected industrial action will increase.

r.297. Protected action ballot offences will be subject to civil penalties, not criminal proceedings. Any offences may be enforced by a wider range of people, such as FWA

inspectors. This will ensure that ballot applicants and agents adhere to the provisions and it will increase protection for other parties.

r.298. Applications for protected action ballot orders will be able to be made up to 30 days prior to the Nominal Expiry Date (NED), of an enterprise agreement. From a practical perspective, this will give employees access to protected industrial action earlier than is currently the case, as under current arrangements, a ballot order cannot be applied for until the NED of an agreement has past.

Employer industrial action

r.299. Employer industrial action will continue to be defined as a lockout. However, employer industrial action will only be protected where the employer locks out employees in response to employee industrial action.

r.300. This measure may reduce the incidence of lockouts and their negative impact on productivity and the economy. During a lockout, all production is typically lost and the financial impact on employees can be profound.

Strike pay

r.301. The four hour rule for strike pay will be retained for unprotected industrial action. Additional options will be introduced to provide employers flexibility in managing partial work bans. Providing employers with some discretion on partial work bans should assist in resolving some disputes more quickly and efficiently.

r.302. It will continue to be unlawful for an employer to pay, or an employee to demand or to accept strike pay for any period of protected or unprotected action. However, strike pay provisions will differ according to whether the industrial action is protected or unprotected.

Unprotected action

r.303. Employers will be required to withhold four hours pay for any incident of unprotected industrial action up to, or including, four hours. For action longer than four hours, the employer will be required to withhold pay for the total duration of the action. This would include complete withdrawals of labour, overtime bans and partial work bans or restrictions. The rate of pay required to be withheld will be the rate of pay that would have applied to the period during which action was taken.

r.304. This should act as a strong disincentive to taking unprotected action. Unprotected action typically has a greater impact on the economy as it is often targeted to cause significant damage to a business, with no opportunity afforded to the employer to prepare for or manage the impact.

Protected action: complete withdrawal of labour

r.305. For protected action where there is a complete withdrawal of labour, such as a stoppage or strike, employers will be required to withhold pay for the actual period of industrial action taken. This is a more balanced response to protected industrial action, and may see the duration

of periods of industrial action fall (e.g. stop work meeting of one hour then a return to work, rather than no production for four hours, if staff fail to return to work immediately following the meeting due to the four hour rule).

Protected action: overtime bans

r.306. In the case of protected overtime bans, employees will not be paid for the overtime hours not worked, but pay for ordinary hours worked will be unaffected.

Protected action involving partial work bans or restrictions

r.307. The employer will now be able to choose to:

- accept the partial performance by employees and continue to pay full salary, or
- lock out the employees, or
- refuse to accept partial performance and (where the agreement or contract allows) stand the employees down until such time as they are prepared to perform all their duties, or
- issue a 'partial work notice' and apportion pay according to work performed.

r.308. This measure will provide employers with more discretion and flexibility on how to best manage the impact of the situation when action of this nature is taken. This may assist in resolving disputes more efficiently and may prevent the escalation of some disputes.

Process for apportioning pay where partial performance is accepted and a "partial work notice" is issued

r.309. An employer will be required to issue a written notice accepting partial performance and specifying the proportion of the employee's wages to be deducted that are reasonably attributable to the work which is the subject of the ban. The amount to be deducted will not be damages suffered by the business, but will relate to the proportion of the employee's work not performed and his or her normal wages. At least one working day must elapse after the notice before a deduction is made.

r.310. FWA will have the power to settle any dispute about the proportion of wages that should be deducted.

r.311. There will be no deduction from wages if an employee has not done anything except express an intention to not do something if asked, for example, work unrostered overtime or commence a task.

Termination of industrial action

r.312. The concept of a bargaining period has been removed in the Bill, although industrial action will continue to be protected during bargaining for an enterprise agreement. FWA will be required to order industrial action to end if it is causing or may cause significant harm to the Australian economy or to the safety or welfare of the community.

r.313. FWA will have discretion to end industrial action and determine a settlement where industrial action is protracted and significant economic harm is being caused to, or is imminent for, both of the bargaining parties.

r.314. However, Ministerial power to terminate industrial action will be restricted to 'essential services' only. This is likely to have a neutral impact, as, to date, the Ministerial power to stop industrial action has never been used. This will also help ensure the independence of FWA.

Impact **Analysis**

r.315. Many of the current industrial action provisions are retained in the Bill. The Bill retains clear, tough rules regarding industrial action, though aspects of the framework will be streamlined and simplified. From a regulatory perspective, this should impact positively on employers and employees and their representatives. Where provisions have been streamlined, for example the definition of pattern bargaining, feedback from stakeholders has been taken into account to ensure no effective change to the regulations.

r.316. While, generally speaking, industrial action has a negative impact on productivity, these proposals recognise the right of bargaining participants to take protected industrial action and provide the employer with a proportionate response. The options for managing partial work bans give additional flexibility and discretion to employers. The provisions will provide clarity and improve the regulatory impact in this regard.

Protected industrial action

OHS exception

r.317. To the department's knowledge, since Work Choices, there have been six applications for section 496 orders made to the AIRC which have concerned the OHS exception. Of these six, one application was upheld, one application was withdrawn after employees subsequently returned to work and four attempts to rely on the OHS exception were unsuccessful.

r.318. The limited number of OHS exception claims in relation to section 496 orders made to the Commission may reflect that the express requirement to prove the OHS case has dissuaded employees from stopping work over legitimate OHS concerns.

r.319. Two OHS exception claims were also made by employees as a response to orders or injunctions sought by employers under s36 of the *Building and Construction Industry Improvement Act 2005* and s494 of the WR Act. Neither of these exception claims was successful.

r.320. While removing the reverse onus of proof will reduce the regulatory burden on an employee for action taken out of concern for his or her health or safety, this may result in employees being more prepared to take action over legitimate OHS concerns.

Protected action ballots

Genuinely trying to reach agreement

r.321. The current pre-requisite for a protected action ballot application is that the party must be genuinely trying to reach agreement. From the commencement of Work Choices in 2006 to 18 February 2008, there were 19 decisions published where an application was not approved - 11 of these applications were refused because the party was not genuinely trying to reach agreement. Retaining the requirement for parties to be genuinely trying to reach agreement before a ballot order is granted will help to ensure that parties focus on agreement making and the Government does not fully fund ballots authorising industrial action which would be unprotected at the time of the application.

Results of protected action ballots

r.322. Of the 19 unsuccessful protected action ballot applications in which reasons were published, seven were rejected because of procedural errors. These errors included:

- the bargaining period was not properly notified as the notice referred to wrong employer, employees, or provisions in Act;
- the bargaining period notice was unsigned;
- the nominal expiry date hadn't passed; and
- the employee applicant didn't advise the employer of the application in time.

r.323. Streamlining the protected action ballot provisions and reducing procedural complexity will have a positive regulatory impact on applicants.

Employer industrial action

r.324. The number of employee applications for orders that employer industrial action cease, or not occur, has fallen sharply since the Work Choices amendments. In 2007, there were two such applications compared with 38 in 2005.

r.325. Evidence on the number of working days lost due to lockouts is limited, but research presented by Briggs suggests that while lockouts comprised a small proportion of disputes between 1999 and 2003, they were responsible for just over half of long disputes (disputes that lasted more than a month) and therefore a disproportionate number of working days lost.[56]

r.326. It is possible therefore that restricting protected employer industrial action to reactive lockouts only will reduce the number of working days lost to disputes, impacting positively on productivity and the economy more broadly.

[56] C Briggs 'Lockout law in Australia: The case for reform' *Journal of Industrial Relations*, 49(2), April 2007, page 167.

Table 7: Employer and employee stakeholder views on new industrial action provisions

Employer Stakeholders	Employer groups generally support the retention of existing industrial action provisions, including secret ballots. While supporting the role of FWA in issues arising with secret ballots, some groups are concerned with the proposed arbitration powers of FWA for protracted disputes. Employer groups have suggested that if such provisions are to be in the Bill, the threshold for arbitration must be very high and the notion of harm should be defined as 'economic harm'. Most employer groups support the four hour rule, noting that this has been a disincentive to taking industrial action. One group would like some discretion in applying the rule, but this is not generally supported by other employer groups.
Employee Stakeholders	Employee groups are dissatisfied with retaining the four hour rule for unprotected industrial action. They do not support the four hour rule, and have argued that it is counter-productive to business, as it provides no incentive for workers to return to work for the remaining work day. Unions are opposed to holding secret ballots for initiating protected industrial action. Employee groups reaffirm the need for a strong umpire to settle disputes, believing that otherwise employers could deliberately frustrate collective bargaining negotiations. As such, they support last resort arbitration to resolve protracted disputes.

6. INSTITUTIONAL FRAMEWORK

Current Arrangements

r.327. Under the current system, there are a range of separate statutory agencies that share responsibility for various aspects of the workplace relations system. The various agencies and their roles and responsibilities are detailed as follows:

- Australian *Industrial Relations Commission (AIRC)* is responsible for creating modern awards, resolving industrial disputes and dealing with unfair dismissal claims. The AIRC has a five-tier officeholder structure: the President, Vice Presidents, Senior Deputy Presidents, Deputy Presidents and Commissioners

- Australian *Industrial Registry (AIR)*: provides registry and administrative support to the AIRC and is headed by the Industrial Registrar, a statutory office holder and agency head.

- Australian *Fair Pay Commission (AFPC)*: is responsible for conducting wage reviews and exercising wage-setting powers, as well as promoting an understanding of matters relevant to its wage-setting and other functions. The AFPC consists of the AFPC Chair, four AFPC Commissioners and is supported by a secretariat.

- Workplace *Authority (WA)*: is headed by a Director and has responsibility for a number of functions including: promoting the understanding of federal workplace relations legislation and the making of workplace agreements; providing education, assistance and advice to employees, employers and organisations; accepting lodgement of workplace agreements and notices about transmission of instruments; assessing workplace agreements to determine whether they pass the No Disadvantage Test; authorising multiple business agreements; analysing workplace agreements; and, referring matters, where necessary, to the Workplace Ombudsman for investigation.

- *Workplace Ombudsman (WO)*: is a statutory agency, headed by the Workplace Ombudsman, and is responsible for promoting and monitoring compliance with, and investigating suspected contraventions of, federal workplace relations laws, awards and agreements.

- Australian *Building and Construction Commission (ABCC)*: is a statutory agency, established under the *Building and Construction Industry Improvement Act 2005*, to undertake a compliance function in the building and construction industries.

- Judicial functions are also conferred by the WR Act on the Federal Court, the Federal Magistrates Court and in some cases, state and territory courts.

Government Policy on the Workplace Relations **Institutional** Framework

r.328. The Government's objectives for the workplace relations institutional framework are twofold. One is to efficiently integrate the services that currently span seven agencies, to ensure the public is provided with a streamlined, accessible, one-stop shop on workplace relations issues. The other key objective is to combine the best elements of the past arrangements, particularly the historical independence of Australia's industrial umpire, with new approaches so

that they are less formal, legalistic and adversarial. The aim is to ensure the new institutional framework is both accessible and responsive in providing fair, efficient services to users.

Proposed Changes

r.329. The Government will establish a new institution, Fair Work Australia (FWA), which will replace the AIRC, AIR, AFPC, WA and WO from 1 January 2010 and the ABCC from 1 February 2010. The key functions of FWA will include:

- minimum wage-setting and adjustment by a specialist Minimum Wages Panel to be established within FWA;
- award variation;
- ensuring good faith bargaining;
- facilitating multi-employer bargaining for the low paid;
- dealing with industrial action:
- approval of agreements; and
- resolution of disputes and unfair dismissal matters.

r.330. A diagram illustrating the structure of FWA is at Figure 3. FWA will comprise the FWA President, deputy presidents, commissioners and specialist Minimum Wages Panel members, as well as a general manager and administrative staff.

r.331. FWA members will be appointed via a merit based process. A panel of federal and state and territory senior government officials will shortlist candidates with bipartisan consultation and consultation with the President of FWA to be undertaken before appointments can be made. All current AIRC members will be invited to become FWA members.

r.332. FWA will be complemented by a related but independent and separate statutory agency, the Office of the Fair Work Ombudsman, and newly created Fair Work Divisions of the Federal Court and the Federal Magistrates Court. The Office of the Fair Work Ombudsman will be headed by the Fair Work Ombudsman. It will have separate governance arrangements and will have an educative role in the new system. However, its day-to-day operations will be practically integrated with FWA. Fair Work Inspectors will be appointed by the Fair Work Ombudsman. It will be possible for the Fair Work Ombudsman to establish specialist divisions in the Office to focus on persistent or pervasive unlawful behaviour in particular industries or sectors.

r.333. Fair Work Divisions of the Federal Court and the Federal Magistrates Court will operate as the independent judicial arm of FWA. Matters brought under the Bill will be required to be heard and determined in the Fair Work Divisions. State and territory courts will continue to have jurisdiction to hear and determine claims in respect of breaches of awards, workplace agreements and minimum entitlements.

r.334. The Wilcox Inquiry is reviewing the operation of the ABCC. The Hon Murray Wilcox QC, a former Australian Federal Court judge, is conducting consultation on the structure, independence, powers, resourcing and other matters relating to the new specialist division and will report to the Government by the end of March 2009.

Figure 2: Structure of Fair Work Australia

<table>
<tr><th colspan="2">Fair Work Australia</th><th>Office of the Fair Work Ombudsman</th><th>Fair Work Divisions of the Federal Court and the Federal Magistrates Court</th></tr>
<tr><td colspan="2">President of FWA
• Statutory office holder with tenure to age 65</td><td rowspan="4">Fair Work Ombudsman
• Statutory office holder
• Will promote compliance with legislation, including through education, information and assistance
• Will appoint Fair Work Inspectors

Fair Work Inspectors
• Powers include:
– Entry to premises to monitor compliance with legislation or instruments made under legislation (e.g. NES, awards, agreements)
– Bring court proceedings to enforce rights and obligations
– Investigate and enforce common law entitlements that relate to the NES or modern awards</td><td rowspan="2">• New specialist Fair Work Divisions will be created in Federal Court and Federal Magistrates Court
– Will deal with all matters arising under new workplace legislation
– Will deal with entitlements under a contract of employment about matters in the NES (e.g. leave) or modern awards (e.g. wages)
• Small claims procedure extended to the Federal Magistrates Court</td></tr>
<tr><td>Tribunal functions</td><td>Non-Tribunal functions</td></tr>
<tr><td>FWA Members
• Statutory office holders with tenure to age 65
• Functions/powers, include:
– Approval of enterprise agreements
– Awards review and variation
– Good faith bargaining orders
– Unfair dismissal
– Industrial action orders
– Mediation and dispute resolution
• FWA will have broad powers to conduct matters and inform itself as it considers appropriate in an informal and non-adversarial way (e.g. compulsory conferences)

Minimum Wages Panel
• Will set and adjust wages in its annual wage review
• Headed by President</td><td>General Manager and staff
• Statutory office holder
• Will provide assistance to President and FWA members
• Exercise powers under delegation of President
• Will manage FWA staff, who will assist FWA members to discharge functions (including ancillary non-determinative functions, e.g. provide registry functions, gather information for matters before FWA)
• Provide information about role and functions of FWA</td><td>State and Territory Courts

• State and Territory Courts will retain existing jurisdiction and powers</td></tr>
</table>

Less formality

r.335. FWA will move away from formal, adversarial processes, with legal representation and intervening parties. There will also be a higher bar set for representation. Permission for representation will only be granted to parties (including the Minister) where it would enable the matter to be dealt with more efficiently or fairly.[57] It is envisaged that in most cases legal representation will not be necessary.

r.336. The language employed to describe FWA functions and powers will move away from powers and procedures premised on all matters being dealt with by hearing and instead reflect the fact that matters may be dealt with through a range of processes (for example, on the papers). The ability to decide matters 'on the papers' combined with the proposed FWA less-adversarial style will add to the informality of proceedings.

r.337. In most cases, FWA's powers and functions will be exercised by a single FWA member with FWA staff performing ancillary non-determinative functions. Staff will conduct initial enquiries and gather information about a matter before FWA. This will be particularly important in relation to approval of agreements and unfair dismissal applications. This large range of ancillary functions to be performed by FWA staff will allow FWA to act quickly, informally and by avoiding unnecessary technicality.

r.338. When dealing with a matter under the small claims procedure, the Fair Work Division may act in an informal manner, will not be bound by formal rules of evidence, and may act without regard to legal form and technicality. The Court will have discretion to allow a person to be represented by a lawyer but in most cases this will not be necessary.

A 'one-stop shop' – closer to workplaces, more accountable and quicker in response

r.339. FWA staff will perform ancillary non-determinative functions for workplace agreement and unfair dismissal matters. In addition, the need for legal representation before FWA will be minimised as there will be a move away from a third person 'intervening' in a proceeding towards a 'right to be heard'. FWA will only grant permission for a person to be heard where it would enable the matter to be dealt with more efficiently, or the person or organisation (or its members) are likely to be directly affected by the outcome of the matter, or it would be in the public interest. This means that a person being heard or making a submission will not have the right to cross-examine, appeal, or exercise a range of other rights enjoyed by parties. These two measures should minimise delays and quicken proceedings while still according the parties procedural fairness.

r.340. It is anticipated that restricting responsibility for decision making to FWA members however, will improve the consistency of decision making and consequently reduce the rate of appeals – making for a shorter process and greater accountability. A potentially lower rate of FWA appeals would contrast with the proportionate increase in the number of AIRC appeals under Work Choices. Currently, appeals to a full bench are restricted to AIRC and AIR matters. Appeals against WA decisions (for example in relation to whether an agreement passes the No

[57] Currently, the Minister may intervene in full-bench and public sector matters by advising the Registrar, and parties may be represented by counsel, solicitors or agents where both parties agree and the AIRC grants leave.

Disadvantage Test) however are prohibitive as they must currently go to the High Court. Under FWA, appeals against a decision by a single member (or by the General Manager or FWA staff under delegation) will generally be by leave to a Panel. This will provide greater accountability in relation to, for example, decisions on whether agreements pass the BOOT.

r.341. In relation to any subsequent appeals, it will be cheaper and more streamlined for litigants to commence appeal proceedings in the Federal Court, rather than the High Court which is currently the case for decisions of the AIRC, Registry, AFPC and the WA.

r.342. FWA will be required to disclose information about, and provide copies of, notifications or applications to FWA and orders, decisions or actions made by FWA to the Office of the Fair Work Ombudsman. This will address the current problem of the AIRC not being able to pass on information that contains 'personal information' to the WO, and is consistent with the two agencies operating as a 'one-stop shop' to reduce delays.

r.343. Delays will also be reduced through requiring employers to 'allow access' to inspectors. Currently WO investigations may be sometimes frustrated by employers not facilitating the work of inspectors through access to premises. Inspectors will also be able to perform their functions more effectively by being able to take assistants, such as an interpreter or forensic accountant, on-site.

r.344. Inspectors will also be allowed to investigate and enforce common law safety net entitlements, that is, entitlements relating to the NES or a modern award, where there is a breach of the NES, modern award, enterprise agreement or wages order. This will allow the Fair Work Ombudsman to assist employees resolve statutory and basic common law underpayments at the same time, and provides a 'one-stop shop' for enforcement of these matters.

r.345. The legislation will allow entitlements under a common law contract of employment that relate to matters in the NES, such as leave and notice of termination and redundancy, or modern awards (for example, wages, penalty rates and allowances) to be enforced by the Federal Court and the Federal Magistrates Court. This will make it easier to enforce related entitlements at the same time. State and territory courts will also be able to hear claims about these matters.

r.346. The existing small claims mechanism will be extended to the Fair Work Division of the Federal Magistrates Court and the monetary limitation of the small claims mechanism will be increased from $10,000 to $20,000 (including in relevant state and territory courts). This will allow employees to elect to have claims about entitlements, such as underpayment of wages, dealt with under a simple and quick mechanism.

Dispute Mediation and Resolution

r.347. The Department expects that case flow measures will improve as a result of FWA being responsive and able to visit workplaces to offer assistance and resolve issues quickly and informally. As shown in Table 8 below, the average time taken to hold the first hearing in a dispute resolution of 28 days includes an average of 16 days taken by the AIR to formally list the hearing.[58] In relation to termination of employment claims, 85 per cent of cases are finalised

[58] AIR *Annual Report 2006-07*, page.61.

within 102 days. As FWA will be more flexible, the Department expects that these processing times will fall. This is likely to be particularly the case in relation to dispute resolution, an area in which case flow times have increased since Work Choices.

Table 8: Current AIRC case flow statistics

Nature of proceeding	Event	No. of cases %	Days from lodgement			
			2003-04	2004-05	2005-06	2006-07
Dispute resolution	First hearing	85	22	21	21	28
Order relating to industrial action	First hearing	85	3	3	3	1
Dispute resolution in agreements	First hearing	85	25	23	29	24
Termination of employment	First conciliation	85	50	52	55	46
Termination of employment	Finalisation	85	124	120	115	102

Source: AIRC Annual Report 2006-2007, page 45

r.348. Improved case flow measures would benefit the economy as should the increased jurisdiction of FWA with respect to mediating disputes. As well as taking longer to resolve, dispute notifications to the AIRC dropped to around 10 per cent of 2002-03 levels following Work Choices. International experience suggests that economic advantage should result from FWA's involvement in mediating disputes the AIRC is currently excluded from.

Impact Analysis

r.349. As a new institution, with no precedent in Australia, it is difficult to gauge the potential impact of Fair Work Australia using Australian-based evidence.

r.350. While the Productivity Commission has recommended establishing institutional arrangements in relation to National Workers' Compensation and Occupational Health and Safety Frameworks, there has been little assessment of the economic impact of employment-related tribunals.[59] It is instructive, however, to examine international evidence, particularly the experience of the UK in establishing the Advisory, Conciliation and Arbitration Service (ACAS).

UK evidence - Advisory, Conciliation and Arbitration Service (ACAS)

r.351. ACAS in the UK has generated economic advantage for the British economy, operating as a one-stop-shop in relation to preventing and resolving workplace relations disputes.

r.352. Details of ACAS performance measures are at Table 17. Note that measures used by ACAS are not consistent with measures used by the AIRC. ACAS measures performance generally in terms of tribunal hearing days saved through its success in resolving workplace disputes while the AIRC measures time taken to hold a hearing across a range of matters, and time taken to finalise employment termination matters. The ACAS model is, however, indicative

[59] Productivity Commission 'National Workers' Compensation and Occupational Health and Safety Frameworks', Productivity Commission Inquiry Report No 27, 16 March 2004.

of the economic benefits that may be expected from a body with streamlined processes such as those proposed for FWA.

r.353. While FWA will not have the same expansive dispute prevention capacity as ACAS, it will provide information and advice to employers and employees and it will have a greater capacity to mediate disputes than the AIRC. The evidence from the UK therefore suggests that the changes to be implemented with the establishment of FWA are likely to result in economic benefits for Australia.

r.354. The economic benefits of ACAS are discussed in a recent article by Dr Anthony Forsyth of Monash University. [60] In his article, Dr Forsyth cites a report by the National Institute of Economic and Social Research (NIESR), published in 2007, which stresses the independent nature of ACAS and its role in facilitating harmonious workplaces, features that are objectives for FWA.[61]

r.355. The NIESR found, in particular, that every pound of taxpayers' money spent on ACAS delivers a 16 pound return. ACAS' work in resolving individual and collective disputes at work produced immediate savings to the economy of £313 million, while the advice and guidance services contributed a further £475 million. Overall, ACAS provided an economic dividend of almost £800 million per year to UK business. Australian commentators have noted that further benefits of ACAS were anticipated to arise from long term improvements in productivity and investment in the UK economy.

Potential impacts of FWA

r.356. Given that FWA will act as far as possible as a one-stop-shop, with increased powers and streamlined processes, any regulatory burden on employers and employees is likely to be minimal.

r.357. Ensuring that FWA will be independent and effective in assisting to resolve disputes is likely to provide for direct and immediate benefits to the Australian economy, in the way that ACAS has been found to contribute to economic success in the UK. Allowing for appeals from FWA to the Fair Work Divisions of the Federal Courts is likely to result in reduced costs and a lower regulatory burden as compared with current arrangements.

[60] A Forsyth, 'Cooperation key to reform of the workplace' *The Age*, Business Day, 31 October 2008
[61] P Meadows "A Review of the Economic Impact of Employment Relations Services Delivered by ACAS", National Institute of Economic and Social Research, November 2007.

Table 9: ACAS performance measures, 2007-08

Key performance indicators for service level agreement (SLA)		2007/08		2006/07		2005/06	
		Target	Outturn	Target	Outturn	Target	Outturn
Conciliation in collective disputes							
a) The promotion of a settlement in disputes in which ACAS is involved		80%	90%	80%	90%	80%	n/a
B) ACAS involvement in large-scale disputes		100%	100%	100%	100%	100%	100%
Conciliation in employment tribunal cases							
Percentage of tribunal hearing days saved during fixed period of conciliation in short and standard period cases or prior to the full hearing in open period cases	Short period	50%	53%	50%	52%	50%	53%
	Standard period	60%	63%	60%	63%	60%	64%
	Open period	85%	85%	65%	84%	85%	86%
Workplace projects The percentage of workplace projects reporting an improvement in employment relation following ACAS intervention		70%	81%	70%	70%	70%	75%
ACAS training services The percentage of managers in SMEs who introduce or reform discipline and grievance procedures following							
a) Attendance at an ACAS training event		70%	n/a	70%	n/a	70%	68%[1]
b)Use of an e-learning tool		65%	n/a	70%	n/a	70%	78%
ACAS helpline							
The percentage of callers who were able to take clear action following their call to ACAS helpline		70%	n/a	70%	87%	70%	n/a
Mediation services							
a) The percentage of mediations that are successful		80%	82%	n/a	n/a	n/a	n/a
b) The number of individuals receiving accreditation following ACAS CIWM training		72	121	72	100	72	74
Equality services[2] (NEW)							
The percentage of workplaces reporting a change in equality policies, practices and supporting activities such as training and monitoring		75%	76%	70%	n/a	70%	n/a
Publications on good practice at work[3] (NEW)							
a) the percentage of users for whom the guidance helped solve a problem at work or reassured them that they had taken the right course of action		65%	76%	60%	n/a	60%	n/a
b) The percentage of users reporting that the guidance helped to amend or introduce a policy		15%	20%	n/a	n/a	n/a	n/a
Performance against key targets		**2007/08**		**2006/07**		**2005/06**	
		target	**outturn**	**target**	**outturn**	**target**	**outturn**
Promoting settlements of employment tribunal cases							
Customers satisfied or very satisfied with service		85%	n/a	65%	90%	85%	90%
Provision of information and advice							
Percentage of helpline callers answered within 20 seconds		70%	57%	70%	63%	70%	73%
Customers satisfied or very satisfied with the service		95%	n/a	95%	94%	95%	n/a
Training Services							
Customers very satisfied or satisfied with charged services		95%	96%	95%	96%	95%	95%

Other performance targets	2007/08		2006/07		2005/06	
	target	outturn	target	outturn	target	outturn
Percentage of arbitration awards provided to parties within three weeks of hearing	100%	90%	100%	88%	100%	92%
Percentage of letters to helpline answered within seven working days	100%	96%	100%	98%	100%	98%
Percentage of bills paid within the terms of the relevant contract or within 30 days of receipt of valid invoice	100%	98%	100%	96%	100%	96%
Other performance measures				**2007/08**	**2006/07**	**2005/06**
Number of ET1s and non-ET1s received				203,184	162,653	141,288
Number of non-ET1s received				51,935	57,476	31,576
Number of re-employments				670	660	913
Number of collective conciliation requests received				896	912	952
Number of workplace projects started				237	221	245
Number of requests for trade dispute arbitration				47	47	57
Number of calls answered by the national helpline				885,353	839,335	906,553
Number of calls answered by Equality Direct				5,238	6,181	5,061
Number of advisory visits				1,972[4]	1,343	2,002
Number of training sessions delivered				2,500	2,707	2,964
Number of equality contracts delivered				199[5]	1,008	135
Parties to tribunal cases who felt that ACAS helped speed up the resolution of their case				n/a	n/a	81%
Costs of completed collective conciliation cases where a settlement was achieved or significant progress made				£2,773	£2,044	£1,673
Cost of an arbitration hearing				£2,414	£2,287	£1,650
Cost of an individual conciliation case settled or withdrawn				£213	£219	£280
Cost of a helpline enquiry answered				£8.50	£9.11	£7.33

[1] This figure was reported as 80% in 2005/06 but was later adjusted to 68%
[2] This KPI has been changed. Therefore, it is not possible to have direct comparisons with previous years.
[3] This KPI has been changed. Therefore, it is not possible to have direct comparisons with previous years.
[4] For 2007/08 this includes in-depth advisory telephone calls which have replaced some visits to maximise the number of employees assisted with the available resource
[5] The variance between 2006/07 and 2007/08 is due to a change in the methodology for recording equality and diversity contracts. The new system now focuses solely on recording equality and diversity policies, procedures and health checks with all advice and workplace training captured elsewhere. It is not therefore possible to make a direct comparison between the years.

r.358. The Office of the Fair Work Ombudsman will investigate and enforce NES and modern award entitlements much in the same manner as the Workplace Ombudsman currently investigates and enforces award and agreement entitlements.

r.359. The new Fair Work Divisions of the Federal Court and the Federal Magistrates Court will likely result in a reduced regulatory impact as employees and employers will be able to have claims about entitlements dealt with under a simple and quick mechanism.

Table 10: Employer and employee stakeholder views on new institutional framework provisions

Employer Stakeholders	Employer groups have raised concerns over the separation of FWA's judicial and non judicial roles. Many are satisfied with the incorporation of powers from current stand-alone institutions into FWA, but want assurances that there will be no arbitration for matters above the safety net. All employer groups want the existing powers of the Australian Building and Construction Commission to be incorporated into the Fair Work Inspectorate beyond 2010, although some want the ABCC to remain as a stand-alone entity. Some groups warn that major projects are at risk should the powers of the ABCC be watered down. Some employer groups support current members of the AIRC being appointed to FWA. Some employer groups have also sought a lower threshold to appeal decisions of FWA (particularly any arbitrated outcomes).
Employee Stakeholders	Unions want FWA to have strong powers to enforce collective rights and resolve disputes in the new bargaining framework, to enforce the provisions in the NES, and to enforce unfair dismissal protections for workers. All unions want the powers of the ABCC, and the institution, to be abolished and are critical of its proposed retention by the Government until 31 January 2010. Unions are unhappy that workers in the building and construction industry are regulated differently to the rest of the workforce.

POST IMPLEMENTATION REVIEW

r.360. The Government is committed to ensuring that the new workplace relations system provides a fair and flexible workplace relation system that achieves the right balance between employers and employees. As part of this commitment, the Government will be putting in place appropriate information gathering mechanisms. This will ensure that, once implemented, the new measures can be closely monitored, to enable the evaluation of their effectiveness in achieving the Government's policy objectives as stated in this impact analysis in a clear and transparent manner.

ATTACHMENT A

Table A1: Consultations conducted by the Australian Government in the development of the Substantive Bill

Forum	Membership	Meetings
Workplace Relations Ministers' Council (WRMC)	Council of federal, state and territory Workplace Relations Ministers, with the New Zealand Minister of Labour invited as an observer. *Current Membership:* The Hon Julia Gillard MP (Cth) The Hon John Hatzistergos MLC (NSW) The Hon Joseph Tripodi (NSW) The Hon Robert Knight MLA (NT) The Hon John Mickel MP (QLD) The Hon Tim Holding MP (VIC) The Hon Rob Hulls MP (VIC) Mr John Hargreaves MLA (ACT) The Hon Troy Buswell MLA (WA) The Hon Paul Caica MP (SA) The Hon Allison Ritchie MLC (TAS) The Hon Trevor Mallard MP (NZ)	1 Feb 08 23 May 08 22 Aug 08 5 Nov 08
High Level Officials' Group (HLOG)	At a meeting of WRMC on 1 February 2008, members agreed to establish a high level officials' group to collaborate on the development of the new workplace relations system and its interface with state systems.	7 Feb 08 18 Feb 08 25 Feb 08 6-7 Mar 08 13 Mar 08 9 Apr 08 30 Apr 08 16 Jun 08 2 Jul 08 17 Jul 08 29 Jul 08 17 Sept 08
National Workplace Relations Consultative Council (NWRCC)	Chair: The Hon Julia Gillard MP, Minister for Employment and Workplace Relations. Membership is made up of seven representatives from employer associations, and seven representatives from the ACTU: *Current Membership:* Mr Jeff Lawrence (ACTU) Ms Sharan Burrow (ACTU) Mr Geoff Fary (ACTU) Mr Joe De Bruyn (ACTU) Ms Cath Bowtell (ACTU) *(Vacant, to be determined)* (ACTU) *(Vacant, to be determined)* (ACTU) Mr Peter Anderson (ACCI) Mr Steven Knott (ACCI) Mr Graham Harris (ACI) Ms Denita Wawn (NFF) Mrs Heather Ridout (AiG) Mr Richard Calver (MBA) Dr Ruth Dunkin (BCA)	24 Jan 08 14 Mar 08 16 Sept 08
Committee on Industrial Legislation (COIL)	COIL is a sub-committee of NWRCC. On 18 December 2007, the Deputy Prime Minister invited all NWRCC members to attend COIL. On 16 September 2008, the Deputy Prime Minister indicated that other stakeholders such as state territory officials would be invited to consider the draft Workplace Relations Bill.	7-17 Oct 08 14 Nov 08

Forum	Membership		Meetings
Business Advisory Group (BAG)	Chair: Mr John Denton, Partner and Chief Executive Officer, Corrs Chambers Westgarth National Workplace Relations Consultative Council (NWRCC) Representative: Ms Heather Ridout, Chief Executive of the Australian Industry Group		27 Feb 08 4 March 08 11 April 08 22 April 08 16 Sept 08
	Current Membership: Australian Hotels Association Australian National Retailers Association Housing Industry Association Mirvac News Limited Recruitment & Consulting Services Australia Rio Tinto Australia Ron Finemore Transport St. George Bank Woodside	Mr Bill Healey Mr Margy Osmond Dr Ron Silberberg Mr Greg Paramor Mr John Hartigan Ms Julie Mills Mr Stephen Creese Mr Ron Finemore Mr Paul Fegan Mr Don Voelte	
Workers' Advisory Group (WAG)	Chair: The Hon Julia Gillard MP, Minister for Employment and Workplace Relations		5 March 08 4 April 08 20 May 08 14 July 08 2 Sept 08
	Current Membership: Mr Jeff Lawrence (ACTU) Ms Sharan Burrow (ACTU) Ms Cath Bowtell (ACTU) Ms Susan Hopgood (AEU) Mr Julius Roe (AMWU) Ms Ged Kearney (ANF) Ms Linda White (ASU) Mr Paul Howes (AWU)	Mr Stephen Jones (CPSU) Mr John Sutton (CFMEU) Mr David Carey (CPSU-SPSF) Mr Peter Tighe (ETU) Ms Louise Tarrant (LHMU) Mr Charlie Donnelly (NUW) Mr Tony Sheldon (TWU) Mr John Robertson (Unions NSW)	
Small Business Working Group (SBWG)	Chair: The Hon Craig Emerson MP, Minister for Small Business, Independent Contractors and the Service Economy		27 Feb 08 7 March 08 1 July 08
	Current membership: Council of Small Business of Australia Hotel, Motel and Accommodation Association Institute of Chartered Accountants McDonald's National Retailers' Association Pharmacy Guild Real Estate Institute of Australia Restaurant and Catering Australia Victorian Automobile Chamber of Commerce Victorian Farmers Federation	Mr Tony Steven Mr Greg Holmes Mr Andrew Arkell Mr Frank McManus Mr Gary Black Mr Wendy Phillips Mr Neil Fisher Mr John Hart Mrs Leyla Yilmaz Ms Patricia Murdock	
Union Working	Chair: The Hon Craig Emerson MP, Minister for Small Business, Independent		28 Feb 08 7 March 08

Forum	**Membership**		**Meetings**
Group on Unfair Dismissal (UWG)	Contractors and the Service Economy		
	Current membership: Mr Jeff Lawrence (ACTU) Mr Richard Watts (ACTU) Mr Barry Terzic (AMWU) Mr John Nucifora (ASU) Mr Neal Swancott (LHMU)	Ms Deborah Ralston (QCU) Ms Sue-Anne Burnley (SDA) Ms Bev Myers (TCFUA) Mr Angus Storey (Unions SA)	

ATTACHMENT B

Employee coverage of unfair dismissal laws

Under Work Choices	**No of employees**	**% of employees**
Total number of employees eligible for UFD (October 2008 estimate)	3,739,661	44
Total number of employees not eligible for UFD (October 2008 estimate)	4,664,834	56
Total number of employees (October 2008)	8,404,496	100

Under Forward with Fairness	**No of employees**	**% of employees**
Total number of employees eligible for UFD (October 2008 estimate)	6,747,074	80
Total number of employees not eligible for UFD (October 2008 estimate)	1,657,422	20
Total number of employees (October 2008)	8,404,496	100

Source: DEEWR calculations using ABS data

- Under Work Choices legislation, approximately 3.7 million employees (44 per cent) had access to unfair dismissal laws. The Government's proposed changes to unfair dismissal laws will see the number of employees who will have access to unfair dismissal laws increase to 6.7 million or 80 per cent of employees.

Estimated number of employees covered by unfair dismissal laws under Work Choices

Employees of businesses with 100 or more employees

Permanent employees (May 2006):

A) Total number permanent employees (ex working proprietors)[62] = 3,453,522

B) Number of permanent employees (ex working proprietors) with less than 6 months tenure = 310,817

Casual employees (May 2006):

C) Total number of casual employees = 700,878

D) Total number of casual employees with less than 12 months tenure = 319,820

Employees of businesses with 1 - 99 employees

E) All employees excluded from UFD

[62] Should also exclude fixed term contractors as these workers are not covered by unfair dismissal laws. However, it is not possible to do so as May 2006 EEH data combines permanent and fixed term contractors together. Therefore the final estimate slightly overestimates the true number of employees covered by unfair dismissal laws.

Employees eligible for unfair dismissal laws

F) Total number of employees eligible for UFD (May 2006) = (A-B) + (C-D) = 3,523,763

G) Employment growth between May 2006 to October 2008 = 6.1%

H) Taking G into account, the total number of employees eligible for UFD (September 2008) = F * (1.061) = **3,739,661**

(Conversely, total number of employees not eligible for UFD (October 2008) = 4,664,834)

Estimated number of employees covered by unfair dismissal laws under this Bill

Employees of businesses with 15 or more employees

Permanent employees (May 2006):

A) Total number permanent employees (ex working proprietors)[63] = 4,854,999

B) Number of permanent employees (ex working proprietors) with less than 6 months tenure = 436,950

Casual employees (May 2006):

C) Total number of casual employees = 1,192,961

D) Total number of casual employees with less than 6 months tenure = 349,249

Employees of businesses with 1 - 14 employees

Permanent employees (May 2006):

E) Total number of permanent (ex working proprietors) = 1,457,703

F) Total number of permanent (ex working proprietors) less than 12 months tenure = 269,675

Casual employees (May 2006):

G) Total number of casual employees = 499,507

H) Total number of casual employees with less than 12 months tenure = 227,932

Non-award employees earning $98,200 or more per year

I) Total number of non-award employees earning $98,200 or per year (May 2006)

[63] Should also exclude fixed term contractors as these workers are not covered by unfair dismissal laws. However, it is not possible to do so as May 2006 EEH data combines permanent and fixed term contractors together. Therefore the final estimate slightly overestimates the true number of employees covered by unfair dismissal laws.

= 363,812

Employees eligible for unfair dismissal laws

J) Total number of employees eligible for UFD (May 2006) = (A-B) + (C-D) + (E-F) + (G-H) – I = 6,357,552

K) Employment growth between May 2006 to October 2008 = 6.1%

L) Taking K into account, the total number of employees eligible for UFD (October 2008) = J * (1.061) = **6,747,074**

(Conversely, total number of employees not eligible for UFD (October 2008) = 1,657,422)

NOTES ON CLAUSES

In this notes on clause the following abbreviations are used:

AEC	Australian Electoral Commission
AIRC	Australian Industrial Relations Commission
EEZ	Exclusive economic zone
FWA	Fair Work Australia
FWO	Fair Work Ombudsman
HREOC	Human Rights and Equal Opportunity Commission
NES	National Employment Standards
Transitional and Consequential Bill	Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009
WR Act	*Workplace Relations Act 1996*

Chapter 1 – Introduction

Part 1 – 1 – Introduction

Division 1 – Preliminary

Clause 1 – Short title

1. Once enacted, the short title of the Act will be the *Fair Work Act 2008*.

Clause 2 – Commencement

2. The table in this clause sets out when the Bill's provisions commence.

3. Clauses 1 and 2 commence on the day the Fair Work Act receives Royal Assent (item 1 of the table). Clauses 3 to 800 commence on a day or days to be fixed by Proclamation (item 2).

4. Transitional arrangements and consequential amendments relating to the Bill will be set out in separate legislation, to be known as the Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009.

5. It is intended that no provision of the Bill will commence before the Transitional and Consequential Bill is enacted and that no provision will commence later than six months after that enactment.

6. These arrangements will phase in the new workplace relations system and ensure that it operates in a seamless and comprehensive way.

Division 2 – Object of this Act

Clause 3 – Object of this Act

7. This clause sets out the object of the Bill, which is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion by the means set out in the clause.

Division 3 – Guide to this Act

Clause 4 – Guide to this Act

8. This clause provides a guide to this Bill.

Clause 5 – Terms and conditions of employment (Chapter 2)

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

Clause 7 – Compliance and enforcement (Chapter 4)

Clause 8 – Administration (Chapter 5)

Clause 9 – Miscellaneous (Chapter 6)

9. Clauses 5 to 9 set out the key elements to each of the chapters in the Bill.

Part 1-2 – Definitions

Division 1 – Introduction

Clause 10 – Guide to this Part

10. This clause provides a guide to this Part.

Clause 11 – Meanings of *employee* and *employer*

11. The terms employer and employee are used in various contexts in the Bill and have their ordinary meanings in this Part unless otherwise specified.

Division 2 – The Dictionary

12. The Dictionary contains a list of every term that is defined in the Bill. It includes a number of 'signpost' definitions that refer readers to the sections in which terms are substantively defined. For example, in relation to the meaning of the term covers, readers are referred to clause 48 in relation to a modern award, clause 53 in relation to an enterprise agreement and clause 277 in relation to a workplace determination.

13. Key definitions are explained below in alphabetical order.

4 yearly review of modern awards

14. A 4 yearly review of modern awards is a review conducted under clause 156.

15. Under clause 156, FWA must conduct a regular review of modern awards starting as soon as practicable after each 4 year anniversary of the commencement of the award. These reviews are the principal way in which an award is maintained as a fair and relevant safety net of terms and conditions.

annual wage review

16. An annual wage review is a review referred to in clause 285. During an annual wage review, FWA must review modern award minimum wages and the national minimum wage order and:

- may make one or more determinations to set, vary or revoke award minimum wages; and
- must make a new national minimum wage order.

associated entity

17. Associated entity has the meaning given by section 50AAA of the *Corporations Act 2001*. The definition includes, but is not limited to, the following structures:

- a principal entity controlling an associate entity;
- an associate entity controlling a principal entity, where the operations, resources or affairs of the principal are material to the associate; and
- a principal entity and associate entity that are related bodies corporate.

Australian ship

18. The definition of Australian ship has the meaning given by section 29 of the *Shipping Registration Act 1981*. It includes ships registered under that Act, as well as unregistered ships that are Australian-owned (within the meaning of section 3 of that Act) or wholly owned or operated by residents of Australia, or Australian nationals, or both. The definition is relevant to provisions dealing with the geographical application of the Bill (Division 3 of Part 1-3).

award/agreement free employee

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

continental shelf

20. The definition of continental shelf has the meaning given by the Schedule to the *Seas and Submerged Lands Act 1973*. The Schedule sets out relevant Parts of the *United Nations Convention on the Law of the Sea* (Montego Bay, 10 December 1982) [1994] ATS 31. Article 76 of the Convention defines the continental shelf of a coastal state to mean the sea-bed and subsoil of the submarine areas that extend beyond the territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or (where the outer edge of the continental margin does not extend up to that distance), to a distance of 200 nautical miles from the territorial sea baseline.

21. The definition is relevant to provisions dealing with the geographical application of the Bill (Division 3 of Part 1-3).

Commonwealth authority

22. The definition of Commonwealth authority includes a body corporate established for a public purpose under a Commonwealth law, and a body corporate incorporated under a law of the Commonwealth or a State or Territory and in which the Commonwealth has a controlling interest. The definition is relevant in a number of provisions of the Bill, including the definition of national system employer (in clause 14).

constitutional corporation

23. The definition of constitutional corporation means a corporation to which paragraph 51(xx) of the Constitution (the corporations power) applies. The corporations power enables the Parliament to legislate with respect to foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth. The definition is relevant to the

definition of national system employer (in clause 14) and to a number of other provisions, including those relating to general protections (Part 3-1) and right of entry (Part 3-4).

constitutional trade or commerce

24. The definition of constitutional trade or commerce means trade or commerce between Australia and a place outside Australia, among the States, between a State and a Territory, between two Territories or within a Territory.

25. This definition reflects the scope of the Parliament's capacity to regulate trade and commerce with other countries and among the States under paragraph 51(i) of the Constitution (the trade and commerce power), and in relation to the territories under section 122 of the Constitution (the Territories power). The definition is relevant to the definition of national system employer (in clause 14).

de facto partner

26. A de facto partner of a national system employee includes an employee's same sex de facto partner. This is consistent with amendments being made to Commonwealth legislation to remove discrimination and has the effect of ensuring that entitlements under the NES to carer's leave, compassionate leave and birth-related unpaid parental leave apply to members of same sex couples and their children.

employee, employer

27. These definitions refer readers to the provisions in the first Division of each Part in which the terms employee and employer appear. Those provisions give these terms their constitutionally limited national system meanings (see clauses 13 and 14) or their ordinary meanings (see clause 15).

28. National system employers and national system employees are employers and employees (at common law) who are within the constitutional limitations set out in clauses 13 and 14. Generally speaking, the ordinary meanings of employer and employee encompass but are not limited to national system employers and national system employees.

- In some parts of the Bill, the ordinary meanings are used because rights and obligations may be imposed on any employer (e.g., in Part 3-1 (General protections), in circumstances where an employer's action affects a constitutional corporation (as defined in clause 12) or certain other persons).

- In other parts (e.g., Part 4-1 (Civil remedies) and Part 5-1 (Fair Work Australia)), the ordinary meanings are used because references to employer and employee are incidental to substantive rights and obligations that arise under other parts of the Bill, which are supported by relevant heads of constitutional power. A provision in Part 4-1 or 5-1 could relate to national system employers and their employees, or to other employers and employees, depending on the part of the Bill that creates the substantive right or obligation.

29. However, the ordinary meanings are also used where they relates to employers and employees who are not national system employers and employees. For example, Part 6-3 (Extension of NES entitlements), relies on paragraph 51 (xxix) of the Constitution (the external affairs power) to assist in giving effect to Australia's international obligations. These provisions can therefore extend to employers and employees who are not within the national system definitions.

enterprise

30. The term enterprise is used in various clauses in the Bill.

31. The definition makes it clear that an enterprise includes an activity. This is intended to ensure that an enterprise includes activities carried out by not-for-profit organisations and government authorities. For example, an employer that is government authority, such as the Commonwealth, or a State or Territory, may make a greenfields agreement in relation to a genuine new activity that it proposes to undertake (see clause 172).

32. The definition of enterprise also includes a project to enable employers and employee organisations to make a greenfields agreement in relation to a genuine new project.

exclusive economic zone

33. The definition of exclusive economic zone has the meaning given by section 3 of the *Seas and Submerged Lands Act 1973*, which refers to Articles 55 and 57 of the *United Nations Convention on the Law of the Sea* (Montego Bay, 10 December 1982) [1994] ATS 31, set out in the Schedule to that Act. Article 57 of the Convention provides that the EEZ is the area beyond and adjacent to the territorial sea, and extends up to 200 nautical miles from the territorial sea baseline.

34. The definition is relevant to provisions dealing with the geographical application of the Bill (Division 3 of Part 1-3).

fixed platform

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

The definition is relevant to provisions dealing with the geographical application of the Bill (Division 3 of Part 1-3).

flight crew officer, maritime employee, pilot, waterside worker

36. These definitions are relevant to the definition of national system employee (in clause 13) and national system employer (in clause 14) to the extent that those definitions rely on paragraph 51(i) of the Constitution (the trade and commerce power).

industrial association

37. The definition of industrial association is mainly relevant to the general protections in Part 3-1 of the Bill. It has three limbs.

38. Paragraph (a) of the definition provides that an industrial association means an association of employees and/or independent contractors, or an association of employers, which is registered, or recognised as such an association (however described), under a workplace law (as defined in this clause).

39. Paragraph (b) of the definition provides that an industrial association means an association of employees and/or independent contractors (whether formed formally or informally), a purpose of which is the protection and promotion of their interests in matters concerning their employment, or interests as independent contractors, as the case requires. This element of the definition differs from the pre-reform definition in subsection 779(1) of the WR Act in two respects:

- it now includes informal associations of employees and/or independent contractors; and
- the requisite purpose of protecting and promoting their interests does not need to be a principal purpose of the association.

40. Paragraph (c) of the definition provides that an industrial association means an association of employers, a principal purpose of which is the protection and promotion of their interests in matters concerning employment and/or independent contractors.

41. Industrial association is also defined to include a branch of an industrial association, an organisation (as defined in clause 12) and a branch of an organisation.

minimum wages objective

42. Clause 284 sets out the minimum wages objective and provides for when the minimum wages objective applies.

43. The minimum wages objective requires FWA to establish and maintain a safety net of fair minimum wages, taking into account factors that are specified in clause 284.

44. The minimum wages objective applies to the performance or exercise of FWA's functions and powers under Part 2-6 (Minimum wages). The minimum wages objective also applies when FWA performs or exercises its functions or powers under Part 2-3 (Modern awards) to set, vary or revoke modern award minimum wages.

modern awards objective

45. Clause 134 sets out the modern awards objective and provides for when the modern awards objective applies.

46. The modern awards objective requires FWA to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions, taking into account factors that are specified in clause 134.

47. The modern awards objective applies to the exercise of FWA's functions and powers under Part 2-3 (Modern awards). The modern awards objective also applies when FWA exercises its powers or functions under Part 2-6 (Minimum wages), to the extent that they relate to setting, varying or revoking modern award minimum wages.

modifications

48. The term modifications is used in various clauses in the Bill. For example, it is used in Part 6-3 to describe the additions, omissions and substitutions that are made to the NES.

49. Further additions, omissions and substitutions may be provided for in the regulations in relation to:

- the application of the Bill, including extensions of the Bill (see Division 3 of Part 1-3);
- variations of enterprise agreements (see subclause 211(6)).

national minimum wage order

50. The national minimum wage order is the national minimum wage order made in an annual wage review (as defined in this clause). Each national minimum wage order must set:

- the national minimum wage;
- special national minimum wages for junior employees, employees to whom training arrangements apply and employees with a disability; and
- the casual loading for award/agreement free employees.

The national minimum wage order applies to award/agreement free employees.

nominal expiry date

51. The Bill provides the following in relation to the nominal expiry date of enterprise agreements and workplace determinations:

- In the case of an enterprise agreement approved under clause 186 or a workplace determination – the nominal expiry date is the date specified in the agreement or determination as its nominal expiry date, which must not be more than 4 years after the day on which FWA approves the agreement or determination. (Note that an agreement cannot be varied to extend its nominal expiry date to a date that is more than four years after the day on which FWA approved the agreement – see paragraph 211(1)(b));

- In the case of an agreement approved under clause 189 – the nominal expiry date is the date specified in the agreement as its nominal expiry date or two years after the day on which FWA approved the agreement.

outworker

52. An employee is an outworker if the employee, for the purpose of his or her employer, performs work at residential premises or other premises that would not conventionally be regarded as business premises.

53. An individual who is not an employee may also be an outworker. An individual, who is not an employee, is an outworker if, for the purposes of a contract for the provision of services, she or he performs work in the textile, clothing or footwear industry at residential premises or at other premises that would not conventionally be regarded as business premises.

outworker entity

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

- a constitutional corporation;
- the Commonwealth;
- a Commonwealth authority;
- a body corporate incorporated in a Territory;
- a person who carries on an activity (whether of a commercial, governmental or other nature) in a Territory in Australia, in connection with the activity carried on in the Territory.

55. A modern award may cover an outworker entity in relation to the outworker terms included in the award.

outworker terms

56. Clause 140 defines outworker terms. Outworker terms are terms that relate to the conditions under which an employer may employ outworkers or terms that relate to the conditions under which an outworker entity may arrange for work to be carried out for the entity (either directly or indirectly), if the work is, or is reasonably likely to be, carried out by outworkers. Terms that are incidental to these terms or are machinery terms are also outworker terms.

57. Outworker terms may include, but are not limited to, terms relating to pay and conditions of outworkers. Clause 140 is intended to give FWA broad scope to include terms in modern awards dealing with outworkers. In particular, it allows terms dealing with chain of contract arrangements, registration of employers, employer record keeping and inspection to be included in modern awards.

relevant employee organisation

58. The definition of relevant employee organisation is relevant to greenfields agreements. An employer is prevented from making a greenfields agreement with an employee organisation that is not entitled to represent the industrial interests of the employees who will be covered by the agreement.

ship

59. The definition of ship (as distinct from Australian ship, as defined in clause 12) is an inclusive, not exhaustive, definition. The definition is relevant to provisions dealing with the geographical application of the Bill (Division 3 of Part 1-3).

vocational placement

60. The definition of vocational placement is relevant to the meanings of employee (as defined in clause 15) and national system employee (as defined in clause 13). These terms exclude persons on a vocational placement. A vocational placement is a period of unpaid placement with an employer as part of an education or training course which is authorised under a law or an administrative arrangement of the Commonwealth, a State or a Territory.

workplace instrument

61. Workplace instrument is defined to mean an instrument that is made under, or recognised by, a workplace law (as defined in clause 12) and concerns the relationships between employers and employees. This definition is relevant to the protection in Part 3-1 of a person's workplace rights (see subclause 341(1)).

workplace law

62. Workplace law means this Bill, Schedule 1 to the WR Act, the *Independent Contractors Act 2006* or any other law of the Commonwealth, a State or a Territory that regulates the relationships between employers and employees (including by dealing with occupational health and safety matters). This definition is relevant to the protection in Part 3-1 of a person's workplace rights (see subclause 341(1)).

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

Clause 13 – Meaning of *national system employee*

Clause 14 – Meaning of *national system employer*

63. The definitions of national system employee and national system employer in these clauses operate together to provide the constitutional support for most parts of the Bill.

64. These parts rely on the Parliament's power to legislate with respect to foreign corporations and trading or financial corporations (paragraph 51(xx) of the Constitution), the territories (section 122 of the Constitution), interstate and overseas trade and commerce

(paragraph 51(i) of the Constitution) and the Commonwealth's power to regulate its own employment relationships (incidentally to other legislative powers).

65. The links to these heads of power are established by defining national system employer as the following, in their capacities as employers of individuals:

- a constitutional corporation;
- the Commonwealth or a Commonwealth authority;
- a person who employs a flight crew officer, maritime employee or waterside worker in connection with constitutional trade or commerce;
- a body corporate incorporated in a Territory; or
- a person who carries on an activity in a Territory and employs a person in connection with the activity.

66. The definition of national system employer includes a constitutional corporation that usually employs an individual and national system employee includes an individual usually employed by a national system employer.

67. The Federal Court considered the meaning of 'usually employed' in *Australian Meat Industry Employees' Union v Belandra Pty Ltd* [2003] FCA 910; 126 IR 165. In that case, the Court held that while an employer ceased operating for a period of time and did not have any employees during that period, it was still an employer for the purposes of then paragraph 298K(1)(c) of the WR Act. Other cases considered in that decision indicate that a casual or daily hire employee may still be an employee for the purposes of the Bill, even though their employment relationship terminates at the end of each shift or daily period of employment.

68. The definition of national system employee makes clear that a person on a vocational placement (as defined in clause 12) is not within the definition.

69. A reference to a person in the definition of national system employer includes a body politic or body corporate as well as an individual (section 22 of the *Acts Interpretation Act 1901*). Only legal persons can enter into contracts of employment with employees. In the case of a partnership, an employee's contract of employment is with each and every partner. In the case of an unincorporated body, an employee's contract of employment is with an individual member or individual members of that body.

70. While an industrial instrument may use the name of a partnership or association as a description of the persons to whom an instrument applies, any action for contravention of the instrument must name the actual individual employers (see *Devane v Gati* (1956) 95 CLR 174; *Re Independent Schools' Staff Association (ACT); Ex parte Hubert* (1986) 65 ALR 673; *Peckham v Moore* [1975] 1 NSWLR 353; *Executive Council of Australian Jewry v Scully* (1998) 79 FCR 537.

Clause 15 – Ordinary meanings of *employee* and *employer*

71. In some Parts of the Bill, the terms employee and employer have their ordinary meanings (see clause 12). Clause 15 provides that:

- a reference to an employee, within the ordinary meaning of that term, includes a reference to a person who is usually an employee, but does not include a person on a vocational placement; and

- a reference to an employer, within the ordinary meaning of that term, includes a reference to a person who is usually an employer.

72. As noted above, the concepts of 'usually employed' and 'usually employs' were considered by the Federal Court in *Australian Meat Industry Employees' Union v Belandra Pty Ltd* [2003] FCA 910; 126 IR 165.

Division 4 – Other definitions

Clause 16 – Meaning of *base rate of pay*

73. Subclause 16(1) defines base rate of pay as the rate payable to a national system employee for his or her ordinary hours of work, but does not include incentive based payments and bonuses, loadings, monetary allowances, overtime and penalty rates and any other separately identifiable amounts.

74. The definition is relevant to calculating the amount payable to an employee when they take various forms of leave under the NES, including paid annual leave, paid personal carer's leave, payment for an absence from work on a public holiday or when a female employee takes paid no safe job leave.

75. Subclause 16(2) provides that the base rate of pay for pieceworkers is specified in an applicable modern award or enterprise agreement or in the regulations for award/agreement free pieceworkers.

Clause 17 – Meaning of *child of a person*

76. Subclause 17(1) defines child for the purposes of the Bill. This definition is relevant to entitlements in the NES to request flexible working arrangements (Division 4 of Part 2-2), unpaid parental leave (Division 5 of Part 2-2) and carer's and compassionate leave (Division 7 of Part 2-2).

77. The definition is inclusive, and builds upon the ordinary meaning of the word child. A child of a person includes a person who is:

- a person's child within the meaning of the *Family Law Act 1975* (see further detail below); and

- an adopted child or step-child of the person.

78. The definition also clarifies that a person may be the child of a person even though the child is an adult (this is relevant to the NES entitlements to personal/carer's leave and compassionate leave).

79. Child within the meaning of the *Family Law Act 1975* includes, but is not limited to:

- a child conceived by an artificial conception procedure (whether or not there is a biological link), where the child is a child of a woman under a prescribed law of a State or Territory;
- a child of a man who is the parent of the child under a prescribed law of a State or Territory (even though not biologically related to the child); or
- a child born under a surrogacy arrangement, if a court has made an order under a prescribed law of a State or Territory determining that the person is a parent of the child.

80. Subclause 17(2) clarifies that if one person is the child of another person, then other family relationships are determined on the basis that the child is the child of the other person. This clarification is relevant to the concept of a national system employee's immediate family and the NES entitlements to carer's leave and compassionate leave. For example, for the purposes of personal/carer's and compassionate leave, the de facto partner of the child's father is the child's parent and the children of the de facto partner are the child's siblings.

Clause 18 – Meaning of *full rate of pay*

81. Subclause 18(1) defines full rate of pay as the rate of pay payable to a national system employee for his or her ordinary hours of work, including any incentive-based payments and bonuses, loadings, monetary allowances, overtime or penalty rates and any other separately identifiable amounts.

82. The definition is relevant for two entitlements under the NES. A pregnant female employee who is transferred to an appropriate safe job under subclause 81(5) is entitled to be paid at her full rate of pay, as is an employee who receives a payment in lieu of notice on the termination of his or her employment under paragraph 117(2)(b).

83. Any other separately identifiable amounts could include amounts otherwise payable to an employee that the employee has agreed, under a permissible salary sacrifice or other arrangement, to forgo in order to receive other benefits.

84. Subclause 18(2) provides that the full rate of pay for pieceworkers will be specified in an applicable modern award or enterprise agreement or in the regulations for award/agreement free pieceworkers.

Clause 19 – Meaning of *industrial action*

85. Clause 19 sets out the definition of *industrial action*.

86. The definition of industrial action identifies:

- the kind of action that can be taken by an employee, employer and their bargaining representatives that is capable of being protected industrial action under the Bill (if the requirements in Division 2 of Part 3-3 are met); and

- the kind of action that if taken by an employee, employer and their bargaining representatives could be subject to statutory and common law remedies (including those contained in Division 4 of Part 3-3) for taking industrial action that is not protected industrial action under the Bill.

87. Subclause 19(1) sets out the types of conduct by an employee that constitute industrial action, including:

- performing work in a manner that is different from the manner in which work is customarily performed or adopting a practice in relation to work the result of which is a restriction or limitation on or delay in the performance of work;

- a ban, limitation or restriction on the performance of work or on the acceptance of or offering for work;

- a failure or refusal to attend for work or a failure or refusal to perform any work at all by the employees who attend for work.

88. The subclause also defines industrial action by employers as locking out employees from their employment.

89. An employer locks out employees from employment if the employer prevents the employees from performing work under their contracts of employment in circumstances where the contracts of employment have not been terminated (subclause 19(3)).

90. The legislative note at the end of subclause 19(1) alerts the reader to the decision of the AIRC in *Automotive, Food Metals, Engineering, Printing and Kindred Industries Union v The Age Company Ltd* [2004] AIRC 1254. The note is included to clarify that the definition of industrial action is only intended to cover actions that have an industrial character and occur within the area of disputation and bargaining.

91. Subclause 19(2) provides that action is not considered industrial action if the action has been authorised or agreed to by the person to whom the action is directed.

92. Paragraph 19(2)(c) provides an exception to the definition of industrial action for action based on occupational health and safety concerns. Action by an employee is not industrial action if:

- the action was based on a reasonable concern of the employee about an imminent risk to his or her health and safety; and

- the employee did not unreasonably fail to comply with a direction of the employer to perform other available work, whether at the same or another workplace, that was safe and appropriate for the employee to perform.

Clause 20 – Meaning of *ordinary hours of work* for award/agreement free employees

93. The concept of an employee's ordinary hours of work is central to the accrual and payment rules for a number of entitlements under the NES.

94. The definition of ordinary hours of work in clause 20 only applies to an award/agreement free employee.

95. Under subclause 20(1), the ordinary hours of work for an award/agreement free employee are the hours agreed as such between the employee and his or her employer.

96. If no such agreement is reached, the ordinary hours of work for an award/agreement free employee are 38 hours for a full-time employee and the lesser of 38 hours or the employee's usual weekly hours of work for an employee who is not a full-time employee (subclause 20(2)).

97. Subclause 20(3) is designed to protect employees who are not full-time employees who may have agreed ordinary hours of work under subclause 20(1) which are less than the employee's usual weekly hours of work. In this situation, the employee's ordinary hours of work are the lesser of 38 hours or the employee's usual weekly hours of work.

98. Subclause 20(4) enables regulations to be made to specify the usual weekly hours of work for the purposes of subclauses (2) and (3) for an award/agreement free employee who is not a full-time employee and who does not have usual weekly hours of work.

99. The Bill does not define the concept of an employee's ordinary hours of work for those employees to whom a modern award or enterprise agreement applies.

100. The ordinary hours of work for an employee to whom a modern award applies are the ordinary hours set out in the award (all awards are required to provide ordinary hours, or a means of identifying ordinary hours). The ordinary hours of work for an employee to whom an enterprise agreement applies are the hours identified in the agreement. (An agreement should identify ordinary hours, or a means of identifying ordinary hours, in order for the agreement to satisfy the better off overall test.)

Clause 21 – Meaning of *pieceworker*

101. Subclause 21(1) defines pieceworker as an employee who is defined or described as a pieceworker in a modern award or enterprise agreement that applies to the employee. Regulations may also be made to identify a class of award/agreement free employees as pieceworkers.

102. Subclause 21(2) lists ways in which regulations could describe a class of award/agreement free employees as pieceworkers (e.g., by reference to an industry or a particular kind of work).

Clause 22 – Meanings of *service* and *continuous service*

103. Clause 22 defines the meaning of service and continuous service in general terms that apply to the Bill as a whole (including the NES), and also in the specific context of identified Divisions of the NES where a particular meaning is required.

104. Under subclause 22(1), a period of service by a national system employee with his or her national system employer is a period during which the employee is employed by the employer, less any excluded period that does not count as service.

105. Subclause 22(2) identifies the periods that are excluded and therefore do not count as service. They are:

- any period of unauthorised absence (e.g., when an employee has abandoned his or her employment, is engaging in industrial action or is otherwise absent from work for a period contrary to a direction made by an employer) (paragraph 22(2)(a));

- any period of unpaid leave (e.g., unpaid parental leave or unpaid carer's leave) or unpaid authorised absence other than a period when the employee is absent from work on community service leave, a period when an employee is stood down from work (under Part 3-5 of the Bill or under an applicable enterprise agreement or contract of employment) or a period or absence prescribed by the regulations (paragraph 22(2)(b)).

106. Subclause 22(3) confirms that while an excluded period does not count as service, it does not break the employee's continuity of service.

107. Subclause 22(4) sets out a different rule for the calculation of an employee's service for the purposes of Division 4 (Requests for flexible working arrangements), Division 5 (Parental leave and related entitlements) and Subdivision A of Division 11 (Notice of termination or payment in lieu of notice) of Part 2-2 (the NES).

108. Under this subclause, a period of service by a national system employee with his or her national system employer is a period during which the employee is employed by the employer, less any period of unauthorised absence that does not count as service (paragraph 22(4)(a)). However, the period of unauthorised absence does not break the employee's continuity of service, even though the period does not count towards the length of service (paragraph 22(4)(b)). The general meanings of service and continuous service otherwise do not apply (paragraph 22(4)(c)).

109. The effect of this definition is that an employee's absence from work on unpaid parental leave, for example, does count as service for the purpose of determining the employee's entitlement to a later period of unpaid parental leave, even though it does not count as service for the purpose of accruing other entitlements under the NES, such as paid annual leave or paid personal/carer's leave.

110. Subclause 22(5) provides that where a transfer of employment (as defined in subclause 22(7)) occurs, an employee's service with one employer is treated as service with another employer. It also provides that any period that occurs between the employee's employment with

the first employer and the second employer does not break the employee's continuity of service (although the period does not count towards the length of an employee's continuous service with the second employer).

111. Subclause 22(7) defines a transfer of employment as:

- where an employee's employment with the first employer ceases and the employee accepts new employment with an associated entity of the first employer within three months (defined as a transfer of employment between associated entities); or
- where an employee is a transferring employee in relation to a transfer of business and the first employer and the second employer are not associated entities (defined as a transfer of employment between non-associated entities).

112. Associated entity is defined in clause 12.

113. Broadly, these provisions are intended to ensure that an employee's service-related entitlements under the NES are not affected merely because the employee's employer changes as a result of a transfer of business, or because the employee's employer changes within a group of employers who are associated entities.

Illustrative example

Teneille has worked as a beautician at Nifty Nails for 18 months. While an employee of Nifty Nails, she has accrued 15 days of paid personal/carer's leave under the NES. Following a transfer of business, Teneille becomes employed by Acrylics-R-Us. Acrylics-R-Us is required to recognise Teneille's service with Nifty Nails – in effect, recognising the paid personal/carer's leave she accrued with Nifty Nails.

114. A legislative note under paragraph 22(5)(b) makes clear that this subclause does not apply to a transfer of employment between non-associated entities in relation to the NES annual leave provisions in Division 6 of Part 2-2 of the Bill, or the NES redundancy pay provisions in Subdivision B of Division 11 of Part 2-2 if the second employer decides not to recognise the employee's service with the first employer.

115. Subclause 22(6) is an 'anti-double dipping' provision. Where an employee has taken the benefit of an entitlement and that entitlement was calculated by reference to a period of service with the first employer, then subclause 22(5) does not result in the employee's period of service with the first employer being counted again when calculating the employee's entitlements of that kind as an employee of the second employer.

116. A legislative note under subclause 22(6) provides two examples of how the subclause is intended to operate.

117. The first example provides that an employee with an entitlement to accrued paid annual leave as an employee of the second employer does not include any period of paid annual leave that the employee has already taken as an employee of the first employer. This includes any

accrued annual leave paid to the employee on the ending of the employee's employment with the first employer.

118. The second example provides that an amount of notice of termination or payment in lieu of notice that an employee receives at the end of their employment with the first employer is not counted again in calculating an amount of notice of termination or payment in lieu of notice to which the employee is entitled as an employee of the second employer.

119. Subclause 22(7) provides a definition of transfer of employment (see above). A legislative note under paragraph 22(7)(b) makes clear that paragraph 22(7)(a) applies whether or not there is a transfer of business from the first employer to the second employer.

120. For the purposes of paragraph 22(7)(b), the operative transfer of business provisions are located in Part 2-8 (Transfer of business). Transferring employee is also defined in Part 2-8.

121. Subclause 22(8) provides that a transfer of employment is:

- a transfer of employment between associated entities if paragraph 22(7)(a) applies; and
- a transfer of employment between non-associated entities if paragraph 22(7)(b) applies.

Clause 23 – Meaning of *small business employer*

122. The definition of small business employer is relevant to determining an employer's obligation to pay redundancy pay under clause 119 (see paragraph 121(b)), provide notice of termination of employment under clause 117 (see paragraph 123(3)(a)), determine the applicable minimum employment period (see clause 383) and determine the applicability of the Small Business Fair Dismissal Code (see clause 388).

123. Under subclause 23(1), an employer is a small business employer if the employer employs fewer than 15 employees at a particular time. The particular time referred to in this subclause is set by the applicable provision that relies on this definition. For example, in clause 121 (exclusions from obligation to pay redundancy pay), the particular time is either immediately before the time of termination of employment or when the employee is given notice of the termination (whichever happens first).

124. The effect of subclause 23(2) is that, for the purpose of calculating the number of employees at a particular time, all employees employed by the employer are counted. All casual employees are included in the calculation if they have, at the particular time, been employed on a regular and systematic basis. Employees employed by associated entities are also included in the count (subclause 23(3)).

125. The purpose of subclause 23(4) is to confirm that, when calculating the number of employees at a particular time in relation to the ending of an employee's employment, employees of an employer include not only the employee whose employment is ending, but also other employees of the employer whose employment is ending.

Part 1-3 – Application of this Act

Division 1 – Introduction

Clause 24 – Guide to this Part

126. This clause provides a guide to this Part.

Division 2 – Interaction with State and Territory laws

127. This Part establishes the basis for a national workplace relations system that recognises the appropriate balance between Commonwealth, State and Territory regulation. This framework includes mechanisms that enable this balance to be adjusted in light of future circumstances.

128. The Bill is intended to cover the workplace relations field by excluding the application of State and Territory industrial laws to national system employers and their employees. This approach was upheld by the High Court in *New South Wales v Commonwealth* (2006) 219 CLR 1.

129. However, the Bill does not exclude State and Territory laws that impose obligations on national system employers and employees in relation to matters outside the central area of workplace relations.

Clause 25 – Meanings of *employee* and *employer*

130. The terms employer and employee are used in various contexts in this Part and have their ordinary meanings unless otherwise specified.

Clause 26 – Act excludes State or Territory industrial laws

131. Subclause 26(1) excludes State and Territory industrial laws so far as they would otherwise apply to national system employers and national system employees.

132. Paragraph 26(2)(a) excludes general State industrial laws – that is, the State Acts specified in subclause 26(3). Paragraph 26(2)(b) excludes State or Territory laws that apply to employment generally (considered further below) and have the main purpose, or one or more main purposes, of:

- regulating workplace relations (including settling industrial disputes and regulating industrial action and collective bargaining);
- providing for the establishment or enforcement of terms and conditions of employment;
- providing for the making and enforcement of statutory individual agreements, collective agreements and other industrial instruments or orders that determine terms and conditions of employment;

- regulating conduct relating to a person's membership or non-membership of an industrial association;

- providing rights and remedies connected with termination of employment or conduct that adversely affects an employee in his or her employment.

133. These provisions therefore exclude the application, to persons in their capacities as national system employers and national system employees, of named State industrial relations Acts, as well as present or future State or Territory laws that are within the scope of clause 26(2)(b).

134. In addition, subclause 26(2) excludes State or Territory laws that:

- apply to employment generally and deal with leave, other than long service leave or leave for victims of crime (paragraph 26(2)(c));

- provide for State tribunals or courts to make equal remuneration orders (paragraph 26(2)(d)), or to vary or set aside unfair contracts (paragraph 26(2)(e)); or

- provide rights of entry for trade unions (paragraph 26(2)(f)).

135. Paragraph 26(2)(g) excludes legislative instruments (such as regulations) made under the excluded State or Territory laws. Paragraph 26(2)(h) excludes State or Territory laws, and legislative instruments made under those laws, that are prescribed by the regulations.

136. For the purposes of paragraph 26(2)(b) and paragraph 26(2)(c), subclause 26(4) provides that a law applies to employment generally if it applies to all employers and employees in a State or Territory, even though:

- for constitutional reasons, the law does not apply to some employers and employees (such as national system employers and their employees);

- some classes of employers and employees (e.g., by reference to industry sectors or classifications) are excluded from the law's scope;

- the law applies to other persons (such as independent contractors); or

- an exercise of power under the law (e.g., to make a modern award) does not affect all employers and employees.

137. Examples of State or Territory laws that apply to employment generally are laws dealing with annual leave for all employees in the State or laws setting State-wide minimum terms and conditions of employment. Examples of laws that do not apply to employment generally include laws that apply to a single industry sector, or to a particular class of employees and their employers or to only one employer and its employees (e.g., a law creating a body corporate and setting terms and conditions of employment for its employees).

Clause 27 – State or Territory industrial laws that are not excluded

138. Clause 27 'saves' certain State or Territory laws that might otherwise be excluded by making clear that they are not part of the field covered by clause 26 and are intended to apply to national system employers and national system employees. Under subclause 27(1), the following State or Territory laws are not excluded:

- laws dealing with discrimination and/or equal employment opportunity;
- laws prescribed by the regulations;
- laws dealing with the non-excluded matters set out in subclause 27(2); and
- laws dealing with rights and remedies that are incidental to any of these laws.

139. Paragraph 27(1)(a) saves the application to national system employers and employees of State and Territory anti-discrimination and equal employment opportunity legislation, including laws about discrimination in relation to parental or carer responsibilities (such as the *Equal Opportunity Act 1995* (Vic)). Such laws are not saved to the extent that they are, or are contained in, State or Territory industrial laws (e.g., a State industrial relations Act).

140. The intention is that rights and remedies in relation to termination of employment and other adverse treatment for discriminatory reasons in State and Territory anti-discrimination and equal employment opportunity legislation are preserved in their application to national system employers and employees. A person whose employment has been terminated or who has been adversely treated in employment for reasons such as race, colour, sex, sexual preference, age or other discriminatory reasons could seek a remedy under either a State or Territory anti-discrimination or equal employment opportunity law or a remedy for contravention of the protections under Division 5 of Part 3-1 (General protections), but not both (see Division 3 of Part 6-1(Multiple actions)).

141. Clause 66 provides that it is not intended to exclude State or Territory laws to the extent that they provide more beneficial entitlements to a national system employee than Division 4 of Part 2-2 (the NES) in relation to requests for flexible work arrangements. Under the *Equal Opportunity Act 1995* (Vic), for example, employers must not unreasonably refuse arrangements to accommodate an employee's parental or carer responsibilities.

142. Paragraph 27(1)(c) saves State or Territory laws dealing with the following non-excluded matters, which are set out in subclause 27(2):

- superannuation;
- workers compensation;
- occupational health and safety;
- outworkers;

- child labour (such as minimum age of employment, restrictions on working hours, supervision and parental contact requirements and permitted types of child employment);

- training arrangements (such as the administration of training contracts and the award of training qualifications), but not terms and conditions of employment dealt with by the NES or that can be included in modern awards (such as classifications and rates of pay, certain monetary allowances and penalty rates);

- long service leave, but not for employees who have long service leave entitlements under the NES (Division 9 of Part 2-2);

- leave for victims of crime (such as provided for under Part 4B of the *Industrial Relations Act 1996* (NSW));

- attendance for jury service or emergency service duties (including entitlements to payment for such service);

- declaration, prescription or substitution of public holidays, but not employee and employer public holiday rights and obligations, which are dealt with by the NES (Division 10 of Part 2-2);

- directions to perform work at any time, or in any place, or in a particular way, in relation to disruptions to essential services or in situations of emergency (such as pandemics or natural disasters);

- regulation of employer and employee organisations and their members;

- workplace surveillance;

- business trading hours (including functions conferred on inspectors who are appointed under a general State industrial law in connection with regulation of trading hours); and

- claims for enforcement of contracts of employment (e.g., under section 14 of the *Fair Work Act 1994* (SA)), but not the variation or setting aside of unfair contracts.

143. In relation to the general saving of State or Territory laws dealing with jury service or emergency service duties (paragraph 27(2)(i)), clause 112 in Division 8 of Part 2-2 (the NES) specifically provides that it is not intended to exclude State or Territory laws to the extent that they provide entitlements in relation to participation in eligible community service activities that are more beneficial to national system employees than entitlements provided under the NES.

- For example, under the *Juries Act 2000* (Vic), an employee may be entitled to a higher level or longer period of 'make up' payment from an employer while absent from work during a period of jury service.

144. State or Territory laws dealing with attendance for jury service and emergency service duties also apply to national system employers and their employees under paragraph 27(1)(c) and

paragraph 27(2)(i), including in relation to matters not within the meaning of eligible community service activity in subclause 109(1).

145. The regulations could may save additional State or Territory laws (paragraph 27(1)(b)) and also prescribe additional non-excluded matters (paragraph 27(2)(p)). State or Territory laws dealing with rights or remedies that are incidental to any of the non-excluded laws are also saved (paragraph 27(1)(d)).

- For example, rights of entry under State or Territory laws about outworkers and occupational health and safety are saved (despite paragraph 26(2)(f)). Rights of entry under State or Territory laws about occupational health and safety operate subject to the requirements set out in Division 3 of Part 3-4 (Rights of entry).

- Remedies for termination of employment and other adverse treatment in employment under the non-excluded State and Territory laws are preserved in their application to national system employers and employees.

Clause 28 – Act excludes prescribed State and Territory laws

146. Clause 28 provides that the regulations may prescribe additional State or Territory laws that are excluded, so far as they would otherwise apply to national system employers and their employees, even if the law is not excluded by reason of clause 27. This enables the regulations to prescribe an excluded State or Territory law in circumstances where it would not be appropriate for regulations under paragraph 26(2)(h) to prescribe such a law as a State or Territory industrial law (a definition which is also relevant in Part 3-4 (Right of entry)).

Clause 29 – Interaction of modern awards and enterprise agreements with State and Territory laws

147. Subclause 29(1) provides that a modern award or enterprise agreement prevails over a State or Territory law (such as an industry-specific employment law that is not already excluded as a State or Territory industrial law) to the extent of any inconsistency.

148. Such a law cannot operate, in relation to persons in their capacities as national system employers and national system employees, to the extent that it prescribes rights and obligations that are inconsistent with their rights and obligations set out in a modern award or enterprise agreement.

- Modern awards can only include terms that are permitted or required under subclause 136(1) to provide a minimum safety net of terms and conditions of employment.

- Enterprise agreements can only contain permitted matters (subclause172(1)).

149. However, subclause 29(2) provides that a modern award or enterprise agreement is subject to any of the State or Territory laws that are saved by clause 27, as well as any State or Territory laws prescribed by the regulations. This means that a modern award or enterprise agreement cannot diminish, but may supplement, rights and obligations under these laws.

150. Subclause 29(3) enables the regulations to prescribe State or Territory laws to which modern awards or enterprise agreements are not subject.

Clause 30 – Act may exclude State and Territory laws etc. in other cases

151. This clause provides that Division 2 of Part 1-3 does not comprehensively state the circumstances in which the Bill prevails over or excludes State or Territory laws and instruments. This clause makes clear that:

- where no express provision is made about the relationship between the Bill and State or Territory laws and instruments, other provisions of the Bill might nevertheless, by implication, leave no room for the operation of a State or Territory law or instrument; and
- the existence of clauses 26, 27 and 28 does not affect the drawing of such an implication.

Division 3 – Geographical application of this Act

152. This Division provides for the extraterritorial operation of the new workplace relations system. It includes mechanisms to adjust rights and obligations where necessary to reflect Australia's obligations under international law and to suit particular circumstances. This framework recognises limits on the extent to which the Bill's extraterritorial application is possible and appropriate.

153. The Bill applies geographically in Australia and in other areas or circumstances in relation to which Australia has sovereign rights.

154. The Bill applies generally in Australia, the coastal sea and the territories of Christmas Island and the Cocos (Keeling) Islands. An express statement to this effect in the Bill is not necessary because the *Acts Interpretation Act 1901* makes this clear (see the note to clause 31). Coastal sea is defined in section 15B of the *Acts Interpretation Act 1901* and includes the territorial sea of Australia, as well as the sea on the landward side of the territorial sea and the airspace over, and the seabed and subsoil under, those waters.

Clause 31 – Exclusion of persons etc. insufficiently connected with Australia

155. Under clause 31, the regulations may prescribe persons or entities in relation to whom the Bill does not apply. Before any regulations are made, the Minister needs to be satisfied that the person or entity does not have a sufficient connection to Australia.

Clause 32 – Regulations may modify application of this Act in certain parts of Australia

156. This clause enables the making of regulations to modify the operation of the Bill in relation to the waters out to the limits of the territorial sea, the internal waters of the States and Territories, and in relation to the territories of Christmas Island and the Cocos (Keeling) Islands. Under clause 12, modifications includes additions, omissions and substitutions.

157. The Bill's application in Australia is subject to any modifications prescribed by the regulations that are necessary to adapt the workplace relations system in these areas (see clause 32).

- For example, regulations may be made to exclude foreign-flagged ships engaged in innocent passage across the coastal sea between an overseas port and an Australian port.

158. The regulation making power allows different modifications to be made in relation to each area or territory.

Clause 33 – Extension of this Act to the exclusive economic zone and the continental shelf

159. Under paragraphs 33(1)(a) and (b), the Bill applies generally to Australian ships and fixed platforms in the EEZ and the continental shelf (these terms are defined in clause 12).

160. The Bill applies to foreign-flagged ships in the EEZ and over the continental shelf that operate to and from Australian ports and that service or operate in conjunction with fixed platforms (paragraph 33(1)(c)).

161. Under paragraph 33(1)(d), the Bill applies to foreign-flagged ships in the EEZ and over the continental shelf that are operated or chartered by an Australian employer (see subclause 35(1)) and that use Australia as a base. For this purpose, references in relevant provisions of the Bill to employer and employee are deemed to mean, respectively, Australian employer and employee of an Australian employer (subclause 33(2)).

162. The Bill's application to these ships and platforms is subject to any modifications prescribed by the regulations that are necessary to adapt the workplace relations system in these areas. Modifications may be made in relation to different parts of the EEZ and continental shelf (subclauses 33(4) and (5)).

163. Subject to any modifications prescribed by regulations made under clause 32, ships and platforms located in the coastal sea are within the Bill's scope because of its application in Australia, which, under the *Acts Interpretation Act 1901*, includes the coastal sea.

Clause 34 – Extension of this Act beyond the exclusive economic zone and the continental shelf

164. The Bill applies beyond the EEZ and the continental shelf within recognised limits under international law. In general terms, this means there must be a sufficient connection between the Bill and Australia in terms of geography or nationality of persons.

165. In the area beyond the EEZ and Australia's continental shelf, the Bill applies to Australian ships and to foreign-flagged ships operated or chartered by an Australian employer and using Australian ports as a base (subclause 34(1)). For this purpose, subclause 34(2) deems references in relevant provisions of the Bill to employer and employee to mean, respectively, Australian employer and employee of an Australian employer.

166. The regulations are able further to extend or modify the application of the Bill beyond the EEZ and continental shelf in relation to Australian employers and Australian-based employees (as defined in clause 35).

- For example, regulations could apply minimum terms and conditions of employment to Australian-based employees of Australian employers working overseas for a period or provide for the application of an enterprise agreement to those employees.

167. In making regulations, account will be taken of Australia's international law obligations. As with any extraterritorial application of law, the Bill's application is subject to the concurrent jurisdiction of other countries which also have sovereign rights in relation to areas within the scope of the Bill in which work is performed. Inconsistency may arise and, in these circumstances, it may not be possible to enforce the provisions of the Bill.

Clause 35 – Meanings of *Australian employer* and *Australian-based employee*

168. The definitions of Australian employer and Australian-based employee in clause 35 encompass employers and employees with a substantial connection to Australia, for the purpose of applying provisions of the Bill to certain ships, and to persons beyond the EEZ and the continental shelf.

169. The definition of Australian employer includes Australian trading and financial corporations (but not foreign corporations), the Commonwealth and Commonwealth authorities and bodies corporate incorporated in a Territory (each of which is also within the definition of national system employer). The definition of Australian employer also includes an employer that carries on an activity in Australia, in the EEZ or on or over the continental shelf and whose central management and control is in Australia (paragraph 35(1)(f)). This clause and any regulations extending the Bill's application beyond the EEZ and continental shelf to employers within this meaning is supported by paragraph 51(xxix) of the Constitution (the external affairs power).

170. The definition of Australian-based employee means an employee:

- whose primary place of work is in Australia or who is prescribed by the regulations (e.g., such regulations could clarify whether the primary place of work of a class of employees is in Australia); or

- who is employed by an Australian employer, whether the employee is in Australia or elsewhere (but under subclause 35(3) this does not include an employee engaged outside Australia and the external Territories to perform duties outside these places).

Division 4 – Miscellaneous

Clause 36 – Geographical application of offences

171. This clause displaces the application of Division 14 of the Criminal Code in relation to an offence under the Bill. That Division provides for the geographical jurisdiction applicable to offences under Commonwealth laws.

172. Division 3 of Part 1-3 sets out the geographical application of the Bill. That scheme is appropriate for the workplace relations system under the Bill. It is not necessary or appropriate to rely on the operation of Division 14 of the Criminal Code in relation to this system.

Clause 37 – Act binds Crown

173. This clause provides that the Bill binds the Crown in each of its capacities. This does not render the Crown liable for prosecution for an offence under the Bill.

Clause 38 – Act not to apply so as to exceed Commonwealth power

174. This clause reflects the intention that the Bill not operate beyond the limits of the constitutional power of the Commonwealth. The clause enables any invalid application of the Bill to be read down so that only the valid application is taken to have been intended. The reading down of invalid applications is not available where otherwise valid applications can only operate together with the invalid applications.

Clause 39 – Acquisition of property

175. It is not anticipated that the Bill (or instruments made under it) effects any acquisition of property other than on just terms contrary to paragraph 51(xxxi) of the Constitution. Clause 39 is included out of an abundance of caution to ensure that an acquisition contrary to paragraph 51(xxxi) cannot take place. In any circumstance where an acquisition contrary to paragraph 51(xxxi) is effected, the relevant law or instrument does not apply.

Clause 40 – Interaction between fair work instruments and public sector employment laws

176. Clause 40 is about the interaction between fair work instruments that deal with public sector employment and public sector employment laws.

- Fair work instruments are defined in clause 12 as a modern award, an enterprise agreement, a workplace determination and an order of FWA.
- Subclause 40(3) defines public sector employment law for the purposes of this clause as any law of the Commonwealth (other than the Fair Work Act) or a Territory, or of an instrument made under such a law, that deals with public sector employment.
- Public sector employment is defined in subclauses 795(4) and (5).

177. Subclause 40(1) provides that, in general, a public sector employment law prevails over a fair work instrument that deals with public sector employment to the extent of any inconsistency. This means, for example, that determinations made by the Police Arbitral Tribunal under the *Police Administration Act* (NT) prevail over a fair work instrument that applies to the Police Force of the Northern Territory.

178. However, subclause 40(2) allows regulations to prescribe a fair work instrument or term, or class of fair work instruments or terms, so that they prevail over particular public sector employment laws. For example, a regulation could be made under subclause 40(2) to provide

for an enterprise agreement to prevail over a specified term or condition contained in a determination made by an Agency Head under subsection 24(1) of the *Public Service Act 1999*, except where the determination is made for the purposes of a machinery of government change.

179. Subclause 40(4) ensures that a fair work instrument cannot prevail over certain public sector laws including the *Safety, Rehabilitation and Compensation Act 1988*, specified laws dealing with superannuation matters or instruments made under those laws.

180. Subclause 40(5) clarifies the relationship between this clause and clause 29. Clause 29 provides that a modern award or enterprise agreement prevails over a law of a State or Territory to the extent of any inconsistency. The two rules are inconsistent in so far as they deal with the interaction between a modern award or enterprise agreement on the one hand and Territory public sector employment laws on the other. Subclause 40(5) provides that clause 40 prevails over clause 29 to the extent of any inconsistency. This ensures that Territory public sector employment laws and instruments made under those laws prevail over fair work instruments.

Chapter 2 – Terms and conditions of employment

Part 2-1 – Core provisions for this Chapter

Overview

181. Part 2-1 is a set of core provisions for Chapter 2 of the Bill. The rest of the Chapter provides for the fundamental terms and conditions of employment (such as wages and leave) of national system employees (as defined in clause 13). The principal sources of these terms and conditions are the NES, modern awards and enterprise agreements.

182. The core provisions detail how the NES, awards and agreements give rise to rights and obligations of employers and employees and, in some cases, organisations (as defined in clause 12) and outworker entities (as defined in clause 12), which can be enforced under Part 4-1 (Civil remedies). This includes the rules which determine how rights and obligations under the NES, modern awards and enterprise agreements interact with each other.

Division 1 – Introduction

Clause 41 – Guide to this Part

183. This clause provides a guide to this Part.

Clause 42 – Meanings of *employee* and *employer*

184. In this Part, the terms employee and employer mean national system employee and national system employer respectively (as defined in clauses 13 and 14). The rights and obligations of employers and employees set out in this Part apply only to the employment relationships within the scope of the corporations and other constitutional powers that are engaged by clauses 13 and 14.

Division 2 – Core provisions for this Chapter

Subdivision A – Terms and conditions of employment provided under this Act

Clause 43 – Terms and conditions of employment provided under this Act

185. This clause lists the sources of the terms and conditions of employment provided for in Chapter 2 of the Bill.

Subdivision B – Terms and conditions of employment provided by the National Employment Standards

Subdivision C – Terms and conditions of employment provided by a modern award

Subdivision D – Terms and conditions of employment provided by an enterprise agreement

Clause 44 – Contravening the National Employment Standards

Clause 45 – Contravening a modern award

Clause 50 – Contravening an enterprise agreement

186. Clause 44 provides that an employer must not contravene a provision of the NES. Similar clauses provide that a person to whom a modern award or an enterprise agreement applies must not contravene a term of the award (clause 45) or agreement (clause 50).

187. The prohibitions on contravening a provision of the NES, or a term of an award or an agreement, are civil remedy provisions under Part 4-1 (Civil remedies).

- Under Part 4-1, a person who contravenes clauses 44, 45 or 50 may be subject to a maximum civil penalty of 60 penalty units (i.e., $6,600) in the case of an individual, and 300 penalty units (i.e., $33,000) in the case of a body corporate, and may be ordered to pay amounts not paid to a person in contravention of a provision of the NES or a term of an award or an agreement. Penalty and payment orders can be made by an eligible State or Territory court, the Federal Court or the Federal Magistrates Court. The Federal Court or the Federal Magistrates Court may also make such other orders as they see fit.

- However, orders cannot be made in relation to a contravention (or alleged contravention) of subclauses 65(5) or 76(4) of the NES. These subclauses provide that an employer may only refuse a request for flexible work arrangements or extended parental leave on reasonable business grounds. This is also reflected in the scope of FWA's power to deal with disputes about the operation of the NES (see subclause 739(2)). However, an employer is still required to provide details about a decision to refuse such a request (see notes on clauses 65 and 76).

Subdivision C – Terms and conditions of employment provided by a modern award

Clause 46 – The significance of a modern award applying to a person

Clause 47 – When a modern award applies to an employer, employee, organisation or outworker entity

Clause 48 – When a modern award covers an employer, employee, organisation or outworker entity

Clause 49 – When a modern award is in operation

Subdivision D – Terms and conditions of employment provided by an enterprise agreement

Clause 51 – The significance of an enterprise agreement applying to a person

Clause 52 – When an enterprise agreement applies to an employer, employee or employee organisation

Clause 53 – When an enterprise agreement covers an employer, employee or employee organisation

Clause 54 – When an enterprise agreement is in operation

188. The NES apply to national system employees at all times, whether as a direct source of entitlements or as a minimum standard underpinning their entitlements under a modern award, enterprise agreement or contract of employment. The remaining provisions of this Part deal with when a modern award or enterprise agreement applies to an employee (or employer, organisation or outworker entity) to provide a direct source of entitlements (such that the term providing the entitlement cannot be contravened). Subdivisions C and D contain provisions dealing with the concepts which govern the operation and effect of modern awards and enterprise agreements.

Operate

189. Clauses 49 and 54 deal with when modern awards and enterprise agreements 'operate'. Awards and agreements do not necessarily start to operate when (in the case of awards) they are made or (in the case of agreements) they are approved by FWA. Further, once they operate, they may or may not apply to determine entitlements of any person (or any particular person). For instance, an agreement in operation may be displaced by another agreement in operation (see clause 58).

190. For modern awards, the general rule is that an award starts operating on 1 July in the financial year after it is made (or on the day it is made if the award is made on 1 July) (subclause 49(1)). This timing is consistent with when changes to modern award minimum wages commence (see Part 2-6), and is designed to ensure certainty and predictability for employers and employees.

191. However, if FWA is satisfied that it is appropriate to specify a different date then it has power to do so (subclause 49(2)). This date may not be earlier than the day on which the modern award is made (subclause 49(3)).

192. Subclauses 49(4) and (5) provide for the revocation of modern awards. If FWA makes a determination to revoke a modern award the determination will come into operation on the date that is specified in the determination (subclause 49(4)). This cannot be earlier than the day on which the revocation determination was made (subclause 49(5)).

193. A modern award or a determination revoking a modern award does not take effect in respect of a particular employee until the start of an employee's first full pay period that starts on or after the day the award or determination comes into operation.

194. Subclause 49(7) provides that a modern award continues in operation until it is revoked.

195. On the other hand, an enterprise agreement operates from seven days after the agreement is approved by FWA or from a later date specified in the agreement (subclause 54(1)).

196. The terms of an agreement can only have any effect when an agreement commences operation. However, this does not preclude an agreement from including a term that has retrospective effect (e.g., a backdated wage increase).

197. An enterprise agreement will operate indefinitely unless it ceases to operate under subclause 54(2). This subclause provides that an enterprise agreement ceases to operate on the earlier of the following days:

- the day on which a termination of the agreement comes into operation (under clause 224 or clause 227); or
- the day clause 58 has the effect that the agreement does not apply to any employee.

198. Subclause 54(3) provides that an enterprise agreement can never operate again if it has ceased to operate.

Illustrative example

An online service provider makes an enterprise agreement with its IT specialists (the earlier agreement). The earlier agreement comes into operation on 1 May 2010 and specifies a nominal expiry date of 10 February 2013 (the agreement will continue to operate beyond this date if it is not replaced). The online service provider later makes a single-enterprise agreement with the entire workforce (the later agreement), which covers all the IT specialists. The later agreement comes into operation on 21 June 2013 – after the nominal expiry date of the earlier agreement. Paragraph 58(2)(e) provides that the earlier agreement ceases to apply to the IT specialists when the later agreement commences operation. The effect of clause 54(2)(b) is that the earlier agreement will cease to operate on 21 June 2013 when the later agreement commences operation because it will no longer apply to any employees. Once the earlier agreement has ceased to operate, it can never operate again.

Covers and applies

199. A modern award or enterprise agreement covers a person if, in effect, the person is within the scope or coverage of the award or agreement, even if the instrument does not actually confer entitlements or impose obligations on that person at a particular time (because the instrument is not yet in operation or because it has been displaced by or under the Bill by other entitlements and obligations which operate instead). This is subject to any contrary provision of the Bill or an order made under the Bill – e.g., in a transfer of business situation, FWA can order that a transferable instrument that covers a transferring employee does not in fact cover the employee (see, generally, Part 2-8).

200. On the other hand, a modern award or enterprise agreement applies to a person if the relevant instrument is in operation, covers the person and actually confers entitlements or imposes obligations on that person at a particular time. It is only where the award or agreement applies to a person that the person has obligations under the instrument which the person is capable of contravening (see clauses 46 and 51).

201. Thus, coverage of a modern award or enterprise agreement is a broader concept than application of the award or agreement. An award or agreement that covers a person does not necessarily apply to the person. For example, an award will not apply to a person where an agreement applies to the person (see clause 57) or where the person is a high-income employee (see subclause 47(2)). Similarly, an agreement may not apply to a person where another agreement applies to the person, depending on which agreement applied first and the agreements' nominal expiry dates (see clause 58).

202. The note to subclause 46(2) points to the fact that modern awards do not apply to outworkers who are not employees but that this does not affect whether outworker terms in a modern award relate to those outworkers, or whether those outworkers are affected by a contravention of such terms, for the purposes of giving those outworkers standing to enforce those terms.

203. Even though coverage of a modern award or enterprise agreement does not necessarily determine who has enforceable entitlements and obligations under those instruments, coverage of the instrument can be significant for a variety of other reasons. For example, coverage means that, from the time the award is made or the agreement is approved by FWA until the time the award or agreement ceases to operate:

- persons covered by the award or agreement can apply to vary the instrument;
- employers and employees can participate in bargaining and industrial action for an agreement which will cover them, even if the agreement will not necessarily apply to them once it operates;
- the application of the better off overall test (including for high-income employees) will depend on the award which covers the employee, whether or not the award applies to the employee (as long as, in this case, the award is in operation); and
- certain awards and agreements can transfer on a transfer of business even if not yet in operation.

204. The provisions setting out when modern awards and enterprise agreements cover, and apply to, persons are formulated slightly differently only because:

- agreements cover, and apply to, employers, employees and employee organisations, and modern awards also cover, and apply to, outworker entities (in relation to outworker terms) and employer organisations; and
- the way organisations become covered by awards and agreements is different. An award must contain coverage provisions stating which persons (including which organisations) are covered by the award. Although an agreement will necessarily cover the employer(s) and employees it is expressed to cover (however coverage is described), an employee organisation is covered by an agreement only if it notifies FWA that it wishes to be covered (non-greenfields agreement) or makes the agreement (greenfields agreement).

205. Subclauses 47(3), 48(3), 52(2) and 3(6) make it clear that a reference in the Bill to a modern award or enterprise agreement applying to, or covering, an employee is a reference to the award or agreement applying to, or covering, the employee in relation to particular employment. This means that, if a national system employee has more than one job, each job is treated separately in determining the effect of an award or agreement on the employee's entitlements in relation to each job. For instance, the rule that only one enterprise agreement can operate in relation to a person at a particular time (see clause 58) does not mean that two agreements cannot cover, or apply to, an employee in relation to two different jobs.

Division 3 – Interaction between the National Employment Standards, modern awards and enterprise agreements

Subdivision A – Interaction between the National Employment Standards and a modern award or an enterprise agreement

Clause 55 – Interaction between the National Employment Standards and a modern award or enterprise agreement

Clause 56 – Terms of a modern award or enterprise agreement contravening section 55 have no effect

206. Clause 55 sets out the relationship between the NES on the one hand and modern awards and enterprise agreements on the other.

207. No specific rule is provided about the relationship between the NES and contracts of employment. That relationship is governed by well established principles (e.g., a term in the contract of employment that is less favourable than a statutory entitlement is not effective) and does not require additional legislative elaboration.

208. The intent of the NES is that it provides enforceable minimum entitlements for all eligible employees. This is reflected in subclause 55(1), which provides that a modern award or enterprise agreement may not exclude the NES, or any part of it.

209. This prohibition extends both to statements that purport to exclude the operation of the NES or a part of it, and to provisions that purport to provide lesser entitlements than those provided by the NES. For example, a clause in an enterprise agreement that purported to provide three weeks' annual leave would be contrary to subclause 55(1). Such a clause would be inoperative (clause 56).

210. Some provisions of the NES expressly authorise a modern award or enterprise agreement to deal with certain issues in a way that would, or might, otherwise be contrary to the NES – and which may therefore be prohibited by subclause 55(1). For example:

- clauses 93 and 101 allow for the cashing out of paid annual leave and paid personal/carer's leave; and
- subclause 107(5) allows a modern award or enterprise agreement to specify the kind of evidence that must be provided to access paid personal/carer's leave.

211. Subclause 55(2) ensures that such terms are able to be included in a modern award or enterprise agreement. Subclause 55(2) also ensures that an award or agreement may include any additional matters permitted by regulations made under clause 127.

212. The NES operates subject to such terms (subclause 55(3)).

213. A modern award or enterprise agreement can also include:

- terms that are incidental or ancillary to the operation of NES entitlements; and
- terms that supplement NES entitlements,

provided that the effect of those terms is not detrimental to an employee in any respect compared to the NES (subclause 55(4)).

214. This provision allows modern awards and enterprise agreements to deal with machinery issues (such as when payment for leave must be made). It also allows awards to provide more beneficial entitlements than the minimum standards provided by the NES. For example, an award or agreement could provide for more beneficial payment arrangements for periods of leave, or provide redundancy entitlements to employees of small business employers. Similarly, an agreement could provide a right to flexible working arrangements. The term about a dispute settlement procedure would also apply to that right.

215. A term permitted by subclause 55(4) does not contravene subclause 55(1) (subclause 55(5)).

216. A legislative note to this section points readers to the approval requirements for enterprise agreements, and notes that an enterprise agreement term that contravenes this section must not be approved (see clause 186).

217. Clause 56 provides that if a modern award term or enterprise agreement term contravenes clause 55 it will have no effect.

Subdivision B – Interaction between modern awards and enterprise agreements

Clause 57 – Interaction between modern awards and enterprise agreements

218. This clause provides for the interaction between a modern award and an enterprise agreement that each cover an employee in relation to particular employment at the same time.

219. Subclause 57(1) provides that a modern award does not apply to an employee in relation to particular employment at a time when an enterprise agreement applies to the employee in relation to that employment. The effect of this subclause is that an agreement that is in operation and covers an employee determines the employee's rights and obligations in relation to particular employment, even if an award covers the employee in relation to that employment.

220. This subclause highlights the difference between when an agreement covers an employee and when it applies to an employee. An employee may be covered by both a modern award and an enterprise agreement in relation to particular employment at the same time;

however, both types of industrial instrument cannot apply to an employee in relation to that particular employment at the same time.

- Clause 206 provides a limited exception to this rule: where an enterprise agreement contains a base rate of pay for an employee that is less than the base rate of pay that would apply to that employee under an award that covers them, the base rate of pay from the award is taken to be a term of the agreement.

Illustrative example

Rihanna is a clerical officer. The Clerks Award (the award) applies to determine the rights and obligations between Rihanna and her employer. Her employer makes a single-enterprise agreement with its employees. The agreement comes into operation on 12 September 2011 and applies to Rihanna's employment as a clerical officer. When the enterprise agreement applies to Rihanna, the award will no longer apply. The award does, however, still cover Rihanna's employment as a clerical officer. This means that if, e.g., the agreement was later terminated (and consequently ceased to operate), the award would apply to Rihanna again.

221. Subclause 57(2) provides that where a modern award does not apply to an employee because of subclause 57(1), the award does not apply to an employer or employee organisation in relation to the employee. For example, if an employee is covered by a modern award and an enterprise agreement commences operation in relation to his or her employment, the modern award would cease to apply to:

- the employee (subclause 57(1));
- his or her employer, in relation to the employee; and
- an employee organisation of which the employee is a member and who is covered by the award and entitled to represent the employee's industrial interests under the agreement, in relation to the employee.

Subdivision C – Interaction between one or more enterprise agreements

Clause 58 – Only one enterprise agreement can apply to an employee

222. This clause sets out the interaction between enterprise agreements where more than one agreement covers an employee at a particular time.

223. Subclause 58(1) provides that only one enterprise agreement can apply to an employee at a particular time. While an employee may be covered by more than one agreement at a particular time, only one agreement can apply to that employee. This is intended to encourage employees and employers to make comprehensive agreements.

224. Subclause 58(2) provides for the interaction between two enterprise agreements where:

- an enterprise agreement (the earlier agreement) applies to an employee in relation to particular employment; and

- another enterprise agreement (the later agreement) that covers the employee in relation to the same employment comes into operation; and
- the interaction rule dealing with single-enterprise agreements and multi-enterprise agreements (subclause 58(3)) does not apply.

225. In that situation, subclause 58(2) provides for the interaction between the earlier and the later agreement where the earlier agreement:

- has not passed its nominal expiry date; or
- has passed its nominal expiry date.

226. Paragraph 58(2)(c) provides that if the earlier agreement has not passed its nominal expiry date and the later agreement comes into operation, the later agreement cannot apply to an employee until the earlier agreement has passed its nominal expiry date. When the earlier agreement reaches its nominal expiry date it will cease to apply to the employee and the later agreement will apply.

227. Paragraph 58(2)(d) provides that if the earlier agreement has passed its nominal expiry date it ceases to operate when the later agreement comes into operation.

228. Subclause 58(2) has the effect that an earlier agreement that ceases to operate in relation to an employee can never apply again to that employee.

Illustrative example

Luke works as an engineer in a car factory. An enterprise agreement is in operation that only covers the engineers in the factory (the earlier agreement). This agreement applies to Luke and his employer. The earlier agreement has a nominal expiry date of 31 October 2010. In May 2010, Luke's employer agrees to bargain collectively with all of the employees in the factory and an agreement is made and approved by FWA (the later agreement). The later agreement specifies a nominal expiry date of 31 May 2014. The later agreement commences operation on 14 August 2010, before the earlier agreement has reached its nominal expiry date. It would not apply to Luke at this time. On 31 October 2010, the earlier agreement would cease to apply to Luke and the later agreement would then apply to determine the rights and obligations between Luke and his employer.

229. Subclause 58(3) provides for the interaction between a single-enterprise agreement and a multi-enterprise agreement. Despite subclause 58(2), if a multi-enterprise agreement applies to an employee in relation to particular employment and a single-enterprise agreement that covers the employee in relation to the same employment commences operation, the multi-enterprise agreement ceases to apply to the employee when the single-enterprise agreement comes into operation. Unlike subclause 58(3), this interaction rule does not depend on whether or not the multi-enterprise agreement had passed its nominal expiry date.

230. The interaction rule in subclause 58(3) only takes effect where a single-enterprise agreement comes into operation after a multi-enterprise agreement has come into operation.

Where a multi-enterprise agreement comes into operation during the life of a single-enterprise agreement the interaction rules in subclause 58(2) apply. This will allow an earlier agreement that is a single-enterprise agreement to be replaced by a later multi-enterprise agreement only after the nominal expiry date of the single-enterprise agreement.

Illustrative example

Willow Tree Childcare Pty Ltd (Willow Tree) is one of a number of employers to which the North Townsville Childcare Centres Agreement 2011 (NTCC Agreement) applies. The NTCC agreement – a multi-enterprise agreement – started operating from 5 August 2011 and has a nominal expiry date of 30 September 2014. In June 2013, Willow Tree and its employees make a single-enterprise agreement. The single-enterprise agreement would, from the day it starts operating, replace the NTCC Agreement as it applies to Willow Tree and its employees, even though the NTCC Agreement has not passed its nominal expiry date. The NTCC Agreement would continue to apply to the other employers that it covers and their employees.

Part 2-2 – The National Employment Standards

Overview

231. Part 2-2 contains the NES. The NES are minimum entitlements listed in clause 61.

232. The NES provide entitlements which, together with modern awards (Part 2-3) and the national minimum wage order (Part 2-6), provide a safety net of terms and conditions for national system employees (as defined in clause 13). The NES also provide a benchmark for bargaining and underpin enterprise agreements (see Part 2-4).

233. The NES is designed to 'lock in' to modern awards and enterprise agreements. It does this by including provisions that specifically allow awards and agreements to deal with specific issues. Modern awards and enterprise agreements can also 'build on' the NES by including terms that supplement, or are ancillary or incidental to, the NES. But, other than as expressly allowed, an award or agreement cannot be detrimental to an employee in any respect when compared to the NES.

234. There are a number of concepts that are used regularly in Part 2-2. These are explained below.

235. Various employee entitlements under the NES are based on the employee's ordinary hours of work.

- The ordinary hours of work for an employee to whom a modern award applies will be the ordinary hours set out in the modern award (all awards are required to provide ordinary hours, or a means of determining ordinary hours) (see clause 147).
- The ordinary hours of work for an employee to whom an enterprise agreement applies will be the hours identified in the enterprise agreement. (An agreement should identify ordinary hours, or a means of determining ordinary hours, in order for the agreement to pass the better off overall test.)
- The ordinary hours of work for an award/agreement free employee (as defined in clause 12) are calculated in the manner set out in clause 20.

236. An employee's base rate of pay is defined in clause 16 as the rate of pay payable for the employee's ordinary hours of work, but does not include any incentive-based payments and bonuses, loadings, monetary allowances, overtime or penalty rates or any other separately identifiable amount.

237. An employee's full rate of pay is defined in clause 18 as the rate of pay payable for the employee's ordinary hours of work, including any incentive-based payments and bonuses, loadings, monetary allowances, overtime or penalty rates and any other separately identifiable amount (which may, for example, include superannuation payments).

Division 1 – Introduction

Clause 59 – Guide to this Part

238. This clause provides a guide to this Part.

Clause 60 – Meanings of *employee* and *employer*

239. In this Part, the terms employee and employer mean national system employee and national system employer respectively (as defined in clauses 13 and 14). The rights and obligations of employers and employees set out in this Part apply only to the employment relationships within the scope of the corporations and other constitutional powers that are engaged by clauses 13 and 14.

Division 2 – What are the National Employment Standards?

Clause 61 – The National Employment Standards are minimum standards applying to employment of employees

240. The NES are minimum standards that employers are required to provide to employees (clause 61). The NES relate to:

- maximum weekly hours;
- requests for flexible working arrangements;
- parental leave and related entitlements;
- annual leave;
- personal/carer's leave and compassionate leave;
- community service leave;
- long service leave;
- public holidays;
- notice of termination and redundancy pay; and
- the Fair Work Information Statement.

241. These standards are explained in more detail in Divisions 3 to 12 of Part 2-2.

Division 3 – Maximum weekly hours

242. This Division establishes the maximum weekly hours for employees and also the circumstances in which an employee may refuse a request or requirement to work additional hours if the hours are unreasonable.

243. This Division also sets out arrangements for the averaging of hours of work under a modern award or enterprise agreement, or by agreement between an employer and an award/agreement free employee.

Clause 62 – Maximum weekly hours

244. Subclause 62(1) provides that an employer must not request or require an employee to work more than a specified number of hours in a week, unless the additional hours are reasonable.

245. The specified hours are:

- for a full-time employee – 38 hours; or
- for an employee who is not a full-time employee – the lesser of 38 hours or the employee's ordinary hours of work in a week.

246. The ordinary hours of work for an employee to whom a modern award or enterprise agreement applies will be those hours set out in the modern award or enterprise agreement. The ordinary hours of work for an award/agreement free employee are calculated in the manner set out in clause 20.

247. An employer may request or require an employee to work additional hours either expressly or by implication (e.g., by setting tasks that could only be completed by the employee working additional hours).

248. An employee may refuse to work additional hours if the additional hours are unreasonable (subclause 62(2)).

249. Subclause 62(3) contains a non-exhaustive list of factors that must be taken into account in determining whether additional hours are reasonable or unreasonable. These are:

- any risk to employee health and safety from working the additional hours;
- the employee's personal circumstances, including family responsibilities;
- the needs of the workplace or enterprise in which the employee is employed;
- whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects the expectation of, working additional hours;
- any notice given by the employer of any request or requirement to work the additional hours;
- any notice given by the employee of his or her intention to refuse to work the additional hours;

- the usual patterns of work in the industry, or part of the industry, in which the employee works;
- the nature of the employee's role and the employee's level of responsibility;
- whether the additional hours are in accordance with an averaging arrangement; and
- any other relevant matter.

250. The relevance of each of these factors and the weight to be given to each of them will vary according to the particular circumstances. In some cases, a single factor will be of great importance and outweigh all others. Other cases will require a balancing exercise between factors. For example:

- There may be a situation where, although an employer provides advance notice of the requirement to work additional hours and the requirement to work those hours is based on the needs of the workplace, the hours are nonetheless unreasonable when the risks to employee health and safety or the employee's family responsibilities are taken into account.
- The significant remuneration and other benefits paid to a senior manager, together with the nature of the role and level of responsibility, may be sufficient to ensure that additional hours are reasonable in many cases.
- The additional hours an employee is required to work may also be reasonable if the hours are worked at a particular time and in a particular manner in order to meet the employer's operational requirements, or are worked in accordance with a particular pattern or roster that is prevalent in a particular industry, such as the fly-in-fly-out arrangements in the mining industry. The fact that a requirement to work additional hours is set out in the offer of employment accepted by an employee will also be relevant, though not determinative.

251. Subclause 62(4) provides that, for the purposes of subclause 62(1), the hours an employee works in a week must be taken to include any hours of authorised paid or unpaid leave or absence.

Clause 63 – Modern awards and enterprise agreements may provide for averaging of hours of work

252. Clause 63 permits a modern award or enterprise agreement to include terms providing for the averaging of hours of work over a specified period. The average weekly hours over the period must not exceed 38 hours (for a full-time employee), or the lesser of 38 hours or the employee's ordinary hours of work in a week (for an employee other than a full-time employee). Hours worked in a week in excess of this number of hours are additional hours and must not be unreasonable. The fact that additional hours are worked in accordance with an averaging arrangement does not necessarily mean that those hours are reasonable. Rather, the averaging arrangement is one factor to be considered in the particular circumstances.

253. The clause does not restrict the period over which the hours can be averaged under a modern award or enterprise agreement.

254. The general protections set out in Part 3-1 of the Bill, and in particular clause 344 which prohibits the exertion of undue influence and undue pressure, apply when an employer and employee enter into an averaging arrangement under a term included in a modern award or enterprise agreement. This is designed to ensure that averaging arrangements are genuinely consensual.

Clause 64 – Averaging of hours of work for award/agreement free employees

255. Clause 64 permits an employee who is not covered by a modern award or enterprise agreement to make a written agreement with their employer to average their hours of work over a specified period of no more than 26 weeks.

256. The average weekly hours over the period must not exceed 38 hours (for a full-time employee), or the lesser of 38 hours or the employee's ordinary hours of work in a week (for an employee other than a full-time employee). Hours worked in a week in excess of this number of hours are additional hours and must not be unreasonable. The fact that additional hours are worked in accordance with an averaging arrangement does not necessarily mean that those hours are reasonable. Rather, the averaging arrangement is one factor to be considered in the particular circumstances.

257. The general protections set out in Part 3-1 of the Bill, and in particular clause 344 which prohibits the exertion of undue influence and undue pressure, apply when an employer and employee enter into an agreement under this clause.

Illustrative example

Averaging arrangements and reasonable additional hours

The modern award regulating Alex's employment includes averaging arrangements in relation to hours of work so that full-time employees would ordinarily work 152 hours over four weeks (an average of 38 hours per week). Over a four week period, Alex's work pattern was as follows:

Week 1 – worked 21 hours

Week 2 – worked 60 hours

Week 3 – worked 38 hours

Week 4 – worked 33 hours

The averaging arrangement would be relevant in determining the reasonableness of the additional 22 hours that Alex was required to work in week 2. Other factors such as Alex's family responsibilities, his health and safety and the notice he was given of having to work those additional 22 hours would also be relevant.

Division 4 – Requests for flexible working arrangements

258. Division 4 establishes a right to request flexible working arrangements in certain circumstances. The intention of these provisions is to promote discussion between employers and employees about the issue of flexible working arrangements.

Clause 65 – Requests for flexible working arrangements

259. Subclauses 65(1) and (2) establish a right to request flexible working arrangements for employees (including casual employees) where:

- the employee is a parent of a child under school age, or a person with a responsibility for the care of a child under school age (e.g., a foster parent);
- the change is to assist the employee to care for the child; and
- the employee has 12 months continuous service with the employer, or (in the case of a casual employee) is a long term casual employee with an expectation of ongoing employment on a regular and systematic basis.

260. School age is defined in clause 12 of the Bill to mean the age at which a child is required to start attending school in the relevant State or Territory.

261. A child of a person includes someone who is the person's child within the meaning of the *Family Law Act 1975*, or an adopted child or step child of the person (see clause 17).

262. For the purpose of this Division, continuous service is defined in subclause 22(4) to mean the employee's period of service with their employer other than any period of unauthorised absence. (The period of unauthorised absence does not break the employee's continuous service, but does not count as service.)

263. A long term casual employee is defined in clause 12 of the Bill as an employee who, at a particular time, is casual employee who has been employed by the employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months.

264. A request for flexible working arrangements must be in writing and set out the change sought and reasons for the change (subclause 65(3)).

265. Subclause 65(4) requires that the employer give the employee a written response to the request within 21 days, stating whether the request is granted or refused. If the employer refuses the request, the written response is required to include details of the reasons for the refusal (subclause 65(6)). The intention is that an employee is able to clearly understand why their request is being rejected. A bare refusal (i.e., without reasons) is insufficient.

266. Subclause 65(5) provides that the employer may only refuse the request on reasonable business grounds.

267. The Bill does not identify what may, or may not, comprise reasonable business grounds for the refusal of a request. Rather, the reasonableness of the grounds is to be assessed in the

circumstances that apply when the request is made. Reasonable business grounds may include, for example:

- the effect on the workplace and the employer's business of approving the request, including the financial impact of doing so and the impact on efficiency, productivity and customer service;
- the inability to organise work among existing staff; and
- the inability to recruit a replacement employee or the practicality or otherwise of the arrangements that may need to be put in place to accommodate the employee's request.

268. It is envisaged that FWA will provide guidance on this issue.

269. Rather than refusing a request, it would be open for an employee and their employer to discuss the request and come up with an approach that would accommodate the needs of both parties.

270. An employee who is not eligible to request flexible working arrangements under this Division (e.g., because they do not have the requisite service) is not prevented from requesting flexible working arrangements. However, such a request would not be subject to the procedures in this Division.

Illustrative example

Michael would like to start work at 10am, four days a week, to enable him to take his three year old son to pre-school. He submits a written request to his employer setting out the reasons for requesting the change in hours. His employer considers the request but is unable to agree to the changes, as they would mean that Michael misses an important nationwide teleconference each morning.

However, instead of simply refusing the request, Michael's employer discusses the situation with him. They agree to an arrangement where Michael will start work at 10am four days a week and participate in the teleconference by phone hook-up before he leaves home, while attending in person for the most important weekly agenda-setting meeting.

Michael's employer gives Michael a written response, setting out details of the reasons for the refusal of the initial request as well as a statement of the revised arrangements they have agreed.

Clause 66 – State and Territory laws that are not excluded

271. Clause 66 makes clear that State and Territory laws that provide employee entitlements in relation to flexible work arrangements are not excluded and continue to apply to employees where they provide more beneficial employee entitlements than the entitlements under Division 4.

272. The intention of clause 66 is to ensure the application to national system employers and their employees of more beneficial State or Territory laws that confer a right to request flexible

work arrangements and deal with discrimination in relation to parental or carer responsibilities. For example, this clause is intended to enable the operation of provisions in the *Equal Opportunity Act 1995* (Vic) that oblige an employer in Victoria to accommodate an employee's responsibilities as a parent or carer and that prescribe remedies if an employer breaches those obligations. (See also paragraph 27(1)(a) of the Bill.)

273. An employee may also have remedies under relevant discrimination legislation (including federal anti-discrimination legislation) if an employee considers they have been discriminated against by the employer's handling or refusal of their request.

Division 5 – Parental leave and related entitlements

274. This Division establishes minimum parental leave and related entitlements for eligible national system employees. (See, also, Part 6-3 which provides for the extended application of this entitlement to non-national system employees.)

275. Under the Bill, parental leave includes birth-related leave and adoption-related leave. The separate labels of maternity and paternity leave are not used. The leave must be associated with the birth of a child to the employee, the employee's spouse or the employee's de facto partner, or the placement of a child under 16 years of age with the employee for adoption.

276. Under this Division, each member of an employee couple will be entitled to be absent from work for separate periods of up to 12 months.

277. However, if only one person is taking leave, or if one member of an employee couple wishes to take more than 12 months leave, the employee may request a longer period from their employer. The period of the extension cannot exceed 12 months less any period of parental leave taken, or intended to be taken, by the other member of an employee couple in relation to a child (i.e., the total period of leave for an employee couple cannot exceed 24 months).

278. Specific provision is made to cover the situation where only one member of a couple is an employee.

279. The parental leave NES recognises same-sex de facto relationships for the purpose of determining unpaid parental leave entitlements. This means, for example, that the same-sex de facto partner of either a person who gives birth or the biological parent of a child may be eligible to take unpaid birth-related parental leave, if they are otherwise eligible.

280. The parental leave NES also provides the following related entitlements:

- unpaid special maternity leave;
- a right to transfer to a safe job in appropriate cases, or take paid no safe job leave;
- consultation requirements;
- a return to work guarantee; and
- unpaid pre-adoption leave.

Subdivision A – General

281. This Subdivision establishes the eligibility rules for:

- unpaid parental leave and related entitlements taken in association with the birth of a child; and

- unpaid parental leave and unpaid pre-adoption leave taken in association with the placement of a child for adoption.

282. In general terms, an employee must have completed at least 12 months of continuous service with their employer immediately before the proposed leave is to start.

283. Specific rules apply to determine the eligibility of long term casual employees (see subclause 67(2)).

284. The eligibility rules in clause 67 do not apply to unpaid pre-adoption leave.

285. This Subdivision also sets out rules that apply in a transfer of employment situation to ensure recognition of notice and other information relevant to an employee's application for leave, or to enable an employee on leave to continue on leave.

Clause 67 – General rule – employee must have completed at least 12 months of service

286. Subclause 67(1) requires an employee (other than a casual employee) to have completed at least 12 months of continuous service immediately before the date that applies under subclause 67(3) to be entitled to unpaid parental leave.

287. For the purpose of this Division, continuous service is defined in subclause 22(4) to mean the employee's period of service with their employer other than any period of unauthorised absence. (The period of unauthorised absence does not break the employee's continuous service, but does not count as service.) Subclause 67(2) establishes a corresponding eligibility rule for casual employees.

288. To be entitled to unpaid parental leave (other than unpaid pre-adoption leave), a casual employee must qualify as a long term casual employee of the employer immediately before the date that applies under subclause 67(3) (paragraph 67(2)(a)).

289. A long term casual employee is defined in clause 12 as an employee who, at a particular time, is a casual employee who has been employed by the employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months.

290. Additionally, the casual employee must have a reasonable expectation of continuing employment by the employer on a regular and systematic basis, but for the birth or expected birth or placement or the expected placement of the child or the taking of unpaid parental leave (paragraph 67(2)(b)).

291. Subclause 67(3) specifies the date at which an employee must have completed 12 months of service in order to qualify for unpaid parental leave (other than unpaid pre-adoption leave). The relevant date is:

- for birth-related leave – the date of birth, or the expected date of birth, of the child (subparagraph 67(3)(a)(i));
- for adoption-related leave – the day of placement, or the expected day of placement, of the child (subparagraph 67(3)(a)(ii));
- for an employee taking a period of leave that is to start within 12 months after the birth or placement of the child under subclause 71(6) (which deals with the situation where a member of a couple is not an employee) – the date on which the employee's period of leave is to start (paragraph 67(3)(b)); or
- for an employee who is a member of an employee couple taking a period of leave that is to start after the other member's period of leave finishes – the date on which the employee's period of leave is to start (paragraph 67(3)(c)).

292. Subclauses 67(4) to (6) define the terms birth related leave, adoption-related leave and day of placement respectively for purposes of this Division:

- Birth-related leave means unpaid parental leave taken in association with the birth of a child and unpaid special maternity leave.
- Adoption-related leave means unpaid parental leave taken in association with the placement of a child for adoption and unpaid pre-adoption leave.
- The day of placement, in relation to the adoption of a child, means the earlier of the day on which the employee first takes custody of the child or the day on which the employee starts any travel that is reasonably necessary to take custody of the child for adoption.

Clause 68 – General rule for adoption-related leave – child must be under 16 etc.

293. Clause 68 establishes additional eligibility rules for adoption-related leave.

Under this clause, adoption-related leave (including unpaid pre-adoption leave) is only available if the child placed with the employee:

- is, or will be, under 16 years of age as at the day of placement, or the expected day of placement;
- has not, or will not have, lived continuously with the employee for six months or more as at the day of placement, or the expected day of placement; and
- is not (otherwise than because of the adoption) a child of the employee or the employee's spouse or de facto partner.

Clause 69 – Transfer of employment situations in which employee is entitled to continue on leave etc.

294. Clause 69 enables employees to take their parental leave entitlements when they are involved in a transfer of employment (as defined in subclause 22(7)). The clause allows an employee to continue their leave:

- when they are already on parental leave at the time their employment with the first employer ends; or
- when they have taken steps to take their parental leave.

295. Subclause 69(1) provides that an employee is entitled to continue to take leave under Division 5:

- if there is a transfer of employment in relation to the employee; and
- the employee had already started the period of leave when their employment with the first employer ended.

296. Subclause 69(2) provides that:

- if there is a transfer of employment in relation to an employee; and
- the employee has, in relation to the first employer, already taken a step that is required or permitted by a provision of this Division in relation to taking a period of leave,

then the employee is deemed to have taken that step in relation to the second employer.

297. A legislative note under subclause 69(2) states that an example of a step taken by the employee could include giving the first employer notice to take leave under subclause 74(1), confirmation or advice under subclause 74(4) or evidence under subclause 74(5).

Subdivision B – Parental leave

Clause 70 – Entitlement to unpaid parental leave

298. Clause 70 provides an eligible employee with a minimum entitlement of up to 12 months of unpaid parental leave.

299. The leave can be taken in association with the birth of a child to the employee, or the employee's spouse or de facto partner, or the placement of a child with the employee for adoption (paragraph 70(a)).

300. However, the leave is only available if the employee has or will have a responsibility for the care of the child (paragraph 70(b)).

301. The following definitions apply for the purpose of the entitlement to unpaid parental leave:

- A child of a person includes someone who is the person's child within the meaning of the *Family Law Act 1975*, or an adopted child or step child of the person (clause 17).

- An employee's de facto partner means a person who, although not legally married to the employee, lives with the employee in a relationship as a couple on a genuine domestic basis (whether the employee and the person are of the same sex or different sexes) and also includes an employee's former de facto partner (clause 12).

- An employee's spouse includes a former spouse (clause 12).

302. The definition of de facto partner in clause 12 of the Bill ensures that same-sex de facto relationships are recognised for the purpose of determining unpaid parental leave entitlements. This means that the same-sex de facto partner of either a person who gives birth or a biological parent may be eligible to take unpaid birth-related leave, including:

- a female employee whose female de facto partner gives birth to the child;

- a female employee whose female de facto partner is the biological mother of the child; or

- a male employee whose male de facto partner is the biological father of a child.

303. The legislative notes following this clause remind readers of the eligibility rules for unpaid parental leave in clause 67 and explain circumstances in which an employee's entitlement to unpaid parental leave is reduced (e.g, where special maternity leave has been taken by the employee in relation to the pregnancy).

Clause 71 – The period of leave – other than for members of an employee couple who each intend to take leave

304. The purpose of clause 71 is to provide rules for the taking of unpaid parental leave if only one parent intends to take unpaid parental leave because:

- the employee is not a member of an employee couple (e.g., a single person, or an employee who is in a relationship, but the other person is a contractor); or

- the employee is a member of an employee couple and the other member of the couple does not intend to take unpaid parental leave (subclause 71(1)).

305. An employee couple is defined in clause 12 to mean two national system employees where each employee is the spouse or de facto partner of the other. (Part 6-3 provides for the extended application of this entitlement to non-national system employees.)

306. Under subclause 71(2), unpaid parental leave must be taken in a single continuous period (not broken periods) – subject to specific exceptions about concurrent leave around the

time of the child's birth or placement under subclause 72(5) and (6) and directed leave under clause 73.

307. A legislative note points readers to clause 79 to explain that this rule does not prevent an employee from taking a form of paid leave (e.g., paid annual leave) while on unpaid parental leave.

308. Subclauses 71(3) to (5) specify when unpaid parental leave must start:

- For a pregnant female employee, the period of leave may start up to 6 weeks before the expected date of birth of her child, but no later than the date of the child's birth (subclause 71(3)).
- For an employee other than the pregnant female employee, unpaid parental leave must start on the child's date of birth (subclause 71(4)).
- For adoption leave, the leave must start on the day of placement of the child (subclause 71(5)).

309. Subclause 71(6) qualifies the rules about when parental leave may start, in cases where the employee's spouse or de facto partner is not an employee and the spouse or de facto partner will have responsibility for the care of the child between the birth or placement and the date the employee starts their unpaid parental leave. In this situation, the employee's leave may start anytime within 12 months after the date of birth or day of placement of the child.

310. The legislative note under this subclause set out an example of the intended operation of this subclause and makes clear that an employee who starts their leave under this provision is still entitled to request an extension of the period of unpaid parental leave under clause 76, but the period of the leave may not extend beyond 24 months after the date of birth or placement of the child (see subclause 76(7)).

Clause 72 – The period of leave – members of an employee couple who each intend to take leave

311. Clause 72 provides for the way in which unpaid parental leave may be taken (including when leave must start) if each member of an employee couple intends to take unpaid parental leave (subclause 72(1)).

312. Unpaid parental leave must be taken in a single continuous period (not broken periods) (subclause 72(2)) – subject to limited exceptions about concurrent leave (subclauses 72(5) and (6)) or directed leave under clause 73.

313. Subclauses 72(3) and (4) specify when unpaid parental leave must start for birth-related and adoption leave respectively and ensures that members of a couple take their leave consecutively.

314. Subclause 72(5) creates a limited exception to the prohibition on both members of an employee couple taking unpaid parental leave at the same time. Both employees are entitled to

take leave at the same time for a period of up to three weeks from the date of the child's birth or day of placement (paragraphs 72(5)(a) and (b)).

315. However, by agreement with the employer, the concurrent leave (which can only be a maximum period of three weeks) may be taken at any time during an extended period ending no later than six weeks after the child's birth or placement (paragraph 72(5)(c)).

316. Concurrent leave is parental leave and reduces the entitlement an employee otherwise has to unpaid parental leave (subclause 72(6)).

Clause 73 – Pregnant employee may be required to take unpaid parental leave within 6 weeks before the birth

317. Clause 73 sets out the circumstances in which a pregnant employee who proposes to work during the six week period before her child's expected date of birth may be required to start unpaid parental leave early. This clause does not alter or override an employer's general duty of care to the employee.

318. If a pregnant employee continues to work within six weeks before the estimated date of birth, an employer may ask the employee to provide a medical certificate, stating whether the employee is fit for work (paragraph 73(1)(a)) and, if so, whether it is inadvisable for the employee to continue working in her present position during a stated period because of any of the specified risk factors (paragraph 73(1)(b)). The risk factors include any illness or risks arising out of the employee's pregnancy, or hazards connected with the employee's position.

319. Under subclause 73(2), an employer may require an employee to start unpaid parental leave as soon as practicable if the employee fails to provide the certificate within seven days, or if the certificate states that the employee is not fit for work. The employer may also require an employee to start unpaid parental leave as soon as practicable if the employee is certified as fit for work, but:

- the certificate indicates that it is inadvisable for the employee to continue in her present position for a specified reason; and
- the employee is not entitled to transfer to a safe job or to no safe job leave (see clause 81).

320. This form of directed leave runs until the end of the employee's pregnancy, or the date the employee's planned leave was due to start (subclause 73(3)). The leave is parental leave and, therefore, counts as part of an employee's 12 month entitlement.

321. This form of leave is an exception to the usual requirements about notice, when leave must start and that leave be taken in a continuous period (subclauses 73(4) and (5)).

Clause 74 – Notice and evidence requirements

322. Clause 74 sets out the notice and evidence requirements for taking a period of unpaid parental leave. An employee must comply with these requirements to be eligible for unpaid parental leave (subclause 74(7)).

323. Subclauses 74(1) and (2) require an employee to give the employer at least 10 weeks' written notice before starting the leave or, if that is not practicable, to provide notice as soon as practicable (which may be a time after the leave has started). For example, it may not be practical for an employee to give the requisite notice in relation to the premature birth of a child, but valid notice could still be given as soon as practicable after the child's birth.

324. The notice must specify the intended start and end dates of the leave (subclause 74(3)). Subclause 74(4) requires an employee to confirm the intended start and end dates of the leave (or advise of any changes) at least 4 weeks before the intended start date, unless it is not practicable to do so.

325. An employer may require an employee who has given notice of the taking of unpaid parental leave to provide evidence of the child's actual or expected date of birth or the day or expected day of placement for adoption and that the child is or will be under 16 years of age as at that date. The evidence must be sufficient to satisfy a reasonable person and, in the case birth-related leave, the employer may require that this be a medical certificate (subclauses 74(5) and (6)).

Separate notice and evidence requirements apply in relation to special maternity leave (see clause 80) and unpaid pre-adoption leave (see clause 85).

Clause 75 – Extending period of unpaid parental leave – extending to use more of available parental leave period

326. Clause 75 enables an employee to extend a period of unpaid parental leave once leave has commenced. Leave may not be extended by more than the period which the employee has available to them up to the maximum allowable period of 12 months (subclauses 75(1), (2) and (6)).

327. Subclauses 75(3) and (4) enable an employee to extend the period of leave once as of right, by providing at least four weeks' notice in writing to the employer before the end date of the original leave period. Further extensions may be agreed between the employer and employee (subclause 75(5)).

Clause 76 – Extending period of unpaid parental leave – extending for up to 12 months beyond available parental leave period

328. Clause 76 enables an employee to request an additional period of unpaid parental leave. The maximum period of additional leave that may be sought is 12 months. In a case where both members of an employee couple intend to take unpaid parental leave, the additional amount of leave an employee may request is reduced by any leave that the other member of the couple has taken or will take. The amount of unpaid parental leave the other member of the couple is entitled to take is reduced by the period of the extension (subclause 76(6)).

329. These arrangements allow members of an employee couple flexibility in configuring their combined leave entitlement over a period of up to 24 months.

330. To be eligible to request an extension of unpaid parental leave for up to an additional 12 months, the employee must first take their full entitlement to 12 months' unpaid parental

leave (which may include any periods of the kind described in paragraphs 75(2)(a) to (e), such as special maternity leave) (subclause 76(1)). Any proposed extension must be continuous with the employee's unpaid parental leave.

331. Subclauses 76(2) to (5) set out the process for an employee to make a request and the employer to respond. The process involves:

- the employee providing at least 4 weeks' notice in writing before the end of the employee's period of leave, requesting an extension;
- the employer responding to the request, in writing, as soon as practicable and not later than 21 days after the request is made, by either granting or refusing the employee's request (a request may only be refused on reasonable business grounds); and
- the employer including details of the reasons for a refusal. The intention is that if the request is refused, the employer must give details of the grounds upon which the request was refused. A bare refusal (i.e. without reasons) is insufficient.

332. The Bill does not identify what may, or may not, be reasonable business grounds for the refusal of a request. Rather, the reasonableness of the grounds is to be assessed in the circumstances that apply when the request is made. Reasonable business grounds may include, for example:

- the effect on the workplace and the employer's business of approving the request, including the financial impact of doing so and the impact on efficiency, productivity and customer service;
- the inability to organise work among existing staff; or
- the inability to recruit a replacement employee or the practicality or otherwise of the arrangements that may need to be put in place to accommodate the employee's request.

333. It is envisaged that FWA will provide guidance on this issue.

334. Subclause 76(7) confirms that an employee is not entitled to extend the period of unpaid parental leave beyond 24 months after the date of birth or day of placement of the child.

Illustrative example:

Rosa is a pregnant employee entitled to unpaid parental leave. She has taken two weeks of unpaid special maternity leave, on account of a pregnancy-related illness. Rosa intends to take four weeks' paid annual leave from the proposed start date of her period of unpaid parental leave.

Rosa also intends to apply to extend her unpaid parental leave entitlement, so she can care for the child up to the child's second birthday.

Rosa's spouse Jim is also entitled to unpaid parental leave, but only intends to take one week of concurrent leave around the time of the child's birth. Rosa and Jim are treated as an employee couple for purposes of this entitlement.

The maximum entitlement of any employee to unpaid parental leave is 12 months. (Rosa and Jim are entitled to a maximum of 12 months' unpaid parental leave each.)

Rosa's entitlement to unpaid parental leave is reduced by the amount of unpaid special maternity leave she has taken (i.e., two weeks).

Rosa may take any period of paid annual leave at the same time she is taking unpaid parental leave.

The maximum extension to a period of unpaid parental leave is 12 months, but this is reduced by the amount of unpaid parental leave and related entitlements that the other member of the employee couple may have taken. Extensions are only available to an employee if the employee takes their available initial parental leave period. (For Rosa, the available parental leave period would be the initial 12 month period of leave less the two weeks of unpaid special maternity leave.)

Rosa meets this requirement and is entitled to request (in writing and subject to certain notice requirements) a further period of leave of up to 12 months less one week (i.e., the amount of unpaid parental leave taken by Jim).

Rosa's employer may only refuse this request in writing on reasonable business grounds.

If Rosa's employer agrees to the extension, Jim's entitlement to unpaid parental leave would be effectively reduced by a corresponding amount. Because Rosa will be extending her period of unpaid parental leave by a further 12 months (less one week's leave taken by Jim), Jim could not take any further unpaid parental leave in relation to this child.

Clause 77 – Reducing period of unpaid parental leave

335. Clause 77 enables an employee and employer to agree to reduce a period of scheduled unpaid parental leave. This clause is included to avoid any doubt, as there is nothing to prevent such an agreement being made.

Clause 78 – Employee who ceases to have responsibility for care of child

336. This clause provides for an early return to work if an employee who is on unpaid parental leave ceases to have any responsibility for the care of the relevant child.

Clause 79 – Interaction with paid leave

337. Clause 79 deals with the interaction between unpaid parental leave and other kinds of leave.

338. Subject to certain exceptions, subclause 79(1) enables an employee to take paid leave at the same time the employee is taking unpaid parental leave. The period of unpaid parental leave would run concurrently with the period of paid leave taken by the employee and will not break the continuity of the period of unpaid parental leave. The requirements for taking the other form of leave would still apply – e.g., the employer agreeing to the employee taking paid annual leave (see clause 88).

339. Subclauses 79(2) and (3) ensure that an employee is not eligible to take paid personal/carer's leave or compassionate leave while taking unpaid parental leave, and is not eligible for any payment under Division 8 (community service leave). However this does not deprive an employee of their entitlement to be paid for their jury service under applicable State or Territory jury service laws (see clause 112).

Subdivision C – Other entitlements

Clause 80 – Unpaid special maternity leave

340. Clause 80 enables an eligible pregnant employee to take unpaid special maternity leave if the employee is not fit to work because of a pregnancy-related illness, or because the pregnancy ends otherwise than by the birth of a living child within 28 weeks of the expected date of birth (subclause 80(1)). Any period of special maternity leave taken by the employee while she was pregnant counts as part of the employee's entitlement to 12 months of unpaid parental leave under clause 70 (subclause 80(7)).

341. To be eligible for this entitlement, the employee must meet the service requirement in clause 67 and also comply with the notice and evidence requirements set out in subclauses 80(2) to (4).

342. Subclause 80(5) enables the employer to require the employee to provide a medical certificate as evidence of entitlement to the leave.

Clause 81 – Transfer to a safe job

343. Clause 81 provides an eligible pregnant employee with an entitlement to be transferred to a safe job in specified circumstances.

344. Subclause 81(1) establishes that the entitlement applies if the employee:

- is entitled to unpaid parental leave;

- has complied with the notice and evidence requirements for accessing unpaid parental leave; and

- provides evidence that would satisfy a reasonable person that she is fit for work, but it is inadvisable for her to continue in her present position during a period because of illness or risks arising out of her pregnancy, or hazards connected with that position.

345. An employer may require the evidence to be in the form of a medical certificate (subclause 81(2)).

346. If these requirements are met, the employee must be transferred, for the risk period, to an appropriate safe job with no other change to the employee's terms and conditions of employment (paragraph 81(3)(a)).

347. Subclause 81(4) defines appropriate safe job to be a safe job that has the same ordinary hours of work as the employee's present position, subject to agreed changes to those hours. (The meaning of ordinary hours of work is described at the beginning of this Part.)

348. Subclause 81(5) requires an employer to pay the transferred employee at their full rate of pay (as defined in clause 18) for the position she was in before the transfer for the hours that she works in the risk period. (The meaning of full rate of pay is described at the beginning of this Part.)

349. If there is no appropriate safe job available, the employee is entitled to take paid 'no safe job' leave for the risk period (paragraph 81(3)(b)).

350. Subclause 81(6) requires an employer to pay the employee who takes no safe job leave at the employee's base rate of pay (as defined in clause 16) for the employee's ordinary hours of work in the risk period. (The meaning of base rate of pay is described at the beginning of this Part.)

351. Subclause 81(7) clarifies that the risk period ends when the pregnancy ends. The employee's absence from work on no safe job leave does not reduce the employee's entitlement to unpaid parental leave under this Division.

Clause 82 – Employee on paid no safe job leave may be asked to provide a further medical certificate

352. Clause 82 applies if a pregnant employee is on paid no safe job leave in the 6 week period before the expected date of birth of the child.

353. The provision ensures that, in such a situation, an employer has the same ability as applies generally (under clause 73) to seek a medical certificate about fitness for work in the 6 weeks before the expected date of birth and, if necessary, direct the employee to take unpaid parental leave.

Clause 83 – Consultation with employee on unpaid parental leave

354. Subclause 83(1) provides employees on unpaid parental leave with an entitlement to be kept informed of decisions by their employer that will have a significant effect on the status, pay or location of the employee's pre-parental leave position.

355. The employer must take all reasonable steps to give the employee information about, and an opportunity to discuss, the effect of the decision on the employee's position. The employer satisfies this provision by taking all reasonable steps to contact the employee using their last known contact details.

356. Subclause 83(2) defines the employee's pre-parental leave position to be the position the employee held before starting the unpaid parental leave or the position held by the employee before she was transferred to a safe job or reduced her working hours due to her pregnancy.

Clause 84 – Return to work guarantee

357. Clause 84 provides employees with a return to work guarantee immediately following a period of unpaid parental leave, entitling them to return to:

- their pre-parental leave position; or
- if that position no longer exists – an available position for which the employee is qualified and suited that is nearest in status and pay to the employee's pre-parental leave position.

Clause 85 – Unpaid pre-adoption leave

358. Subclause 85(1) provides all employees (i.e., irrespective of length of service) with an entitlement to up to 2 days of unpaid pre-adoption leave, to attend any interviews or examinations required in order to obtain approval for the employee's adoption of a child. Leave may be taken in a single continuous period, or in separate periods agreed between the employer and employee (subclause 85(3)).

359. However, the entitlement does not apply if the employee could instead take some other form of leave and the employer directs the employee to take that other form of leave (e.g., paid annual leave) (subclause 85(2)).

360. Subclauses 85(4) to (7) set out the notice and evidence requirements for taking a period of unpaid pre-adoption leave.

Division 6 – Annual leave

361. This Division establishes a minimum entitlement to annual leave for employees.

Clause 86 – Division applies to employees other than casual employees

362. This clause provides the entitlement to paid annual leave applies to all employees, other than casual employees.

Clause 87 – Entitlement to annual leave

363. The minimum entitlement to paid annual leave is four weeks for each year of service, unless the employee is a shiftworker, in which case the employee is entitled to a minimum of five weeks' paid annual leave for each year of service (subclause 87(1)). Leave accrues progressively according to an employee's ordinary hours of work and is cumulative (subclause 87(2)). (The meaning of ordinary hours of work is outlined at the beginning of this Part.)

364. The additional week of leave for shiftworkers applies where:

- a modern award or enterprise agreement applies to the employee and defines or describes the employee as a shiftworker for the purposes of the NES; or
- an award/agreement free employee (as defined in clause 12) meets the criteria for the shiftworker annual leave entitlement under subclause 87(3).

An award/agreement free employee will qualify for the shiftworker annual leave entitlement of five weeks of paid annual leave per year of service under subclause 87(3) if:

- the employee is employed in a business in which shifts are continuously rostered 24 hours a day for seven days a week, is regularly rostered to work those shifts, and regularly works on Sundays and public holidays; or
- the employee is in a class of employees prescribed by the regulations as shiftworkers for the purpose of the NES.

365. Subclauses 87(4) and (5) permit the regulations to exclude a class of award/agreement free employees from qualifying as shiftworkers for annual leave purposes.

366. As part of the award modernisation process, the AIRC is to have regard to whether it is appropriate to include a definition of shiftworker in a modern award for the purpose of the NES annual leave entitlement.

367. The entitlement to annual leave set out in this clause is a minimum entitlement and does not prevent an employer and employee from agreeing to, or an award or enterprise agreement providing for, a more generous entitlement.

Clause 88 – Taking paid annual leave

368. Annual leave may be taken for a period agreed between the employee and the employer (subclause 88(1)). The employer must not unreasonably refuse to agree to a request by the employee to take paid annual leave (subclause 88(2)).

Clause 89 – Employee not taken to be on paid annual leave at certain times

Under clause 89, an employee will not be taken to be on paid annual leave:

- during a day or part-day that is a public holiday which falls during the period of their absence from work on annual leave; or

- while the employee takes other types of leave provided for under the NES, with the exception that paid annual leave may be taken in conjunction with unpaid parental leave.

369. The effect of this clause is that if a public holiday falls during a period when an employee is absent from work, or the employee is sick and takes paid sick leave for the period of their illness, then the employee's annual leave accrual will not be reduced by that day or period.

Clause 90 – Payment for annual leave

370. Subclause 90(1) entitles an employee to be paid at their base rate of pay (as defined in clause 16) for the employee's ordinary hours of work for the period of their absence on leave. (The meaning of ordinary hours of work and base rate of pay are outlined at the beginning of this Part.)

371. This is a minimum entitlement and would not prevent an employer and employee from agreeing to, or an award or enterprise agreement providing for, more generous payment terms.

372. Subclause 90(2) provides that, on termination of employment, an employee is entitled to receive a payment in respect of any untaken paid annual leave. The payment will be equivalent to the amount that the employee would have been paid if the employee had taken the annual leave.

Clause 91 – Transfer of employment situations that affect entitlement to payment for period of untaken paid annual leave

373. Subclause 91(1) provides that subclause 22(5) (which provides for the automatic recognition of service where there is a transfer of employment) does not apply for the purposes of Division 6 to a transfer of employment between non-associated entities if the second employer decides not to recognise an employee's service with the first employer.

374. The intention of this subclause is that an employee's service with the first (old) employer does not have to be recognised by the second (new) employer in relation to the employee's untaken paid annual leave entitlements where there is a transfer of business between two non-associated employers.

375. The old employer will be required to pay out an employee's untaken paid annual leave where the new employer does not agree to recognise service with the old employer.

376. Subclause 91(2) provides that if subclause 22(5) applies for the purposes of Division 6 to a transfer of employment in relation to an employee, the employee is not entitled to be paid an amount under subclause 90(2) for the period of untaken paid annual leave.

Clause 92 – Paid annual leave must not be cashed out except in accordance with permitted cashing out terms

377. Clause 92 states that paid annual leave may only be cashed out in accordance with the terms included in a modern award or enterprise agreement under clause 93 or by agreement between an employer and an award/agreement free employee (as defined in clause 12) under

clause 94. For example, if an award or agreement that applies to the employee does not include a cashing out provision for annual leave, cashing out of paid annual leave is not permitted.

Clause 93 – Modern awards and enterprise agreements may include terms relating to cashing out and taking paid annual leave

378. Subclauses 93(1) and (2) permit a modern award or enterprise agreement to include terms providing for the cashing out of paid annual leave. In recognition of the importance of employees taking leave for the purposes of rest and recreation, the cashing out terms in an award or agreement must require that:

- the employee retain a minimum balance of four weeks' accrued annual leave after the cash out;
- each cashing out arrangement be a separate agreement in writing between the employer and the employee; and
- the employee receive at least the full amount that would have been payable so the paid annual leave cannot be cashed out at a lower rate than the employee would have received had the employee taken the leave.

379. The effect of cashing out paid annual leave is that the payment the employee receives for cashing out paid annual leave is in addition to the payment that the employee would be entitled to receive for working during the period covered by the cash out.

380. The general protections provisions in Part 3-1 of the Bill will apply to entering into a cashing out arrangement under this clause (see, in particular, clause 344, which prohibits the exertion of undue influence or undue pressure on an employee to agree to cash out the leave).

381. Subclause 93(3) permits terms to be included in an award or agreement that require an employee, or that enable an employer to require or direct an employee, to take paid annual leave in particular circumstances, but only if the requirement is reasonable. This may include the employer requiring an employee to take a period of annual leave to reduce the employee's excessive level of accrual or if the employer decides to shut down the workplace over the Christmas/New Year period.

382. In assessing the reasonableness of a requirement or direction under this subclause it is envisaged that the following are all relevant considerations:

- the needs of both the employee and the employer's business;
- any agreed arrangement with the employee;
- the custom and practice in the business;
- the timing of the requirement or direction to take leave; and
- the reasonableness of the period of notice given to the employee to take leave.

383. Subclause 93(4) enables an award or agreement to include other terms about the taking of paid annual leave – e.g., the taking of paid annual leave in advance of accrual.

Clause 94 – Cashing out and taking paid annual leave for award/agreement free employees

384. Subclause 94(1) enables an employer and an award/agreement free employee (as defined in clause 12) to agree to cash out a particular amount of the employee's accrued annual leave and imposes the same conditions on the cashing out arrangement as those that apply to a cashing out arrangement under terms included in a modern award or enterprise agreement (see above). Clause 344 in Part 3-1 (General protections) is equally applicable to a cashing out arrangement under this subclause.

385. Subclause 94(5) allows an employer to require an award/agreement free employee to take a period of paid annual leave, but only if the requirement is reasonable. The factors for assessing the reasonableness of a requirement identified for subclause 93(3) equally apply here.

386. Subclause 94(6) enables an employer and an award/agreement free employee to agree on when and how paid annual leave may be taken by the employee. The legislative note to this subclause contains examples of the matters that could be agreed.

The concept of an employee's ordinary hours of work is central to the paid annual leave entitlement as it determines the rate at which the entitlement accrues and also entitlement to payment when leave is taken. For example:

- a full-time employee whose ordinary hours of work each week are 38 will accrue 2 weeks' leave (76 hours) over a 6 month period. If the employee then takes that leave, the employee will be paid for 2 weeks of leave (76 hours) at their base rate of pay; and

- a part-time employee whose ordinary hours of work each week are 12 hours will also accrue 2 weeks' leave (24 hours) over the same 6 month period. If the part-time employee then takes that leave, the employee will be paid for 2 weeks of leave (24 hours) at their base rate of pay.

If an employee changes the basis of their employment (e.g., from full-time to part-time), they would not lose accrued leave, although the future rate of accrual will be different (based on the employee's new ordinary hours of work).

Division 7 – Personal/carer's leave and compassionate leave

387. This Division establishes minimum entitlements for employees to paid personal/carer's leave, unpaid carer's leave and paid and either paid or unpaid compassionate leave.

Subdivision A – Paid personal/carer's leave

Clause 95 – Subdivision applies to employees other than casual employees

388. This clause states that the entitlement to paid personal/carer's leave applies to all employees, other than casual employees.

Clause 96 – Entitlement to paid personal/carer's leave

389. The minimum entitlement to paid personal/carer's leave is ten days for each year of service (subclause 96(1)).

390. Leave accrues progressively according to an employee's ordinary hours of work and is cumulative (subclause 96(2)).

391. The entitlement to personal/carer's leave set out in this clause is a minimum entitlement and does not prevent an employer and employee from agreeing to, or a modern award or enterprise agreement providing for, a more generous entitlement.

Clause 97 – Taking paid personal/carer's leave

392. An employee may take paid personal/carer's leave:

- if the employee is not fit for work because of a personal illness, or personal injury; or
- to provide care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because of a personal illness or personal injury, or an unexpected emergency.

393. The legislative note that follows this clause is a reminder of the need to comply with the notice and evidence requirements set out in clause 107 to be entitled to take paid personal/carer's leave.

Clause 98 – Employee taken not to be on paid personal/carer's leave on public holiday

394. Clause 98 has the effect that an employee will not be taken to be on paid personal/carer's leave when a day or part-day that is a public holiday falls during the employee's absence on leave.

Clause 99 – Payment for paid personal/carer's leave

395. If an employee takes a period of paid personal/carer's leave, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period (clause 99). (The meaning of base rate of pay and ordinary hours of work are outlined at the beginning of this Part.)

396. This is a minimum entitlement and would not prevent an employer and employee from agreeing to, or an award or enterprise agreement providing for, more generous payment terms (see subclause 55(4)).

The concept of an employee's ordinary hours of work is central to the paid personal/carer's leave entitlement as it determines the rate at which the entitlement accrues and also the entitlement to payment when leave is taken.

General principles

Leave accrues according to an employee's ordinary hours of work (which may be set out in a modern award or enterprise agreement, or are calculated in the manner set out in clause 20). Such hours are often expressed as a number of hours per week. In effect, therefore, the Bill ensures an employee will accrue the equivalent of two weeks' paid personal/carer's leave over the course of a year of service.

Although this is expressed as an entitlement to 10 days (reflecting a 'standard' 5 day work pattern), by relying on an employee's ordinary hours of work, the Bill ensures that the amount of leave accrued over a period is not affected by differences in the actual spread of an employee's ordinary hours of work in a week.

Therefore, a full-time employee who works 38 hours a week over five days (Monday to Friday) will accrue the same amount of leave as a full-time employee who works 38 ordinary hours over four days per week. Over a year of service both employees would accrue 76 hours of paid personal/carer's leave

Similarly, the requirement to pay an employee for their absence on the basis of their ordinary hours of work for the period of the absence means that the employee is entitled to be paid for his or her ordinary hours of work on the days in the week they would have worked but for being absent from work on paid personal/carer's leave (i.e., excluding overtime).

Illustrative examples

The following examples illustrate the intended operation of the accrual and payment provisions.

- Tulah is a full-time employee whose ordinary hours of work are 38 per week. On average, she also works an additional two hours of overtime per week. Tulah will accrue ten days' personal/carer's leave based on her ordinary hours of work (76 hours) over a year of service. If she takes a week's personal/carer's leave because she is sick or to care for a member of her immediate family who is sick, she will be entitled to be paid for 38 ordinary hours at her base rate of pay.

- Brendan is a part-time employee whose ordinary hours of work are 19 per week. He will accrue half the amount of paid personal/carer's leave over a year of service as Tulah (38 hours), reflecting the lower number of ordinary hours that he works. This is also reflected in how much he is entitled to be paid if he takes a week's paid personal/carer's leave. If he takes a week's personal/carer's leave, he will be entitled to be paid for 19 ordinary hours at his base rate of pay.

- Sudhakar is a full time employee who has entered into a permissible averaging arrangement under the NES and works an average of 152 hours every four weeks (based on 38 ordinary hours per week). The number of ordinary hours that Sudhakar works on any given day may vary according to the averaging arrangement. However, over a year he accrues ten days (76 hours) of paid personal/carer's leave. If he is sick and takes leave for a day, he will be entitled to be paid for the number of ordinary hours he was rostered to work on that day (but not for any additional overtime hours that he was to work).

If an employee changes the basis of their employment (e.g., if the employee changes from a full-time employee to a part-time employee), they would not lose accrued leave, although the future rate of accrual will be different (based on the employee's new ordinary hours of work).

Clause 100 – Paid personal/carer's leave must not be cashed out except in accordance with permitted cashing out terms

397. Clause 100 makes clear that paid personal/carer's leave may only be cashed out in accordance with the terms included in a modern award or enterprise agreement under clause 101. If a modern award or enterprise agreement that applies to the employee does not include a cashing out provision for paid personal/carer's leave, the cashing out of this leave is not permitted.

Clause 101 – Modern awards and enterprise agreements may include terms relating to cashing out paid personal/carer's leave

398. Subclauses 101(1) and (2) permit a modern award or enterprise agreement to include terms providing for the cashing out of paid personal/carer's leave. To ensure that employees retain access to paid leave in the event of illness or injury, the cashing out terms in a modern award or enterprise agreement must require that:

- the employee retain a minimum balance of 15 days of paid personal/carer's leave after the cash out;
- each cashing out arrangement be a separate agreement in writing between the employer and the employee; and
- the employee receive at least the full amount that would have been payable had the employee taken the leave.

399. In essence, the requirement to retain a minimum balance of 15 days' leave means that the employee must retain the equivalent of three weeks' leave based on their ordinary hours. The effect of cashing out paid personal/carer's leave is that the payment the employee receives for cashing out the leave is in addition to the payment that the employee would be entitled to receive for working during the period covered by the cash out.

400. The general protections provisions in Part 3-1 of the Bill will also apply to entering into a cashing out arrangement under this clause (see, in particular, clause 344, which prohibits the exertion of undue influence or undue pressure on an employee to agree to cash out the leave).

Subdivision B – Unpaid carer's leave

401. The unpaid carer's leave provisions in this subdivision apply to all employees, including casual employees.

Clause 102 – Entitlement to unpaid carer's leave

402. Clause 102 entitles an employee to 2 days of unpaid carer's leave for each occasion when a member of the employee's immediate family or household requires care or support because of a personal illness, personal injury or unexpected emergency, affecting the family or household member.

Clause 103 – Taking unpaid carer's leave

403. Subclause 103(1) enables an employee to take unpaid carer's leave to provide the care and support referred to in clause 102.

404. The leave may be taken as a single period of up to 2 days or separate periods agreed between the employer and employee (subclause 103(2)), but the employee cannot take unpaid carer's leave if the employee could have taken paid personal/carer's leave instead (subclause 103(3)).

405. The legislative note that follows this clause is a reminder of the need to comply with the notice and evidence requirements set out in clause 107 to be entitled to take unpaid personal/carer's leave.

Subdivision C – Compassionate leave

406. The compassionate leave provisions in this Subdivision apply to all employees, including casual employees. However, the entitlement to payment does not apply to casual employees; for such employees the entitlement is unpaid.

Clause 104 – Entitlement to compassionate leave

407. Clause 104 entitles an employee to 2 days of compassionate leave for each occasion when a member of the employee's immediate family or a member of the employee's household:

- contracts or develops a personal illness or sustains a personal injury that poses a serious threat to the member's life; or
- dies.

Clause 105 – Taking compassionate leave

408. Subclause 105(1) enables an employee to take leave:

- to spend time with the member of their immediate family or household who has contracted the serious illness or sustained the serious injury; or
- following the death of a member of the employee's immediate family or household.

409. The leave may be taken as a single, continuous period of 2 days, or 2 separate periods of 1 day each, or any separate periods agreed between the employer and employee (subclause 105(2)).

410. Subclause 105(3) provides that if the permissible occasion for taking compassionate leave is the contraction or development of a personal illness, or the sustaining of a personal injury, the employee may take the compassionate leave entitlement for that occasion at any time while the illness or injury persists.

411. The legislative note that follows this clause is a reminder of the need to comply with the notice and evidence requirements set out in clause 107 to be entitled to take compassionate leave.

Clause 106 – Payment for compassionate leave (other than for casual employees)

412. Clause 106 entitles an employee, other than a casual employee, to receive his or her base rate of pay for ordinary hours of work during a period of compassionate leave.

Subdivision D – Notice and evidence requirements

Clause 107 – Notice and evidence requirements

413. Subclause 107(1) requires an employee to give his or her employer notice of the taking of paid personal/carer's leave, unpaid carer's leave or compassionate leave.

414. The notice must be given as soon as practicable (which may be a time after the leave has started) and must identify the period, or expected period, of the leave (subclause 107(2)).

415. Subclause 107(3) enables an employer to require an employee who has given notice to provide evidence that would satisfy a reasonable person that the employee is entitled to the leave. The types of evidence commonly requested include a medical certificate or statutory declaration. It may not be reasonable on every occasion of personal illness for an employer to require an employee to provide a medical certificate. However, in cases of an absence extending beyond a short period or repeated absences on particular days (e.g., before or after a weekend or public holiday), it may be reasonable for an employer to request a medical certificate in support of the employee's request for leave.

416. An employee who has not complied with the notice and evidence requirements is not entitled to take the leave (subclause 107(4)).

417. Subclause 107(5) allows a modern award or enterprise agreement to include terms relating to the kind of evidence that an employee must provide in order to be entitled to leave under this Division.

Illustrative example

Brenda and her de facto partner Gladys are employed by companies in Wollongong, NSW. Brenda works full-time and Gladys is a casual employee.

Brenda learns in April that her grandmother, Bonnie, who lives in Adelaide, has been diagnosed with a terminal illness. The treating doctor has advised that Bonnie faces a sharp deterioration in her psychological well-being without strong family support. Brenda and Gladys visit Bonnie in June and November, missing five days of work on each occasion and attend the funeral in December.

Is there an entitlement to paid personal/carer's leave?

Brenda would be entitled to paid personal/carer's leave for both the June and November visits to Bonnie, as the leave is being taken to provide care and support to a member of her immediate family who requires care and support because of an illness.

Brenda may be required to provide evidence that would satisfy a reasonable person that Bonnie, as a member of her immediate family, required Brenda's care and support. This might be evidenced in, e.g., a statutory declaration by Brenda or a letter from a family member confirming that the visits would provide necessary support.

Gladys is a casual employee and is not entitled to take paid personal/carer's leave.

Is there an entitlement to unpaid carer's leave?

Gladys may have access to unpaid carer's leave as Bonnie is member of her immediate family (as the grandmother of her de facto partner). Whether she would be entitled to leave would depend on whether the leave would be for the purpose of providing care or support.

Is there an entitlement to compassionate leave?

Because Bonnie is a member of both Brenda and Gladys' immediate family and developed a terminal illness before passing away, there are two permissible occasions for taking compassionate leave. Subject to notice and evidence requirements, Brenda and Gladys could take two days of compassionate leave over the course of their June and November visits and a further two days after Bonnie passes away. Brenda's compassionate leave would be paid and Gladys' (as a casual employee) would be unpaid.

Division 8 – Community service leave

418. Division 8 provides minimum safety net entitlements to community service leave for employees, including casual employees.

Clause 108 – Entitlement to be absent from employment for engaging in eligible community service activity

419. Clause 108 entitles an employee who is engaged in an eligible community service activity to be absent from his or her employment if:

- the absence is limited to the time that the employee is engaged in the activity, reasonable travelling time associated with the activity and reasonable rest time immediately following the activity; and
- the absence (other than absence on jury service) is reasonable in all the circumstances.

Clause 109 – Meaning of eligible community service activity

420. Subclause 109(1) defines an eligible community service activity as:

- jury service, including attendance for jury selection;
- voluntary emergency management activity (as defined by subclause 109(2)); or
- an activity prescribed in the regulations.

421. Subclauses 109(2) and (3) define relevant terms.

422. Subclause 109(4) allows regulations to prescribe an activity that is of a community service nature as an eligible community service activity.

Clause 110 – Notice and evidence requirements

423. Clause 110 requires an employee to comply with notice and evidence requirements before becoming entitled to take community service leave.

424. Subclause 110(1) requires an employee to give his or her employer notice of the taking of community service leave. An absence from work will not be covered by the community service leave provisions unless the employee has complied with the notice and evidence requirements (subclause 110(4)).

Notice must be given as soon as practicable (which may be a time after the leave has started) and advise of the period, or expected period, of the leave (subclause 110(2)).

425. An employer may require an employee who has given notice of taking community service leave to provide evidence that would satisfy a reasonable person that the employee is entitled to the leave (subclause 110(3)).

Clause 111 – Payment to employees (other than casuals) on jury service

426. Clause 111 sets out the manner and circumstances in which an employee, other than a casual employee, is entitled to be paid while absent for a period because of jury service.

Subclauses 111(2) to (5) set out an employee's qualified entitlement to be paid during the period of the employee's absence from work during a period of jury service.

427. An employer may require an employee to provide evidence of the steps taken by the employee to obtain any amount of jury service pay to which the employee is entitled and the employee is not entitled to be paid unless the evidence is provided.

428. If the evidence is provided, the amount payable to the employee for their absence is reduced by the amount of any payment received (or to be received) by the employee.

429. An employer's obligation to pay an employee is capped at ten days in total.

- This would mean that a full-time employee working Monday to Friday, would be entitled to be paid for the first two weeks of absence. In the case of a part-time employee working two days per week, the ten day cap would cover a five week absence.

430. An employee is entitled to be paid at their base rate of pay for ordinary hours of work for the relevant period.

431. Subclauses 111(6) and (7) define jury service pay (as excluding amounts in the nature of expense-related allowances) and jury service summons.

Illustrative example

Deborah is a part-time employee working four days a week in Sydney, NSW. Deborah's gross wage is $800 per week ($200 per day).

Deborah receives a summons to attend for jury service before the District Court of NSW. After being selected as a juror, Deborah is absent from work for four weeks.

Under the *Jury Act 1977* (NSW) and *Jury Regulation 2004* (NSW), Deborah is entitled to an attendance fee of $88.40 per day for the first week of jury service, rising to $102.60 per day for the second week and $119.70 per day for the third and fourth weeks.* Deborah is also entitled to a travelling allowance of up to $29.60 per day.*

Subclause 5(1A) of the Jury Regulation provides that the attendance fee is only payable to an employee if the employee's full wage or salary is reduced during the period of jury service and only to the extent of that reduction. Subclause 5(2) of the Jury Regulation requires Deborah to provide a statutory declaration when claiming the attendance fee. The statutory declaration must verify that Deborah was not paid a full wage or salary by her employer while attending for jury service.

Deborah's employer requires her to provide evidence that she has taken all necessary steps to obtain jury service pay and the amount paid or payable before she is paid.

Deborah submits a statutory declaration to the effect that she has not been paid a full wage or salary during the period of jury service and will be entitled to receive from that office the attendance fee prescribed in the Jury Regulation.

This evidence satisfies the employer of Deborah's entitlement.

The make up pay that the employer is required to provide is as follows:

Payment to be made by employer

- Week 1: $446.40, calculated as $800 (four days at $200 each) less jury allowance of $353.60 (four days' jury allowance of $88.40);
- Week 2: $389.60, calculated as $800 (four days at $200) less jury allowance of $410.40 (four days' jury allowance of $102.60);
- Week 3: $160.60, calculated as $400 (two days at $200) less jury allowance of $239.40 (two days'** jury allowance of $119.70); and
- Week 4: Nil.**

* These rates are sourced from Schedule 1 of the *Jury Regulation 2004* (NSW) and applicable as at 21 November 2008.

** Reduced entitlement in these two weeks because of the ten day cap.

Clause 112 – State and Territory laws that are not excluded

432. Subclause 112(1) states that State or Territory laws that provide employee entitlements in relation to engaging in eligible community service activities are not excluded and continue to apply to employers and their employees where they provide more beneficial employee entitlements than the entitlements under Division 8.

433. The intention of subclause 112(1) is to ensure the application of a State or Territory law to an employer and employee to the extent that it adds to employee entitlements provided under Division 8.

434. The legislative note under this clause provides an example of the intended operation of this clause by confirming that the Bill does not exclude a State or Territory law that entitles a casual employee to be paid jury service pay. Also, the intention is that State or Territory laws that entitle an employee to be paid when absent from work while engaging in a voluntary emergency management activity (the absence is unpaid under the NES) will continue to apply. Further, the intention is that a State or Territory law applies where it obliges an employer to provide payment to an employee during a period of jury service, in addition to jury service fees paid by a State or Territory government body, after the 10 day period referred to in subclause 111(5), if the employee's period of jury service is longer than ten days.

435. Subclause 112(2) enables the rule in subclause 112(1) to apply to any further community service activity prescribed in regulations made under subclause 109(4), subject to any contrary intention set out in the regulations.

Division 9 – Long service leave

436. This Division sets out the entitlement to long service leave for national system employees.

437. This entitlement is a transitional entitlement, pending development of a uniform, national long service leave standard with the States and Territories.

438. This Division preserves long service leave entitlements in pre-modernised awards (referred to as applicable award-derived long service leave terms).

439. If an employee does not have applicable award-derived long service leave terms, any entitlement to long service leave will be derived from State or Territory long service leave legislation (subject to its modification or exclusion by certain industrial instruments).

Clause 113 – Entitlement to long service leave

440. An employee is entitled to long service leave under this Division in accordance with applicable award-derived long service leave terms (subclause 113(1)).

441. This clause preserves the effect of long service leave terms in pre-modernised awards (i.e., awards as they stood immediately before commencement of the NES).

442. To determine whether there are applicable award-derived long service leave terms, it is necessary to consider the award that would have applied to the employee's current employment if the employee had been in that employment immediately before commencement (paragraph 113(3)(a)). (This applies to existing employees and new employees after commencement of the NES.)

443. In making this assessment, the effect of any pre-commencement workplace agreement, AWA or workplace determination that applies or applied to the employee is ignored (paragraph 113(3)(b)).

444. However, subclause 113(2) provides that an employee's award-derived entitlement will not apply if:

- a workplace agreement or AWA that came into operation before the commencement of the Bill continues to apply to the employee after commencement (whether or not that agreement deals with long service leave); or

- one of a number of listed industrial instruments that came into operation before commencement applies to the employee and expressly deals with long service leave.

445. The legislative note after this subclause makes clear if such an agreement or instrument ceases to apply, the employee will then be entitled to long service leave in accordance with any applicable award-derived long service leave terms.

446. If an employee does not have applicable award-derived long service leave terms, any entitlement to long service leave will be derived from State or Territory long service leave legislation (subject to its modification or exclusion by certain industrial instruments).

Division 10 – Public Holidays

447. This Division establishes an entitlement to be absent from work on a public holiday. The Division also allows an employer to request an employee to work on a public holiday where this is reasonable and entitles an employee to refuse to do so in certain circumstances.

Clause 114 – Entitlement to be absent from employment on public holiday

448. Subclause 114(1) entitles an employee to be absent from work on a day or part-day that is a public holiday where the employee is based for work purposes.

449. Under subclause 114(2), an employer may ask an employee to work on a public holiday, if the request is reasonable.

450. However, an employee may refuse a request to work on a public holiday if the request is not reasonable, or if the refusal is reasonable (subclause 114(3)).

451. Subclause 114(4) sets out a non-exhaustive list of matters to be taken into account when determining whether a request, or a refusal of a request, to work on a public holiday is reasonable. The factors to be taken into account are:

- the nature of the employee's workplace or enterprise (including its operational requirements) and the nature of the work performed by the employee;
- the employee's personal circumstances, including family responsibilities;
- whether the employee could reasonably expect that the employer might request work on the public holiday;
- whether the employee is entitled to overtime, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of, work on the public holiday;
- the type of employment of the employee (e.g., full-time, part-time, casual or shiftwork);
- the amount of notice in advance of the public holiday given by the employer when making the request;
- in relation to the refusal of a request – the amount of notice in advance of the public holiday given by the employee when refusing the request; and
- any other relevant matter.

452. The relevance of each of these factors and the weight to be given to each will vary according to the particular circumstances. In some cases, a single factor will be of great importance and outweigh all others, in others there will be a balancing exercise between factors.

453. For example, where an employee is employed in a workplace that requires a certain level of staffing on a public holiday (like a hospital) and has been given warning of the likelihood of being required to work on public holidays, a request by an employer to work may be considered reasonable.

454. On the other hand, a refusal by an employee of a request to work on a public holiday may be reasonable where, e.g., the employee has notified the employer in advance that she or he will not be able to work on the public holiday because of family commitments.

Clause 115 – Meaning of public holiday

455. Subclause 115(1) defines public holiday.

456. Eight common days are specifically named. Other days or part-days declared or prescribed by or under a law of a State or Territory to be observed generally, or within a region of that State or Territory, are also considered public holidays. Regulations may exclude a day or part-day (or a kind of day or part-day) from the definition of a public holiday.

457. Where a law of a State or Territory substitutes a day or part-day for a day or part-day that would otherwise be a public holiday, the substituted day or part-day is considered to be the public holiday for the purposes of the NES (subclause 115(2)). That is, where a day is substituted under State or Territory law, an employee is entitled to be absent on the substituted day instead of the original public holiday, not on both days and an employer will not be required to provide public holiday entitlements on 2 days in respect of the one holiday.

458. Subclause 115(3) permits a modern award or enterprise agreement to include terms providing for an employer and employee to agree on the substitution of a day or part-day for a day or part-day that would otherwise be a public holiday under subclauses 115(1) or (2). This means that a modern award or agreement cannot provide that a substitute day can be determined unilaterally by the employer.

459. Subclause 115(4) provides equivalent scope for the substitution of public holidays for employees who are not covered by an award or agreement. An award/agreement free employee may agree with their employer to substitute a day or part-day for a day or part-day that would otherwise be a public holiday under subclauses 115(1) or (2). The general protections set out in Part 3-1 of the Bill, in particular clause 344 which prohibits the exertion of undue influence and undue pressure, apply when an employer and employee enter into an agreement under this clause.

Clause 116 – Payment for absence on public holiday

460. Clause 116 entitles an employee to payment when absent from work on a public holiday. Where an employee is absent on a day or part-day that is a public holiday under this Division, the employer is liable to pay the employee at his or her base rate of pay for ordinary hours of work.

461. An employee is not entitled to any payment for absence on a public holiday if they would not ordinarily have worked on that day.

Illustrative example

Erika usually works overtime in addition to her ordinary hours of work on Tuesdays, receiving penalty rates for the overtime hours under a modern award. Erika is absent on the public holiday on Tuesday, 26 January 2010. Erika is entitled to her base rate of pay for her ordinary hours. She is not entitled to payment for the overtime hours she would have worked had it not been a public holiday.

Erika's colleague Toby is a part-time employee who is rostered to work Wednesday to Friday only. As Toby's ordinary hours of work do not include Tuesdays, Toby is not entitled to payment for the public holiday on 26 January 2010.

Another employee, Holger is on unpaid parental leave for the first half of 2010. Holger would not be entitled to payment for the public holiday on 26 January 2010.

Division 11 – Notice of termination and redundancy pay

462. This Division provides entitlements to notice of termination of employment and redundancy pay for national system employees.

Subdivision A – Notice of termination or payment in lieu of notice

463. This Subdivision provides an entitlement to notice upon termination of employment, or payment in lieu of that notice. (See, also, Part 6-3 which provides for the extended application of this entitlement to non-national system employees.)

Clause 117 – Requirement for notice of termination or payment in lieu

464. Subclause 117(1) specifies that an employer must not terminate the employment of an employee unless they have given the employee written notice of the day of termination. A legislative note refers to provisions in the *Acts Interpretation Act 1901* that explain that an employer may give notice to the employee by:

- delivering it personally;
- leaving it at the employee's last known address; or
- sending it by pre-paid post to the employee's last known address.

465. Subclause 117(2) provides that an employer must not terminate an employee's employment unless they have given the employee the necessary period of notice worked out under subclause 117(3), or they have paid the employee in lieu of that notice. If the employee is paid in lieu of notice, paragraph 117(2)(b) requires that the employee must be paid at least the amount the employee would have received had they continued in employment until the end of the required notice period. That is, the employee must be paid for hours they would have worked during that period, at their full rate of pay (as defined in clause 18).

466. The intention of paragraph 117(2)(b) is to impose on an employer that makes the payment in lieu of notice, an obligation to pay either to (or for the benefit of or on behalf of) the employee, everything which the employee would have been entitled to receive had the employee worked out the required period of notice. This would include superannuation contributions an employer would otherwise have been required to make, on behalf of an employee, to a superannuation fund: see *Furey v Civil Service Association of WA (Inc)* [1999] FCA 1492; 91 FCR 407. It would also include amounts payable to an employee that the employee has agreed, under a permissible salary sacrifice or other arrangement, to forgo in order to receive other benefits.

467. Subclause 117(3) outlines the amount of notice, or payment in lieu, that must be provided. This amount is based largely on the length of an employee's continuous service on the day notice is given:

- if not more than 1 year – 1 week;
- if more than 1 year, but not more than 3 years – 2 weeks;
- if more than 3 years, but not more than 5 years – 3 weeks; or
- if more than 5 years – 4 weeks.

468. In addition, an employee who is over 45 years old is entitled to an extra week's notice if they have at least two years' continuous service.

469. The amount of notice required by the NES reflects longstanding minimum standards.

Clause 118 – Modern awards and enterprise agreements may provide for notice of termination by employees

470. Clause 118 permits a modern award or enterprise agreement to include terms setting out the period of notice an employee must give in order to terminate his or her employment.

Subdivision B – Redundancy pay

471. This Subdivision sets out the circumstances in which an employee is entitled to redundancy pay upon termination of their employment.

Clause 119 – Redundancy pay

472. Subclause 119(1) entitles an employee to redundancy pay from their employer where employment is terminated:

- at the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone (except where this is due to the ordinary and customary turnover of labour); or
- because the employer is bankrupt or insolvent.

473. Subclause 119(2) specifies the scale of payment for redundancy pay that must be paid to an employee at their base rate of pay for ordinary hours of work. The scale is based on the length of an employee's continuous service on termination:

- at least 1 year, but less than 2 years – 4 weeks;
- at least 2 years, but less than 3 years – 6 weeks;
- at least 3 years, but less than 4 years – 7 weeks;
- at least 4 years, but less than 5 years – 8 weeks;
- at least 5 years, but less than 6 years – 10 weeks;
- at least 6 years, but less than 7 years – 11 weeks;
- at least 7 years, but less than 8 years – 13 weeks;
- at least 8 years, but less than 9 years – 14 weeks;
- at least 9 years, but less than 10 years – 16 weeks; or
- at least 10 years – 12 weeks.

Clause 120 – Variation of redundancy pay for other employment or incapacity to pay

474. This clause enables an employer to apply to FWA for a determination reducing the employer's liability to pay redundancy pay under clause 119 to a specified amount (that may be nil) if FWA considers it appropriate. The employer may apply for the determination if an employee is entitled to redundancy pay and the employer finds other acceptable employment for the employee, or cannot pay the amount (subclauses 120(1) and (2)). The reduced amount determined by FWA will become the amount of redundancy pay the employee is entitled to receive under clause 119 (subclause 120(3)).

Clause 121 – Exclusions from obligation to pay redundancy pay

475. Clause 121 provides that the entitlement to redundancy pay under clause 119 does not apply where immediately before the time of termination, or at the time when notice of termination was given as required by subclause 117(1) (whichever happened first):

- the employee's period of continuous service with the employer is less than 12 months (paragraph 121(a)); or
- the employer is a small business employer (paragraph 121(b)).

476. Small business employer is defined in clause 23 as an employer with fewer than 15 employees at the relevant time.

Clause 122 – Transfer of employment situations that affect the obligation to pay redundancy pay

477. Subclause 122(1) provides that subclause 22(5) (which provides for automatic recognition of service) does not apply in relation to redundancy pay where there is a transfer of employment between non-associated entities, if the second (new) employer decides not to recognise the employee's service with the first (old) employer.

478. The intention of this subclause is that an employee's service with the old employer does not have to be recognised by the new employer in relation to the employee's redundancy pay entitlements where there is a transfer of business between two non-associated employers.

479. If the new employer does not agree to recognise an employee's service in relation to redundancy pay, the old employer will be required to pay out that employee's redundancy pay.

480. Subclause 122(2) provides that if subclause 22(5) applies for the purposes of Subdivision B of this Division to a transfer of employment in relation to an employee, the employee is not entitled to redundancy pay under clause 119 in relation to the termination of their employment with the old employer.

481. A legislative note under subclause 122(2) indicates that subclause 22(5) generally provides that service with the old employer counts as service with the new employer on a transfer of employment.

482. Subclause 122(3) provides that an employee is not entitled to redundancy pay under clause 119 on the termination of their employment with an employer (the first employer) if the employee rejects an offer of employment made by another employer (the second employer) that:

- is on substantially similar (and overall no less favourable) terms and conditions as applied to the employee immediately before the termination;
- recognises the employee's service with the first employer for the purpose of the entitlement to redundancy pay; and
- had the employee accepted the offer, there would have been a transfer of employment in relation to the employee.

483. Where the second employer is willing to provide the transferring employees with similar and overall no less favourable employment and to recognise their previous service for redundancy pay purposes, this clause removes any entitlement to redundancy pay.

484. However, an employee not entitled to redundancy pay at the time of a transfer of employment due to the operation of subclause 122(3) would still remain entitled to redundancy pay if terminated by the second employer at a later date due to the employee's position being made redundant.

485. Subclause 122(4) enables FWA to make an order that the first employer pay the employee a specified amount of redundancy pay, if FWA is satisfied that it would be unfair to deny the employee a redundancy payment due to the operation of subclause 122(3). The specified amount must not exceed the amount that the employee would otherwise be entitled to under clause 119, but for the operation of subclause 122(3).

Subdivision C – Limits on scope of this Division

486. This Subdivision identifies the categories of employees not covered by the notice of termination and/or redundancy pay provisions in this Division.

Clause 123 – Limits on scope of this Division

487. Subclause 123(1) lists the categories of employees that are excluded from the entitlements to notice of termination of employment and redundancy pay set out in this Division. The following employees are excluded:

- an employee employed for a specified period of time, specified task, or for the duration of a specified season;
- an employee whose employment is terminated because of serious misconduct;
- a casual employee;
- an employee (other than an apprentice) to whom a training arrangement applies and whose employment is for a specified period of time or is limited to the duration of the training arrangement; and
- an employee prescribed by the regulations as an employee to whom this Division does not apply.

488. Subclause 123(2) is an 'anti-avoidance' provision. The subclause provides that an employee employed for a specified period of time, specified task, or for the duration of a specified season is not excluded if a substantial reason for employing the employee on that basis was to avoid the application of this Division.

489. Subclause 123(3) lists further categories of employees not covered by the notice of termination provisions in this Division. The employees not covered are:

- an employee who had not served the requisite qualifying period (12 months if the employer is a small business employer (as defined in clause 23) and six months otherwise);
- a daily hire employee working in the building and construction industry;
- a daily hire employee working in the meat industry in connection with the slaughter of livestock;
- a weekly hire employee working in connection with the meat industry and who is terminated solely as a result of seasonal factors; and
- an employee prescribed by the regulations as an employee to whom the notice of termination entitlement does not apply.

490. Subclause 123(4) lists further categories of employees not covered by the redundancy pay provisions in this Division. The employees not covered are:

- an apprentice;
- an employee to whom an industry-specific redundancy scheme in a modern award applies (see clause 141);
- an employee to whom a redundancy scheme in an enterprise agreement applies (if the scheme is an industry-specific redundancy scheme and is incorporated by reference into the enterprise agreement from a modern award); and
- an employee prescribed by the regulations as an employee to whom the redundancy pay entitlement does not apply.

491. An employee excluded from the entitlement to redundancy pay because they are covered by an industry-specific redundancy scheme would derive their entitlement to redundancy pay from the industry-specific redundancy scheme. Such a scheme is enforceable as a term of the award or agreement; it does not become a term of the NES.

Division 12 – Fair Work Information Statement

492. This Division establishes the entitlement to be provided with the Fair Work Information Statement upon commencement of employment and describes what the Statement must contain.

Clause 124 – FWA to determine and publish Fair Work Information Statement

493. Subclause 124(1) requires FWA to determine a Fair Work Information Statement and publish the Statement in the *Gazette*.

494. The Statement must contain information about:

- the NES;
- modern awards;
- agreement making under the Act;
- the right to freedom of association; and
- the role of FWA and the Fair Work Ombudsman (subclause 124(2)).

495. Subclause 124(3) authorises the making of regulations prescribing other matters relating to the content or form of the Statement, or the way in which employers can give the Statement to employees.

Clause 125 – Giving new employees the Fair Work Information Statement

496. An employer is required to give each employee the Fair Work Information Statement before, or as soon as practicable after, the employee starts employment, but need not give a particular employee the Statement more than once in any 12 month period where an employer employs an employee more than once in the 12 month period (e.g., a casual employee).

Division 13 – Miscellaneous

Clause 126 – Modern awards and enterprise agreements may provide for school-based apprentices and trainees to be paid loadings in lieu

497. Clause 126 permits a modern award or enterprise agreement to provide for school-based apprentices or school-based trainees to be paid loadings in lieu of any of the following:

- paid annual leave;
- paid personal/carer's leave; or
- paid absence under Division 10 (which deals with public holidays).

498. The legislative note under this clause highlights the effect clause 199 has on whether FWA may approve an enterprise agreement covering an employee who is a school-based apprentice or school-based trainee if the employee is to be paid in lieu for these entitlements.

The following terms are defined in clause 12:

- school-based apprentice means an employee who is an apprentice to whom a school-based training arrangement applies;
- school-based trainee means an employee (other than a school-based apprentice) to whom a school-based training arrangement applies; and

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

Clause 127 – Regulations about what modern awards and enterprise agreements can do

499. Clause 127 allows regulations to be made to permit modern awards or enterprise agreements or both to include terms that would, or might, otherwise be contrary to the NES. Clause 127 also permits regulations to be made to prohibit modern awards or enterprise agreements or both from including terms that would or might otherwise be permitted by the NES.

500. The interaction between the NES and modern awards and enterprise agreements more generally is dealt with by clause 55.

Clause 128 – Relationship between NES and agreements etc. permitted by this Part for award/agreement free employees

501. Provisions of the NES allow an employer and an award/agreement free employee (as defined in clause 12) to agree on certain matters. For example:

- under clause 94, an employer and an award/agreement free employee may agree to the employee cashing out a period of annual leave (subject to certain requirements being met); and

- under clause 115, an employer and an award/agreement free employee may agree to substitute a public holiday for another day.

502. Clause 94 also allows an employer to require an award/agreement free employee to take a period of annual leave, if the requirement is reasonable.

503. Clause 128 makes clear that the NES has effect subject to any agreement or requirement that is permitted by the terms of the NES itself or by regulations made under clause 129.

Clause 129 – Regulations about what can be agreed to etc. in relation to award/agreement free employees

504. Clause 129 allows regulations to be made to permit employers and award/agreement free employees (as defined in clause 12) to agree about matter that may otherwise be contrary to the NES.

505. Regulations can also be made to prohibit employers and award/agreement free employees from agreeing on matters, and to prohibit employers from making requirements, that would or might otherwise be permitted by the NES.

506. An equivalent regulation making power is provided in relation to the interaction of the NES with modern awards and enterprise agreements (clause 127).

Clause 130 – Restriction on taking or accruing leave or absence while receiving workers' compensation

507. An employee who is absent from work and in receipt of workers' compensation is not entitled to take or accrue any paid or unpaid leave or absence under the NES unless the taking or accruing of the leave is permitted by a Commonwealth, State or Territory law that provides for workers' compensation (subclauses 130(1) and (2)).

508. Subclause 130(3) ensures that the ability of an employee to take to take unpaid parental leave is not affected.

509. The effect of clause 130 is to 'switch-off' the leave accrual and taking rules in this Part for the period of the employee's absence from work in receipt of workers' compensation. It is not intended that the provisions of this clause impact on the calculation of an employee's service or continuous service under clause 22.

Clause 131 – Relationship with other Commonwealth laws

510. Clause 131 makes clear the intention that this Part establishes minimum standards that supplement and do not override entitlements under other Commonwealth laws.

511. For example, the unpaid parental leave provisions in Division 5 of Part 2-2 would not affect the entitlement to paid maternity leave under the *Maternity Leave (Commonwealth Employees) Act 1973*.

Part 2-3 – Modern awards

Overview

512. Part 2-3 provides for making, varying and revoking modern awards. Modern awards, together with the NES, provide a safety net of terms and conditions and the benchmark for collective bargaining for award covered employees.

513. Part 2-1 (Core Provisions for this Chapter) deals with the manner in which modern awards operate and how they give rise to rights and obligations.

Division 1 – Introduction

Clause 132 – Guide to this Part

514. This clause provides a guide to this Part.

Clause 133 – Meanings of *employee* and *employer*

515. In this Part, the terms employee and employer mean national system employee and national system employer respectively (as defined in clauses 13 and 14). The rights and obligations of employers and employees set out in this Part apply only to the employment relationships within the scope of the corporations and other constitutional powers that are engaged by clauses 13 and 14.

Division 2 – Overarching provisions

Clause 134 – The modern awards objective

516. Clause 134 sets out the modern awards objective and when the modern awards objective applies.

517. The modern awards objective requires FWA to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions, taking into account the following factors:

- relative living standards and the needs of the low paid;
- the need to encourage collective bargaining;
- the need to promote social inclusion through increased workforce participation;
- the need to promote flexible modern work practices and the efficient and productive performance of work;
- the principle of equal remuneration for work of equal or comparable value;

- the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden;

- the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

- the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

518. In ensuring that the minimum safety net of terms and conditions is relevant, it is anticipated that FWA will take account of changes in community standards and expectations, and that the terms and conditions will be tailored (as appropriate) to the specific industry or occupation covered by the award.

519. The modern awards objective applies to the exercise of FWA's functions and powers under this Part. The objective also applies when FWA exercises its powers or functions under Part 2-6 (which relates to minimum wages), to the extent that they relate to setting, varying or revoking modern award minimum wages (subclause 134(2)). The legislative note to this subclause points out that the minimum wages objective is also relevant when FWA is setting, varying or revoking modern award minimum wages. The minimum wages objective is described Part 2-6.

Clause 135 – Special provisions relating to modern award minimum wages

520. Subclause 135(1) sets out the specific circumstances in which modern award minimum wages can be varied under Part 2-3 (modern award minimum wages will generally only be varied in an annual wage review under Part 2-6). These circumstances are:

- in a 4 yearly review of modern awards, if FWA is satisfied that the variation is justified by work value reasons (see notes on subclause 156(3));

- outside a 4 yearly review if FWA is satisfied that the variation is justified by work value reasons and making the determination outside the system of annual wage reviews and 4 yearly reviews of modern awards is necessary to achieve the minimum wages objective (see notes on subclause 157(2)); or

- on referral by the HREOC, or to remove an ambiguity or uncertainty or to correct an error (see notes on clauses clause 160 and 161).

521. In exercising its powers under this Part to set, vary or revoke modern award minimum wages, FWA must take into account the rate of the national minimum wage in the national minimum wage order (subclause 135(2)).

Division 3 – Terms of modern awards

Subdivision A – Preliminary

Clause 136 – What can be included in modern awards?

522. Clause 136 sets out content rules for modern awards.

523. Subclause 136(1) provides that a modern award must only include terms that are permitted or required by:

- Subdivision B (which deals with terms that may be included in modern awards); or
- Subdivision C (which deals with terms that must be included in modern awards); or
- Part 2-2 (which deals with the NES); or
- clause 55 (which deals with the interaction between the NES and a modern award or enterprise agreement).

524. Subclause 136(2) provides that a modern award must not include terms that contravene:

- Subdivision D (which deals with terms that must not be included in modern awards); or
- clause 55 (which deals with the interaction between the NES and a modern award or enterprise agreement).

525. The provisions of clause 55 will have the following effect on the content of modern awards:

- a modern award must not exclude the NES or any provision of the NES (subclause 55(1)) – 'exclude' in this context means that a modern award cannot provide a lesser entitlement than is provided by the NES, or seek to remove an entitlement provided by the NES;
- a modern award may include any terms that it is expressly permitted to include under Part 2-2 (dealing with the NES) or regulations made pursuant to clause 127 (subclause 55(2)) – paragraph 127(a) will allow the regulations to permit terms of modern awards that would otherwise be contrary to Part 2-2;
- a modern award may include terms that are ancillary or incidental to the operation of an entitlement of an employee under the NES, but only if the effect of those terms is not detrimental to an employee in any respect when compared to the NES (paragraph 55(4)(a));
- a modern award may include terms that supplement the NES, but only if the effect of those terms is not detrimental to an employee in any respect when compared to the NES (paragraph 55(4)(b)).

Clause 137 – Terms that contravene clause 136 have no effect

526. Clause 137 provides that a term of a modern award has no effect to the extent that it contravenes clause 136. This would mean, for example, that a term of a modern award that excludes a term of the NES (by providing a lesser entitlement, or no entitlement) will be of no effect.

Clause 138 – Achieving the modern awards objective

527. Clause 138 provides that a modern award may include terms that it is permitted or required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective. That is, the scope and effect of permitted and mandatory terms of a modern award must be directed at achieving the modern awards objective of a fair and relevant safety net that accords with community standards and expectations.

Subdivision B – Terms that may be included in modern awards

528. Subdivision B sets out general and specific terms that may be included in modern awards.

Clause 139 – Terms that may be included in modern awards – general

529. Clause 139 sets out the kinds of terms that may be included in modern awards. These terms reflect those that the legislation instigating the award modernisation process permits modern awards to include (see section 576J of the WR Act). These terms are:

Minimum wages

530. Paragraph 139(1)(a) provides for minimum wages to be included in modern awards. This allows modern awards to include terms about minimum wages, including wage rates for junior employees, employees with a disability and employees to whom training arrangements apply. It would also allow modern awards to include terms about skill-based classifications and career structures, incentive-based payments, piece rates and bonuses.

Type of employment

531. Paragraph 139(1)(b) allows terms about type of employment to be included in modern awards. This includes terms about full-time employment, casual employment, regular part-time employment and shift work. This paragraph would also allow modern awards to include terms about the facilitation of flexible working arrangements, particularly for employees with family responsibilities.

Arrangements for when work is performed

532. Paragraph 139(1)(c) allows terms about arrangements for when work is performed to be included in modern awards. This would allow modern awards to include terms about hours of work, rostering, notice periods, rest breaks and variations to working hours.

Overtime rates

533. Paragraph 139(1)(d) provides that terms about overtime may be included in modern awards.

Penalty rates

534. Paragraph 139(1)(e) provides that terms about penalty rates may be included in modern awards, including penalty rates for any of the following:

- employees working unsocial, irregular or unpredictable hours;
- employees working weekends or public holidays;
- shift workers.

Annualised wage arrangements

535. Paragraph 139(1)(f) provides that annualised wage or salary arrangements may be included in modern awards provided these arrangements:

- take into account the pattern of work in an occupation, industry or enterprise;
- provide an alternative to the separate payment of wages or salaries, and other monetary entitlements; and
- include appropriate safeguards to ensure that individual employees are not disadvantaged.

Allowances

536. Paragraph 139(1)(g) provides for modern awards to include terms dealing with allowances, including allowances for:

- expenses incurred in the course of employment;
- responsibilities or skills that are not taken into account in rates of pay;
- disabilities associated with the performance of particular tasks or work in particular conditions or locations.

537. An example of an allowance that might be included in an award under this paragraph is accident make-up pay.

Leave, leave loadings and arrangements for taking leave

538. Paragraph 139(1)(h) provides that terms dealing with leave, leave loadings and arrangements for taking leave may be included in modern awards.

Superannuation

539. Paragraph 139(1)(i) provides that terms about superannuation may be included in modern awards.

Procedures for consultation, representation and dispute settlement

540. Paragraph 139(1)(j) provides that procedures for consultation, representation and dispute settlement may all be included in modern awards. Paragraph 139(1)(j) is in addition to clause 146 which requires a modern award to include a term for settling disputes about matters arising under the modern award or in relation to the NES.

541. Subclause 139(2) provides that any allowance included in a modern award must be separately and clearly identified in the modern award. This interacts with clause 149 that requires award terms providing certain allowances to also provide for the automatic variation of the allowance when wage rates in modern awards are varied.

Clause 140 – Outworker terms

542. Clause 140 permits a modern award to include terms that relate specifically to outworkers.

543. The term outworker is defined in clause 12. An employee is an outworker if the employee, for the purpose of the business of his or her employer, performs work at residential premises, or other premises that would not conventionally be regarded as business premises.

544. An individual who is not an employee may also be an outworker. An individual, who is not an employee, is an outworker if, for the purposes of a contract for the provision of services, they perform work in the textile, clothing or footwear industry at residential premises or at other premises that would not conventionally be regarded as business premises.

545. Outworker terms may relate to the conditions under which an employer may employ employee outworkers.

546. Outworker terms may also relate to the conditions under which an outworker entity may arrange for work to be performed for the entity (either directly or indirectly), if the work is, or is reasonably likely to be, performed by outworkers.

547. The term outworker entity is defined in clause 12 to mean any of the following entities, other than in the entity's capacity as a national system employer:

- a constitutional corporation;
- the Commonwealth;
- a Commonwealth authority;
- a body corporate incorporated in a Territory;

- a person who carries on an activity (whether of a commercial, governmental or other nature) in a Territory in Australia, in connection with the activity carried on in the Territory.

548. Outworker terms may include, but are not limited to, terms relating to pay and conditions of outworkers. Clause 140 is intended to give FWA broad scope to include terms in modern awards dealing with outworkers. In particular, it will allow terms dealing with chain of contract arrangements, registration of employers, employer record keeping and inspection to be included in modern awards.

549. Clause 140 is broader than section 576K of the WR Act and ensures that a modern award may include outworker terms relating to work that is, or is reasonably likely to be, performed by outworkers (paragraph 140(1)(b)). This is intended to make it clear that an outworker entity does not need to be aware that an outworker will perform work at the time of arranging for work to be undertaken in order for outworker terms to apply to that entity.

550. The definition of outworker has also been expanded to cover a broader range of situations where an individual performs outwork in the textile, clothing or footwear industry. For example, it is designed to allow a modern award to deal with a situation where a contract is made with a company and an individual performs work in the capacity as a director of the company. The definition also applies to work performed at a broader range of premises.

Clause 141 – Industry-specific redundancy schemes

551. Clause 141 permits a modern award to include an industry-specific redundancy scheme in limited circumstances, and also provides rules about varying or omitting such a scheme. A legislative note reminds readers that an employee to whom an industry-specific redundancy scheme in a modern award applies is not entitled to redundancy entitlements under the NES.

552. Subclauses 141(1) and (2) allow a modern award to include an industry-specific redundancy scheme if the scheme was included in the modern award in the award modernisation process. The award modernisation request issued by the Minister for Education, Employment and Workplace Relations sets out the following factors relevant to whether such a scheme is included in a modern award:

- when considered in totality, whether the scheme is no less beneficial to employees in the industry than the redundancy provisions of the NES; and

- whether the scheme is an established feature of the industry.

553. FWA may also include an industry-specific scheme in a modern award where it makes or varies another modern award so that it covers employees who were previously covered by a modern award that included such a scheme. In such a situation, FWA must ensure that the coverage of the scheme is not extended to classes of employees that it did not previously cover.

554. The intention is that the industry specific nature of such a scheme should be retained if it is to remain in a modern award. This is because industry-specific schemes, developed with the needs of employees and employers in the particular industry in mind, operate to the exclusion of

the general redundancy entitlements in the NES. If such a scheme no longer meets industry specific needs, the NES should apply.

555. Subclauses 141(3) and (4) set out the limited ways in which an industry-specific redundancy scheme may be varied – i.e., to vary the amount of redundancy payment in the scheme, or in the limited circumstances permitted by Subdivision B of Division 5 (e.g., to remove an ambiguity).

556. In varying an industry-specific redundancy scheme, FWA must retain the industry-specific character of the scheme.

557. FWA may also omit an industry-specific redundancy scheme (subclause 141(5)).

558. In addition to industry specific-schemes dealt with by clause 141, a modern award may also deal with redundancy by including terms that supplement the NES (see paragraph 55(4)(b)).

Clause 142 – Incidental and machinery terms

559. Clause 142 permits a modern award to include incidental or machinery terms.

560. Subclause 142(1) provides that a modern award may include terms that are incidental to a term that is permitted or required to be in the modern award and essential for the purpose of making a particular term operate in a practical way.

561. Subclause 142(2) provides that a modern award may include machinery terms, including formal matters (such as a title, date or table of contents).

Subdivision C – Terms that must be included in modern awards

562. This Subdivision sets out mandatory content for modern awards.

Clause 143 – Coverage terms

563. Clause 143 sets out requirements for a modern award to contain coverage terms.

564. The Bill distinguishes between an award 'covering' a person and an award 'applying' to a person. This is explained in Part 2-1 (Core Provisions for this Chapter).

565. FWA is required to include in a modern award terms that clearly identify the persons and bodies that are covered by the award (subclause 143(1)).

566. A modern award must be expressed to cover specified employers and specified employees of those employers (subclause 143(2)).

567. A modern award may provide for an organisation to be covered in relation to some or all employees or employers covered by the award (subclause 143(3)).

568. A modern award may cover specified outworker entities but only in relation to the outworker terms included in the award (subclause 143(4)).

569. Subclauses 143(5) and (6) set out the manner in which the employers, employees, organisations and outworker entities covered by a modern award may be described. A modern award must not be expressed to cover classes of employees who, because of the nature or seniority of their role, have traditionally not been covered by awards (whether made under laws of the Commonwealth or the States) or who perform work that is not of a similar nature to work that has traditionally been regulated by such awards (subclause 143(7)).

Clause 144 – Flexibility terms

570. Clause 144 requires a modern award to include a flexibility term. A flexibility term is a term that enables an employee and his or her employer to agree on an individual flexibility arrangement that will vary the operation of the award to meet the genuine needs of the employee and the employer. For example, an individual flexibility arrangement might provide for varied working hours to allow parents or guardians to drop off or pick up children from school where this suited the business needs of the employer.

571. Subclause 144(1) requires a flexibility term to be included in each modern award.

572. Subclause 144(2) provides that if an employee and employer agree to an individual flexibility arrangement under a flexibility term in a modern award:

- the modern award has effect in relation to the employee and the employer as if it were varied by the flexibility arrangement; and
- the arrangement is taken, for the purposes of the Act, to be a term of the modern award (this means that an individual flexibility arrangement is enforceable as a term of the award).

573. Subclause 144(3) clarifies that an individual flexibility arrangement between an employer and a particular employee does not change the effect the modern award has in relation to any other employee of the employer.

574. Subclause 144(4) provides that the flexibility term in a modern award must:

- identify the terms of the modern award the effect of which may be varied by an individual flexibility arrangement;
- require that the employee and the employer genuinely agree to any individual flexibility arrangement;
- require the employer to ensure that any individual flexibility arrangement must result in the employee being better off overall than the employee would have been if no individual flexibility arrangement were agreed to;
- set out how any flexibility arrangement may be terminated by the employee or the employer;

- require the employer to ensure that any individual flexibility arrangement must be in writing and signed by the employee and the employer and (if the employee is under 18) by a parent or guardian of the employee; and

- require the employer to ensure that a copy of any individual flexibility arrangement is given to the employee.

575. A flexibility term must not require that any individual flexibility arrangement be approved, or consented to, by another person (e.g., the flexibility term could not require any individual flexibility agreement to be approved by a trade union or employer association) (subclause 144(5)). This subclause operates subject to subparagraph (4)(e)(ii) which requires a flexibility arrangement to be signed by a parent or guardian of an employee who is under 18.

Clause 145 – Effect of individual flexibility arrangement that does not meet requirements of flexibility term

576. Clause 145 deals with the situation where an individual flexibility arrangement does not meet a requirement of clause 144. In this situation, the arrangement still has effect as if it were an individual flexibility arrangement.

577. Where an employer is required to ensure that a requirement for a flexibility term in subclause 144(4) is met (such as ensuring that the employee is better off overall), failure to do so is a contravention of the flexibility term of the award (subclause 145(3)). A contravention of a term of a modern award is a civil remedy provision (clause 45) and may be enforced under Part 4-1 (Civil remedies).

578. Subclause 145(4) enables the individual flexibility arrangement to be terminated. The subclause allows an arrangement to be terminated by either the employer or employee giving not more than 28 days written notice. It also allows an arrangement to be terminated at any time if the employer and employee agree in writing to the termination.

Clause 146 – Terms about settling disputes

579. Clause 146 requires a modern award to include a term for settling disputes about any matters arising under the modern award and in relation to the NES. (Under Part 6-2, FWA is not able to deal with disputes about whether an employer had reasonable business grounds for refusing certain requests under the NES).

580. Clause 146 does not limit paragraph 139(1)(j) which permits a modern award to contain procedures for consultation, representation and dispute settlement.

Clause 147 – Ordinary hours of work

581. Clause 147 requires a modern award to specify or provide for the determination of the ordinary hours of work for each classification of employee covered by the modern award and each type of employment permitted by the modern award.

582. This is necessary because many of the entitlements (such as paid annual leave) under the NES are calculated on the basis of an employee's ordinary hours of work.

Clause 148 – Base and full rates of pay for pieceworkers

583. Clause 148 only applies if a modern award defines or describes employees covered by the award as pieceworkers. In such a case, the modern award must include terms specifying, or providing for the determination of, base and full rates of pay for those employees for the purposes of the NES. This is relevant to calculating a pieceworker's entitlements (e.g., to paid annual leave) under the NES.

Clause 149 – Automatic variation of allowances

584. Clause 149 requires a modern award to include terms providing for the automatic variation of any allowances that FWA considers are of a kind that should be varied when wage rates in the modern award are varied. The intention is to ensure variation of such allowances automatically occurs as a result of an annual wage review that varies minimum wages, and is not limited to 4 yearly reviews.

Subdivision D – Terms that must not be included in modern awards

585. Subdivision D prohibits a modern award from containing certain specified terms – including discriminatory terms and terms that contain State based differences.

Clause 150 – Objectionable terms

586. Clause 150 prohibits a modern award from including an objectionable term. An objectionable term is defined in clause 12 to include terms that require or permit a breach of the general protections under Part 3-1 or payment of a bargaining services fee.

Clause 151 – Terms about payments and deductions for benefit of employer

587. Clause 151 prohibits a modern award from including a term that is of no effect because:

- the term includes unreasonable payments and deductions for the benefit of an employer (subclause 326(1)); or
- the term relates to unreasonable requirements in relation to how employees spend their wages or other amounts (subclause 326(3)).

588. Although such terms are of no effect, this clause ensures that such terms are not included in awards, as their inclusion (even though inoperative) could be confusing and create uncertainty.

Clause 152 – Terms about right of entry

589. Clause 152 prohibits a modern award from including terms that require or authorise an official of an organisation to enter premises to hold discussions with, or interview, an employee or to inspect any work, process or object.

590. Right of entry for these purposes is provided by Part 3-4.

Clause 153 – Terms that are discriminatory

591. Clause 153 prohibits a modern award from including certain discriminatory terms.

592. Subclause 153(1) prohibits modern award terms that discriminate against an employee because of, or for reasons including, the employee's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

593. However, subclause 153(2) provides that a term of a modern award does not discriminate against an employee:

- if the reason for the discrimination is the inherent requirements of the particular position held by the employee; or

- merely because it discriminates, in relation to employment of the employee as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, in good faith and to avoid injury to the religious susceptibilities of adherents of that religion or creed.

594. Subclause 153(3) provides that a term of a modern award does not discriminate against an employee because the term provides a minimum wage for all (or a class of) junior employees, employees with a disability or employees to whom training arrangements apply.

Clause 154 – Terms that contain State-based differences

595. Clause 154 prohibits a modern award from containing State-based difference terms; that is, terms that:

- are determined by reference to State or Territory boundaries; or

- are not capable of having effect in each State and Territory.

596. However, clause 154 allows a modern award to contain State-based difference terms for up to five years from award modernisation, to allow for the orderly phasing out of such arrangements (subclauses 154(2) and (3)).

597. It is not intended that clause 154 would prohibit modern awards including terms that have differing practical operation in different States and Territories, provided that they are capable of applying in each State or Territory. For example, a modern award could contain a provision that allowed for the payment of a remote location allowance or tropical allowance to address a particular degree of remoteness or particular climatic conditions.

Clause 155 – Terms dealing with long service leave

598. Clause 155 prevents a modern award from including terms dealing with long service leave. This clause is not intended to prevent terms that have an incidental effect on long service leave entitlements – such as a term that states whether a particular type of leave counts as service.

599. This prohibition anticipates the development of a national long service leave entitlement under the NES. This ensures that modern awards do not pre-empt the outcome of the development of a national standard.

Division 4 – 4 yearly reviews of modern awards

Clause 156 – 4 yearly review of modern awards to be conducted

600. Clause 156 establishes a system of 4 yearly reviews of modern awards. These reviews are the principal way in which a modern award is maintained as a fair and relevant safety net of terms and conditions.

601. FWA must conduct a 4 yearly review of modern awards starting as soon as practicable after each 4 year anniversary of the commencement of the award provisions (subclause 156(1)).

602. The modern awards objective and (where relevant) the minimum wages objective apply to the conduct of such reviews.

603. A 4 yearly review must be conducted by one or more Full Benches of FWA (clause 616). However, the process for conducting 4 yearly reviews is largely left to the discretion of the President of FWA – who may issue directions about the conduct of such reviews under clause 582.

604. FWA must review all modern awards as part of the 4 yearly reviews of modern awards and may vary, make or revoke modern awards during this process (subclause 156(2)). Special criteria apply to changing coverage of modern awards or revoking modern awards. These criteria are set out in clause 163 and clause 164.

605. Subclause 156(3) ensures that FWA may only vary wages as part of a 4 yearly review where it is satisfied that the variation of minimum award wages is justified by work value reasons. The annual wage review is the main way in which wages will be set and varied by FWA. Variation of minimum award wages in a 4 yearly review for work value reasons is a limited exception to this approach.

606. The term work value reasons is defined in subclause 156(4) as reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:

- the nature of the work;
- the level of skill or responsibility involved in doing the work;
- the conditions under which the work is done.

607. This limitation does not apply to setting new rates (e.g., including new classifications, and associated minimum wage arrangements for junior employees).

608. In conducting a 4 yearly review, FWA must ensure that each modern award is reviewed in its own right. This does not prevent FWA reviewing two or more modern awards at the same time, as long each modern award is reviewed in its own right (subclause 156(5)).

Division 5 – Exercising modern award powers outside 4 yearly reviews and annual wage reviews

609. Division 5 sets out limited circumstances in which modern awards may be made, varied or revoked outside the system of annual wage and 4 yearly modern award reviews.

Subdivision A – Exercise of powers if necessary to achieve modern awards objective

Clause 157 – FWA may vary etc. modern awards if necessary to achieve modern awards objective

610. Clause 157 provides FWA with the power to vary modern awards outside the system of 4 yearly reviews in limited circumstances.

611. FWA may vary a modern award (other than in relation to modern award minimum wages), make a modern award or revoke a modern award outside the 4 yearly reviews if it is satisfied that to do so is necessary to achieve the modern awards objective (subclause 157(1)).

612. The modern awards objective requires FWA to take account of a number of matters, including the need to ensure a stable modern award system. It is intended that in deciding whether to vary, make or revoke a modern award outside the 4 yearly reviews, FWA will balance the considerations contained in the modern awards objective to determine whether it is necessary to exercise the power outside the system of 4 yearly reviews.

613. FWA may also vary modern award minimum wages outside the system of 4 yearly reviews, where it is satisfied that:

- the variation is justified by work value reasons (that is, by reasons justifying the amount that employees should be paid for doing a particular kind of work relating to: the nature of the work; the level of skill or responsibility involved in doing the work; or the conditions under which the work is done); and
- making the variation outside the 4 yearly reviews is necessary to achieve the modern awards objective (subclause 157(2)).

614. FWA may make, vary or revoke a modern award under clause 157 either on its own initiative or as a result of an application (subclause 157(3)).

Clause 158 – Applications

615. Clause 158 sets out the persons who may apply to FWA to exercise its power to make, vary or revoke a modern award under clause 157. An applicant may apply for two or more related things at the same time (e.g., the making of a modern award and the related revocation of an existing modern award).

Subdivision B – Other situations

616. Subdivision B sets out other circumstances in which FWA may vary a modern award outside the system of 4 yearly and annual wage reviews.

Clause 159 – Variation of modern award to update or omit name of employer, organisation or outworker entity

617. Clause 159 allows FWA to vary a modern award to update or remove the name of an employer, outworker entity or organisation.

Clause 160 – Variation of modern award to remove ambiguity or uncertainty or correct error

618. Clause 160 allows FWA to make a determination varying a modern award to remove an ambiguity or uncertainty or to correct an error. FWA may make the determination at its own initiative or on application by an employer, employee, organisation or outworker entity that is covered by the modern award. Clauses 165 and 166 set out when a determination comes into operation. Clause 167 sets out special rules relating to retrospective variations of awards.

Clause 161 – Variation of modern award on referral by HREOC

619. Clause 161 requires FWA to review a modern award referred to it under section 46PW of the *Human Rights and Equal Opportunity Commission Act* 1986 (which deals with discriminatory industrial instruments).

620. FWA must make a determination varying the modern award if it considers that the award requires a person to do an act that would be unlawful under Part II of the *Sex Discrimination Act 1984* (but for the fact that the act would be done in direct compliance with the modern award). The legislative note refers to special criteria applying to changing coverage of modern awards set out in clause 163.

Division 6 – General provisions relating to modern award powers

Clause 162 – General

621. Clause 162 explains that Division 6 contains some specific provisions about the exercise of modern award powers. The clause notes that Part 5-1 (Fair Work Australia) also contains general provisions about the exercise of modern award powers. These include:

- the power of the President to issue directions (clause 582); and
- the manner in which FWA may inform itself (clause 590).

Clause 163 – Special criteria relating to changing coverage of modern awards

622. Clause 163 contains a number of specific criteria that apply to FWA decisions about changing the coverage of modern awards.

623. Subclause 163(1) provides that FWA must not vary a modern award to restrict coverage unless it is satisfied that the relevant employers or employees will instead become covered by another modern award (other than the miscellaneous modern award) that is appropriate to them. This requirement, together with the modern awards objective, is designed to ensure that when considering a change in award coverage, FWA considers whether the content of the new award is an appropriate safety net for the employers and employees that would become covered by it.

624. Subclause 163(2) relates to FWA decisions about whether to make a new modern award. This subclause requires FWA to consider whether it could vary an existing modern award to cover certain employers or employees before making a new modern award. It is intended that FWA should vary an existing award to cover certain employers or employees, rather than make a new award, if it is appropriate to do so. This is designed to limit the proliferation of new awards, by ensuring that making a new award occurs only where variation of coverage of an existing award is not appropriate.

625. Subclause 163(3) prohibits FWA from making or varying a modern award to cover an organisation unless the organisation is entitled to represent the industrial interests of one or more employers or employees who are or will be covered by the modern award.

Clause 164 – Special criteria for revoking modern awards

626. Clause 164 deals with when FWA may revoke a modern award. This clause provides that FWA must not revoke a modern award unless it is satisfied that:

- the modern award is obsolete or no longer capable of operating; or
- all the employees covered by the modern award are covered by a different modern award (other than the miscellaneous modern award) that is appropriate to them, or will be so covered when the revocation comes into operation.

627. An award may become obsolete by the making of a new modern award. In such cases it is envisaged that commencement of the new award and revocation of the existing award would be co-ordinated to ensure no gap in award coverage.

Clause 165 – When variation determinations come into operation, other than determinations setting, varying or revoking modern award minimum wages

628. Clause 165 provides rules for working out when a determination comes into operation. These rules do not relate to determinations setting, varying or revoking modern award minimum wages (commencement of these determinations is dealt with by clause 166).

629. A determination that varies a modern award, other than in relation to modern award wages, will come into operation on the day specified in the determination (subclause 165(1)). This day will almost always be on or after the day that the determination is made. FWA may only vary an award retrospectively in very limited circumstances, where:

- the determination relates to a variation to remove an ambiguity or uncertainty, or to correct an error; and

- FWA is satisfied that there are exceptional circumstances that justify doing so (subclause 165(2)).

630. A determination takes effect in relation to a particular employee at the start of the employee's next full pay period (subclause 165(3)).

Clause 166 – When variation determinations setting, varying or revoking modern award minimum wages come into operation

631. Clause 166 provides for when determinations setting, varying or revoking modern award minimum wages come into operation. (These rules apply to determinations made under this Part. Wage variations flowing from annual wage reviews commence in accordance with rules in Part 2-6.)

632. A determination affecting modern award minimum wages will generally come into operation on 1 July in the next financial year, or on the day it is made if made on 1 July (clause 166(1)). This is consistent with the commencement of wage variations from annual wage reviews, and is designed to ensure certainty and predictability for employers and employees (see clause 286).

633. However, if FWA is satisfied that it is appropriate to do so it may specify another day on which the determination comes into operation (clause 166(2)).

634. This day will almost always be on or after the day that the determination is made. FWA may only vary an award retrospectively in very limited circumstances, where:

- the determination relates to a variation to remove an ambiguity or uncertainty, or to correct an error; and

- FWA is satisfied that there are exceptional circumstances that justify doing so (subclause 166(3)).

635. FWA may provide that changes to modern award minimum wages take effect in stages if it is satisfied that it is appropriate to do so (subclause 166(4)).

636. A determination setting, varying or revoking modern award minimum wages will generally take effect in relation to a particular employee at the start of the employee's next full pay period on or after the day that the determination comes into operation. However, where a determination is to take effect in stages, it will not take effect in relation to a particular employee until the start of the employee's next full pay period on or after the day that the change to modern award minimum wages is specified to take effect (subclause 166(5)).

Clause 167 – Special rules relating to retrospective variations of awards

637. Clause 167 ensures that a person who has contravened a term of award or an enterprise agreement due to a retrospective amendment of the award under subclause 165(2) or 166(3) is not liable to pay a pecuniary penalty in respect of the contravention.

638. A breach of an enterprise agreement may arise from variation of the award because of the requirement in clause 206 that the base rate of pay payable to an employee under an enterprise agreement must not be less than would be payable under an award that covers the employee.

Clause 168 – Varied modern award must be published

639. Clause 168 requires FWA to publish (on its website or otherwise) a varied modern award as soon as practicable.

Part 2-4 – Enterprise Agreements

Overview

640. Part 2-4 provides for the making of enterprise agreements through collective bargaining primarily at the enterprise level. It enables employers and employees, and their bargaining representatives, to bargain in good faith to make an enterprise agreement.

641. Employers and employees can make an enterprise agreement about permitted matters. Permitted matters include matters pertaining to the relationship between an employer and its employees, matters pertaining to the relationship between an employer and an employee organisation that will be covered by the agreement, deductions from wages and how the agreement operates.

Types of enterprise agreements

642. Enterprise agreements are collective agreements that will cover a group of employees. Part 2-4 provides for the making of two types of enterprise agreement – single-enterprise agreements and multi-enterprise agreements. A single-enterprise agreement or multi-enterprise agreement relating to a genuine new enterprise may also be a greenfields agreement.

643. The term 'proposed enterprise agreement' is a generic term that is used in Part 2-4 and in Part 3-3 (Industrial action) to describe 'an agreement' that is being negotiated with a view to being approved as an enterprise agreement (see the observations of French J in *Wesfarmers Premier Coal Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (No 2)* [2004] FCA 1737; 138 IR 362). A proposed agreement can be an idea, or it can be a series of claims on behalf of a group of employees whose bargaining representatives seek to negotiate with the employer with a view to it becoming an agreement that is ultimately approved by FWA.

Single-enterprise agreements

644. Single-enterprise agreements are made between a single employer, or two or more employers that are single interest employers, and a group of employees. Two or more employers can bargain together for a single-enterprise agreement if they are related bodies corporate, or they are engaged in a joint venture or common enterprise, or they are specified in a single interest employer authorisation (clause 248).

Multi-enterprise agreements

645. Multi-enterprise agreements are made between two or more employers and groups of their employees. Other than in the low-paid bargaining stream, employers must voluntarily agree to bargain together for a multi-enterprise agreement.

646. A special stream of bargaining for multi-enterprise agreements is available to enable low-paid employees who have not historically participated in enterprise level collective bargaining to make a multi-enterprise agreement. FWA can make low paid authorisations that allow access to this stream (clause 243). Low-paid authorisations enable employers and

employees to, among other things, seek assistance from FWA in order to bargain for a multi-enterprise agreement.

Greenfields agreements

647. Greenfields agreements are made between an employer or employers and an employee organisation or employee organisations. They must relate to a genuine new enterprise and be made before the employer or employers employ any of the persons who will be necessary for the normal conduct of the new enterprise.

Bargaining and representation during bargaining

648. Employers and employees are entitled to appoint any person as their bargaining representative for a proposed enterprise agreement. Employers are required to take all reasonable steps to notify each employee of their right to be represented during bargaining. The Bill provides a more significant formal role for bargaining representatives in the bargaining process compared to bargaining agents under the WR Act.

649. Bargaining representatives for a proposed enterprise agreement must meet the good faith bargaining requirements. A bargaining representative may apply to FWA for a bargaining order to ensure that the good faith bargaining requirements are being met and that bargaining is proceeding efficiently and fairly.

650. Failure to comply with a bargaining order exposes a bargaining representative to pecuniary penalties and other court orders. If the contravention is serious and sustained and significantly undermines the bargaining process, a bargaining representative may also apply to FWA for a serious breach declaration. The consequence of such a declaration is that FWA may make a bargaining-related workplace determination (see Part 2-5).

651. If an employer does not agree to bargain with its employees, a bargaining representative for an employee may apply to FWA for a majority support determination. If FWA determines that there is majority support among employees for collective bargaining, the employer is required to bargain. If the employer still refuses to bargain, the employee bargaining representative may seek a bargaining order to require the employer to meet the good faith bargaining requirements. Where there is a dispute about which classes or groups of employees will be covered by the proposed enterprise agreement, FWA has power to make scope orders. A scope order is available on application by a bargaining representative.

652. Bargaining representatives may also apply to FWA for assistance in dealing with a dispute about a proposed enterprise agreement.

Availability of protected industrial action and orders

653. One of the significant aspects of an enterprise agreement being of a particular type is the effect that this has on the availability of protected industrial action and orders that facilitate bargaining.

Type of enterprise agreement	Protected industrial action	Bargaining orders/Serious breach declaration	Majority support determination	Scope orders
Single-enterprise agreement with a single employer or two or more employers that are related bodies corporate, or engaged in a joint venture or common enterprise	✓	✓	✓	✓
Single-enterprise agreement with two or more employers that are specified in a single interest employer authorisation	✓	✓	✓	✗
Multi-enterprise agreement with two or more employers specified in a low-paid authorisation	✗	✓	✗	✗
Multi-enterprise agreement with two or more employers that are *not* specified in a low-paid authorisation	✗	✗	✗	✗

Approval and operation of enterprise agreements

654. An enterprise agreement that is not a greenfields agreement is made when it is approved by the employees of the employer or employers that will be covered by the agreement. A greenfields agreement is made when it is signed by each employer and each relevant employee organisation.

655. After an enterprise agreement has been made, a bargaining representative for that agreement must apply to FWA for approval of the agreement. FWA can approve an enterprise agreement if it is satisfied that all approval requirements are met. Among other things, the approval requirements will ensure that enterprise agreements do not undermine the guaranteed safety net of minimum terms and conditions set out in the NES and in modern awards. An enterprise agreement will only come into operation after it has been approved by FWA.

656. Employers and employees can agree to vary or terminate an enterprise agreement at any time. A variation or termination will come into operation when it is approved by FWA.

Division 1 – Introduction

Clause 169 – Guide to this Part

657. This clause provides a guide to this Part.

Clause 170 – Meaning of *employee* and *employer*

658. In this Part, the terms employee and employer mean national system employee and national system employer respectively (as defined in clauses 13 and 14). The rights and obligations of employers and employees set out in this Part apply only to the employment relationships within the scope of the corporations and other constitutional powers that are engaged by clauses 13 and 14.

Clause 171 – Objects of this Part

659. This clause sets out the objects of Part 2-4.

Division 2 – Employers and employees may make enterprise agreements

Clause 172 – Making an enterprise agreement

660. This clause provides for the making of enterprise agreements. Enterprise agreements can be made about 'permitted matters' (subclause 172(1)). The permitted matters are:

- matters pertaining to the relationship between an employer or employers and employees (paragraph 172(1)(a));
- matters pertaining to the relationship between an employer or employers and an employee organisation or employee organisations (paragraph 172(1)(b));
- deductions from wages authorised by an employee (paragraph 172(1)(c)); or
- how the agreement will operate (paragraph 172(1)(d)).

661. In *Electrolux Home Products Pty Limited v The Australian Workers' Union and others* (2004) 221 CLR 309 the High Court found, when considering a provision similar to clause 172(1), that industrial action could not be taken in support of claims that could not be validly included in an agreement under the WR Act as in force at the time.

662. After the High Court's decision, the AIRC carefully checked whether each term of an agreement pertained to the employment relationship in order to determine whether the application before it for certification of the agreement was valid.

663. To resolve any uncertainty following the High Court's decision, the Parliament enacted the *Workplace Relations Amendment (Agreement Validation) Act 2004* to ensure that agreements that contained non-pertaining terms were valid to the extent that they contained pertaining terms.

664. Clause 253 will have the effect that an agreement will still be valid even where it includes terms that are not about permitted matters. It is not intended that FWA will have to scrutinise each enterprise agreement to ensure that all its terms are about permitted matters as this would unduly delay the agreement approval process.

665. However, to the extent that a term of an enterprise agreement is not about permitted matters, the term will be of no effect.

666. It is intended that each substantive term of an enterprise agreement must be about one or more of the permitted matters in order for the agreement to be characterised as about permitted matters. This would not prevent an enterprise agreement from containing other, valid, terms where the term is ancillary or incidental to, or a machinery provision, relating to a permitted matter (*Electrolux* ibid. at [96]-[97], per McHugh J).

667. Whether an enterprise agreement is about permitted matters is also significant in the context of protected industrial action for the purpose of clause 409 (which deals with employee claim action). Employees and their bargaining representatives cannot organise or take protected industrial action in support of claims for a proposed enterprise agreement that will include terms that are not about permitted matters.

668. Paragraph 172(1)(a) refers to 'matters pertaining to the relationship between an employer that will be covered by the agreement and that employer's employees who will be covered by the agreement', referred to after this as 'matters pertaining to the employment relationship'.

669. The matters pertaining to the employment relationship formulation is of long standing. Under both the *Industrial Relations Act 1988* and the WR Act prior to 27 March 2006, collective agreements had to be about matters pertaining to the employment relationship. Since 27 March 2006, a term of a workplace agreement that was not about such matters was 'prohibited content'. Between 1904 and 2006, the formula was also used in the definition of 'industrial dispute' under successive Commonwealth industrial relations statutes.

670. Although the precise words used have changed from time to time, the courts have construed each manifestation of the formula in a similar way. There is substantial jurisprudence about what the phrase means. It is intended that paragraph 172(1)(a) should be read in line with that jurisprudence. The courts' interpretation of the formulation has evolved over time in line with changing community understandings and expectations about the kinds of matters that pertain to the employment relationship, and it is expected that this approach will continue.

671. Whether a particular term is about matters pertaining to the employment relationship will depend on its precise construction, as well as the circumstances surrounding the particular employment relationship. Frequently, it will be obvious that a term pertains to the employment relationship – e.g., a term about the payment of wages or a term about hours of work and shift patterns. However, there are some terms where it is not so immediately clear whether the terms

are about matters pertaining to the employment relationship (see, e.g., the discussion in *Re Schefenacker Vision Systems Australia Pty Ltd, AWU, AMWU Certified Agreement 2004* [2004] AIRC 1064.

672. It is intended that the following terms would be within the scope of permitted matters for the purpose of paragraph 172(1)(a):

- terms relating to particular staffing levels (subject to any other applicable legislative requirements or limitations) particularly if those terms are aimed at ensuring the health, safety and well-being of employees;

- terms relating to conditions or requirements about employing casual employees or engaging labour hire or contractors if those terms sufficiently relate to employees' job security – e.g. a term which provided that contractors must not be engaged on terms and conditions that would undercut the enterprise agreement;

- terms that would provide that casual employees are converted to permanent employees after a set period of time;

- terms that would prevent an employer from seeking a contribution or indemnity from an employee in respect of personal injuries or losses suffered by that person where such injuries or losses were cause by the employee in the course of their employment.

673. The following terms would not be intended to be within the scope of permitted matters for the purpose of paragraph 172(1)(a):

- terms that would contain a general prohibition on the employer engaging labour hire employees or contractors;

- terms that would contain a general prohibition on the employer employing casual employees;

- terms that would require an employer or employee covered by to the enterprise agreement to make a donation to a political party or charity;

- terms that would require an employer to source only products from a particular supplier or Australian made products (unless, e.g., such a term was directly related to employees' job security);

- terms that would require an employer to engage or not engage particular clients, customers or suppliers who had agreed to commit to certain employment, environmental or ethical standards (unless, e.g., such a terms was directly related to employees' health and safety);

- terms that relate to corporate social responsibility, e.g., terms requiring an employer to participate in charity events or commit to climate change initiatives.

674. The permitted matters in paragraph 172(1)(a) are focussed on the employment relationship. One effect of this is that terms that are about the relationship between an employer

and an employee organisation may not pertain to the employment relationship, even where the terms are closely associated with the organisation's representation of employees under the agreement.

675. Paragraph 172(1)(b) permits terms in agreements that are about matters pertaining to the relationship between the employer or employers, and the employee organisation or employee organisations that will be covered by the agreement. For an agreement term to fall within paragraph 172(1)(b), the term needs to relate to the employee organisation's legitimate role in representing the employees to be covered by the agreement.

676. The following terms are examples of those intended to fall within the scope of permitted matters for the purpose of paragraph 172(1)(b):

- terms relating to union training leave and leave for training conducted by a union;
- terms that provide for employees to have paid time off to attend union meetings or participate in union activities;
- terms that provide for union involvement in dispute settlement procedures;
- terms that allow unions to promote membership or have noticeboards in the workplace or otherwise provide information to employees;
- terms that require an employer to provide information to a union about employees who are covered by an enterprise agreement or information about a union to an employee;
- terms that provide for the union to attend the workplace for certain purposes such as dispute resolution or consultation meetings (subject to the rules governing unlawful content – clause 194).

677. The fact that a term falls with paragraph 172(1)(b) does not prevent it from also falling within the description in paragraph 172(1)(a).

678. Because of the way in which the relationship arises, there are limitations on the types of terms that would pertain to the relationship between an employer and an employee organisation. For example, a term granting a lease over property owned by the employer to the employee organisation would not be a term about a permitted matter because it would not concern the relationship between the employer as an employer and the employee organisation as a representative of the employees covered by the agreement.

679. Paragraph 172(1)(c) provides that agreements will be able to contain terms about deductions from wages provided that they are authorised by an employee. This would, for example, permit terms dealing with salary sacrifice, payments to superannuation or the deduction of union membership fees. This has been expressly included because courts have held that such terms may not be a permitted matter under paragraph 172(1)(a) – see *R v Portus; Ex parte ANZ Banking Group Ltd* (1972) 127 CLR 353 and *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96.

680. There are some other limits on terms about deductions from wages. For example, terms relating to bargaining agents fees are unlawful terms (see paragraph 194(b)) and terms that provide for unreasonable deductions from wages are of no effect (see Division 2 of Part 2-9).

681. Paragraph 172(1)(d) permits an agreement to contain terms about how the agreement operates. This could include, e.g., terms setting out how and when the negotiations for a replacement agreement will be conducted, about the nominal expiry date or terms specifying who the agreement will cover (subject to subclause 186(3)).

682. This clause also sets out the different types of enterprise agreements. There are two types of enterprise agreements – single-enterprise agreements and multi-enterprise agreements.

683. Enterprise agreements that are not greenfields agreements are made between employers and their employees. The use of the phrase 'employees who will be covered by the agreement' in clause 172 is intended to make clear that the employees covered by the agreement are not limited to those employees who were employed at the time the agreement was made. An agreement covers all employees whom it is expressed to cover (clause 53). This includes persons employed at the time the agreement was made and persons employed at a later time provided that they fall within a class or group of employees who are expressed to be covered by the agreement.

684. Subclause 172(2) describes a single-enterprise agreement. A single employer, or two or more employers that are single-interest employers, may make a single-enterprise agreement with their employees (paragraph 172(2)(a)) or, in the case of a greenfields single-enterprise agreement, with one or more relevant employee organisations (paragraph 172(2)(b)).

685. Paragraph 172(2)(a) provides for the making of a single-enterprise agreement with the employees employed at the time the agreement is made (see subclause182(1)) and who will be covered by the agreement.

686. Paragraph 172(2)(b) provides for the making of a single-enterprise agreement that is a greenfields agreement. An employer, or two or more employers that are single-interest employers, may make a single-enterprise agreement that is a greenfields agreement with one or more relevant employee organisations (see subclause 182(3)) if:

- the agreement relates to a genuine new enterprise that the employer or employers are establishing or propose to establish; and
- the employer or employers have not employed any of the persons who will be necessary for the normal conduct of that enterprise.

687. Subclause 172(3) describes the concept of a multi-enterprise agreement. This is an agreement with two or more employers that are not single interest employers and their employees or, in the case of a greenfields multi-enterprise agreement, with one or more relevant employee organisations.

688. Paragraph 172(3)(a) provides for the making of a multi-enterprise agreement with two or more employers and the employees employed at the time the agreement is made (see subclause 182(2)) and who will be covered by the agreement.

689. Paragraph 172(3)(b) provides for the making of a multi-enterprise agreement that is a greenfields agreement. A multi-enterprise agreement that is greenfields agreement cannot be made with two or more employers specified in a low-paid authorisation. This is because a greenfields agreement, by definition, cannot be made once the employers have employed any persons that will be necessary for the normal conduct of the enterprise.

690. Subclause 172(4) provides that a greenfields agreement is a single-enterprise agreement as referred to in paragraph 172(2)(b) or a multi-enterprise agreement as referred to in paragraph 172(3)(b). A greenfields agreement must be made with one or more relevant employee organisations. A relevant employee organisation is defined in Part 1-2 as an employee organisation that is entitled to represent the industrial interests of one or more employees who will be covered by the agreement, in relation to work to be performed under the agreement (see clause 12). A demarcation order may provide that an employee organisation is not entitled to represent the industrial interests of a particular class or group of employees, despite those employees being eligible to be members of that employee organisation.

691. A greenfields agreement must relate to a genuine new enterprise that the employer or employers are establishing or proposing to establish. The legislative notes following subclauses 172(2) and 172(3) make it clear that a genuine new enterprise includes a genuine new business, activity, project or undertaking. They do this by referring to clause 12 which defines an enterprise as a business, activity, project or undertaking. The definition of enterprise also permits an employer that is the Commonwealth, or a State or Territory, or one of its authorities, to make a greenfields agreement in relation to a genuine new activity that it proposes to undertake.

692. The use of the word ‘genuine’ in paragraphs 172(2)(b) and 172(3)(b) is intended to make it clear that the enterprise must be a new enterprise rather than an existing enterprise that the employer or employers acquire, or propose to acquire, as a going concern (see the decision of the AIRC in *Re Patrick Cargo Pty Limited Certified Agreement 2002* (2002) 115 IR 443). In other words, a genuine new enterprise is not an enterprise that has been previously carried out by another employer. For example, a supermarket operator could not make a greenfields agreement if it acquired a chain of liquor stores in a transfer of business situation. Similarly, a new employer cannot make a greenfields agreement where it acquires or proposes to acquire an enterprise that has previously been conducted by another employer.

693. The nature of the genuine new enterprise may nonetheless be the same or similar to the employer’s existing enterprise, particularly in the case of a new project. For example, an existing employer in the construction industry could make a greenfields agreement in relation to a genuine new construction project. However, an existing employer, such as a major retailer, could not make a greenfields agreement in relation to a new store that it is proposing to establish if that store is part of the employer’s existing enterprise.

694. Subclause 172(5) sets out the meaning of single interest employer. Single interest employers can bargain together for a single-enterprise agreement (see subclause 172(2)). Two or more employers are single interest employers in relation to a proposed enterprise agreement if they are:

- engaged in a joint venture or common enterprise; or
- related bodies corporate (as defined in the *Corporations Act 2001*); or
- specified in a single interest employer authorisation that is in operation in relation to the agreement.

695. Two or more employers may jointly apply for a single interest employer authorisation under clause 248. FWA must make a single interest authorisation if the requirements of clause 249 are met.

Division 3 – Bargaining and representation during bargaining

696. Division 3 sets out the rights of employers and employees to appoint a person of their choice as their bargaining representative. It also ensures that each employee is notified of his or her right to representation when bargaining for a proposed enterprise agreement. These rules are adjusted for a proposed enterprise agreement that is a greenfields agreement and for a multi-enterprise agreement in relation to which a low-paid authorisation is in operation.

697. Bargaining representatives have a more significant formal role in the bargaining process compared to bargaining agents under the WR Act. Bargaining representatives are entitled to: bargain for enterprise agreements and depending on the type of agreement will usually be entitled to apply for (among other things) protected action ballot orders, bargaining orders, majority support determinations, scope orders and serious breach declarations. Bargaining representatives are also entitled to represent a person in matters before FWA (see clause 596). As part of their responsibilities, bargaining representatives for a single-enterprise agreement and a multi-enterprise agreement to which a low paid authorisation is in operation are required to meet the good faith bargaining requirements set out in subclause 228(1). Non-compliance with the requirements exposes a bargaining representative to bargaining orders. Division 3 also makes clear that an employer must not refuse to recognise or bargain with a bargaining representative.

Clause 173 – Notice of employee representational rights

698. Subclause 173(1) requires an employer to take all reasonable steps to give notice to each employee of their right to be represented by a bargaining representative. Reasonable steps could include sending the notice by email to each employee or posting the notice to a forum or site that is known by and accessible to the relevant employees. The requirement applies to those employees employed at the notification time. Separate rules apply for proposed greenfields agreements.

699. The notification time for a proposed enterprise agreement is specified in subclause 173(2) as being the time when:

- the employer agrees to bargain, or initiates bargaining, for the agreement; or
- a majority support determination in relation to the agreement comes into operation; or
- a scope order in relation to the agreement comes into operation; or
- a low-paid authorisation in relation to the agreement that specifies the employer comes into operation.

700. The legislative note to subclause 173(2) serves as a reminder to the reader that an employer cannot request employees to approve a proposed enterprise agreement under subclause 181(2) until 21 days after the last notice of employee representational rights is given.

701. The notice of employee representational rights is required to be given as soon as practicable and not later than 14 days after the notification time (subclause 173(3)). If the proposed enterprise agreement will cover two or more employers, each employer will need to give the notice to its respective employees.

702. Subclause 173(4) does not require an employer to give a notice of employee representational rights to an employee if the employer has already given the employee a notice within a reasonable period before the notification time for the agreement. For example, if an employer issues an employee with a notice at the time the employer agrees to bargain, the employer is not required to issue another notice to that employee if a scope order subsequently varies who will be covered by the agreement, provided the notice was issued within a reasonable period of the scope order.

703. Subclause 173(5) allows the regulations to prescribe how notices of employee representational rights may be given by the employer to employees.

Clause 174 – Content of notice of employee representational rights

704. This clause sets out four content requirements for the notice of employee representational rights.

705. First, the notice must specify that the employee may appoint a bargaining representative to represent the employee in bargaining for the agreement and in a matter before FWA that relates to bargaining for the agreement (subclause 174(2)).

706. Secondly, the notice must explain that, if the employee is a member of an employee organisation and the employee has not appointed another person as his or her bargaining representative, the organisation is automatically the bargaining representative for the employee (subclause 174(3)). This rule only applies if the third rule described below does not apply.

707. Thirdly, if a low-paid authorisation in relation to the proposed agreement that specifies the employer comes into operation and an employee organisation applied for the authorisation, the notice must explain the effect of paragraph 176(1)(b) and subsection 176(2), which is that the

organisation is taken to be the bargaining representative of the employee unless the employee appoints another person as his or her bargaining representative (subclause 174(4)).

708. Fourthly, the notice must explain that if an employee appoints a bargaining representative, a copy of the instrument of appointment must be given to the employee's employer (subclause 174(5)).

Clause 175 – Relevant employee organisations to be given notice of employer's intention to make greenfields agreements etc.

709. This clause requires each employer that agrees to bargain, or initiates bargaining, for a proposed greenfields agreement to take all reasonable steps to give notice of its intention to make the agreement to each relevant employee organisation. The employer is not required to give the notice if the employer does not know, or could not reasonably be expected to know, that an employee organisation is a relevant employee organisation. A relevant employee organisation is defined in Part 1-2 as an employee organisation that is entitled to represent the industrial interests of one or more of the employees who will be covered by the greenfields agreement, in relation to work to be performed under the agreement (see clause 12).

710. The notice is required to state that the employee organisation is a bargaining representative for the agreement. Clause 177 lists the other bargaining representatives for greenfields agreements.

The legislative note to subclause 175(1) is a reminder to readers that an employer cannot make the agreement until 14 days after the last notice is given.

711. Subclause 175(4) requires the employer to give the notice as soon as reasonably practicable and not later than 14 days after the employer agrees to bargain or initiates bargaining for a greenfields agreement. At the same time or as soon as reasonably practicable after giving the notice to the relevant employee organisations, the employer must give a copy of the notice to FWA. If FWA was of the view that a relevant employee organisation had not been given notice of the employer's intention to make a greenfields agreement, it could advise the employer, thereby giving the employer the opportunity to give a notice to that organisation and thereby meet the requirements for approval of a greenfields agreement.

712. Subclause 175(6) enables regulations to prescribe how notices under this clause may be given.

Clause 176 – Bargaining representatives for proposed enterprise agreements that are not greenfields agreements

713. This clause specifies the persons who are the bargaining representatives for proposed enterprise agreements that are not greenfields agreements. Bargaining representatives are required to meet the good faith bargaining requirements set out in subclause 228(1).

714. An employer is always a bargaining representative for a proposed enterprise agreement, although the employer may also appoint, in writing, another bargaining representative such as an organisation of employers or a consultant. If the proposed enterprise agreement will cover two

or more employers, each employer is a bargaining representative and similarly each employer can appoint another person or organisation as its bargaining representative.

715. An employee may appoint any person (including himself or herself), in writing, as his or her bargaining representative. If the employee does not appoint someone as his or her bargaining representative and the employee is a member of an employee organisation, then the employee organisation is automatically the bargaining representative for the employee. If a member of an employee organisation appoints a bargaining representative other than the organisation, the employee must notify the employer but need not advise the employee organisation.

716. There is no restriction on when a person may appoint a bargaining representative. This means, for example, that during bargaining, an employee who is a member of an employee organisation may appoint his or her own bargaining representative with the effect that the automatic appointment of the employee organisation as that employee's bargaining representative will cease to apply.

717. If the proposed enterprise agreement is a multi-enterprise agreement in relation to which a low-paid authorisation is in operation and an employee has not appointed another person as his or her representative, then the employee organisation that applied for the authorisation is the bargaining representative for the employee. This will be the case even if the employee is a member of another employee organisation unless that organisation was one of the applicants for the authorisation (subclause 176(2)).

718. Subclause 176(3) provides that an employee organisation cannot be a bargaining representative for an employee unless the employee organisation is entitled to represent the industrial interests of the employee in relation to work that will be performed under the proposed enterprise agreement. In this context, it is relevant to note that an employee organisation can only apply for a low-paid authorisation in relation to a multi-enterprise agreement if it is entitled to represent the industrial interests of an employee in relation to work to be performed under the agreement (paragraph 242(1)(b)).

Clause 177 – Bargaining representatives for proposed greenfields agreements

719. This clause specifies the persons who are the bargaining representatives for a proposed greenfields agreement as being: the employer; a person who has been appointed by the employer in writing; and a relevant employee organisation (as defined in clause 12).

Clause 178 – Appointment of bargaining representatives – other matters

720. Subclause 178(1) provides that an appointment of a bargaining representative comes into force on the day specified in the instrument of appointment. There is no restriction on when a person may appoint a bargaining representative. The instrument of appointment may be revoked in the same manner (i.e. by instrument of revocation) in reliance on the *Acts Interpretation Act 1901*.

721. Subclause 178(2) requires an employee to give a copy of the instrument of appointment of a bargaining representative to his or her employer. This process ensures the employer knows

who the bargaining representatives for the proposed agreement are and is consistent with the duty bargaining representatives have to abide by the good faith bargaining requirements set out in clause 228(1).

722. If an employer appoints a bargaining representative for a proposed enterprise agreement, a copy of the instrument of appointment must be given, on request, to an employee's bargaining representative (paragraph 178(2)(b)). If the agreement is a proposed greenfields agreement, then a copy of the instrument of an appointment must be given, on request, to a relevant employee organisation that is a bargaining representative (paragraph 178(2)(c)).

723. Subclause 178(3) enables regulations to prescribe the matters relating to the qualifications or appointment of bargaining representatives.

724. Bargaining representatives cannot be appointed in relation to a variation or termination of an enterprise agreement under Division 7.

Clause 179 – Employer etc. must not refuse to recognise or bargain with other bargaining representatives

725. Subclause 179(1) provides that an employer, or a bargaining representative for an employer, must not refuse to recognise or bargain with another bargaining representative for the proposed enterprise agreement.

726. This subclause is a civil remedy provision under Part 4-1 (Civil remedies).

727. However, if the employer or the bargaining representative for the employer does not know or could not reasonably be expected to know that the other person is a bargaining representative for the agreement then subclause 179(1) will not apply. For example, an employer may not know that a person is a bargaining representative where an employee organisation – automatically appointed as a bargaining representative under clause 176 – has not attempted to take part in the process and the employer does not know if any of the employees are members of that organisation.

728. The obligation in this subclause on the employer or its bargaining representative is in addition to any good faith bargaining requirements that they are required to meet under subclause 228(1).

Division 4 – Approval of enterprise agreements

Subdivision A – Pre-approval steps and applications for FWA approval

Clause 180 – Employees must be given a copy of a proposed enterprise agreement etc.

729. This clause sets out the pre-approval steps that an employer must carry out in relation to a proposed enterprise agreement.

730. Subclause 180(1) provides that an employer must comply with the requirements of this clause before requesting the employees to approve the proposed enterprise agreement. Where

the proposed enterprise agreement is a single-enterprise agreement with two or more single interest employers, or a multi-enterprise agreement, each employer must comply with the requirements of this clause.

731. FWA cannot approve an agreement where an employer has not complied with the requirements of this clause (see paragraph 186(2)(a) and subparagraph 188(a)(i)).

732. Subclause 180(2) requires the employer to take all reasonable steps to ensure that the relevant employees are given a copy of, or access to, the proposed enterprise agreement and any other material incorporated by reference in the agreement prior to approving the agreement. The relevant employees are the employees employed during the access period that will covered by the agreement. This may include new employees that commence employment during that period.

733. An agreement can incorporate by reference any written material (see clause 257). This enables an employer and employee to incorporate by reference terms from materials such as an earlier written agreement, modern award or enterprise award, a State or Territory law or a workplace policy. Subparagraph 180(2)(b)(ii) provides that if an agreement incorporates by reference material contained in another instrument the employer must take all reasonable steps to ensure that the relevant employees are given, or have access to, a copy of that material for the entire seven day access period.

734. Subclause 180(3) requires the employer to take all reasonable steps to notify the relevant employees before the start of the access period of:

- the time and place at which the vote will occur; and
- the voting method that will be used.

735. This ensures that the relevant employees are informed at least seven days prior to the vote for the agreement about how and when the vote will occur.

736. Subclause 180(4) defines the access period as the period of seven days ending immediately before the start of the voting for the proposed agreement (see subclause 181(1)).

737. The access period can run concurrently with the 21-day period referred to in subclause 181(2), so that the shortest period between the day on which an employer gives the last notice of employee representational rights to its employees and the day that the employer requests the employees to vote on the agreement is 21 days.

738. The employer is required to take all reasonable steps to ensure that the relevant employees are given a copy of the proposed enterprise agreement and any other material incorporated in the agreement at the beginning of the access period.

739. This could include providing electronic copies of the material, or making copies of the material available for inspection by employees. In cases where an employee is not at the workplace, for example, because the employee is on maternity leave, it may include providing a copy of the agreement and other materials by post.

740. There may also be situations where an employee commences employment or returns to work during the access period. For example, a new employee may commence employment during the access period or an existing employee who was leave, such as maternity leave, may return to work during the access period. In situations such as these, the employer must take all reasonable steps to ensure that the employee is given a copy of the agreement and other materials on the day the employee commences employment or returns to work. FWA will consider whether the employer took all reasonable steps to ensure that relevant employees were given access to the agreement during the access period in deciding whether to approve the agreement.

741. Subclause 180(5) requires the employer to take all reasonable steps to ensure that the terms of the agreement and the effect of those terms are explained to the relevant employees prior to the employees approving the agreement. The explanation must take into account the particular circumstances and needs of the relevant employees.

742. Subclause 180(6) provides examples of the kinds of employees whose circumstances and needs the employer must take into account when explaining the terms of the agreement and the effect of those terms. The examples are:

- employees from culturally and linguistically diverse backgrounds – for these employees, an employer may need to use an interpreter or translated materials to explain the terms of the agreement;
- young employees – for these employees, an employer may need to explain the terms of an agreement to both the employee and to their parent or guardian;
- employees who did not have a bargaining representative for the proposed agreement – for these employees, it may be reasonable for an employer to provide a more detailed explanation of the agreement.

Clause 181 – Employers may request employees to approve a proposed enterprise agreement

743. An employer may request employees to approve a proposed enterprise agreement by voting for it. An agreement cannot be approved by FWA unless employees have approved the agreement.

744. This approval step is not relevant for a greenfields agreement. This is because a greenfields agreement, by definition, relates to a genuine new enterprise where the employer or employers have not yet employed any persons that will be necessary for the normal conduct of the enterprise.

745. Subclause 181(2) provides that an employer cannot request employees to vote for the proposed enterprise agreement until at least 21 days after the employer has given the last notice of employee representational rights to the employees employed at the notification time who will be covered by the agreement under clause 173. Clause 173 provides that an employer must take all reasonable steps to notify all employees employed at the notification time that they have the right to be represented.

746. Subclause 181(3) makes clear that, among other methods of voting, the employer may request that the employees vote by ballot (secret or not) or by an electronic method. The vote could also be conducted by a show of hands or by another method that demonstrates the employees' genuine agreement.

Clause 182 – When an enterprise agreement is made

747. This clause states the point in time at which each of the different types of enterprise agreement described in clause 172 is made.

748. Once an agreement has been made, a bargaining representative must make an application for the agreement to be approved by FWA.

749. Subclause 182(1) provides that a proposed single-enterprise agreement that is not a greenfields agreement is made when the agreement is approved by a majority of the employees who will be covered by the agreement and who cast a valid vote for the agreement (see subclause 181(1)). In the case of a proposed single-enterprise agreement that will cover two or more employers that are single interest employers, the agreement is made when it is approved by a majority of the employees (taken as a group) who will be covered by the agreement and who cast a valid vote for the agreement.

750. Subclause 182(2) provides that a proposed multi-enterprise agreement that is not a greenfields agreement is made on an enterprise by enterprise basis. A multi-enterprise agreement is made immediately after the voting process referred to in subclause 181(1) where the employees of each of the employers that will be covered by the proposed agreement have voted for the agreement and it has been approved by a majority of the employees of at least one of those employers who cast a valid vote for the agreement.

751. Subclause 182(3) provides that a greenfields agreement (whether a single-enterprise or multi-enterprise agreement) is made when it is signed by each employer and each employee organisation that will be covered by the agreement. This ensures that the time at which a greenfields agreement is made is certain.

752. Subclause 182(4) provides that a greenfields agreement cannot be signed by each employer and each employee organisation until at least 14 days after the day on which the last notice of the employer's intention to make a greenfields agreement was given to the relevant employee organisation or organisations.

Clause 183 – Entitlement of an employee organisation to have an enterprise agreement cover it

753. After an enterprise agreement has been made, an employee organisation that was a bargaining representative for a proposed agreement may notify FWA, in writing that it wants to be covered by the agreement. (For the rules on coverage, see clause 53.) When an employee organisation is covered by an agreement, it will have certain entitlements that it would not otherwise have. For example, an employee organisation that is covered by an agreement would be able to enforce the agreement to ensure that the employer is meeting its obligations. Furthermore, the permitted matters that may be included in an agreement include matters

pertaining to the relationship between the employer or employers and the employee organisations that will be covered by the agreement.

754. Subclause 183(2) provides that an employee organisation must give the notice that it wants to be covered by the agreement to FWA before FWA approves the agreement. A copy of the notice must also be given to each employer covered by the agreement before FWA approves the agreement.

755. The legislative note at the end of clause 183 refers to subclause 201(2) which requires FWA to note in its decision to approve an enterprise agreement that the agreement covers the employee organisation.

Clause 184 – Multi-enterprise agreement to be varied if not all employees approve the agreement

756. This clause enables a bargaining representative to vary a multi-enterprise agreement after it has been made (under subclause 184(2)) if the agreement was not approved by the employees of all the employers who requested their employees to vote for the agreement. This ensures that the agreement is expressed to cover the correct employees and employers (see clause 53).

757. Subclause 184(1) provides that a bargaining representative may vary a multi-enterprise agreement where the agreement has been made and the agreement was not approved by the employees of all of the employers who requested their employees to vote for the agreement under subclause 181(1).

758. Subclause 184(2) provides that prior to making the application for FWA approval of the agreement, the relevant bargaining representative must vary the agreement so that it is only expressed to cover each employer whose employees approved the agreement and the employees of each of those employers. This is to ensure that the agreement FWA is asked to approve is expressed to cover the correct employers and their employees.

759. Subclause 184(3) requires the bargaining representative who makes the variation under subclause 184(2) to give written notice of the variation to all other bargaining representatives for the agreement. The notice must specify the employers and employees that the agreement as varied covers (subclause 184(4)).

760. Subclause 184(5) makes it clear that the bargaining representative who makes the variation is not required to give notice of the variation to a person that it does not know, or could not reasonably be expected to know, is a bargaining representative for the agreement.

Clause 185 – Bargaining representatives must apply for FWA approval of an enterprise agreement

761. Subclause 185(1) requires a bargaining representative to apply for FWA approval of an enterprise agreement that has been made. This can be the employer, a bargaining representative for an employer, or a bargaining representative for an employee.

762. Subclause 185(2) sets out the material that must accompany the application for FWA approval. The bargaining representative must provide FWA with a signed copy of the agreement and any other declarations required by the procedural rules of FWA. The requirement for a bargaining representative to provide FWA with a signed copy of the agreement is intended to ensure that the agreement that FWA considers for approval is the one that the parties have made. The power for FWA to make procedural rules about the requirements for making an application is set out in clause 609. This enables FWA to make procedural rules about the form and content of the declarations that must accompany the agreement.

- For example, the procedural rules may require that the bargaining representative declare that all other bargaining representatives involved in the bargaining have been notified of the employer's intention to apply to FWA for approval of the agreement.

763. The powers of FWA enable it to inform itself in relation to the application in such manner as it considers appropriate (clause 590), including contacting the employer or employers, their employees, and bargaining representatives.

764. Subclause 185(3) provides that an application for FWA approval of an enterprise agreement that is not a greenfields agreement must be made within 14 days after the agreement has been made. A bargaining representative may make an application for FWA approval any time within the 14 day period, including immediately after the agreement is made. If none of the bargaining representatives makes an application for FWA approval within 14 days of the agreement being made, FWA may extend that period if it considers it fair to do so in all the circumstances.

765. Subclause 185(4) provides that an application for FWA approval of a greenfields agreement must be made within 14 days after the agreement has been made. There is no provision for an extension of time.

766. Subclause 185(5) allows the regulations to prescribe the requirements in relation to the signing of an agreement, including who may sign the agreement and the type of signature that is permissible (e.g., a hand written signature or digital certificate).

Subdivision B – Approval of enterprise agreements by FWA

Clause 186 – When FWA must approve an enterprise agreement – general requirements

767. This clause provides that FWA must approve an enterprise agreement if the requirements of this clause and clause 187 are met. An enterprise agreement that has been made in accordance with clause 182 does not have any legal effect until it is approved by FWA. Therefore, an enterprise agreement cannot have effect at general law.

768. It is intended that FWA will usually act speedily and informally to approve agreements, with most agreements being approved on the papers within 7 days. This period has not been legislated, however, as there may be instances where approval takes longer because FWA has concerns about approving the agreement and it is necessary to seek further information from the bargaining representatives. FWA may hold a hearing, but it need not. An example of a case where FWA might hold a hearing is where there is insufficient information before it as to

ordinary time working patterns to be satisfied on the papers that the agreement passes the better off overall test in relation to a group of employees covered by the agreement.

769. Subclause 186(1) requires FWA to approve an enterprise agreement where a bargaining representative has made an application for FWA approval and the requirements of this clause and clause 187 are met.

770. The legislative note following subclause 186(1) makes it clear that FWA may approve an enterprise agreement under this clause with undertakings, as provided for in clause 190.

771. Subclause 186(2) requires FWA to be satisfied that:

- the agreement has been genuinely agreed to by employees (clause 188), except if it is a greenfields agreement;
- in the case of a multi-enterprise agreement – the agreement has also been genuinely agreed to by each employer covered by the agreement and no person coerced, or threatened to coerce, any of the employers to make the agreement;
- the terms of the agreement do not contravene the NES; and
- the agreement passes the better off overall test (clause 193).

772. The legislative notes at the end of subclause 186(2) set out references to the provisions dealing with genuine agreement, FWA approval of an agreement that does not pass the better off overall test and FWA approval of an agreement with undertakings. The final note makes it clear that an agreement can supplement the NES as permitted by clause 55.

773. The requirements relating to genuine agreement, the guarantee concerning the application of the NES and the operation of the better off overall test in relation to modern awards means that the safety net cannot be undermined by the terms of an enterprise agreement.

774. An employee and employer may agree to an individual flexibility arrangement (clause 202) in accordance with the flexibility term of an enterprise agreement (such a term must require the employee to be better off overall as against the agreement – clause 203(4)).

775. Subclause 186(3) provides that if the agreement does not cover all employees, the group of employees covered by the agreement must be fairly chosen. There is no requirement that an agreement should cover all the employees of an employer.

776. The effect of paragraph 186(3) is that where an agreement covers a group of employees that do not work in a geographically, operationally or organisationally distinct part of an employer's enterprise, FWA is required to assess whether the group covered by the agreement was fairly chosen.

777. It is intended that in assessing whether the group of employees covered by the agreement is fairly chosen, FWA might have regard to matters such as:

- the way in which the employer has chosen to organise its enterprise; and

- whether it is reasonable for the excluded employees to be covered by the agreement having regard to the nature of the work they perform and the organisational and operational relationship between them and the employees who will be covered by the agreement.

778. This subclause allows an agreement to cover a group of employees that is constituted in any fair and appropriate way (e.g., all the electricians employed by the employer or employers).

Illustrative example

A single employer operates five organisationally distinct units within its enterprise. The employer makes an agreement with all of the employees in two organisationally distinct units, as well as ten employees who are the only non-union members within from another organisational unit that has a total of 30 employees. FWA is required to decide whether the group of employees covered by the agreement is fairly chosen.

In this example, the group of employees covered by the agreement is likely to be unfair, particularly as the employees were unfairly chosen.

779. Subclause 186(4) requires FWA to be satisfied that the agreement does not contain any unlawful terms (see clause 194).

780. Paragraph 186(5)(a) requires FWA to be satisfied that an agreement specifies a nominal expiry date. FWA will not be able to approve an agreement without a nominal expiry date. The absence of such a term will require the employer to request employees to re-cast their vote on the agreement – which this time would need to include a nominal expiry date.

781. Paragraph 186(5)(b) requires that the nominal expiry date must not be more than four years after the day on which FWA approves that agreement. However, the nominal expiry date of agreements approved under clause 189 must not be more than two years after the day on which FWA approves the agreement (paragraph 189(4)(b)). Clause 189 allows FWA to approve agreements that do not pass the better off overall test if, because of exceptional circumstances, approval of the agreement would not be contrary to the public interest.

782. Paragraph 186(6)(a) requires FWA to be satisfied that the agreement includes a term that provides a procedure that requires or allows FWA or another person independent of the persons covered by the agreement to settle disputes:

- about any matters arising under the agreement; and
- in relation to the NES.

783. A disputes procedure could not, for example, provide for disputes to be resolved by:

- the managing director of the employer; or
- a disputes board made up of officials of a union covered by the agreement.

784. Paragraph 186(6)(b) provides that the term of an agreement that provides a procedure for dealing with disputes must also allow for the representation of employees covered by the agreement when dealing with disputes.

785. The legislative note following subclause 186(6) refers to subclause 739(2) and subclause 740(2) which provide that FWA or a person must not deal with a dispute about whether an employer had reasonable business grounds under certain provisions of the NES (subclause 65(5) or subclause 76(4)).

786. However, an agreement could include a term providing for a right to flexible working arrangements separate to subclause 65(5). The enterprise agreement may also provide for the agreement's disputes procedure to apply in respect of any such term.

Clause 187 – When FWA must approve an enterprise agreement – additional requirements

787. This clause sets out additional requirements that must be met before FWA approves an enterprise agreement (subclause 187(1)).

788. Subclause 187(2) provides for an additional approval requirement where a scope order is in operation in relation to a proposed enterprise agreement, or enterprise agreement. This subclause is intended to deal with the situation where a bargaining representative has made an application for FWA approval of an enterprise agreement that is not expressed to cover all the employees and employers specified in a scope order issued by FWA in relation to that agreement. FWA may approve an enterprise agreement in that situation provided that it is satisfied that the approval of the agreement would not be inconsistent with or undermine good faith bargaining by one or more of the bargaining representatives.

789. If (despite a scope order) the bargaining representatives have subsequently all agreed to make an agreement of a different scope, this may not undermine good faith bargaining. However, if the employer has obtained employee approval for an agreement despite a scope order against the wishes of a group of employees who should have been covered (or excluded) as a result of the scope order, then this clause is likely to be triggered.

790. Subclause 187(3) provides an additional approval requirement in relation to a multi-enterprise agreement that has been varied as mentioned in clause 184 (i.e., where the agreement was not approved by the employees of all the employers).

791. Where a bargaining representative has varied the agreement as mentioned in clause 184, FWA must be satisfied that:

- the agreement has been properly varied – see subclause 184(2); and
- the bargaining representative that made the variation has given written notice to all the other bargaining representatives for the agreement in accordance with subclause 184(3).

792. Subclause 187(4) provides that FWA must be satisfied that the provisions of Subdivision E must be complied with in relation to shiftworkers, pieceworkers, school-based apprentices and trainees and outworkers.

Clause 188 – When employees have genuinely agreed to an enterprise agreement

793. This clause sets out a non-exhaustive list of the matters for FWA to consider when determining whether an enterprise agreement has been genuinely agreed to by employees covered by the agreement.

794. Paragraph 188(a) requires FWA to be satisfied that the employer or each of the employers has complied with the pre-approval steps (subclauses 180(2), (3) and (5)) and that the request for employees to approve the agreement was made at least 21 days after the day on which the employer provided the last employee with a notice of representational rights (subclause 181(3)).

795. Paragraph 188(b) requires FWA to be satisfied that the agreement was made in accordance with clause 182 – the requirement that an agreement must be approved by the employees who will be covered by the agreement.

796. Paragraph 188(c) provides that FWA must only approve an agreement if there are no other reasonable grounds to believe that the agreement was not genuinely agreed to by the employees. FWA can refuse to approve an agreement where there are reasonable grounds to believe that the agreement has not been genuinely agreed to by the employees who will be covered by the agreement.

797. In determining whether there are reasonable grounds for believing that the agreement has not been genuinely agreed to by employees, FWA may consider whether the agreement has been validly made in accordance with clause 182 (see, e.g., *Construction Forestry Mining and Energy Union v Australian Industrial Relations Commission* (1999) 93 FCR 317 and the decision of the AIRC in *Grocon Pty Ltd Enterprise Agreement (Victoria)* (2003) 127 IR 13).

Clause 189 – FWA may approve an enterprise agreement that does not pass better off overall test – public interest test

798. This clause enables FWA to approve an enterprise agreement that does not pass the better off overall test if, because of exceptional circumstances, approval of the agreement would not be contrary to the public interest (subclause 189(2)).

799. Subclause 189(1) provides that this clause applies where the only reason why FWA is not required to approve an agreement under clause 186 is that it does not pass the better off overall test.

800. The legislative note following subclause 189(2) makes it clear that FWA may approve an agreement in exceptional circumstances with undertakings under clause 190 in relation to a concern about whether the agreement meets the approval requirements.

801. Subclause 189(3) provides an example of a case in which FWA may approve an agreement under this clause.

802. Subclause 189(4) provides that the nominal expiry date of an agreement approved under this clause is either the date specified in the agreement as its nominal expiry date, or two years after the day on which FWA approved the agreement, whichever is earlier.

Clause 190 – FWA may approve an enterprise agreement with undertakings

803. This clause provides that FWA may approve an enterprise agreement with undertakings where the approval requirements in clause 186 and 187 have not been met.

804. Subclause 190(1) provides that this clause only applies if FWA has a concern that the agreement does not meet one or more of the requirements in clauses 186, 187 and 189.

- For example, an enterprise agreement may contain a term that the employer will not approve requests for annual leave during the end of financial year accounts processing.

805. Subclause 88(2) provides that an employer must not unnecessarily refuse to agree to a request by an employee to take paid annual leave. FWA may be concerned that the term might breach clause 55 (which deals with the interaction of enterprise agreements and the NES) because it excludes subclause 88(2). Paragraph 186(2)(c) requires FWA to be satisfied that the terms of an agreement do not contravene clause 55. FWA might accept an undertaking from the employer that it will not unnecessarily refuse an employee's request to take paid annual leave at any time, including during the end of financial year accounts processing. Note that the fact that the employer needs all employees to work at this time would be relevant to whether a refusal was unreasonable under subclause 88(2).

806. Subclause 190(2) enables FWA to approve the agreement under clause 186 or clause 189 where it is satisfied that the undertaking clarifies the intended operation of the agreement.

807. Subclause 190(3) provides that FWA may only accept a written undertaking from one or more employers covered by the agreement if FWA is satisfied that the effect of accepting the undertaking is not likely to cause financial detriment to any employee covered by the agreement, or result in substantial changes to the agreement. This enables FWA to accept an undertaking that addresses a concern it has, e.g., about whether an enterprise agreement passes the better off overall test under clause 193.

Illustrative example

The EN & EM Surveillance Pty Ltd Enterprise Agreement 2011 covers 800 employees working in a local security business. FWA has a concern that the agreement may not pass the better off overall test for a group of 80 employees employed under the classification of Static Guard. The agreement would pass the better off overall test if the base rate of pay under the agreement was increased by 23 cents per hour. FWA may accept an undertaking from the employer to pay the additional 23 cents an hour, without putting the agreement out for a further approval process, because it is not likely to cause financial detriment to any employee covered by the agreement, and would not result in substantial changes to the agreement.

FWA also has a concern that the EN & EM Surveillance Pty Ltd Enterprise Agreement 2011 would not pass the better off overall test for employees employed under the classification of Security Patrol Officers if those employees were rostered to work on Sundays. In this situation, FWA could not accept an undertaking from the employer that those employees would no longer be required to work on Sundays because such an undertaking is likely to cause financial detriment to those employees as they would lose the opportunity to work on Sundays for penalty rates. This would change the nature of the agreement and may have affected the way the employees chose to vote on it.

808. Subclause 190(4) requires FWA to seek the views of each person who FWA knows is a bargaining representative for the agreement before accepting an undertaking under subclause 190(3). FWA cannot accept a unilateral undertaking made by an employer without seeking the views of each person it knows is a bargaining representative for the agreement.

809. Subclause 190(5) provides that the undertaking must meet any requirements relating to the signing of undertakings that are prescribed by the regulations.

Clause 191 – Effect of undertakings

810. This clause provides for the effect of an undertaking accepted by FWA under subclause 190(3).

811. Where FWA accepts an undertaking under subclause 190(3) in relation to an agreement that covers a single employer, the undertaking is taken to be a term of the agreement (subclause 191(1)).

812. Subclause 191(2) provides that where FWA accepts an undertaking under subclause 190(3) in relation to an agreement that covers two or more employers (whether or not single interest employers), the undertaking is taken to be a term of the agreement, as the agreement applies to each employer that gave the undertaking. For example, FWA may accept an undertaking from two employers in relation to a multi-enterprise agreement that covers five employers. The undertaking is taken to be a term of the agreement as it applies to those two employers but not in relation to the other three employers.

Clause 192 – When FWA may refuse to approve an enterprise agreement

813. Subclause 192(1) provides that FWA may refuse to approve an agreement if it considers that compliance with the terms of the agreement may result in:

- a person committing an offence against a law of the Commonwealth; or
- the imposition of a pecuniary penalty on a person for a contravention of a Commonwealth law.

814. Subclause 192(2) makes it clear that FWA may refuse to approve an agreement on this basis even if it would otherwise be required to approve the agreement under clause 186 or clause 189.

815. Subclause 192(3) enables FWA to refer an enterprise agreement to any person or body it considers appropriate where it refuses to approve an agreement under this clause.

Subdivision C – Better off overall test

Clause 193 – Passing the better off overall test

816. This clause provides when an enterprise agreement passes the better off overall test.

817. Subclause 193(1) provides that an agreement that is not a greenfields agreement passes the better off overall if FWA is satisfied, as at the test time, that each award covered employee and each prospective award covered employee would be better offer overall if they were employed under the agreement than under the relevant modern award.

818. Although the better off overall test requires FWA to be satisfied that each award covered employee and each prospective award covered employee will be better off overall, it is intended that FWA will generally be able to apply the better off overall test to classes of employees. In the context of the approval of enterprise agreements, the better off overall test does not require FWA to enquire into each employee's individual circumstances.

Illustrative example

Moss Hardware and Garden Supplies Pty Ltd makes an enterprise agreement to cover approximately 1800 employees working at its national chain of retail garden and hardware supplies outlets. All of these employees are 'award covered employees'. The seven classifications under the agreement broadly correlate to seven classifications under the relevant modern award. Because there will be many employees within each classification under the agreement and the agreement affects each employee within a classification in the same way, FWA could group employees together when assessing the employees against the better off overall test. It is intended that FWA could assess a hypothetical employee in each of the classifications under the agreement against the relevant classification under the modern award.

If FWA were satisfied that the agreement affected each employee within the classification in the same way, and that the agreement passed the better off overall test for the hypothetical employee within the classification, FWA could be satisfied that the agreement passed the better off overall test for each award covered employee and prospective award covered employee within that classification.

819. Subclause 193(2) requires FWA to disregard any individual flexibility arrangement that has been agreed to by an award covered employee and his or her employer under the flexibility term of the relevant modern award when assessing whether that employee would be better off overall under the agreement. It is envisaged that an employee and employer who have agreed to an individual flexibility arrangement under a modern award would take into account the terms of that arrangement when negotiating a proposed new agreement. If the flexibilities set out in the arrangement were not included in the agreement, it would be open to an employee and employer, subject to the terms of the agreement, to agree to a similar individual flexibility arrangement under the flexibility term of the agreement.

820. Subclause 193(3) provides that a greenfields agreement passes the better off overall if FWA is satisfied that each prospective award covered employee would be better off overall if the employee was employed under the agreement than under the relevant modern award.

821. Subclause 193(4) defines an award covered employee. Subclause 193(4) would provide that an award covered employee is an employee who, at the test time, is covered by the agreement and is covered by a modern award that is in operation and covers the employee's employer. The modern award must cover the employee in relation the work that she or he is to perform under the agreement.

822. The better off overall test refers to all award covered employees, including those that have been given a guarantee of annual earnings (as defined in clause 330). This is because an employee that has been given a *guarantee of annual earnings* remains covered by a modern award even though the award ceases to apply to the employee where the annual rate of the guarantee exceeds the high income threshold (see clause 328).

823. Subclause 193(5) defines a prospective award covered employee as an employee who, if she or he were employed at the test time, would be covered by the agreement and would be covered by the relevant modern award that is in operation and covers the employer. The relevant

modern award would need to cover the employee in relation the work that she or he would perform under the agreement.

824. The better off overall test also refers to prospective award covered employees because sometimes an agreement may cover classifications of employees in which no employees are actually engaged at the test time. Extending the application of the better off overall test to these types of employees guarantees the integrity of the safety net. Note that where an agreement covers a large number of classifications of employees in which no employees are actually engaged there may be a question as to whether the agreement has been genuinely agreed – see clause 188.

Illustrative example

The Moss Hardware and Garden Supplies Pty Ltd Enterprise Agreement 2010 covers the classification of Assistant Store Manager. At the test time for the better off overall test, Moss Hardware and Garden Supplies Pty Ltd does not employ any Assistant Store Managers. However, it has recently announced that it will restructure its staffing arrangements to introduce this new position. The Assistant Store Manager classification is covered by the relevant modern award. Assistant Store Managers employed after the agreement commences operation would therefore be prospective award covered employees. FWA would need to be satisfied that the agreement passed the better off overall test in respect of these persons.

825. Subclause 193(6) defines the time at which the better off overall test is applied. The better off overall test is a point in time test, which requires each award covered employee and prospective award covered employee to be better off overall at the test time. The test time would be the time that a bargaining representative made the application for FWA approval of the agreement under clause 185.

Subdivision D – Unlawful terms

Clause 194 – Meaning of unlawful term

826. This clause specifies the terms of an enterprise agreement that are unlawful terms.

827. Paragraph 194(a) provides that a discriminatory term is an unlawful term. The meaning of discriminatory term is set out in clause 195.

828. Paragraph 194(b) provides that a term of an enterprise agreement is an unlawful term if it is an objectionable term (as defined in clause 12).

829. Paragraph 194(c) provides that a term of an enterprise agreement is an unlawful term if it gives an employee, who has not completed the minimum employment period (clause 383) and who would be protected from unfair dismissal under Part 3-2 after completing that period (clause 382), an entitlement or remedy in relation to a termination of the employee's employment that is unfair (however described).

830. For example, a term of an enterprise agreement would be unlawful if it purported to confer a remedy of reinstatement or damages on employees who were unfairly dismissed after at

least three months of employment. As the minimum employment period is either six months for an employee who is working for an employer that is not a small business, or 12 months for an employee who is working for an employer that is a small business, a term of an agreement cannot purport to confer an entitlement or remedy on an employee who has only completed a period of three months of employment.

831. Paragraph 194(d) provides that a term of an enterprise agreement is an unlawful term if it excludes or modifies the application of the unfair dismissal provisions in Part 3-2. An agreement may supplement the unfair dismissal provisions, but it cannot exclude or modify the application of those provisions in a way that is detrimental to a person.

832. For example, a term of an agreement that purported to extend the minimum employment period to a period of 24 months would be an unlawful term because it modifies the application of Part 3-2 in way that is detrimental to the employee. However, a term of an agreement might provide that the employer must not dismiss an employee for poor performance except in accordance with the employer's performance management procedure, as this term does not modify the application of the unfair dismissal provisions in a way that is detrimental to an employee.

833. Paragraph 194(e) provides that a term of an enterprise agreement is an unlawful term if it is inconsistent with a provision of Part 3-3 (Industrial action). For example, a term that purported to authorise or allow industrial action prior to the nominal expiry date of the agreement would be an unlawful term.

834. Paragraphs 194(f) and 194(g) provide that certain terms of an enterprise agreement dealing with right of entry are unlawful.

835. Paragraph 194(f) provides that a term of an enterprise agreement is an unlawful term if it provides for an entitlement that is inconsistent with Part 3-4 in relation to:

- entry to premises for a purpose referred to in clause 481, which deals with investigation of suspected breaches; or

- entry to premises to hold discussions of a kind mentioned in clause 484.

836. The right of entry framework provides balanced and appropriate processes and requirements for entry for these purposes that must be complied with.

837. Paragraph 194(g) provides that a term of an enterprise agreement is an unlawful term if it provides for the exercise of a State or Territory OHS right (as defined in clause 494) otherwise than in accordance with the right of entry provisions in Part 3-4.

838. It is intended that agreements can include terms allowing for union officials to enter the employer's premises for purposes other than those set out in paragraphs 194(f) and (g). An agreement might, for example, provide an entitlement to enter the employer's premises for a range of reasons connected to the terms of the agreement, such as:

- to assist with representing an employee under a term dealing with the resolution of disputes or consultation over workplace change; or
- to attend induction meetings of new employees; or
- to meet with the employer when bargaining for a replacement to the current agreement.

Clause 195 – Meaning of discriminatory term

839. A discriminatory term is defined as a term of an enterprise agreement that discriminates against an employee covered by the agreement because of, or for reasons including, the employee's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin (subclause 195(1)).

840. Subclause 195(2) provides that a term of an enterprise agreement does not discriminate against an employee in the following circumstances:

- if the reason for the discrimination is the inherent requirements of the particular position concerned (paragraph 195(2)(a));
- merely because it discriminates, in relation to employment of the employee as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed in good faith and to avoid injury to the religious susceptibilities of adherents of that religion or creed (paragraph 195(2)(b)).

841. Subclause 195(3) provides that a term of an enterprise agreement does not discriminate against an employee merely because it provides for wages for:

- all junior employees, or a class of junior employees; or
- all employees with a disability, or a class of employees with a disability; or
- all employees to whom training arrangements apply, or a class of employees to whom training arrangements apply (including apprentices and school-based apprentices).

Subdivision E – Approval requirements relating to particular kinds of employees

Clause 196 – Shiftworkers

842. This clause sets out an additional requirement for FWA approval of an enterprise agreement in relation to shiftworkers.

843. Subclause 196(1) provides that this clause applies where an employee is covered by an enterprise agreement and a modern award that is in operation and covers the employee defines or describes the employee as a shiftworker for the purposes of the NES.

844. Subclause 196(2) requires FWA to be satisfied that the agreement defines or describes the employee as a shiftworker for the purposes of clause 87, which deals with annual leave. This would ensure that a shiftworker would receive five weeks annual leave for each year of service with his or her employer. A shift worker would not be able to trade away his or her extra week of annual leave under the agreement.

Clause 197 – Pieceworkers – enterprise agreement includes pieceworker term

845. This clause sets out an additional requirement for FWA approval of an enterprise agreement that contains a term defining or describing particular employees as pieceworkers where these employees would not be defined or described as pieceworkers under a modern award that covers them (subclause 197(1)).

846. Subclause 197(2) provides that FWA must be satisfied, in determining whether to approve the agreement, that the effect of including a term that defines or describes an employee as a pieceworker is not detrimental to the employee in respect of entitlements of the employee under the NES.

Clause 198 – Pieceworkers – enterprise agreement does not include a pieceworker term

847. This clause sets out an additional approval requirement for enterprise agreements that do not define employees as pieceworkers where they are defined as such under a modern award that covers them (subclause 198(1)).

848. Subclause 198(2) provides that FWA must be satisfied, in determining whether to approve the agreement, that the effect of not including a term that defines or describes an employee as a pieceworker is not detrimental to the employee in respect of entitlements of the employee under the NES.

Illustrative example

Gita is employed as a grape harvester. Under the relevant modern award, Gita would be defined as a pieceworker. If the award applied to determine Gita's terms and conditions of employment, subclause 16(2) would have the effect that Gita's base rate of pay for the purposes of the NES would be the rate set out in the relevant modern award. This would be relevant, e.g., when calculating the rate at which Gita must be paid during paid annual leave (subclause 90(1)).

Under the enterprise agreement that applies to Gita, she is not defined as a pieceworker. Instead, she has an hourly rate of pay. FWA would need to be satisfied that not defining Gita as a pieceworker under the agreement for the purposes of the NES would not be detrimental to her. For example, it would be detrimental to her if the base rate of pay under the agreement, which she would be paid at when taking paid annual leave under the NES, was less than the base rate of pay set out for pieceworkers in her classification under the relevant modern award.

Clause 199 – School-based apprentices and school-based trainees

849. This clause sets out an additional requirement for FWA approval of an enterprise agreement in relation to school-based apprentices and school-based trainees covered by the agreement.

850. Subclause 199(1) provides when this clause applies. This clause applies where an employee who is a school-based apprentice or a school-based trainee is covered by an enterprise agreement and the agreement provides for the employee to be paid loadings in lieu of paid annual leave, paid personal/carer's leave or paid absence under Division 10 of Part 2-2 (Public holidays). The employee must also be covered by a modern award that is in operation and provides for school-based apprentices and school-based trainees to be paid loadings in lieu of paid annual leave, paid personal/carer's leave or paid absence under the public holiday entitlements of the NES.

851. Subclause 199(2) requires FWA to be satisfied that the amount or rate of the loadings provided for in the agreement is not detrimental to the employee when compared to the amount or rate of annual leave, personal/carer's leave or absence on account of public holidays under the award.

Clause 200 – Outworkers

852. This clause provides an additional requirement for FWA approval of an enterprise agreement in relation to outworkers.

853. Subclause 200(1) provides that this clause applies if an employee is an outworker and the employee is covered by:

- an enterprise agreement; and
- a modern award that is in operation and includes outworker terms (clause 140).

854. The definition of outworker terms in clause 140 is intended to cover only those terms that are specifically directed at outworkers.

855. Subclause 200(2) requires FWA to be satisfied that the agreement includes outworker terms and that those terms are not detrimental to the employee when compared to the outworker terms of the modern award. If FWA considers that the outworker terms in the agreement are detrimental to the employee when compared to the outworker terms of the modern award, FWA would not be able to approve the agreement.

Subdivision F – Other matters

Clause 201 – Approval decision to note certain matters

856. This clause sets out the matters that FWA must note in its decision to approve an enterprise agreement. It is intended that FWA will publish approved enterprise agreements and the decisions approving them together. Providing that these matters be noted in the decision will

ensure that an employee who accesses a copy of the agreement and decision on the FWA website will be able to find a comprehensive record of the terms and conditions that apply.

857. Subclause 201(1) provides that FWA must note in its decision to approve an agreement that the agreement includes either or both of the following;

- the model flexibility term (subclause 202(4));
- the model consultation term (subclause 205(2)).

It is intended that these model terms will be set out in the regulations.

858. Subclause 201(2) provides when FWA must note in its decision to approve an agreement that the agreement covers an employee organisation. If an employee organisation has given a notification under subclause 183(1) that the organisation wants the enterprise agreement to cover it and FWA approves the agreement, FWA must note in its decision to approve the agreement that it covers the organisation.

859. Subclause 201(3) provides when FWA must note in its decision to approve an agreement that it has accepted an undertaking under subclause 190(3) and that the undertaking that is taken to be a term of the agreement. Clause 191 provides that an undertaking is taken to be a term of the agreement, as the agreement applies to:

- a single employer (subclause 191(1)); or
- if the agreement covers two or more employers – each employer that gave the undertaking (subclause 191(2)).

Division 5 – Mandatory terms of enterprise agreements

Clause 202 – Enterprise agreements to include a flexibility term, etc.

860. Subclause 202(1) requires an enterprise agreement to include a flexibility term which:

- enables an employee and his or her employer to agree to an arrangement (an individual flexibility arrangement) varying the effect of the agreement in relation to the employee and the employer in order to meet the genuine needs of the employee and employer; and
- complies with the requirements of clause 203. The flexibility term must specify which terms of the enterprise agreement can be varied by an individual flexibility arrangement.

Illustrative example

Danae is employed full time as a graphic designer at Pax Designs Pty Ltd. The Pax Designs Pty Ltd Enterprise Agreement 2010 enables an individual flexibility arrangement to be made between the employer and its employees in relation to the span of ordinary hours to be worked.

Danae has school aged children that she wishes to pick up from school two days per week. She negotiates an individual flexibility arrangement with her employer that she will work longer hours three days per week, so that she can leave at 3pm on the other two days to pick up her children. Danae will still work the equivalent of full time hours.

861. Where there is an individual flexibility arrangement under a flexibility term in an enterprise agreement, the agreement has effect in relation to the employee and the employer as if it were varied by the flexibility arrangement and the arrangement is taken to be a term of the agreement. This means, for example, that if an employer contravened a term of an individual flexibility arrangement the employer would contravene a term of the agreement – so the individual flexibility arrangement can be enforced as a term of the agreement.

862. The individual flexibility arrangement does not change the effect the agreement has in relation to the employer and any other employee and does not have any other effect other than as a term of the agreement (subclause 202(3)). For example, an individual flexibility arrangement would not have any effect as a contract in its own right or as a variation to an employee's contract of employment.

863. The model flexibility term that is prescribed by the regulations will be taken to be a term of the agreement where an enterprise agreement does not include a flexibility term that complies with the requirements under clause 203 (subclause 202(4)).

864. It is intended that the model term to be prescribed will be based upon the model flexibility term developed by the AIRC for inclusion in modern awards. If FWA approves an enterprise agreement and the model flexibility term is taken to be a term of the agreement, FWA must note in its decision to approve the agreement that the model flexibility term is included in the agreement (subclause 201(1)).

Clause 203 – Requirements to be met by a flexibility term

865. This clause provides the requirements that are to be met by a flexibility term. Subclause 203(1) provides that a flexibility term must meet the requirements of the clause.

866. Subclause 203(2) provides a content requirement for a flexibility term. The flexibility term must set out the terms of the enterprise agreement which may be varied by an individual flexibility arrangement. Which particular terms of the enterprise agreement may be varied will be a matter for bargaining. The employer is required to ensure that an individual flexibility arrangement must only be about matters that would be permitted matters if the arrangement were an enterprise agreement. Permitted matters are defined in subclause 172(1). An individual flexibility arrangement must not include a term that would be an unlawful term as defined in clause 194.

867. The flexibility term must require that the employee and the employer genuinely agree to any individual flexibility arrangement (subclause 203(3)). Genuinely agree is not defined here and bears its ordinary meaning. It must also require the employer to ensure that any individual flexibility arrangement must result in the employee being better off overall than if there was no individual flexibility arrangement. It is the employer's responsibility to ensure that this is the case (subclause 203(4)).

Illustrative example

Josh works as a membership consultant at a gymnasium. Under the enterprise agreement applying to his employment, the ordinary hours of work are 37 ½ hours each week to be performed in a span between 8am and 6pm each day. Hours worked outside this span attract penalty rates. Josh's employer usually requires membership consultants to work from 9am to 5.30pm.

In his spare time, Josh coaches an under-12s footy team. To do this, he needs to be able to leave work at 4pm on Tuesdays and Thursdays each week. He wants to start work at 7.30am on these days, but usually this would attract a penalty under the terms of the agreement. The agreement allows the employer and an employee to make an individual flexibility arrangement that varies the terms of the agreement dealing with hours of work and penalty rates.

Josh approaches his employer and asks whether the employer will make an individual flexibility arrangement with him under which the employer agrees that Josh can work from 7.30am to 4pm on Tuesdays and Thursdays. Josh agrees that he will not be paid a penalty on these days, even though he starts work at 7.30am. Josh is genuinely happy to agree to this arrangement because it enables him to balance his work and personal commitments. The employer agrees to this arrangement.

The employer must ensure that Josh is better off overall under the individual flexibility arrangement than under the agreement. Often this will require the employer to make a comparison of the relevant financial benefits that the employee would receive under the agreement, and the agreement as varied by the individual flexibility arrangement. In Josh's case, however, he has agreed under the individual flexibility arrangement to give up a financial benefit (penalty rates) in return for a non-financial benefit (leaving work early). It is intended that, in appropriate circumstances, such an arrangement would pass the better off overall test. Because the better off overall test is being applied here to an individual arrangement, it is possible to take into account an employee's personal circumstances in assessing whether the employee is better off overall. Relevant factors in Josh's case that suggest the individual flexibility arrangement is likely to pass the better off overall test are:

- Josh initiated the request for the individual flexibility arrangement, suggesting that he places significant value on being able to leave work early to coach the footy team;
- Josh genuinely agreed to the arrangement;
- the period of time falling outside the span of hours is relatively insignificant. It is only one hour out of the 37 ½ hour ordinary week that Josh works.

868. Because the value that a particular employee may place on a non-monetary benefit is important, it is less likely that an employee would be better off overall where the employer has initiated a request to agree an individual flexibility arrangement under which the employee gives up a monetary benefit in exchange for a non-monetary benefit. Similarly, it is less likely that an individual flexibility arrangement would result in an employee being better off overall where the monetary benefit given up by the employee had a substantial value, or if the value of the monetary benefit was, in the view of a reasonable person, disproportionate to the non-monetary benefit for which it was exchanged.

869. Subclause 203(5) requires the employer to ensure that the flexibility term does not require that an individual flexibility arrangement must be consented to, or approved, by any other person. For example, a flexibility term could not require that an individual flexibility arrangement only be made where a union or a majority of employees in an enterprise agree. The only exception is where the employee is under 18 and a parent or guardian must sign the individual flexibility arrangement (subparagraph 203(7)(a)(ii)).

870. The flexibility term must require the employer to ensure that any individual flexibility arrangement must be able to be terminated by either the employee or employer by giving written notice of not more than 28 days (paragraph 203(6)(a)). Where both the employee and employer agree in writing to the termination of the individual flexibility arrangement, there is no requirement that 28 days' notice must be given and a termination can be made at any time (paragraph 203(6)(b)). This provides protection for the employer and employee so that either is able to terminate an individual flexibility arrangement at any time, whether the other agrees or not.

871. The flexibility term must require the employer to ensure that any individual flexibility arrangement must be in writing and signed by the employee and the employer (subparagraph 203(7)(a)(i)). Where the employee is under 18 years the individual flexibility arrangement must be signed by a parent or guardian (subparagraph 203(7)(a)(ii)). A copy of an individual flexibility arrangement must be given to the employee within 14 days after it is agreed (paragraph 203(7)(b)).

Clause 204 – Effect of arrangement that does not meet requirements of flexibility term

872. This clause provides for what happens when an employer and employee agree what they intend to be an individual flexibility arrangement, but the arrangement does not meet the requirements set out in clause 203. The clause makes clear that the arrangement has effect as if it were an individual flexibility arrangement.

873. This ensures that an employee retains any benefits that she or he is receiving under the arrangement. If an employee believes she or he is being disadvantaged by the arrangement, the employee can unilaterally terminate the agreement with 28 days notice and bring action in a court for compensation and penalties for breach of the terms of the enterprise agreement.

874. The legislative note under subclause 204(1) makes clear that certain failures to comply with clause 203 may contravene the general protections in Part 3-1.

- For example, if an employer applied coercion to an employee to make an individual flexibility arrangement, the employee is unlikely to have genuinely agreed to the individual flexibility arrangement ((subclause 203(3)).

- In addition, the employer may contravene clauses 343 and 344. Clause 343 prohibits the application of coercion to induce an employee not to exercise a workplace right (relevantly, the right to the benefit of the enterprise agreement). Clause 344 relevantly prohibits the application of undue influence or undue pressure on an employee to compel them to enter into an individual flexibility arrangement.

Clause 205 – Enterprise agreements to include a consultation term, etc.

875. This clause provides that an enterprise agreement must include a consultation term.

876. A consultation term must require the employer(s) to which the agreement applies to consult the employees to whom the agreement applies about major workplace changes that are likely to have a significant effect on those employees. The term must also allow for the representation of those employees during consultation (subclause 205(1)). A person representing the employees could be an elected employee or a representative from an employee organisation.

877. Where an enterprise agreement does not include such a consultation term, the model consultation term will be taken to be a term of the agreement. If FWA approves an enterprise agreement and the model consultation term is taken to be a term of the agreement, FWA must note in its decision to approve the agreement that the model consultation term is included in the agreement (subclause 201(1)).

878. The regulations may set out the model consultation term for enterprise agreements. It is intended that this clause will be based on the consultation term developed by the AIRC for inclusion in modern awards.

Division 6 – Base rate of pay under enterprise agreements

Clause 206 – Base rate of pay under an enterprise agreement must not be less than the modern award rate or the national minimum wage order rate etc.

879. This clause will ensure that the base rate of pay under an enterprise agreement cannot be less than the base rate of pay under either the modern award (the award rate) or a national minimum wage order (the employee's order rate) at any time during the life of the agreement.

880. This clause protects an employee's minimum wage entitlement after FWA approves an enterprise agreement and the agreement commences operation, thus ensuring the integrity of the safety net. In deciding whether or not to approve an enterprise agreement, FWA will consider the base rate of pay provided for by the agreement (the agreement rate) as part of the better off overall test. Subclauses 206(2) and (4) deal with the situation where the agreement rate falls below the award rate or the employee's order rate while the agreement is in operation.

881. If FWA approves an enterprise agreement (under clause 186 or clause 190) that provides for a base rate of pay that is less than the award rate or employee's order rate, the

employee would be entitled to a base rate of pay that is equal to the award rate or the employee's order rate on the day that the agreement commences operation.

882. Subclauses 206(1) and 206(2) operate where an employee is covered by a modern award that is in operation. If an enterprise agreement applies to the employee and the agreement rate is less than the award rate, the employee is entitled to be paid under the agreement at a rate equal to the award rate.

883. Subclauses 206(3) and 206(4) operate where an enterprise agreement applies to an employee who is not covered by a modern award, and consequently, a national minimum wage order would determine the employee's base rate of pay if the agreement did not apply to the employee. For those employees, if the agreement rate is less than the order rate, the employee is entitled to be paid under the agreement at a rate equal to the order rate.

884. In these circumstances, the award or order rate is taken to be a term of the agreement and can be enforced as such.

Illustrative example

Min works in the hospitality industry as an assistant in a sandwich shop. She is covered by the modern award for the hospitality industry. In negotiations for a proposed enterprise agreement, Min is told that she will be entitled to $798.00 per week under the agreement but there will be no annual wage increases. At that time, Min is entitled to $744.80 per week under the hospitality award. The proposed enterprise agreement is approved by a valid majority of employees at the sandwich shop and Min's employer applies to have the agreement approved by FWA. At the time that the employer applied for approval of the agreement by FWA, Min would be better off under the agreement than under the hospitality award. Therefore, the agreement would pass the better off overall test. FWA approves the agreement and it commences operation on 24 February 2010. However, on 1 October 2012 the award rate is adjusted to $802.00 per week, and therefore, the agreement rate falls below the award rate. At this time, Min would be entitled to $802.00 per week under the agreement.

Division 7—Variation and termination of enterprise agreements

Subdivision A – Variation of enterprise agreements by employers and employees

Clause 207 – Variation of an enterprise agreement may be made by employers and employees

885. In general, the process for varying an enterprise agreement is the same as the process for making an enterprise agreement, with some minor modifications.

886. The employees affected by a variation are:

- the employees employed at the time when a proposed variation is made and who are covered by the agreement; and

- the employees employed at the time who will be covered by the agreement if the proposed variation is approved by FWA.

887. These employees are referred to as affected employees – see subclause 207(2). In many instances, these two groups of employees will be the same. However, this clause ensures that where the scope of the agreement changes as a result of the variation, all of the employees affected by the change decide whether to make the variation.

888. Subclause 207(1) provides that an employer, if the agreement covers a single employer, or all of the employers, if the agreement covers two or more employers, can make a variation with affected employees.

889. A variation to an agreement has no effect unless approved by FWA in accordance with clause 211 which sets out when FWA must approve a variation (subclause 207(3)). A variation to a greenfields agreement can only be made if one or more of the employees necessary for the normal conduct of the enterprise concerned have been employed (subclause 207(4)).

890. An agreement which did not pass the better off overall test, but which FWA approved under clause 189, cannot be varied by employers and employees under subclause 207(1).

Clause 208 – Employers may request employees to approve a proposed variation of an enterprise agreement

891. Subclause 208(1) provides that an employer covered by an enterprise agreement may request the affected employees to approve the proposed variation by voting for it.

892. Subclause 208(2) makes clear that, among other methods of voting, the employer may request that the employees vote by ballot (secret or not) or by an electronic method. The vote may also be conducted by a show of hands or by another method that demonstrates the employees' genuine agreement.

Clause 209 – When a variation of an enterprise agreement is made

893. This clause states the point in time at which a variation is made.

894. Subclause 209(1) provides that a variation to a single-enterprise agreement is made when the proposed variation is approved by a majority of the affected employees of an employer, or each employer covered by the agreement, who cast a valid vote for the proposed variation.

895. Subclause 209(2) provides that a variation to a multi-enterprise agreement is made when the proposed variation is approved by a majority of the affected employees of each individual employer who cast a valid vote for the proposed variation. The variation must be approved by the affected employees of each of the employers. A variation of a multi-enterprise agreement is not made on an enterprise by enterprise basis (in contrast to the making of a multi-enterprise agreement – subclause 182(2)).

Clause 210 – Application for FWA approval of a variation of an enterprise agreement

896. If a variation of an enterprise agreement (whether single or multi-enterprise) is made, a person covered by the agreement must apply to FWA for approval of the variation (subclause 210(1)). This could be an employer, employee or employee organisation covered by the agreement.

897. The application must be accompanied by a signed copy of the variation and a copy of the agreement consolidated to include the variation and any declarations that are required by the procedural rules to accompany the application (subclause 210(2)).

898. The application to FWA by the employer or employers must be made within 14 days after the variation is made (paragraph 210(3)(a)). FWA would have discretion to extend this period if it considers that, in all the circumstances, it would be fair to do so (paragraph 210(3)(b)).

899. The regulations may prescribe requirements relating to the signing of variations of agreements (subclause 210(4)).

Clause 211 – When FWA must approve a variation of an enterprise agreement

900. This clause provides for when FWA must approve a variation of an enterprise agreement. In general, the rules that apply to the approval of agreements apply equally to variations. This clause applies those rules by reference, but makes some modifications to ensure that the rules work correctly when applied to the approval of variations.

901. Subclause 211(1) provides that FWA must approve a variation if the following requirements in relation to the agreement as proposed to be varied are met:

- FWA is satisfied that had an application been made under clause 185 for the approval of the agreement as proposed to be varied, FWA would have been required to approve the agreement under clause 186. This would require FWA to be satisfied that the agreement was genuinely agreed to by the employees, the terms of the agreement did not contravene the NES (see clause 55) and the agreement passes the better off overall test.

- FWA is satisfied that the group of employees covered by the agreement is fairly chosen, the agreement does not contain any unlawful terms, the agreement includes a term that provides a procedure for settling disputes and the provisions of Subdivision E, dealing with approval requirements relating to particular employees, are complied with.

- FWA is satisfied that the agreement as varied does not specify a nominal expiry date of more than four years after the day on which FWA initially approved the agreement.

- FWA considers it appropriate to approve the variation taking into account the views of the employee organisation, or organisations (if any), covered by the agreement. For example, FWA may not approve a proposed variation if it imposes additional

obligations on an employee organisation and the organisation did not want to agree to them.

902. The legislative note under subclause 211(1) makes clear that a variation may be approved under this clause if a written undertaking has been provided to address FWA's concern that the variation does not meet the approval requirements.

903. Subclause 211(2) provides that in deciding whether it is satisfied of the necessary requirements in order to approve a proposed variation, FWA is to take account of subclauses 211(3) and (4), which set out how the requirements for FWA approval would apply in relation to a variation.

904. Subclause 211(3) modifies the requirements for FWA approval of a new enterprise agreement to ensure that FWA takes into account these provisions when deciding whether to approve a proposed variation.

905. Subclause 211(4) modifies the requirements in clause 193 (which deals with the better off overall test). The effect of these modifications is that a greenfields agreement as proposed to be varied (where employees have been employed) is assessed as if it were a non-greenfields agreement.

906. Individual flexibility arrangements that have been agreed to under the terms of the agreement are to be disregarded by FWA in assessing whether the enterprise agreement as proposed to be varied passes the better off overall test (subclause 211(5)).

907. Subclause 211(6) permits regulations to be made to ensure that further modifications can be made if subclauses 211(3) and (4) do not make all of the changes necessary to properly apply the approval requirements for a new agreement to the approval of an agreement as varied.

Clause 212 – FWA may approve an enterprise agreement with undertakings

908. This clause provides that FWA may approve a variation of an enterprise agreement with undertakings. It is of similar effect to clause 190.

Clause 213 – Effect of undertakings

909. Subclause 213(1) provides that where FWA accepts an undertaking in relation to the variation, it is taken to be a term of the agreement, as it applies to the employer.

910. Where an agreement covers two or more employers, subclause 213(2) provides that the undertaking is taken to be a term of the agreement, as it applies to each employer that gave the undertaking.

Clause 214 – When FWA may refuse to approve a variation of an enterprise agreement

911. Subclause 214(1) provides that FWA may refuse to approve a variation of an agreement if it considers that compliance with the terms of the agreement may result in:

- a person committing an offence against a law of the Commonwealth; or

- result in the imposition of a pecuniary penalty on a person for a contravention of a Commonwealth law.

912. Subclause 214(2) makes it clear that FWA may refuse to approve an agreement as varied on this basis even if it would otherwise be required to do so under clause 211.

913. Subclause 214(3) enables FWA to refer an agreement a proposed to be varied to any person or body it considers appropriate where it refuses to approve a variation of an agreement under this clause.

Clause 215 – Approval decision to note undertakings

914. Clause 215 provides when FWA must note in its decision to approve a variation of an agreement that it has accepted an undertaking under subclause 212(3) and that the undertaking is taken to be a term of the agreement. Clause 213 provides that an undertaking is taken to be a term of the agreement, as the agreement applies to:

- a single employer (subclause 213(1)); or

- if the agreement covers two or more employers – each employer that gave the undertaking (subclause 213(2)).

Clause 216 – When variation comes into operation

915. This clause provides for when a variation of an enterprise agreement comes into operation. If a variation is approved it operates from the day specified in the decision to approve the variation.

Subdivision B – Variations of enterprise agreements where there is ambiguity, uncertainty or discrimination

Clause 217 – Variation of an enterprise agreement to remove ambiguity or uncertainty.

916. This clause provides for variations of enterprise agreements to remove ambiguity or uncertainty.

FWA can vary an enterprise agreement to remove an ambiguity or uncertainty in the agreement. An application may be made by one or more of the employers covered by the agreement, an employee covered by the agreement or an employee organisation covered by the agreement (subclause 217(1)).

917. FWA would need to be satisfied that the agreement contains an ambiguity or uncertainty and then decide whether the ambiguity or uncertainty should be removed and, if so, how.

918. If FWA varies the agreement, the variation operates from the day specified in the decision to approve the variation (subclause 217(2)).

Clause 218 – Variation of an enterprise agreement on referral by HREOC

919. This clause provides that an enterprise agreement can be varied on referral by the HREOC.

920. Subclause 218(1) provides that if an agreement is referred to FWA under section 46PW of the *Human Rights and Equal Opportunity Commission Act 1986*, it must review the agreement. Section 46PW allows a person or a trade union to lodge a complaint with the HREOC alleging that a person has done a discriminatory act under an industrial instrument.

921. The Sex Discrimination Commissioner is entitled to make submissions to FWA for consideration in the review (subclause 218(2)).

922. If FWA considers that the agreement reviewed requires a person to do an act that would be unlawful under Part II of the *Sex Discrimination Act 1984*, but for the fact that the act would be done in direct compliance with the agreement, FWA must vary the agreement so that it no longer requires the person to do an act that would be unlawful (subclause 218(3)). Part II of the *Sex Discrimination Act 1984* sets out what is sex discrimination in work and in other areas and deals with sexual harassment.

923. If the agreement is varied, the variation operates from the day specified in FWA's decision to vary the agreement (subclause 218(4)).

Subdivision C – Termination of enterprise agreements by employers and employees

Clause 219 – Employers and employees may agree to terminate an enterprise agreement

924. This clause provides that employers and employees may agree to terminate an enterprise agreement at any time while the agreement is in operation.

925. The employer, if the agreement covers a single employer, or all of the employers, if the agreement covers two or more employers (whether single interest employers covered by a single enterprise agreement, or employers covered by a multi-enterprise agreement), and the employees covered by the agreement may jointly agree to terminate an agreement.

926. The legislative note under subclause 219(1) explains that a termination is agreed to when a majority of employees who cast a valid vote approve the termination.

927. A termination of an agreement has no effect unless it is approved by FWA under clause 223, which sets out the requirements that FWA must be satisfied of in order to approve a termination (subclause 219(2)).

928. Subclause 219(3) provides that the employer or employers and the employees are covered by an agreement can agree to terminate a greenfields agreement only if one or more of the persons who will be necessary for the normal conduct of the enterprise concerned have been employed.

Clause 220 – Employers may request employees to approve a proposed termination of an enterprise agreement

929. This clause provides that an employer may request employees to approve a proposed termination of an enterprise agreement.

930. An employer covered by an agreement may request the employees covered by the agreement to approve the proposed termination by voting for it.

931. Subclause 220(2) requires the employer, before making the request, to take all reasonable steps to notify the employees of:

- the time and place at which the vote will occur; and
- the voting method that will be used.

932. The employer must also give the employees a reasonable opportunity to decide whether they want to approve the proposed termination (paragraph 220(2)(b)). This may, for example, involve the employer allowing employees sufficient time between making the request and the time of the vote to consider the effect of the termination on their terms and conditions.

933. Subclause 220(3) provides examples of the voting method that may be used. Without limiting subclause 220(1), the employer may request that the employees vote by ballot (secret or not) or by an electronic method.

Clause 221 – When termination of an enterprise agreement is agreed to

934. This clause provides for when a termination of an enterprise agreement is agreed to.

935. Subclause 221(1) provides that in the case of a single-enterprise agreement, the termination is agreed to when a majority of the employees (taken as a group) who are covered by the agreement and who cast a valid vote approve the termination.

936. Subclause 221(2) provides that in the case of a multi-enterprise agreement, the termination is agreed to when the employees covered by the agreement are asked to approve a proposed termination and a majority of the employees of each individual employer who cast a valid vote have approved the termination.

937. If the termination is only approved by a majority of employees of some, but not all, the employers, FWA cannot approve the termination. It would be open to the employees and employer to negotiate a new single-enterprise agreement which would replace the multi-enterprise agreement (clause 58(3)). The special rule in clause 58(3) provides that where a multi-enterprise agreement is replaced by a single enterprise agreement in relation to the same employment, the multi-enterprise agreement ceases to apply to the employee in relation to that employment.

Clause 222 – Application for FWA approval of a termination of an enterprise agreement

938. If a termination of an enterprise agreement has been agreed to, a person covered by the agreement must apply to FWA for approval of the termination (subclause 222(1)). This would allow any employee, employer or employee organisation who is covered by the agreement to apply for FWA approval of the termination.

939. The application to FWA must be accompanied by any declarations that are required by the procedural rules (subclause 222(2)). The application must be made within 14 days after the termination is agreed to (paragraph 222(3)(a)). FWA would have discretion to extend this period if it considers that, if in all the circumstances, it would be fair to do so (paragraph 222(3)(b)).

Clause 223 – When FWA must terminate an enterprise agreement

940. This clause provides when FWA must terminate an enterprise agreement. If an application under clause 222 is made, FWA must approve the termination if it is satisfied that:

- each employer complied with the requirement to take all reasonable steps to notify the employees of the time and place at which the vote for the termination would occur and the voting method that would be used, and each employer gave the employees a reasonable opportunity to decide whether they wanted to approve the proposed termination;
- a majority of the employees (in the case of a single-enterprise agreement) and the majority of the employees of each individual employer (in the case of a multi-enterprise agreement) approved the proposed termination;
- there are no other reasonable grounds for believing that the employees have not agreed to the termination; and
- it is appropriate to approve the termination taking into account the views of the employee organisation or employee organisations covered by the agreement.

Clause 224 – When termination comes into operation

941. This clause provides that if a termination of an enterprise agreement is approved by FWA under clause 223, the termination will operate from the date specified in the decision to approve the termination.

Subdivision D – Termination of enterprise agreements after nominal expiry date

Clause 225 – Application for termination of an enterprise agreement after its nominal expiry date

942. This clause provides that if an enterprise agreement has passed its nominal expiry date, one or more of the employers, an employee or an employee organisation covered by the agreement may apply to FWA for termination of the agreement.

Clause 226 – When FWA must terminate an enterprise agreement

943. This clause requires FWA to terminate an agreement if an application has been made under clause 225, if it:

- is satisfied that it is not contrary to the public interest to do so; and
- considers it appropriate to do so taking into account all the circumstances including the views of the employees, each employer, any employee organisations covered by the agreement and the circumstances of those employees, employers and organisations including the likely effect that the termination will have on them.

Clause 227 – When termination comes into operation

944. This clause provides that if an agreement is terminated under clause 226, the termination operates from the day specified in the decision of FWA to terminate the agreement.

Division 8 – FWA's general role in facilitating bargaining

945. Division 8 sets out FWA's role in facilitating the bargaining process. It lists the good faith bargaining requirements which bargaining representatives are required to meet when bargaining for a proposed single enterprise agreement or a multi-enterprise agreement in respect of which a low-paid authorisation is in operation.

946. It is anticipated that most bargaining representatives will bargain voluntarily and cooperatively without the need for assistance or intervention from FWA. In the occasional cases where this is not occurring, the Bill provides mechanisms for FWA to facilitate bargaining and, where necessary, make orders to ensure the integrity of the bargaining process.

947. If a representative does not meet the good faith bargaining requirements, another bargaining representative may apply to FWA for a bargaining order. A bargaining representative who fails to comply with a bargaining order may contravene a civil remedy provision exposing the bargaining representative to pecuniary penalties and other court orders. If the non-compliance with the bargaining orders is serious and sustained, another bargaining representative may also apply for a serious breach declaration (see clause 235). The consequence of a serious breach declaration is that FWA may make a bargaining-related workplace determination under clause 269.

948. If an employer has not agreed to bargain with its employees, an employee bargaining representative may apply for a majority support determination. If FWA determines that there is majority support for collective bargaining and an employer continues to not participate in bargaining, a bargaining representative for the employees may seek a bargaining order. Where the agreement is a single-enterprise agreement not subject to a single interest employer authorisation, a bargaining representative may apply to FWA for a scope order to determine which classes or groups of employees are to be covered by a proposed enterprise agreement.

949. Bargaining representatives may also apply to FWA for assistance in dealing with bargaining disputes under clause 240. Where a low-paid authorisation is in operation in relation to the agreement, FWA may provide assistance on its own initiative under clause 246.

Subdivision A – Bargaining orders

Clause 228 – Bargaining representatives must meet the good faith bargaining requirements

950. Subclause 228(1) lists the good faith bargaining requirements that bargaining representatives are required to meet. If a bargaining representative is not meeting the good faith bargaining requirements, another bargaining representative may seek an order from FWA to enforce compliance with the requirements. The good faith bargaining requirements are:

- attending, and participating in, meetings at reasonable times;
- disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;
- responding to proposals made by other bargaining representatives for the agreement in a timely manner;
- giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative's responses to those proposals; and
- refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining.

951. The good faith bargaining requirements are generally self-explanatory. The last requirement, 'refraining from capricious or unfair conduct…' is intended to cover a broad range of conduct. For example, conduct may be capricious or unfair conduct if an employer:

- fails to recognise a bargaining representative;
- does not permit an employee who is a bargaining representative to attend meetings or discuss matters relating to the terms of the proposed agreement with fellow employees;
- dismisses or engages in detrimental conduct towards an employee because the employee is a bargaining representative or is participating in bargaining; or
- prevents an employee from appointing his or her own representative.

952. Subclause 228(2) makes it clear that the good faith bargaining requirements do not require a bargaining representative to make concessions during bargaining for the agreement or to enter into an agreement if they do not agree to its terms. Paragraph 255(1)(a) also provides that FWA may not make an order requiring any particular content to be included or not included in a proposed enterprise agreement.

953. The good faith bargaining requirements do not apply to the process of varying or terminating an enterprise agreement.

Clause 229 – Applications for bargaining orders

954. Subclause 229(1) provides that only a bargaining representative may apply to FWA for a bargaining order in relation to a proposed enterprise agreement. Bargaining orders are not available in relation to a proposed multi-enterprise agreement unless a low-paid authorisation is in operation in relation to the agreement (subclause 229(2)).

955. Subclause 229(3) imposes conditions on the time when applications may be made for bargaining orders. While bargaining for an enterprise agreement may occur at any time, this subclause ensures that if an existing enterprise agreement is in operation, no bargaining representative can be required to comply with the good faith bargaining requirements if it is more than 90 days before the nominal expiry date of the enterprise agreement, unless it is after an employer has requested the employees to approve the proposed agreement. If there is no existing enterprise agreement in operation, an application may be made at any time.

956. A bargaining representative may only apply for a bargaining order if the representative:

- has concerns that the good faith bargaining requirements are not being met or if the bargaining process is not proceeding efficiently or fairly because there are multiple bargaining representatives for the agreement;
- has given a written notice setting out those concerns to the relevant bargaining representatives; and
- after giving them a reasonable time within which to respond, considers that the relevant bargaining representatives have not responded appropriately to those concerns (subclause 229(4)).

957. In some instances, FWA may allow a bargaining order application even though the written notice of concerns has not been issued, if FWA is satisfied it is appropriate given all the circumstances (subclause 229(5)). For example, if there is an application for a scope order before FWA, FWA may consider it appropriate in the particular circumstances to consider bargaining order applications at the same time and so not require the written notice of concerns to be issued. FWA may also consider it appropriate to waive this requirement in a case where failure to urgently consider the matter may result in detriment or disadvantage to the application, e.g., where an application for a bargaining order is made on the ground that an employee has been threatened with dismissal in breach of the good faith bargaining requirement in paragraph 228(1)(e) (refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining).

Clause 230 – When FWA may make a bargaining order

958. FWA may make a bargaining order in relation to a proposed enterprise agreement: if an application for a bargaining order has been made; the requirements under this clause are met; and FWA is satisfied that it is reasonable in all the circumstances to make the order.

959. Prior to making a bargaining order, subclause 230(2) requires FWA to be satisfied that the employer or employers have agreed to bargain, or have initiated bargaining, for the proposed enterprise agreement. Alternatively, FWA must be satisfied that one of the following instruments is in operation in relation to the agreement (subclause 230(1)):

- a majority support determination;
- a scope order; or
- a low-paid authorisation.

960. To make a bargaining order, subclause 230(3) requires FWA to be satisfied either that a bargaining representative has not met the good faith bargaining requirements or that the bargaining process is not proceeding efficiently and fairly because there are too many bargaining representatives.

961. In addition, FWA must be satisfied that the applicant has complied with the requirements to notify bargaining representatives in writing of their concerns (see subclause 229(4)), unless FWA had previously been satisfied that no notice was necessary.

Clause 231 – What a bargaining order must specify

962. This clause makes clear what must be specified in a bargaining order and describes the kind of bargaining orders FWA may make in relation to a proposed enterprise agreement. Effectively, a bargaining order must specify the actions to be taken by, and the requirements imposed upon, bargaining representatives for the purpose of any or all of the three categories described below. FWA is granted the discretion as to the kinds of bargaining orders it may make so it can tailor the order appropriately to rectify any failure to meet the good faith bargaining requirements.

963. First, the bargaining order can specify the actions required to ensure that the bargaining representatives meet the good faith bargaining requirements (see subparagraph 231(1)(a)). For example, the order may specify the times and dates when the representatives must attend and participate in meetings.

964. Secondly, it can specify the actions required to ensure the representatives specifically meet the good faith bargaining requirement of refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining (see paragraphs 231(1)(b) and (c)). For example, the order may specify that the employer must not terminate the employment of an employee if the termination would constitute capricious or unfair conduct undermining freedom of association (see paragraph 231(2)(c)). Another example is that the order may require the reinstatement of an employee whose employment has been terminated if the termination constitutes, or relates to, a failure by a bargaining representative to meet this particular good faith bargaining requirement (see paragraph 231(2)(d)). The order could also require an employer to pay an amount of compensation to the reinstated employee. In such circumstances, clause 726 would prevent an employee seeking a remedy for the termination under another part of the Bill or under a State or Territory law.

965. Thirdly, it can specify appropriate matters, actions or requirements to promote the efficient or fair conduct of bargaining in the event of their being multiple bargaining representatives (see paragraph 231(1)(d)). For example, FWA may exclude a bargaining representative who is hindering or disrupting bargaining from participating in the process. If the bargaining process is not proceeding efficiently because there are too many employee bargaining representatives, FWA may require the bargaining representatives for the proposed agreement to meet and appoint one of them to represent the others in bargaining (see paragraphs 231(2)(a) and (b)).

966. Subclause 231(3) enables regulations to both prescribe the factors FWA may or must take into account in deciding whether or not to make a bargaining order for reinstatement of an employee and provide for FWA to take action and make orders in connection with, and to deal with matters relating to, a bargaining order of that kind. It is proposed that regulations be made to make clear that FWA can make orders to require the repayment of lost wages to the employee and to ensure continuity of service for accrued entitlements.

Clause 232 – Operation of a bargaining order

967. Clause 232 provides that a bargaining order comes into operation on the day on which it is made. The order ceases to be in operation at the earliest to occur of the circumstances described in paragraph 232(b), namely: revocation, approval of an enterprise agreement by FWA, the making of a workplace determination by FWA or when the bargaining representatives agree that bargaining has ceased.

Clause 233 – Contravening a bargaining order

968. A person to whom a bargaining order applies must not contravene a term of the order.

969. This is clause is a civil remedy provision under Part 4-1 (Civil remedies).

Subdivision B – Serious breach declarations

Clause 234 – Applications for serious breach declarations

970. This clause allows a bargaining representative for a proposed enterprise agreement to apply for a serious breach declaration. The consequence of a serious breach declaration is that FWA may, in certain circumstances, make a bargaining-related workplace determination (see clause 269).

971. It is intended that serious breach declarations would be made rarely and only as a last resort in the event that a bargaining representative has behaved in a manner that shows disregard for the bargaining obligations and that significantly undermines bargaining and where the framework of good faith bargaining orders has been demonstrated to have failed to bring about good faith bargaining.

Clause 235 – When FWA may make a serious breach declaration

972. FWA may make a serious breach declaration in relation to a proposed enterprise agreement if an application is made and FWA is satisfied that:

- a bargaining representative has contravened one or more bargaining orders in relation to the agreement;
- the contravention(s) is serious and sustained and has significantly undermined bargaining for the agreement;
- the other bargaining representatives have exhausted all other reasonable alternatives to reach agreement on the terms for the agreement;
- agreement on the terms for the agreement will not be reached in the foreseeable future; and
- it is reasonable in all the circumstances to make the declaration, taking into account the views of all the bargaining representatives for the agreement.

973. Subclause 235(3) specifies the factors FWA must take into account when considering whether the representatives have exhausted all other reasonable alternatives to reach agreement on the terms for the proposed enterprise agreement. These factors include:

- whether FWA has provided assistance under clause 240 in relation to the agreement;
- whether a bargaining representative has applied to a court for an order in relation to the contravention(s) of the bargaining order; and if so,
- any findings or orders made by the court as a result.

974. Subclause 235(4) sets out the form requirements for the serious breach declaration. The declaration comes into operation on the day on which it is made and ceases when each employer specified in the declaration is covered by an enterprise agreement or a workplace determination (subclause 235(5)).

Subdivision C – Majority support determinations and scope orders

Clause 236 – Majority support determinations

975. This clause allows a bargaining representative of an employee to apply to FWA for a determination that a majority of the employees who will be covered by the proposed enterprise agreement want to bargain with the employer – a majority support determination. These determinations are only available in relation to proposed single-enterprise agreements.

976. There is no penalty for contravening a majority support determination. If FWA determines that there is majority support for collective bargaining and an employer still refuses to bargain, the employee bargaining representative may seek a bargaining order to require the employer to bargain.

977. The application for a majority support determination must specify the employers and the group of employees that will be covered by the proposed agreement (subclause 236(2)).

Clause 237 – When FWA must make a majority support determination

978. This clause requires FWA to make a majority support determination if an application for the determination has been made and FWA is satisfied that:

- a majority of the employees (employed at a time determined by FWA) who will be covered by the proposed agreement want to bargain (paragraph 237(2)(a));

- the employer has not yet agreed to bargain, or initiated bargaining, for the agreement (paragraph 237(2)(b)). If bargaining has commenced in relation to a proposed enterprise agreement, the appropriate tool to resolve issues surrounding coverage are scope orders (or bargaining orders) and not majority support determinations. This does not prevent employees of the employer who are not covered by the proposed agreement from applying for a majority support determination in relation to an agreement that will cover them;

- if the agreement will not cover all the employees of the employer and the group of employees that will be covered by the agreement is not geographically, operationally or organisationally distinct, the group of employees was fairly chosen (paragraph 237(2)(c)); and

- it is reasonable in all the circumstances to make the majority support determination (paragraph 237(2)(d)).

979. It is at the discretion of FWA what method it uses to work out whether a majority of the employees want to bargain (subclause 237(3)). Methods might include a secret ballot, survey, written statements or a petition. A majority support determination comes into operation on the day on which it is made (subclause 237(4)).

Clause 238 – Scope orders

980. Subclause 238(1) allows a bargaining representative for a single enterprise agreement to apply for a scope order if the representative has concerns that bargaining for the proposed enterprise agreement is not proceeding efficiently or fairly because the agreement will not cover the appropriate employees, or will cover employees that is not appropriate for the agreement to cover.

981. Subclause 238(2) prohibits a bargaining representative applying for a scope order in respect of: a multi-enterprise agreement (including one for which a low-paid authorisation is in operation) or a single enterprise agreement in respect of which a single-interest authorisation is in operation.

982. A bargaining representative may only apply for a scope order if the representative:

- has given a written notice to the relevant bargaining representatives setting out the concerns mentioned in subclause 238(1); and

- has provided a reasonable time within which to respond to the concerns, and considers that the relevant bargaining representatives have not responded appropriately to the concerns.

983. These same preconditions apply for bargaining orders (except that for bargaining orders, FWA has the ability to waive the requirement to give the written notice of concerns). This requirement is included to encourage bargaining representatives to consider resolving issues surrounding the scope of a proposed enterprise agreement through the good faith bargaining process. It also ensures that it is no more expedient to obtain a scope order rather than a bargaining order.

984. Subclause 238(4) provides that FWA may make a scope order only if FWA is satisfied that:

- the applicant bargaining representative has met or is meeting the good faith bargaining requirements;
- making the order will promote the fair and efficient conduct of bargaining;
- if the agreement will not cover all the employees of the employer and the group of employees that will be covered by the agreement is not geographically, operationally or organisationally distinct, the group of employees was fairly chosen; and
- it is reasonable in all the circumstances to make the order.

985. A scope order must specify the employer(s) and the employees or classes or group of employees that will be covered by the proposed enterprise agreement. For example, a scope order may require an employer to include a class of employees in bargaining for a proposed agreement or exclude a class of employees from bargaining for an agreement. Alternatively, a scope order may require an employer to bargain collectively with different classes of employees in relation to separate agreements.

986. Subclause 238(7) provides that when FWA makes a scope order, it may also amend existing bargaining orders and make or vary other orders, determinations or other instruments made by FWA, or take other actions as it considers appropriate. This ensures that FWA may vary a majority support determination rather than allow it to be inconsistent with a scope order. Equally, FWA may extend the application of earlier bargaining orders issued in relation to bargaining for a proposed enterprise agreement, so that they continue to apply to the new proposed enterprise agreements as detailed in the scope orders.

Illustrative example

David's Debt Services (DDS) is refusing to bargain collectively with its employees, who are in two Divisions – the Loans Division, and the Debt Recovery Division. Justine, a bargaining representative for the Debt Recovery employees, obtains a majority support determination that a majority of the employees at DDS want to bargain with the employer for a proposed enterprise agreement.

DDS, Justine and the bargaining representative for the Loans Division employees, Cath, commence negotiations. However, the different interests of the employees of the two Divisions mean that Justine and Cath cannot agree on their negotiating strategy.

Two months after the determination is made DDS applies for a scope order because it believes bargaining is not proceeding efficiently on the basis it is more appropriate for it to bargain separately with the employees of each Division.

FWA is satisfied that: DDS is meeting the good faith bargaining requirements; making the order will promote the fair and efficient conduct of bargaining; the two groups of employees are operationally distinct; and it is reasonable in the circumstances to make the order. FWA makes the scope order specifying DDS and the Debt Recovery Division employees in one proposed enterprise agreement, and DDS and the Loans Division employees in another proposed enterprise agreement. At the same time, FWA varies the majority support determination so that it applies to what are now the two proposed agreements.

Clause 239 – Operation of a scope order

987. Clause 239 provides that a scope order comes into operation on the day on which it is made and ceases to be in operation at the earliest of the circumstances provided in paragraph 239(b).

988. There is no civil remedy provision for contravention of a scope order. Instead, the consequence of contravening a scope order is that a bargaining representative risks having a bargaining order issued against it (contravening a bargaining order is a civil remedy provision). Also, subclause 187(2) makes clear that prior to approving an enterprise agreement, FWA must be satisfied that the agreement would not be inconsistent with or undermine good faith bargaining for a proposed enterprise agreement in respect of which there is a scope order in operation.

Subdivision D – FWA may deal with a bargaining dispute on request

Clause 240 – Application for FWA to deal with a bargaining dispute

989. A bargaining representative for a proposed enterprise agreement may apply to FWA for assistance if there is a dispute about the making of an enterprise agreement and it cannot be resolved by the bargaining representatives (subclause 240(1)).

990. If the proposed enterprise agreement is a single-enterprise agreement or a multi-enterprise agreement in relation to which a low-paid authorisation is in operation, the application

can be made by one bargaining representative without the agreement of the other bargaining representatives (subclause 240(2)).

991. If the agreement is a multi-enterprise agreement for which a low-paid authorisation is not in operation, a bargaining representative may only make the application for assistance if all of the bargaining representatives for the agreement have agreed to the making of it (subclause 240(3)).

FWA may deal with the dispute by mediation or conciliation or by making a recommendation or expressing an opinion (see clause 595). FWA may arbitrate the dispute only if the bargaining representatives have agreed to it doing so (subclause 240(4)).

Division 9 – Low-paid bargaining

992. Division 9 provides a framework to facilitate bargaining for multi-enterprise agreements for certain types of employees, being low-paid employees who either have not historically had access to collective bargaining or who face substantial difficulties in bargaining at the enterprise level. These employees include, e.g., certain employees in the community services sector and the cleaning and child care industries.

993. The Bill does not define low-paid employees. Whether employees are 'low-paid' will be a matter that FWA must consider having regard to all relevant circumstances when deciding whether to make a low-paid authorisation under clause 243.

994. Access to the low-paid multi-enterprise bargaining stream will be limited to those employers and employees covered by a low-paid authorisation obtained from FWA.

995. There are a number of matters that differentiate bargaining for a proposed multi-enterprise agreement in the low-paid bargaining stream from bargaining for a multi-enterprise agreement outside that stream.

996. First, the good faith bargaining requirements apply to bargaining representatives in the low-paid stream and bargaining orders are available. Secondly, FWA may act on its own initiative in order to facilitate bargaining in the low-paid stream. Thirdly, where the bargaining representatives for an agreement in the low-paid stream are genuinely unable to reach agreement on some or all of the issues arising in bargaining, FWA may in certain circumstances make a low-paid workplace determination.

997. The availability of this special stream of bargaining for a multi-enterprise agreement recognises the particular difficulties facing low-paid employees. These difficulties are often particularly acute when the employees are trying to bargain collectively for the first time. The purpose of the low-paid authorisation is to limit access to the stream, and to the additional benefits associated with it, to those employers and employees who meet the criteria in clause 243.

998. Although parties who are covered by an authorisation will be required to bargain in good faith, scope orders (under Division 8 of Part 2-4 of this Bill) will not apply and parties will not be permitted to take protected industrial action in support of bargaining claims.

Clause 241 – Objects of this Division

999. The objects of Division 8 are set out in clause 241. They are:

- to assist and encourage low-paid employees and employers, who have not historically had the benefits of collective bargaining, to make an enterprise agreement that meets their needs;

- to assist low-paid employees and their employers to identify improvements to productivity and service delivery through bargaining for an enterprise agreement that covers two or more employers, while taking into account the specific needs of individual enterprises;

- to address constraints on the ability of low-paid employees and their employers to bargain at the enterprise level, including constraints relating to a lack of skills, resources, bargaining strength or previous bargaining experience; and

- to enable FWA to provide assistance to low-paid employees and their employers to facilitate bargaining for agreements.

1000. A legislative note indicates that a low-paid workplace determination may be made under Part 2-5 of this Act if a low-paid authorisation is in operation and the bargaining representatives for a proposed enterprise agreement are unable to reach agreement.

Clause 242 – Low-paid authorisations

1001. Clause 242 sets out the process for employers and employees to enter the low-paid bargaining stream. The first requirement to enter the stream will be for applicants to obtain a low-paid authorisation from FWA.

1002. An application to FWA for a low-paid authorisation in relation to a proposed multi-enterprise agreement may be made by:

- a bargaining representative for the agreement;

- an employee organisation that is entitled to the represent the industrial interests of an employee in relation to work to be performed under the agreement.

1003. Bargaining representative is defined in clauses 176 and 177.

1004. A legislative note under paragraph 242(1)(b) indicates that employers who are covered by a low-paid authorisation are subject to certain rules in relation to a proposed enterprise agreement that would not otherwise apply. This contemplates that, unlike multi-enterprise agreement making generally, employers specified in a low-paid authorisation will be obliged to bargain in good faith and will be required to give employees a notice of employee representational rights.

1005. Subclause 242(2) provides that an application made to FWA for a low-paid authorisation must specify:

- the employers that will be covered by the agreement; and
- the employees who will be covered by the agreement.

1006. An application would need to specify the names of each of the proposed employers.

1007. An application under clause 242 must not be made in relation to a proposed greenfields agreement (subclause 242(3)).

Clause 243 – When FWA must make a low-paid authorisation

1008. Clause 243 sets out the circumstances in which FWA must make a low-paid authorisation.

1009. FWA must make a low-paid authorisation in relation to a proposed multi-enterprise agreement if:

- an application for the authorisation has been made; and
- it is satisfied that it is in the public interest to make the authorisation, taking into account the matters in subclauses 243(2) and 243(3).

1010. Subclause 243(2) provides a number of matters that FWA must take into account when deciding whether to make a low-paid authorisation. These matters relate to the historical and contemporary collective bargaining practices in the particular industry in which the authorisation is being sought.

1011. In assessing these matters, and whether to make an authorisation, FWA must be satisfied that the employees who will be covered by the authorisation are low-paid paid employees who either have not had access to collective bargaining or who face substantial difficulty bargaining at the enterprise level.

1012. The second limb of this test recognises that the low-paid stream is not confined to employees who have never been covered by a collective agreement or instrument before, although the applicant for the authorisation will need to show that such employees face substantial difficulty in bargaining at the enterprise level.

FWA will also be required to take into account the degree of commonality in the nature of the enterprises to which the proposed agreement relates. It is more likely that bargaining in the low-paid stream will be in the public interest where the enterprises concerned have a significant commonality of issues – e.g., they are all employers providing similar services and operating under a common funding arrangement with a government or are all contracted to provide similar services to a single business..

1013. Subclause 243(3) provides a number of additional matters that FWA must have regard to in deciding whether to make a low-paid authorisation. These matters relate to the likely success of the parties agreeing to an enterprise agreement if the authorisation is granted. The matters that FWA is required to consider include:

(a) whether granting the authorisation would assist in identifying improvements to productivity and service delivery at the enterprises to which the agreement relates;

(b) the extent to which the likely number of bargaining representatives for the agreement would be consistent with a manageable collective bargaining process. Although good faith bargaining orders can regulate the conduct of bargaining representatives, FWA may take the view that a large number of bargaining representatives will not facilitate fair and effective bargaining;

(c) the views of the employers and employees who would be covered by the authorisation;

(d) the extent to which the terms and conditions of employment of the employees who would be covered by the agreement is controlled, directed or influenced by a person other than the employer or employers that will be covered by the agreement;

(e) the extent to which the applicant for the authorisation is prepared to consider and respond reasonably to claims, or responses to claims, that may be made by a particular employer named in the application, if that employer later proposes to bargain for an agreement that:

(i) would cover that employer; and

(ii) would not cover the other employers specified in the application.

1014. Paragraph 243(3)(c) enables FWA to hear, for example, objections from individual employers and exclude them from the application before making a low-paid authorisation. An employer could object to being covered by an authorisation, for example, on the basis that it has a history of successful collective bargaining arrangements (whether in the form of a certified agreement or informal above-award arrangements) or that the employer has been bargaining or is prepared to bargain for a single-enterprise agreement.

1015. Paragraph 243(3)(d) contemplates that, in some circumstances, FWA will be required to consider the level of control that a third party such as a head contractor or a government agency has, e.g., through funding or procurement, in determining the terms and conditions that can be offered under an agreement.

1016. The intention of paragraph 243(3)(e) is to prevent applicants from obtaining an authorisation where they are engaging in pattern bargaining, that is, they are insistent upon a common outcome and are not prepared to consider the needs and responses of each individual employer. However, where, e.g., it can be demonstrated that an applicant is willing to consider claims or responses to claims made by an individual employer, the making of a common claim for multi-employer agreement that would not of themselves prevent an applicant from obtaining an authorisation.

1017. Subclause 243(4) sets out the information that FWA must specify in a low-paid authorisation. This includes:

- the employers that will be covered by the agreement. This may be some or all of the employers specified in the application, as determined by FWA;
- the employees that will be covered by the agreement. This may be some or all of the employees specified in the application, as determined by FWA; and
- any other matter prescribed by the FWA's procedural rules.

1018. Subclause 243(5) provides that a low-paid authorisation will come into operation on the day it is made.

Clause 244 – Variation of low-paid authorisations – general

1019. This clause enables FWA to vary a low-paid authorisation to remove or add an employer's name in certain circumstances.

1020. Subclauses 244(1) and (2) enable an employer who is specified in a low-paid authorisation to apply to FWA to have its name removed from that authorisation.

1021. FWA must vary the authorisation if it is satisfied that because of a change in the employer's circumstances, it is no longer appropriate for the employer to be specified in the authorisation. For example, an employer may have made a single enterprise agreement with its employees.

1022. Subclauses 244(3) and (4) provide that an application to vary a low-paid authorisation to add the name of an employer that is not specified in the authorisation may be made by the following:

- the employer;
- a bargaining representative of an employee who will be covered by the proposed multi-enterprise agreement to which the authorisation relates;
- an employee organisation that is entitled to represent the industrial interests of an employee in relation to work to be performed under that agreement.

1023. FWA must vary the authorisation to add the employer's name if it is satisfied that it is in the public interest to do so, taking into account the matters specified in subclauses 243(2) and (3).

Clause 245 – Variation of low-paid authorisations – enterprise agreement etc. comes into operation

1024. This clause provides that FWA is taken to have varied a low-paid authorisation to remove an employer's name when an enterprise agreement, or a workplace determination, that covers the employer comes into operation. This recognises that not all of the employers covered by the authorisation may make an agreement or be covered by a workplace determination that is made under Part 2-8. The remaining employers and their employees would continue to bargain.

Clause 246 – FWA assistance for the low-paid

1025. Clause 246 outlines the forms of assistance that FWA may provide to assist parties covered by an authorisation to bargain for a proposed multi-enterprise agreement. In addition, the bargaining representatives for a proposed multi-enterprise agreement may ask FWA for assistance under clause 240.

1026. Subclause 246(1) provides that clause 246 applies when a low-paid authorisation is in operation in relation to a proposed multi-enterprise agreement.

1027. Subclause 246(2) provides that FWA may provide such assistance to the bargaining representatives as it considers appropriate in order to facilitate bargaining for an agreement. FWA may provide this assistance on its own initiative.

1028. The type of assistance FWA may provide is limited to that it could provide if it were dealing with a dispute – e.g., mediation or conciliation (clause 595). This assistance may include for example, convening conferences, helping to identify productivity improvements to underpin an agreement and generally guiding the parties through the negotiating process. A legislative note under subclause 246(2) makes clear that FWA is not permitted to provide assistance under this clause in the form of arbitration.

1029. Subclause 246(3) makes clear that one form of assistance which FWA may provide under subclause 246(2) is to direct a person who is not an employer specified in an authorisation to attend a conference if FWA is satisfied that the participation of the person in bargaining is necessary for the agreement to be made. This may be appropriate where a third party, such as a head contractor or a government agency, has control (either directly or indirectly) over the terms and conditions that can be offered under an agreement.

1030. Subclause 246(4) provides that subclause 246(3) does not limit FWA's powers under Part 5-1 (Fair Work Australia).

Division 10 – Single interest employer authorisations

1031. Single-enterprise agreements can be made by a single employer, or two or more employers all of which are single interest employers. Where employers are related bodies corporate, or they are engaged in a joint venture or common enterprise, they will be single interest employers without the need to obtain an authorisation (see paragraph 172(5)). Other employers having a close connection with one another may be permitted to bargain for a single-enterprise agreement. These employers must obtain a single interest employer authorisation, which FWA will only make if it is satisfied that the employers have the requisite close connection. FWA may only make a single interest employer authorisation in limited circumstances.

1032. The types of employers that may apply for a single interest employer authorisation are franchisees, and, where approved by a Ministerial declaration, employers such as schools in a common education system and public entities providing health services.

1033. The employers specified in a single interest employer authorisation are each single interest employers. Each employer is treated as separate employer in Part 2-4 (e.g., for the purposes of the pre-approval steps in clause 180). For example, each employer is required to take reasonable steps to ensure that employees are given a copy, and have access to, the agreement during the access period (see subclause 180(2)).

Subdivision A – Declaration that employers may bargain together for a proposed enterprise agreement

Clause 247 – Ministerial declaration that employers may bargain together for a proposed enterprise agreement

1034. This clause enables the Minister to make a declaration that two or more employers may bargain together for a proposed enterprise agreement. The employers specified in the declaration may apply to FWA for a single interest authorisation under clause 248. FWA must make a single interest employer authorisation under subclause 249(3) if the Minister has issued a declaration under this clause in relation to a proposed enterprise agreement that specifies those employers.

1035. Subclause 247(1) enables two or more employers that will be covered by a proposed enterprise agreement to apply to the Minister for a declaration under subclause 247(3) that they may bargain together for the agreement.

1036. The legislative note following subclause 247(1) makes it clear that the employers named in a declaration may apply to FWA for a single interest employer authorisation.

1037. Subclause 247(2) provides that the application for a declaration under subclause 247(3) must specify the employers that will be covered by the agreement. The term relevant employer is used to describe the employers that will be covered by the agreement.

1038. Subclause 247(3) gives the Minister the discretion to make a declaration that the relevant employers may bargain together for a proposed enterprise agreement, after considering specified criteria. However, the Minister may only make a declaration upon application by the relevant employers. The declaration must be in writing.

1039. Subclause 247(4) sets out the matters that the Minister must take into account in deciding whether or not to make a declaration that two or more employers may bargain together for a proposed enterprise agreement.

1040. The matters that the Minister must take into account are:

- the history of bargaining of each of the relevant employers, including whether they have previously bargained together;
- the interests that the relevant employers have in common, and the extent to which those interests are relevant to whether they should be permitted to bargain together;
- whether the relevant employers and their employees are governed by a common regulatory regime;

- whether it would be more appropriate for each of the relevant employers to make a separate enterprise agreement with its employees;
- the extent to which the relevant employees operate collaboratively rather than competitively;
- whether the relevant employers are substantially funded, directly or indirectly, by the Commonwealth or a State or Territory; and
- any other matter the Minister considers relevant.

1041. The categories of employers that might potentially be the subject of a declaration are those which receive a common source of funding, do not compete with each other and which conduct their workplace relations activities through a central body. Categories of employers that may be considered in this context include:

- public hospitals that are technically distinct employers, but have a high degree of coordination and common employment arrangements;
- schools which share common employment arrangements and a common funding source and arrangements; and
- school councils or parents and friends associations that are technically separate employers but who may employ additional staff to work within a single public school system.

1042. If the Minister decides to make a declaration, it must specify the relevant employers (i.e., the employers that will be covered by the agreement) (subclause 247(5)). A Ministerial declaration made under subclause 247(3) is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Subdivision B – Single interest employer authorisations

Clause 248 – Single interest employer authorisations

1043. This clause enables two or more employers to apply to FWA for a single interest employer authorisation in relation to a proposed enterprise agreement.

The legislative note at the end of subclause 248(1) explains the effect of a single interest employer authorisation. The note makes it clear that the employers specified in a single interest employer authorisation are single interest employers as mentioned in paragraph 172(5)(c).

1044. The application for a single interest employer authorisation must specify the employers and employees that will be covered by the agreement and, if applicable, the person that the employers nominate to make applications on behalf of the employers if the authorisation is made (see clause 254).

Clause 249 – When FWA must make a single interest employer authorisation

1045. This clause provides when FWA must make a single interest employer authorisation.

FWA must make a single interest employer authorisation if:

- an application for the authorisation has been made (clause 248); and
- FWA is satisfied that the employers that will be covered by the agreement have agreed to bargain together without being coerced by any person; and
- the requirements of either subclause 249(2) or subclause 249(3) are met.

1046. Subclause 249(2) enables FWA to make a single interest employer authorisation in respect of two or more employers that are franchisees. The employers must carry on similar business activities under the same franchise as franchisees of the same franchisor, or related bodies corporate of the same franchisor, or any combination the two.

1047. Franchisees specified in a single interest employer authorisation will be single interest employers for the purpose of making a single-enterprise agreement. This is intended to clarify any uncertainty arising from the jurisprudence about whether franchisees are engaged in a 'common enterprise'. The AIRC has previously found some franchisees to be engaged in a common enterprise (see, e.g., *McDonald's Australia Ltd v Shop, Distributive and Allied Employees Association* (2004) 132 IR 165) and others not to be, in apparently similar circumstances (see, e.g., *Re Bakers Delight Holdings Ltd* (2002) 119 IR 20).

1048. Subclause 249(3) enables FWA to make a single interest employer authorisation if all of the employers specified in the application made under clause 248 are also specified in a Ministerial declaration made under clause 247 in relation to the agreement. FWA is not required to assess whether or not the employers should be able to bargain together as single interest employers, as this decision will have been made by the Minister taking into account the matters set out in subclause 247(4).

1049. Subclause 249(4) provides for the operation of a single interest employer authorisation. A single interest employer authorisation comes into operation on the day on which it is made. It ceases to operate on the earlier of the following:

- the day on which the enterprise agreement to which the authorisation relates is made;
- 12 months after the day on which the authorisation is made, or if the period is extended under clause 251, at the end of that period.

1050. If a single-enterprise agreement is not made within 12 months after the day on which FWA made a single interest employer authorisation in relation to the agreement, the authorisation will cease to operate. This is intended to ensure that the authorisation only operates in relation to the proposed enterprise agreement for which it is made. Clause 251 enables a bargaining representative for the proposed agreement to apply to FWA to extend the period for which the authorisation is in operation.

Clause 250 – What a single interest employer authorisation must specify

1051. This clause provides the information that must be included in a single interest employer authorisation made by FWA in relation to a proposed enterprise agreement.

1052. Subclause 250(1) provides that a single interest employer authorisation must specify the employers and employees that will be covered by the agreement and, if applicable, the person that the employers nominate to make applications on behalf of the employers if the authorisation is made (see clause 254), and any other matter prescribed by the procedural rules.

1053. Subclause 250(2) makes it clear that the single interest employer authorisation need not specify all the employers set out in the application for the authorisation made under clause 248. If FWA is satisfied that the matters referred to in subclauses 249(2) and (3) are met in relation some of the employers set out in the application, FWA may make a single interest authorisation specifying those employers and their employees only.

1054. For example, a mix of 30 wholly owned employers and franchisees of the same franchisor apply to FWA for a single interest employer authorisation. If FWA is satisfied that the requirements of subclause 249(2) (which deals with franchisees) are met only in relation to 28 of those employers, the single interest employer authorisation would specify those 28 employers and their employees.

Clause 251 – Variation of single interest employer authorisations

1055. This clause provides for the variation of a single interest employer authorisation to add and remove employer names.

1056. Subclause 251(1) allows an employer specified in a single interest employer authorisation to apply to FWA to remove the employer's name from the authorisation.

1057. FWA must vary the single interest employer authorisation to remove the employer's name if it is satisfied that, because of a change in the employer's circumstances, it is no longer appropriate for the employer to be specified in the authorisation (subclause 251(2)).

1058. Subclause 251(3) provides that an employer that is not specified in a single interest employer authorisation may apply to FWA for a variation of the authorisation to add the employer's name to the authorisation.

1059. FWA must vary a single interest employer authorisation to add an employer's name if it is satisfied that:

- each employer specified in the authorisation has agreed to the variation;
- no person coerced, or threatened to coerce, the employer to make the application to be specified to the authorisation; and
- the requirements of subclause 249(2) and (3) are met (i.e., the employers satisfy the requirements in relation to franchisees or the Minister has made a declaration that the employers may bargain together for a proposed enterprise agreement).

Clause 252 – Variation to extend period single interest authorisation is in operation

1060. This clause provides for the variation of a single interest employer authorisation to extend the 12 month period for which the authorisation is in operation (see subclause 250(2)).

1061. A bargaining representative for a proposed enterprise agreement to which a single interest employer authorisation relates may apply to FWA to vary the authorisation to extend the 12 month period for which the authorisation is in operation (subclause 252(1)).

1062. FWA may vary the authorisation to extend the period if FWA is satisfied that there are reasonable prospects that the agreement will be made if the authorisation is in operation for a longer period and it is appropriate in all the circumstances to extend the period (subclause 252(2)).

Division 11 – Other matters

Clause 253 – Terms of an enterprise agreement that are of no effect

1063. This clause provides that a term of an enterprise agreement has no effect to the extent that:

- it is not a term about a permitted matter (see 172(1)); or
- it is an unlawful matter.

1064. The legislative notes following subclause 253(1) refer to other clauses in the Bill which provide that a term of an enterprise agreement has no effect. The notes make it clear that a term of an enterprise agreement has no effect if:

- it contravenes clause 55 – see also clause 56; or
- it permits or requires deductions or payments to be made, if those deductions or payments benefit the employer and are unreasonable in the circumstances – see clause 326.

1065. Subclause 253(2) makes it clear that the inclusion of a term has no effect because of subclause 253(1), clause 56 or clause 326, does not affect the validity of an enterprise agreement.

This clause is intended to clarify any uncertainty about the operation of an enterprise agreement containing such terms as a result of the High Court decision in *Electrolux Home Products Pty Ltd v Australian Workers' Union and others* (2004) 221 CLR 239 (*Electrolux*) (see the discussion of this case at the beginning of the Explanatory Memorandum relating to Part 2-4).

Clause 254 – Applications by bargaining representatives

1066. This clause provides who may make an application where a proposed enterprise agreement will cover two or more employers and this Part permits an application to be made by a bargaining representative of an employer for the agreement. The persons who may make the application are set out in clause 254.

1067. Paragraph 254(2)(a) provides that if the agreement is a proposed single-enterprise agreement in relation to which a single interest employer authorisation is in operation, the application may be made by the person (if any) specified in the authorisation as the person who may make applications under this Bill (see subclause 250(1)).

1068. In any other case where an a proposed agreement will cover two or more employers, paragraph 254(2)(b) provides that a bargaining representative of an employer that will be covered by the agreement may make the application on behalf of the other bargaining representatives for the agreement if those bargaining representatives agree.

Clause 255 – Part does not empower FWA to make certain orders

1069. This clause provides that FWA is not empowered under this Part to make an order that requires, or has the effect of requiring:

- particular content to be included or not included in a proposed enterprise agreement; or
- an employer to request employees to approve a proposed enterprise agreement (see clause 181(1)); or
- an employee to approve or not approve a proposed enterprise agreement.

1070. For example, FWA could not make an order that has the effect of requiring:

- a bargaining representative to make concessions in relation to a proposed enterprise agreement;
- an employer to request employees to vote on a proposed agreement on or by a particular day; or
- an employee to vote in favour of a proposed agreement (see also Part 3-1 – General Protections).

1071. Subclause 255(2) provides that, despite paragraph 255(1)(a), FWA may make an order that particular content be included or not included in a proposed enterprise agreement if the order is made in the course of arbitration undertaken when dealing with a dispute under clause 240. The legislative note following subclause 255(2) reiterates that FWA may only arbitrate a dispute under clause 240 if arbitration has been agreed to by the bargaining representatives for the agreement.

Clause 256 – Prospective employers and employees

1072. This clause makes clear that a reference to an employer, or an employee, in relation to a greenfields agreement also refers to a person who may become an employer or an employee.

Clause 257 – Enterprise agreements may incorporate material in force from time to time etc.

1073. This clause provides that an enterprise agreement may incorporate material contained in an instrument or other writing as in force at a particular time or as in force from time to time.

1074. An enterprise agreement may incorporate material contained in instruments or other writing such as modern awards or enterprise awards, State or Territory laws and workplace policies.

1075. This clause enables an agreement to incorporate, e.g., a workplace policy as in force on the day the agreement was made. It also enables an agreement to incorporate material as in force from time to time so that if, for example, an agreement incorporates the terms of a modern award that is amended six months after the agreement commences operation the agreement will incorporate the amended award terms.

Part 2-5 – Workplace determinations

Overview

1076. The expectation is that in the overwhelming majority of cases bargaining will result in an enterprise agreement being submitted to FWA for approval. However, in special or unusual cases, there will be capacity for FWA to determine terms and conditions, but only after specific requirements are met. A workplace determination can only be made by a Full Bench of FWA.

1077. This Part provides for three kinds of workplace determinations.

1078. The first is a low-paid workplace determination, which is only available if there is a low-paid authorisation in operation in relation to a proposed multi-enterprise agreement and one or more of the bargaining representatives are unable to reach agreement on the terms of the proposed agreement. Within this kind of determination, there are two categories namely, a consent low-paid workplace determination (if the bargaining representatives jointly apply for a determination) and a special low-paid workplace determination (for which a single bargaining representative may apply but which can only be made if additional requirements are met).

1079. The second type of workplace determination is an industrial action related workplace determination, which must be made by FWA if: protected industrial action has been terminated by FWA (under clause 423 or 424) or by a Ministerial declaration (clause 431); and the representatives have not settled the matters at issue at the end of a negotiating period.

1080. The third type of workplace determination is a bargaining-related workplace determination, which must be made by FWA if a serious breach declaration has been made in relation to a proposed enterprise agreement and the representatives have not settled the matters at issue at the end of a negotiating period (clause 235).

Division 1 – Introduction

Clause 258 – Guide to this Part

1081. This clause provides a guide to this Part.

Clause 259 – Meanings of *employee* and *employer*

1082. In this Part, the terms employee and employer mean national system employee and national system employer respectively (as defined in clauses 13 and 14). The rights and obligations of employers and employees set out in this Part apply only to the employment relationships within the scope of the corporations and other constitutional powers that are engaged by clauses 13 and 14.

Division 2 – Low-paid workplace determinations

Clause 260 – Applications for low-paid workplace determinations

1083. An application may be made for a low-paid workplace determination under this clause if a low-paid authorisation is in operation in relation to a proposed multi-enterprise agreement and one or more of the bargaining representatives are unable to reach agreement about the terms that should be included in the agreement.

1084. There are two categories of low-paid workplace determinations – consent low-paid workplace determinations and special low-paid workplace determinations.

1085. Subclause 260(2) enables bargaining representatives of one or more of the employers that would have been covered by the proposed agreement and the bargaining representatives of the employees of those employers to *jointly* apply to FWA for a consent low-paid workplace determination to be made under clause 261.

1086. Subclause 260(3) provides that an application for a consent low-paid workplace determination must specify:

- the bargaining representatives making the application;
- the terms that the bargaining representatives have agreed should be included in the agreement;
- the matters at issue at the time of the application;
- the employers that have consented to being covered by the workplace determination;
- those employers' employees who will be covered by the determination; and
- each employee organisation (if any) that is a bargaining representative of those employees.

1087. Subclause 260(4) enables any bargaining representative for a multi-enterprise agreement for which there is a low-paid authorisation in operation to apply to FWA for a special low-paid workplace determination. The application must specify the matters listed in subclause 260(5) (which are similar to those listed for consent low-paid workplace determinations in subclause 260(3)).

Clause 261 – When FWA must make a consent low-paid workplace determination

1088. Clause 261 provides that FWA must make a consent low-paid workplace determination if an application has been made and it is satisfied that the applicant bargaining representatives have made all reasonable efforts to agree on the terms that should be included in the agreement and there is no reasonable prospect of agreement being reached. Arbitration can only occur as a last resort when all reasonable attempts to reach an agreement have failed.

Clause 262 – When FWA must make a special low-paid workplace determination – general requirements

Clause 263 – When FWA must make a special low-paid workplace determination – additional requirements

1089. FWA must make a special low-paid workplace determination if an application has been made and FWA is satisfied that the general requirements set out in clause 262 and the additional requirements set out in clause 263 have been met.

1090. The general requirements in clause 262 are that:

- the bargaining representatives are genuinely unable to reach agreement on the terms of the proposed enterprise agreement and there is no reasonable prospect of agreement being reached (subclause 262(2));
- at the time of the application, the terms and conditions of the employees who will be covered by the determination were substantially equivalent to the minimum safety net of terms and conditions provided by modern awards together with the NES – in other words, the employees are paid at or just above the safety net (subclause 262(3));
- the determination will promote: bargaining in the future for an enterprise agreement that will cover the employers and employees who will be covered by the determination; and productivity and efficiency in the enterprises concerned (subclause 262(4)); and
- it is in the public interest to make the workplace determination (subclause 262(5)).

1091. The additional requirements in clause 263 are that no employer that will be covered by the special low-paid workplace determination is:

- specified in an application for a consent low-paid workplace determination (subclause 263(2));
- covered (or has previously been covered) by an enterprise agreement, or another workplace determination, in relation to the work to be performed by the employees who will be covered by this determination (subclause 263(3)).

1092. Access to a special low-paid workplace determination is more restricted than access to a consent low-paid workplace determination. This is because the primary focus of the low paid stream is to encourage and assist parties to make their own agreements. The availability of the special low-paid workplace determination recognises, however, that in very limited circumstances, where despite the best endeavours of the bargaining participants and FWA to conclude an agreement, the bargaining has failed. It is only as a last resort, where there is no prospect of an agreement being made, that it may be appropriate for FWA to arbitrate an outcome in order to give employees access to collective bargaining for the first time and encourage and enable future bargaining by these employees.

Clause 264 – Terms etc. of a low-paid workplace determination

1093. Subclause 264(1) provides that a low-paid workplace determination must include the following terms:

- the core terms set out in clause 272;
- the mandatory terms set out in clause 273;
- the agreed terms, which for a low-paid workplace determination, are defined in subclause 274(1) to be the terms that the bargaining representatives for the proposed enterprise agreement had been able to agree should be included in the agreement at the time the application for the determination was made (subclause 264(2)); and
- the terms that FWA considers deal with the matters at issue specified in the application for the determination (subclause 264(3)).

1094. Subclause 264(4) provides that the determination must be expressed to cover the employers, employees and employee organisations (if any) that were specified in the application for the determination.

Clause 265 – No other terms

1095. This clause provides that a low-paid workplace determination must not include any terms other than those required by subclause 264(1).

Division 3 – Industrial action related workplace determinations

1096. The key prerequisite for the making of an industrial action related workplace determination is that protected industrial action has been terminated either because:

- FWA was satisfied the action was causing, or threatening to cause, significant economic harm to the parties under clause 423;
- FWA was satisfied the action was endangering life or causing significant damage to the Australian economy (among other things) under clause 424; or
- the Minister made a declaration terminating the action under clause 431.

These three actions are defined in this Division as being termination of industrial action instruments.

Clause 266 – When FWA must make an industrial action related workplace determination

1097. Subclause 266(1) provides that FWA must make an industrial action related workplace determination as quickly as possible after the end of the post-industrial action negotiating period if:

- a termination of industrial action instrument has been made in relation to a proposed enterprise agreement; and
- the bargaining representatives have not settled all of the matters that were at issue during bargaining for the agreement.

1098. Subclause 266(2) defines a termination of industrial action instrument as being either an order under clauses 423 or 424 or a Ministerial declaration under clause 431, terminating protected industrial action for the agreement.

1099. Subclause 266(3) defines the post-industrial action negotiating period as being the period that starts on the day on which the termination of industrial action instrument is made and ends either 21 days after that day, or if FWA has extended the period under subclause 266(4), then 42 days after that day.

1100. Subclause 266(4) requires FWA to extend the post-industrial action negotiating period if all of the bargaining representatives jointly apply to FWA for the extension within 21 days after the termination of industrial action instrument was made and those bargaining representatives have not settled all of the matters that were at issue during bargaining for the agreement.

Clause 267 – Terms etc. of an industrial action related workplace determination

1101. Subclause 267(1) provides that a low-paid workplace determination must include the following terms:

- the core terms set out in clause 272;
- the mandatory terms set out in clause 273;
- the agreed terms which, for an industrial action related workplace determination, are defined in subclause 274(2) to be the terms that the bargaining representatives for the proposed enterprise agreement concerned had, at the end of the post-industrial action negotiating period, agreed should be included in the agreement (subclause 267(2));
- the terms that FWA considers deal with the matters that were still at issue at the end of the post-industrial action negotiating period (subclause 267(3)).

1102. Subclause 267(4) provides that the determination must be expressed to cover each employer and the employees that would be covered by the proposed agreement and each employee organisation (if any) that was a bargaining representative of those employees.

Clause 268 – No other terms

1103. Clause 268 provides that an industrial action related workplace determination must not include any terms other than those required by subclause 267(1).

Division 4 – Bargaining related workplace determinations

1104. The key prerequisite for the making of a bargaining related workplace determination is that FWA has made a serious breach declaration in relation to a proposed enterprise agreement under clause 235. Subject to other criteria being met, FWA may make a serious breach declaration when a bargaining representative has contravened a bargaining order and the contravention is serious and sustained and has significantly undermined bargaining for the agreement.

Clause 269 – When FWA must make a bargaining related workplace determination

1105. This clause provides that FWA must make a bargaining-related workplace determination as quickly as possible after the end of the post-declaration negotiating period if:

- a serious breach declaration has been made in relation to a proposed enterprise agreement; and
- the bargaining representatives have not settled all of the matters that were at issue during bargaining for the agreement.

1106. Subclause 269(2) defines the post-declaration negotiating period as being the period that starts on the day on which the serious breach declaration is made and ends either 21 days after that day, or if FWA has extended the period under subclause 269(3), then 42 days after that day.

1107. Subclause 269(3) requires FWA to extend the post-declaration negotiating period if all of the bargaining representatives jointly apply to FWA for the extension within 21 days after the serious breach declaration was made and those bargaining representatives have not settled all of the matters that were at issue during bargaining for the agreement.

Clause 270 – Terms etc. of a bargaining related workplace determination

1108. Subclause 270(1) provides that a bargaining-related workplace determination must include the following terms:

- the core terms set out in clause 272;
- the mandatory terms set out in clause 273;
- the agreed terms which, for a bargaining-related workplace determination, are defined in subclause 274(3) to be the terms that the bargaining representatives for the proposed enterprise agreement concerned had, at the end of the post-declaration negotiating period, agreed should be included in the agreement (subclause 270(2)); and

- the terms that FWA considers deal with the matters that were still at issue at the end of the post-declaration negotiating period (subclause 270(3)).

1109. Subclause 270(4) provides that if a serious breach declaration was made in relation to a proposed single enterprise agreement, the determination must be expressed to cover each employer and the employees that would be covered by the proposed agreement and each employee organisation (if any) that was a bargaining representative of those employees.

1110. Subclause 270(5) provides that if a serious breach declaration was made in relation to a proposed multi-enterprise agreement in respect of which a low-paid authorisation is in force and the bargaining representatives for one or more of the employers contravened the bargaining order, then the determination must be expressed to cover each of those employers, their employees who would have been covered by that agreement and each employee organisation that was a bargaining representative for those employees.

1111. Subclause 270(6) provides that if a serious breach declaration was made in relation to a proposed multi-enterprise agreement in respect of which a low-paid authorisation is in force and the bargaining representatives for one or more of the employees contravened the bargaining order, then the determination must be expressed to cover the employers of those employees if they are employers that would have been covered by that agreement, all of their employees and each employee organisation that was a bargaining representative for those employees.

Clause 271 – No other terms

1112. Clause 271 provides that a bargaining related workplace determination must not include any terms other than those required by clause 270.

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

Clause 272 – Core terms of workplace determinations

1113. This clause provides that the core terms a workplace determination must include are:

- a term specifying a date as the determination's nominal expiry date, which must not be more than four years after the date on which the workplace determination comes into operation (subclause 272(2)); and

- terms such that the determination, if it were an enterprise agreement, would pass the better off overall test under clause 193 (subclause 272(4)).

1114. This clause further provides that a workplace determination must not include terms that would:

- not be about permitted matters if the determination were an enterprise agreement (paragraph 272(3)(a));

- be unlawful in an enterprise agreement (paragraph 272(3)(b)); or

- if the determination were an enterprise agreement – means that FWA could not approve the agreement because either the term would contravene clause 55 (which deals with the relationship between the NES and enterprise agreements) or because of the approval requirements relating to particular kinds of employees set out in Subdivision E of Division 4 of Part 2-4 (subclause 272(5)).

Clause 273 – Mandatory terms of workplace determinations

1115. This clause provides that a workplace determination must include the following mandatory terms:

- a term that provides a procedure for settling disputes about any matters arising under the determination and in relation to the NES (subclause 273(2));
- the model flexibility term (subclause 273(4)); and
- the model consultation term (subclause 273(5)).

1116. If FWA is satisfied that an agreed term for the determination would, if the determination were an enterprise agreement, deal with the mandatory term, then the mandatory term is not required to be included in the determination (subclause 273(3)).

Clause 274 – Agreed terms for workplace determinations

1117. This clause defines the agreed terms for each type of workplace determination.

Clause 275 – Factors FWA must take into account in deciding terms of a workplace determination

1118. Clause 275 sets out the factors FWA must take into account in deciding which terms to include in a workplace determination. These factors include the following:

- the merits of the case (paragraph 275(a);
- if the determination is a low-paid workplace determination, the interests of the employers and employees who will be covered by the determination, including ensuring that the employers are able to remain competitive;
- for any other type of workplace determination, the interests of the employers and employees who will be covered by the determination (paragraph 275(c));
- the public interest (paragraph 275(d));
- how productivity might be improved in the enterprise(s) that would be covered by the determination (paragraph 275(e));
- the extent to which the conduct of the bargaining representatives was reasonable during bargaining for the proposed enterprise agreement (paragraph 275(f));

- the extent to which the bargaining representatives have complied with the good faith bargaining requirements (paragraph 275(g)); and

- incentives to continue to bargain at a later time (paragraph 275(h)).

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

1119. This Division contains the rules governing the operation, coverage and interaction of workplace determinations. Workplace determinations generally operate and interact with other instruments as if they were enterprise agreements (clause 279). This Division sets out this general rule, and some exceptions to it.

Clause 276 – When a workplace determination operates etc.

1120. A workplace determination operates from the day on which it is made (subclause 276(1)).

1121. Subclause 276 (2) provides that a workplace determination ceases to operate on the earlier of:

- the day on which a termination of the determination comes into operation under clause 224 or clause 227 (which are clauses relating to the termination of enterprise agreements) as applied to the determination by clause 279; or

- the day on which clause 278 (which deals with the interaction of a workplace determination with enterprise agreements and other determinations) first has the effect that the workplace determination does not apply to any employee.

1122. If a workplace determination has ceased to operate, it can never operate again.

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

1123. This clause provides that a workplace determination covers an employer, employee or employee organisation if the determination is expressed to cover them or if a provision of this Bill, an order of FWA made under a provision of this Bill or an order of a court provides, or has the effect, that the determination covers the employer, employee or organisation (subclause 277(2)). A circumstance where the coverage of a workplace determination might be altered by a provision of the Bill is in transfer of business (Part 2-8). A workplace determination that covered the old employer and its employees will (subject to further FWA order) cover the new employer in respect of transferring employees.

1124. However, a workplace determination will not cover an employer, employee or employee organisation if another provision of this Bill, an order of FWA made under another provision of this Bill or an order of a court provides that the determination does not cover the employer, employee or employee organisation (subclause 277(3)). Equally, a determination will not cover an employer, employee or employee organisation if the determination has ceased to operate (subclause 277(4)).

1125. Subclause 277(5) provides that a reference in this Bill to a workplace determination covering an employee is a reference to the determination covering the employee in relation to particular employment.

1126. These provisions are similar to the coverage provisions that apply to awards and agreements (see Part 2-1).

Clause 278 – Interaction of a workplace determination with enterprise agreements etc.

1127. Subclause 278(1) provides that a workplace determination will cease to apply to an employee if an enterprise agreement that covers the employee in relation to the same employment comes into operation.

1128. Subclause 278(2) provides that a workplace determination will cease to apply to an employee if another workplace determination that covers the employee in relation to the same employment comes into operation.

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

1129. Clause 279 provides that, subject to certain exceptions, this Bill applies to a workplace determination as if it were an enterprise agreement that is in operation. This means that other provisions of this Bill which affect an enterprise agreement in operation, such as the interaction of enterprise agreements with modern awards, also apply to workplace determinations.

1130. Subclause 279(2) sets out the following exceptions to the above rule in provisions of the Bill that deal with:

- contraventions of enterprise agreements;
- the coverage of enterprise agreements;
- the operation of enterprise agreements;
- the interaction between enterprise agreements;
- the entitlement of an employee organisation to be covered by an enterprise agreement; and
- the variation of enterprise agreements.

1131. In addition, subclause 279(3) provides that the provisions of Subdivision C of Division 7 of Part 2-4 which deals with the termination of enterprise agreements (by employers and employees) only apply to a workplace determination once the workplace determination has passed its nominal expiry date.

Division 7 – Other matters

Clause 280 – Contravening a workplace determination

1132. Clause 280 provides that a person must not contravene a term of a workplace determination.

1133. This clause is a civil remedy provision under Part 4-1 (Civil remedies).

Clause 281 – Applications by bargaining representatives

1134. This clause provides that if a provision of this Part permits an application to be made by a bargaining representative and the proposed enterprise agreement will cover more than one employer, then the application may be made by one bargaining representative on behalf of the other representatives if they have agreed to the application being made on their behalf (paragraph 281(2)(b)). However, if there is a single interest employer authorisation in operation in relation to the proposed enterprise agreement, then the application may be made by the person (if any) specified in the authorisation as the person who may make applications under this Bill (paragraph 281(2)(a)).

Part 2-6 – Minimum wages

Overview

1135. Under Part 2-6, FWA has responsibility for establishing and maintaining a safety net of fair minimum wages. The new minimum wages system will comprise a number of key features:

- Minimum wages will be guaranteed under modern awards and the national minimum wage order.
- A specialist panel of FWA – the Minimum Wage Panel – will undertake an annual wage review each financial year, with adjustments in wage rates generally taking effect in the first pay period on or after 1 July. This timing is designed to ensure certainty and predictability for employers and employees.
- In each annual wage review, FWA will review minimum wages in modern awards and the national minimum wage order.
- As a result of an annual wage review, FWA will make any changes to minimum wages in modern awards that it considers necessary to ensure that modern awards provide a safety net of fair minimum wages. FWA must also make a new national minimum wage order in each annual wage review setting a national minimum wage, special national minimum wages and a casual loading for award/agreement free employees.
- Employees to whom a modern award applies – including junior employees, employees to whom a training arrangement applies and employees with a disability – will receive the minimum wage rates specified in the award. In exercising its powers to set, vary or revoke modern award minimum wages in an annual wage review, FWA will be required to take account of the national minimum wage that it proposes to set as part of the annual wage review.
- Employees to whom an enterprise agreement applies will receive the rates of pay specified in the agreement. However, these rates of pay must at least be equal to the base rate of pay that they would receive under the relevant modern award (where the employee is covered by a modern award) or the base rate of pay payable that they would receive under the national minimum wage order (where the employee is not covered by a modern award).

1136. The annual wage review is the primary means by which wages are set and adjusted by FWA. In addition to its role in maintaining the safety net of fair minimum wages under Part 2-6, FWA also has capacity to vary minimum wages in modern awards under Part 2-3 (in limited circumstances).

1137. However, under Part 2-3, FWA will be able to set new minimum wages in awards (where appropriate) and will be able to provide for other aspects of employees' remuneration (such as incentive-based payments, bonuses, overtime rates, penalty rates, allowances and leave loadings).

Division 1 – Introduction

Clause 282 – Guide to this Part.

1138. This clause provides a guide to this Part.

Clause 283 – Meanings of *employee* and *employer*

1139. In this Part, the terms employee and employer mean national system employee and national system employer respectively (as defined in clauses 13 and 14). The rights and obligations of employers and employees set out in this Part apply only to the employment relationships within the scope of the corporations and other constitutional powers that are engaged by clauses 13 and 14.

Division 2 – Overarching provisions

Clause 284 – The minimum wages objective

1140. Clause 284 sets out the minimum wages objective and when it applies.

1141. The minimum wages objective requires FWA to establish and maintain a safety net of fair minimum wages, taking into account the following factors:

- the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth;
- promoting social inclusion through increased workforce participation;
- relative living standards and the needs of the low paid;
- the principle of equal remuneration for work of equal or comparable value; and
- providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability.

1142. The minimum wages objective applies to the performance or exercise of FWA's functions and powers under this Part (which deals with setting, varying or revoking minimum wages in an annual wage review). The minimum wages objective also applies when FWA performs or exercises its functions or powers under Part 2-3 (Modern awards) to set, vary or revoke modern award minimum wages (subclause 284(2)). The note to this subclause points out that the modern awards objective is also relevant when FWA is setting, varying or revoking modern award minimum wages. The modern awards objective is described in clause 134.

1143. Subclause 284(3) defines modern award minimum wages. Modern award minimum wages are the rates of minimum wages in modern awards, including:

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

- casual loadings; and
- piece rates.

1144. The definition of modern award minimum wages does not include incentive-based payments, bonuses, overtime rates, penalty rates, allowances and leave loadings. These components of remuneration can be included in modern awards under Part 2-3.

1145. The Bill draws a distinction between setting and varying minimum wages. The distinction ensures that it is clear when FWA may exercise its powers to set or vary modern award minimum wages – in particular its powers to vary such rates. The powers of FWA are described further later in the notes in relation to this Part.

1146. Subclause 284(4) defines the meaning of setting and varying modern award minimum wages. The setting of modern award minimum wages means the initial setting of one or more new modern award minimum wages in a modern award, either in the modern award as originally made or by a later adjustment of the modern award. The varying of modern award minimum wages means the varying of the current rate of one or more existing modern award minimum wages.

Division 3 – Annual wage reviews

1147. This Division provides for the conduct of annual wage reviews. Annual wage reviews are conducted by a specialist panel of FWA – the Minimum Wage Panel (see clause 617).

1148. The minimum wages objective applies to the conduct of annual wage reviews.

Subdivision A – Main provisions

Clause 285 – Annual wage reviews to be conducted

1149. Clause 285 sets out FWA's obligations in conducting annual wage reviews.

1150. Subclause 285(1) requires FWA to undertake and complete an annual wage review in each financial year.

1151. Subclause 285(2) sets out what FWA must do in undertaking an annual wage review:

- FWA is required to review modern award minimum wages (as defined in subclause 284(3)) and may make one or more determinations to set, vary or revoke modern award minimum wages.
- FWA must also review the national minimum wage order and must make a new national minimum wage order in each annual wage review. (The national minimum wage order applies to award/agreement free employees.)

1152. In exercising its power in an annual wage review to set, vary or revoke modern award minimum wages, FWA is required by the minimum wage objective to take into account the rate

of the national minimum wage that it proposes to set in its national minimum wage order (subclause 285(3)).

1153. Provisions relevant to the conduct of annual wage reviews are also contained in Division 2 of Part 5-1 (Fair Work Australia). For example, clause 617 requires annual wage reviews to be conducted by a Minimum Wage Panel and includes provisions in relation to the constitution of the Minimum Wage Panel (subclauses 620(1) and (2)). Division 2 of Part 5-1 also allows the President of FWA to issue directions about the conduct of an annual wage review (see clause 582).

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

1154. Clause 286 provides that a determination affecting modern award minimum wages that is made in an annual wage review comes into operation on 1 July in the next financial year, unless FWA is satisfied that there are exceptional circumstances that justify deferring its operation in relation to a particular situation. Any deferral must be limited to the particular situation to which the exceptional circumstances relate.

1155. Changes to modern award minimum wages apply to particular employees from the employees' first full pay period after the determination comes into operation. This is designed to ensure the practical implementation of wage variations.

The Bill also provides for the operation of determinations made under Part 2-3 (Modern awards) (see clause 166).

Clause 287 – When national minimum wage orders come into operation

1156. Clause 287 provides that a national minimum wage order that is made in an annual wage review comes into operation on 1 July in the next financial year. There is no scope provided for deferral of national minimum wage orders.

1157. A national minimum wage order determination applies to a particular employee from the employee's first full pay period after it comes into operation on 1 July. This is designed to ensure the practical implementation of wage variations.

Subdivision B – Provisions about conduct of annual wage reviews

Clause 288 – General

1158. Clause 288 explains that provisions relevant to the conduct of annual wage reviews are contained in this Subdivision and Part 5-1 (Fair Work Australia). These provisions include:

- The President may issue directions about the conduct of the review (clause 582).
- FWA may inform itself in manner it considers appropriate, including by conducting or commissioning research (clause 590).

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

1159. Clause 289 requires FWA to ensure that all persons and bodies have a reasonable opportunity to make written submissions for consideration in each annual wage review (subclause 289(1)). FWA must publish all submissions and ensure that all persons and bodies have a reasonable opportunity to make comments to FWA on those submissions for consideration in the annual wage review (subclause 289(2)). Publication may occur on FWA's website or by any other appropriate means (subclause 289(3)).

1160. Clause 289 is designed to ensure openness and transparency in the conduct of annual wage reviews by ensuring that written submissions are published and all persons and bodies have a reasonable opportunity to comment on those submissions. This is consistent with the general objective of the Bill that FWA perform its functions and exercise its powers in an open and transparent manner (see clause 577(c)).

Clause 290 – President may direct investigations and reports

1161. Clause 290 provides that the President of FWA may give a direction under clause 582 requiring that a matter be investigated, and that a report about the matter be prepared, for consideration in an annual wage review.

1162. A direction can be given to the Minimum Wage Panel, a Minimum Wage Panel Member, or a Full Bench that includes at least one Minimum Wage Panel Member (paragraph 290(2)(a)). Unless the direction is given to the Minimum Wage Panel, the report by a Minimum Wage Panel Member or a Full Bench must be given to the Minimum Wage Panel (paragraph 290(2)(b)).

1163. This mechanism is designed to provide the President with the flexibility to direct a targeted investigation into an award-specific issue, or broader wage issues for a specific group of employees – such as junior employees or employees in a particular industry – outside the main annual wage review process, the outcome of which can then be considered in the context of the next annual wage review.

Clause 291 – Research must be published

1164. Clause 291 requires FWA to publish, on its website (or otherwise), any research that it undertakes or commissions for the purpose of an annual wage review so that submissions can be made addressing issues covered by the research. This provision is designed to ensure an open and transparent decision-making process.

Clause 292 – Varied wage rates must be published by 1 July

1165. Where FWA varies modern award minimum wages in an annual wage review, clause 292 requires that FWA publish the new rates before 1 July in the next financial year (subclause 292(1)).

1166. The publishing may be on FWA's website or by any other means it considers appropriate (subclause 292(2)).

1167. An explanatory note reminds readers that, under subclause 168(1), FWA is also required to publish the modern award as varied as soon as practicable.

1168. These provisions are included to assist compliance with award obligations.

Division 4—National minimum wage orders

1169. Division 4 contains provisions about the operation of national minimum wage orders. National minimum wage orders apply to award/agreement free employees.

Clause 293 – Contravening a national minimum wage orders

1170. Clause 293 prohibits an employer from contravening a national minimum wage order.

1171. This clause is a civil remedy provision under Part 4-1 (Civil remedies)

Clause 294 – Content of national minimum wage order – main provisions

1172. Clause 294 sets out the content of a national minimum wage order and identifies the employees to whom such an order applies.

1173. Subclause 294(1) provides that the national minimum wage order must set:

- the national minimum wage for award/agreement free employees;
- special national minimum wages for all award/agreement free employees who are junior employees, employees to whom training arrangements apply or employees with a disability; and
- the casual loading for award/agreement free employees.

1174. Subclause 294(2) provides that the national minimum wage order must require employers to pay employees at least the applicable base rates of pay, and casual loading as applied to base rates of pay.

1175. Subclause 294(3) provides that the national minimum wage applies to all award/agreement free employees who are not junior employees, or employees to whom training arrangements apply or employees with a disability.

1176. Subclause 294(4) provides that a special national minimum wage applies to the employees to whom the order is expressed to apply. Special national minimum wages can only apply to award/agreement free employees who are junior employees, employees to whom training arrangements apply or employees with a disability. A special national minimum wage may apply to all such employees or to a class of such employees.

1177. The following definitions are relevant to whether a special national minimum wage applies to an award/agreement free employee:

- a junior employee means an employee who is under 21;
- a training arrangement means a combination of work and training that is subject to a training agreement, or a training contract, that take effect under a law of a State or Territory relating to the training of employees; and
- an employee with a disability means an employee who is qualified for a disability support pension as set out in section 94 or 95 of the *Social Security Act 1991*, or who would be so qualified but for paragraph 94(1)(e) or 95(1)(c) of that Act (these paragraphs restrict eligibility for disability support pensions according to criteria associated with Australian residency).

Clause 295 – Content of national minimum wage order – other matters

1178. Clause 295 requires the national minimum wage and special national minimum wages to be expressed in a way that produces a monetary amount per hour, and a casual loading to be expressed as a percentage (subclause 295(1)).

1179. The order may also include terms about how the order, or any of the requirements in it, will apply in particular circumstances (subclause 295(2)). For example, the order may include terms about hours that count as hours of work for the purposes of the national minimum wage order (this may be relevant where an employee is 'on call' and there may otherwise be uncertainty about whether the employee is 'at work').

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

1180. Clause 296 prevents a national minimum wage order from being varied except to remove ambiguity or uncertainty or to correct an error. Nor can it be revoked. FWA must publish any such variation as soon as practicable, on its website or otherwise. Clauses 297 and 298 are also relevant to variations made under this clause.

Clause 297 – When determinations varying national minimum wage orders come into operation

1181. Subclause 297(1) provides that a determination varying a national minimum wage order to remove ambiguity, uncertainty or to correct an error comes into operation on the day specified in the determination.

1182. Subclause 297(2) requires that the day specified in the determination must not be earlier than the day on which the determination is made, unless FWA is satisfied that there are exceptional circumstances to justify specifying an earlier day – e.g., where an ambiguity is causing significant confusion about the correct implementation of a national minimum wage order. (Clause 298 makes provision about the consequences of variation determinations in such cases.)

1183. Subclause 297(3) provides that a determination starts to apply to a particular employee from the start of the employee's next full pay period.

Clause 298 – Special rule about retrospective variations of national minimum wage orders

1184. Clause 298 ensures that a person who has contravened a term of the national minimum wage order or an enterprise agreement due to a retrospective amendment of a national minimum wage order under subclause 297(2) is not liable to pay a pecuniary penalty in respect of the contravention.

Clause 299 – When a national minimum wage order is in operation

1185. Clause 299 provides that a national minimum wage order operates until replaced by the next national minimum wage order.

Part 2-7 – Equal remuneration

1186. This Part allows FWA to make equal remuneration orders to ensure equal remuneration for men and women workers for work of equal or comparable value.

Division 1 – Introduction

Clause 300 – Guide to this Part

1187. This clause provides a guide to this Part.

Clause 301 – Meanings of *employee* and *employer*

1188. In this Part, the terms employee and employer mean national system employee and national system employer respectively (as defined in clauses 13 and 14). The rights and obligations of employers and employees set out in this Part apply only to the employment relationships within the scope of the corporations and other constitutional powers that are engaged by clauses 13 and 14.

Division 2 – Equal remuneration orders

Clause 302 – FWA may make an order requiring equal remuneration

1189. Clause 302 allows FWA to make any order it considers appropriate to ensure that there will be equal remuneration for men and women workers for work of equal or comparable value in relation to the employees to whom the order will apply (subclauses 302(1) and (2)).

1190. The term remuneration encompasses entitlements in addition to wages (i.e., it encompasses wages and other monetary entitlements).

1191. The principle of equal remuneration for men and women workers for work of equal or comparable value requires there to be (at a minimum) equal remuneration for men and women workers for the same work carried out in the same conditions. However, the principle is intentionally broader than this, and also requires equal remuneration for work of comparable value. This allows comparisons to be carried out between different but comparable work for the purposes of this Part. Evaluating comparable worth (for instance between the work of an executive administrative assistant and a research officer) relies on job and skill evaluation techniques.

1192. The Bill also removes the current requirement for the applicant to demonstrate (as a threshold issue) that there has been some kind of discrimination involved in the setting of remuneration. Instead, an applicant must only demonstrate that there is not equal remuneration for work of equal or comparable value.

1193. Subclause 302(3) provides that an equal remuneration order may only be made upon application by an employee to whom the order will apply; an employee organisation entitled to

represent the industrial interests of an employee to whom the order will apply; or the Sex Discrimination Commissioner.

1194. Subclause 302(4) sets out particular matters that FWA must take into account in deciding whether to make an equal remuneration order. This subclause requires FWA to take into account orders and determinations made by the Minimum Wage Panel in annual wage reviews and the reasons for those orders and determinations.

1195. Subclause 302(5) clarifies that an equal remuneration order may only be made if FWA is satisfied that there is not equal remuneration for work of equal or comparable value in relation to the employees to whom the order will apply.

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

1196. Clause 303 ensures that FWA may increase, but not reduce, employees' rates of remuneration by an equal remuneration order. This means, for example, that FWA could not reduce the higher rates of remuneration of a male (or predominately male) comparator group to bring the rates into line with the lower rates of remuneration of female employees subject to the application.

Clause 304 – Equal remuneration order may implement equal remuneration in stages

1197. Clause 304 allows increases to remuneration determined under an equal remuneration order to be phased in over an appropriate period of time if FWA considers that it is not feasible to implement the whole increase when the order comes into operation.

Clause 305 – Contravening an equal remuneration order

1198. Clause 305 provides that an employer must not contravene a term of an equal remuneration order.

1199. This clause is a civil remedy provision under Part 4-1 (Civil remedies).

Clause 306 – Inconsistency with modern awards, enterprise agreements and orders of FWA

1200. Clause 306 deals with the relationship between an equal remuneration order and modern awards, enterprise agreements and other orders of FWA. Under the provision, a term of one of these instruments has no effect to the extent that it is inconsistent with a term of an equal remuneration order.

Part 2-8 – Transfer of business

Overview

1201. This Part contains the rules that apply when there is a transfer of business from one national system employer to another. Broadly, the effect of the rules is to provide that enterprise agreements and certain modern awards that covered employees of the old employer continue to cover those employees if they are offered and accept employment with the new employer. The rules also provide for the effect of a transfer of business on guarantees of annual earnings given under Part 2-9 (Other terms and conditions of employment).

1202. Part 2-2 sets out the effect of a transfer of business on employees' entitlements under the NES.

1203. This Part applies when there is a particular type of connection between two employers (the old employer and new employer), the new employer agrees to employ some or all employees of the old employer and there has been no significant change to the work performed by those employees. The types of connection between employers which may result in there being a transfer of business include the sale and purchase of all or part of a business, certain outsourcing and in-sourcing arrangements and where the two employers are associated entities (as defined in clause 12).

1204. The circumstances in which a transfer of business occurs under Part 2-8 are broader than those contemplated by the current transmission of business provisions contained in Part 11 of, and Schedule 9 to, the WR Act.

1205. The WR Act provisions are based on earlier provisions construed by the High Court in *PP Consultants Pty Ltd v Finance Sector Union of Australia* (2000) 201 CLR 648 and *Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd* (2005) 222 CLR 194. In deciding whether there has been a transmission of business between private sector entities for the purposes of the WR Act, courts and tribunals have examined the character of the business (or part) in the hands of both the old employer and the new employer – where the character of the business is the same, there is likely to be a transmission of business. There must also be a succession, assignment or transmission of 'a business' – that is, some assets (tangible or intangible) must move between the old employer and the new employer.

1206. Although the provisions of this Part use the term transfer of business, they are not intended to require the focus under current Part 11 of the WR Act on what the 'business' of the old employer is and whether the new employer has in some way taken over that 'business'. They instead focus on whether there has been a transfer of work between two employers and the reason for the transfer of that work or, viewed another way, the connection between the two employers.

1207. FWA is permitted to make certain orders that modify the general transfer of business rules. In particular, FWA is able to make orders regarding the coverage of certain instruments and their application to transferring and non-transferring employees.

Division 1 – Introduction

Clause 307 – Guide to this Part

1208. This clause provides a guide to this Part.

Clause 308 – Meanings of *employee* and *employer*

1209. In this Part, the terms employee and employer mean national system employee and national system employer respectively (as defined in clauses 13 and 14). The rights and obligations of employers and employees set out in this Part apply only to the employment relationships within the scope of the corporations and other constitutional powers that are engaged by clauses 13 and 14.

1210. The definition of national system employer (clause 13) includes a person who is usually an employer. The effect of this is that, in this Part, a person may be an old employer or new employer even when, at a particular point, they do not actually have any employees. So, e.g., a new employer could apply to FWA for an order under Division 3 prior to the time when the new employer first engages a transferring employee.

Clause 309 – Object of this Part

1211. Clause 309 sets out the object of Part 2-8. It is to provide a balance between:

- protecting employees' terms and conditions of employment under an enterprise agreement, certain modern awards or certain other instruments; and
- the interests of employers in running their enterprises efficiently;

if there is a transfer of business.

Division 2 – Transfer of instruments

Clause 310 – Application of this Division

1212. Clause 310 outlines the circumstances in which Division 2 applies. This Division deals with the transfer of rights and obligations under enterprise agreements, certain modern awards and certain other instruments on a transfer of business.

Clause 311 – When does a transfer of business occur

1213. Subclause 311(1) is the operative provision of Division 2. It provides a definition of transfer of business and provides for the circumstances in which a transfer of business can occur. It also sets out the definitions of old employer, new employer and transferring work. These terms are used throughout the Part.

1214. Subclause 311(1) provides that there is a transfer of business from an employer (the old employer) to another employer (the new employer) if the following requirements are satisfied:

- the employment of an employee of the old employer has terminated;
- within 3 months after the termination, the employee becomes employed by the new employer;
- the transferring employee performs the same, or substantially the same, work (the transferring work) for the new employer as she or he performed for the old employer; and
- there is a connection between the old employer and the new employer as described in any of subclauses 311(3) to (6).

1215. The reference in paragraph 311(1)(a)to an employee's employment terminating is intended to capture all of the circumstances in which an employee ceases to be employed by an employer, including resignation.

1216. Under paragraph 311(1)(b), there can be a period of up to three months between the periods of employment with the old employer and new employer. This is intended to reflect that in some transactions, e.g., where the old employer has become insolvent and the liquidator is trying to sell the business, there may be a period where the transferring employees are not employed by either the old or the new employer. The three month period is also intended to ensure that the operation of Part 2-8 cannot be avoided by the new employer delaying the employment of an employee.

1217. Under paragraph 311(1)(c), the transferring employee must perform the same, or substantially the same, work for the new employer as she or he performed for the old employer. It is intended that this provision not be construed in a technical manner. It recognises that, in a transfer of business situation, there may well be some minor differences between the work performed for the respective employers. However, the requirement is satisfied where, overall, the work is the same or substantially the same – even if the precise duties of the employees, or the manner in which they are performed, have changed.

1218. Further, although paragraph 311(1)(c) is framed in terms of the work undertaken by an individual employee, in many instances a transfer of business occurs and a group of employees is engaged by the new employer. In this circumstance, it may be possible to categorise the work more generally. For example, if the old employer runs a supermarket and sells the supermarket to the new employer, the work might be characterised generally as retail work in a supermarket. The fact that an employee may have stacked shelves for the old employer but now works on the checkout for the new employer would not stop the employee from being a transferring employee.

1219. Subclause 311(2) provides that an employee is a transferring employee if the requirements set out in paragraphs 311(1)(a), (b) and (c) are satisfied.

1220. Subclauses 311(3) – (6) set out the circumstances in which there is a connection between the old and new employer for the purposes of paragraph 311(1)(d).

1221. Subclause 311(3) provides that one type of connection between the old employer and the new employer for the purposes of paragraph 311(1)(d) is where there has been some form of

asset transfer between the old and the new employer (or their associated entities). There is a connection if there is an arrangement between:

- the old employer or an associated entity of the old employer; and
- the new employer or an associated entity of the new employer; and
- the new employer or an associated entity of the new employer owns, or has the beneficial use of, some or all of the assets (whether tangible or intangible) that:
    - the old employer, or an associated entity of the old employer owned or had the beneficial use of; and
    - relate to or are used in connection with the transferring work.

1222. The word arrangement is intended to be interpreted broadly.

1223. This subclause and those following refer to associated entities of the old employer or new employer to recognise the wide variety of ways in which transactions may be structured.

Illustrative example

Walsh's Excellent Building Supplies (Walsh) enters into an arrangement with Carbone DIY Construction (Carbone) under which Carbone agrees to buy part of Walsh's construction business. Carbone employs some of the employees of Walsh who work in the construction business through its subsidiary, Carbone MYOB (Staffing) Construction (Carbone Staffing). Carbone Staffing would be, under subclause 311(3), the 'new employer'. There would be a transfer of business, even though the arrangement is between Walsh, the old employer, and Carbone – because Carbone is an associated entity of the new employer.

1224. Subclause 311(4) provides that a transfer of business occurs where, in addition to the elements in paragraphs 311(1)(a) to (c) being satisfied, the old employer or an associated entity of the old employer outsources work to the new employer or an associated entity of the new employer. This is intended to cover the situation where an employer (the old employer) decides that it no longer wishes to perform work of a particular type, or no longer wishes to perform as much work of a particular type, and so engages a third party to perform that work instead and that third party engages employees of the old employer to continue performing that work. This provision applies irrespective of whether there is a transfer of assets between the old employer and the new employer.

Illustrative example

Kambo & Partners is a human resources consultancy firm in Victoria. Kambo employs four security guards who staff its reception desk and keep the business's premises secure. Kambo decides that it no longer wishes to employ security guards itself, and enters into a contract (an outsourcing arrangement) with Elvis Security Pty Ltd (Elvis Security) under which Elvis Security will provide security services to Kambo's premises. Elvis Security offers employment to the four security guards employed by Kambo and they accept the offers. They perform substantially the same work for Elvis Security as they performed for Kambo. This would be a transfer of business.

1225. Subclause 311(5) sets out another circumstance in which there is a connection between the old employer and the new employer for the purposes of paragraph 311(1)(d). It provides that a connection between the old employer and the new employer exists where:

- the transferring employee performed the transferring work as an employee of the old employer because the new employer or an associated entity of the new employer had outsourced the work to the old employer or an associated entity of the old employer; and

- the transferring employee performs the work as an employee of the new employer because the new employer or an associated entity of the new employer has ceased to outsource the work to the old employer or the associated entity of the old employer.

1226. The intention of this subclause is that a transfer of business occurs where a new employer decides to in-source the work previously done by the transferring employee of the old employer.

Illustrative example

This example continues the example given at subclause 311(4) above.

After two years, Kambo decides that it no longer wishes to outsource the security work at its premises and wishes again to engage employees itself to perform this work. Kambo terminates the outsourcing contract that it made with Elvis Security and offers employment to the security guards employed by Elvis Security. They accept the offers and perform substantially the same work as employees of Kambo as they previously performed as employees of Elvis Security, namely, providing security services at Kambo's premises. This would be a transfer of business.

1227. Subclause 311(6) provides that there is a connection between the old employer and the new employer for the purposes of paragraph 311(1)(d) if the new employer is an associated entity of the old employer at the time when the transferring employee becomes employed by the new employer. The definition of 'associated entity' is that used in the *Corporations Act 2001*. This type of connection is intended to cover some corporate restructures. It also ensures that employers cannot intentionally avoid obligations under instruments by 'transferring' employees

between associated entities (although any attempt to change an employee's employer without the employee's consent may be ineffective: *McCluskey v Karagiozis* [2002] FCA 1137; 120 IR 147).

Clause 312 – Instruments that may transfer

1228. Subclause 312(1) provides a definition of transferable instrument for the purposes of this Part. This is defined as:

- an enterprise agreement that has been approved by FWA (whether or not in operation);
- a workplace determination; and
- a named employer award.

1229. Subclause 312(2) provides a definition of named employer award.

1230. Modern awards that are not named employer awards are not transferable instruments because they continue to cover transferring employees according to their terms following a transfer of business. This is because modern awards that are not named employer awards cover a class or classes of employees or employers specified in the award (e.g., employees working in retail shops). Because an employer or an employee is covered by an award if the employer or employee is included in the specified class, there is no need to include provisions providing for the transfer of modern awards that operate on an industry basis.

Clause 313 – Transferring employees and new employer covered by transferable instrument

1231. Clause 313 sets out the default rules that apply to the coverage of transferable instruments when a transfer of business occurs. The effect of subclause 313(1) is that a transferable instrument that covered an old employer and a transferring employee immediately before that employee's employment was terminated covers the new employer and the transferring employee in relation to the transferring work:

- after the time the transferring employee becomes employed by the new employer; and
- any other enterprise agreement or named employer award (that is not a transferable instrument) which covers the new employer does not cover the transferring employee.

1232. This means, for example, that an enterprise agreement or named employer award that already covered the new employer would not cover a transferring employee who is covered by a transferable instrument even if it is capable of doing so on its terms.

1233. The transfer of business provisions work by reference to the rules on coverage (see Part 2-1 (Core provisions for this Chapter)). They therefore preserve the rules that govern the interaction of different instruments. For example, where the old employer is covered by an enterprise agreement and a named employer award, the named employer award would not apply to the old employer and its employees although it would continue to cover them. This would be the effect of the rule governing the interaction of enterprise agreements and modern awards (clause 57). Following a transfer of business, both the enterprise agreement and named

employer award would cover the new employer, but their interaction with each other would be preserved.

Illustrative example

Clarke Electrical Shocking employs 10 electricians at its engineering workshop. The employees are covered by the Clarke Electrical Award (a named employer award). Clarke sells its business to McKinlay Really Really White Goods (McKinlay), on condition that it agrees to employ some of Clarke's electricians.

McKinlay already has an enterprise agreement in place covering its existing electricians. On its terms McKinlay's agreement would be capable of covering the transferring employees. However, clause 313 has the effect that the agreement will not cover the transferring employees.

1234. Subclause 313(2) provides that, to avoid doubt, for the purposes of subclause 313(1), a transferable instrument that covers a new employer and a transferring employee includes any individual flexibility arrangement that operates as a term of the transferable instrument.

1235. Subclause 313(3) provides that clause 313 has effect subject to any order of FWA under subclause 318(1), which deals with the orders that FWA may make in relation to instruments covering new employers and transferring employees.

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

1236. This clause has the effect that a transferable instrument covers a non-transferring employee of the new employer in certain circumstances. Subclause 314(1) provides that for a transferable instrument to cover a new employer and a non-transferring employee, the following requirements must be satisfied:

- the transferable instrument covers the new employer and a transferring employee under paragraph 313(1)(a);
- the new employer employs a non-transferring employee (the new non-transferring employee) after the transferable instrument starts to cover the new employer;
- the new non-transferring employee performs the transferring work; and
- no other enterprise agreement or modern award covers the new employer and the non-transferring employee at the time the new non-transferring employee is employed.

1237. The effect of this clause is that it allows new employees who are not transferring employees and to whom no other instrument applies to be covered by the same workplace instrument as the transferring employees. It forms an exception to the general rule in clause 313 that transferable instruments only cover transferring employees.

Illustrative example

Hannah establishes the Cutty Sark Kayak Company (Cutty). Before hiring any of its own employees, Cutty buys Titanic Kayaking Expeditions Pty Ltd (Titanic). Cutty agrees to employ Titanic's kayaking instructors, who are covered by the Titanic Enterprise Agreement. Cutty does not have its own enterprise agreement and is not covered by a modern award at the time it purchases Titanic, so Titanic's enterprise agreement will cover Cutty and the transferring employees.

A month later, Cutty decides to expand its business, so it employs Eleni and Hussain as kayaking instructors. Because there is no other enterprise agreement or modern award that covers these employees at the time they are employed, the Titanic Enterprise Agreement will also cover Eleni and Hussain in relation to their work for Cutty.

1238. Subclause 314(2) provides a definition of non-transferring employee. This is defined as an employee of the new employer who is not a transferring employee.

1239. Subclause 314(3) provides that this section is subject to any order of FWA that is made under subclause 319(1), which deals with orders that FWA may make in relation to instruments covering new employers and non-transferring employees.

Clause 315 – Organisations covered by transferable instrument

1240. Clause 315 outlines the circumstances in which employee and employer organisations can be covered by a transferable instrument.

1241. Subclause 315(1) provides that a named employer award covers an employer organisation in relation to the new employer where the named employer award:

- covers the new employer because of paragraph 313(1)(a); and
- covered the organisation in relation to the old employer immediately before the termination of a transferring employee's employment with the old employer.

1242. Subclause 315(2) enables employee organisations to be covered by a named employer award on a transfer of business. It provides that if:

- a named employer award covers the new employer and a transferring employee because of paragraph 313(1)(a); and
- the named employer award covered an employee organisation in relation to the transferring employee immediately before the termination of the employee's employment with the old employer;

then the named employer award covers the employee organisation in relation to the transferring employee and any non-transferring employee who is covered by the award because of a provision of this Part or an FWA order and performs the same work as the transferring employee.

1243. Subclause 315(3) makes clear that, to avoid doubt, an enterprise agreement covers an employee organisation where:

- the enterprise agreement covers a transferring employee or a non-transferring employee because of a provision of this Part or an FWA order; and
- an enterprise agreement covered an employee organisation immediately before the termination of a transferring employee's employment with the old employer.

Clause 316 – Transferring employees who are high income employees

1244. Clause 316 applies where the old employer gave a guarantee of annual earnings to a transferring employee who is a high income employee.

1245. Part 2-9 of the Bill contains the operative provisions relating to guarantees of annual earnings. A guarantee of annual earnings only applies to high income employees who are covered by a modern award and to whom an enterprise agreement does not apply.

1246. Subclause 316(1) provides that the clause applies where:

- an old employer has given a guarantee of annual earnings for a guaranteed period to a transferring employee; and
- the transferring employee was a high income employee immediately before the employee's employment with the old employer was terminated; and
- some of the guaranteed period occurs after the time the transferring employee becomes employed by the new employer; and
- an enterprise agreement does not apply to the transferring employee at the time they transfer to the new employer.

1247. Subclause 316(2) provides that a guarantee of annual earnings given to an employee by the old employer is treated, if the employee becomes a transferring employee, as if it had been given to the employee by the new employer. This rule operates subject to subclauses 316(3), (4) and (5).

1248. Subclauses 316(3) and (4) provide that the new employer is not required to comply with the guarantee of annual earnings:

- in relation to the part of the guaranteed period before the transferring employee became employed by the new employer; and
- to the extent that it requires the new employer to pay an amount of earnings at a higher rate than the annual rate of the guarantee of annual earnings.

1249. The effect of subclause 328(2), which deals with employer obligations in relation to guarantees of annual earnings, is that when the transferring employee's employment with the old employer ends, the old employer must have paid the employee a pro-rated amount of the annual

rate of guarantee of annual earnings from the start of the guarantee period to the day the employment ends. Subclause 316(3) ensures that the new employer is not responsible for any payment in relation to that period, despite the fact that under subclause 316(2) the new employer is taken to have given the guarantee.

1250. Subclause 316(4) is intended to deal with the situation where the guarantee of annual earnings provides for different rates of pay throughout the period and the rate of earnings is lower in respect of the period when the transferring employee was an employee of the old employer.

Illustrative example

Mandy works as a senior engineer for a mining company. Her employer gives her a guarantee of annual earnings on 1 January 2010 for a 12 month period. The guarantee is to pay Mandy an annual salary of $90,000 and to pay a guaranteed Christmas bonus of $30,000 on 15 December 2010.

On 30 June 2010, Mandy's employer outsources its engineering function to Edwards Engineers Pty Ltd (Edwards). Her employment ceases and she is employed by Edwards. The outsourcing satisfies the requirements for it to be a transfer of business. Accordingly, Edwards is treated as having given Mandy the guarantee of earnings.

As at 30 June 2010, Mandy would have been paid $45,000 of the $120,000 that she was guaranteed under the guarantee of earnings, being her annual salary from 1 January to 30 June. The effect of subclause 328(2) is that Mandy's old employer must pay to her a further $15,000. This additional payment reflects the fact that the guarantee was end-loaded. Subclause 316(3) makes clear that Edwards would not be responsible for this payment or any other payment under the guarantee relating to the period of Mandy's employment with the old employer.

Under the terms of the original guarantee, Mandy would be entitled as an employee of Edwards to a further $45,000, being her salary from 1 July to 31 December 2010, and the Christmas bonus of $30,000 – a total of $75,000. However, if Mandy received $75,000 she would be unjustly enriched as it does not take into account that she has already received an additional $15,000 from her old employer. Subclause 316(4) adjusts the guarantee as it applies to Edwards so that Edwards is only required to pay a further $60,000 over the remainder of the guaranteed period, from 1 July to 31 December 2010. The combined effect of these provisions is that Mandy would still receive $120,000 over the guaranteed period.

1251. Subclause 316(5) applies where it is not practicable for a new employer to provide non-monetary benefits to a transferring employee and those benefits form part of the guarantee of annual earnings. In those circumstances, the guarantee of annual earnings is taken to be varied so that the transferring employee is entitled instead to an amount of money equivalent to the agreed money value of the non-monetary benefit.

1252. The agreed money value of a non-monetary benefit is the value agreed between the old employer and the transferring employee at the time when the guarantee of annual earnings was given.

1253. Subclause 316(6) makes clear that clause 316 does not affect the rights and obligations of the old employer that arose before the transfer time.

Division 3 – Powers of FWA

Clause 317 – FWA may make orders in relation to a transfer of business

1254. Clause 317 describes the application of Division 3. Division 3 provides for FWA to make certain orders where there is or is likely to be a transfer of business.

Clause 318 – Orders relating to instruments covering new employer and transferring employees

1255. Subclause 318(1) provides that FWA may make certain orders in relation to a new employer and a transferring employee. The types of orders that FWA may make are set out in paragraphs 318(1)(a) and (b).

1256. Paragraph 318(1)(a) enables FWA to make an order that a transferable instrument that would or would be likely to cover the new employer and the transferring employee under paragraph 313(1)(a) does not cover the new employer and the transferring employee. The effect of this paragraph is that it displaces the general rule in paragraph 313(1)(a) that a transferable instrument covers the new employer and a transferring employee.

1257. Paragraph 318(1)(b) enables FWA to make an order that an enterprise agreement or named employer award that covers the new employer covers or will cover the transferring employee. For example, this paragraph allows a new employer that is already covered by an existing enterprise agreement or named employer award to apply to FWA for an order that a transferring employee also be covered by that enterprise agreement or named employer award, instead of the transferring instrument.

1258. Subclause 318(2) provides that FWA may only make an order under subclause 318(1) on application by:

- the new employer or the likely new employer;
- a transferring employee or a likely transferring employee;
- if the application relates to an enterprise agreement – an employee organisation that is or is likely to be covered by the agreement;
- if the application relates to a named employer award – an employee organisation that is entitled to represent the industrial interests of an transferring employee or a likely transferring employee.

1259. Subclause 318(3) sets out the matters that FWA must take into account when deciding whether to make an order under subsection 318(1). These factors, which must be read having regard to the objects of the Part, are intended to enable FWA to balance appropriately the protection of employees' entitlements under certain instruments with the need for some

flexibility to depart from the default rules about coverage of instruments following a transfer of business. They recognise that in some circumstances, having regard to matters such as the views of the persons covered by the instruments and the public interest, there may be good reason for an alternative instrument to cover the transferring employees.

1260. Subclause 318(4) restricts the commencement of an order made under subclause 318(1). An order must not come into operation in relation to a particular transferring employee before the later of:

- the time when the transferring employee becomes employed by the new employer;
- the day on which the order is made.

Illustrative example

Carlo's Auto Repairs (Carlo) is covered by the CAR Enterprise Agreement 2010. Mega Motors Limited (Mega) buys Carlo's business. Mega employs some of Carlo's employees and a transfer of business occurs. Mega already has an enterprise agreement that applies to employees across its chain of auto repair businesses, the Mega Motors Collective Agreement.

Following an application from Mega, FWA makes an order that the CAR Enterprise Agreement does not cover the transferring employees and the Mega Motors Collective Agreement covers the transferring employees instead.

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

1261. Subclause 319(1) provides that FWA may make certain orders that apply to a new employer and a non-transferring employee. The types of orders that FWA may make are set out in paragraphs 319(1)(a) to (c).

1262. Paragraph 319(1)(a) allows FWA to order that a transferable instrument that would cover the new employer and the non-transferring employee under subclause 314(1) does not cover the new employer and the non-transferring employee.

1263. Under paragraph 319(1)(b), FWA may make an order that a transferable instrument that covers the new employer also covers a non-transferring employee who performs the transferring work for the new employer. This contemplates, for example, that an employer and its non-transferring employees who are covered by an instrument can apply to FWA for an order to be covered by a transferable instrument. In effect, this paragraph would allow a non-transferring employee to be covered by a transferable instrument while performing the transferring work without necessarily 'switching off' an instrument which already covers them.

1264. Paragraph 319(1)(c) permits FWA to make an order that an enterprise agreement or a modern award that covers the new employer no longer covers a non-transferring employee who performs, or is likely to perform, the transferring work of the new employer. This paragraph allows an existing enterprise agreement or modern award that covers a non-transferring

employee to be 'switched off', so that the non-transferring employee can instead be covered by a transferable instrument.

1265. The legislative note under paragraph 319(1)(c) makes clear that FWA may make orders under paragraphs 319(1)(b) and (c) irrespective of when the non-transferring employee was employed by the new employer. In contrast, paragraph 319(1)(a) only applies to a new non-transferring employee who is employed after the transferable instrument started to cover the new employer.

1266. Subclause 319(2) provides that FWA may only make an order under subclause 319(1) on application by:

- the new employer or the likely new employer;
- a non-transferring employee who performs, or is likely to perform, the transferring work for the new employer;
- if the application relates to an enterprise agreement – an employee organisation that is or is likely to be covered by the agreement;
- if the application relates to a named employer award – an employee organisation that is entitled to represent the industrial interests of an transferring employee or a likely transferring employee.

1267. Subclause 319(3) sets out the matters that FWA must take into account when deciding whether to make an order under subclause 319(1).

1268. Subclause 319(4) restricts the commencement of an order made under subclause 319(1). An order must not come into operation in relation to a particular non-transferring employee before the later of:

- the time when the non-transferring employee starts to perform the transferring work for the new employer; and
- the day on which the order is made.

Clause 320 – Variation of transferable instruments

1269. Clause 320 applies to a transferable instrument that covers, or is likely to cover, a new employer because of a provision of this Part or an order of FWA. A transferable instrument may be varied by FWA as provided under subclause 320(2).

1270. Paragraph .320(2)(a) permits FWA to vary a transferable instrument to remove terms that, in FWA's opinion, are not or will not be capable of meaningful operation because of the transfer of business to the new employer. For example, a term of an enterprise agreement relating to participation in an employee share plan of the old employer would not be capable of meaningful operation when the agreement applies to the new employer.

1271. Paragraph 320(2)(b) permits FWA to vary a transferable instrument to remove ambiguity or uncertainty about how a term of the transferable instrument operates. This contemplates, for example, a term of a transferable instrument that requires a payment to be made in accordance with 'company policy' where it is unclear whether it is the old or new employer's policy that is being referred to.

1272. Subclause 320(3) provides that FWA may only vary a transferable instrument on application by a person who is or is likely to be covered by the transferable instrument.

1273. The matters that FWA must take into account when deciding whether to make a variation under subclause 320(1) are set out in subclause 320(4). These are:

- the views of the new employer or a person who is likely to be the new employer and the views of the employees who would be affected by the transferable instrument as varied;
- whether any employees would be disadvantaged by the transferable instrument as varied in relation to their terms and conditions of employment;
- if the transferable instrument is an enterprise agreement – the nominal expiry date of the agreement; and
- the public interest.

1274. Subclause 320(5) restricts the time at which a variation made under subclause 320(2) may commence operation. It provides that a variation of a transferable instrument must not come into operation before the later of:

- the time when the transferable instrument starts to cover the new employer; and
- the day on which the variation is made.

Part 2 – 9 – Other terms and conditions of employment

Division 1 – Introduction

Clause 321 – Guide to this Part

1275. This clause provides a guide to this Part.

Clause 322 – Meanings of *employee* and *employer*

1276. In this Part, the terms employee and employer mean national system employee and national system employer respectively (as defined in clauses 13 and 14). The rights and obligations of employers and employees set out in this Part apply only to the employment relationships within the scope of the corporations and other constitutional powers that are engaged by clauses 13 and 14.

Division 2 – Payment of wages

1277. This Division is about the frequency and methods of payment of amounts payable to an employee in relation to the performance of work and allowable deductions from such amounts.

1278. Currently, these issues are dealt with primarily by State and Territory legislation. This has led to a patchwork of obligations for employers. The payment of wages provisions in this Division draw upon the protections that exist in State and Territory legislation to provide a simple, national scheme.

Clause 323 – Method and frequency of payment

1279. Subclause 323(1) requires employers to pay employees any amounts payable to the employees in relation to the performance of work:

- in full (except as permitted by clause 324);
- in money (i.e. not 'in kind') by one, or a combination, of the methods referred to in subclause 323(2);
- at least monthly.

1280. A modern award, enterprise agreement or contract of employment may provide for more frequent payment.

1281. Subclause 323(1) does not provide an exception from the requirement for at least monthly payment to deal with the situation where payment of wages falls due on a public holiday. In such a case, the employer would need to ensure that appropriate arrangements are put in place so that employees are paid before the public holiday.

1282. This subclause is a civil remedy provision under Part 4-1 (Civil remedies).

1283. The legislative note after this subclause makes clear that the payment rule covers a wide range of payments, where they fall due during the relevant payment period – including incentive-based payments and bonuses, loadings, monetary allowances, overtime or penalty rates and leave payments. However, the amounts referred to in this subclause would not include superannuation contributions or non-monetary benefits.

1284. Subclause 323(2) lists the methods by which payments may be made, which include cash, direct deposit or cheque. This would, for example, prohibit payment by store credit vouchers. Alternatively, if a modern award or an enterprise agreement provides a method of payment, this must be complied with (subclause 323(3)).

1285. This subclause is a civil remedy provision under Part 4-1 (Civil remedies).

Clause 324 – Permitted deductions

1286. Clause 324 lists deductions that may be made from payments due to an employee.

1287. A deduction may be made if it is authorised by:

- the employee (in writing), provided that the deduction is principally for the employee's benefit;
- the employee, in accordance with an enterprise agreement;
- a modern award or an order of FWA; or
- a law of the Commonwealth, a State or a Territory, or an order of a court.

1288. Deductions that may be made under this provision include salary sacrifice arrangements (as is made clear by the first legislative note after this clause).

1289. The second legislative note after this clause clarifies that certain terms of a modern award, enterprise agreement or contract of employment relating to deductions may have no effect (see clause 326). A deduction purportedly made in accordance with such a term would therefore not be authorised for the purposes of this clause.

1290. An authorised deduction does not have the effect of reducing an employee's minimum wage (e.g., under an award), but will have the effect of reducing the amount that an employer is required to pay to the employee. Other amounts may still be required to be paid by the employer to third parties on behalf of the employee; e.g., under a salary sacrifice arrangement.

Clause 325 – Unreasonable requirements to spend amount

1291. An employer may not directly or indirectly require an employee to spend any part of the amount payable to the employee in a particular way, if the requirement is unreasonable in the circumstances (subclause 325(1)).

1292. For example, it is likely to be unreasonable for an employer to require an employee to donate a proportion of his or her pay to a charitable or religious organisation nominated by the

employer. It may be reasonable, however, for an employer to require an employee who is a tradesperson to purchase tools required to perform his or her duties (unless the employer is otherwise required to provide those tools).

1293. Any such clause with unreasonable operation is of no effect (see subclause 326(3)).

1294. If an employee is required to spend wages in contravention of this clause, then the employee may recover the amounts so spent from the employer as an underpayment of wages claim (see paragraph 327(b)).

1295. This subclause is a civil remedy provision under Part 4-1 (Civil remedies).

1296. Subclause 325(2) allows regulations to prescribe circumstances in which a requirement on an employee to spend money would be taken to be, or not to be, reasonable.

Clause 326 – Certain terms have no effect

1297. Subclause 326(1) provides that a term of a modern award, enterprise agreement or contract of employment is of no effect to the extent that the term:

- permits, or has the effect of permitting, an employer to deduct an amount from an amount payable to an employee for the performance of work; or

- requires, or has the effect of requiring, an employee to make a payment to an employer (e.g., by imposing a fine on the employee for lateness) or another person (e.g., requiring the employee to lease premises from a person who is related to the employer), if the deduction or payment directly or indirectly benefits the employer and is unreasonable in the circumstances.

1298. Subclause 326(2) allows regulations to prescribe circumstances in which a deduction or payment referred to in subclause 326(1) is or is not reasonable.

1299. Subclause 326(3) provides that a term of a modern award, enterprise agreement or contract of employment has no effect to the extent that the term:

- permits, or has the effect of permitting, an employer to make a requirement that would contravene subclause 325(1); or

- directly or indirectly requires an employee to spend an amount, if the requirement would contravene subclause 325(1) if it had been made by the employee's employer.

Clause 327 – Things given or provided, and amounts required to be spent, in contravention of this Division

1300. The effect of paragraph 327(a) is that anything given or provided by the employer contrary to paragraph 323(1)(b) (the requirement to pay wages in money) and subclause 323(3) (the requirement to pay wages in accordance with a modern award or enterprise agreement) is taken never to have been given or provided and cannot, therefore, be used to offset an underpayment of wages claim.

1301. For example, if an employer purports to pay an employee 'in kind' by providing the employee with goods or services in lieu of wages, the value of the goods or services provided by the employer in lieu of wages would not discharge the employer's obligation to pay the employee wages in money under this Division.

1302. The effect of paragraph 327(b) is that any amount the employee has been required to unreasonably spend by the employer (contrary to subclause 325(1)), or in accordance with a term to which subclause 326(3) applies), is taken to have never been paid to the employee. This means that an employee could seek to be reimbursed by the employer for any amount that they were required to spend in contravention of a provision of this Division.

Division 3 – Guarantee of annual earnings

1303. Under Part 2-1, a modern award will not apply to an employee while the employee is a high income employee (see subclause 47(2)).

1304. A high income employee is an employee who has guaranteed annual earnings that are more than the high income threshold. The amount of the high income threshold will be prescribed by regulations. It is intended that the high income threshold will be $100,000 per annum for full time employees, indexed from 27 August 2007 and then annually from 1 July each year. The high income threshold for part time or casual employees will be determined on a proportionate basis.

1305. This Division deals with:

- how to determine whether an employee is a high income employee at a particular time (clauses 329-331 and 333);
- what may be included in a guarantee of annual earnings (clause 332); and
- an employer's obligations in relation to a guarantee of annual earnings (clause 328).

Clause 328 – Employer obligations in relation to guarantee of annual earnings

1306. An employer's obligations in relation to a guarantee of annual earnings are set out in clause 328. (The expression guarantee of annual earnings is defined in section 330.)

1307. Subclause 328(1) provides that an employer who has given a guarantee of annual earnings to an employee must comply with that guarantee while the employee is a high income employee and covered by a modern award in operation.

1308. The obligation to comply with a guarantee does not affect the circumstances in which the employer is entitled or obliged to reduce the employee's earnings. For example, the fact that an employer has provided a guarantee of annual earnings would not require the employer to pay the employee for periods of unpaid leave (such as parental leave) or unauthorised absences.

1309. If an employer terminates the employment of a high income employee before the end of the guaranteed period, or if the high income employee becomes a transferring employee in

relation to a transfer of business from the employer to a new employer and the guarantee is transferred to the new employer under subclause 316(2), the former employer will be required to ensure that for the period before termination the employee is paid at the annual rate of the guarantee of annual earnings (subclause 328(2)).

1310. The requirement to make up any shortfall in earnings under this subclause only applies if the employer terminates the employment of the high income employee or where the employee becomes a transferring employee.

1311. Subclause 328(2) ensures that where an employer and employee agree to guaranteed annual earnings that vary over a guaranteed period, the employee is not disadvantaged in the event of early termination of employment or by a transfer of business.

Illustrative example

Caleb has a guarantee of annual earnings of $120,000 over a 12 month period. The guarantee is structured so that Caleb receives $20,000 for the first three months and $100,000 for the remaining nine months. Caleb is a high income employee for the entire period and the relevant modern award will not apply to his employment.

If Caleb's employer terminates his employment after three months (or if there is a transfer of business), he will have only received earnings at the rate equivalent to annual salary of $80,000. Subclause 328(2) will require the employer to ensure that for the period of employment prior to the termination or transfer of business, Caleb is paid earnings at the guaranteed annual earnings rate. This means that Caleb's employer will be required to pay Caleb a further $10,000.

1312. Subclause 328(3) requires an employer before or at the time of giving a guarantee of annual earnings to notify an employee who is covered by a modern award of the consequences of giving a guarantee of annual earnings. This notification must be provided in writing. It must state that a modern award will not apply to the employee for any period during which the employee is a high income employee.

1313. Subclauses 328(1), (2) and (3) are each civil remedy provisions under Part 4-1 (Civil remedies).

Clause 329 – High income employee

1314. This clause defines high income employee. A high income employee is an employee who is guaranteed to earn an annual rate of earnings in excess of the high income threshold (the high income threshold is dealt with in clause 333).

1315. For employees other than full time employees (e.g., part time or casual employees) the annual rate of earnings is treated on a proportionate basis.

1316. To avoid doubt, subclause 329(3) provides that an employee does not have a guarantee of annual earnings if the guarantee is revoked by agreement.

Clause 330 – Guarantee of annual earnings and annual rate of guarantee

1317. Clause 330 defines a guarantee of annual earnings.

1318. A guarantee of annual earnings is a written undertaking given by an employer to an employee who is covered by a modern award, which guarantees the employee payment of earnings over a period of 12 months or more, in return for the performance of work by the employee.

1319. An employee must be covered by a modern award that is in operation in order to be employed on the basis of a guarantee of annual earnings, but not an enterprise agreement.

1320. The employer and employee must reach agreement about the undertaking and the employee's acceptance of the undertaking before it commences operation, and no later than 14 days after the employee is employed, or the parties agree to vary the employee's terms and conditions of employment.

1321. A guarantee of annual earnings may be given for less than 12 months in the case of a fixed term employment of less than 12 months, or where an employee is temporarily performing particular duties for a period of less than 12 months (e.g., doing a different job for a period while another employee is on leave) (subclause 330(2)).

1322. A guarantee may be given as a condition of accepting employment but an employer must not apply pressure to an employee in connection with the offer or acceptance of a guarantee of annual earnings. Applying undue influence or pressure is dealt with in the general protections in Part 3-1 (see clause 344).

Clause 331 – Guaranteed period

1323. Clause 331 defines the meaning of guaranteed period. A guaranteed period is a period starting when the undertaking regarding guaranteed annual earnings commences and ending at the earliest of the following:

- at the end of the period specified in the undertaking; or
- when an enterprise agreement starts to apply to the employment of the employee; or
- when the employer revokes a guarantee of annual earnings with the employee's agreement.

Clause 332 – Earnings

1324. The meaning of earnings is set out in clause 332.

1325. Earnings include: wages, amounts paid on behalf of the employee or at the employee's direction and the agreed value of non-monetary benefits.

1326. Non-monetary benefits are defined to mean benefits provided to an employee in a form other than money in return for the performance of work. Non-monetary benefits must have an

agreed, reasonable monetary value. Benefits provided to an employee which are not related to the employee's work or which are provided without the parties reaching agreement as to a reasonable money value are not included in the definition.

1327. An employee's earnings do not include payments for which a value is not ascertainable in advance (such as variable performance bonuses). This means that payments made, but which were not anticipated or agreed to in advance (either because the type of payment was not anticipated, or the value of the payment was not agreed), will not be included. A legislative note provides examples of payments that cannot be determined in advance. These payments include overtime (unless the overtime is guaranteed), commissions and incentive-based payments and bonuses.

1328. Other payments that are excluded from the definition of earnings are reimbursements for expenses incurred on behalf of the employer and statutory superannuation contributions.

1329. The statutory superannuation contributions that are excluded are:

- contributions which would attract a superannuation guarantee charge under the *Superannuation Guarantee Charge Act 1992* if they are not paid by an employer in respect of an employee;
- payments in relation to a defined benefit interest (as defined in section 292-175 of the *Income Tax Assessment Act 1997*); and
- payments under a Commonwealth, a State or a Territory law that requires an employer to contribute to a superannuation fund for the employee's benefit.

1330. The regulations may prescribe additional amounts or benefits that are included in, or excluded from, the definition of earnings.

Clause 333 – High income threshold

1331. This clause provides for the regulations to prescribe the amount of the high income threshold.

1332. It is intended that the high income threshold will be $100,000 per annum for full time employees, indexed from 27 August 2007 (the date this policy was announced) and then annually from 1 July each year.

Chapter 3 – Rights and responsibilities of employees, employers, organisations etc.

Part 3-1 – General Protections

1333. Part 3-1 sets out a range of workplace protections. This is a key part of this Bill that ensures fairness and representation at the workplace by recognising the right to freedom of association and preventing discrimination and other unfair treatment.

1334. The Part provides protections for national system employers and national system employees, organisations and other associations of national system employers or employees. It also provides protections in some circumstances for other persons, including employers and employees in State industrial relations systems, independent contractors and the persons who engage them (principals), State registered industrial associations, and other associations of State employers or employees (the application of Part 3-1 is explained in detail under Division 2 below).

1335. Part 3-1 incorporates and streamlines the following WR Act protections:

- unlawful termination;
- freedom of association;
- sham arrangements in relation to independent contractors; and
- various other specific protections (such as the protection from coercion in relation to making a collective agreement in subsection 400(1) of the WR Act).

1336. The consolidated protections in Part 3-1 are intended to rationalise, but not diminish, existing protections. In some cases, providing general, more rationalised protections has expanded their scope.

1337. Key concepts that underpin Part 3-1 are:

- workplace rights (see clause 341);
- engaging in industrial activities (see clause 347); and
- adverse action (see clause 342).

1338. The principal protections in Part 3-1 have been divided into protections relating to workplace rights (which can be broadly described as employment entitlements and the freedom to exercise and enforce those entitlements) and engaging in industrial activities (which encompasses the freedom to be or not be a member or officer of an industrial association and to participate in lawful activities, including those of an industrial association).

1339. Certain persons, including employers, employees and industrial associations, are prohibited from taking adverse action against certain other persons because the other person has, or exercises a workplace right, or engages in industrial activity. Adverse action includes

dismissal of an employee but also includes a range of other action such as prejudicing an employee or independent contractor and organising industrial action against another person. Coercion and misrepresentations in relation to workplace rights and industrial activities are also prohibited.

1340. The other protections included in Part 3-1 ensure that existing protections in the WR Act that do not fall into the categories of protecting workplace rights or engaging in industrial activities are also protected by the Part.

1341. All of the prohibitions in Part 3-1 are civil remedy provisions under Part 4-1(Civil remedies).

1342. Part 3-1 does not rely on the external affairs power in the Constitution in the same way as the existing unlawful termination protections (which apply to all employees in Australia). To maintain existing protections, Division 2 of Part 6-4 provides for unlawful termination protections for employees who do not have a remedy under this Part. This ensures that every employee in Australia has a remedy for unlawful termination.

Division 1 – Introduction

Clause 334 – Guide to this Part

1343. This clause provides a guide to this Part.

Clause 335 – Meanings of *employee* and *employer*

1344. In this Part, the terms employer and employee have their ordinary meaning because references to these terms are not limited to national system employers and employees (see clause 13 and clause 14). Part 3-1 regulates the conduct of all employers and employees and a range of other persons but only where the conduct is connected to (principally) the constitutional powers that support the main provisions of this Bill (e.g., the corporations power).

Clause 336 – Objects of this Part

1345. Clause 336 sets out the objects of Part 3-1, which include:

- protection of workplace rights and freedom of association;
- providing protection from workplace discrimination; and
- providing effective remedies for persons who have been adversely affected as a result of a contravention of Part 3-1.

Division 2 – Application of this Part

1346. Part 3-1 does not rely on the terms national system employer and national system employee as defined in clauses 13 and 14. Instead, Division 2 sets out how the Part applies to action taken by a person. It does not apply on the same basis as the main provisions of this Bill,

which regulate the rights and obligations of national system employers and employees in relation to each other and the rights and obligations of organisations in relation to those employment relationships.

1347. On the face of the provisions of Part 3-1, the Part regulates the conduct of all employers, employees, principals, independent contractors, industrial associations and, in some cases, all persons. However, the Part only applies to the extent provided for in this Division.

Clause 337 – Application

1348. Clause 337 applies Part 3-1 only to the extent set out in clauses 338 and 339. Those provisions connect the conduct regulated by the Part to the constitutional powers that support the main provisions of this Bill (such as the corporations power and the Territories power) and to the Commonwealth's power to make laws with respect to Commonwealth places.

Clause 338 – Action to which the Part applies

1349. Subclause 338(1) provides that the Part applies to action:

- taken by national system employers against national system employees (paragraphs 338(1)(a) and 338(1)(e));
- taken by national system employees which affects the activities, functions, relationships or business of national system employers (paragraphs 338(1)(b) and 338(1)(f)),

whether the national system employer is classified, for the purposes of these provisions, as a constitutionally-covered entity, a trade and commerce employer or a Territory employer. (Constitutionally-covered entity, trade and commerce employer and Territory employer are defined in subclauses 338(2), (3) and (4) respectively and cover all types of national system employers.)

1350. Subclause 338(1) also applies the Part to:

- action taken by a constitutionally-covered entity against any person, even if the action is not taken against one of its employees (paragraph 338(1)(a));
- action taken by any person which affects the activities, functions, relationships or business of a constitutionally-covered entity, whether or not that person is one of its employees (paragraph 338(1)(b)); and
- action taken by any person to advise, incite, encourage or coerce a constitutionally-covered entity to take action, whether or not the person who advises etc., or the person against whom the action would be taken, is one of its employees (paragraph 338(1)(c)).

1351. Paragraph 338(2)(e) also applies the Part to all action by, affecting or advising etc. an organisation.

1352. Paragraph 338(1)(d) also applies the Part to any action taken in a Territory or in a Commonwealth place. (Some of this action would also be covered by other provisions of subclause 338(1).)

1353. Subclause 338(1) largely applies the Part to national system employers and employees and organisations. However, extension of the Part to actions by and affecting national system employers (even if not in their capacity as employers) and organisations, and to all action in Territories and Commonwealth places, means that the Part may in some circumstances also apply to actions by:

- State employers and State employees;
- principals and independent contractors;
- unregistered federal industrial associations;
- registered and unregistered State industrial associations; and
- other persons.

Illustrative examples

If an unincorporated principal took adverse action against one of its contractors (e.g., terminated the contractor's contract) because the contractor was a member of a State industrial association or had given evidence in a proceeding before a State industrial body, the action would be prohibited by Part 3-1 if the termination of the contract affected the business of a constitutional corporation (e.g., a constitutional corporation for which the contractor's work was ultimately done) or if it took place in a Territory or a Commonwealth place.

If a State industrial association, or any other person, coerced an unincorporated contractor to refuse to engage an unincorporated subcontractor because the subcontractor had refused to join the association, the coercion action would be prohibited by Part 3-1 if the refusal to engage the subcontractor affected the business of a constitutional corporation (e.g., a constitutional corporation for which the sub-contractor's work would ultimately have been done) or if it took place in a Territory or a Commonwealth place.

Clause 339 – Additional effect of this Part

1354. Clause 339 applies Part 3-1 by giving the Part effect as if a reference to employer, employee, industrial association, officer of an industrial association, workplace law, workplace instrument or industrial body were a reference to the federal manifestation of one of those entities.

1355. For example, the Part has effect as if, in any particular instance, employer were read as national system employer, industrial association were read as federal organisation or unregistered federal industrial association and workplace law were read as Commonwealth workplace law. The Commonwealth has legislative power to regulate all of the action in the Part if restricted in one of these ways to the relevant federal manifestation.

1356. Clause 339 also applies Part 3-1 by giving the Part effect as if a reference to a person were a reference to a constitutionally-covered entity.

1357. The effect of clause 339 overlaps significantly with the effect of clause 338. Clause 339 ensures that, at a minimum, the Part applies in circumstances where a direct federal connection exists.

Division 3 – Workplace rights

1358. Division 3 provides protections in relation to a person's workplace rights.

Clause 341 – Meaning of workplace right

1359. Clause 341 defines workplace right. There are three elements to the definition:

- entitlements, roles and responsibilities (paragraph 341(1)(a));
- processes and proceedings under workplace laws and instruments (paragraph 341(1)(b)); and
- complaints or inquiries (paragraph 341(1)(c)).

1360. Paragraph 341(1)(a) provides that a person has a workplace right if the person is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body. Workplace law, workplace instrument and industrial body are defined in clause 12 in a way that is intended to ensure that this Division protects entitlements, roles and responsibilities under Commonwealth, State and Territory laws, and instruments made under those laws, that regulate employment and similar relationships and industrial associations.

1361. Clause 341 is intended to cover a broad range of benefits, roles and responsibilities including:

- an employee's right under clause 186 to have an enterprise agreement apply to the employee only if it satisfies the better off overall test;
- an employee's right to be absent from work during parental leave;
- an employee's right to be absent from work because of voluntary emergency management activity; and
- an employee's entitlement to the benefit of an enterprise agreement or an order of FWA.

1362. The use of the phrase 'entitled to the benefit of' in paragraph 341(1)(a) is intended to capture both the fact that a workplace law or instrument applies to a person, as well as the individual entitlements under the workplace law or instrument.

1363. A benefit under a workplace law or workplace instrument is also intended to include benefits that are contingent or accruing (e.g., long service leave).

1364. The inclusion of 'role or responsibility' in paragraph 341(1)(a) is intended to provide protection for persons who perform a representative function in the workplace that is recognised under a workplace law, workplace instrument or order of an industrial body.

Illustrative examples

A workplace has an enterprise agreement in place that provides for the appointment of a harassment officer. An employee performing this role is protected against adverse action in relation to carrying out that role.

The *Workplace Health and Safety Act 1995* (Qld) makes provision for the appointment of workplace health and safety representatives in the workplace. An employee performing this role is protected against adverse action for fulfilling that role.

1365. The second element of the definition of workplace right is in paragraph 341(1)(b). It provides that a person has a workplace right if the person is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument.

1366. What is a process or proceedings under a workplace law or workplace instrument is defined in detail in subclause 341(2). It provides a number of examples of what is a process or proceedings under a workplace law or workplace instrument within the meaning of paragraph 341(1)(b). These are provided to assist the reader, particularly as the existing law has tended to deal with these sorts of protections via subject specific rules rather than the streamlined general approach taken in these provisions.

1367. The inclusion of paragraph 341(2)(k) makes it clear that the definition is not intended to be a comprehensive list of all of the matters that would constitute a process or proceedings under a workplace law or workplace instrument. In particular, the nature of the examples is not intended in any way to limit the meaning of what is a process or proceedings.

1368. Other examples of what amounts to participation in a process or proceedings under a workplace law or instrument which are not referred to in subclause 341(2) include:

- accepting a guarantee of annual earnings (see clause 330); or
- agreeing to substitute another day for a 'public holiday' (see clause 115).

1369. The third element of the definition of workplace right is in paragraph 341(1)(c). It provides that a person has a workplace right if the person is able to make a complaint or inquiry:

- to a person or body having the capacity under a workplace law to seek compliance with that law or a workplace instrument (e.g. Workplace Ombudsman); or
- if the person is an employee, in relation to their employment.

1370. Subparagraph 341(1)(c)(ii) specifically protects an employee who makes any inquiry or complaint in relation to his or her employment. Unlike existing paragraph 659(2)(e) of the WR Act, it is not a pre-requisite for the protection to apply that the employee has 'recourse to a

competent administrative authority'. It would include situations where an employee makes an inquiry or complaint to his or her employer.

Illustrative examples

Rachel is employed in a night fill position. The ladder that she uses at work to stock the shelves is missing a rung which makes it dangerous for her to climb. Rachel raises this issue with her employer. Under subparagraph 341(1)(c)(ii) Rachel has a workplace right because she has made a complaint/inquiry to her employer in relation to her safety concerns regarding the ladder.

Paul is employed as a shop assistant. To cope with the busy holiday trade, his employer has asked him to work overtime hours. However, Paul's take home pay does not appear to reflect the appropriate penalty rates under the award for the extra hours he has worked. His employer has ignored repeated requests to provide an explanation of how his pay has been calculated. Paul approaches his union and asks for their assistance to work out whether he is being paid the correct amount. Paul's union is a registered organisation and is entitled to represent his industrial interests. Under clause 539 of the Bill, the union is therefore able to bring an action in relation to the alleged breach. The employer finds out that he has sought the assistance of his union and dismisses him. Under subparagraph 341(1)(c)(i) Paul has a workplace right because he has made an inquiry to the union about his entitlements under the award and the union is a person or body that can seek compliance with a workplace instrument (the award) under a workplace law.

Freddy works part-time at a petrol station. He believes he is not being paid the correct award rate for a console operator. He writes a letter of complaint to the Australian Competition and Consumer Commission (ACCC) as he mistakenly believes that it is able to investigate wage underpayments. Freddy tells his manager about the letter. Following this, his hours for the next fortnight are cut in half. While the complaint would not be covered by paragraph 341(1)(c)(i) as the ACCC does not have capacity under a workplace law to seek compliance with the applicable award, Freddy would still have exercised a workplace right because he has made a complaint regarding his employment (subparagraph 341(1)(c)(ii)).

1371. The categories of workplace rights listed in paragraphs 341(1)(a) – (c) are not intended to be mutually exclusive. There is a degree of overlap between the categories so that a number of workplace rights may fall within more than one category.

Illustrative example

Clause 456 authorises an employee to vote in a protected action ballot provided the employee's name is on the roll of voters for the ballot. The workplace right of the employee in these circumstances could be characterised as:

- an entitlement to the benefit of a workplace law (i.e., an entitlement under clause 456); and
- the ability to participate in a process under a workplace law (i.e., a protected action ballot).

1372. Subclause 341(3) provides that a prospective employee is taken to have the workplace rights they would have if they were employed in the prospective employment by the prospective employer.

1373. A legislative note provides an example of how the subclause is intended to operate, namely that a prospective employer cannot make an offer of employment conditional on the person entering into an individual flexibility arrangement. In this case, the employer would be prohibited from refusing to employ the prospective employee because she or he would have an entitlement to the benefit of a modern award or enterprise agreement not subject to an individual flexibility agreement.

1374. There are two exceptions to the prospective employee protection in subclause 341(3). These are dealt with in subclauses 341(4) and (5).

1375. The first exception, in subclause 341(4), provides that an employer can make an offer of employment conditional on the person accepting a guarantee of annual earnings (see Division 3 of Part 2-9).

1376. The second exception relates to transfer of business. Subclause 341(5) provides that despite paragraph 341(1)(a), a prospective employer does not contravene subclause 340(1) (which is the protection for workplace rights) if that employer refuses to employ a prospective employee who would be entitled to the benefit of Part 2-8 (which deals with transfer of business).

1377. This subclause is intended to 'switch off' Part 2-8 as a workplace right for the period before a prospective employer employs a transferring employee. A prospective employer is entitled to not employ the employees of the old employer for a reason that includes their entitlement to the benefit of a workplace instrument. As such, employees are not entitled to the benefit of Part 2-8 while they are 'prospective employees' (that is, they are not entitled to have an instrument that covered them with the old employer transfer to a new employer).

1378. If a prospective employer decides to employ a prospective employee in a transfer of business situation, that employee is no longer a 'prospective employee' and the employee will have the benefit of Part 2-8 in addition to the protections in this Division. Further, the prospective employer could not refuse to employ a prospective employee in a transfer of business situation for a reason connected with the industrial activities protection in Division 4 (e.g., because the employee was a union member).

Clause 340 – Adverse action protection

1379. This clause prohibits a person taking adverse action (defined in clause 342) against another person in relation to that person's workplace rights. The protection has two basic limbs:

- protection from adverse action because a person has a workplace right (subparagraph 340(1)(a)(i)); and
- protection from adverse action because a person exercises (or does not exercise) a workplace right (subparagraphs 340(1)(a)(ii) to (iii)).

1380. For example, in the context of the workplace right that is contained in clause 114, being an entitlement to be absent from employment on a public holiday, the protections work in the following way:

- a person is protected from adverse action because she or he has the right to reasonably refuse to work on a public holiday (covered by subparagraph 340(1)(a)(i));

- a person is similarly protected from adverse action because she or he does in fact exercise the right to reasonably refuse to work on a public holiday (covered by subparagraph 340(1)(a)(ii)).

1381. Paragraph 340(1)(b) prohibits a person from taking adverse action against another person to prevent them exercising a workplace right.

1382. Subclause 340(2) prohibits a person from taking adverse action against another person (the second person) because a third person exercises a workplace right for the second person's benefit, or for the benefit of a class of persons to which the second person belongs.

Illustrative example

Clause 302 authorises an employee organisation to apply to FWA for an equal remuneration order. Subclause 340(2) protects an employee (to whom an equal remuneration order would apply once made) from adverse action during the period after which the application is made but before FWA makes the order. This is because the employee organisation has made the application for the equal remuneration order for the benefit of the relevant employee (or class of relevant employees). Once the order is made, the employee is protected from adverse action under subparagraph 340(1)(a)(i) because an equal remuneration order is an order made by an industrial body (see paragraph 341(1)(a)).

Clause 342 – Meaning of adverse action

1383. Adverse action is a key definition that intersects with a number of the substantive protections in the Part.

1384. On its face, the workplace rights protections apply to a very broad range of persons. However, the definition of adverse action in subclause 342(1) limits the action that will give rise to liability in relation to workplace rights to specified action taken by specified persons against other specified persons. What is adverse action in any particular case depends on the nature of the relationship between the relevant persons. The scope of the conduct captured by the concept of adverse action is based on conduct that is prohibited by the freedom of association, unlawful termination and other provisions in the WR Act that have been incorporated into the General Protections.

1385. Subclause 342(1) contains a table that sets out the circumstances in which a person takes adverse action against another person for the purposes of the protections in Division 3 (Workplace rights). It also applies in relation to the protections in Division 4 (Industrial activities) and clause 351 which deals with discrimination in employment, both of which are discussed in detail further below.

1386. The consolidation of the existing specific WR Act provisions into generally applicable prohibitions means that the new provisions protect persons against a broader range of adverse action.

Illustrative example

The unlawful termination ground in paragraph 659(2)(e) of the WR Act provides that an employer must not dismiss an employee because the employee has participated in proceedings against an employer involving alleged violation of laws. Under the new protections, an employee is protected from the full range of adverse action (e.g., dismissal, refusal to employ or injury to the employee in his or her employment) for this reason (see the protection in subparagraph 340(1)(a)(iii) discussed above in relation to the exercise of workplace rights).

1387. Subclause 342(2) defines adverse action to include threatening to take any action covered by the table in subclause 342(1) and organising such action.

1388. Subclause 342(3) provides that action is not adverse action if it is authorised by or under this Bill, any law of the Commonwealth or State or Territory law prescribed by the regulations.

Illustrative example

Paragraph 524(1)(c) authorises an employer to stand down an employee during a period in which the employee cannot usefully be employed because of a stoppage of work for any cause for which the employer cannot reasonably be held responsible. An employer who stands down an employee in these circumstances will not have taken adverse action against the employee because the stand down was authorised by law.

1389. Without limiting the exclusion to adverse action in subclause 342(3), subclause 342(4) provides that adverse action does not include an employer standing down an employee who is engaged in protected industrial action and employed under a contract of employment that provides for the employer to stand down the employee in the circumstances. An employer could also stand down an employee in accordance with the terms of an enterprise agreement without such action being adverse action, because the action would be authorised by this Bill and would therefore fall within the exception in subclause 342(3).

Clause 343 – Coercion

1390. Subclause 343(1) prohibits a person from organising or taking, or threatening to organise or take, any action against another person with intent to coerce that person or a third person to:

- exercise or not exercise, or propose to exercise or not exercise, a workplace right; or
- exercise or not exercise, a workplace right in a particular way.

1391. This clause is intended to prohibit any action (i.e., not limited to adverse action) taken with intent to coerce another person, or a third person, in relation to the exercise (or not) of their

workplace rights. The prohibition applies irrespective of whether the action taken to coerce the other person is effective or not.

1392. Subclause 343(1) is intended to cover section 400 of the WR Act which broadly dealt with coercion in agreement-making. However, the protection in subclause 343(1) is broader because it protects all workplace rights.

Illustrative examples

Paragraph 343(1)(b) operates to prohibit an employee organisation that is a bargaining representative for a proposed enterprise agreement from taking unprotected industrial action against an employer with intent to coerce the employer to make concessions in relation to the agreement. Engaging in action that is not protected may be a breach of clause 343 and may also expose the employee organisation to sanctions under Part 3-3 or under tort law.

Paragraph 343(1)(b) similarly operates to prohibit an employee organisation from taking industrial action against an employer with intent to coerce the employer to enter into a multi-enterprise agreement within the meaning of subclause 172(3). (Note that if a bargaining representative applied for FWA approval of the agreement in this example, FWA would not be able to approve the agreement because subparagraph 186(2)(b)(ii) provides that FWA must be satisfied in approving a multi-enterprise agreement that no person coerced, or threatened to coerce, an employer to make the agreement.)

In these examples, the workplace right that is being protected is the employer's participation in a process under a workplace law (see paragraph 341(1)(b)).

Paragraph 343(1)(a) operates to prohibit an employer from reducing an employee's overtime with intent to coerce the employee not to make a complaint to a relevant workplace health and safety authority in relation to occupational health and safety concerns in the workplace.

1393. Subclause 343(2) provides that the prohibition in subclause 343(1) does not apply to protected industrial action. This means that protected industrial action will continue to not amount to coercive conduct.

Clause 344 – Undue influence or pressure

1394. Clause 344 prohibits an employer from exerting undue influence or undue pressure on an employee in relation to a decision by the employee to:

- make or not make an arrangement under the NES;
- make or not make an agreement or arrangement under a term of a modern award or enterprise agreement permitted to be included in the award or agreement by subclause 55(2);
- agree to or terminate an individual flexibility arrangement;
- accept a guarantee of annual earnings; and

- agree, or not agree, to a deduction from amounts payable to the employee in relation to the performance of work.

1395. The prohibition applies in circumstances where an employer makes an agreement with an individual employee (not employees acting collectively) and where the employer should be expected to take care not to exert significant and inappropriate pressure on an employee to make the agreement.

1396. Under influence or pressure is a lower threshold than coercion. This is deliberate as it recognises there should be higher obligations on an employer when they are entering into arrangements with employees that effectively modify or alter their conditions under the safety net.

Illustrative examples

David is 18 years old and is employed by Sparkles Pty Ltd (Sparkles). The manager of Sparkles has approached David about the possibility of cashing out his annual leave entitlement saying that, because Sparkles is a small business, if David took leave the business would have to close temporarily to cover David's absence. In the circumstances, David feels obliged to agree to the manager's request. Depending on the exact way in which this issue was raised with David, the manager's request may amount to undue influence or pressure and would be prohibited by paragraph 344(a). Of course, if the manager made it clear to David that he was in no way obliged to cash out his leave and that the manager was merely exploring all possible business options, the manager's request is unlikely to amount to undue influence or pressure.

Sam is employed by Happy Café Pty Ltd (Happy Café) as a casual waiter. The manager of Happy Café would like Sam to work from 5am – 1pm each day so that the restaurant can open for the lunch and breakfast trade. The manager would like Sam to work these hours at his regular hourly rate of pay (i.e., no penalty rates) under an individual flexibility arrangement. The manager tells Sam that if he doesn't agree to the arrangement, he cannot guarantee Sam a minimum number of hours of work each week. The manager's threat of reduced hours convinces Sam that he should agree to the proposed arrangement. This would amount to undue influence or pressure and would be prohibited by subclause 344(a).

Clause 345 – Misrepresentation

1397. Clause 345 prohibits a person from knowingly or recklessly (i.e., not caring whether it is true or false) making a false or misleading representation about:

- the workplace rights of another person; or
- the exercise or the effect of the exercise of a workplace right by another person.

1398. Subclause 345(1) is intended to broadly cover existing section 401 of the WR Act which deals with false or misleading statements in relation to agreement-making. However, unlike section 401, the protection in subclause 345(1) does not have a causal element. It also extends to conduct beyond the making of an agreement to misrepresentations about all workplace rights. This means that liability does not depend on evidence that the statement 'caused' the person to whom the representation was made to act in a particular way.

Illustrative examples

Madison is a long-term casual employee of Benny J Enterprises Pty Ltd. Madison is pregnant with her first child and asks her manager about her parental leave entitlement. Madison's manager tells her that only full-time employees are entitled to parental leave knowing that this is not true. In doing so, the manager will contravene the prohibition in paragraph 345(1)(a).

Moon Enterprises Pty Ltd (Moon Enterprises) would like to enter into a new enterprise agreement with its employees. The manager of Moon Enterprises provides the employees with a document that contains false and misleading statements relating to the terms and effect of the proposed new agreement. In particular, the document contains false statements in relation to pay increases, casual loadings and penalty rates. The misrepresentation made by the manager is in relation to the effect of approving the enterprise agreement and is prohibited under paragraph 345(1)(b).

1399. Subclause 345(2) provides that the prohibition in subclause 345(1) does not apply if the person to whom the representation was made would not be expected to rely on it.

Illustrative example

Peter, Emma, Audrey and Annabelle attend a large end of year party hosted by their employer, Sunny Up Pty Ltd (Sunny Up). During the course of the festivities, the manager of Sunny Up is talking to a group of employees, including Peter, about the project the company is working on that has to be completed in a couple of weeks. Peter says that it's a tight timeframe and it might not be achievable. The manager laughs and jokes that everyone's sick leave entitlement will be suspended until the project is completed. The exception in subclause 345(2) applies in this case because the statement it was a joke delivered in a social context, meaning it would not be expected that Peter or the others would have relied on it as a true representation of what the employer intended to do.

Division 4 – Industrial activities

1400. Division 4 provides protections in relation to a person's freedom of association and participation or non-participation in industrial activities. The protections in the Division revolve around the right to engage or not engage in certain industrial activities – namely, being a member or officer of an industrial association or engaging in activities of industrial associations. The Division prevents adverse action, coercion and misrepresentations in connection with these industrial activities. It also prevents inducements to be, or not be, a member of an industrial association.

1401. All of the protections relate to industrial associations. Industrial association is defined in clause 12. The definition covers unions and employer associations (whether or not registered or recognised under a law), and also covers employees and/or independent contractors who come together informally in the workplace for a purpose which includes protecting and promoting their interests in matters concerning their employment.

Illustrative example

Andrea works at the Bouncy Bluebell Childcare Centre. The manager, Bernadette, has been asking child care workers to put away heavy equipment at the end of each day while also watching the children. This requires the staff to leave the children without supervision. Andrea is concerned that this breaches the relevant government regulations. She suggests to a number of her co-workers that they meet after work to talk about whether they should take a collective approach on this issue, including reporting the issue or contacting the union. If the other employees agree to the meeting, they will be an industrial association within the meaning of clause 12.

Clause 346 – Protection

Clause 347 – Meaning of engages in industrial activity

Clause 348 – Coercion

Clause 349 – Misrepresentation

Clause 350 – Inducements – membership action

1402. The industrial activity provisions protect:

- being or not being a member or officer of an industrial association;
- participation or non-participation in other lawful industrial activity;
- non-participation in unlawful industrial activity.

Membership and offices

1403. Division 2 provides comprehensive protection for the key element of freedom of association – freedom to join or not join an industrial association, and freedom to be or not be an officer of an industrial association.

1404. Paragraph 346(a) prohibits a person from taking adverse action (defined in detail in clause 342 and explained above) against another person because the other person is, or is not, or was or was not, an officer or member of an industrial association.

1405. In addition, paragraph 346(b) (read with paragraph 347(a)) prohibits a person from taking adverse action against another person because the other person becomes, or does not become, or remains or ceases to be, an officer or member of an industrial association.

1406. The formulation of the protections in paragraph 346(a) and paragraph 346(b) (read with paragraph 347(a)) is different to a number of the WR Act provisions it is broadly intended to cover.

1407. For example, section 402 of the WR Act prohibits an employer, when making an agreement, from discriminating between employees because some employees are union members while other employees are not. In contrast, paragraphs 346(a) and 346(b) prohibit discrimination by reason of union membership in the agreement-making context, but the prohibition also applies in circumstances unconnected with agreement-making.

1408. It is intended that the protections in paragraph 346(a) and 346(b) (read with paragraph 347(a)) also prohibit a person from taking adverse action against another person because of the person's membership or non-membership of a particular industrial association – i.e., they would operate to protect someone from adverse action because they are a member of union A rather than unions B or C.

1409. Clause 348 (read with paragraph 347(a)) prohibits a person from organising or taking, or threatening to organise or take, any action against another person with intent to coerce that person or a third person to become, or not become, or remain or cease to be, an officer or member of an industrial association. This would cover, for instance, an industrial association organising industrial action against an employer with intent to coerce the employer, or an employee of the employer, to become a member of the industrial association.

1410. Subclause 349(1) (read with paragraph 347(a)) prohibits a person from knowingly or recklessly (i.e., not caring whether it is true or false) making a false or misleading representation about another person's obligation to:

- become, or not become, or remain or cease to be, an officer or member of an industrial association;
- disclose whether she or he, or a third person, is or is not, an officer or member of an industrial association; or
- disclose whether she or he, or a third person, is or is not, an officer or member of an industrial association, or is becoming, or not becoming, or remaining or ceasing to be, an officer or member of an industrial association.

1411. Subclause 349(2) provides that the prohibition in subclause 349(1) does not apply if the person to whom the representation is made would not be expected to rely on it.

1412. Paragraph 349(1)(a) is intended, for example, to prohibit an industrial association from making a representation to a person, on which the person would be expected to rely, that the person must be a member of the industrial association to work at a particular workplace.

1413. Clause 350 prohibits an employer from inducing an employee to be or not be a member or officer of an industrial association. It similarly prevents a person who has entered into a contract for services from inducing the independent contractor to be or not be a member of an industrial association. Clause 350 is intended to broadly cover section 794 of the WR Act.

Participation and non-participation in lawful industrial activities

1414. Clauses 346, 348 and 349 likewise protect persons from adverse action, coercion and misrepresentation in relation to participation and non-participation in lawful industrial activities (the activities set out in paragraph 347(b)).

1415. Subparagraphs 347(b)(i) to (v) provide that a person engages in industrial activity if she or he does or does not:

- become involved in establishing an industrial association (subparagraph 347(b)(i));
- organise or promote a lawful activity for, or on behalf of, an industrial association (subparagraph 347(b)(ii));
- encourage or participate in a lawful activity organised or promoted by an industrial association (subparagraph 347(b)(iii));
- comply with a lawful request made by, or requirement of, an industrial association (subparagraph 347(b)(iv)); or
- represent or advance the views, claims or interests of an industrial association (subparagraph 347(b)(v)).

1416. Subparagraphs 347(b)(i) to (v) can broadly be described as 'participation protections' and cover a broad range of lawful participation activities including:

- carrying out duties or exercising rights as an officer of an industrial association; and
- participating in union discussions at the workplace where a union has exercised a right of entry for this purpose.

The protections operate in a wide range of situations. For example:

- an employee is protected from adverse action by their employer because they are involved in establishing an industrial association;
- an independent contractor is protected from action taken by an industrial association with intent to coerce the contractor to comply with a direction given by the industrial association; and
- a person is protected from a false or misleading representation about the obligation to pay a bargaining services fee on which the person could be expected to rely.

1417. Subparagraph 347(b)(v) (together with the expansion of the definition of industrial association to include informal associations) is intended to protect persons exercising a representative function in the workplace, even if the person is not a union member, officer or workplace delegate.

Illustrative example

A group of employees, informally formed to represent the views of employees on OHS issues in the workplace, approach their employer regarding their concerns about the lack of available secure parking for those employees requested to work overtime at night. The employees will be an 'industrial association' and acting in a representative capacity for the purpose of subparagraph 347(b)(v). They will be protected from adverse action because of their involvement in the association, from being coerced not to be involved in the association and from misrepresentations about their obligations in relation to being involved in the association.

1418. Subparagraph 347(b)(vi) provides that a person engages in industrial activity if she or he does or does not pay a fee (however described) to an industrial association. This clause is intended to cover payment (and non-payment) of bargaining and other fees.

1419. Subparagraph 347(b)(vii) provides that a person engages in industrial activity if she or he seeks or does not seek to be represented by an industrial association. This is intended to complement the freedom that a person has to become or not become an officer or member of an industrial association as the ability to be represented by an association is a key element of freedom of association (paragraph 347(a)).

Illustrative example

Kylie is employed by Daffy Duke Pty Ltd (Daffy Duke). Daffy Duke proposes, during negotiations for an enterprise agreement, to make a number of rostering changes at the workplace. A number of staff are unhappy about the proposal and the relevant union organises protected industrial action that includes a strike against Daffy Duke. Kylie is happy with the proposed rostering changes and declines to participate in the protected action ballot to authorise the taking of industrial action or participate in the protected industrial action. The union would be prohibited from taking adverse action against Kylie (e.g., refusing to provide her with union services) because she refused to participate in the protected action ballot and any subsequently approved protected industrial action.

Non-participation in unlawful industrial activities

1420. Clauses 346, 348 and 349 further protect persons from adverse action, coercion and misrepresentation in relation to not engaging in other industrial activities (i.e., the activities set out in paragraphs 347(c) to (g)).

1421. Paragraph 346(c) provides that a person is only protected from adverse action for not engaging in the activities in paragraphs 347(c) from (g). In addition, all of the activities in those paragraphs are framed solely in the positive (i.e., they relate only to taking, rather than not taking, the action). This ensures that a person is only protected from adverse action, coercion and misrepresentation in relation to non-participation. These protections are limited to non-participation as the activities are unlawful activities.

1422. Paragraphs 347(c) to (g) provide that a person engages in industrial activity if she or he:

- organises or promotes an unlawful activity for, or on behalf of, an industrial association (paragraph 347(c));
- encourages, or participates in, an unlawful activity organised or promoted by an industrial association (paragraph 347(d));
- complies with an unlawful request made by, or requirement of, an industrial association (paragraph 347(e));
- takes part in industrial action (paragraph 347(f)); or
- makes a payment that, because of Division 9 of Part 3-3 (which deals with payments in relation to periods of industrial action), the person must not pay or makes a payment to which an employee is not entitled because of Division 9 of Part 3-3 (paragraph 347(g)).

1423. The protections operate in a wide range of situations. For example:

- a member is protected from adverse action by an industrial association (e.g., imposition of a penalty) because the member refuses to engage in industrial action organised by the industrial association during a period in which an enterprise agreement is in operation;
- an employer is protected from action by an industrial association with intent to coerce the employer to make a payment to an employee in relation to a period of industrial action contrary to the strike pay provisions in Part 3-3 (Industrial action); and
- an employee is protected from a misrepresentation by an industrial association to the employee, on which the employee could be expected to rely, about whether the employee is obliged to comply with an unlawful request of the industrial association.

Division 5 – Other protections

Clause 351 – Discrimination

1424. Clause 351 protects an employee or prospective employee from workplace discrimination. It is intended to broadly cover paragraph 659(2)(f) of the WR Act, which makes it unlawful to dismiss an employee for discriminatory reasons. However, the protection in clause 351 has been expanded to prohibit any adverse action (as defined in subclause 342(1)) on discriminatory grounds.

1425. Subclause 351(1) prohibits an employer from taking adverse action against an employee or prospective employee of the employer because of the person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

Illustrative example

Sarita is employed by Dazzle Designers Pty Ltd. She has recently applied for a promotion. She tells her manager that she is pregnant and will be taking parental leave under the NES in five months time. Sarita is unsuccessful in her application. Although highly qualified for the job, Sarita's manager advises her that the reason she was not promoted is because she will only be able to do the job for a short period of time before going on parental leave. Denying Sarita the promotion because she is pregnant would be prohibited under subclause 351(1).

1426. Subclause 351(1) has been expanded to include a person's carer's responsibilities as a ground upon which adverse action is prohibited.

1427. Subclause 351(2) provides exceptions to the prohibition in subclause 351(1). Adverse action is not taken against an employee or prospective employee if the action is:

- authorised by or under a State or Territory anti-discrimination law (paragraph 351(2)(a));
- taken because of the inherent requirements of the particular position concerned (paragraph 351(2)(b)); or
- taken against certain persons in good faith to avoid injury to the religious susceptibilities of adherents of a particular religion or creed (paragraph 351(2)(c)).

1428. The exceptions in paragraphs 351(2)(b) and (c) broadly cover the existing exceptions in section 659 of the WR Act.

1429. The exception in paragraph 351(2)(a) ensures that action authorised by or under a State or Territory anti-discrimination law (defined in subclause 351(3)) is not adverse action under subclause 351(1). This would occur, for example, where the action is exempt from being discrimination because it was taken to protect the health and safety of people at a workplace (see the relevant exemption in section 108 of the *Anti-Discrimination Act 1991* (Qld)).

1430. The note under subclause 351(2) alerts readers that action authorised by or under a law of the Commonwealth is also not adverse action under subclause 351(1). The exception for action authorised by or under a law of the Commonwealth is separately provided for in subclause 342(3) because it operates across the whole of Part 3-1.

1431. Many similar protections against discriminatory conduct exist in other Commonwealth, State and Territory anti-discrimination legislation. Part 6-1, which deals with multiple applications, limits a person to a remedy under only one of these laws in relation to the same conduct.

Clause 352 – Temporary absence – illness or injury

1432. Clause 352 prohibits an employer from dismissing an employee because the employee is temporarily absent from work because of illness or injury of a kind prescribed by the regulations. It is intended to broadly cover paragraph 659(2)(a) of the WR Act. There is some

overlap between this protection and the workplace rights protection for entitlement to personal leave under the NES or a workplace instrument.

Clause 353 – Bargaining services fees

1433. Clause 353 prohibits an industrial association, or an officer or member of an industrial association, from demanding a bargaining services fee . It is intended to broadly cover section 801 of the WR Act.

1434. This subclause is a civil remedy provision under Part 4-1 (Civil remedies).

1435. Subclauses 353(2) and (3) define bargaining services fee and bargaining services respectively.

1436. Subclause 353(4) provides an exception to subclause 353(1) where a bargaining services fee is payable to an industrial association under a contract for the provision of bargaining services. This is designed to ensure that industrial associations can continue to offer bargaining services on a fee for service basis where an individual voluntarily enters into a contract.

Clause 354 – Coverage by particular instruments

1437. Clause 354 prohibits a person from discriminating against an employer on the basis that employees of the employer are or are not covered by provisions of the NES or are or are not covered or proposed to be covered by:

- a particular type of workplace instrument (including a particular kind of workplace instrument within a type of workplace instrument); or
- an enterprise agreement that does, or does not, cover an employee organisation, or a particular employee organisation.

1438. It is intended to be broadly equivalent to section 804 of the WR Act.

1439. The clause only applies to discrimination on the basis of the particular type of workplace instrument, rather than anything contained in that instrument.

1440. The reference to a particular type of workplace instrument (including a particular kind of workplace instrument within a type of workplace instrument) is intended to ensure that the clause deals with both:

- particular types of workplace instruments, such as modern awards and enterprise agreements; and
- subsets of those particular types of workplace instruments, such as single-enterprise agreements and multi-enterprise agreements.

1441. For example, subclause 354(1) prohibits:

- A head contractor refusing to engage a subcontractor because the subcontractor's employees are not covered by an enterprise agreement, but instead a modern award applies to determine their entitlements and obligations. In this example, the person is discriminating against an employer because a particular type of workplace instrument does not cover the employer's employees.

- A head contractor refusing to engage a subcontractor because the subcontractor's employees are covered by a multi-enterprise agreement rather than a single-enterprise agreement. In this example, the person is discriminating against the employer because a particular type of enterprise agreement covers the employer's employees.

1442. Subclause 354(2) makes clear that the provision does not apply to protected industrial action. This means that protected industrial action does not amount to discrimination.

Clause 355 – Coercion – allocation of duties etc. to a particular person

1443. Clause 355 is intended to prevent persons from being coerced to make certain employment or management related decisions. It prohibits a person from organising or taking, or threatening to organise or take, any action against another person with intent to coerce that person or a third person to:

- employ, or not employ, a particular person;

- engage, or not engage, a particular independent contractor;

- allocate, or not allocate, particular duties or responsibilities to a particular employee or independent contractor; or

- designate a particular employee or independent contractor as having, or not having, particular duties or responsibilities.

1444. For example, clause 355 prohibits an industrial association from organising industrial action against a head contractor with intent to coerce the head contractor to engage a specific employee as a site delegate or safety officer.

Clause 356 – Objectionable terms

1445. Clause 356 provides that a term of a workplace instrument, or an agreement or arrangement (whether written or unwritten), has no effect to the extent that it is an objectionable term. It is intended to broadly cover subsection 811(2) of the WR Act. Objectionable term is defined in clause 12 to mean one that requires or permits (or has the effect of requiring or permitting):

- a contravention of the provisions of the Part; or

- the payment of a bargaining services fee.

Division 6 – Sham arrangements

1446. Division 6 provides civil penalties for sham arrangements with respect to employment and independent contracting relationships.

Clause 357 – Misrepresenting employment as independent contracting arrangement

1447. Clause 357 prohibits an employer misrepresenting an employment or proposed employment relationship as an independent contracting relationship. Although the text of the clause has been simplified, it is intended to broadly cover the effect of sections 900 and 901 of the WR Act.

1448. Subclause 357(1) prohibits a person who employs (or proposes to employ) an individual from representing to the individual that the contract under which the individual is (or would be employed) is a contract for services under which the individual performs (or would perform) work as an independent contractor.

1449. The person contravenes subclause 357(1) unless they can prove the matters in subclause 357(2).

1450. Subclause 357(2) provides that a person will not breach subclause 357(1) if, when they made the representation that there was an independent contracting relationship, they did not know and were not reckless to the fact that the contract was a contract of employment rather than a contract for services. The burden of proof in relation to the defence rests with the person who made the representation. This is consistent with the WR Act provisions.

1451. This subclause is a civil remedy provision under Part 4-1 (Civil remedies).

Clause 358 – Dismissing to engage as an independent contractor

1452. Clause 358 prohibits an employer from dismissing (or threatening to dismiss) an employee who performs particular work for the employer, in order to engage the individual as an independent contractor to perform the same, or substantially the same work under a contract for services.

1453. Clause 358 is intended to broadly cover section 902 of the WR Act except that clause 358 does not include a 'sole or dominant purpose' reason formulation. Instead, the formulation in clause 360 applies, which provides that a person takes action for a particular reason if the reasons for the action include that reason.

1454. This clause is a civil remedy provision under Part 4-1 (Civil remedies).

Clause 359 – misrepresentation to engage as independent contractor

1455. Clause 359 prohibits a person from knowingly making a false statement to a current or former employee with the intention of persuading or influencing that worker to become an independent contractor to do the same, or substantially the same, work. It is intended to broadly cover section 903 of the WR Act.

1456. This clause is a civil remedy provision under Part 4-1 (Civil remedies).

Division 7 – Ancillary rules

Clause 360 – Multiple reasons for action

1457. Clause 360 deals with the extent to which a person's action must be motivated by a particular reason to establish a contravention of Part 3-1.

1458. Clause 360 provides that for the purposes of Part 3-1, a person takes action for a particular reason if the reasons for the action include that reason. The formulation of this clause embodies the language in existing section 792 which appears in Part 16 of the WR Act (Freedom of Association) and includes the related jurisprudence. This phrase has been interpreted to mean that the reason must be an operative or immediate reason for the action (see *Maritime Union of Australia v CSL Australia Pty Limited* [2002] FCA 513; 113 IR 326 at [54]–[55]). The 'sole or dominant' reason test which applied to some protections in the WR Act does not apply in Part 3-1.

Clause 361 – Reason for action to be presumed unless proved otherwise

1459. Clause 361 reverses the onus of proof applicable to civil proceedings for a contravention of Part 3-1. It is intended to broadly cover section 809 of the WR Act.

1460. Generally a civil action places the onus on the complainant to establish on the balance of probabilities that the action complained of was carried out for a particular reason or with a particular intent.

1461. However, subclause 361(1) provides that once a complainant has alleged that a person's actual or threatened action is motivated by a reason or intent that would contravene the relevant provision(s) of Part 3-1, that person has to establish, on the balance of probabilities, that the conduct was not carried out unlawfully. This has been a long-standing feature of the freedom of association and unlawful termination protections and recognises that, in the absence of such a clause, it would often be extremely difficult, if not impossible, for a complainant to establish that a person acted for an unlawful reason.

1462. Subclause 361(2) provides that the reverse onus will not apply to the granting of interim injunctions. This is consistent with section 809 of the WR Act, and is intended to address the problems that can arise from the interaction of the reverse onus with the 'balance of convenience' test that applies to interim injunctions.

Clause 362 – Advising, encouraging, inciting or coercing action

1463. This clause is intended to ensure that a person cannot avoid being subject to the prohibitions in the Part by getting another person to carry out the prohibited conduct.

1464. Subclause 362(1) prohibits a person from, for a particular reason:

- advising, encouraging or inciting another person; or

- taking any action with intent to coerce another person to take action,

in circumstances where the action if taken for the first person's reason would breach a provision of Part 3-1.

1465. The drafting of clause 362 makes it clear that it is the reason motivating the first person (and not the incited or coerced person) that is relevant for the purpose of the prohibition.

1466. Subclause 362(1) captures the conduct of a third party where, for example:

- an industrial association advises an employer to dismiss an employee because the employee is not a member of an industrial association; or

- an industrial association encourages a person to refuse to make use of the services of an independent contractor because the independent contractor (or a person employed by the independent contractor) is not a member of an industrial association.

1467. This clause does not limit the general ancillary liability provisions contained in clause 551.

Clause 363 – Actions of industrial associations

1468. Subclause 363(1) defines what are taken to be the actions of an industrial association for the purposes of Part 3-1. This recognises that there can be difficulty in identifying whether actions taken by persons associated with an industrial association (such as members and officers) are attributable to the association irrespective of whether or not the association is a legal person (e.g., an organisation). This clause identifies actions by individuals and groups which are taken to be actions of an industrial association and thus give rise to liability on the part of the industrial association.

1469. The clause provides a defence in subclause 363(2) which operates where all reasonable steps are taken by management, officers or authorised members to prevent action by a member or members.

1470. Clause 363 is intended to broadly cover subsection 779(2) of the WR Act. However, the provision has been broadened to include paragraph 363(1)(e) which deals with unincorporated industrial associations that do not have a committee of management. In such circumstances, action taken by a member or group of members of the industrial association is deemed to be action of the industrial association.

1471. There can also be difficulty in establishing whether a body corporate or unincorporated body (such as an industrial association) has the requisite state of mind to be liable for a contravention. Subclause 363(3) provides, in effect, that the association's state of mind is taken to be the state of mind of the member who took the relevant action or of a person in a group which took the action.

1472. Subclause 363(4) ensures that subclauses 363(1) to (3) have effect despite subclauses 793(1) and (2), which make similar provision to deal with the liabilities of bodies corporate more generally under this Bill.

Clause 364 – unincorporated industrial associations

1473. Subclause 364(1) provides that, for the purposes of Part 3-1, a reference to a person includes a reference to an unincorporated industrial association. Many of the provisions of Part 3-1 apply to persons. Those provisions clearly apply to incorporated industrial associations because they are legal persons. This provision deems unincorporated industrial associations to be persons so that the provisions can also apply to them.

1474. However, because an unincorporated industrial association is not a legal person, liability for a contravention of a provision of Part 3-1 cannot be imposed on the association itself. Subclause 364(2) provides that a contravention of Part 3-1 by an unincorporated industrial association is taken to have been committed by any member, officer or agent of the industrial association who took part in the relevant action and did so with the relevant state of mind.

Division 8 – Compliance

1475. This Division sets out the compliance framework for contraventions of Part 3-1. In most cases where there has been a dismissal, the dispute will be dealt with at first instance in a conference conducted by FWA. If the dispute remains unsettled after the conclusion of the conference, the dismissed employee can proceed to court. In all other cases, participation in an FWA conference is voluntary and a person can instead elect to proceed directly to court.

1476. Not all procedural matters relating to general protections contraventions are contained in Part 3-1. Relevant clauses are also located in:

- Part 5-1 of this Bill which deals with FWA; and
- Part 4-1 of this Bill which deals with applications to court for a contravention of a civil remedy provision.

1477. Part 6-1, which deals with multiple applications, sets out circumstances in which a person is prevented from obtaining more than one remedy in relation to the same conduct.

Subdivision A – Contraventions involving dismissal

Clause 365 – Application for FWA to deal with a dispute

1478. Clause 365 provides that a person who alleges that they have been dismissed in contravention of Part 3-1, may apply to FWA for a conference to attempt to settle the dispute. An industrial association entitled to represent the industrial interests of the dismissed employee may also make an application to FWA under clause 365.

Clause 366 – Time for application

1479. Subclause 366(1) provides that an application must be made within 60 days of a dismissal taking effect. However, FWA has discretion to extend the timeframe for making an application if it is satisfied that there are exceptional circumstances.

1480. Subclause 366(2) provides an exhaustive list of the factors FWA must take into account when determining if there are exceptional circumstances. These factors are based on the principles set down by the Industrial Relations Court of Australia in *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298 and are consistent with the approach taken to extension of time applications in the WR Act.

Clause 367 – Application fees

1481. Subclause 367(1) requires an application under clause 365 to be accompanied by the prescribed fee (if any).

1482. Subparagraphs 367(2)(a), (b) and (c) provide that the application fee, the method for indexing the fee and the circumstances in which all or part of the fee may be waived or refunded may be prescribed by regulation.

Clause 368 – Conferences

1483. Subclause 368(1) provides that if a person makes an application under clause 365 in relation to their dismissal, FWA must conduct a conference to deal with the dispute.

1484. A legislate note alerts the reader that clause 592 contains procedural rules relating to the conduct of conferences by FWA.

1485. A further legislative note alerts the reader to clause 595, which sets out FWA's powers when dealing with a dispute. The effect of this provision is that FWA cannot arbitrate the dispute (see subclauses 595(1) and (5)), but can deal with the dispute by mediation, conciliation, making a recommendation or expressing an opinion. The note also makes it clear that where FWA forms the view that the dispute is in fact more properly characterised as an unfair dismissal claim, FWA can recommend that the dismissed employee make an application under Part 3-2 (which deals with unfair dismissal).

1486. Subclause 368(2) provides that FWA must conduct the conference in private. The subclause is a limitation on FWA's discretion in subclause 592(3), which would otherwise allow the person conducting the conference to direct it be held in public.

Clause 369 – Certificate if matter not resolved

1487. Clause 369 requires FWA, where it is satisfied all reasonable attempts to settle the matter have been, or are likely to be unsuccessful, to issue a certificate to that effect.

Clause 370 – Advice on general protections court application

1488. If FWA considers, taking into account all of the materials before it, that a general protections court application would not have a reasonable prospect of success, subclause 370(1) requires FWA to advise the parties accordingly.

1489. Subclause 370(2) defines a general protections court application as an application to the Federal Court or the Federal Magistrates Court under Division 2 of Part 4-1 for orders in relation to a contravention of Part 3-1.

Clause 371 – General protections court applications

1490. Subclause 371(1) sets out the two circumstances in which a dismissed employee can make a general protections court application in relation to the dismissal. They are:

- if FWA has issued a certificate under clause 369 in relation to the dispute; or
- if the general protections court application includes an application for an interim injunction. This recognises that a conference may be a barrier to obtaining urgent relief in some cases – e.g., where the employment of a bargaining representative has been terminated for reasons related to this role.

1491. Subclause 371(2) provides that once FWA has issued a certificate under clause 369, a person has 14 days to make a general protections court application.

Subdivision B – Other Contraventions

Clause 372 – Application for FWA to deal with a dispute

Clause 373 – Application fees

Clause 374 – Conferences

Clause 375 – Advice on general protections court application

1492. Where a person alleges a contravention of Part 3-1 but is not entitled to make an application under clause 365, the person has the option of applying under clause 372 for FWA to deal with the dispute rather than proceeding immediately to a court action. Applications can be made under this clause if, for example, an employee was not dismissed, but suffered a reduction in wages because of the alleged contravention.

1493. The prescribed fee (if any) must accompany the application (subclause 373(1)).

1494. In cases where an application is made to FWA, the process is broadly the same as for applications under clause 365, except that a conference to deal with the dispute can only be convened by FWA if all parties to the dispute agree to participate (subclause 374(1)).

1495. Where all the parties to the dispute do not agree to participate in an FWA conference, the person alleging a contravention of Part 3-1 can still make an application to the Federal Court or the Federal Magistrates Court under Division 2 of Part 4-1 for orders in relation to the contravention.

1496. An example of where an FWA conference may not be appropriate and where the dispute would instead proceed directly to court is where an inspector is bringing the action and is seeking the imposition of a monetary penalty.

Subdivision C – Conference costs

Clause 376 – Costs orders against lawyers and paid agents

1497. Subclause 376(1) allows FWA to make costs orders against lawyers and paid agents who cause costs to be incurred by another party in relation to an application under clause 365 or clause 372, because they encouraged a person to make the application when it should have been reasonably apparent there were no reasonable prospects of success, or because an act or omission by them in connection with the conduct or continuation of the dispute was unreasonable.

1498. These provisions are designed to deter lawyers and paid agents from encouraging others to make speculative applications, or make applications they know have no reasonable prospects of success.

1499. Subclause 376(1) operates in addition to subclause 611(2). Subclause 611(2) provides FWA with a general power to make costs orders against a person in the following circumstances:

- where a person made an application, or responded to an application, vexatiously or without reasonable cause; or

- where a person made an application, or responded to an application, and it should have been reasonably apparent to the person that their application, or response to an application, had no reasonable prospects of success.

1500. Subclause 376(2) provides that, in order for FWA to make a costs order against a lawyer or paid agent, an application by the person seeking the costs needs to have been made under clause 376.

1501. Subclause 376(3) clarifies that these provisions are not intended to limit FWA's power to order costs under clause 611.

Clause 377 – Applications for costs orders

Clause 378 Contravening costs order

1502. Clause 377 sets a time limit on applications for costs in relation to an application under subdivisions A or B of 14 days after FWA has finished dealing with the dispute.

1503. Clause 378 provides that a person to whom a costs order applies must not contravene a term of the order.

1504. This clause is a civil remedy provision under Part 4-1 (Civil remedies).

Part 3-2 – Unfair Dismissal

Division 1 – Introduction

Clause 379 – Guide to this Part

1505. This clause provides a guide to this Part.

Clause 380 – Meaning of *employee* and *employer*

1506. In this Part, the terms employee and employer mean national system employee and national system employer respectively (as defined in clauses 13 and 14). The rights and obligations of employers and employees set out in this Part apply only to the employment relationships within the scope of the corporations and other constitutional powers that are engaged by clauses 13 and 14.

Clause 381 – Object of this Part

1507. This clause sets out the object of the unfair dismissal Part. A principal aim of the unfair dismissal framework is balancing the needs of businesses and employees, with particular accommodation of the needs of small businesses.

1508. The object is also to provide a quick, flexible and informal process for the resolution of unfair dismissal claims that addresses the needs of both employers and employees. Paragraph 381(1)(c) highlights that reinstatement should be the primary remedy for unfair dismissal.

1509. Subclause 381(2) provides that the unfair dismissal provisions are intended to operate in a way that provide a fair go all round to both employers and employees. A legislative note refers to the fact that the expression 'a fair go all round' was used by Sheldon J in *Loty and Holloway v Australian Workers' Union* [1971] AR (NSW) 95.

Division 2 – Protection from unfair dismissal

1510. This Division sets out when a person may be entitled to a remedy for unfair dismissal.

Clause 382 – When a person is protected from unfair dismissal

1511. This clause outlines the situations when a person may be entitled to an unfair dismissal remedy. It does this by providing a definition of when a person is protected from unfair dismissal – this expression is subsequently used in clause 390 to set out when FWA may order a remedy for unfair dismissal.

1512. Paragraph 382(a) provides that a person must have completed a minimum employment period with his or her employer. A requirement that an employee serve a minimum period before having access to an unfair dismissal remedy enables an employer to have a period of time to assess the capacity and conduct of a new employee without being subject to an unfair dismissal claim if they dismiss the employee during this period.

1513. Paragraph 382(b) provides that a person will be protected from unfair dismissal if they are covered by a modern award or if an enterprise agreement applies to their employment. If neither of these criteria applies, a person will only be able to bring an unfair dismissal claim if their remuneration is less than the high income threshold.

1514. The high income threshold is defined in clause 333 as an amount prescribed by regulations and will be $100,000 as indexed from 27 August 2007. A person has remuneration in excess of the high income threshold if their annual rate of earnings, plus any other amounts as prescribed under the regulations exceed the amount of the threshold. The person's earnings will be assessed in accordance with the definition in clause 332.

Clause 383 – Minimum employment period

1515. This clause sets out what is the minimum employment period. It is one year for employees of a small business and six months for all other employees. Whether an employee has served the minimum employment period is assessed either when the person is given notice of dismissal, or when the dismissal actually takes effect, whichever happens first. Clause 383 relies on the definition of small business employer in clause 23 when determining the length of the minimum employment period applying to employees in a particular business.

1516. Under subclause 23(1), an employer is a small business employer if the employer employs fewer than 15 employees. All employees employed by the employer will be counted, including all casual employees who have been employed on a regular and systematic basis and employees employed by associated entities (as defined in clause 12).

Clause 384 – Period of employment

1517. This clause outlines when an employee's service counts towards the minimum employment period.

1518. An employee's period of employment is defined as the period of continuous service the employee has completed with the employer. Service as a casual employee does not count towards the period of employment unless it was on a regular and systematic basis and the employee had a reasonable expectation of continuing engagement on a regular and systematic basis.

1519. What constitutes continuous service is defined in clause 22. According to that definition, the following periods are excluded periods and do not count towards the period of employment:

- any period of unauthorised absence;
- any period of unpaid leave or unpaid authorised absence other than community service leave, a period of stand down under Part 3-5 or a period of leave or absence of a kind prescribed in the regulations.

1520. Any excluded period does not break continuous service but does not count towards the length of the employee's continuous service.

1521. A period of employment with one employer can include periods of employment with another employer in certain circumstances due to the definition of service in clause 22. This occurs where the employee is a transferring employee in relation to a transfer of business or where the employee transfers between associated entities (as defined in clause 12).

1522. Under paragraph 384(2)(b) when a transfer of business occurs, a new employer can choose not to recognise service of the employee with the old employer for the purposes of the unfair dismissal provisions. However, they must inform the employee in writing before the new employment starts. This does not apply if the transfer of business was between associated entities.

1523. Consequently, where there is a transfer of employment between associated entities, service with the first employer will always count towards service with the second employer. This means that an employee can access unfair dismissal remedies without having to serve another minimum employment period when they are transferred between employers as part of a corporate restructure.

1524. Clause 22 is intended to be able to apply multiple times, so that an employee who had been a transferring employee in relation to a transfer of business or had been moved between associated entities more than once would be able to count service with each employer towards their minimum employment period.

Illustrative examples

Marty is dismissed from his job as an IT technician at UberTek Pty Ltd. His manager told him he was not happy about a recent incident where Marty was late for work and was therefore dismissing him. Marty does not think this is a valid reason for his dismissal, as he had phoned his manager to tell him he would be late because his car broke down.

Marty has only been employed by UberTek Pty Ltd for three months. However, he became an employee of UberTek due to a transfer of business where Marty was a transferring employee. Before the transfer of business, Marty was continuously employed with his old employer (not an associated entity of UberTek) for three years. Marty was not notified in writing before his employment started that his service with his old employer would not be recognised by UberTek.

Marty's period of continuous service with UberTek is therefore three years and three months, meaning he has completed the minimum employment period and is able to bring a claim for unfair dismissal.

Natalie runs a number of Melbourne bars through different corporate entities. She creates a new entity, Martini Pty Ltd, with a view to moving all the employees to this new entity to streamline her employment and payroll practices. As Martini Pty Ltd and the other companies are associated entities, all the employees will retain their continuity of service, and would not need to serve new minimum employment periods.

Division 3 – What is an unfair dismissal

1525. This Division sets out what will constitute an unfair dismissal, including when a person is taken to be dismissed and the factors FWA must take into account when determining whether a dismissal is harsh, unjust or unreasonable.

Clause 385 – What is an unfair dismissal

1526. This clause sets out when a person has been unfairly dismissed, being when FWA is satisfied that:

- the person has been dismissed;
- the dismissal was harsh, unjust or unreasonable;
- the dismissal was not consistent with the Small Business Fair Dismissal Code; and
- the dismissal was not a case of genuine redundancy.

1527. FWA has to be satisfied in relation to each paragraph in 385(a) to (d) for a person to have been unfairly dismissed. However, whether or not a dismissal is consistent with the Small Business Fair Dismissal Code is only relevant where the person was employed by a small business employer as the Code will only apply to small business employers. The note below this clause clarifies this by providing a cross reference to the definition of the expression consistent with the Small Business Fair Dismissal Code.

Clause 386 – Meaning of *dismissed*

1528. This clause sets out the circumstances in which a person is taken to be dismissed. A person is dismissed if the person's employment with his or her employer was terminated on the employer's initiative. This is intended to capture case law relating to the meaning of 'termination at the initiative of the employer' (see, e.g., *Mohazab v Dick Smith Electronics Pty Ltd (1995) 62 IR 200)*.

1529. Paragraph 386(1)(b) provides that a person has been dismissed if they resigned from their employment but were forced to do so because of conduct, or a course of conduct, engaged in by their employer. Conduct includes both an act and a failure to act (see the definition in clause 12).

1530. Paragraph 386(1)(b) is intended to reflect the common law concept of constructive dismissal, and allow for a finding that an employee was dismissed in the following situations:

- where the employee is effectively instructed to resign by the employer in the face of a threatened or impending dismissal; or
- where the employee quits their job in response to conduct by the employer which gives them no reasonable choice but to resign.

1531. Subclause 386(2) sets out circumstances in which a person is taken not to have been dismissed. These are where:

- the person was employed for a specified period of time, for a specified task, or for the duration of a specified season, and the employment has terminated at the end of the period, task or season; or

- the employment has terminated at the end of a training arrangement (as defined in clause 12) that applied to the person and the person's employment was for a specified period of time or limited to the duration of the training arrangement; or

- the person was demoted in employment but it did not involve a significant reduction in his or her remuneration or duties and she or he remains employed with the employer.

1532. Paragraph 386(2)(a) reflects the common law position that termination in these circumstances would not be a dismissal. The fact that an employment contract may allow for earlier termination would not alter the application of this provision as the employment has terminated at the end of the period, task or season. However, if a person engaged on this sort of contract is terminated prior to the end time specified in the contract, they may seek an unfair dismissal remedy if they satisfy the other requirements.

1533. In relation to employment for a specified task, paragraph 386(2)(a) only applies where it was specifically intended at the start of the person's employment that the person's employment would be terminated on the completion of a specified task. It is not designed to cover persons who were simply engaged in connection with a particular task at first instance (e.g., to work on a particular project) but whose employment was intended to be ongoing.

1534. Season has its ordinary meaning and covers a range of things, for example:

- the part of a year when a product is best or available;

- the part of a year characterised by particular conditions of weather or temperature; or

- the part of a year marked by certain conditions, festivities or other activities.

1535. The provision that a person is not dismissed when she or he is terminated at the end of a specified season is intended to apply in situations where employees are gradually reduced in number towards the end of a season. For instance, it will capture a situation where an employee is dismissed when the season is winding down and consequently the employer only requires half the number of employees they did at the start of the season.

1536. Subclause 386(3) is an anti-avoidance rule. It provides that where a substantial purpose of a person's engagement on a contract for a specified period of time, task or season is to avoid the employer's obligations under the unfair dismissal provisions, then paragraph 386(2)(a) does not apply.

1537. Paragraph 386(2)(b) provides that a person on a training arrangement and whose employment is for a specified time or is otherwise limited to the duration of the training arrangement has not been dismissed where their employment has terminated at the end of the

training arrangement. Training arrangement as defined covers both trainees and apprentices. This paragraph is intended to cover competency-based training arrangements that have a nominal end date which can be altered in line with the employee's competency but that still limit the person's employment to the duration of the training arrangement.

1538. Paragraph 386(2)(b) does not prevent trainees and apprentices from seeking a remedy if they are dismissed during the life of their traineeship or apprenticeship.

1539. Trainees and apprentices may also have remedies for a dismissal under State or Territory training laws. However, the provisions dealing with multiple applications in Part 6-1 would prevent a trainee or apprentice from accessing multiple remedies.

Clause 387 – Criteria for considering harshness etc.

1540. This clause is central to the unfair dismissal provisions as it sets out the factors FWA must take into account when considering whether a dismissal was harsh, unjust or unreasonable:

- whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and
- whether the person was notified of that reason; and
- whether the person was given any opportunity to respond to any reason related to the capacity or conduct of the person; and
- any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
- if the dismissal related to unsatisfactory performance by the person – whether the person had been warned about that unsatisfactory performance before the dismissal; and
- the degree to which the size of the employer's enterprise (as defined in clause 12) would be likely to impact on the procedures followed in effecting the dismissal; and
- the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- any other matters that FWA considers relevant.

1541. FWA must consider all of the above factors in totality. It is intended that FWA will weigh up all the factors in coming to a decision about whether a dismissal was harsh, unjust or unreasonable and no factor alone will necessarily be determinative.

1542. These factors are the same as those in subsection 652(3) of the WR Act, with the addition of paragraph 387(d). This factor will only be a relevant consideration when an employee asks to have a support person present in a discussion relating to dismissal and the employer unreasonably refuses. It does not impose a positive obligation on employers to offer

an employee the opportunity to have a support person present when they are considering dismissing them. It will be one factor FWA must consider when determining whether a dismissal was unfair, having regard to all of the circumstances, including the capacity of the employee to respond to the allegations put to him or her without such a support person being present..

Clause 388 – The Small Business Fair Dismissal Code

1543. Subclause 388(1) enables the Minister to declare a Small Business Fair Dismissal Code by legislative instrument. Subclause 388(2) provides that a person's dismissal is consistent with the Small Business Fair Dismissal Code if the person's employer was a small business employer at the relevant time and complied with the Small Business Fair Dismissal Code when dismissing the person. Small business employer is defined in clause 23.

1544. Under subclause 23(1), an employer is a small business employer if the employer employs fewer than 15 employees. All employees employed by the employer will be counted, including all casual employees who have been employed on a regular and systematic basis and employees employed by associated entities (as defined in clause 12).

1545. If a person's dismissal is consistent with the Small Business Fair Dismissal Code then the dismissal will be considered fair and the other factors relating to unfair dismissal do not need to be considered. This arises because clause 396 provides that whether a dismissal is consistent with the Code is an initial matter that FWA must consider before considering the merits of the application. If the employer has not complied with the Code, the claim will be treated the same way as any other unfair dismissal claim.

Clause 389 – Meaning of *genuine redundancy*

1546. This clause sets out what will and will not constitute a genuine redundancy. If a dismissal is a genuine redundancy it will not be an unfair dismissal.

1547. Paragraph 389(1)(a) provides that a person's dismissal will be a case of genuine redundancy if his or her job was no longer required to be performed by anyone because of changes in the operational requirements of the employer's enterprise. Enterprise is defined in clause 12 to mean a business, activity, project or undertaking.

1548. The following are possible examples of a change in the operational requirements of an enterprise:

- a machine is now available to do the job performed by the employee;
- the employer's business is experiencing a downturn and therefore the employer only needs three people to do a particular task or duty instead of five; or
- the employer is restructuring their business to improve efficiency and the tasks done by a particular employee are distributed between several other employees and therefore the person's job no longer exists.

1549. It is intended that a dismissal will be a case of genuine redundancy even if the changes in the employer's operational requirements relate only to a part of the employer's enterprise, as this will still constitute a change to the employer's enterprise.

1550. Paragraph 389(1)(b) provides that it will not be case of genuine redundancy if an employer does not comply with any relevant obligation in a modern award or enterprise agreement to consult about the redundancy. This does not impose an absolute obligation on an employer to consult about the redundancy but requires the employer to fulfil obligations under an award or agreement if the dismissal is to be considered a genuine redundancy.

1551. Subclause 389(2) provides that a dismissal is not a case of genuine redundancy if it would have been reasonable in all the circumstances for the person to be redeployed within the employer's enterprise, or within the enterprise of an associated entity of the employer (as defined in clause 12).

1552. There may be many reasons why it would not be reasonable for a person to be redeployed. For instance, the employer could be a small business employer where there is no opportunity for redeployment or there may be no positions available for which the employee has suitable qualifications or experience.

1553. Whether a dismissal is a genuine redundancy does not go to the process for selecting individual employees for redundancy. However, if the reason a person is selected for redundancy is one of the prohibited reasons covered by the general protections in Part 3-1 then the person will be able to bring an action under that Part in relation to the dismissal.

Illustrative example

Cath is one of four chefs at Kat's Bar and Bistro. She has been working at the restaurant for five years. Six months ago a new restaurant opened up across the road and business has been steadily declining. The manager, Kristy, has made the decision to cut the number of chefs from four to two as only two chefs are needed to manage the reduced workload. There are no redeployment opportunities for either of the chefs as Kat's bar and bistro only employs a small number of staff and has no associated entities. Before deciding to make employees redundant, Kristy checks the award that applies to the chefs and finds that there are no obligations to consult about the redundancy. Kristy dismisses Cath and one other chef and provides them with notice of termination under the NES and pays all amounts owing on termination (e.g., untaken annual leave).

Based on these facts, Cath's dismissal would be a case of genuine redundancy and she would not have been unfairly dismissed.

However, Kristy's reason for selecting Cath as one of the employees to be dismissed was that she had recently complained to her union that she was not being paid the correct allowances under the award.

While this would not change a finding that it was a genuine redundancy, it may contravene the general protections as it may involve Kristy taking adverse action (being the dismissal) against Cath because she exercised a workplace right to complain to the union about not receiving her entitlements.

Division 4 – Remedies for unfair dismissal

1554. This Division deals with the remedies that FWA may order for an unfair dismissal.

Clause 390 – When FWA may order remedy for unfair dismissal

1555. This clause sets out when FWA may order a remedy for unfair dismissal, namely when a person has been unfairly dismissed and they were protected from unfair dismissal. Consistent with reinstatement being the primary remedy, FWA may order compensation only if it is satisfied that reinstatement is inappropriate and that compensation is appropriate.

1556. Subclause 390(2) provides that FWA can order a remedy only if the person has made an application under clause 394. However, FWA will not be confined to ordering the remedy the applicant has specifically applied for. Clause 599 provides that FWA does not have to make an order in the terms applied for.

Clause 391 – Remedy – reinstatement

1557. This clause provides that an order for reinstatement must be to either reappoint the person to the position they had immediately before the dismissal or appoint them to another position that has terms and conditions no less favourable than the position they previously held..

1558. The clause also sets out other orders FWA may make if it orders reinstatement.

1559. Under subclause 391(2) FWA can make any other order it considers appropriate to maintain the person's continuity of employment and period of continuous service.

1560. Under subclause 391(3) FWA can make any other order it considers appropriate for an employer to pay an amount for the remuneration lost or likely to have been lost because of the dismissal. In making any such order, FWA must take into account any remuneration the person has earned or is likely to earn from employment or other work in the time between their dismissal and reinstatement.

- As these orders are only to compensate for lost remuneration, they cannot extend to include any component by way of compensation for shock, distress or humiliation caused by the manner of the person's dismissal.

Clause 392 – Remedy – Compensation

1561. This clause sets out rules in relation to when FWA decides to make an order for compensation in lieu of reinstatement.

1562. FWA must take into account all the circumstances of the case in determining the amount of compensation, including:

- the effect of the order on the viability of the employer's enterprise; and
- the length of the person's service with the employer; and

- the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed; and
- the efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal; and
- the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation; and
- the amount of any remuneration reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation; and
- any other matter that FWA considers relevant.

1563. Subclause 392(3) provides that FWA must reduce the amount of compensation it would otherwise order if it is satisfied that the person's misconduct contributed to the employer's decision to dismiss the person.

1564. Under subclause 392(4), any compensation ordered by FWA must not include a component by way of compensation for shock, distress or humiliation caused by the manner of the person's dismissal. This reflects the common law position that shock, distress or humiliation resulting from the dismissal is not compensable (*Addis v Gramophone Co Ltd* [1909] AC 488 and *Baltic Shipping Co v Dillon* (1993) 176 CLR 344).

1565. Subclause 392(5) provides that there is a cap on the compensation FWA can order to a person. The compensation cap is the lesser of:

- half the amount of the high income threshold, which is defined in clause 333; or
- the amount of remuneration received by the person, or that they were entitled to receive (whichever is higher) in the 26 weeks before the dismissal.

1566. The compensation cap will be the same for all employees, regardless of what employment instrument there are employed under.

1567. If an employee was on leave without pay or without full pay in the 26 weeks before the dismissal, their remuneration will be calculated in accordance with the regulations.

Clause 393 – Monetary orders may be in instalments

1568. This clause clarifies that FWA can allow an employer to pay an order for lost pay or an order for compensation in instalments.

Division 5 – Procedural matters

1569. This Division deals with the process side of an unfair dismissal application. It sets out rules relating to applications for a remedy, how FWA will deal with a matter and ancillary matters.

1570. This Division balances the need for a faster, less costly and less complex process of resolving unfair dismissal claims with the need to provide fairness for both employers and employees. In addition to the rules set out in these provisions, the rules of natural justice will apply.

Clause 394 – Application to FWA for unfair dismissal remedy

1571. This clause sets out when a person who has been dismissed may apply to FWA for a remedy where the dismissal was harsh, unjust or unreasonable.

1572. Subclause 394(2) provides that an application must be made within seven days of a dismissal taking effect. However, FWA has discretion to extend the timeframe for making an unfair dismissal application if it is satisfied that there are exceptional circumstances.

1573. This discretion must be exercised in accordance with subclause 394(3), which provides an exhaustive list of the factors FWA must take into account when determining if there are exceptional circumstances. These factors are based on the principles set down by the Industrial Relations Court of Australia in *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298.

1574. Paragraph 394(3)(b) provides an additional factor which is not one of the *Brodie-Hanns* factors. This factor is whether the person first became aware of the dismissal after it had taken effect. It is intended to address situations where the person fails to lodge an application within the seven day time limit because they were unaware they had been dismissed until some time after the dismissal occurred.

1575. Not all procedural matters relating to unfair dismissal are contained in Part 3-2.

1576. Clauses that are relevant to unfair dismissal applications are also located in Part 5-1 (Fair Work Australia), including:

- clause 585, which has the effect that unfair dismissal applications to FWA must be made in accordance with any procedural rules determined by FWA;
- clause 586, which allows FWA to correct or amend an application on any terms that FWA considers appropriate; and
- clause 587, which allows FWA to dismiss an application if it:
    - is not made in accordance with the requirements of the Bill;
    - is frivolous or vexatious; or
    - has no reasonable prospects of success.

1577. Part 6-1 (Multiple processes) sets out circumstances in which a person would be prevented from bringing an unfair dismissal claim because they have sought a remedy under another part of the Bill or another law.

Clause 395 – Application fees

1578. Subclause 395(1) requires unfair dismissal applicants to pay any prescribed fee at the time of making their application.

1579. Paragraphs 395(2)(a), (b) and (c) provide that the application fee, the method for indexing the fee and the circumstances in which all or part of the fee may be waived or refunded may be prescribed by regulation.

Clause 396 – Initial matters to be considered before merits

1580. Clause 396 requires FWA to decide certain matters before it considers whether a dismissal was harsh, unjust or unreasonable. These matters are whether:

- the application is made within the time limit required in 394(2);
- the person is protected from unfair dismissal;
- the dismissal is consistent with the Small Business Fair Dismissal Code (only where the employer is a small business employer as defined in clause 23); and
- the dismissal is a case of genuine redundancy.

1581. How FWA decides an initial matter will be subject to any relevant procedural requirements. For instance, the approach will depend on whether or not contested facts are involved.

1582. If there are contested facts in relation to an initial matter, clause 397 provides that FWA is required to inform itself either by holding a conference or by conducting a hearing prior to making a decision. Provisions relating to the way in which unfair dismissal conferences and hearings are to be held or conducted are contained in clauses 398 and 399 respectively.

1583. If there are no contested facts, FWA can inform itself in relation to the initial matter in any way it considers appropriate using the non-exhaustive list of powers available to it in clause 590. In these circumstances, FWA will have discretion whether or not it is necessary to hold a conference or conduct a hearing.

1584. FWA's power to make decisions regarding initial matters is exercisable by FWA Members and may not be delegated (see clauses 612 and 625).

1585. The following FWA powers may, however, be delegated by the President of FWA to a member of the staff of FWA:

- FWA's power to inform itself as it considers appropriate, other than FWA's power to hold a hearing (see paragraph 625(1)(b)); and

- FWA's power to hold a conference (see paragraph 625(1)(c)).

1586. If an application fails to meet one or more of the initial matters, FWA must dismiss the application.

1587. FWA decisions regarding initial matters may be appealed by the person who has been dismissed or the employer, subject to the appeals provisions in clauses 400 and 604.

1588. If FWA decides an initial matter in favour of the person who has been dismissed, the employer may elect to appeal the decision at this point or after the merits of the application have been decided. Flexibility in the timing of an appeal is possible because a decision regarding initial matters is an appealable decision and clauses 400 and 604 do not require that appeals be lodged within specified timeframes.

Clause 397 – Matters involving contested facts

1589. Clause 397 provides that, where a matter involves contested facts, FWA must either hold a conference or conduct a hearing in relation to the matter.

1590. However, FWA's ability to conduct a hearing is limited by clause 399.

Clause 398 – Conferences

1591. Subclause 398(1) sets out that this clause only applies where FWA holds a conference.

1592. Subclause 398(2) provides that where a conference is held it must be undertaken in private. The subclause acts as an unfair dismissal specific limitation on FWA's discretion in subclause 592(3), which would otherwise enable the person conducting the conference to direct it be held in public.

1593. Subclause 398(3) requires FWA to take into account any differences in the circumstances of the parties when considering and informing itself in relation to an application.

Illustrative example

Tara is an executive assistant who has been working for Wrenview Pty Ltd for two years. Following her dismissal, Tara applies to FWA alleging that the termination of her employment by Wrenview Pty Ltd was harsh, unjust or unreasonable.

The presence of contested facts relating to the dismissal between Tara and Wrenview Pty Ltd has resulted in FWA deciding to hold a conference between the parties. Tara is self-represented. Wrenview Pty Ltd is represented by Brett, its human resources manager. Brett has extensive human resources and workplace relations experience, including advocacy.

In these circumstances, FWA would be required to take Tara's inexperience into account in its consideration of Tara's application and the way in which it informed itself in relation to Tara's application. For instance, it may need to adopt a more inquisitorial role to ensure that Tara is able to present her side of the story.

In accordance with its obligations to comply with the rules of natural justice, FWA must give both parties a reasonable opportunity to put forward their side of the story and respond to what is put by the other party.

1594. Subclause 398(4) requires FWA to take into account the wishes of the parties when considering and informing itself in relation to an application in a conference situation. It relates to how FWA considers a matter in a procedural sense, for instance where it holds the conference or the method of conducting it. It does not mean that FWA should take into account the circumstances and wishes of the parties when making a substantive decision in relation to the matter.

1595. Clauses that are relevant to the holding of unfair dismissal conferences are also located in Part 5-1 (Fair Work Australia).

1596. Subclause 592(1) has the effect of empowering FWA to direct people to attend an unfair dismissal conference at a time and place specified by FWA.

1597. Subclause 592(2) has the effect that responsibility for conducting unfair dismissal conferences rests with an FWA Member, or a delegate of FWA.

- Subclause 609(2)(g) also enables the President of FWA to make procedural rules for the manner in which conferences are to be conducted in relation to applications made under Part 3-1, 3-2 or Part 6-4 (which deal with general protections, unfair dismissal and unlawful termination).

Clause 399 – Hearings

1598. Subclause 399(1) restricts FWA's discretion to hold a hearing under paragraph 590(2)(i).

1599. FWA is only permitted to hold a hearing in relation to a matter arising under Part 3-2 if it considers it is appropriate to do so, taking into account the views of the parties and whether a hearing would be the most effective and efficient way to deal with the matter.

1600. Clauses relevant to unfair dismissal hearings are also contained in Part 5-1 (Fair Work Australia).

1601. Clause 593 has the effect that unfair dismissal hearings must be held in public, except where evidence is of a confidential nature.

1602. Subclause 399(2) provides FWA with flexibility to hold a hearing in relation to all, or only part of, a matter arising under Part 3-2. For instance, FWA may decide that one element of an unfair dismissal claim is best dealt with in a formal hearing because it involves a complex legal issue but that the remaining elements would be better dealt with in a more informal conference.

1603. Subclause 399(3) provides FWA has the flexibility to decide to hold a hearing in relation to a matter arising under Part 3-2 before, during or after a conference.

Clause 400 – Appeal rights

1604. The primary provisions dealing with appeal of decisions are in the FWA provisions in Part 5-1 (Fair Work Australia). The effect of clause 400 is to make the process for permitting appeals for unfair dismissal decisions different from the general grounds in clause 604 in two respects. Firstly, the general provisions do not require public interest as a prerequisite for permitting appeals, whereas clause 400 provides that only appeals in the public interest can be permitted for unfair dismissal matters.

1605. Secondly, subclause 400(2) limits appeals based on an error of fact to only allow an appeal where that error is a significant error of fact. This subclause is intended to limit FWA's discretion to permit an appeal under 604(1).

1606. Clauses relevant to appeals from, and reviews of, unfair dismissal decisions are also contained in Part 5-1 (Fair Work Australia).

1607. Clause 605 has the effect of empowering the Minister to apply to FWA for a review of unfair dismissal decisions (other than those made by a Full Bench) if, in the Minister's opinion, the decisions are contrary to the public interest.

1608. Clause 606 has the effect of allowing FWA to stay the operation of the whole or part of a decision made in relation to a matter arising under Part 3-2 on any terms that FWA considers are appropriate.

1609. Clause 607 contains details of the processes for appealing or reviewing decisions, including those made in relation to a matter arising under Part 3-2.

Clause 401 – Costs orders against lawyers and paid agents

1610. Subclause 401(1) allows FWA to make costs orders against lawyers and paid agents in two sets of circumstances. The first is where they have caused costs to be incurred by the other party to the matter because they encouraged a person to commence or continue a matter when it should have been reasonably apparent there were no reasonable prospects of success. The second circumstance is where they have caused costs to be incurred by the other party because of an unreasonable act or omission in conducting or continuing the matter.

1611. These provisions are designed to deter lawyers and paid agents from encouraging others to bring speculative unfair dismissal claims, particularly claims they know have no reasonable prospects of success, or to unreasonably encourage a party to defend a claim or make a jurisdictional argument where there is no prospect of the argument succeeding.

1612. Subclause 401(1) operates in addition to sub-clause 611(2). Subclause 611(2) provides FWA with a general power to make costs orders against a person in the following circumstances:

- where a person made an application, or responded to an application, vexatiously or without reasonable cause; or
- where a person made an application, or responded to an application, and it should have been reasonably apparent to the person that their application, or response to an application, had no reasonable prospects of success.

1613. Subclause 401(2) provides that, in order for FWA to make a costs order against a lawyer or paid agent, an application by the person seeking the costs needs to have been made under clause 402.

1614. Subclause 401(3) clarifies that these provisions are not intended to limit FWA's power to order costs under clause 611.

1615. Not complying with a costs order would expose a person to a civil penalty, by virtue of clause 405 which provides that a person must not contravene a term of an order made this Part.

1616. Provisions relating to civil remedy provisions, including who may apply for an order and the orders that may be made by particular courts, are contained in Part 4-1 (Civil remedies).

Clause 402 – Applications for costs orders

1617. This clause provides that an application for costs, under either the general costs provisions in clause 611 or the unfair dismissal specific provisions in clause 401, must be made within 14 days after a matter is determined by FWA or is discontinued.

1618. Clauses relevant to the discontinuation of matters are contained in Part 5-1 (Fair Work Australia).

1619. Clause 588 allows a person who has applied to FWA to discontinue the application in accordance with any procedural rules, whether or not the matter has been settled.

Clause 403 – Schedule of costs

1620. Subclause 403(1) allows for the prescription of a schedule of costs. The term costs is intended to have its ordinary meaning, namely legal and professional costs, disbursements and expenses of witnesses (see *Cachia v Hanes* (1994) 179 CLR 403; *Re JJT; Ex parte Victoria Legal Aid* (1998) 195 CLR 184). The purpose of this subclause is to expand FWA's capacity to award legal and professional costs and disbursements to include expenses arising from the representation of a party by a person or organisation other than on a legal professional basis.

1621. Subclause 403(2) provides that, if a schedule of costs is prescribed, FWA is not restricted in its award of costs to the items of expenditure listed in the schedule. However, if an item of expenditure appears in the schedule, FWA cannot make an award of costs above the rate or amount specified.

Clause 404 – Security for costs

1622. Clause 404 allows FWA to make procedural rules for the furnishing of security of costs in respect of matters arising under Part 3-2.

Clause 405 – Compliance with orders made under this Part

1623. Clause 405 provides that, where an order made by FWA under Part 3-2 applies to a person, that person must not contravene a term of the order.

1624. This clause is a civil remedy provision under Part 4-1 (Civil remedies).

Part 3-3 – Industrial action

1625. Part 3-3 deals with industrial action and includes rules about:

- when industrial action for a proposed enterprise agreement is protected industrial action;
- a prohibition on organising or engaging in industrial action during the nominal life of an enterprise agreement and remedies where industrial action is taken;
- orders that can be made by FWA in relation to industrial action that is not protected industrial action and the other remedies that are available;
- a prohibition on pattern bargaining and remedies that are available if pattern bargaining is occurring;
- the grounds for FWA to suspend or terminate protected industrial action;
- declarations that can be made by the Minister to terminate protected industrial action;
- a process to allow employees to participate in a secret ballot to authorise the taking of protected industrial action; and
- restrictions on payments to employees during periods of industrial action.

Division 1 – Introduction

Clause 406 – Guide to this Part

1626. This clause provides a guide to this Part.

Clause 407 – Meanings of *employee* and *employer*

1627. In this Part, the terms employee and employer mean national system employee and national system employer respectively (as defined in clauses 13 and 14). The rights and obligations of employers and employees set out in this Part generally apply only to the employment relationships within the scope of the corporations and other constitutional powers that are engaged by clauses 13 and 14.

1628. Under clause 419, FWA may make orders to stop actual or pending industrial action by non-national system employees or non-national system employers, where that action is likely to have the effect of causing substantial loss or damage to the business of a constitutional corporation. In clause 12, references to employer and employee have their ordinary meanings in the definition of non-national system employer and non-national system employee. These terms are defined in clause 12.

Division 2 – Protected industrial action

Subdivision A – What is protected industrial action?

1629. It is intended that industrial action that is organised or taken in the context of legitimate collective bargaining and meets certain prerequisites is permissible and therefore protected action.

1630. The current WR Act regulates industrial action and allows for protected action to be taken during a bargaining period so long as certain requirements are met. Although the Bill no longer contains the concept of a bargaining period, protected industrial action is only available during bargaining for an enterprise agreement.

1631. The distinction between protected industrial action and industrial action that is not protected is important due to the consequences that flow from the classification of the action. For example, FWA may order that industrial action that is not protected stop, not occur or not be organised. Also, only persons who organise or engage in protected industrial action are subject to immunity from certain legal proceedings. Industrial action is only protected if it meets all of the requirements set out in this Division.

1632. This Division consolidates the provisions that determine when industrial action is protected. In so doing, the Bill has 'common requirements' for all types of industrial action and specific requirements that relate to industrial action depending on whether it is taken by an employer or employees. These requirements must be met for industrial action to be protected, rather than 'exclusions' for when action is not protected (which is the framework in the WR Act).

1633. The result of this has been the avoidance of duplication in the new provisions. For example, in the WR Act, the following factors operate both as grounds for suspending or terminating a bargaining period as well as exclusions for when action is not protected:

- not genuinely trying to reach an agreement (subsection 430(2) and section 444);
- failing to comply with industrial action orders issued by the AIRC (subsection 430(2) and section 443); and
- pattern bargaining (sections 431 and 439).

1634. Under the Bill, these factors are preconditions for protected industrial action and not grounds for suspending or terminating a bargaining period (or protected industrial action).

1635. This means that, for industrial action to be protected, a person must (among other things) be genuinely trying to reach an agreement, complying with any orders of FWA and not engaging in pattern bargaining. Failure to comply with these preconditions immediately exposes the person to the possibility of being subject to an FWA order to stop the industrial action.

1636. The Division also separately defines the types of protected industrial action as: employee claim action, employee response action and employer response action.

Clause 408 – Protected industrial action

1637. Protected industrial action is industrial action which is immune to legal remedies that otherwise would be available (subclause 415(1)). Industrial action that is not protected industrial action may be stopped or prevented by FWA orders and those orders may be enforced by injunction (clauses 418 to 421).

1638. Industrial action in relation to a proposed greenfields agreement or multi-enterprise agreement is never protected action.

1639. Clauses 408 to 410 set out the circumstances in which industrial action is protected. Clause 408 defines protected industrial action. Industrial action is protected industrial action for a proposed enterprise agreement if it falls within any of the following types of industrial action:

- employee claim action (defined in clause 409);
- employee response action (defined in clause 410); or
- employer response action (defined in clause 411).

Clause 409 – Employee claim action

1640. The first element of employee claim action is that it is organised or engaged in for the purpose of supporting or advancing claims in relation to a proposed enterprise agreement that are about, or are reasonably believed to be about, permitted matters (paragraph 409(1)(a)).

1641. An enterprise agreement may only contain terms that are either required under this Bill or that are about permitted matters. (The description of clause 172 discusses relevant case law and lists examples of the types of matters are that intended to be permitted matters for enterprise agreements). In most cases, it is clear that particular claims are about permitted matters.

1642. In limited cases it is not so clear. However, industrial action is protected if – at the time of the action – the person reasonably believes they are pursuing claims about permitted matters (paragraph 409(1)(a)). What constitutes a 'reasonable belief' depends on the circumstances of the case and the person concerned. For example, a tribunal would expect an official of an employee organisation with extensive experience in enterprise bargaining to have a greater appreciation of the limits of the permitted matters than a novice employee bargaining representative who has been appointed by his or her colleagues to represent them in bargaining with the employer.

1643. Another factor that is relevant to the question of reasonable belief is whether the employer attempted to advise its employees or its bargaining representatives that they were pursuing claims about non-permitted matters. If the employer did so and the industrial action proceeded nonetheless, then it is much more likely that it would not be found to be protected.

1644. In addition, the pursuit of claims about non-permitted matters during bargaining for a proposed enterprise agreement does not necessarily prevent a finding that a bargaining representative is genuinely trying to reach an agreement (which is also a pre-condition to the

taking of protected industrial action under subclause 413(3)) e.g., where those claims have subsequently been abandoned.

1645. The second element of employee claim action is that it is organised or engaged in against an employer (that will be covered by the enterprise agreement) by:

- a bargaining representative of an employee who will be covered by the agreement subparagraph 409(1)(b)(i); or
- an employee who is included in a group or groups of employees on a protected action ballot order issued by FWA under Division 8 of this Part (subparagraph 409(1)(b)(ii)).

1646. Subclause 409(7) has the effect that a reference to a bargaining representative of an employee in subparagraph 409(1)(b)(i) that is an employee organisation includes a reference to an officer of that organisation.

1647. The third element of employee claim action is that it meets the common requirements in Subdivision B and the additional requirements contained in this clause. The additional requirements contained in subclauses 409(2) to (6) are:

- industrial action must be authorised by a protected action ballot (Division 8 sets out the requirements for a protected action ballot) (subclause 409(2));
- industrial action cannot be in support of or to advance claims to include in an enterprise agreement any unlawful terms (as defined in clause 194) (subclause 409(3));
- industrial action cannot be taken in support of pattern bargaining claims (as defined in clause 412) (subclause 409(4));
- industrial action must not relate to a significant extent to a demarcation dispute or contravene an order of FWA that relates to a significant extent to a demarcation dispute (subclause 409(5));
- notice of intended industrial action must be given if an FWA-ordered suspension of the industrial action has ended and it is able to continue without a further protected action ballot (clause 430 sets out the notice requirements in these circumstances and clause 429 specifies when industrial action may continue without a further protected action ballot) (subclause 409(6)).

Clause 410 – Employee response action

1648. Employee response action for a proposed enterprise agreement has three elements.

1649. First, it is industrial action that is organised or engaged in by employees in response to industrial action (whether protected or not protected) taken by an employer (paragraph 410(1)(a)).

1650. Secondly, the action is organised or engaged in against an employer by an employee bargaining representative or an employee (who will be covered by the proposed enterprise agreement) (paragraph 410(1)(b)).

1651. Thirdly, the action meets the common requirements in Subdivision B and the additional requirement contained in subclause 410(2). This requirement is that industrial action must not relate to a significant extent to a demarcation dispute or contravene an order of FWA that relates to a significant extent to a demarcation dispute.

1652. Subclause 410(3) has the effect that a reference to a bargaining representative of an employee in subparagraph 410(1)(b)(i) that is an employee organisation includes a reference to an officer of that organisation.

Clause 411 – Employer response action

1653. Employer response action for a proposed enterprise agreement has four elements. First, it is industrial action that is organised or engaged in as a response to industrial action taken by an employee bargaining representative or an employee who will be covered by the proposed enterprise agreement (paragraph 411(a)). This means that industrial action by an employer is only protected if it is taken in response to industrial action taken by its employees. For example, a pre-emptive employer lockout of employees is never protected industrial action.

1654. Secondly, it is industrial action organised or engaged in by an employer against an employee or employees that will be covered by the enterprise agreement (paragraph 411(b)).

1655. Thirdly, the action must not affect the continuity of the employees' employment for purposes that are prescribed by the regulations (paragraph 411(d)).

1656. Fourthly, it must meet the common requirements in Subdivision B (paragraph 411(c)).

1657. In addition to the type of industrial action that may be taken by an employer, under clause 416 an employer may refuse to make payments to employees during a period that the employer engages in employer response action.

Clause 412 – Pattern bargaining

1658. Subclause 412(1) provides that pattern bargaining is a course of conduct by a bargaining representative for two or more proposed enterprise agreements. That course of conduct must involve the bargaining representative seeking the inclusion of common terms in two or more proposed enterprise agreements and that course of conduct must also extend beyond a single employer.

1659. The meaning of pattern bargaining contained in clause 412 is in substance the same as the meaning of pattern bargaining contained in the WR Act, but it has been simplified where possible.

1660. Subclause 412(2) makes clear that a bargaining representative does not engage in pattern bargaining if the bargaining representative is genuinely trying to reach an agreement with an employer.

1661. A list of factors relevant to whether a bargaining representative is genuinely trying to reach an agreement with a particular employer is set out in subclause 412(3). The list is not exhaustive and other matters may be relevant. The list includes the following:

- Whether the bargaining representative is demonstrating a preparedness to bargain for an enterprise agreement with the employer. This requires a preparedness to consider the individual circumstances of the employer (e.g., including in the proposed agreement work reforms or a nominal expiry date which takes into account the needs of that employer's enterprise). This example is not intended to limit the circumstances that may be considered and other matters may be relevant.

- Whether the bargaining representative is bargaining in a manner that is consistent with the terms of the agreement being determined as far as possible by agreement between the particular employer and its employees.

- Whether the bargaining representative is meeting the good faith bargaining requirements.

1662. Subclause 412(4) provides that a bargaining representative bears the burden of proving that they were genuinely trying to reach an agreement. A reverse onus of proof applies because the bargaining representative is in a better position to know and to provide evidence of reasons for engaging in particular conduct.

1663. Subclause 412(5) makes clear that clause 412 does not affect and is not affected by the meaning of the term genuinely trying to reach agreement or any variant of that term used elsewhere in the Bill. In the context of this provision, it is limited to the issue as to whether pattern bargaining is occurring.

Subdivision B – Common requirements for industrial action to be protected industrial action

Clause 413 – Common requirements that apply for industrial action to be protected industrial action

1664. Clause 413 contains the common requirements that an employee, employer or their bargaining representatives must meet in order for industrial action to be considered protected industrial action for a proposed enterprise agreement. These common requirements are additional to any other requirements that must be met under clauses 409, 410 or 411, and they are that:

- The industrial action cannot relate to a proposed greenfields agreement or multi-enterprise agreement (subclause 413(2)).

- Specified persons organising or engaging in industrial action must be genuinely trying to reach an agreement (subclause 413(3)). The question whether a person is genuinely trying to reach an agreement requires a subjective assessment of the actual intention of the person and the overall circumstances. It is not limited to an assessment of whether the person is complying with the good faith bargaining requirements.

- The notice requirements set out in clause 414 must be met (subclause 413(4)).

- Specified persons organising or engaging in industrial action must not have contravened any orders that apply to them relating to the industrial action, the proposed enterprise agreement or a matter that arose during bargaining for the proposed enterprise agreement (subclause 413(5)). Examples of orders are bargaining orders made by FWA in response to a failure to meet the good faith bargaining requirements.

- Industrial action must not contravene clause 417 (i.e., it must not be organised or engaged in before the nominal expiry date specified in an enterprise agreement).

1665. In addition, industrial action cannot occur when an order under Division 6 suspending or terminating protected industrial action is in operation or a Ministerial declaration terminating protected industrial action under subclause 431(1) is in operation (subclause 413(7)).

Clause 414 – Notice requirements for industrial action

1666. Industrial action is protected only if the requisite period of notice of the intended action is given before the action starts. Clause 414 sets out the notice requirements a person must meet before engaging in employee claim action, employee response action or employer response action.

1667. Before an employee engages in employee claim action for a proposed enterprise agreement, a bargaining representative of the employee must provide written notice of the intended industrial action to the employer (subclauses 414(1) to (2)). That notice must be given at least three working days prior to any industrial action unless FWA has specified a longer period (of up to seven working days) in a protected action ballot order.

1668. Working day is defined as a day that is not a Saturday, a Sunday or a public holiday (see clause 12). Three working days is intended to mean three clear (full) days which excludes both the day on which the notice is given and the day when the action is to occur.

1669. Notice of employee claim action (as required by subclause 414(1)) cannot be given until after the results of the protected action ballot for the action have been declared (subclause 414(3)).

1670. Before an employee engages in employee response action for a proposed enterprise agreement, a bargaining representative of an employee must provide written notice of the intended industrial action to the employer of the employee (subclause 414(4)).

1671. Before an employer engages in employer response action for a proposed enterprise agreement, the employer must give written notice of the intended industrial action to each bargaining representative of an employee and take all reasonable steps to notify its employees of the action. For example, depending on the circumstances, emails to individual employees or bulletins on noticeboards in the enterprise may constitute reasonable steps (subclause 414(5)).

1672. Subclause 414(6) details the information required to be included in the notice of intended employee claim action, employee response action or employer response action, as the

case may be. The notice must specify the nature of the industrial action to be taken and the day on which the intended industrial action will start. The content requirements contained in this subclause substantially replicate the requirements in subsection 441(6) of the WR Act.

Subdivision C – Significance of industrial action being protected industrial action

Clause 415 – Immunity provision

1673. This clause confirms the extent of the immunity that applies to protected industrial action. It is equivalent to section 447 of the WR Act. Where a person is engaged in protected industrial action, immunity from civil liability exists in respect of an action under any law (whether written or unwritten) in force in a State or Territory. This includes common law actions. The immunity does not apply to action involving personal injury, wilful or reckless destruction of, or damage to, property or unlawful taking, keeping or use of property (subclause 415(1)).

1674. The immunity provision does not prevent an action for defamation being brought in relation to anything that occurred during the industrial action (subclause 415(2)).

1675. Other safeguards attach to protected industrial action. For example, an employer is prohibited from taking adverse action (as defined by clause 342) against an employee (e.g., dismissing or threatening to dismiss the employee) because the employee exercises a workplace right (as defined by clause 341) (see Part 3.1 (General protections)).

Clause 416 – Employer response action

1676. An employer can refuse to make payments to its employees during a period the when the employer engages in employer response action.

1677. The legislative note informs the reader that an employer must not make a payment to an employee in relation to certain periods of industrial action taken by the employee (see Subdivision A of Division 9).

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

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

1678. A person is prohibited from organising or engaging in industrial action before the nominal expiry date of an enterprise agreement or workplace determination. Subclause 417(1) outlines the remedies available if industrial action is organised or engaged in before that time. This clause substantially replicates section 494 of the WR Act.

1679. This restriction applies whether or not the industrial action relates to a matter dealt with in the enterprise agreement or the workplace determination.

1680. Subclause 417(2) sets out the categories of persons who are subject to the prohibition. The prohibition applies to an employer, an employee or employee organisation, to whom the

enterprise agreement or workplace determination applies. It also applies to an officer of an employee organisation to which the agreement or determination applies, acting in their capacity as an officer of an employee organisation.

1681. This subclause is a civil remedy provision under Part 4-1 (Civil remedies).

1682. The court (on application only) may grant an injunction restraining industrial action and may impose a pecuniary penalty or make any other order the court considers necessary to stop the contravention or remedy its effects (subclause 417(3)).

1683. The legislative note at the end of subclause 417(5) alerts the reader to the fact that subclause 539(2) deals with applications for orders in relation to contraventions of civil remedy provisions.

1684. Subclause 417(5) makes it clear that, despite subclause 545(4) (which deals with orders that a court may make if a person has contravened a civil remedy provision), the court may only make an order in relation to a contravention of clause 417 on application by a specified person.

Division 4 – FWA orders stopping etc. industrial action

Clause 418 – FWA must order that industrial action by employees or employers stop etc.

1685. Subclause 418(1) requires FWA to make an order that industrial action stop, not occur or not be organised for a specified period if it appears to FWA that industrial action that is not protected industrial action is happening, threatened, impending or probable or is being organised.

1686. This provision largely replicates section 496 of the WR Act and sets out the circumstances in which FWA is to make orders in relation to industrial action by national system employees or employers that is not or would not be protected industrial action.

1687. The legislative note under subclause 418(1) alerts the reader to the interim orders that may be made by FWA under clause 420.

1688. An application for an order may be made by a person who is or who is likely to be affected (whether directly or indirectly) by the industrial action or an organisation of which the person is a member. FWA may also make the order on its own initiative (subclause 418(2)).

1689. In making an order to stop or prevent industrial action, FWA does not have to specify the particular industrial action (subclause 418(3)). This is intended to allow FWA to make effective orders that do not require the separate identification of each particular instance of industrial action.

1690. Subclause 418(4) allows FWA to specify in an order whether further protected industrial action may be engaged in after the end of a stop period without another protected action ballot. FWA may only make such an order if the protected action ballot authorised specific types of industrial action and at the time the order was made for the industrial action to stop, not all the industrial action specified in the protected action ballot had been taken. FWA may also make such an order if the industrial action that was specified in the protected action

ballot was intended to occur for a period beyond the period for which the industrial action was ordered to stop.

Clause 419 – FWA must order that industrial action by non-national system employees or non-national system employers stop etc.

1691. Subclause 419(1) requires FWA to make an order that industrial action stop, not occur or not be organised for a specified period if it appears to FWA that industrial action by a non-national system employee or non-national system employer is happening, threatened, impending or probable or is being organised and will or would be likely to have the effect of causing substantial loss or damage to the business of a constitutional corporation.

1692. The legislative note after the end of subclause 419(1) alerts the reader to the interim orders that may be made by FWA under clause 420.

1693. An application for an order may be made by a person who is or who is likely to be affected (whether directly or indirectly) by the industrial action or an organisation of which the person is a member. FWA may also make the order on its own initiative (subclause 419(2)).

1694. As with subclause 418(3), subclause 419(3) makes clear that FWA does not have to specify the particular industrial action when making the order.

Clause 420 – Interim orders etc.

1695. Subclause 420(1) requires FWA, as far as practicable, to determine an application for an order under clause 418 or clause 419 within two days after the application is made.

1696. If FWA is unable to determine the application within two days, subclause 420(2) requires FWA to make an interim order that the industrial action stop, not occur or not be organised, as the case may be, unless FWA is satisfied that it would be contrary to the public interest to do so (subclause 420(3)).

1697. The interim order operates until the substantive application has been determined (subclause 420(5)).

1698. Consistent with subclauses 418(3) and 419(3), subclause 420(4) makes clear that FWA does not have to specify the particular industrial action in the interim order.

Clause 421 – Contravening an order etc.

1699. Clause 421 expressly states that a person to whom an order or interim order applies under clause 418, 419 or 420 must not contravene that order. Subclause 421(2) makes clear that the requirement to comply with the order does not apply where the order relates to protected industrial action.

1700. This clause is a civil remedy provision under Part 4-1 (Civil remedies).

1701. This clause also specifies when the Federal Court or the Federal Magistrates Court may grant an injunction in relation to stop orders made under clauses 418, 419 and 420.

1702. Subclause 421(3) provides that the Federal Court or the Federal Magistrates Court may grant an injunction on application by a person who is affected by the contravention of the stop order or an inspector if the court is satisfied that the person to whom the order applies has contravened or proposes to contravene a term of the order. The court may grant an injunction on whatever terms it considers appropriate.

1703. The legislative note after the end of subclause 421(3) alerts the reader to the fact that clause 539 deals with applications for orders in relation to contraventions of civil remedy provisions. Clause 545 (which deals with orders that a court may make if a person has contravened a civil remedy provision) does not apply to a contravention of an order under this Division (subclause 421(4)).

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

Clause 422 – Injunction against industrial action if a bargaining representative is engaging in pattern bargaining

1704. Subclause 422(1) allows any person to make an application to the Federal Court or Federal Magistrates Court for an injunction to restrain a bargaining representative who is engaging in pattern bargaining.

1705. The court to which the application has been made may grant an injunction (on terms that it considers appropriate) if it is satisfied that employee claim action for a proposed enterprise agreement is being engaged in or is threatened, impending or probable and a bargaining representative of an employee is engaging in pattern bargaining (subclause 422(2)).

Division 6 – Suspension or termination of protected industrial action by FWA

1706. Division 6 sets out the grounds upon which FWA may suspend or terminate protected industrial action organised, or engaged in, in relation to a proposed enterprise agreement.

1707. Suspension or termination of protected industrial action brings to an end the right to take protected industrial action. Protected industrial action may be resumed after any period of suspension, but will be subject to any requirements for the giving of notice before any action may be taken. A termination of protected industrial action may lead to FWA making a workplace determination under Part 2-5.

1708. The Bill recognises that employees have a right to take protected industrial action during bargaining. These measures recognise that, while protected industrial action is legitimate during bargaining for an enterprise agreement, there may be cases where the impact of that action on the parties or on third parties is so severe that it is in the public interest, or even potentially the interests of those engaging in the action, that the industrial action cease — at least temporarily.

1709. It is not intended that these mechanisms be capable of being triggered where the industrial action is merely causing an inconvenience. Nor is it intended that these mechanisms be used generally to prevent legitimate protected industrial action in the course of bargaining.

1710. Under the Bill, FWA:

- may suspend or terminate protected industrial action if the action is causing (or threatening to cause) significant economic harm to the employer and/or employees (clause 423);
- must suspend or terminate protected industrial action if the action has threatened, is threatening or would threaten to endanger life, personal safety or the health of the population or cause significant damage to the economy (clause 424);
- must suspend protected industrial action to provide for a cooling-off period (clause 425); and
- must suspend protected industrial action if the action is adversely affecting the employer and its employees and is threatening to cause significant harm to a third party (clause 426).

Clause 423 – FWA may suspend or terminate protected industrial action – significant economic harm etc

1711. FWA has the discretion to order the suspension or termination of protected industrial action on the basis that it is causing significant economic harm to employers and/or employees (clause 423), when it is satisfied certain requirements have been met.

1712. Subclauses 423(2), (3), (5) and (6) set out the requirements that must be met before FWA may make an order suspending or terminating protected industrial action. If the protected industrial action is employee claim action, FWA must be satisfied that the action is causing or threatening to cause significant economic harm to any employer and any employees who will be covered by the agreement (subclause 423(2)).

1713. If the protected industrial action is employee response action or employer response action, FWA must be satisfied only that the action is causing or threatening to cause significant economic harm to any of the employees who will be covered by the agreement (subclause 423(3)). In other words, if any industrial action is being undertaken by the employer (whether protected or not), FWA is only required to consider the harm to the employees. This reflects the fact that an employer that has locked out its employees should not then be able to have the employees' protected industrial action terminated based on the significant harm being caused to it.

1714. If the protected industrial action is threatening to cause significant economic harm, FWA must be satisfied that the harm is imminent (subclause 423(5)).

1715. Subclause 423(4) sets out the factors that FWA is to take into account in deciding whether protected industrial action is causing or is threatening to cause significant economic harm. The list of factors is inclusive so FWA may consider additional factors. The factors set out in the subclause are:

- the source, nature and degree of harm suffered or likely to be suffered;

- the likelihood that the harm will continue to be caused or will be caused;
- the capacity of those persons to bear the harm;
- the views of those persons and the bargaining representatives for the enterprise agreement;
- whether the bargaining representatives for the enterprise agreement have met the good faith bargaining requirements and complied with any bargaining orders in relation to the enterprise agreement; and
- the objective of promoting and facilitating bargaining for the enterprise agreement.

1716. In addition, if FWA is considering terminating the protected industrial action, it must also consider:

- whether the bargaining representatives are genuinely unable to reach agreement on the terms to be included in the agreement; and
- whether there is no reasonable prospect of agreement being reached (paragraph 423(4)(f)).

1717. FWA must also be satisfied that the protected industrial action has been engaged in for a protracted period of time and the dispute will not be resolved in the reasonably foreseeable future (subclause 423(6)).

1718. Subclause 423(7) allows FWA to make the order on its own initiative or upon application by a bargaining representative for the proposed agreement, the Minister or a person prescribed by the regulations.

Clause 424 – FWA must suspend or terminate protected industrial action – endangering life etc.

1719. FWA must make an order suspending or terminating protected industrial action if it is satisfied that the protected industrial action has threatened, is threatening or would threaten to endanger the life, the personal safety, health or welfare of the population (or part of it) or to cause significant damage to the Australian economy (or an important part of it) (subclause 424(1)).

1720. FWA may make the order on its own initiative or upon application by a bargaining representative for the proposed agreement, the Minister or a person prescribed by the regulations (subclause 424(2)).

1721. FWA is required, as far as practicable, to determine any application on this ground within five days, or if FWA cannot do so within that time, to make an interim order suspending the protected industrial action (subclauses 424(3) and (4)).

1722. Subclause 424(6) makes clear that any interim order continues in force until the application is determined by FWA.

Clause 425 – FWA must suspend protected industrial action – cooling off

1723. This clause enables FWA to suspend the taking of protected industrial action to provide for a cooling-off period. Protected industrial action cannot be terminated on this ground.

1724. FWA is required to make an order suspending protected industrial action if it is satisfied that it would be appropriate to do so taking into account the following matters (subclause 425(1)):

- whether suspension would assist the bargaining representatives to resolve the matters at issue;
- the duration of the protected industrial action;
- the public interest and the objects of the Act; and
- any other relevant matters.

1725. FWA may only make an order suspending protected industrial action upon application by a bargaining representative for the proposed enterprise agreement or a person prescribed by the regulations (subclause 425(2)).

Clause 426 – FWA must suspend protected industrial action – significant harm to a third party

1726. FWA is required to suspend protected industrial action if action is being engaged in and it is satisfied that (subclause 426(1)):

- the industrial action is adversely affecting any employer or any employee who will be covered by the proposed enterprise agreement (subclause 426(2));
- the industrial action is threatening to cause significant harm to a person other than a bargaining representative for the agreement or an employee who will be covered by the agreement (subclause 426(3)); and
- it is appropriate to make the order, taking into account whether the suspension would be contrary to the public interest as well as any other relevant matters (subclause 426(5)).

1727. The factors that FWA may take into account when determining whether protected industrial action is threatening to cause significant harm to a third person are specified in subclause 426(4). They are:

- any potential damage to the ongoing viability of an enterprise carried on by the third party;
- any threatened disruption to the supply of goods or services to an enterprise carried on by the third party;

- any threatened reduction to the third party's capacity to fulfil a contractual obligation; or

- any threatened economic loss to the third party.

1728. FWA may make the order on application by an organisation, person or body directly affected by the industrial action, the Minister, or a person prescribed by the regulations (subclause 426(6)). The Bill provides employees with right to take protected industrial action in support of a proposed single enterprise agreement. The purpose of this clause is to provide FWA with a means to address significantly serious impacts that industrial action is having on the welfare of third parties. It allows for a respite from industrial action which is causing them significant harm. The harm to the third party would need to be significant, that is a more serious nature than merely suffering of a loss, inconvenience or delay. Therefore, it is anticipated that FWA would suspend industrial action on this basis only in very rare cases.

1729. Protected industrial action cannot be terminated on this ground.

Clause 427 – FWA must specify the period of suspension

1730. Subclause 427 applies if FWA is required or permitted to make an order suspending protected industrial action. Subclause 427(2) requires FWA to specify in any suspension order the period for which that industrial action is to be suspended.

1731. Subclause 427(3) permits FWA, in exceptional circumstances, to extend the required period of notice for protected industrial action (specified in paragraph 430(2)(b)) from three working days to up to seven working days following the end of a period of suspension.

Clause 428 – Extension of a period of suspension

1732. The Bill contains uniform provisions for when protected industrial action is suspended. This means that whatever the reason for which the action is suspended, there is also a right for the applicant to seek an extension of the suspension order. FWA also has discretion to extend the suspension period if the preconditions giving rise to the original suspension remain satisfied.

1733. Subclause 428(1) allows FWA to make an order extending the period of suspension of protected industrial action in certain circumstances upon application by a person who applied or could have applied for the original suspension order.

1734. FWA may also extend the period of suspension if:

- FWA has not previously extended the period of suspension; and

- FWA is satisfied that it would be appropriate to extend the period of suspension after considering the factors specified in the provision under which the order suspending the protected industrial action was made and any other factors that are relevant.

1735. Subclause 428(2) requires FWA to specify the period of extension in its order. This subclause also permits FWA, in exceptional circumstances, to extend the required period of

notice of protected industrial action (specified in paragraph 430(2)(b)) from three working days to up to seven working days following the end of a period of suspension.

Clause 429 – Employee claim action without a further protected action ballot after a period of suspension etc.

1736. If employee claim action has been suspended by FWA, it may be possible for employees to resume industrial action after the period of suspension without another protected action ballot if the industrial action was authorised by a ballot and one of the following circumstances applies:

- some or all of the industrial action authorised by the protected action ballot is yet to be taken (paragraph 429(1)(b)(i)); or
- the industrial action had not ended before the period of suspension (paragraph 429(1)(b)(ii)); or
- the industrial action would have continued beyond the period of suspension (paragraph 429(1)(b)(iii)).

1737. Subclause 429(3) states that when determining when the employee claim action may be engaged in, the period of suspension must be disregarded.

1738. Subclause 429(4) makes clear that this clause does not authorise employee claim action that is different in type or duration from the industrial action authorised by the protected action ballot.

Clause 430 – Notice of employee claim action engaged in after a period of suspension etc.

1739. Industrial action taken after a period of suspension will not be protected industrial action unless a bargaining representative of an employee gives 3 working days written notice of an intention to engage in employee claim action to the employer of the employee – or a longer period of notice if specified by FWA in the suspension order (clause 430). The notice must state the nature of the industrial action and the day on which it will commence (subclause 430(3)).

Division 7 – Ministerial declarations

Clause 431 – Ministerial declaration terminating industrial action

1740. This clause provides the Minister with discretion to make a declaration terminating protected industrial action for a proposed enterprise agreement if she or he is satisfied that industrial action is being engaged in or is threatened, impending or probable and:

- the industrial action is threatening or would threaten to endanger the life, the personal safety or health, or the welfare, of the population (or a part of it); or
- the industrial action is threatening or would threaten to cause significant damage to the Australian economy (or an important part of it).

1741. The declaration is required to be in writing (subclause 431(1)).

1742. The declaration comes into operation on the day it is made (subclause 431(2)).

1743. Subclause 431(3) provides assistance to readers as the declaration is not a legislative instrument within the meaning of the *Legislative Instruments Act 2003*.

Clause 432 – Informing people of declaration

1744. If the Minister makes a declaration terminating protected industrial action, the relevant parties must be informed of the declaration (clause 432). The Minister must:

- inform FWA of the making of the declaration (subclause 432(3));
- as soon as practicable, take all reasonable steps to ensure that the bargaining representatives are made aware of the declaration and the effect of Part 2-5 in relation to workplace determinations (subclause 432(4)).

1745. The declaration must be published in the *Gazette* (subclause 432(2)).

Clause 433 – Ministerial directions to remove or reduce threat

1746. As well as making a declaration, subclause 433(1) allows the Minister to give written directions requiring specified bargaining representatives or employees to take, or refrain from taking, specified actions.

1747. The Minister may only give directions that she or he is satisfied are reasonably directed to removing or reducing the threat referred to in paragraph 431(1)(b). The directions may, e.g., require employees to return to work or an employer to allow employees to return to work after a lockout.

1748. Subclause 433(3) provides assistance to readers, as a direction given by the Minister is not a legislative instrument within the meaning of the *Legislative Instruments Act 2003*.

Clause 434 – Contravening a Ministerial direction

1749. Clause 434 makes clear that if a direction under subclause 433(1) applies to a person, they must not contravene the direction.

1750. This clause is a civil remedy provision under Part 4-1 (Civil remedies).

Division 8 – Protected action ballots

1751. Industrial action is only lawful if it is protected industrial action under this Part. Industrial action by employees is not protected industrial action unless (among other things) it has been authorised in advance by a protected action ballot conducted under this Division (except where industrial action is taken in response to industrial action by the employer).

1752. There are essentially four stages involved in the protected action ballot process, including:

- an application by a bargaining representative to FWA for a protected action ballot order that will authorise a protected action ballot to be held;
- the making of the protected action ballot order by FWA;
- the conduct of the protected action ballot (including the declaration of the ballot results); and
- the determination of the effect of the protected action ballot.

1753. As a default, protected action ballots are conducted by the AEC unless FWA is satisfied that a ballot agent that is not the AEC (a non-AEC ballot agent) is capable of conducting the protected action ballot.

Subdivision A – Introduction

Clause 435 – Guide to this Division

1754. This clause provides a guide to this Division.

Clause 436 – Object of this Division

1755. Clause 436 states that the object of the Division is to provide bargaining representatives with access to a fair, simple and democratic secret ballot process in order to determine whether employees wish to take certain types of protected industrial action. The Division contains facilitative provisions designed to provide a means for assessing the level of support for protected industrial action. The process the Division establishes is not intended to delay or frustrate the taking of protected industrial action by employees.

Subdivision B – Protected action ballot orders

Clause 437 – Application to FWA for a protected action ballot order

1756. A bargaining representative may apply to FWA for an order (a protected action ballot order) requiring a protected action ballot to be conducted (clause 437). The purpose of such a ballot is to determine whether certain employees wish to engage in particular protected industrial action for a proposed enterprise agreement.

1757. An application may be made by a bargaining representative of an employee who will be covered by the proposed enterprise agreement or two or more such bargaining representatives acting jointly (subclause 437(1)). For example, an employee organisation that is a bargaining representative could apply with another employee organisation or another person that is also a bargaining representative for the proposed enterprise agreement.

1758. An application for a protected action ballot order cannot be brought in relation to a proposed greenfields agreement or a multi-enterprise agreement (subclause 437(2)).

1759. An application must specify (subclause 437(3)):

- the group or groups of employees (represented by the bargaining representative) who are to be balloted (paragraph 437(3)(a));
- the question or questions to be put to the employees, including the nature of the proposed industrial action (paragraph 437(3)(b)); and
- if a non-AEC ballot agent is proposed – the name of that ballot agent (subclause 437(4)) (the legislative note after subclause 437(4) explains that the ballot agent is taken to be the AEC unless FWA orders otherwise).

1760. An application is taken to include only the employees who will be covered by the proposed enterprise agreement and are represented by a bargaining representative who is an applicant for the protected action ballot order (subclause 437(5)).

1761. An application must be accompanied by any documents and other information prescribed by the regulations (subclause 437(6)).

Clause 438 – Restriction on when application may be made

1762. An application for a protected action ballot may be made from 30 days before the nominal expiry date of an existing enterprise agreement applying to the employees who will be covered by the proposed enterprise agreement (subclause 438(1)). If two or more enterprise agreements apply, then an application cannot be made earlier than 30 days before the latest of the nominal expiry dates of those agreements (subclause 438(1)).

1763. Even if a protected action ballot is conducted before the nominal expiry date of an existing agreement, it is unlawful to organise or take industrial action pursuant to the ballot before that date (see clause 417). Additionally, such action is not protected industrial action (subclause 413(6)).

1764. Subclause 438(2) is an avoidance of doubt provision which makes clear that the making of an application under this Division does not constitute organising industrial action.

Clause 439 – Joint applications

1765. FWA may prescribe procedural rules dealing with joint applicants for a protected action ballot order (e.g., about varying and revoking orders) (clause 439). This power is not intended to limit FWA's general power to make procedural rules.

Clause 440 – Notice of application

1766. An applicant for a protected action ballot order must give a copy of the application to the employer of the employees to be balloted and the proposed protected ballot agent within 24 hours of the application being made (clause 440).

Clause 441 – Application to be determined within 2 days after it is made

1767. FWA must, as far as practicable, determine an application for a protected action ballot order within two working days after the application is made (subclause 441(1)).

1768. However, an application must not be determined unless the applicant has notified the affected employer of the application (subclause 441(2)).

Clause 442 – Dealing with multiple applications together

1769. In some cases, it may be expedient for FWA to deal with related applications together, even in the absence of a joint application. FWA may deal with related applications at the same time if the applications relate to industrial action by employees of the same employer or employees at the same workplace (e.g., a construction site) (clause 442). However, FWA must be satisfied that dealing with the applications at the same time would not unreasonably delay the determination of any of the applications (paragraph 442(b)).

Clause 443 – When FWA must make a protected action ballot order

1770. FWA must make a protected action ballot order if an application has been made in accordance with clause 437 (which deals with content and related requirements) and the applicant is and has been genuinely trying to reach an agreement with the employer of the employees to be balloted (subclause 443(1)). The 'genuinely trying to reach an agreement' requirement only applies in relation to the particular employer to which the application for a protected action ballot relates.

1771. For joint applications, each applicant must be and must have been, genuinely trying to reach an agreement with the relevant employer. A finding by FWA that there is no majority support for collective bargaining is not of itself intended to be determinative of the question of whether the applicant is genuinely trying to reach an agreement with the employer.

1772. It could be the case that an applicant engaged in pattern bargaining (as defined in clause 412) in relation to the relevant employer would not be genuinely trying to reach an agreement, based on the indicia listed in subclause 412(3) (e.g., the applicant may not have been prepared to take into account the individual circumstances of the employer in bargaining for the agreement).

1773. FWA cannot make a protected action order if these prerequisites (including the genuinely trying to reach an agreement requirement) have not been met (subclause 443(2)), or if the applicant has failed to notify the affected employer of the application being made, as required by subclause 441(2)).

1774. A protected action ballot order must specify the matters listed in subclause 443(3), including: the name of each applicant for the order; the group or groups of employees who are to be balloted; the date by which voting in the protected action ballot closes; and the question or questions to be put to the employees who are to be balloted, including the nature of the proposed industrial action.

1775. If FWA decides on a non-AEC ballot agent, then that person and also the independent advisor (if any), must be named in the order (subclause 443(4)).

1776. FWA could also specify in a protected action ballot a longer period for notice of the intention to take industrial action required by clause 414. Under that clause, at least three working days' notice must be provided of any employee claim action for a proposed enterprise agreement. Subclause 443(5) allows FWA to extend that period to a period of up to seven working days if exceptional circumstances justify the extension.

Clause 444 – FWA may decide on ballot agent other than the Australian Electoral Commission and independent advisor

1777. An application for a protected action ballot order may nominate a non-AEC ballot agent (subclause 437(4)). FWA may decide that the nominated person is to be the ballot agent if satisfied the person is a fit and proper person to conduct the protected action ballot and providing any other requirements prescribed by the regulations are met (subclause 444(1)).

1778. The regulations may prescribe conditions a person must meet to be considered a fit and proper person and also any other factors that FWA must consider in determining whether a person is a fit and proper person for this purpose (subclause 444(2)).

1779. If FWA decides on a non-AEC ballot agent, then it must also consider whether it is appropriate to appoint an independent advisor for the ballot (subclause 444(3)). An independent advisor must be sufficiently independent of the applicant (or each applicant) for the protected action ballot order and must also meet any other requirements prescribed by the regulations (paragraph 444(3)(c)).

Clause 445 – Notice of protected action ballot order

1780. This clause requires FWA to give a copy of a protected action ballot order to each applicant for the order, the affected employer and the protected action ballot agent, as soon as practicable after making the order.

Clause 446 – Protected action ballot order may require 2 or more protected action ballots to be held at the same time

1781. Clause 446 deals with the situation where more than one ballot is proposed to be conducted in relation to employees of the same employer, or employees at the same workplace. To minimise disruption, FWA may order that the ballots be held at the same time in circumstances where one protected action ballot order has already been made and another is proposed to be made (subclause 446(2)). This is only possible if FWA is satisfied that requiring the ballots to be held at the same time will not unreasonably delay either ballot (paragraph 446(2)(b)).

Clause 447 – Variation of protected action ballot order

1782. FWA may vary a protected action ballot order upon application by the applicant for the order (subclauses 447(1), (2) and (4)).

1783. FWA may also change the closing date for a protected action ballot upon application by the protected action ballot agent (subclause 447(2)). (Under paragraph 443(3)(c), an order must specify the date by which voting in the protected action ballot closes.)

1784. In either case, an application to vary the protected action ballot order may be made at any time before the day by which voting in the protected action ballot closes or after that time if the ballot has not been held before that date (providing FWA consents to making the variation) (subclause 447(3)).

1785. A protected action ballot order is spent if a ballot has not been held within the period specified in the order, subject to variation under this provision.

Clause 448 – Revocation of protected action ballot order

1786. FWA must revoke a protected action ballot order upon application by an applicant for the order at any time before voting in the protected action ballot closes (clause 448).

Subdivision C – Conduct of protected action ballot

1787. Subdivision C establishes a framework for conducting protected action ballots, whether by the AEC or a non-AEC ballot agent. A protected action ballot must be conducted in accordance with the protected action ballot order, the timetable for the ballot, this Subdivision, any directions given by FWA and any procedures prescribed by the regulations (subclause 449(2)).

1788. Subdivision C sets out the requirements for protected action ballots conducted by the AEC, but allows FWA to determine whether it is appropriate for the same requirements to apply to non-AEC ballot agents.

1789. In a number of places, the Bill makes a distinction between the powers of the AEC to conduct protected action ballots as opposed to the powers of non-AEC ballot agents. For example, the AEC is able to direct employers and bargaining representatives to provide it with the information necessary to compile the roll of voters (subclause 452(3)) and the AEC is able to amend the roll of voters on its own initiative (subclauses 454(5)). In contrast, a non-AEC ballot agent may only exercise such powers if it has been directed to do so by FWA.

1790. This reflects the fact that the AEC is a Commonwealth body which is accountable to the Parliament for its activities and is subject to the legal frameworks that apply to Commonwealth agencies. Also, the AEC has the systems and procedures in place to enable it to effectively conduct protected action ballots with limited supervision by FWA.

1791. The AEC must meet requirements under this Subdivision about:

- developing a timetable for the conduct of the protected action ballot (paragraph 451(2)(a));
- determining the voting method, or methods, to be used for the ballot (paragraph 451(2)(b));

- compiling the roll of voters (clause 452); and
- varying the roll of voters (clause 454).

1792. FWA may also direct a non-AEC ballot agent to meet any of these requirements. Alternatively, FWA may give a non-AEC ballot agent directions about these matters, or any other matters in relation to the conduct of the ballot that FWA considers appropriate (see clause 450).

1793. Under this Subdivision, all ballot agents (whether the AEC or a non-AEC ballot agent) must also comply with requirements about ballot papers (clause 455), who may vote in a protected action ballot (clause 456), declaring results of a protected action ballot (clause 457) and reporting to FWA about the conduct of certain protected action ballots (clause 458).

Clause 449 – Protected action ballot to be conducted by Australian Electoral Commission or other specified ballot agent

1794. For a ballot to be a protected action ballot, it must be conducted by the AEC or a non-AEC ballot agent who is specified in the protected action ballot order (subclause 449(1)).

1795. A protected action ballot must be conducted in accordance with the protected action ballot order, the timetable for the ballot, this Subdivision, any directions given by FWA and any procedures prescribed by the regulations (subclause 449(2)).

Clause 450 – Directions for conduct of protected action ballot

1796. FWA may direct a non-AEC ballot agent, in writing, in relation to any of the matters listed in subclause 450(2) (e.g., relating to the development of a timetable; the voting method, or methods to be used; and the compilation of the roll of voters).

1797. This allows FWA to determine how much discretion a non-AEC ballot agent has in conducting a protected action ballot in relation to these matters.

1798. The legislative note after the end of subclause 450(2) explains that a non-AEC ballot agent must not contravene a term of a direction given by FWA in relation to a protected action ballot (see subclause 463(2)).

1799. A non-AEC ballot agent may not have the same powers as the AEC to assist it to compile the roll of voters (i.e., because subclause 452(3) may not apply). To assist with the compilation of the roll, FWA may direct the applicant for the protected action ballot order, or the affected employer, to provide certain information to enable the roll of voters to be compiled (i.e., by FWA or the non-AEC ballot agent) (subclause 450(4)).

Clause 451 – Timetable for protected action ballot

1800. Clause 451 requires the AEC – or a non-AEC ballot agent directed by FWA to comply with this clause – to develop a timetable and determine the voting method, or methods, to be used for the protected action ballot.

1801. This must be done in consultation with each applicant for the order and the employer of the employees who are to be balloted, as soon as practicable after the ballot agent receives a copy of a protected action ballot order (subclause 451(2)).

Clause 452 – Compilation of roll of voters

1802. Clause 452 requires the AEC – or a non-AEC ballot agent directed by FWA to comply with this clause – to compile a roll of voters for the protected action ballot (subclause 452(1)). A roll must be compiled as soon as practicable after the ballot agent receives a copy of a protected action ballot order (subclause 452(2)).

1803. To assist this process, the ballot agent may direct, in writing, the employer of the employees to be balloted, or the applicant (or each applicant) for the order to provide it with the information necessary to compile the roll of voters (subclause 452(3)).

Clause 453 – Who is eligible to be included on the roll of voters

1804. Clause 453 sets out eligibility rules for employees to be included on the roll of voters. An employee is only eligible to be included on the roll if:

- the employee will be covered by the proposed enterprise agreement to which the ballot relates (paragraph 453(a)); and
- on the day the protected action ballot order was made the employee was represented by a bargaining representative who was an applicant for the order (subparagraph 453(b)(i)).

1805. The employee must also be included in a group of employees specified in the protected action ballot order (subparagraph 453(b)(ii)).

Clause 454 – Variation of roll of voters

1806. Clause 454 establishes a procedure for the AEC—or a non-AEC ballot agent directed by FWA to comply with this clause—to vary a roll of voters after it has been compiled so that it only includes names of employees who are eligible to be included on the roll.

1807. A ballot agent must vary a roll for this purpose (i.e., by adding or removing a name from the roll), if requested to do so by an applicant for the protected action ballot order, an affected employee, or the employee's employer (subclauses 454(2) to (3)). The AEC may also – on its own initiative – vary a roll it has compiled to ensure that the roll only includes the names of eligible employees (e.g., to correct a technical error) (subclause 454(5)).

1808. A ballot agent must also remove a person's name from the roll of voters if the person is no longer employed by the relevant employer and the ballot agent is requested to do so by an applicant for the protected action ballot order, the employee or the employee's employer (subclause 454(4)). The AEC may also – on its own initiative – remove a person's name from a roll it has compiled if it becomes aware that the person is no longer employed by the relevant employer (subclause 454(5)).

1809. The ballot agent is only required to make a variation upon the request of a specified person if the request is made before the end of the working day before the day on which voting in the ballot starts (paragraphs 454(2)(c), (3)(c) and (4)(c)).

Clause 455 – Protected action ballot papers

1810. This clause requires the ballot paper for a protected action ballot to be in the form prescribed by the regulations (if any) and include the information prescribed by the regulations (if any).

Clause 456 – Who may vote in protected action ballot

1811. Voting in a protected action ballot is restricted to employees whose names are on the roll of voters for the ballot (clause 456).

Clause 457 – Results of protected action ballot

1812. Clause 457 deals with the declaration, notification and publication of the results of a protected action ballot.

1813. A protected action ballot agent is required to declare, in writing, the results of the ballot, as soon as practicable after voting has closed and inform the persons specified in paragraph 457(1)(b) of those results, including FWA (subclause 457(1)).

1814. FWA is required to publish the results of a protected action ballot (e.g., on its website, or by any other means FWA considers appropriate) as soon as practicable after being informed of the results by the protected action ballot agent (subclause 457(2)).

Clause 458 – Reports about conduct of protected action ballot

1815. Clause 458 establishes a framework for dealing with complaints and alleged irregularities in relation to the conduct of a protected action ballot. The reporting procedure is slightly different for ballots conducted by the AEC compared to those conducted by a non-AEC ballot agent.

1816. In relation to an AEC-run ballot, the AEC must provide FWA with a written report about the conduct of any ballot about which it has received a complaint, or if it becomes aware of any irregularities in relation to the conduct of the ballot (subclause 458(1)).

1817. A report may be required about any aspect of the conduct of the ballot, such as (but not limited to) the compilation of the roll of voters for the ballot (subclause 458(5)).

1818. Similar obligations apply to a non-AEC ballot agent or the independent advisor (if any) for the ballot (subclause 458(2)). Additionally, FWA may also direct (in writing) a report to be prepared about the conduct of a non-AEC ballot if it receives any complaints about the conduct of the ballot or becomes aware of any irregularities in relation to the conduct of the ballot (subclause 458(3)). The directions may apply to the non-AEC ballot agent who conducted the ballot, or the independent advisor for the ballot, or both.

1819. A report prepared by a non-AEC ballot agent or independent advisor must be prepared in accordance with the regulations and (if applicable) any directions of FWA (subclause 458(4)).

1820. Subclauses 458(5) and (6) define the terms conduct and irregularity for purposes of this clause. However, these requirements are not intended to limit what may be included in the report.

1821. This subclause is a civil remedy provision under Part 4-1 (Civil remedies).

1822. Subclause 458(3) is not a civil remedy provision, but contravention of a direction given by FWA is dealt with under subclause 463(2), which is a civil remedy provision.

Subdivision D – Effect of protected action ballot

1823. Subdivision D explains when the results of a protected action ballot authorise the taking of industrial action.

1824. This Division also confers limited immunity on persons who act in good faith on protected action ballot results, even if it is subsequently established that industrial action taken in reliance on those results was not in fact authorised by the protected action ballot.

Clause 459 – Circumstances in which industrial action is authorised by protected action ballot

1825. Industrial action is taken to be authorised by a protected action ballot if (subclause 459(1)):

- the action is the subject of the protected action ballot (i.e., the action relates to the questions that formed part of the ballot) (paragraph 459(1)(a));
- at least 50 per cent of the employees on the roll of voters for the protected action ballot voted in the ballot and more than 50 per cent of votes validly cast approved the action (paragraphs 459(1)(b) and (c)); and
- the action commences during the 30 day period starting on the date of the declaration of the results of the protected action ballot, or a longer period as extended by FWA under subclause 459(3) (paragraph 459(1)(d)).

1826. The legislative note following this provision clarifies the effect of having industrial action authorised under a protected action ballot.

1827. In some cases, there may be doubt as to whether the protected action ballot authorises certain industrial action. For example, it may not be clear whether a ballot that authorises rolling strikes of fixed duration (for example, 12 hours) also allows the strike periods to be run back-to-back (so that a series of six 12 hour strikes in effect equals a continuous 72 hour strike): see *City of Wanneroo v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union-Western Australian Branch* [2008] AIRC 147.

1828. Subclause 459(2) makes clear that only the first (in this case, 12 hour) strike in a series of rolling strikes run back-to-back would be authorised under a protected action ballot unless the ballot expressly contemplated otherwise.

1829. FWA may extend the 30 day period allowed to commence industrial action once by up to 30 days, upon application by the applicant for the protected action ballot order (subclause 459(3).

Clause 460 – Immunity for persons who act in good faith on protected action ballot results

1830. Industrial action must be (among other things) authorised by a protected action ballot for it to be protected industrial action. Persons engaging in protected industrial action are immune from certain legal action in relation to the action under clause 415.

1831. However, action that is thought at first to be authorised by a protected action ballot may turn out to be unauthorised (for example, if a protected action ballot order is overturned on appeal). This means that any industrial action taken pursuant to the ballot would not be protected industrial action.

1832. In such cases, clause 460 would confer limited immunity on an organisation or person who, acting in good faith, relies on declared ballot results to organise or engage in industrial action. Such persons would be immune from the kind of legal action specified in subclause 460(2), unless the action involved:

- personal injury; or
- intentional or reckless destruction of, or damage to, property; or
- the unlawful taking, keeping or use of property.

1833. The immunity would not cover action for defamation in relation to anything that occurred in the course of the industrial action (subclause 460(3)).

1834. This immunity is particularly relevant in relation to protected action ballot orders that are subject to appeal or review. Because such orders cannot be stayed (subclause 606(3)), a ballot could be conducted pursuant to an impugned order and action could subsequently be taken based on the ballot results, all before the resolution of the appeal or review. The immunity conferred by this provision would protect any employees who had taken action in good faith, in reliance on the ballot results, even if the action turned out not to be authorised by the ballot (e.g., because the ballot order was overturned).

Clause 461 – Validity of protected action ballot etc. not affected by technical breaches

1835. Clause 461 provides that the validity of a protected action ballot and any of the other related things listed in paragraphs 461(a) to (f) is not affected by a technical breach of the Division.

1836. The effect of this clause is to ensure technical breaches of the specified provisions of Division 8 will not go to jurisdiction (that is, not lead to invalidity). This is to protect the

integrity of the conduct of the protected action ballot and ballot results where a ballot has been conducted (or purportedly conducted) unless a person has contravened – other than in a technical way – a protected action ballot order or an order, direction or decision of FWA in relation to a ballot, etc. (see paragraphs 461(a) to (f)).

Subdivision E—Compliance

1837. Subdivision E deals with compliance issues under the Division – in particular with irregularities (and related matters) in connection with protected action ballots and also non-compliance with orders etc. of FWA.

Clause 462 – Interferences etc. with protected action ballot

1838. Subclause 462(1) prohibits certain conduct that could lead to irregularities in the conduct of a protected action ballot (e.g., hindering or obstructing the holding of a ballot, or offering inducements to person to persuade them not to vote, or to vote in a particular way).

1839. Subclause 462(3) makes it unlawful for a person performing functions or exercising powers as part of the ballot process to show another person, or permit another person to have access to, a ballot paper used in the ballot, except in the course of performing those functions or exercising those duties.

1840. Subclauses 462(1) and 462(3) are civil remedy provisions under Part 4-1 (Civil remedies).

Clause 463 – Contravening a protected action ballot order etc.

1841. It is unlawful for a person to contravene:

- a term of a protected action ballot order, or a term of an order made by FWA in relation to a protected action ballot order or a protected action ballot (subclause 463(1)); or
- a direction given by FWA, or a protected action ballot agent (under this Division), in relation to the protected action ballot order or a protected action ballot (subclause 463(2)).

1842. Contravention (other than by the AEC) is subject to a civil remedy (subclause 463(3)).

1843. Subclauses 463(1) and 463(2) are civil remedy provisions under Part 4-1 (Civil remedies).

Subdivision F – Liability for costs of protected action ballot

1844. Subdivision F deals with costs in relation to a protected action ballot, including costs on appeal etc.

Clause 464 – Costs of protected action ballot conducted by the Australian Electoral Commission

1845. If the protected action ballot was conducted by the AEC, the Commonwealth is liable for the costs incurred by the AEC, whether or not the ballot is completed (subclause 464(2)).

1846. However, the Commonwealth is not liable for any costs incurred by the AEC in relation to legal challenges to matters connected with the protected action ballot, except as otherwise provided for by the regulations prescribed for this purpose (subclause 464(3)).

Clause 465 – Costs of protected action ballot conducted by protected action ballot agent other than the Australian Electoral Commission

1847. If the protected action ballot was not conducted by the AEC, the applicant for a protected action ballot order is liable for the costs of conducting the protected action ballot (as defined in subclause 465(4)), whether or not the ballot is completed (subclause 465(2)). If the application for the protected action ballot order was made by joint applicants, each applicant is jointly and severally liable for those costs (subclause 465(3)).

1848. Subclause 465(4) defines the costs of conducting a protected action ballot, which excludes any costs incurred by the protected action ballot agent in relation to legal challenges to matters connected with the ballot (subclause 465(5)).

Clause 466 – Costs of legal challenges

1849. The regulations may prescribe liability for costs incurred in relation to legal challenges to matters connected with a protected action ballot. Any regulations made for this purpose may also make provision for a person who is liable for such costs to be indemnified by another person for some or all of those costs.

Subdivision G – Miscellaneous

1850. Subdivision G deals with a number of miscellaneous matters, including the disclosure of personal information acquired under this Division and record-keeping rules for protected action ballots.

Clause 467 – Information about employees on roll of voters not to be disclosed

1851. Subclause 467(1) prohibits the disclosure of information by a non-AEC ballot agent or independent advisor about an employee who is on a roll of voters for a protected action ballot, if the information will identify whether or not the employee is a member of an employee organisation.

1852. This subclause is a civil remedy provision under Part 4-1 (Civil remedies).

1853. Disclosure is permitted, however, if it is made in the course of performing functions or exercising powers for the purposes of the protected action ballot, the disclosure is required or authorised by or under a law, or the employee has consented, in writing, to the disclosure (subclause 467(2)).

1854. The legislative note after subclause 467(2) explains that personal information given to FWA, the AEC or a non-AEC ballot agent under this Division may be regulated under the *Privacy Act 1988*.

Clause 468 – Records

1855. This clause requires a ballot agent for a protected action ballot to keep specified records relating to the ballot (e.g., the roll of voters for the ballot and the ballot papers etc.) for one year after the day on which the protected action ballot closed.

1856. The ballot agent must also comply with any requirements prescribed by the regulations in relation to how the ballot material is to be kept (subclause 468(3)).

Clause 469 – Regulations

1857. This clause provides a regulation-making power that would enable regulations to make provision in relation to any of the specified matters (e.g., requirements relating to the appointment of a non-AEC ballot agent and the form and content of the ballot paper).

Division 9 – Payments relating to periods of industrial action

1858. Division 9 deals with payments for periods of industrial action as defined in clause 19 (strike pay). Different rules apply depending on whether or not the action that is taken is protected industrial action. Division 2 of this Part sets out when industrial action for a proposed enterprise agreement is protected industrial action.

1859. In general, payment for any period where an employee has failed or refused to attend for work, or attended but failed or refused to perform any work at all (i.e., strike) is prohibited for the total duration of the protected industrial action taken by an employee on a day. Special rules apply in relation to overtime bans and partial work bans.

1860. If the action taken by an employee on a day is not protected industrial action, payments must be withheld for at least four hours or the total duration of the industrial action on the day depending on the duration of the industrial action taken.

1861. The general prohibition on strike pay does not apply to partial work bans (other than overtime bans) that are protected industrial action. In relation to such bans, an employer may elect to accept the partial performance and pay an employee in full, issue a partial work notice and reduce an employee's payments accordingly or issue a notice stating that partial performance will not be accepted and withhold payments altogether for the industrial action period, subject to certain notice requirements. Where partial performance of work is accepted by the employer, an employee or his or her bargaining representative may apply to FWA to vary the proportion by which an employee's payments are reduced. However, FWA cannot review an employer's decision not to accept partial performance and to withhold all payments for the period of the partial work ban.

1862. Accepting or seeking strike pay is generally unlawful and is subject to a civil penalty.

Subdivision A – Protected industrial action

1863. Subdivision A deals with strike pay in relation to periods of protected industrial action.

Clause 470 – Payments not to be made relating to certain periods of industrial action

1864. An employer is prohibited from paying strike pay to an employee who engages in protected industrial action on a day, for the total duration of the action on that day (subclause 470(1)). Payments must be withheld in relation to the actual period when industrial action was taken (e.g., if taken on a public holiday, payment at the applicable penalty rate (if any) must be withheld).

1865. Separate rules deal with partial work bans, which generally involve an employee attending for work, but failing or refusing to perform some of their normal duties (e.g., a ban on the marking of homework) (subclause 470(2)).

1866. Subclause 470(3) defines a partial work ban as industrial action that falls short of a total stoppage of work (that is, because the employee either fails or refuses to attend for work, or the employee attends work but fails or refuses to perform any work at all whether for the whole of part of a day).

1867. The general prohibition on paying strike pay under subclause 470(1) does not apply in relation to a period of overtime, unless the employee refuses to work a period of overtime they are requested or required to work in contravention of a term of an applicable modern award, enterprise agreement or contract of employment (subclause 470(4)). This means that payments cannot be withheld under this clause in relation to an overtime period that the employee is entitled to refuse to work (e.g., under a relevant instrument or the NES) or where the employee was not rostered to work or otherwise requested to work. For example, a term of an enterprise agreement might allow an employee to decline a request to work overtime on the ground of family responsibilities. If an employee declines to work overtime and complies with that term, the prohibition on the payment of strike pay will not apply because the employee has not engaged in industrial action.

1868. Subclause 470(5) provides that, for an overtime ban, the duration of the action is taken not to extend beyond the period of overtime to which the ban relates (subclause 470(4)). Therefore, payments must only be withheld for a period when the employee would otherwise have been working overtime (subject to subclause 470(4)). So, for example, if the industrial action is an overtime ban of two hours on a day, the total duration of the action is two hours.

1869. This subclause is a civil remedy provision under Part 4-1 (Civil remedies).

Clause 471 – Payments relating to partial work bans

1870. This clause deals with payments relating to partial work bans (other than overtime bans) that are protected industrial action. Provided certain prerequisites are met, an employer may reduce an employee's payments by a specified proportion, or withhold payments altogether where the employer refuses to accept partial performance.

1871. Subclauses 471(1) to (3) allow an employer to reduce an employee's payments by a proportion specified in a written notice given to the employee, in relation to the period of industrial action (the industrial action period).

- Subclause 471(5) defines the industrial action period during which deductions may be made if a valid notice has been issued. Deductions may be made in respect of any day on which an employee implements a partial work ban, providing the employer's notice covers that period. However, a notice cannot take effect retrospectively, or earlier than the start of the next day after the day on which the notice was given, on which the employee performs work.

1872. The notice must state that, as a result of the ban, the employee's payments will be reduced by a proportion specified in the notice (paragraph 471(1)(c)). The employee's modern award, enterprise agreement or contract of employment (whichever applies) would then take effect accordingly (subclause 471(2)).

1873. In the absence of a valid notice, payment must be made in full. If an employer deducts pay without a valid notice, or does not make deductions in accordance with the notice, then the affected employee could bring proceedings for underpayment of wages under the applicable modern award, enterprise agreement or contract of employment.

1874. The proportion specified in the notice must be worked out in accordance with the regulations (subclause 471(3)) and may be varied by FWA in certain circumstances (clause 472).

1875. An employer may also refuse to accept partial performance of work and instead refuse to make any payment to the employee, by giving the employee notice of its refusal and non-payment in relation to the industrial action period (subclause 471(4)).

Illustrative example

Allison works at the Sandy Shores Private Clinic which operates seven days a week. On Friday 13 May 2011, Allison's bargaining representative provides her employer with three working days' notice of protected industrial action by employees it represents that will take the form of partial work bans over a two week period, commencing the following Thursday. The bans include refusing to admit new patients before noon on each day.

On the Monday, Allison's employer decides that the employees' payments will be reduced by 40 per cent on account of any partial work bans and gives the bargaining representative and affected employees written notice of the proposed reductions over the two week period. The reductions begin on the Thursday, the first day on which the bans are implemented.

Sandy Shores could have decided to issue notices under the provision at a later stage, including after the bans have started. In that case, it could not have made deductions from employees' pay until the start of the next day after the day notice was given on which the employee performed work.

1876. Subclause 471(6) allows the regulations to prescribe the form and content of a notice referred to under paragraphs 471(1)(c) or 471(4)(c).

1877. An employer is taken to have given notice to an employee under this provision if the employer has taken all reasonable steps to ensure that the employee and the employee's bargaining representative receives the notice (paragraph 471(7)(a)). The employer must also comply with any requirements relating to the giving of the notice prescribed in the regulations (paragraph 471(7)(b)).

1878. If an employer fails to provide valid notice of reduction or non-payment under this clause an employee remains entitled to payment in full (subclause 471(8)).

Clause 472 – Orders by FWA relating to certain partial work bans

1879. Clause 472 provides that an employee, or his or her bargaining representative, may apply to FWA to vary the effect of a notice that has been issued under paragraph 471(1)(c), stating that the employee's payments will be reduced (subclauses 472(1), (2) and (4)). Under this clause, e.g., FWA could decide to increase or decrease the amount employees are entitled to be paid during the partial work bans. No application may be made, however, in relation to a notice issued under subclause 471(4) to withhold the employees' pay altogether.

1880. In deciding whether to vary the effect of a notice issued under paragraph 471(1)(c), FWA must take into account the reasonableness of the proposed reduction, having regard to the nature and extent of the relevant partial work ban or bans to which the notice relates (paragraph 472(3)(a)). FWA must also take into account fairness between the parties, considering all the circumstances of the case (paragraph 472(3)(b)).

Illustrative example

Allison's bargaining representative applies to FWA to reduce the proportion of Sandy Shores' proposed deduction. After taking into account whether the 40 per cent deduction was reasonable having regard to the nature and extent of the partial work bans and fairness between the parties, FWA orders Sandy Shores to reduce the deduction to 15 per cent and to pay the difference to the employees.

Clause 473 – Accepting or seeking payments relating to periods of industrial action

1881. Clause 473 prohibits certain conduct having the effect of encouraging contravention of this Subdivision.

1882. An employee is prohibited from accepting strike pay from the employer (that is, a payment that would contravene clause 470), or asking the employer to make such a payment (subclause 473(1)). The intention is that an employee should not be subject to a pecuniary penalty if the employer paid them and they were unaware of the purpose of the payment.

1883. This clause does not cover accepting or seeking payments relating to partial work bans. It is intended that the employer should be able to elect to pay employees full salary during any period where partial work bans are in place. It is anticipated that many employers will prefer to take this option , especially where bans are not overly disruptive. Where the employer elects to issue a partial work notice, the relevant parties should be able to resolve any disputes relating to the employer's notice through recourse to FWA.

1884. However, the legislative note under subclause 473(1) clarifies that acts of coercion, or misrepresentations, relating to payments for industrial action may contravene clause 348 or 349. Clause 348 prohibits a person taking adverse action against another person for, among other matters, refusing to pay strike pay. Clause 349 prohibits misrepresentations about, among other matters, the payment of strike pay. Clause 348 covers the conduct currently covered by sections 508 and 509 of the WR Act.

1885. An employee organisation, or member of an employee organisation, is prohibited from asking an employer to provide strike pay if the employer would contravene clause 470 by making the payment (subclause 473(2)).

1886. The legislative note under subclause 473(2) clarifies that acts of coercion, or misrepresentations, relating to payments for industrial action may contravene clause 348 or 349.

1887. Subclauses 473(1) and (2) are civil remedy provisions under Part 4-1 (Civil remedies).

Subdivision B – Industrial action that is not protected industrial action

1888. Subdivision B deals with strike pay in relation to periods of industrial action that are not protected industrial action.

1889. Action that does not meet the requirements contained in Division 2 of Part 3-3, or that is taken during the life of an enterprise agreement (clause 417), cannot be protected industrial action.

1890. Division 2 of Part 3-3 sets out when industrial action (as defined in clause 19) for a proposed enterprise agreement is protected industrial action.

Clause 474 – Payments not to be made relating to certain periods of industrial action

1891. An employer is prohibited from providing strike pay to an employee who engages in industrial action that is not protected industrial action on a day:

- if industrial action is taken for at least 4 hours – the total duration of the industrial action on that day (paragraph 474(1)(a));
- otherwise – 4 hours of that day (four hour rule) (paragraph 474(1)(b)).

1892. This subclause is a civil remedy provision under Part 4-1 (Civil remedies).

1893. It does not matter whether the industrial action is a partial work ban. However, in relation to an overtime ban, it is intended that the duration of the action is taken not to extend beyond the period of overtime to which the ban relates.

1894. Payments must be withheld in relation to the actual period when industrial action was taken (e.g., if taken on a public holiday, payment at the applicable penalty rate (if any) must be withheld).

Illustrative example

Leila participates in industrial action that is not protected by implementing a ban on working overtime. Under her enterprise agreement, Leila would usually have been required to work six hours of rostered overtime in a week (i.e., two hours each day on Monday, Tuesday and Thursday).

In Leila's case, the industrial action taken on each of the relevant days is taken to last two hours (i.e., the period of overtime to which the ban relates).

However, under the four hour rule, Leila's employer must withhold four hours' pay in relation to each day that Leila would have worked overtime but for the bans. The effect of this is that Leila's employer is required to withhold two hours of overtime pay, and two hours of ordinary time pay.

1895. The four hour rule does not apply in relation to a period of overtime to which an overtime ban applies, unless the employee refuses to work a period of overtime they are requested or required to work, in contravention of a term of an applicable modern award, enterprise agreement or contract of employment. This means that payments cannot be withheld under the provision in relation to an overtime period that the employee was entitled to refuse to work under an applicable instrument. An equivalent rule applies in relation to protected action involving overtime bans (subclause 470(4)).

1896. The legislative note following subclause 474(2) clarifies that there may be other circumstances in which an employee can lawfully refuse to work overtime, including under the NES.

1897. Subclause 474(3) clarifies how the four hour rule applies in relation to shiftworkers whose industrial action occurs during a shift (or other period of work) that spans two days. In those circumstances, the shift is taken to be a day and the remaining parts of the days are taken not to be part of that day. This means that the four hour rule cannot apply twice in respect of the one shift. Subclause 474(4) provides that overtime is taken not to be a separate shift for purposes of subclause 474(3).

1898. A legislative note following subclause 474(3) provides an example of how the provision is intended to work.

Clause 475 – Accepting or seeking payments relating to periods of industrial action

1899. Clause 475 mirrors clause 473, but in relation to industrial action that is not protected. It prohibits certain conduct having the effect of encouraging contravention of this Subdivision.

1900. An employee is prohibited from accepting strike pay from the employer (i.e., a payment that would contravene clause 474), or asking the employer to make such a payment (subclause 475(1)).

1901. An employee organisation, or member of an employee organisation, is prohibited from asking an employer to provide strike pay if the employer would contravene clause 474 by making the payment (subclause 475(2)).

1902. Subclauses 475(1) and (2) are civil remedy provisions under Part 4-1 (Civil remedies)..

1903. Legislative notes under subclauses 475(1) and (2) clarify that an act of coercion, or misrepresentations, relating to payments under this clause may contravene clause 348 or 349.

Subdivision C – Miscellaneous

Clause 476 – Other responses to industrial action unaffected

1904. Clause 476 clarifies that this Division does not affect any right of the employer, under the Bill or otherwise (e.g., at common law), to do anything in response to employee industrial action that does not involve payments to the employee (e.g., standing down the employee).

Division 10 – Other matters

Clause 477 – Applications by bargaining representatives

1905. This clause provides that if a provision of this Part permits an application to be made by a bargaining representative and the proposed enterprise agreement will cover more than one employer, then the application may be made by one bargaining representative on behalf of the other representatives if they have agreed to the application being made on their behalf (paragraph 477(2)(b)).

1906. However, if there is a single interest employer authorisation in operation in relation to the proposed enterprise agreement, then the application may be made by the person (if any) specified in the authorisation as the person who may make applications under this Bill (paragraph 477(2)(a)).

Part 3-4 – Right of entry

Overview

1907. This Part confers rights on officials of organisations to enter premises and exercise certain powers while on those premises. Permit holders may enter premises for the purpose of investigating suspected contraventions of the Bill or fair work instruments or to hold discussions with members and potential members of the organisation while on the premises (see Division 2). The Part also sets out additional requirements officials of organisations must meet when exercising rights under State or Territory OHS laws (see Division 3).

1908. Division 4 of the Part prohibits certain conduct by permit holders and others with respect to right of entry and provides for civil remedies in the event of a contravention. Division 5 empowers FWA to deal with disputes between an occupier of premises and a permit holder about the provisions and allows FWA to take action against permit holders and organisations that have misused their entry rights.

1909. Machinery provisions necessary for the operation of this Part, such as the issuing of entry permits, are included in Division 6.

Division 1 – Introduction

1910. This Division sets out a range of introductory material relevant to the Part. It provides an overview of the way in which the Part works and its object. It also explains the meaning of relevant key terms.

Clause 478 – Guide to this Part

1911. This clause provides a guide to this Part.

Clause 479 – Meanings of *employee* and *employer*

1912. In this Part, the terms employer and employee have their ordinary meanings.

1913. Subdivision A of Division 2 is incidental to other parts of the Bill and could relate to national system employers and their employees, or to other employers and their employees, depending on the part of the Bill that creates the substantive right or obligation.

- For example, under Subdivision A permit holders will be able to exercise a right of entry to investigate a suspected breach of the NES in Part 2-2 involving a national system employer, or a suspected breach of the extended NES entitlements in Part 6-3 (which is supported by the external affairs power) involving a non-national system employer.

1914. Subdivision A is supported by the constitutional powers that support the substantive rights and obligations in other parts of the Bill and there is no need to limit references to employee and employer to those within the national system definitions.

1915. Under Subdivision B, permit holders will be able to exercise a right of entry to hold discussions with employees. Subdivision B is supported by the constitutional powers that support the regulation of organisations and is not limited to discussions with national system employees.

1916. Under Division 3, permit holders are required to meet certain requirements in exercising a right of entry under a State or Territory OHS law. Division 3 is supported by the constitutional powers that are engaged by subclause 494(2) and there is no need to limit references to employee and employer to those within the national system definitions.

Clause 480 – Object of this Part

1917. This clause sets out the object of the Part. The object is to establish a framework that allows officials of organisations to enter premises that balances:

- the right of organisations to represent their members, hold discussions with potential members, and investigate suspected contraventions of the Bill and fair work instruments;
- the right of employees to receive information from, and be represented by, officials of organisations in the workplace; and
- the right of occupiers of premises and employers to conduct their activities in the workplace without undue interference or interruption.

Division 2 – Entry rights under this Act

1918. Division 2 sets out when a permit holder may enter premises and the rights they may exercise while on those premises. Subdivision A allows a permit holder to enter premises for the purpose of investigating a suspected contravention of the Bill or a fair work instrument. Subdivision B allows a permit holder to enter premises for the purpose of holding discussions with members, and people eligible to be members of the permit holder's organisation. Subdivision C sets out the mandatory requirements a permit holder must meet when exercising rights under either Subdivision A or B.

1919. This Division gives officials of organisations a statutory right to enter premises and exercise powers provided they satisfy various conditions. It is not intended to codify all of the ways in which entry can occur or provide an exhaustive list of the powers exercisable on the premises. The Division does not affect the ability of an occupier of premises to invite any person onto that premises, e.g., to meet with the employer about a particular matter.

Subdivision A – Entry to investigate suspected contravention

1920. Subdivision A authorises a permit holder to enter premises to investigate a contravention of the Bill or a fair work instrument. A permit holder must reasonably suspect that the contravention has occurred or is occurring. This Subdivision also details the rights a permit holder may exercise while on premises.

Clause 481 – Entry to investigate suspected contravention

1921. This clause provides that a permit holder may enter premises and exercise a right conferred by clause 482 or 483 in order to investigate a suspected contravention of the Bill or a term of a fair work instrument (this term is defined in clause 12 to mean a modern award, enterprise agreement, workplace determination or an FWA order). However, subclause 481(1) provides that these rights may only be exercised if the following entry conditions are met:

- the suspected contravention relates to or affects a member of the permit holder's organisation;
- the organisation is entitled to represent the industrial interests of that member; and
- that member performs work on the premises.

1922. Subclause 481(2) requires the fair work instrument being investigated under this clause to apply or have applied to the member. This subclause allows a permit holder to investigate compliance with a fair work instrument that has ceased to apply to the member (e.g., an agreement which previously applied to an employee but which has been replaced by a new agreement).

1923. Subclause 481(3) makes clear that clause 481 is only intended to facilitate a permit holder's ability to verify whether an actual suspected contravention is occurring or has occurred. It is not intended to allow a permit holder to enter premises to engage in 'fishing expeditions' where there is nothing to suggest a contravention is occurring or has occurred. As such, the clause provides that the permit holder has the burden of proving that she or he was acting on a reasonable suspicion that the contravention has occurred or is occurring when she or he entered the premises. A reasonable suspicion could include a suspicion based on complaints by members to the permit holder's organisation that suggest contraventions of the Bill or a relevant fair work instrument have occurred or are occurring.

1924. Notes under subclause 481(1) direct the reader to entry notification requirements in other provisions of the Bill. Note 2 alerts the reader that FWA may issue an affected member certificate under clause 520 which may assist in resolving disputes about whether a permit holder satisfies the requirements in subclause 481(1).

Clause 482 – Rights that may be exercised while on premises

1925. This clause lists the rights a permit holder can exercise while on premises to investigate a suspected contravention under clause 481. While on premises, a permit holder may do any of the following:

- inspect work, processes or objects (see paragraph 482(1)(a));
- interview certain people who agree to be interviewed (see paragraph 482(1)(b));
- require the occupier or an affected employer to allow the inspection and copying of any record or document kept on, or accessible from, the premises (see paragraph 482(1)(c)).

1926. All rights exercised by a permit holder under this clause must be relevant to the investigation of the suspected contravention. This means for example, that if the suspected breach being investigated concerned an allegation that an employee had their overtime cut for having made a complaint to the Fair Work Ombudsman, the permit holder could only inspect and copy overtime records of relevant employees, but could not inspect or copy, e.g., records of employees' superannuation or managerial employees' salaries.

1927. A note under subclause 482(1) highlights that if personal information is collected by a permit holder under this clause, the use, disclosure and storage of that information may be regulated by the *Privacy Act 1988*. A complaint may be made to the Privacy Commissioner about an organisation (or a representative of an organisation) that uses, discloses or stores personal information in a manner inconsistent with the requirements of the *Privacy Act 1988*. The note also directs the reader to clause 504 which prohibits the unauthorised use or disclosure of employee records (as defined in clause 12).

1928. This clause is a civil remedy provision under Part 4-1 (Civil remedies).

1929. An occupier of premises or an affected employer who is required by a permit holder to allow the inspection and copying of records or documents must comply with that requirement (see subclause 482(3)).

1930. This subclause is a civil remedy provision under Part 4-1 (Civil remedies).

1931. Subclause 482(2) defines the meaning of affected employer in relation to the Subdivision. A person is an affected employer if:

- she or he employs a member of the permit holder's organisation whose industrial interests the organisation is entitled to represent; and
- that member performs work on the premises; and
- the suspected contravention relates to or affects the member.

Clause 483 – Later access to record or document

1932. This clause allows a permit holder to require an affected employer to give him or her documents or records relevant to the suspected contravention at a time after the permit holder has visited the premises. A permit holder can require the production of records or documents when on the premises or up to 5 days afterwards (see subclause 483(3)). The request must be made by written notice indicating what records or documents are sought and the time by which they must be provided (see subclause 483(1)). Affected employers must be given at least 14 days from the day the notice is given in which to produce the documents or records (see subclause 483(2)).

1933. This clause allows a permit holder to gain access to records and other documents that are not kept on the premises or which are not readily available to the permit holder while she or he is on the premises. The documents or records required by the permit holder can be provided either at the premises or at another location agreed between the permit holder and the affected employer (see subclause 483(5)).

1934. An affected employer must provide documents or records that are properly required by the permit holder under this clause (see subclause 483(4)).

1935. This subclause is a civil remedy provision under Part 4-1 (Civil remedies).

1936. A note highlights that the same *Privacy Act 1988* obligations may arise in relation to personal information collected under this clause as information collected under clause 482. The note also highlights that clause 504 may apply.

Subdivision B – Entry to hold discussions

1937. This Subdivision sets out the circumstances in which a permit holder may enter premises to hold discussions with persons at a workplace. The Subdivision also specifies certain types of premises where entry is not authorised.

Clause 484 – Entry to hold discussions

1938. This clause authorises a permit holder to enter premises for the purpose of holding discussions with persons at the premises if one or more of those persons:

- perform work on the premises;
- are entitled to be represented by the permit holder's organisation; and
- wish to participate in those discussions.

1939. The Bill limits when discussions can be held to mealtimes or other break periods. Discussions cannot occur during paid work time (see subclause 490(2)).

Clause 485 – Conscientious objection certificates

1940. This clause exempts certain premises from the application of this Subdivision, meaning a permit holder is not authorised to enter those premises. Entry is not authorised where:

- up to 20 employees work on the premises;
- none of the employees is a member of an organisation; and
- all of the employees are employed by a person who holds a conscientious objection certificate that has been endorsed by FWA.

1941. A conscientious objection certificate is a certificate in force under section 180 of Schedule 1 to the WR Act. It may be issued to a person whose conscientious beliefs do not allow them to be a member of a union or an employer association.

1942. It is important to note that if more than one person employs employees at the premises in question, each employer must hold an endorsed conscientious objection certificate for entry by a permit holder under clause 484 to be excluded by this clause.

1943. When FWA may endorse a conscientious objection certificate is set out in subclauses 485(3)-(4). Endorsement may only occur if:

- FWA is satisfied that the person who holds the certificate is a practising member of a religious society or order, the doctrines or beliefs of which preclude membership of any other body (see subclause 485(3)); and

- the person who holds the certificate has applied for endorsement (see subclause 485(4)).

1944. While an application for a conscientious objection certificate need not be accompanied by an application for endorsement, the two may be made at the same time (see subclause 485(5)).

1945. Subclause 485(6) clarifies that endorsement exists only with respect to the certificate it accompanies. When that certificate expires or is renewed, the endorsement ceases to exist. This means that any new certificate needs to be re-endorsed for this clause to apply.

1946. The power of FWA under this clause may be delegated to the General Manager or FWA staff (see clause 625). Decisions of delegates under this clause are appealable under clause 604.

Subdivision C – Requirements for permit holders

1947. This Subdivision sets out mandatory requirements that a permit holder must meet when exercising or attempting to exercise rights under Subdivision A or B of this Division.

Clause 486 – Permit holder must not contravene this Subdivision

1948. This clause makes clear that a permit holder who is exercising or seeking to exercise a right under Subdivision A or B is not authorised to enter or remain on the premises if she or he contravenes any of the clauses in Subdivision C or any applicable regulations made under clause 521. A permit holder who attempts to exercise a Subdivision A or B right when not authorised to do so may be trespassing on property. FWA may also restrict the rights of a permit holder or an organisation under clause 508 if either misuses rights conferred by this Part.

Clause 487 – Giving entry notice or exemption certificate

1949. This clause requires a permit holder to give either an entry notice or an exemption certificate to the occupier of the premises before entry to investigate a suspected contravention or to hold discussions with people under this Division. Where the permit holder is entering to investigate a suspected contravention, the entry notice or exemption certificate must also be given to any affected employer (this term is defined in subclause 482(2)). This is to address situations where the affected employer is not the occupier of the premises to ensure the affected employer is given advance notice that the permit holder will be entering and may be seeking to interview employees, inspect records or exercise other powers conferred by the Bill.

1950. Subclause 487(3) provides that an entry notice must be provided to the occupier of premises (and any affected employer in relation to entry for investigation purposes) at least

24 hours, but not more than 14 days, before the proposed entry. This ensures there is an appropriate notice of entry.

1951. Subclause 487(2) provides a definition of an entry notice. It is a notice that contains the content requirements set out in clause 518, which includes such matters as the date of entry and a declaration that the organisation is entitled to represent the industrial interests of the relevant employees.

1952. Subclause 487(4) sets out different rules regarding notification of intended entry if FWA has granted an exemption certificate under clause 519. An exemption certificate allows a permit holder to enter premises for investigation purposes without providing advance notice of the entry to the occupier of the premises or an affected employer. Exemption certificates will only be issued if FWA is satisfied that providing notice of the entry might result in the destruction of evidence relevant to the suspected contravention. The certificate must be shown to the occupier of the premises and any affected employer (or someone who apparently represents them) before, or as soon as practicable after, the permit holder's entry.

1953. A permit holder who does not comply with the notice requirements in this clause is not authorised to enter or remain on the premises as a result of the operation of clause 486.

Illustrative Example

Tara is an official of an organisation that represents workers employed on a building site. She has a valid entry permit. Tara suspects that one of the employers who is operating as a subcontractor on the site is not allowing members of her organisation breaks to which they are entitled under the modern award which applies to them. She wishes to enter the site to investigate this suspected contravention. Tara prepares an entry notice that complies with all the requirements of the Part and faxes it to the head contractor on the site, as the occupier of the premises, 48 hours prior to her entry. She also faxes the notice to the employer. Tara has complied with the requirements of clause 487 and is able to enter the site to investigate the suspected contravention of the award.

While on site, Tara is approached by a member of her union working for a different company on the site who complains about being underpaid. This company is another subcontractor. Clause 487 does not authorise Tara to investigate the alleged underpayment during this visit because she has not provided the required notice of entry with respect to this suspected breach to either the occupier or the affected employer. Tara would need to provide a separate entry notice that complies with the requirements of clause 487 to enter on a later date and investigate this suspected contravention.

Clause 488 – Contravening entry permit conditions

1954. FWA may impose conditions on a permit at the time of issuing a permit (see clause 515) or when taking action against a permit holder under Division 5 of this Part. These conditions could include, for example, a requirement that a permit holder provide a longer period of notice to a specific employer than that prescribed by clause 487.

1955. This clause requires a permit holder to comply with any such condition that has been imposed on his or her entry permit whilst exercising or seeking to exercise rights under this Division. If a permit holder fails to do so then she or he is not authorised to enter or remain on the premises because of the operation of clause 486.

Clause 489 – Producing authority documents

1956. This clause requires a permit holder to produce his or her authority documents in certain circumstances. A permit holder's authority documents are the entry permit and either a copy of the entry notice relied on for the entry, or the exemption certificate where one has been issued by FWA for the entry (see subclause 498(3)).

1957. When a permit holder enters premises under Subdivision A to investigate a suspected contravention, subclause 489(1) requires the permit holder to show his or her authority documents when the occupier of the premises or an affected employer requests to see them. Authority documents must also be shown to the occupier or affected employer before requiring access to documents or records under clauses 482 or 483.

1958. When a permit holder enters premises to hold discussions under Subdivision B, subclause 489(2) requires the permit holder to show his or her authority documents to the occupier of the premises on request.

1959. If a permit holder fails to produce his or her authority documents as required by this clause, she or he is not authorised to enter or remain on the premises because of the operation of clause 486.

Clause 490 – When right may be exercised

1960. This clause specifies the time during which entry rights under this Division can be exercised.

1961. Entry to premises to hold discussions or to investigate a suspected contravention may only occur during working hours (see subclause 490(1)). Working hours refers to the actual operating hours of the premises that the permit holder wishes to enter. In addition, permit holders may only enter on a day specified in the entry notice or the exemption certificate for the entry (see subclause 490(3)).

1962. When entering for discussion purposes under Subdivision B, a permit holder may only hold the discussions during mealtimes or other breaks (subclause 490(2)). Discussions cannot occur during paid work time. An example of other breaks would include holding discussions before or after an employee's shift, provided the discussions are held within the working hours of the premises.

1963. If a permit holder seeks to hold discussions outside break times, she or he would not be authorised to enter or remain on the premises because of the operation of clause 486.

Clause 491 – Occupational health and safety requirements

1964. This clause requires a permit holder to comply with a reasonable request by an occupier of premises to observe occupational health and safety requirements that apply to the premises. For example, if a permit holder seeks to enter a construction site where there is a legislative requirement to wear a hard hat, it would be reasonable for the occupier to require the permit holder to wear a hard hat. If the permit holder does not comply with this request, then she or he would not be authorised to enter or remain on the premises because of the operation of clause 486.

1965. A note underneath the clause highlights that if there is a dispute about whether a request under this clause is reasonable, FWA can deal with that dispute under clause 505.

Clause 492 – Conduct of interviews in particular room etc.

1966. This clause allows an occupier of premises to request that a permit holder meet employees in a specific room or area of the premises or to take a particular route to that location (see subclause 492(1)). The request must be a reasonable request. A permit holder must comply with a reasonable request or otherwise she or he will not be authorised to enter or remain on the premises because of the operation of clause 486.

1967. The clause sets out a number of circumstances where a request will be considered to be unreasonable. Paragraph 492(2)(a) provides that a request will be unreasonable if the nominated room or area is not fit for the purpose. This is intended to cover situations where the room or area is not appropriate for the holding of discussions or interviews with employees, e.g., where a bathroom or unsafe area is nominated.

1968. Paragraph 492(2)(b) provides that a request will be unreasonable where the request is intended to intimidate, discourage or make it difficult for people to participate in the discussions. This is intended to ensure that an occupier cannot nominate a particular room or location for the purpose of trying to hamper people freely attending and participating in the discussions.

1969. Subclause 492(2) is not intended to be an exhaustive list of when a request is unreasonable. If there is a dispute about the reasonableness of a request FWA may deal with it under clause 505. A note underneath subclause 492(1) alerts the reader to FWA's powers in this respect.

1970. Subclause 492(3) clarifies that a request to meet employees in a particular location or to take a particular route to reach that location is not unreasonable solely because the location or route is not the one the permit holder would have chosen.

1971. Additional circumstances in which a request is or is not reasonable may be prescribed by regulations (see subclause 492(4)).

Illustrative Example

Kate is a permit holder whose organisation is entitled to represent miners at a remote mine site. Kate wants to enter the site to talk to employees about a new superannuation scheme bring operated by the union. She provides the mine manager, David, with the appropriate notice. Out of courtesy, Kate also phones David to inform him that she intends to hold her discussions during the employees' normal 30 minute lunch break. David does not want his employees speaking with Kate. With this in mind, he requests that Kate meet the employees in a small donga that is a 20 minute walk (one way) from where the employees work. Unbeknown to David, the donga is also unsafe because its roof has been damaged and may collapse.

As David made the request with the intention of making it difficult for his employees to attend the discussions during their lunchbreak, his request would be unreasonable under subparagraph 492(2)(b)(iii). David's request would also be unreasonable under paragraph 492(2)(a) because the location is unsafe and therefore not fit for the purpose of holding discussions. It does not matter that David was unaware that the donga was unsafe as there is no requirement under paragraph 492(2)(a) that the nominated location be intended to not be fit for the purpose.

Clause 493 – Residential premises

1972. This clause provides that a permit holder must not enter any part of premises that is mainly used for residential purposes. For example, permit holder could enter a converted garage where outwork is being conducted, but not the living quarters of the residence.

1973. For premises or parts of premises that are used for both residential and work purposes, it is intended that a permit holder will only have an entry right where the premises are mainly used for work purposes on a regular and substantial basis.

1974. If a permit holder enters a part of premises used for residential purposes, that permit holder is not authorised to enter or remain on the premises because of the operation of clause 486.

Division 3 – State or Territory OHS rights

1975. This Division imposes additional requirements on permit holders exercising a right of entry under State or Territory OHS legislation. It does not override entry rights under these laws. These rights are expressly saved by clause 27. State and Territory OHS laws contain their own conditions which can be imposed on permit holders exercising OHS rights of entry. These conditions continue to apply.

1976. This Division does not confer additional rights of entry on permit holders.

Clause 494 – Official must be permit holder to exercise State or Territory OHS right

1977. This clause imposes a requirement on officials of organisations seeking to enter premises under a State and Territory OHS law (being a law of a State or Territory prescribed by the regulations – see subclause 494(3)) that they must hold an entry permit issued under this Part.

1978. This subclause is a civil remedy provision under Part 4-1 (Civil remedies).

1979. The scope of these provisions is set out in the definition of State or Territory OHS right in subclause 494(2). They cover rights conferred by a State or Territory OHS law that allows or authorises entry to premises or inspection or access to employee records on the premises. Employee record is defined in clause 12. It has, in relation to an employee, the meaning given by the *Privacy Act 1988*. Under section 6 of that Act, an employee record is a record of personal information relating to the employment of an employee.

1980. Paragraphs 494(2)(a)-(g) set out the constitutional scope of the provisions.

Clause 495 – Giving notice of entry

1981. This clause requires permit holders to provide written notice to the occupier of the premises and to any affected employer at least 24 hours before exercising a State or Territory OHS right to inspect or access employee records. The requirement to give written notice only applies when the permit holder is exercising a State or Territory OHS right in relation to employee records, and not when attending to OHS emergencies. An affected employer in relation to entry onto premises under this Division is a person whose employees carry out work on the premises (see subclause 495(2)).

1982. This subclause is a civil remedy provision under Part 4-1 (Civil remedies).

1983. The written notice must set out the permit holder's intention to exercise the right and the reasons for doing so (see paragraph 495(1)(a)). For example, a permit holder seeking access to employee timesheets to determine whether time restrictions on the performance of certain work have been complied with would need to set out this allegation in the notice.

Clause 496 – Contravening entry permit conditions

Clause 497 – Producing entry permit

Clause 498 – When right may be exercised

Clause 499 – Occupational health and safety requirements

1984. These clauses impose a range of requirements on a permit holder exercising a State or Territory OHS right.

1985. Clause 496 requires a permit holder to comply with any condition that has been imposed on his or her entry permit when exercising a State or Territory OHS right. FWA may impose conditions on a permit when taking action against a permit holder under Division 5 of this Part or at the time of issuing a permit (see clause 515).

1986. Clause 497 requires a permit holder exercising a State or Territory OHS right to show his or her permit to the occupier of premises or an affected employer when asked to do so. An affected employer in relation to entry onto premises under this Division is a person whose employees carry out work on the premises (see subclause 495(2)).

1987. Clause 498 specifies the time during which a State or Territory OHS right may be exercised. The clause requires that a permit holder only exercise a State or Territory OHS right during working hours. Working hours refers to the actual operating hours of the premises which the permit holder wishes to enter.

1988. Clause 499 requires a permit holder exercising a State or Territory OHS right to comply with a reasonable request by the occupier of the premises to observe any occupational health and safety requirements that apply to the premises. While reasonableness must be determined in the circumstances of the particular case, an example of a reasonable request includes a request that a permit holder wear a safety vest where the wearing of such a vest is mandatory company policy because there are many heavy vehicles operating on the site.

1989. Clause 496, 497, 498 and 499 are civil remedy provisions under Part 4-1(Civil remedies).

Division 4 – Prohibitions

1990. Division 4 outlines the types of actions and conduct that are prohibited under the Part. The prohibitions relate to actions and conduct by both permit holders and others.

Clause 500 – Permit holder must not hinder or obstruct

1991. This clause prohibits two types of conduct by a permit holder exercising or seeking to exercise an entry right – conduct that is intended to hinder or obstruct any person and conduct that amounts to acting in an improper manner.

1992. This clause is a civil remedy provision under Part 4-1 (Civil remedies).

1993. Conduct by a permit holder that would hinder or obstruct a person includes action that intentionally prevents or significantly disrupts an employer or employee from carrying on their normal work duties. An example of this would be where a permit holder deliberately parks his or her car in the entrance of a building site with the intention of preventing access to the site by trucks scheduled to deliver concrete.

1994. Acting in an improper manner is intended to cover a wider range of conduct. It includes actions that are inconsistent with the requirements of the right of entry provisions, such as deliberately engaging in conduct that the permit holder knows is not permitted.

Clause 501 – Person must not refuse or delay entry

Clause 502 – Person must not hinder or obstruct permit holder

1995. These clauses prohibit a person taking certain actions against a permit holder who is exercising rights in accordance with this Part.

1996. Clause 501 prohibits a person refusing or delaying entry onto premises that the permit holder is entitled to enter in accordance with this Part. This would cover action by employers,

occupiers and any other person with the effect of inhibiting the ability of a permit holder to gain access to premises that the permit holder would otherwise be entitled to enter.

1997. Clause 502 prohibits a person from intentionally hindering or obstructing a permit holder. This would cover behaviour such as making repeated and excessive requests that a permit holder show his or her entry permit, refusing entry despite the permit holder having an entry right under this Part or failing to provide access to records that the permit holder is entitled to inspect. It would also include, for example, deliberately altering rosters so that employees with whom the permit holder wished to meet were not present on the premises at the time of the permit holder's intended entry.

1998. Subclause 502(2) clarifies that certain conduct is not intended to be captured by subclause 502(1). It provides that a failure to agree on an alternative place where a permit holder may inspect and copy records or documents after entry onto premises as provided for under paragraph 483(5)(b) would not amount to the hindering or obstructing of a permit holder. A dispute about where records or documents are to be produced could be dealt with by FWA under clause 505.

1999. Subclause 502(3) specifies that this clause covers action that hinders or obstructs a permit holder that is taken after an entry notice is given but before a permit holder enters the premises. This provision would ensure that any action taken before the permit holder enters the premises but which would hinder or obstruct that permit holder while on the premises is caught by this clause. An example of this type of conduct would include situations such as destroying, concealing or manufacturing evidence that relates to a suspected contravention which the permit holder is intending to investigate.

2000. These clauses are both civil remedy provisions under Part 4-1 (Civil remedies).

Illustrative Example

Sian is permit holder. She reasonably suspects that some of her members are not receiving the correct overtime rate of pay specified in the applicable modern award. She wishes to enter the premises of the employer to investigate the suspected breach under clause 481.

Sian issues an entry notice to the employer indicating her intention to enter the employer's premises to investigate the suspected award contravention. The notice meets all of the necessary requirements. After receiving the notice, the General Manager of the company directs the Human Resource Manager to destroy all records relating to the payment of overtime to employees. The Human Resource Manager does so.

As a person affected by the contravention, Sian or her organisation could bring proceedings against the employer under clause 502. This is because the destruction of the overtime records was intended to obstruct Sian and her organisation's ability to investigate the suspected contravention. Subclause 502(3) ensures that the fact that Sian was not on the premises when the hindering or obstructing occurred is immaterial.

Clause 503 – Misrepresentations about right of entry

2001. This clause provides that a person must not take action with the intention of giving the impression, or reckless as to whether the impression is given, that the action is authorised by the Part when this is not the case. An example of behaviour that this clause would cover is where a person represents himself or herself as a permit holder when she or he does not hold a valid entry permit. Other examples would include where a person asserts she or he is entitled to represent particular employees when the union's eligibility rules do not extend to that class of employees, or where an employer asserts to employees that the union is not allowed to talk to them when it can.

2002. This subclause is a civil remedy provision under Part 4-1 (Civil remedies).

2003. Subclause 503(2) provides that a person does not contravene this clause if the person reasonably believed that the action they have misrepresented is authorised.

Clause 504 – Unauthorised use or disclosure of employee records

2004. This clause provides that a person must not use or disclose an employee record (defined in clause 12) obtained by a permit holder when investigating a suspected contravention if the use or disclosure would breach National Privacy Principle 2 of the *Privacy Act 1988*. National Privacy Principle 2 requires that, subject to listed exceptions, an organisation must not use or disclose personal information about an individual for a purpose other than the primary purpose of collection.

2005. This subclause is a civil remedy provision under Part 4-1 (Civil remedies).

2006. Subclause 504(2) ensures that National Privacy Principle 2 will apply to the permit holder for the purposes of this civil remedy provision, even if the permit holder's organisation is not covered by the *Privacy Act 1988* (e.g., where the organisation is a small business within the meaning of section 6D of the *Privacy Act 1988*).

2007. This clause is intended to operate to prevent the use of records obtained under clause 482 or 483 for a purpose other than that it for which they were acquired such as using the employee records for recruitment purposes. It covers not just conduct by the permit holder but also by any other person who has received the information as a result of the permit holder acquiring it.

2008. A person affected by a contravention of the *Privacy Act 1988* may also make a complaint to the Privacy Commissioner under that Act.

Division 5 – Powers of FWA

2009. This Division sets out the specific powers available to FWA in relation to right of entry. These specific powers are in addition to the general powers of FWA contained in Part 5-1 (Fair Work Australia).

2010. Applications made by a person under this Division need to comply with any relevant procedural rules made by the President of FWA (see clause 585).

Subdivision A – Dealing with Disputes

Clause 505 – FWA may deal with a dispute about the operation of this Part

2011. This clause allows FWA to deal with a dispute about the operation of this Part, including by arbitration. An example of a dispute that may be dealt with is a disagreement between a permit holder and an occupier of premises about whether a request under clause 492 that a certain room be used for a meeting between employees and the permit holder is reasonable.

2012. FWA has general powers to deal with a dispute under clause 595. Subclause 505(2) authorises FWA to deal with a dispute under this clause through use of those general powers (e.g., to require attendance before it) as well as by arbitration. In dealing with a dispute, the clause allows FWA to make any order it considers appropriate, including an order to suspend, revoke, or impose conditions on entry permits or the future issue of entry permits to a person.

2013. FWA is empowered to take action under this clause of its own motion (see paragraph 505(3)(a)), or on application by those persons listed in paragraph 505(3)(b), provided the dispute relates to them.

2014. When dealing with a dispute about the operation of this Part, FWA must have regard to fairness between the parties to the dispute (see subclause 505(4)). FWA must not, however, confer rights on a permit holder that are in addition to or inconsistent with rights exercisable under Division 2 or 3 of this Part (subclause 505(5)). This limitation on the exercise of FWA's powers does not apply to disputes about the reasonableness of a request for a permit holder to use particular rooms or areas, or to comply with occupational health and safety requirements. FWA is able to make orders that a specific room be used for a meeting as this may be the only means of effectively resolving the dispute.

2015. The power of FWA under this clause is exercisable by a single FWA member (see clause 612).

2016. A decision by FWA under this clause is appealable under clause 604.

Clause 506 – Contravening order made to deal with dispute

2017. This clause requires that a person who is subject to an order made under subclause 505(2) must comply with the terms of the order.

2018. This clause is a civil remedy provision under Part 4-1 (Civil remedies).

Subdivision B – Taking action against permit holder

Clause 507 – FWA may take action against permit holder

2019. This clause allows FWA to take action against a permit holder on application by certain parties. The provision allows FWA to suspend, revoke or impose conditions on any entry permit held by the permit holder (see paragraphs 507(1)(a)-(c)).

2020. The clause requires FWA to consider the permit qualification matters when deciding whether to take action under subclause 507(1). A note underneath the provision directs the reader to the definition of permit qualification matters in subclause 513(1).

2021. It is intended that this clause will allow FWA to take action against a permit holder who no longer meets the permit qualification matters.

2022. An inspector or a person prescribed by the regulations may apply to FWA to take action against permit holders under this clause.

2023. The power of FWA under this clause may be delegated to the General Manager or FWA staff (see clause 625). Decisions of delegates under this clause are appealable under subclause 604.

Subdivision C – Restricting rights of organisations and officials where misuse of rights

Clause 508 – FWA may restrict rights if organisation or official has misused rights

2024. This clause allows FWA to restrict the rights of permit holders or organisations if it is satisfied that either has misused those rights. Subclause 508(4) provides an example of what may constitute misuse of entry rights. It provides that it will be a misuse if an official uses his or her right for discussion purposes to encourage employees to become members of the union in a manner that is unduly disruptive because the exercise of the right of entry is excessive in the circumstances.

2025. Subclause 508(2) provides that the action FWA may take under subclause 508(2) includes:

- revoking, suspending, or imposing conditions on permits (paragraphs 508(2)(a)-(c)). Under these paragraphs FWA may revoke permits issued to sections of an organisation, such as a particular branch;
- imposing conditions on some or all of the permits that might in the future be issued in respect of an organisation (paragraph 508 (2)(d));
- banning for a specified period the issue of entry permits (paragraph 508(2)(e));
- any other order it considers appropriate (paragraph 508(2)(f)).

2026. FWA may take action under subclause 508(1) on its own motion or on application by an inspector (see subclause 508(3)).

2027. The power of FWA under this clause may only be exercised by a Deputy President or a Full Bench (see subclauses 612 and 615).

Clause 509 – Contravening order made for misuse of rights

2028. This clause requires that a person who is subject to an order made under subclause 508(1) must comply with the terms of the order.

2029. This clause is a civil remedy provision under Part 4-1 (Civil remedies).

Subdivision D – When FWA must revoke or suspend entry permits

Clause 510 – When FWA must revoke or suspend entry permits

2030. This clause sets out the circumstances in which FWA must revoke or suspend an entry permit and ban the issue of any future entry permits to the holder. It also sets out minimum periods for which a permit must be suspended or the future issue of permits be banned.

2031. Subclause 510(1) provides that FWA must revoke or suspend all permits held by a permit holder where a matter specified in paragraphs 510(1)(a)-(f) is found to have occurred. However, FWA is not required to suspend or revoke an entry permit under paragraph 510(1)(d) or (f) where the suspension or revocation of the permit would be harsh or unreasonable in the circumstances (see subclause 510(2)). In these circumstances, FWA has a discretion regarding whether or not to revoke or suspend the permits of a permit holder.

2032. FWA cannot consider a circumstance mentioned in paragraphs 510(1)(a)-(f) if it has already taken that circumstance into account when revoking or suspending an entry permit under subclause 510(1) on a previous occasion (see subclause 510(3)). This is to prevent a holder's entry permit being repeatedly suspended or revoked as a result of the same conduct. For example, a permit holder's entry permit cannot continue to be subject to suspension or revocation for a contravention of subclause 503(1) (which deals with misrepresentations about things authorised by this Part) if FWA has previously suspended the permit based on that contravention.

2033. A permit suspended under this clause must be suspended for the following minimum periods of time (the minimum suspension period):

- three months on the first occasion FWA takes action under this clause (see paragraph 510(4)(a));
- 12 months on the second occasion (see paragraph 510(4)(b)); or
- five years on the third and any subsequent occasion (see paragraph 510(4)(c)).

2034. These are only minimum periods. FWA could exercise its discretion to suspend an entry permit for a longer period.

2035. When FWA revokes or suspends a permit under this clause, it must also ban the issue of any further entry permit for a certain period (the ban period) (see subclause 510(5)). A ban

period must begin when the action is taken under this clause, and be no shorter than the relevant minimum suspension period (subclause 510(6)). Again, FWA could exercise its discretion to ban the issue of a further entry permit for a period longer than the minimum suspension period. This provision is intended to ensure that a permit holder cannot gain a new permit while his or her previous permit is revoked or is still suspended.

2036. The power of FWA under this clause may be delegated to the General Manager or FWA staff (see clause 625). Decisions of delegates under this clause are appealable under subclause 604.

Subdivision E – General rules for suspending entry permits

Clause 511 – General rules for suspending entry permits

2037. This clause provides general rules that apply whenever FWA suspends an entry permit under clauses 505, 507, 508 and 510. These are that:

- FWA must specify the period for which the permit will be suspended (paragraph 511(a));
- the entry permit can be revoked while it is suspended (paragraph 511(b));
- conditions can be imposed on the entry permit while it is suspended (paragraph 511(b)); and
- the suspension of a permit does not affect the time at which the permit would otherwise expire (e.g., if a permit that is due to expire in two months is suspended under paragraph 510(4)(a) for the minimum suspension period of three months, the permit still expires after two months. Paragraph 511(c) makes clear that the permit would not continue to exist until the end of the suspension period).

Division 6 – Entry permits, entry notices and certificates

2038. Division 6 sets out provisions regarding the issuing of, and details to be included in, entry permits, entry notices, exemption certificates and affected member certificates.

Subdivision A – Entry permits

2039. Subdivision A sets out the requirements with respect to the issuing of entry permits by FWA.

Clause 512 – FWA may issue entry permits

Clause 513 – Considering Application

2040. Clause 512 allows FWA, on application by an organisation, to issue an entry permit to an official of that organisation who it is satisfied is a fit and proper person. Clause 513 lists the matters FWA must consider when determining whether an official is a fit and proper person. These considerations are the permit qualification matters.

2041. The permit qualification matters are intended to ensure that only appropriate persons are conferred with the significant rights to access premises conferred by these provisions.

2042. The permit qualification matters also need to be considered by FWA when deciding whether or not to impose conditions on an entry permit under clause 515 and when considering whether or not it should take action against a permit holder under clause 507.

2043. The power of FWA under this clause may be delegated to the General Manager or FWA staff (see clause 625). Decisions of delegates under this clause are appealable under subclause 604.

2044. Subclause 513(2) and the note underneath it make it clear that the spent convictions scheme in Division 3 of Part VIIC of the *Crimes Act 1914* applies to these provisions. This means that a person applying for a permit under this Part would not be required to disclose a spent conviction.

Clause 514 – When FWA must not issue permit

2045. This clause provides that FWA must not issue an entry permit to an official when she or he is suspended or disqualified from exercising a right of entry under a State or Territory OHS law (defined in clause 494(3)) or a State or Territory industrial law (defined in clause 26)). This provision recognises that an official of an organisation who is prevented from exercising entry rights under State or Territory laws is not a fit and proper person to hold similar rights under this Part.

Clause 515 – Conditions on entry permit

2046. This clause relates to the imposition of conditions on entry permits.

2047. Subclause 515(1) provides that FWA may impose conditions on a entry permit when it is issued. In deciding whether or not to impose permit conditions it must consider the permit qualification matters in clause 513. A decision to impose a condition is entirely at the discretion of FWA.

2048. This clause also requires that all permit conditions must be recorded on the permit regardless of whether the condition is imposed under this clause or another clause of the Bill (conditions can be imposed on a permit under this clause and clauses 505, 507 and 508). Clause 517 (which requires the return to FWA of permits where a condition has been imposed) will assist FWA in writing conditions onto entry permits. Where conditions are imposed after the issue of the permit the entry permit would cease to be in force until the conditions are recorded on it by FWA (see subclause 515(4)).

2049. The power of FWA under this clause may be delegated to the General Manager or FWA staff (see clause 625). Decisions of delegates under this clause are appealable under subclause 604.

Clause 516 – Expiry of entry permit

2050. This clause sets out when an entry permit expires. Subclause 516(1) provides that a permit expires at the point when the first of the following occurs:

- the permit reaches its third anniversary of issue (unless that period is extended under subclause 516(2)); or
- the permit holder ceases to be an official of the organisation that applied for the permit holder's permit.

2051. FWA may extend the initial three year period for which a permit is issued in specific circumstances. These circumstances are where:

- an organisation has applied for a new permit for a person who holds an existing permit (the old permit) as an official of the organisation;
- the application was made at least one month before the old permit's expiry; and
- FWA is satisfied that it will not be able to decide the application for the new permit before the old permit expires.

2052. Despite subclause 516(2), subclause 516(4) would prevent FWA from extending an entry permit where:

- it has requested that the organisation or the permit holder provide copies of records or documents relevant to the application;
- the organisation or permit holder has not complied with that request; and
- it is satisfied that the organisation or permit holder has no reasonable excuse for not providing the records or documents.

2053. The last factor is intended to prevent permit holders deliberately delaying providing information to FWA to gain an extension of their old permit in circumstances where providing the information may lead FWA to decide the official is no longer a fit and proper person to hold a permit.

2054. Subclause 516(3) limits the period for which a permit can be extended to the period necessary to deal with the application for a new permit. FWA can extend an initial extension period as long as all of the circumstances in subclause 516(2) still exist.

Clause 517 – Return of entry permits to FWA

2055. This clause deals with when permit holders must return their entry permits to FWA. Subclause 517(1) requires a permit holder to return an entry permit to FWA if the permit has been revoked or suspended, conditions have been imposed on it or the permit has expired. The permit holder must return the permit within 7 days. This is intended to ensure the permit is not misused and to allow FWA to record any conditions imposed on it.

2056. This clause is a civil remedy provision under Part 4-1 (Civil remedies).

2057. Subclause 517(2) requires FWA to return an entry permit to the permit holder at the end of a suspension period where the permit has not expired and the permit holder's organisation has applied for its return.

Subdivision B – Entry notices

2058. Subdivision B specifies the content requirements of an entry notice. Permit holders are required to provide an entry notice to certain persons before entering premises under Division 2 of this Part.

Clause 518 – Entry notice requirements

2059. Clause 518 requires certain information to be included in an entry notice. An entry notice is a notice that complies with the requirements of this clause.

2060. Subclause 518(1) sets out matters that must be included in all entry notices, namely specifying the premises that are proposed to be entered, the day of the proposed entry and the organisation of which the permit holder is an official.

2061. Subclauses 518(2) and 518(3) set out specific additional requirements relating to entry under clause 481 to investigate a suspected contravention and under clause 484 for discussion purposes.

2062. In both cases, the entry notice must specify the clause that authorises the entry (that is either clause 481 or 484). The permit holder is also required to make a declaration that his or her organisation is entitled to represent the industrial interests of the relevant employees and specify the part of the organisation's rules which provide that coverage.

2063. The requirement to make a declaration arises because it may be difficult for an employer to easily establish whether or not an organisation satisfies the pre-requisite for entry of being entitled to represent the industrial interests of their employees. A permit holder who deliberately makes a false declaration in an entry notice would breach clause 503, which prohibits intentionally giving the impression that a permit holder has rights under this Part when she or he does not. A permit holder who is found to have breached clause 503 must have his or her permit suspended or revoked under clause 510.

2064. Paragraph 518(2)(b) imposes an additional requirement in relation to entry for investigation purposes that the notice must include particulars of the suspected contravention or contraventions the permit holder is entering to investigate.

Subdivision C – Exemption certificates

Clause 519 – Exemption certificates

2065. This clause requires FWA to issue an exemption certificate to an organisation seeking entry to investigate a suspected contravention if it reasonably believes that advanced notice of the entry may result in relevant evidence being destroyed, concealed or altered. Clause 487

allows a permit holder to enter premises without giving prior notice to the occupier of that premises or an affected employer if the permit holder shows the certificate on, or as soon as practicable after, his or her entry.

2066. Subclause 519(2) lists the content requirements for an exemption certificate. It provides that an exemption certificate must specify the following:

- the premises to which it relates;
- the organisation to which it relates;
- the day or days that the entry may occur;
- the particulars of the suspected contravention or contraventions; and
- that clause 481 is the provision that authorises the permit holder's entry.

2067. The power of FWA under this clause may be delegated to the General Manager or FWA staff (see clause 625). Decisions of delegates under this clause are appealable under subclause 604.

Subdivision D – Affected member certificates

Clause 520 – Affected member certificates

2068. This clause requires FWA to issue an affected member certificate in certain circumstances. These certificates would prevent the need to disclose the identity of a member of an organisation where a permit holder seeks to enter for investigation purposes. The need to identify a member may arise as entry may only occur if the organisation has a member working on the premises and the breach relates to or affects that member. Establishing these facts with a certificate would cater for circumstances in which the member does not wish to identify themselves to the employer as the person who has sought the union's assistance.

2069. Subclause 520(1) provides that FWA must issue a certificate to an organisation if a member of that organisation, whom the permit holder's organisation is entitled to represent, works on the particular premises to be entered and the suspected contravention relates to or affects that member or his or her work.

2070. The content requirements for affected member certificates are listed in subclause 520(2). The certificate is required to state the following:

- the premises to which it applies;
- the organisation to which it relates;
- the particulars of the suspected contravention or contraventions which the permit holder intends to investigate while on the premises; and
- that FWA is satisfied of the matters in subclause 520(1).

2071. An affected member certificate must not, however, reveal the identity of the affected member or members (see subclause 520(3)).

2072. The power of FWA under this clause may be delegated to the General Manager or FWA staff (see clause 625). Decisions of delegates under this clause are appealable under subclause 604.

Subdivision E – Miscellaneous

Clause 521 – Regulations dealing with instruments under this Part

2073. Clause 521 allows regulations to be made for:

- the form of entry permits, entry notices, exemption certificates and affected member certificates;
- additional information to be included on or given with entry permits, entry notices, exemption certificates and affected member certificates;
- the manner in which entry permits, entry notices, exemption certificates and affected member certificates are to be given; and
- any other matter in relation to entry permits, entry notices, exemption certificates and affected member certificates.

Part 3-5 – Stand down

Division 1 – Introduction

Clause 522 – Guide to this Part

2074. This clause provides a guide to this Part.

Clause 523 – Meanings of *employee* and *employer*

2075. In this Part, the terms employee and employer mean national system employee and national system employer respectively (as defined in clauses 13 and 14). The rights and obligations of employers and employees set out in this Part apply only to the employment relationships within the scope of the corporations and other constitutional powers that are engaged by clauses 13 and 14.

Division 2 – Circumstances allowing stand down

Clause 524 – Employer may stand down employees in certain circumstances

2076. An employer is able to stand down an employee without pay if specified requirements are met. Subclause 524(1) allows an employer to stand down an employee, if the employee could not be usefully employed because of one of the circumstances set out in the subclause. The following circumstances are specified:

- industrial action (other than industrial action organised or engaged in by the employer);
- a breakdown of machinery or equipment, if the employer cannot reasonably be held responsible for the breakdown; or
- a stoppage of work for any cause for which the employer cannot reasonably be held responsible.

2077. An employer can only stand down an employee if they cannot be usefully employed. If the employer is able to obtain some benefit or value for the work that could be performed by an employee then the employer would not be able to stand down an employee.

2078. An employer can stand down an employee under paragraph 524(1)(a) if the industrial action that results in a stand down is not engaged in by the employer.

Illustrative example

Wilko Corporation (Wilko) has a number of divisions including an Engineering Division and a Maintenance Division. Wilko's employees in the Maintenance Division are engaging in protected industrial action. As a result Wilko's employees in the Engineering Division are not able to continue to perform their duties.

In such circumstances, Wilko could stand down employees in the Engineering Division (subject to other requirements set out in this Part).

2079. An employer can stand down an employee under paragraph 524(1)(b) if a breakdown of machinery or equipment is something for which the employer cannot be held responsible. For the purpose of this paragraph, machinery or equipment is not confined to the employer's machinery but also includes a third party's machinery. The term machinery or equipment is intended to have broad application to cover traditional industrial machinery such as a drill rig and also modern electrical equipment such as computers and other electronic equipment.

Illustrative example

Howison Helicopter Corporation (Howison) manufactures helicopter parts. It has noticed that one of its production machines is not working properly and has arranged for a contractor to service the machine. The contractor does not arrive to service the machine and a few days later it stops working altogether.

As the production machine is inoperable there is no work for some of Howison's employees to perform. Howison can stand down those employees until the machine is repaired (subject to other requirements set out in this Part) because Howison cannot be held responsible for the breakdown of machinery.

A short time after the production machine had been repaired and employees had returned to work, Howison made a decision to downgrade the service and repair of its production machine so that it was not regularly serviced.

Again the production machine breaks down. However, Howison may not be able to stand down its employees because it could be considered responsible for the breakdown of machinery.

An employer can stand down an employee under paragraph 524(1)(c) if the stoppage of work is for a cause for which the employer cannot reasonably be held responsible.

Illustrative Example

A flash flood has prevented employees at Beaver Corporation (Beaver) from entering the premises. It is likely that it will take two days before the premises are safe for employees to return to work.

Beaver is able to stand down its employees during the period that the premises are flooded and are unsafe to work at (subject to other requirements set out in this Part).

2080. An enterprise agreement or a contract of employment may provide for stand down in a wider range of circumstances than as provided in this Part (subclause 524(2)). If an enterprise agreement or a contract of employment does not provide for stand down, or authorises stand down in more limited circumstances, or does not deal with one of the specified circumstances in subclause 524(1), then the provisions for stand down set out in this Part will apply.

2081. A note alerts readers that if an employer is unable to stand down an employee under subclause 524(1) an employer may be able to stand down the employee under an enterprise agreement or a contract of employment.

2082. If an employer stands down an employee under an applicable enterprise agreement or contract of employment, the employer is required to comply with the terms of the enterprise agreement or contract of employment in relation to the stand down, including (for example) any consultation requirements or any requirement to continue to make payments to the employee. A failure to comply with those requirements may constitute a breach of the terms of the agreement or contract of employment. Where an employee is stood down under the terms of an enterprise agreement, any dispute about the stand down could be dealt with under the agreement's dispute settlement clause (if it so provides).

2083. Under subclause 524(3), an employer may decide not to make payments that would otherwise be payable to an employee, during a period when the employee is stood down. This subclause does not prevent the employer paying the employees for that period if the employer chooses to.

Clause 525 – Employee not stood down during a period of authorised leave or absence

2084. If an employee is authorised by the employer to take leave (paid or unpaid) or to be absent from employment then the employee is not taken to be stood down under subclause 524(1). Also, if an employee is entitled to be absent from work, for example on a public holiday, the employee is not stood down.

2085. Under subparagraph 22(2)(b)(ii) (Division 4 of Part 1-2), a period during which an employee is stood down is counted as a period of service and would not break an employee's continuous service with his or her employer. This means that an employee that is stood down continues to accrue, for example, annual leave during the stand down period.

Division 3 – Dealing with disputes

Clause 526 – FWA may deal with a dispute about the operation of this Part

2086. FWA is able to deal with a dispute about the operation of this Part. FWA is specifically permitted to deal with the dispute by arbitration (subclauses 526(1) and 595(3)).

2087. The legislative note under subclause 526(2) alerts readers to the fact that FWA may also deal with a dispute by mediation or conciliation or by making a recommendation or expressing an opinion (see subclause 595(2)).

2088. FWA may only deal with a dispute upon application by:

- an employee who has been (or is going to be) stood down under subclause 524(1);
- an employee who has made a request to take leave to avoid being stood down under subclause 524(1) (and the employer has authorised the leave);
- an employee organisation that is entitled to represent the industrial interests of an employee who has been or is going to be stood down; and
- an inspector.

2089. A person who has been stood down in circumstances where the requirements set out in this Part have not been met is also able to make an application to FWA (subclause 526(3)).

2090. Subclause 526(4) requires FWA to take into account fairness between the parties to the dispute when making orders.

Illustrative Example

Jenny is an employee of Howison and was stood down for three days. The second day of the stand down coincided with the start of five days of annual leave that Jenny had previously requested and which Howison had approved.

Howison did not pay Jenny for the first two days of her annual leave because of the stand down. Jenny applied to FWA for an order that she be paid for those two days during which the stand down occurred as she was on authorised annual leave. As Jenny had been authorised to take leave she would not be taken to be stood down.

Taking into account fairness between the parties, FWA could make an order that Howison pay Jenny for those two days. Alternatively, FWA could make an order that Howison re-credit Jenny with two days of annual leave if she did not receive any payment for those days.

Clause 527 – Contravening an order of FWA dealing with a dispute about the operation of this Part

2091. If an order is made by FWA dealing with a dispute in relation to stand down, a person to whom that order applies must comply with the term or terms of that order.

2092. This clause is a civil remedy provision under Part 4-1 (Civil remedies).

Part 3-6 – Other rights and responsibilities

Division 1 – Introduction

Clause 528 – Guide to this Part

2093. This clause provides a guide to this Part.

Clause 529 – Meanings of *employee* and *employer*

2094. In this Part, the terms employee and employer mean national system employee and national system employer respectively (as defined in clauses 13 and 14). The rights and obligations of employers and employees set out in this Part apply only to the employment relationships within the scope of the corporations and other constitutional powers that are engaged by clauses 13 and 14.

Division 2 – Notification and consultation relating to certain dismissals

Subdivision A – Requirement to notify Centrelink

Clause 530 – Employer to notify Centrelink of certain proposed dismissals

2095. Clause 530 is modelled on section 660 of the WR Act and related provisions.

2096. Subclause 530(1) obliges an employer to notify Centrelink in writing if the employer has decided to dismiss 15 or more employees for reasons of an economic, technological, structural or similar nature, or for reasons including such reasons. The notice must be given as soon as practicable after the decision is made and before the employees are dismissed in accordance with the decision (subclause 530(3)).

2097. The notice must be in the prescribed form and set out the information listed in subclause 530(2).

2098. Subclause 530(4) stipulates that the employer must not dismiss an employee on the basis of the decision made unless the employer has complied with this clause.

2099. This subclause is a civil remedy provision under Part 4-1 (Civil remedies).

2100. Subclause 530(5) clarifies the orders that may be made by a court if it finds an employer has breached subclause 530(4).

Subdivision B – Failure to notify or consult registered employee associations

2101. This Subdivision is modelled on Subdivision D in Division 4 of Part 12 of the WR Act.

2102. Under this Subdivision, an employer is obliged to notify or consult a registered employee association (as that term is defined in clause 12). The reason for this is to enable an

employer to properly identify the body with whom it is obliged to consult, which it should be able to do by reason of the registration of the employee association.

Clause 531 – FWA may make orders where failure to notify or consult registered employee associations about dismissals

2103. Subclause 531(1) identifies the circumstances when FWA may make orders in relation to a failure to notify or consult a registered industrial association. The orders may be made if FWA is satisfied that:

- the employer has decided to dismiss 15 or more employees for reasons of an economic, technological, structural or similar nature, or for reasons including such reasons (paragraph 531(1)(a));
- the employer has failed to comply with subclause 531(2) (notifying relevant registered employee associations) or subclause 531(3) (consulting relevant registered employee associations) (paragraph 532(1)(b)); and
- the employer could have reasonably expected to have known that one of more of its employees were members of a registered employee association when the decision was made (paragraph 531(1)(c)).

2104. An employer complies with subclause 531(2) if the employer gives the relevant registered employee association the specified notification as soon as practicable after making the decision, but before dismissing an employee on the basis of the decision.

2105. An employer complies with subclause 531(3) if the employer gives the relevant registered employee association an opportunity to consult about certain measures as soon as practicable after making the decision, but before dismissing an employee on the basis of the decision.

Clause 532 – Orders that FWA may make

2106. The effect of subclause 532(1) is to give FWA the discretion to make appropriate orders in the public interest to, as far as it can, put employees and relevant registered employee associations in the same position as if the employer had complied with paragraphs 531(2)(a) and (3)(a).

2107. In exercising its discretion, FWA may not make the orders identified in subclause 532(2).

Clause 533 – Application to FWA for order

2108. Clause 533 identifies the employees and relevant registered employee associations (as specified in paragraphs 533(b) and (c)) as those who can apply for an order.

Subdivision C – Limits on scope of this Division

Clause 534 – Limits on scope of this Division

2109. Subclause 534(1) lists the categories of employees to whom this Division does not apply.

2110. Subclause 534(2) is an 'anti-avoidance' provision. The subclause establishes that an employee employed for a specified period of time, specified task or for the duration of a specified season is not excluded if a substantial reason for employing the employee on this basis was to avoid the application of this Division.

Division 3 – Employer obligations in relation to employee records and payslips

2111. This Division sets out obligations in relation to:

- the making and retention of employee records;
- payslips.

2112. The meaning of employee records is taken from the *Privacy Act 1988* and includes a record of personal information relating to the employment of an employee including:

- the engagement, training, disciplining or resignation of the employee;
- the termination of the employment of the employee;
- the terms and conditions of employment of the employee;
- the employee's personal and emergency contact details;
- the employee's performance or conduct;
- the employee's hours of employment;
- the employee's salary or wages;
- the employee's membership of a professional or trade association;
- the employee's trade union membership;
- the employee's recreation, long service, sick, personal, maternity, paternity or other leave; or
- the employee's taxation, banking or superannuation affairs.

Clause 535 Employer obligations in relation to employee records

2113. Subclause 535(1) sets out the obligation on an employer to make, and keep for 7 years, employee records of the kind prescribed by regulations, in relation to each employee. The kind

of records that the regulations might require an employer to keep in relation to an employee include records regarding pay, reasonable additional hours, overtime hours, leave, superannuation, termination of employment (where applicable) and other general matters.

2114. Subclause 535(2) sets out the obligation on an employer to keep records in the form, and to include any information, prescribed by regulations. The regulations could therefore ensure that all employer records:

- are kept in a consistent form; and
- contain minimum information to allow a determination that employees are receiving minimum entitlements.

2115. Subclauses 535(1) and 535(2) are both civil remedy provisions under Part 4-1 (Civil remedies).

Clause 536 – Employer obligations in relation to pay slips

2116. Subclause 536(1) requires an employer to give pay slips to each of its employees within one working day of each pay day.

2117. Subclause 536(2) sets out the obligation of an employer to issue pay payslips in the form, and to include any information, prescribed by regulations. The regulations could therefore ensure that all payslips:

- are kept in a consistent form; and
- contain minimum information to enable employees to determine the make up of their pay over a pay period.

2118. Subclauses 536(1) and 536(2) are both civil remedy provisions under Part 4-1 (Civil remedies).

Part 4-1 – Civil Remedies

Overview

2119. In the Bill, there are a number of obligations imposed on persons that are civil remedy provisions. If a civil penalty provision is contravened, a person may apply to a court for an order for a pecuniary penalty and other orders against the alleged wrong-doer. Each clause in the Bill that is a civil remedy provision is appropriately sign posted, using a legislative note, which draws the reader's attention to this Part of the Bill.

2120. Part 4-1 establishes a single compliance framework for the new workplace relations system. All civil remedy provisions have been set out in this Part using a simple and user friendly table. In respect of each civil remedy provision, the table identifies:

- who may apply to enforce a civil remedy provision;
- the courts to which a person may apply; and
- the remedies and penalties available to courts in enforcing civil remedy provisions.

2121. Having a single compliance framework ensures consistency across the Bill in terms of when particular persons can apply for orders and the types of orders that the courts can make.

2122. This Part also provides for the enforcement of particular types of entitlements (safety net contractual entitlements) in contracts of employment and equivalent statutory entitlements.

Division 1 – Introduction

Clause 537 – Guide to Part 4-1

2123. This clause provides a guide to this Part.

Clause 538 – Meanings of *employee* and *employer*

2124. In this Part, the terms employer and employee have their ordinary meanings. This is because this Part is incidental to other parts of the Bill. A provision in this Part could relate to national system employers and their employees, or to other employers and their employees, depending on the part of the Bill that creates the substantive right or obligation.

- For example, this Part applies to a contravention of Part 2-2 (the NES) by a national system employer and of Part 6-3 (Extension of NES entitlements) by a non-national system employer.

2125. This Part is supported by the constitutional powers that support the substantive rights and obligations in other parts of the Bill.

Division 2 – Orders

Subdivision A – Applications for orders

Clause 539 – Applications for orders in relation to contraventions of civil remedy provisions

2126. Clause 539 deals with the enforcement of civil remedy provisions by a court.

2127. Clause 539 sets out a table of civil remedy provisions. In relation to each civil remedy provision, the table identifies who has standing to apply for an order; the courts to which an application for an order may be made; and the maximum penalty that may be imposed by a court.

2128. In the table:

- Column 1 lists all civil remedy provisions in the Bill.
- Column 2 sets out who has standing to apply to a court for an order in relation to a contravention of a civil remedy provision. Column 2 is to be read subject to clause 540 (which deals with limitations on who may apply for orders).
- Column 3 sets out the courts to which a person may make an application for orders in relation to a contravention of a civil remedy provision. The orders which a particular court can make are dealt with in clauses 545 and 546 in Subdivision B of Division 2.
- Column 4 sets out the maximum pecuniary penalty that may be imposed by a court in relation to a contravention of each civil remedy provision.

Clause 540 – Limitations on who may apply for orders etc

2129. Clause 540 limits when a person or entity referred to in column 2 of the table at clause 539 has standing to bring proceedings.

2130. There are limitations in relation to an employee, an employer, an outworker, an outworker entity, an employee organisation, a registered employee association, an employer organisation and an industrial association.

2131. An employee, employer, outworker or outworker entity may only apply for an order in relation to a contravention of a civil remedy provision (or proposed contravention) if the person is affected (or will be affected by) the contravention.

2132. Generally, an employee organisation or a registered employee association can only apply for an order in relation to a contravention of a civil remedy provision (or proposed contravention), concerning an employee, if the employee is affected by the contravention and the organisation or association is entitled to represent the industrial interests of the employee. However, this limitation does not apply where a workplace agreement or workplace determination applies to an employee organisation. In such circumstances, the employee organisation can make an application either in its own right or concerning an employee or both.

2133. The standing rules in relation to an employee organisation or a registered employee association are designed to be consistent across the Bill to ensure consistency and simplicity in proceedings involving them. The rules also recognise the role employee organisations play in enforcement, particularly in relation to the safety net and instruments that apply to them.

Clause 541 – Applications for orders in relation to safety net contractual entitlements

Clause 542 – Entitlements under contracts

Clause 543 – Applications for orders in relation to statutory entitlements derived from contracts

2134. Clauses 541, 542 and 543 are intended to facilitate and streamline enforcement of employment entitlements for national system employees and employers. They relate to safety net contractual entitlements. Safety net contractual entitlement is defined in clause 12 of the Bill to mean an entitlement in a contract of employment about any of the subject matters described in subclause 61(2) (the matters dealt with by the NES) or subclause 139 (which deals with terms that may be included in a modern award). This includes, for example, a contractual entitlement to wages in excess of minimum wages set out in a modern award or enterprise agreement.

2135. At present, an inspector cannot enforce the contractual entitlements of an employee in any court, even if the inspector is bringing enforcement proceedings in relation to the employee's statutory entitlements.

2136. Clause 541 is intended to provide scope for Fair Work Inspectors (inspectors) to assist employees to enforce safety net contractual entitlements.

2137. Under the Bill inspectors have standing to apply to courts for orders in relation to contraventions of civil remedy provisions (see columns 1 and 2 of the table in clause 539) including, for example, contraventions of the NES or a term of a modern award.

2138. Clause 541 provides that where an inspector applies to a court for an order in relation to a contravention or proposed contravention of a provision or term specified in subclause 541(3), the inspector will also be able to enforce, on behalf of an employee, the employee's safety net contractual entitlements.

2139. The provisions and terms specified in subclause 541(3) are:

- a provision of the NES;
- a term of a modern award;
- a term of an enterprise agreement;
- a term of a workplace determination;
- a term of a national minimum wage order;
- a term of an equal remuneration order.

2140. This clause is designed to streamline and simplify enforcement by allowing inspectors to enforce contractual employee entitlements that relate to a breach of a certain statutory entitlement if, at the same time they are enforcing a breach of a certain statutory entitlement (whether or not the safety net contractual entitlements is about the same subject matter as the statutory entitlement that is being enforced).

2141. Contravention of a safety net contractual entitlement is not a civil remedy provision. This means that a court cannot make orders (including a pecuniary penalty) under clause 545. However, it can make orders, under clause 541, to enforce the contractual entitlements.

2142. Clauses 542 and 543 are designed to improve access to enforcement mechanisms in a federal court by removing technicalities associated with establishing that an employment entitlement that arises under a contract of employment is within the original or accrued jurisdiction of the court.

2143. Subclause 542(1) provides that a safety net contractual entitlement (e.g., a wages entitlement) of a national system employer or employee as it exists from time to time in a contract of employment also has effect as an entitlement under the Bill. Subclause 542(2) ensures that the entitlements created by clause 542 have effect subject to modification by the laws and instruments, including the common law, which give rise to and affect the operation, from time to time, of the corresponding contractual entitlement.

2144. The effect of clauses 542 and 543 is that a national system employer or national system employee may apply to the Federal Court or the Federal Magistrates Court to enforce a statutory entitlement corresponding to a safety net contractual entitlement. This is in addition to the right to pursue breaches of a contract of employment in a State or Territory court.

2145. The purpose of clauses 542 and 543 is to provide a simple mechanism for national system employees and employers to enforce safety net contractual entitlements in a federal court.

2146. Clause 543 is not a civil remedy provision. This means that a court cannot make an order pursuant to clause 545 (which deals with orders that can be made by particular courts in relation to a contravention of a civil remedy provision) or order a pecuniary penalty under clause 545 in relation to a contravention of a statutory entitlement corresponding with a safety net contractual entitlement.

2147. However, clauses 564 and 568 provide that the general powers of the federal courts are not displaced by the Bill. Those courts will be able to make orders to enforce the statutory entitlement in the same way as they make orders to enforce contracts in the original or accrued jurisdiction of the court.

2148. An employee or employer may also elect to progress a claim under clause 543 under the small claims mechanism in the Federal Magistrates Court. This is because proceedings can be dealt with as small claims proceedings where a person applies for an order under Division 2 of Part 4-1, including where a person applies for an order under clause 543. This mechanism is set out at clause 548.

Illustrative example:

The wages term in the modern award that applies to Janey provides that she is entitled to be paid $20.00 per hour ($39,520 per annum). Janey is entitled under her contract of employment with her employer, Benny's Biscuits, to be paid $22.77 per hour ($45,000 per annum). Janey is entitled to four weeks' annual leave under the NES. Janey is entitled under her contract of employment to six weeks' annual leave.

Scenario 1

Since the commencement of her employment, Benny's Biscuits has paid Janey only $20.00 per hour ($39,520 per annum). After one year's service, Janey has accrued six weeks' annual leave under her contract of employment and she agrees with her employer to take six weeks annual leave. However, Benny's Biscuits only pays her for three weeks' annual leave.

In this scenario, Benny's Biscuits has met its statutory obligations in respect of Janey's minimum wage because it has paid the amount required under the modern award. However, Benny's Biscuits has contravened the NES in relation to Janey's annual leave entitlements. A contravention of the NES is a civil remedy provision and an inspector has standing to apply to a court for order(s) under clause 539 in relation to the one week's annual leave owing to Janey under the NES.

In addition, an inspector has standing to apply on Janey's behalf for an order under clause 541 in relation to:

- the difference between $20.00 and $22.77 for each hour worked over the period, being the difference between what Janey was actually paid, and the amount Janey should have been paid under her contract of employment; plus
- the additional two weeks' annual leave Janey is entitled to under her contract (in addition to the four weeks' annual leave she is entitled to under the NES).

Scenario 2

Over the past year, Benny's Biscuits paid Janey only $20.00 per hour ($39,520 per annum) and did not meet its contractual obligations to pay Janey $22.77 per hour. Benny's Biscuits paid Janey her four weeks' annual leave entitlements under the NES (although not under her contract of employment).

In these circumstances, although Benny's Biscuits has breached the terms of Janey's employment contract in two key respects, it has not contravened any term or provision set out in subclause 541(3) and therefore an inspector would not have the power to investigate the contraventions nor the standing to apply to a court to Janey's contractual entitlements.

However, Janey could enforce her contractual entitlements in a State or Territory court or could apply to the Federal Court or the Federal Magistrates Court for an order in relation to a statutory entitlement derived from her contract under clause 543.

Clause 544 – Time limit on applications

2149. This clause places a six year time limit on applications that may be made under the Division in relation to a contravention of a civil remedy provision, a safety net contractual entitlement or an entitlement arising under subclause 542(1) (which deals with entitlements under contracts).

Subdivision B – Orders

Clause 545 – Orders that can be made by particular courts

2150. Subclause 545(1) provides that the Fair Work Divisions of the Federal Court and the Federal Magistrates Court can make any orders they consider appropriate to remedy a contravention of a civil remedy provision.

2151. Without limiting the orders that the Federal Court and Federal Magistrates Court may make, 545(2) sets out a range of orders that they may make in relation to a contravention of a civil remedy provision, including injunctions, compensation and reinstatement orders.

2152. Subclause 545(3) provides that an eligible State or Territory court may make an 'underpayment' order – i.e., where an employer was required to pay an amount under the Bill or a fair work instrument and by not paying that amount has contravened a civil remedy provision.

2153. Subclause 545(4) provides that a court may make an order under this clause on its own initiative, during proceedings before the court, or on application.

2154. As indicated in the notes to clauses 541 and 543, this clause does not apply to contraventions of a safety net contractual entitlement or an entitlement arising under subclause 542(1) (which deals with entitlements under contract).

Clause 546 – Pecuniary penalty orders

2155. Subclause 546(1) provides that the Federal Court, the Federal Magistrates Court or an eligible State or Territory court may, on application, order a person to pay a pecuniary penalty in relation to the contravention of a civil remedy provision.

2156. Subclause 546(2) specifies the maximum pecuniary penalty that may be imposed on an individual or a body corporate. The maximum pecuniary penalty that can be imposed on a body corporate is five times higher than for an individual.

2157. Subclause 546(3) provides that the court may order pecuniary penalties (or part of a pecuniary penalty) to be paid to the Commonwealth, a particular organisation or a person. Ordinarily, any pecuniary penalty awarded by the court is paid to the applicant or, in the case of proceedings brought by a Commonwealth official such as an inspector, to the Commonwealth (on the basis that the applicant represents the Commonwealth).

2158. Also, it gives the court the flexibility to award the penalty to someone other than the plaintiff or applicant where the plaintiff or applicant requests. For example, where an inspector brings penalty proceedings against the director of a company that has gone into liquidation, the

inspector might request the court to pay any penalty to an employee rather than the Commonwealth in circumstances where the employee is out of pocket as a result of the company being liquidated.

2159. Subclause 546(4) provides that a pecuniary penalty payable under a civil remedy provision may be recovered as a debt due to the person to whom that penalty is payable.

2160. Subclause 546(5) provides that a court can make a pecuniary penalty order in addition to one or more orders made under clause 545. The effect of this is that a court is not restricted to the making of only one order in respect of any contravention of a particular civil remedy provision.

2161. For example, in a case involving a contravention of a civil remedy provision related to underpayment of minimum wages under a modern award, the court may order that the employee is entitled to compensation for that underpayment and a pecuniary penalty may also be imposed on the employer for the contravention.

Clause 547 – Interest up to judgement

2162. Subclause 547(1) applies where an employer was required to pay to, or on behalf of, an employee an amount under the Bill or a fair work instrument. The words 'on behalf of' an employee are intended to capture payment such as superannuation payments which are paid to a third party on behalf of an employee.

2163. Under subclause 547(2), the court must, on application, include an amount of interest unless good cause is shown to the contrary. The words 'on application' are intended to make it clear that the court is not required to order interest if a party does not apply for interest. Similarly, where the parties file consent orders in court and the orders do not provide for the imposition of interest, it is intended that a court would not award interest on the amount of its own motion.

2164. Subclause 547(3) provides that in awarding an amount of interest the court must take into account the period between the day the cause of action arose and the day the order is made. It allows the court to award interest on an amount prior to the filing of proceedings in a court.

Division 3 – Small claims procedure

Clause 548 – Plaintiffs may choose small claims procedure

2165. Clause 548(1) provides that proceedings are to be dealt with as small claims proceedings where certain conditions are met. Under the WR Act, the small claims procedure only applied to proceedings in a State magistrates court. This clause extends the small claims procedure to the Fair Work Division of the Federal Magistrates Court.

2166. Subclause 548(2) increases the monetary limit on amounts that may be awarded under the small claims procedure from $10,000 under the WR Act to $20,000. This subclause also allows a higher amount to be prescribed by regulation.

2167. Subclause 548(3) provides that, when dealing with a matter under the small claims procedure, the Fair Work Division of the Federal Magistrates Court (or a State or Territory magistrates court) may act in an informal manner. It will not be bound by formal rules of evidence and it may act without regard to legal forms and technicalities. This is intended to ensure that claims for a relatively small amount of money are dealt with efficiently and expeditiously by the courts.

2168. Subclause 548(4) provides that at any stage of the small claims procedure, the court may amend the papers commencing the proceeding so long as sufficient notice is given to any party adversely affected by the amendment. This is intended to ensure that small claims procedures are not subject to onerous procedural requirements.

2169. Subclause 548(5) provides that a person may only be represented by a lawyer with the leave of a court. The term lawyer is defined in the Bill as a person admitted to the legal profession by a Supreme Court of a State or Territory. Lawyer is intended to have the same or a similar meaning to the legislation regulating the legal profession in most States and Territories. It extends to admitted lawyers and not just lawyers with a current practising certificate.

2170. Subclause 548(6) provides that where a court has given permission for a person to be represented by a lawyer, it may do so subject to conditions designed to ensure that no other party is unfairly disadvantaged. For example, if one party is a company and represented by an employee who is legally qualified as permitted, under the exemption in subclause 548(7) (see below), the court may consider it appropriate for the other party to be represented by a person who is a lawyer.

2171. Subclause 548(7) provides that the person is not taken to be represented by a lawyer if the lawyer is an employee or officer of the person.

2172. Subclause 548(8) enables the making of regulations to provide for a party to be represented, in specified circumstances, by an official of an industrial association.

2173. However, subclause 548(9) permits regulations to be made about representation by an industrial association in a State court only to the extent any law of the State allows.

Division 4 – General Provisions relating to civil remedies

Clause 549 – Contravening a civil remedy provision is not an offence

2174. This clause makes it clear that a contravention of a civil remedy provision is not a criminal offence and therefore cannot result in a criminal conviction.

Clause 550 – Involvement in contravention treated in same way as actual contravention

2175. Clause 550 provides that a person involved in contravening a civil remedy provision is taken to have contravened that provision. The clause sets out when a person is involved in a contravention.

2176. The clause means that a pecuniary penalty for a contravention of a civil remedy provision can also be imposed on a person involved in a contravention. For example, where a company contravenes a civil remedy provision, a pecuniary penalty can also be imposed on a director, manager, employee or agent of the company.

2177. However, while a penalty may be imposed on a person involved in a contravention, the clause does not result in a person involved in a contravention being personally liable to remedy the effects of the contravention. For example, where a company has failed to pay, or has underpaid, an employee wages under a fair work instrument, the director is not personally liable to pay that amount to the employee.

2178. As a result of this clause, more than one penalty can be imposed in respect of a single contravention of a civil remedy provision. For example, if a court were satisfied that a company had contravened a civil remedy provision and a director of the company was involved in the contravention, then the court could impose separate penalties (that is, one on the company and one on the director of the company).

Clause 551 – Civil evidence and procedure rules for proceedings relating to civil remedy provisions

2179. Clause 551 provides that a court hearing a matter under a civil remedy provision must apply the rules of evidence and procedure for civil matters.

Clause 552 – Civil proceedings after criminal proceedings

2180. Clauses 552, 553 and 554 deal with the interaction between civil and criminal proceedings.

2181. Clause 552 provides that a court must not make an order under a civil remedy provision that requires a person to pay a pecuniary penalty if that person has been convicted of an offence that relates to substantially the same conduct to which the order could otherwise be made.

2182. This clause ensures that a person who is convicted of a criminal offence cannot also face a pecuniary penalty in relation to the same conduct.

Clause 553 – Criminal proceedings during civil proceedings

2183. Clause 553 provides that a pecuniary penalty order against a person is stayed where criminal proceedings are commenced or have already commenced against a person for an offence and the offence is constituted by substantially the same conduct alleged to constitute the contravention.

Clause 554 – Criminal proceedings after civil proceedings

2184. Clause 554 provides that criminal proceedings may be commenced against a person for conduct that is substantially the same as that for which a pecuniary penalty has already been imposed against the person.

Clause 555 – Evidence given in proceedings for pecuniary penalty not admissible in criminal proceedings

2185. Subclause 555 provides that evidence given, or documents produced, in proceedings for a pecuniary penalty are inadmissible in subsequent criminal proceedings which relate to substantially the same conduct.

2186. However, under subclause 555(2), subclause 555(1) does not apply where a person gives false evidence in those proceedings.

Clause 556 – Civil double jeopardy

2187. This clause applies the double jeopardy principle to pecuniary penalties under the Bill. Under this clause, where a person is ordered to pay a pecuniary penalty under the Bill in relation to particular conduct, the person is not liable to pay a pecuniary penalty under another law of the Commonwealth relating to the same conduct.

Clause 557 – Course of conduct

2188. Subclause 557(1) provides that where the same person commits two or more contraventions of a civil remedy provision referred to in subclause 557(2), arising out of a course of conduct by that person, the contraventions are to be taken to constitute a single contravention for the purposes of this Part.

2189. For example, if a company contravenes a single term of a modern award in respect of ten employees, these ten contraventions are taken to be a single contravention. This means that the maximum penalty that the Court can impose for the contravention is 300 penalty units.

2190. Similarly, if a company contravenes five separate terms of a modern award in respect of ten employees, these 50 contraventions are taken to be five contraventions. This means that the maximum penalty that the Court can impose is five times a maximum penalty of 300 penalty units.

2191. Subclause 557(2) sets out the civil remedy provisions to which the course of conduct rule applies. Under the WR Act, the course of conduct rule only applies to civil remedy provisions in Part 14 of the WR Act. Broadly speaking, the civil remedy provisions in that Part relate to employee entitlements. There is also a course of conduct rule in relation to industrial action in Part 9 of the WR Act. Subclause 557(2) is similar to the position under the WR Act in that it applies the course of conduct rule to civil remedy provisions dealing with entitlements and industrial action.

2192. Subclause 557(3) provides that the course of conduct rule does not apply to a contravention of a civil remedy provision that is committed by a person after a court has already imposed a pecuniary penalty on the person for an earlier contravention of the same provision.

Clause 558 – Regulations dealing with infringement notices

2193. Clause 558 permits the regulations to provide for an infringement notice scheme for civil remedy provisions in Part 4-1 as an alternative to civil proceedings.

2194. The use of an infringement notice scheme is appropriate where the fault element does not have to be proven – i.e., where it is only necessary to show that an act or omission occurred but where a mental element of, for example, intent or recklessness does not need to be established. An infringement notice scheme provides another option for inspectors to deal with non-compliance rather than court proceedings to enforce a contravention. The scheme provides for a pecuniary penalty.

2195. Subclause 558(2) provides a penalty of one tenth of the maximum penalty that can be imposed for a contravention of a civil remedy provision in column 4 of the table in subclause 539(2). For example, rather than bringing court proceedings to enforce a contravention of a civil remedy provision in Part 4-1, an inspector could issue an infringement notice for three or six penalty units (5 times higher for a body corporate).

Division 5 – Miscellaneous

Clause 559 – Unclaimed money

2196. Section 726 of the WR Act permits employers to pay amounts (e.g., wages) to the Commonwealth where those amounts were owed to former employees whom the employer can no longer contact. The Commonwealth holds these amounts in trust for the former employee (subsection 726(2)).

2197. In practice, the unclaimed amounts are held as special public monies, and the corresponding amounts are credited to a Special Account for 'other trust moneys' established under section 20 of the *Financial Management and Accountability Act 1997*. Under these arrangements, the Commonwealth is required to perpetually hold these unclaimed wages in trust and to perform all reporting obligations on these amounts as trust monies indefinitely.

2198. Clause 559 provides that unclaimed monies paid to the Commonwealth under subclause 559(1) would not be trust monies but instead become the property of the Commonwealth. However, subclause 559(3) requires the Director, on behalf of the Commonwealth, to pay monies to a person where they claim the monies under this clause.

2199. Subclause 559(4) provides that the Consolidated Revenue Fund is appropriated for the purposes of making payments under subclause 559(3).

Part 4-2 – Jurisdiction and powers of courts

Overview

2200. This Part deals with the jurisdiction and powers of courts in matters arising under the Bill.

2201. The Bill confers jurisdiction on the Federal Court of Australia, the Federal Magistrates Court and eligible State and Territory courts (as defined in clause 12).

2202. This Part confers on the Federal Court and the Federal Magistrates Court a general jurisdiction in matters arising under the Bill, and generally requires this jurisdiction to be exercised in the new Fair Work Divisions of those courts.

- Amendments to the *Federal Court of Australia Act 1976* and the *Federal Magistrates Act 1999* establishing the Fair Work Divisions of the Federal Court and the Federal Magistrates Court will be contained in the Transitional and Consequential Bill. The Fair Work Divisions will specialise in certain matters arising under the Bill, and complement the work of FWA.

2203. The jurisdiction of eligible State and Territory courts are generally be limited to the making of orders under Part 4-1 (Civil remedies) in relation to contraventions of civil remedy provisions.

2204. This Part also deals with the general powers of the Federal Court and the Federal Magistrates Court, the conferral on the Federal Court of a general appellate jurisdiction from decisions of eligible State and Territory courts exercising jurisdiction under the Bill, intervention in proceedings by the Minister on behalf of the Commonwealth and when costs may be ordered against a party in proceedings under the Bill.

Division 1 – Introduction

Clause 560 – Guide to this Part

2205. This clause provides a guide to this Part.

Clause 561 – Meanings of *employee* and *employer*

2206. In this Part, the terms employer and employee have their ordinary meanings. This is because this Part is incidental to other parts of the Bill.

Division 2 – Jurisdiction and powers of the Federal Court

Clause 562 – Conferring jurisdiction on the Federal Court

2207. This clause confers original jurisdiction on the Federal Court in relation to any civil or criminal matter arising under the Bill.

2208. The jurisdiction conferred on the Federal Court by the Bill is in addition to (and not intended to derogate from) the jurisdiction conferred on the Federal Court of Australia by section 39B of the *Judiciary Act 1903*. This includes jurisdiction in any matter in which a writ of mandamus or prohibition or an injunction is sought against an officer or officers of the Commonwealth (subsection 39B(1)). Currently subsection 39B(2) defines 'officer or officers of the Commonwealth' to exclude a person holding office under the WR Act. No such exclusion will apply to persons holding office under the Bill. For example, the Federal Court will have original jurisdiction in any matter in which a writ of mandamus or prohibition or an injunction is sought against an FWA Member.

2209. The Bill is also not intended to limit the Federal Court's jurisdiction to hear a case stated or question of law reserved to it by a single judge under subsection 25(6) of the *Federal Court of Australia Act 1976*.

Clause 563 – Exercising jurisdiction in the Fair Work Division of the Federal Court

2210. This clause requires the jurisdiction conferred on the Federal Court by the Bill to be exercised by the Fair Work Division of the Federal Court in certain circumstances, including where:

- an application is made (or a prosecution is instituted) under the Bill;
- a writ of mandamus or prohibition or an injunction is sought against a person holding office under the Bill;
- a declaration or injunction is sought in relation to a matter arising under the Bill;
- an appeal is instituted in the Federal Court from a judgment of the Federal Magistrates Court or a court of a State or Territory in a matter arising under the Bill; or
- a matter arising under the Bill is transferred to the Federal Court from the Federal Magistrates Court, or remitted to the Federal Court by the High Court, or involves a case stated or a question reserved for the consideration of the Federal Court (including by the President of FWA under clause 608).

2211. If part of a proceeding is required to be heard in the Fair Work Division, and another part of the proceeding is required to be heard in the General Division, it is proposed that the Chief Justice of the Federal Court have the discretion to direct that the whole of the relevant proceeding be heard in one division. This will be dealt with by amendments to the *Federal Court of Australia Act 1976* contained in the Transitional and Consequential Bill.

Clause 564 – No limitation on Federal Court's powers

2212. For the avoidance of doubt, this clause provides that nothing in the Bill limits the Federal Court's powers (including its powers to grant injunctions and make declarations) under sections 21, 22 or 23 of the *Federal Court of Australia Act 1976*.

2213. The clause is intended to address authorities which have held that federal industrial laws exhaustively contain the remedies available to enforce those laws. The Federal Court will,

for example, be able to make declarations relating to the meaning of industrial instruments made under the Bill. It will also be able to grant injunctions (including interim or interlocutory injunctions) in matters arising under the Bill, even where not granted under Part 4-1 (Civil remedies).

Clause 565 – Appeals from State and Territory courts

2214. This clause provides that the Federal Court has jurisdiction to hear an appeal from a decision of an eligible State or Territory court exercising jurisdiction under the Bill. It is not necessary for a party to obtain leave of the court to hear the appeal. The Federal Court's appellate jurisdiction will be exclusive. No appeal will lie to other State and Territory courts, or to the High Court, from an eligible State or Territory court exercising jurisdiction under the Bill.

2215. Where the eligible State or Territory court is a court of summary jurisdiction (e.g., a magistrates court), a single judge will be able to exercise the Federal Court's appellate jurisdiction (see subsection 25(5) of the *Federal Court of Australia Act 1976*).

2216. The clause does not limit the Federal Court's appellate jurisdiction under section 24 of the *Federal Court of Australia Act 1976* (including its jurisdiction to hear appeals from the Federal Magistrates Court).

2217. The predecessor to this clause referred to decisions of State or Territory courts in matters 'arising under' the Bill. The 'matters arising' language has been interpreted broadly. A proceeding not brought under the WR Act could still arise under the WR Act. Appeals in broader 'matters arising' will proceed through the usual appellate process in the State or Territory court system.

Division 3 – Jurisdiction and powers of the Federal Magistrates Court

Clause 566 – Conferring jurisdiction on the Federal Magistrates Court

2218. This clause confers jurisdiction on the Federal Magistrates Court in relation to all civil matters arising under the Bill.

2219. The Federal Magistrates Court will not have jurisdiction in criminal matters arising under the Bill, appeals from decisions of State or Territory courts under clause 565 or references from FWA on questions of law. These will be dealt with exclusively by the Federal Court.

Clause 567 – Exercising jurisdiction in the Fair Work Division of the Federal Magistrates Court

2220. This clause requires the jurisdiction conferred on the Federal Magistrates Court by the Bill to be exercised by the Fair Work Division of the Federal Magistrates Court in certain circumstances, including where:

- an application is made under the Bill;
- a declaration or injunction is sought in relation to a matter arising under the Bill; or

- a matter arising under the Bill is transferred to the Federal Magistrates Court from the Federal Court, or remitted to the Federal Magistrates Court by the High Court.

2221. If part of a proceeding is required to be heard in the Fair Work Division, and another part of the proceeding is required to be heard in the General Division, it is proposed that the Chief Federal Magistrate have the discretion to direct that the whole of the relevant proceeding be heard in one division. This will be dealt with by amendments to the *Federal Magistrates Act 1999* contained in the Transitional and Consequential Bill.

Clause 568 – No limitation on Federal Magistrates Court's powers

2222. For the avoidance of doubt this clause provides that nothing in the Bill limits the Federal Magistrates Court's powers (including its powers to grant injunctions and make declarations) under sections 14, 15 or 16 of the *Federal Magistrates Act 1999*. As with clause 564 above, this clause is intended to address authorities which have held that federal industrial laws exhaustively contain the remedies available to enforce those laws. The Federal Court will, for example, be able to make declarations relating to the meaning of industrial instruments made under the Bill. It will also be able to grant injunctions (including interim or interlocutory injunctions) in matters arising under the Bill, even where not granted under Part 4-1 (Civil remedies).

Division 4 – Miscellaneous

Clause 569 – Minister's entitlement to intervene

2223. Under this clause the Minister has a right to intervene in a proceeding in any court in any matter arising under the Bill on behalf of the Commonwealth, if she or he believes it is in the public interest to do so.

2224. If the Minister intervenes in a proceeding, she or he will be taken to be a party to the proceeding and may appeal from any judgment.

2225. The general rule that parties carry their own costs in proceedings arising under the Bill (see clause 570) will not apply where the Minister has intervened in a proceeding or instituted an appeal under this clause.

2226. This clause does not otherwise limit the power of courts to allow interveners pursuant to a statute or the rules of a court.

Clause 570 – Costs only if proceedings instituted vexatiously etc.

2227. This clause provides that a party to a proceeding in a court exercising jurisdiction under this Bill cannot be ordered to pay costs, unless the court forms the view that:

- the party instituted the proceedings vexatiously or without reasonable cause; or
- the party's unreasonable act or omission caused the other party to incur the costs; or

- the party unreasonably refused to participate in a matter before FWA, where the matter arose from the same facts as the proceedings.

2228. The ability of the courts to award costs in workplace relations matters has been limited since 1904 and is part of the policy of discouraging legalism in proceedings before industrial courts. However, this clause departs from section 824 of the WR Act, in that it is limited to proceedings in which a court is exercising jurisdiction under the Bill rather than in any matter arising under the Bill. A similar change was made to clause 565 (see above).

2229. As noted above, the 'matters arising' language has been interpreted broadly. A proceeding not brought under the WR Act could still arise under the WR Act. The broad application of the costs provision has given rise to technical arguments that the provision does not apply in a range of proceedings not involving exercise of jurisdiction under the WR Act and its predecessors (see, e.g., *Tristar Steering and Suspension v Industrial Relations Commission (NSW) (No. 2)* [2007] FCAFC 95; 159 FCR 274). Given the nature and complexity of 'matters arising' that are determined before State Supreme Courts, the Federal Court and the High Court, it is not appropriate that the limitation on costs orders apply to matters arising under the Bill which do not involve the exercise of jurisdiction under the Bill.

2230. The third ground for awarding costs has been added to enable a court to award costs against a party if the party unreasonably refused to participate in a related matter before FWA – i.e., a matter arising from the same facts. This new ground is intended to encourage genuine participation in matters before FWA and quicker and more efficient resolution of disputes.

2231. A court will be able to make a costs order against the Minister, if the Minister intervenes in a matter or institutes an appeal from a judgment in a matter in which the Minister intervened, in accordance with clause 569.

Clause 571 – No imprisonment for failure to pay pecuniary penalty

2232. Clause 571 provides that a person cannot be imprisoned for failing to pay a pecuniary penalty (including fines and civil penalties) imposed by any court under the Bill.

Clause 572 – Regulations dealing with matters relating to court proceedings

2233. This clause enables regulations to be made prescribing the fees to be charged in relation to court proceedings under the Bill.

Chapter 5 – Administration

Overview

2234. FWA will be established as an independent statutory agency to oversee the new workplace relations system. FWA will replace the AIRC, the Australian Industrial Registry, the Australian Fair Pay Commission (AFPC), the AFPC Secretariat and the Workplace Authority with a single agency.

2235. FWA's functions will be broadly similar to those previously performed by the entities it replaces. FWA will be a modern institution with a user-friendly culture. It is not intended that it will adopt processes that are overly formal, legalistic or unnecessarily adversarial.

2236. The Bill encourages this culture by:

- providing FWA with broad powers and discretions as to how it informs itself and how it deals with matters;
- providing for FWA to perform its functions in the most efficient and streamlined manner possible. For example, modern awards and wages functions will be exercised in a more inquisitorial than adversarial manner. In other circumstances, rather than conduct hearings in each case, FWA will be encouraged to use less formal processes and mechanisms where appropriate, including conferences, visiting the workplace or making decisions 'on the papers';
- conferring specific powers on the President who will have responsibility for the management and operation of FWA in relation to the performance of all of its functions. For example, the President will be able to direct FWA Members and the General Manager as to how powers and functions are to be exercised, but not in relation to the conduct or outcome of a particular case;
- enabling FWA staff, subject to direction by FWA Members, to perform a wide range of ancillary non-determinative functions, such as gathering information and making recommendations to FWA Members;
- emphasising that FWA may inform itself as it sees fit, rather than providing parties with a right to be heard through formal hearings; and
- placing limits on formal legal representation before FWA.

2237. To provide the public with an accessible 'one-stop-shop', FWA's operations will be integrated with related but independent institutions:

- compliance, education and advisory functions will be performed by the Office of the FWO; and
- judicial functions will be performed by specialist Fair Work Divisions of the Federal Court and the Federal Magistrates Court, and in some cases State and Territory courts.

Part 5-1 – Fair Work Australia

Division 1 – Introduction

Clause 573 – Guide to this Part

2238. This clause provides a guide to this Part.

Clause 574 – Meanings of *employee* and *employer*

2239. In this Part, the terms employer and employee have their ordinary meanings. This is because this Part is incidental to other parts of the Bill. A provision in this Part could relate to national system employers and their employees, and to other employers and their employees, depending on the part of the Bill that creates the substantive right or obligation.

- For example, FWA's power to deal with disputes will apply to disputes about the NES in Part 2-2 (involving a national system employer and its employee) and disputes about unlawful termination under Part 6-4 (which is supported by the external affairs power and could involve any employer and employee).

2240. This Part is supported by the constitutional powers that support the substantive rights and obligations in other parts of the Bill.

Division 2 – Establishment and functions of Fair Work Australia

2241. This Division establishes and confers functions on FWA. FWA consists of the President, Deputy Presidents, Commissioners and Minimum Wage Panel members. This Division also confers functions on the President.

Subdivision A – Establishment and functions of Fair Work Australia

Clause 575 – Establishment of Fair Work Australia

2242. Clause 575 provides for the establishment of FWA. FWA will consist of the President, Deputy Presidents, Commissioners and between four and six specialist Minimum Wage Panel Members who will perform wage related functions. FWA Member is defined in clause 12 to mean the President, a Deputy President, a Commissioner or a Minimum Wage Panel Member.

A note following the clause alerts the reader that FWA also has a General Manager and staff.

Clause 576 – Functions of FWA

2243. Clause 576 sets out the functions of FWA. With some minor exceptions, functions are conferred on FWA as an entity rather than on individual office holders. Division 4 (which deals with the organisation of FWA) sets out the manner in which FWA can perform its functions.

2244. Subclause (1) lists the broad areas in which FWA has functions. Detailed functions are set out in the various parts of the Bill.

2245. Subclause (2) provides that FWA's functions also include:

- dealing with disputes under clause 595;
- providing assistance and advice about its functions; and
- providing administrative support to state industrial authorities under an arrangement made under clause 650.

2246. FWA's advisory function would extend to include publishing material and guides to assist employers and employees to understand parts of the Bill, such as the 'better off overall test' under Part 2-4 (Enterprise agreements) and what may constitute 'reasonable business grounds' for refusing a request for flexible working arrangements or extensions of parental leave under Part 2-2 (NES).

2247. Additional functions can be conferred on FWA by other Commonwealth laws (including regulations).

Clause 577 – Performance of functions etc. by FWA

2248. Clause 577 controls the manner in which FWA must perform its functions and exercise its powers. The intention is that FWA should deal with matters quickly and avoid unnecessary technicality and formality. In order to achieve this aim, this clause requires FWA to perform its functions and exercise its powers in a way that is fair and just, quick and informal, open and transparent, and promotes harmonious and cooperative workplace relations.

2249. A note following this clause alerts the reader to clause 581 which provides that the President is also responsible for ensuring that FWA performs its functions and exercises its powers in a manner that is efficient and adequately serves the needs of employers and employees throughout Australia.

Clause 578 – Matters FWA must take into account in performing functions etc.

2250. Clause 578 lists the factors which FWA must take into account when performing functions or exercising powers. These include:

- the general objects of the Bill contained in clause 3 and specific objects contained in various Parts of the Bill – e.g., clause 336 (objects for general protections) and clause 381 (objects for unfair dismissal);
- equity, good conscience and the merits of the matter; and
- the need to respect diversity in the workforce.

2251. The objects of the Bill require FWA to take into account Australia's international labour obligations – see paragraph 3(a). Australia has international labour obligations under instruments including:

- *ILO Convention (No. 100) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value* (Geneva, 29 June 1951) [1975] ATS 45;
- *ILO Convention (No. 111) concerning Discrimination in respect of Employment and Occupation* (Geneva, 25 June 1958) [1974] ATS 12;
- the *International Covenant on Economic, Social and Cultural Rights* (New York, 16 December 1966) [1976] ATS 5;
- the *Convention on the Elimination of All Forms of Discrimination against Women* (New York, 18 December 1979) [1983] ATS 9;
- *ILO Convention (No. 156) concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities* (Geneva, 23 June 1981) [1991] ATS 7;
- *ILO Convention (No. 158) concerning Termination of Employment at the Initiative of the Employer* (Geneva, 22 June 1982) [1994] ATS 4; and
- *ILO Recommendation (No. 166) concerning Termination of Employment at the Initiative of the Employer* (Geneva, 22 June 1982).

2252. FWA is required to take into account the need to prevent and eliminate discrimination on various grounds (see paragraph 578(c)). The grounds of discrimination are race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin. These grounds may also be grounds of discrimination in employment under other Commonwealth anti-discrimination laws, including the *Sex Discrimination Act 1984*, the *Disability Discrimination Act 1992*, the *Age Discrimination Act 2004* and the *Racial Discrimination Act 1975*. In taking into account the various grounds of discrimination, FWA will have regard to principles similar to those embodied in Commonwealth anti-discrimination law and *ILO Convention (No. 156)*, cited above.

Clause 579 – FWA has privileges and immunities of the Crown

2253. Clause 579 provides that FWA has the privileges and immunities of the Crown in right of the Commonwealth.

Clause 580 – Protection of FWA Members

2254. FWA is an independent statutory agency. To enhance the independence of FWA Members and provide them with freedom to make decisions, clause 580 provides that an FWA Member has the same protection and immunity as a Justice of the High Court in performing his or her functions or exercising his or her powers, including immunity from suit and immunity against the disclosure of certain information.

Subdivision B – Functions and powers of the President

Clause 581 – Functions of the President

2255. The President is the head of FWA and is responsible for the overall performance of FWA's functions. Clause 581 provides that the President is responsible for ensuring that FWA exercises its functions and powers efficiently, and adequately serves the needs of employers and employees.

2256. A note following the clause alerts the reader to clause 649 which also requires the President to perform his or her functions and powers in a manner that facilitates cooperation with prescribed State industrial authorities.

Clause 582 – Directions by the President

2257. As the head of FWA, the President will be able to give directions to FWA Members and the General Manager about how particular functions are to be performed and powers are to be exercised. Directions may be of a general administrative and procedural nature (for example, directing hours of work or allocating types of work and setting workloads) or relate to a particular matter or class of matter. The direction may not, however, relate to a particular decision of FWA. FWA Members have independence in their decision making.

2258. Subclause 582(4) lists some of the kinds of directions that the President can give including directions about the conduct of 4 yearly reviews of modern awards, annual wage reviews and dealing jointly with or transferring matters.

2259. Subclause 582(5) requires a person to comply with a direction that has been given by the President.

2260. A note following this subclause alerts the reader that the General Manager is not required to comply with a direction that would be inconsistent with the General Manager's functions under the *Financial Management and Accountability Act 1997* or where the direction relates to his or her functions under the *Public Service Act 1999*. The General Manager will also not be required to comply with a direction that relates to the General Manager's review function under clause 653.

2261. For the avoidance of doubt, subclause 582(6) clarifies that a direction given in writing is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*. This provision is declaratory of the law and does not amount to an exemption from the *Legislative Instruments Act 2003*.

2262. The President may repeal, rescind, revoke, amend, or vary a direction under subsection 33(3) of the *Acts Interpretation Act 1901*. This power can only be exercised in a like manner and subject to like conditions as the power to give the direction.

Clause 583 – President not subject to direction

2263. FWA will operate as an independent statutory agency independent from the Executive Government. To this end, clause 583 specifically provides that the President is not subject to direction by or on behalf of the Commonwealth.

Clause 584 – Delegation of functions and powers of the President

2264. With a view to promoting increased efficiency of FWA, clause 584 permits the President to delegate his or her functions and powers to a Deputy President, with the exception of the functions and powers identified in paragraphs 584(1)(a) and (b). That is, the President is not able to delegate his or her power of delegation under clause 625, and must personally determine which FWA Members form part of the Minimum Wages Panel, and must personally manage that Panel in the performance of its functions and the exercise of its powers (clause 620).

2265. When a Deputy President is exercising delegated powers or functions she or he must comply with any directions of the President.

2266. A note following this clause alerts the reader to general rules about the making and effect of delegations in sections 34AA and 34AB of the *Acts Interpretation Act 1901*. The effect of section 34AA is that the power to delegate in clause 584 allows delegation to any person from time to time holding an office or position even if the office or position does not come into effect until after the delegation is given. Section 34AB further defines the effect of delegations, for example by clarifying that powers that may be delegated do not include that power to delegate. Additionally, subsection 33(3) of the *Acts Interpretation Act 1901* permits the President to repeal, rescind, revoke, amend, or vary the written delegation.

Division 3 – Conduct of matters before FWA

2267. Division 3 deals with the conduct of matters before FWA (such as applications, representation by lawyers, FWA's decisions and appeals).

Subdivision A – Applications to FWA

Clause 585 – Applications in accordance with procedural rules

2268. Clause 585 provides that an application to FWA must be in accordance with any procedural rules relating to the particular kind of application. Procedural rules are made by the President under clause 609.

2269. A note following the clause alerts the reader to the fact that certain provisions might impose additional requirements in relation to particular kinds of applications. For example, clause 185 requires an application to FWA for approval of an enterprise agreement to be accompanied by a signed copy of the agreement. Another note alerts the reader to the fact that FWA may dismiss an application that is not made in accordance with the procedural rules (see clause 587).

Clause 586 – Correcting and amending applications and documents etc.

2270. Clause 586 provides that FWA may allow a correction or amendment of any application or document relating to a matter before FWA on terms it considers appropriate, or waive an irregularity in the form or manner in which an application is made.

Clause 587 – Dismissing applications

2271. Subclause 587 allows FWA to dismiss, on its own initiative or on application, an application which is not made in accordance with the Bill, or that is frivolous, vexatious or has no reasonable prospects of success.

2272. However FWA may not dismiss an application to deal with a dispute involving a dismissal under clause 365 or clause 773 on the grounds that the application is frivolous, vexatious or has no reasonable prospects of success.

2273. This provision is not intended to limit FWA's power to dismiss applications for other reasons, such as failure to meet jurisdictional requirements.

Clause 588 – Discontinuing applications

2274. Clause 588 allows a person who has applied to FWA to discontinue an application in accordance with any procedural rules, whether or not the matter has settled.

Subdivision B – Conduct of matters before FWA

Clause 589 – Procedural and interim decisions

2275. Without limiting FWA's power to make decisions, clause 589 enables FWA to make, on its own initiative or on application, procedural decisions as to how, when and where a matter is to be dealt with, and interim decisions in relation to a matter before it.

Clause 590 – Powers of FWA to inform itself

2276. Clause 590 provides FWA with flexibility and discretion as to how it is able to inform itself in relation to any matter before it.

2277. Subclause 590(2) lists some of the ways in which FWA can inform itself, including requiring a person to attend before FWA, inviting submissions, requiring a person to provide copies of documents, records or other information, preparing reports, conducting inquiries, commissioning research, conducting conferences or holding hearings.

Clause 591 – FWA not bound by rules of evidence and procedure

2278. Clause 591 provides that FWA is not bound by the rules of evidence and procedure in relation to a matter before it. This is the case regardless of whether or not FWA holds a hearing in relation to the matter.

Clause 592 – Conferences

2279. FWA may inform itself in a number of ways, including holding an informal conference. Subclause 592(1) empowers FWA to direct a person to attend a conference at a specified time and place for the purpose of performing a function or exercising a power (other than a function or power under Part 2-6 (Minimum wages).

Subclause 592(2) provides that an FWA Member (other than a Minimum Wage Panel Member) or a delegate of FWA is responsible for conducting a conference. (Minimum Wage Panel Members perform specialist wages functions under Part 2-6 and will not be able to conduct a conference.)

2280. Subclause 593(3) provides that, generally, conferences must be held in private, unless otherwise directed by the person conducting the conference. This subclause does not apply to conferences held in relation to unfair dismissal or general protection matters which are generally heard in public (see clauses 368, 374, 398 and 776).

Clause 593 – Hearings

2281. Clause 593 deals with hearings before FWA. To discourage overly formal and adversarial processes, subclause 593(1) provides that, except as otherwise provided for by the Act, FWA is not obliged to hold a hearing in order to perform its functions or exercise its powers. This will allow FWA to operate in an accessible, user-friendly and where appropriate, inquisitorial manner. FWA will still be required to operate in accordance with the principles of natural justice, for example, by providing the parties with a reasonable opportunity to present their case and to respond to the case put against them.

2282. Subclause 593(2) provides that if FWA holds a hearing it must be held in public. However, subclause 593(3) enables FWA to conduct hearings in private and make appropriate suppression orders having regard to the confidential nature of any information and evidence, or any other reason.

2283. To ensure transparency of wages decisions, FWA cannot make suppression orders in respect of the publication of a submission made to FWA for consideration in an annual wage review under Part 2-6 (Minimum wages) (see subclause 289(2)).

Clause 594 – Confidential evidence

2284. Clause 594 enables FWA to make appropriate suppression orders having regard to the confidential nature of any information and evidence or any other reason in relation to a matter before it. Again, this does not apply to the publication of a submission made to FWA for consideration in an annual wage review.

Clause 595 – FWA's power to deal with disputes

2285. Generally, FWA will make decisions as required under the Bill by informing itself as it considers appropriate (including by obtaining the views of affected persons as appropriate) and making a decision based on that information. In a range of circumstances, , FWA will have power to seek to resolve matters between persons in dispute through conciliation or mediation

processes. Subject to a range of access criteria, the Act confers some powers on FWA to impose an outcome if the parties cannot agree – in other words, to arbitrate a dispute between the parties.

2286. Clause 595 gives effect to this policy. Subclause 595(1) provides that FWA may only deal with a dispute if it is expressly authorised to do so under the Bill. Subclause 595(2) enables FWA to deal with those disputes as it considers appropriate, including by a process of mediation or conciliation and/or by delivering an outcome such as a recommendation or opinion. However, subclause 595(3) specifically provides that FWA may only deal with a dispute by arbitration if expressly authorised to do so under the Bill. For the avoidance of doubt, subclause 595(5) emphasises that FWA can only exercise these powers as authorised under clause 595.

2287. The Bill expressly authorises FWA to deal with the following disputes (by authorising FWA to 'deal with a dispute'):

- bargaining disputes under Part 2-4;
- general protections disputes under Part 3-1;
- right of entry disputes under Part 3-4;
- stand down disputes under Part 3-5; and
- disputes arising under a procedure for dealing with disputes in a modern award, enterprise agreement, workplace determination or contract of employment under Part 6-2, including procedures required by clause 146 (modern awards), subclause 186(6) (enterprise agreements) and subclause 273(2) as applied by subclause 297(1) (workplace determinations).

2288. The Bill also authorises FWA, in providing assistance to bargaining representatives for a multi-enterprise agreement in respect of which a low-paid authorisation is in operation, to exercise the powers it could exercise if it were dealing with a dispute (see paragraph 246(2)(b)).

2289. FWA will have power to arbitrate a bargaining dispute or a Part 6-2 dispute if the parties have agreed that it may arbitrate, however the parties describe that process (subclauses 240(4) and 739(4)). FWA will also have power to determine right of entry and stand down disputes, whether or not the parties agree (subclauses 505(2) and 526(2)). FWA will not have power to arbitrate general protections disputes. However, FWA will be required to express an opinion about the prospects of success of court enforcement in certain circumstances (see clauses 370 and 375) and to issue a certificate, allowing court enforcement to proceed, in relation to a dismissal dispute which is unlikely to be resolved (see clauses 369 and 371). FWA will not have power to arbitrate in providing assistance for the low paid under clause 246. This is different from FWA making a special low-paid workplace determination under Division 2 of Part 2-5.

2290. Subclause 595(4) ensures that, when FWA is dealing with any of these disputes, FWA can exercise any of its powers under Subdivision B. For example, FWA could direct a person to attend a conference under clause 592. However, there is an exception for Part 6-2 disputes. The procedure in the modern award, enterprise agreement, workplace determination or contract of

employment can limit the powers that FWA can exercise in dealing with the dispute (see subclause 739(3)).

Subdivision C – Representation by lawyers and paid agents and Minister's entitlement to make submissions

Clause 596 – Representation by lawyers and paid agents

2291. FWA is intended to operate efficiently and informally and, where appropriate, in a non-adversarial manner. Persons dealing with FWA would generally represent themselves. Individuals and companies can be represented by an officer or employee, or a member, officer or employee of an organisation of which they are a member, or a bargaining representative. Similarly, an organisation can be represented by a member, officer or employee of the organisation. In both cases, a person from a relevant peak body can be a representative.

2292. However, in many cases, legal or other professional representation should not be necessary for matters before FWA. Accordingly, clause 596 provides that a person may be represented by a lawyer or paid agent only where FWA grants permission.

2293. Lawyer is defined in clause 12 to mean a person who is admitted to the legal profession by a Supreme Court of a State or Territory, and would include a lawyer who does not hold a current practising certificate.

2294. Paid agent in relation to a matter before FWA is defined in clause 12 to mean an agent (other than a bargaining representative) who charges or receives a fee to represent a person in the matter.

2295. Subclause 596(2) sets out that FWA may grant permission only if:

- it enables the matter to be dealt with more efficiently, having regard to the complexity of the matter;
- it would be unfair not to allow the person to be represented because of the inability of the person to represent themselves effectively; or
- it would be unfair not to allow the person to be represented taking into account fairness between the parties.

2296. In granting permission, FWA would have regard to considerations of efficiency and fairness rather than merely the convenience and preference of the parties.

Illustrative examples

Campbell Enterprises is a mining company with a large human resource division as well as in-house lawyers. Campbell Enterprises has reduced the shifts of one of its employees. Leigh is currently a bargaining representative acting on behalf of himself and a small group of employees who work in the kitchen at one of the mining sites. Leigh goes to FWA to seek an order that his shift changes are capricious and unfair conduct that breach the good faith bargaining requirements set out in Part 2-4.

FWA may decide to grant permission to Leigh to be represented by a lawyer or paid agent in proceedings before FWA, because Leigh may be unable to represent himself effectively, or because it would be unfair to not allow such representation given the nature of the Campbell Enterprises resources and the nature of its representation.

Bahati is seeking a remedy for unfair dismissal. She is a newly arrived immigrant with little understanding of Australian laws and has difficulty reading and writing. FWA may grant her request to be represented by a lawyer or a community advocate.

A union has appealed against an FWA decision concerning the making of an order to cease industrial action. Complex jurisdictional arguments are involved. FWA may allow lawyers to represent both parties given the complexity of the matter.

2297. Subclause 596(3) makes it clear that FWA's permission is not required where a person engages a lawyer or paid agent to make a written submission to FWA under Part 2-3 (Modern awards) or Part 2-6 (Minimum wages).

2298. Subclause 596(4) provides that a person is taken not to be represented by a lawyer or paid agent if the lawyer or paid agent is a bargaining representative, or an employee or officer of the person, organisation, peak council or bargaining representative. The effect of this subclause is that in these circumstances FWA's permission is not required. For example, an officer or employee of a registered organisation or peak council who is legally qualified will be able to represent that body without having to have permission from FWA under this clause.

Clause 597 – Minister's entitlement to make submissions

2299. Clause 597 allows the Minister to make a submission in relation to a matter before FWA, whether or not FWA holds a hearing in relation to the matter, if:

- the matter is before a Full Bench, and it is in the public interest for the Minister to do so; or
- the matter involves public sector employment (as defined in subclause 795(4)).

Subdivision D – Decisions of FWA

Clause 598 – Decisions of FWA

2300. Clause 598 clarifies what is a decision of FWA for the purposes of this Part and in particular, for the following provisions:

- the writing and publication requirements contained in clause 601;
- the ability to correct any obvious error, defect or irregularity under clause 602;
- the power to vary and revoke FWA's decisions under clause 603; and
- the appeal provisions contained in clause 604.

2301. Subclause 598(1) defines a decision of FWA in broad terms as including any decision of FWA however described. The note following this subclause provides some examples of actions of FWA that would be considered to be decisions of FWA. It is intended that, for the purposes of this Part, decisions of FWA should include all of the decisions that FWA makes, both substantive and procedural.

2302. Where this outcome is inappropriate, specific provision is made to limit the decisions to which a provision applies. For example, the requirement in clause 601 to put decisions of FWA in writing is confined to most of the substantive decisions made by FWA. In the case of appeals (which can be brought from any decision of FWA) it is expected that FWA would use its discretion to grant permission to appeal (see clause 604) to refuse to hear and determine inappropriate appeals such as appeals from many of its procedural decisions.

2303. The outcomes of non-arbitral processes which seek to resolve a dispute between parties are not determinative and are not, in that sense, decisions. To avoid any doubt, subclause 598(1) provides that a decision of FWA does not include an outcome of a process carried out in accordance with FWA's powers under subclause 595(2) to deal with a dispute other than by arbitration. The decision of FWA to issue a certificate under clause 369 that a general protections dismissal dispute does not fall within the proviso in subclause 598(1) because it is made under clause 369 and not subclause 595(2).

2304. FWA has power to make and vary a range of instruments such as modern awards, national minimum wage orders and majority support determinations. The decision to make or vary an instrument would generally be a decision to make or vary the instrument in particular terms – e.g., a decision to vary a modern award to add a particular term. The decision could be varied or appealed, including as to the terms of the instrument made or varied. Subclause 598(2) is intended to make it quite clear that this is the case. It provides that, if FWA makes or varies an instrument, a reference in this Part to a decision of FWA includes FWA's decision to make or vary the instrument in the particular terms decided.

2305. Courts and tribunals often make decisions (whether substantive or procedural) by order. Subclauses 598(3) and (4) deal with when FWA will make decisions by order. Subclause 598(3) provides that a decision of FWA that is described as an order (e.g., a bargaining order made

under clause 230), must be made by order. Contravention of one of those orders will be a civil penalty provision. Contravention of other FWA orders may also be potentially subject to a criminal penalty under clause 675.

2306. Subclause 598(4) gives FWA discretion as to whether to make any of its other decisions (including procedural decisions) by order. There will be no civil penalty provision in relation to contravention of one of those orders unless otherwise provided for by the Bill, but a contravention will be potentially subject to a criminal penalty under clause 675. FWA will be able to choose whether a particular decision (especially a minor procedural decision) warrants being made by order.

Clause 599 – FWA not required to decide an application in terms applied for

2307. FWA may deal with matters as it considers appropriate. Clause 599 provides that, except as provided by this Act, FWA is not required to make a decision in relation to an application in the terms applied for. This allows FWA to deal with matters in a way that is fair, just and avoids unnecessary technicalities.

Clause 600 – Determining matters in the absence of a person

2308. Clause 600 allows FWA to determine a matter before it in the absence of a person who has been required to attend before it. This enables FWA to deal with matters quickly and avoid unnecessary delay. However, FWA would still be required to observe natural justice requirements.

Clause 601 – Writing and publication requirements for FWA's decisions

2309. Clause 601 sets out the writing and publication requirements for FWA decisions. Subclause 601(1) requires certain decisions to be in writing, including decisions and interim decisions made under other Parts of the Bill and a decision in relation to an appeal (under clause 604) or review (under clause 605).

2310. Subclause 601(2) provides that FWA may give written reasons for any decision that it makes. It is expected that FWA will provide written reasons for all decisions of significance. An example where a written decision may not be necessary is a procedural decision.

2311. Subclause 601(3) provides that any written decision and reasons must be expressed in plain English and be easy to understand in structure and content. This ensures that materials published by FWA will be simple and accessible.

2312. In order to promote transparency of decision-making subclause 601(4) provides that FWA must publish certain decisions and enterprise agreements (approved by FWA under Part 2-4) as soon as practical after making the decision or approving the agreement. Decisions and agreements must be published on FWA's website or by any other means FWA considers appropriate.

2313. It is intended that the requirement to publish an approved enterprise agreement is not limited by copyright or other restrictions.

2314. Subclause 601(5) provides a number of exceptions to the publication requirement. These include various decisions concerning right of entry permits and conscientious objection certificates. The volume of these decisions would impose a significant burden of FWA that is not justified given that these decisions will be routine and uncontroversial. Additionally, FWA is not required to publish decisions where an order restricting the publication or disclosure about the matter is in place (see clause 594).

2315. Subclause 601(6) clarifies that subclauses 601(1) and (4) do not limit FWA's power to publish or put decisions in writing.

Clause 602 – Correcting obvious errors etc. in relation to FWA's decisions

2316. In order to avoid unnecessary technicality, clause 602 allows FWA, on its own initiative or on application by a person, to correct or amend any obvious error, defect or irregularity in relation to a decision of FWA (including an instrument made by FWA). This clause is intended to be a statutory analogue of the 'slip rule' used by superior courts to correct certain errors in orders (see *Re Timber and Allied Industries Award 1999* [2003] AIRC 1137 at [29]-[30]). This clause does not apply, however, to a modern award or a national minimum wage order. (Clauses 160 and 296 deal with corrections to modern awards and national minimum wage orders.)

Clause 603 – Varying and revoking FWA's decisions

2317. Subclause 603(1) provides that FWA may vary or revoke FWA decisions (including an instrument made by FWA), except for certain decisions specified in subclause 603(3).

2318. Subclause 603(2) provides that FWA can revoke or vary a decision either on its own initiative or on application by persons affected by the decision or persons prescribed in the regulations.

2319. Subclause 603(3) would list certain decisions that FWA must not vary or revoke. A note alerts the reader that FWA is able to vary or revoke decisions, or instruments made by decisions under other provisions of this Act. For instance, clauses 447 and 448 enable protected action ballot orders to be varied or revoked.

Subdivision E – Appeals, reviews and referring questions of law

Clause 604 – Appeal of decisions

2320. Clause 604 provides for an appeal to a Full Bench, with the permission of the Full Bench, in relation to certain decisions of FWA. This provision is modelled on the appeal provisions contained in the WR Act and its predecessors, and is intended to maintain the existing jurisprudence in relation to AIRC appeals, in particular the decision of the High Court in *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194.

2321. An appeal under clause 604 involves an appeal by way of rehearing. Although an appeal can and usually will be conducted by reference to the original evidence, the Full Bench is

not limited to the evidence before the primary decision-maker and can admit further evidence (see subclause 607(2)).

2322. Regardless of the nature of the decision being appealed, the powers of the Full Bench may only be exercised if it identifies some error on the part of the primary decision-maker.

2323. Where the original decision has involved the exercise of a significant level of discretion, the Full Bench should only intervene on the limited grounds set out in *House v The King* (1936) 55 CLR 488, namely that the decision-maker has:

- acted upon a wrong principle;
- been guided by irrelevant factors;
- mistaken the facts; or
- failed to take some material consideration into account.

2324. Subclause 604(1) provides that any person who is aggrieved by a decision made by FWA, other than a decision of a Full Bench or Minimum Wage Panel, has standing to initiate an appeal. Any decision of FWA, other than a decision of a Full Bench or Minimum Wage Panel, is appealable. For the purposes of an appeal, a decision would include a decision to make an FWA instrument (see clause 598).

2325. In some cases the number of potential persons aggrieved by a decision could be large – e.g., where the decision has been to amend an award. The requirement for FWA to grant permission will prevent frivolous or vexatious appeals.

2326. A note following this subclause alerts the reader to clause 613 which provides that generally FWA must be constituted by a Full Bench to decide whether to grant permission to hear an appeal. The exception to this rule is when the decision appealed from was made by a delegate of FWA. In these circumstances, the appeal may be determined by the President or a Deputy President (see subclause 613(2)).

2327. The concept of permission in the Bill is intended to replace the concept of leave currently in the WR Act, using more modern terminology. Other than in the special case of subclause 604(2), the grounds for granting permission to appeal are not specified. It is intended that this would call up all the existing jurisprudence about granting leave to appeal – see e.g., *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* (1998) 89 FCR 200; and *Wan v Australian Industrial Relations Commission* (2001) 116 FCR 481.

2328. Subject to the appellant demonstrating an arguable case of appealable error, it is intended that FWA should have a broad discretion as to the circumstances in which it can grant permission to appeal. Some examples of considerations which have traditionally been adopted in granting leave and which would therefore usually be treated as justifying the grant of permission to appeal include:

- that the decision is attended with sufficient doubt to warrant its reconsideration; and

- that substantial injustice may result if leave is refused.

2329. However, subclause 604(2) requires FWA to grant permission to appeal the decision if FWA is satisfied that it is in the public interest to do so.

2330. A note following this subclause clarifies that the public interest requirement in subclause 604(2) does not apply in relation to an application to appeal from an unfair dismissal decision under Part 3-2. Clause 400 also requires that an appeal on a question of fact in relation to unfair dismissal can only be made on the grounds that the decision involved a significant error of fact.

2331. Subclause 604(3) provides that a person may appeal the decision by applying to FWA. This makes it clear that the general provisions dealing with applications to FWA contained in Subdivision A of Division 3 apply to appeals.

Clause 605 – Minister's entitlement to apply for review of a decision

2332. Clause 605 enables the Minister to seek a review of certain decisions made by FWA. This provision is closely analogous to the appeal provisions contained in clause 604. In each case there is a challenge to the correctness of a decision of FWA. A separate mechanism for Ministerial review of decisions has been provided because the Minister is not an aggrieved person and therefore could not institute an appeal against a decision.

2333. Subclause 605(1) provides that the Minister may apply to FWA for a review of a decision made by FWA, other than a decision of a Full Bench or Minimum Wage Panel, on public interest grounds.

2334. Subclause 605(2) requires FWA to conduct a review of the decision if FWA is satisfied that it is in the public interest to do so.

2335. A note following this subclause alerts the reader to clause 614 which requires FWA to be constituted by a Full Bench when deciding whether to conduct a review and when conducting the review.

2336. Paragraph 605(3)(a) requires FWA to ensure that each person with an interest in the review is made aware of the review by taking such steps as FWA considers appropriate.

2337. Paragraph 605(3)(b) provides that the Minister is entitled to make submissions for consideration in the review.

2338. Subclause 605(4) clarifies that this clause would not affect any rights of appeal or any power of FWA under clauses 604 or 607 that deal with the appeals of decisions and the process for appealing or reviewing decisions. To enable matters to be dealt with efficiently, this subclause also provides that a review of a decision and an appeal of the decision may be dealt with together if FWA considers it appropriate.

Clause 606 – Staying decisions that are appealed or reviewed

2339. Clause 606 deals with the staying of decisions that are appealed or reviewed. Subclause 606(1) provides that if FWA hears an appeal from or conducts a review of a decision under clauses 604 or 605, FWA may order that the operation of the whole or part of the decision be stayed, on any term and conditions that FWA considers appropriate, until a decision in relation to the appeal or review is made or FWA makes a further order.

2340. Subclause 606(2) provides that if a Full Bench is hearing the appeal, the Full Bench or an FWA Member who has seniority in accordance with clause 619 will be able to issue an order under subclause 606(1).

2341. Subclause 606(3) clarifies that FWA cannot make an order that a protected action ballot order be stayed.

Clause 607 – Process for appealing or reviewing decisions

2342. FWA would have the discretion to deal with matters as it considers appropriate, including deciding whether to hold a hearing or decide a matter on the papers. Clause 607 establishes a presumption that appeals will be determined by a hearing.

2343. Subclause 607(1) enables an appeal or review of a decision to be heard or conducted without holding a hearing only:

- if it appears to FWA that the matter can be adequately determined without oral submissions; and
- with the consent of the parties.

2344. Subclauses 607(2) and (3) set out the powers of FWA in relation to an appeal or review.

Clause 608 – Referring questions of law to the Federal Court

2345. Subclauses 608(1) and (2) provide that the President may refer a question of law arising in a matter before FWA for the opinion of the Full Court of the Federal Court.

2346. Subclause 608(3) provides that FWA may still make a decision in relation to a matter even if the Federal Court is determining the question of law. However, FWA may not make a decision if the question of law before the Federal Court is whether FWA may exercise powers in relation to the matter.

2347. Once the Federal Court has determined the question of law, subclause 608(4) requires FWA to make a decision that is not inconsistent with the opinion of the Federal Court. If FWA has made a decision that is inconsistent with the opinion of the Federal Court, subclause 608(5) requires FWA to vary the decision so as to make it consistent with the opinion of the Full Federal Court.

Subdivision F – Miscellaneous

Clause 609 – Procedural rules

2348. The procedures of FWA are generally within the discretion of FWA. Subclause 609(1) provides that the President may make procedural rules about the practice and procedures to be followed by FWA or the conduct of business in relation to matters before FWA. The President is required to consult with other FWA Members before making such rules. Procedural rules would be a legislative instrument and therefore subject to publication requirements and disallowance provisions contained in the *Legislative Instruments Act 2003*.

2349. Subclause 609(2) lists some of the matters that the President may make procedural rules about, including the procedural requirements concerning applications, submissions, directions, notifications and making FWA decisions.

2350. For the avoidance of doubt, subclause 609(3) provides that the power to make procedural rules extends to any functions conferred on FWA by any other law of the Commonwealth.

Clause 610 – Regulations dealing with FWA matters

2351. Clause 610 provides that the regulations may provide for any matter that the procedural rules may also provide for. This will enable certain FWA procedures to be mandated if necessary.

2352. The note following this clause sets out that such regulations prevail over procedural rules to the extent of any inconsistency, referring the reader to subclause 796(2).

Clause 611 – Costs

2353. Subclause 611(1) provides that generally a person must bear their own costs in relation to a matter before FWA.

2354. However, subclause 611(2) provides an exception to this general rule in certain limited circumstances. FWA may order a person to bear some or all of the costs of another person where FWA is satisfied that the person made an application vexatiously or without reasonable cause or the application or response to an application had no reasonable prospects of success.

2355. A note following subclause (2) alerts the reader that FWA also has the power to order costs against lawyers and paid agents under clauses 376, 401 and 780 which deal with termination and unfair dismissal matters.

2356. Subclause 611(3) provides that a person to whom a costs order applies must not contravene a term of the order.

Division 4 – Organisation of FWA

2357. Division 4 deals with the organisation of FWA, which persons may (or are required to) perform functions of FWA, and delegation of FWA's functions and powers to the General Manager and FWA staff.

2358. Generally, powers and functions are conferred on FWA as an entity, rather than on individual statutory officeholders. In most cases, functions will be performed by single FWA Members with ancillary non-determinative functions (such as gathering and collating relevant information and making recommendations) performed by FWA staff under the direction of FWA Members.

2359. However, this Division sets out a number of exceptions to this:

- certain significant functions (such as removing or imposing conditions on all of the entry permits held by union officials) can only be performed by the President or a Deputy President;
- certain powers (such as making, varying or revoking modern awards and conducting appeals) may only be exercised by a Full Bench of three or more FWA Members;
- wages functions must be performed by a Minimum Wages Panel comprising seven members, including the President, three or more Minimum Wage Panel members and up to three other FWA members ensuring flexibility and a balance of generalist and specialist skills; and
- some FWA functions can be delegated to the General Manager and FWA staff.

2360. The President has responsibility for the management and operation of FWA and ensuring the expeditious and efficient discharge of FWA functions. To that end, the President will be able to issue directions about the operation of FWA. For example, the President may give directions about how FWA members perform functions or setting priorities and benchmarks for FWA. The President will have the discretion to require certain functions to be exercised by a Full Bench.

Subdivision A – Functions etc to be performed by a single FWA Member, a Full Bench or the Minimum Wage Panel

Clause 612 – FWA functions etc. may generally be performed by single FWA Member

2361. Subclause 612(1) provides that, in most cases, FWA functions and powers may be performed or exercised by a single FWA Member (other than a Minimum Wage Panel Member), subject to the direction of the President. A note following this subclause alerts the reader to the powers of the President to give directions under clause 582.

2362. Subclause 612(2) provides that action taken under subclause 508(1) must be taken by a Deputy President, unless the President directs that the function be performed or exercised by a Full Bench. Subclause 508(1) empowers FWA to restrict the rights exercisable under Part 3-4 (Right of entry) where those rights have been misused.

2363. Subclause 612(3) provides that the power of the President to delegate a function or power of FWA under clause 625 is not limited by this section.

Clause 613 – Appeal of decisions to be heard by a Full Bench, the President or a Deputy President

2364. Appeal rights and processes are dealt with in clauses 604 and 607 respectively. Clause 613 provides for the manner in which appeal decisions are made by FWA. Appeal decisions involve:

- deciding whether to grant permission to appeal; and
- where permission is granted, deciding the appeal.

2365. Generally, appeal decisions must be made by a Full Bench. However, where the decision appealed is made by the General Manager or FWA staff under delegation, appeal decisions may be made by the President or a Deputy President. Appeal decisions made by the President or a Deputy President under clause 613(2) are not subject to further appeal by a Full Bench.

Clause 614 – Review of decisions by a Full Bench

2366. Clause 605 enables the Minister to apply to FWA to review certain FWA decisions when the Minister believes that the decision is contrary to the public interest. Clause 614 provides that review decisions must be made by a Full Bench. Review decisions involve:

- deciding whether to conduct a review of a decision; and
- if the Full Bench so decides, determining the review in accordance with clause 607.

Clause 615 – FWA functions etc. performed by a Full Bench on direction by the President

2367. The President may give directions under clause 582 as to the manner in which FWA is to perform its functions, exercise its powers or deal with matters. Clause 615 provides that the President may direct that a function or power of FWA is to be performed or exercised by a Full Bench (or more than one Full Bench), either generally or in relation to a particular matter or class of matters.

Clause 616 – FWA functions etc. that must be performed by a Full Bench

2368. Clause 616 provides that certain functions must be performed by a Full Bench (or more than one Full Bench). These functions include:

- decisions about modern awards under Part 2-3 – making modern awards, conducting a 4 yearly review of modern awards, and varying or revoking modern awards made in a 4 yearly review of modern awards; and
- making workplace determinations under Part 2-5.

2369. A note following subclause 616(3) indicates that a single FWA Member may vary or revoke a modern award if it is not made in a 4 yearly review of modern awards or in an annual wage review.

2370. In addition, appeals are generally conducted by a Full Bench (see clause 613).

2371. This ensures that FWA brings a range of expertise and views to bear when exercising its most important functions.

Clause 617 – FWA functions etc. that must be performed by the Minimum Wage Panel

Clause 617 provides that FWA wages functions must be performed by a Minimum Wage Panel. These functions include:

- conducting an annual wage review under Part 2-6; and
- making or varying a national minimum wage order, or determination, in an annual wage review.

2372. A note following subclause 617(1) alerts the reader to clause 620 which contains rules for the constitution and decision making of the Minimum Wage Panel. These rules are designed to ensure that FWA Members with appropriate experience are involved in annual wage review functions.

Subdivision B – Constitution of FWA as a single FWA Member, a Full Bench or the Minimum Wage Panel

Clause 618 – Constitution and decision-making of a Full Bench

2373. Clause 618 contains rules for the constitution and decision-making of a Full Bench.

2374. Subclause 618(1) requires that a Full Bench must consist of at least three FWA Members, including at least one Deputy President. A note following this subclause indicates that a Minimum Wage Panel Member may form part of a Full Bench. This may be appropriate, for instance, where the matter before the Full Bench involves a wage-related issue.

2375. Subclause 618(2) provides that the composition of a Full Bench is a matter within the discretion of the President. This ensures that FWA Members with appropriate experience and qualifications are involved in certain functions.

2376. Subclauses 618(3) and (4) provide that a decision of the majority of the FWA Members on the Full Bench prevails and, in the event that there is no majority, the decision of the FWA Member who has seniority prevails.

Clause 619 – Seniority of FWA Members

2377. Clause 619 sets out the order of seniority of FWA Members. The FWA Member who has seniority is responsible for managing the Full Bench in performing functions and exercising powers of FWA. The FWA Member who has seniority also has the deciding vote where there is no majority decision of the Full Bench under clause 618.

Clause 620 – Constitution and decision-making of the Minimum Wage Panel

2378. The Minimum Wage Panel would perform specialist wage-related functions. Subclause 620(1) sets out the constitution of the Minimum Wage Panel. The Minimum Wage Panel consists of seven FWA members and must include the President and at least three specialist Minimum Wage Panel Members. The remaining members can be drawn from Minimum Wage Panel Members or other FWA Members as the President considers appropriate. This configuration would enable flexibility as to the balance of appropriately qualified specialists and FWA Members with generalist expertise to ensure that due consideration can be given to the wage-setting parameters, such as the macro-economic impact of decisions.

2379. Subclause 620(2) provides discretion to the President to determine which FWA Members form part of the Minimum Wage Panel.

2380. Subclause 620(3) provides that the President is responsible for managing the Minimum Wage Panel in performing its functions and exercising its powers.

2381. Subclauses 620(4) and (5) provide that a decision of the majority of the Minimum Wage Panel prevails. In the event that there is no majority (e.g., where an FWA Member becomes unavailable), the decision of the President prevails.

Clause 621 – Reconstitution of FWA when single FWA Member becomes unavailable

2382. Where an FWA Member becomes unavailable to continue dealing with a matter before it has been completely dealt with clause 621 requires the President to direct another FWA Member to constitute FWA to complete the matter. The note alerts the reader that the new FWA Member would be required to take into account everything that happened previously.

Clause 622 – Reconstitution of FWA when FWA Member of a Full Bench or the Minimum Wage Panel becomes unavailable

2383. Clause 622 sets out the arrangements for reconstitution of FWA in the event that an FWA Member who forms part of a Full Bench or the Minimum Wage Panel becomes unavailable to continue dealing with a matter.

2384. A Full Bench or the Minimum Wage Panel can continue to deal with matter provided the quorum requirements specified in subclause 622(2) are met. If the quorum requirements are not met, subclause 622(3) requires the President to direct another FWA Member to form part of the Full Bench or the Minimum Wage Panel, as the case may be. A note alerts the reader that the new FWA Member would be required to take into account everything that happened previously.

Clause 623 – When new FWA Members begin to deal with matters

2385. Clause 623 requires a new FWA Member who begins to deal with a matter due to another FWA Member becoming unavailable to take into account everything that happened and everything FWA did before the new FWA Member began to deal with the matter.

Clause 624 – FWA's decisions not invalid when improperly constituted

2386. Clause 624 preserves the validity of any decision, including any instrument, made by an improperly constituted Full Bench or Minimum Wage Panel. This will ensure that technical challenges to the validity of FWA instruments are avoided.

Subdivision C – Delegation of FWA's functions and powers

Clause 625 – Delegation by the President of functions and powers of FWA

2387. With a view to ensuring FWA operates efficiently, the President is able to delegate certain powers and functions to the General Manager or a member of FWA staff.

2388. Subclause 625(1) enables the President to delegate a range of procedural powers to the General Manager or a member of FWA staff. These powers are non-determinative and would include powers relating to gathering information, conducting informal conferences and administrative tasks like correcting obvious errors in FWA decisions. These powers will be exercised by FWA staff under the supervision of FWA Members.

2389. For example, the President could delegate the power to investigate and assess unfair dismissal applications or the power to make an initial assessment of whether an enterprise agreement passes the better off overall test under Part 2-4 (Enterprise agreements). However, the power to determine unfair dismissal claims under Part 3-2 or approve enterprise agreements under Part 2-4 would not be able to be delegated and would be performed by an FWA Member.

2390. Paragraph 625(1)(b) provides that the President cannot delegate FWA's power to hold a hearing. Hearings are required to be conducted by FWA Members.

2391. Subclauses 625(2) and (3) permit the President to delegate certain substantive functions and powers to the General Manager, SES staff or acting SES staff or a member of the FWA staff who is in a class of persons prescribed by the regulations. These powers and functions include various publication decisions as well as decisions under Part 3-4 (Right of entry) which were previously performed by the Industrial Registrar. As these functions and powers may be substantive rather than merely procedural, they are only able to be delegated to the General Manager and more senior FWA staff. The regulations would enable powers to be delegated to managers of regional offices who may not be SES Staff.

2392. Subclause 625(4) provides that delegates of FWA must comply with any directions of the President.

2393. A note following this subclause alerts the reader to sections 34AA and 34AB of the *Acts Interpretation Act 1901* which deal with the effect of delegations.

- Section 34AA of the *Acts Interpretation Act 1901* provides that a power of delegation could include a power to delegate the function or power to any person from time to time holding, occupying or performing the duties of, a specified office or position, even if the office or position does not come into effect until after the delegation is given.

- Section 34AB of the *Acts Interpretation Act 1901* further defines the effect of delegations, including by providing that a delegation by the President does not prevent the performance or exercise of a function or power by the President, and clarifying that powers that may be delegated do not include that power to delegate.

- Additionally, under section 34AB of the *Acts Interpretation Act 1901*, a function or power performed or exercised by the delegate, shall, for the purposes of the Act, be deemed to have been performed or exercised by the President.

2394. An instrument of delegation can be revoked or varied under subsection 33(3) of the *Acts Interpretation Act 1901*.

Division 5 – FWA Members

2395. Division 5 outlines the qualifications and process of appointment for FWA Members, and their terms and conditions.

Subdivision A – Appointment of FWA Members

2396. It is intended that all current AIRC members will be statutorily appointed to FWA.

2397. New FWA Members will be appointed by the Governor-General on the recommendation of the responsible Minister after completing the following bipartisan process.

2398. A shortlist of candidates will be scrutinised by a panel comprising:

- a senior officer from the Department with responsibility for workplace relations matters (who will chair the panel);

- a senior official from the Australia Public Service Commission; and

- a senior official from each State (and Territory) Department with responsibility for workplace relations that wishes to participate.

2399. The Minister will also be required to consult with the opposition spokesperson for workplace relations and the head of FWA prior to making any recommendations about appointments to Cabinet.

2400. There are separate statutory qualification requirements for the President, Deputy Presidents, Commissioners and Minimum Wage Panel Members, in recognition of their different roles. All FWA Members, other than Minimum Wage Panel Members, will be appointed on a full-time basis until age 65. Specialist Minimum Wage Panel Members will be appointed on a part-time basis for a period of up to five years.

2401. In addition, members of State industrial tribunals may be appointed to FWA.

Clause 626 – Appointment of FWA Members

2402. Clause 626 outlines the manner of appointment of FWA Members.

2403. Subclauses 626(1) and (2) require that an FWA member is to be appointed by the Governor-General by a written instrument which would specify the member's position (i.e., whether the FWA member is the President, a Deputy President, a Commissioner or a Minimum Wage Panel Member).

2404. Subclause 626(3) provides that if more than one Deputy President is appointed on the same day, then the instrument of appointment must assign a precedence to those Deputy Presidents. A note alerts the reader to paragraph 619(1)(c) which specifies the seniority of FWA members when FWA is constituted as a Full Bench. The FWA Member who has seniority is responsible for managing the Full Bench and has a deciding vote if there is no majority of the Full Bench.

2405. Minimum Wage Panel Members perform specialist wage functions. Individual Minimum Wage Panel Members would not perform broader FWA functions in their own right, other than as part of a Full Bench. Accordingly, subclause 626(4) provides that FWA Members would be appointed either as a generalist FWA Member (that is the President, a Deputy President or Commissioner) or as specialist Minimum Wage Panel Members, but not as both.

Clause 627 – Qualifications for appointment of FWA Members

2406. FWA Members should be appropriately qualified or have relevant knowledge of, or experience in, particular relevant fields. Clause 627 sets out the qualification and experience requirements for each category of FWA Member in recognition of the different roles they perform. The Minister must be satisfied that a person is suitably qualified before recommending an appointment to the Governor-General.

2407. The President will have responsibility for the management and operation of FWA and will be responsible for ensuring the expeditious and efficient discharge of FWA functions. Subclause 627(1) provides that a person may be appointed as the President if the person:

- is or has been a judge of a federal court; or
- has high level knowledge of, or experience in, workplace relations, law or business, industry or commerce. The legal experience requirement would enable the appointment of a person who is or has been a State or Territory judge.

2408. The Deputy Presidents will assist the President by performing many high level functions. Subclause 627(2) provides that a person may be appointed as a Deputy President if the person:

- is or has been a judge of a federal court or, alternatively, has been a judge of a State or Territory court; or
- has high level experience in the field of workplace relations acquired through legal practice, representation of employers or employees, government service or academia.

2409. Deputy Presidents will not be entitled to be styled as a judge and have the same rank and status as a judge by virtue of their appointment to FWA. However, appointment to FWA will not affect the rank, status or entitlements of any member who is a judge (see clause 630). This is consistent with creating a modern institution that moves away from the formal and adversarial processes of the past.

2410. Subclause 627(3) provides that a person may be appointed as a Commissioner if the person has knowledge of, or experience in workplace relations, law or business, industry or commerce.

2411. Minimum Wage Panel Members will perform specialist wage related functions such as conducting annual wage reviews under Part 2-6 (Minimum wages). Subclause 627(4) provides that a person may be appointed as a Minimum Wage Panel Member if the person has knowledge of, or experience in, workplace relations, economics, social policy or business, industry or commerce.

Clause 628 – Basis of appointment of FWA Members

2412. Clause 628 provides that:

- generalist FWA Members (that is, the President, a Deputy President or a Commissioner) hold office on a full-time basis, but the President may approve a Deputy President or Commissioner performing duties on a part-time basis; and.
- Specialist Minimum Wage Panel Members hold office on a part-time basis.

Clause 629 – Period of appointment of FWA Members

2413. Clause 629 sets out the relevant periods of appointment for FWA Members:

- generalist FWA Members (i.e., the President, a Deputy President or a Commissioner) hold office until they resign, are terminated or attain the age of 65 years;
- a member of a prescribed State industrial authority may be appointed as a Deputy President or Commissioner for a period specified in the instrument of appointment (generally, the period of appointment will be concurrent with the tenure of the member's primary appointment);
- part-time Minimum Wage Panel Members hold office for the period specified in the instrument of appointment and this period must not exceed five years. A person can be re-appointed as a Minimum Wage Panel Member (see subsection 33(4A) of the *Acts Interpretation Act 1901*).

Subdivision B – Terms and conditions of FWA Members

Clause 630 – Appointment of a Judge not to affect tenure etc.

2414. Judges and former judges would not be precluded from appointment to FWA. Subclause 630(1) provides that where a judge of a federal court is appointed or serves as an FWA Member, the judge's tenure of office as a Judge, rank, title, status, precedence, salary, annual or other allowances or other rights and privileges as the holder of his or her office as a judge would not be affected.

2415. Subclause 630(2) provides that for all purposes, the judge's service as the FWA Member is taken to be service as a judge.

Clause 631 – Dual federal and State appointments of Deputy Presidents or Commissioners

2416. Clause 631 provides for concurrent appointments to FWA and a prescribed State industrial authority.

2417. Subclause 631(1) provides that a Deputy President or Commissioner may, with the permission of the President, be appointed to a concurrent secondary office as a member of a prescribed State industrial authority.

2418. Subclause 631(2) provides that a member of a prescribed State industrial authority who satisfies the statutory qualifications requirements in clause 627 may be appointed to a concurrent secondary office as a Deputy President or Commissioner of FWA. Note 2 alerts the reader to clauses 629 and 637 which deal with the period of appointment, and remuneration and allowances, of a member of such secondary FWA office holders.

2419. Subclause 631(3) provides that concurrent appointments are subject to the law of the relevant State.

Clause 632 – Dual federal and Territory appointment of Deputy Presidents or Commissioners

2420. Clause 632 permits a Deputy President or Commissioner to hold a concurrent dual federal or Territory appointment with the approval of the President. For example, a Deputy President or Commissioner may be appointed to the Defence Force Remuneration Tribunal or to the Police Arbitral Tribunal of the Northern Territory.

Clause 633 – Outside employment of FWA Members

2421. Generally, FWA Members would only be able to engage in any paid employment outside FWA with the approval of the President.

2422. Subclauses 633(1) and (2) prohibit a Deputy President or Commissioner from engaging in paid employment (except an office or appointment in the Defence Force) outside the duties of his or her office without the President's approval. Failure to obtain the President's approval will result in termination of the Member's appointment (clause 644).

2423. Subclause 633(3) prohibits a Minimum Wage Panel Member from engaging in any paid employment that, in the opinion of the President, conflicts or may conflict with the proper performance of his or her duties.

2424. A member of a prescribed State industrial authority member who holds a concurrent secondary appointment as an FWA Member can continue their primary role as a State industrial authority member without the approval of the President.

Clause 634 – Oath or affirmation of office

2425. Clause 634 provides that an FWA Member must take an oath or affirmation as prescribed in the regulations before undertaking the duties of his or her office.

Clause 635 – Remuneration of the President

2426. The qualification requirements set out in clause 627 would allow a President to be appointed from either a judicial or a non-judicial background.

2427. Subclause 635(1) outlines the President's remuneration if she or he is not a judge. The remuneration of the President is linked to the salary payable to the Chief Justice of the Federal Court.

2428. If the President is a judge and receives a judicial salary that is less than that payable to the Chief Justice of the Federal Court, subclauses 635(2) and (3) provide that the President is to be paid an additional allowance that would make up the difference.

2429. Subclause 635(4) provides that the President or former President would be entitled to be paid an additional amount in accordance with subsection 7(5E) of the *Remuneration Tribunal Act 1973* if the President or a former President held the office of Chief Justice of the Federal Court instead of the office of President.

2430. Payments made pursuant to subsection 7(5E) of the *Remuneration Tribunal Act 1973* are, in effect, 'back payment' of any salary increase determined by the Remuneration Tribunal in respect of federal judges. The Constitution prohibits any diminution in the remuneration of a federal judge (see paragraph 72(iii)). As a result of this prohibition, it is customary to defer the payment of any remuneration increase determined by the Remuneration Tribunal until after the expiry of the disallowance period in respect of the relevant determination. Subsection 7(5E) exists to ensure that federal judges are entitled to the remuneration they would have received had it not been necessary, for constitutional reasons, to provide for the possibility of disallowance.

2431. As the President's salary is linked to that of the Chief Justice of the Federal Court, subclause 635(4) maintains the same position in the case of the President or a former President.

Clause 636 – Application of Judges' Pensions Act to the President

2432. Clause 636 ensures that the President is eligible to be covered by the *Judges' Pensions Act 1968*. The President may elect to leave the public sector superannuation scheme, in which case the *Judges' Pensions Act 1968* applies to him or her.

Clause 637 – Remuneration of FWA Members other than the President

2433. Clause 637 provides that the Remuneration Tribunal will determine the salaries of FWA Members other than the President. This is a common mechanism for determining salaries of statutory appointees.

2434. The Remuneration Tribunal will be required to consider the relativities between FWA Members and holders of other offices whose remuneration is determined by the Tribunal. In doing so, the Remuneration Tribunal may have regard to various matters in determining appropriate remuneration, including judicial salaries.

2435. When no such determination is in operation, FWA Members other than the President will be paid the remuneration that is prescribed by the regulations.

2436. The qualification requirements in clause 627 mean that a person with either a judicial or a non-judicial background could be appointed as an FWA Member.

2437. Subclauses 637(1)-(4) set out the remuneration requirements if an FWA Member is not a current serving judge of a federal court. Subclause 637(4) provides that a member of a prescribed State industrial authority who has a secondary appointment as a Deputy President or Commissioner will not be remunerated in relation to the secondary office but will be entitled to any prescribed travel allowances.

2438. If a current serving judge is appointed to FWA (other than to the position of President), it is intended that she or he will continue to receive his or her judicial salary. However, if the FWA Member's judicial salary is less than the remuneration determined by the Remuneration Tribunal, subclauses 637(5) and (6) provide that the FWA Member is entitled to an allowance that would make up the difference.

2439. It is intended that transitional arrangements will preserve the remuneration and entitlements of any current AIRC members who are statutorily appointed to FWA.

2440. Subclause 637(7) clarifies that this clause does not apply to the President who would be remunerated at the same rate as the Chief Justice of the Federal Court in accordance with clause 635.

Clause 638 – Remuneration of Deputy Presidents or Commissioners performing duties on a part-time basis

2441. Clause 638 sets out the remuneration requirements of Deputy Presidents or Commissioners who perform duties on a part-time basis with the approval of the President. The President and the FWA Member must enter into a written agreement specifying the proportion of duties to be performed on a part-time basis, and the part-time member would be remunerated accordingly on a pro rata basis.

Clause 639 – Leave of absence of FWA Members other than the President

2442. This clause provides that an FWA Member (other than the President) is entitled to recreation leave as determined by the Remuneration Tribunal.

2443. Subclause 639(2) provides that the President may grant an FWA Member leave of absence, other than recreation leave, on such terms and conditions as the President determines.

2444. Subclause 639(3) lists the factors that the Remuneration Tribunal and the President must take into account in determining leave entitlements for an FWA Member.

2445. As the office of President may be held by a federal judge, subclause 639(4) clarifies that this clause does not apply to the President.

Clause 640 – Disclosure of interests by FWA Members other than the President

2446. Subclauses 640(1) and (2) require an FWA Member to disclose to the President any interests and potential conflicts of interests that could conflict with the proper performance of the FWA Member's functions.

2447. If an FWA Member discloses a potential conflict of interest to the President, subclause 640(3) provides that she or he may only deal, or continue to deal with the matter, with the approval of the President.

2448. If, after becoming aware that an FWA Member has a potential conflict in relation to a matter, the President considers that the FWA Member should not (or should no longer) deal with the matter, subclause 640(4) requires the President to direct accordingly. Subclause 640(5) clarifies that the President may give a direction under clause 640(4) even if the President had previously given approval to the FWA Member under clause 640(3).

Clause 641 –Termination of appointment on grounds of misbehaviour or incapacity

2449. This clause specifies the circumstances in which the Governor-General may terminate the appointment of an FWA Member.

2450. Subclause 641(1) provides that the Governor-General may terminate the appointment of a FWA Member for misbehaviour, or where the FWA Member is unable to perform the duties of the office because of his or her physical or mental incapacity. However, to preserve the independence of FWA Members from the executive, the Governor-General can only do so when petitioned by both Houses of Parliament in the same session. This ensures that FWA Members have the same protections from termination that apply to federal judges under paragraph 72(ii) the Constitution.

Clause 642 – Suspension on grounds of misbehaviour or incapacity

2451. Notwithstanding the limits on termination contained in clause 641, clause 642 enables the Governor-General to suspend, on full pay, an FWA Member (other than the President) from office on the grounds of misbehaviour or incapacity. The Minister is required to table a statement in both Houses of Parliament within seven sitting days of the suspension outlining the ground of the suspension. The suspension would operate for a further 15 sitting days unless both Houses of Parliament resolve to request that the Governor-General terminate the appointment. If this occurs, the Governor-General must terminate the appointment.

Clause 643 – Termination of appointment for bankruptcy, etc.

2452. Clause 643 sets out the circumstances in which the Governor-General must terminate the appointment of an FWA Member (other than the President). These circumstances include bankruptcy, unapproved absenteeism in excess of the specified period, or for failure, without reasonable excuse, to meet the disclosure of interest requirements contained in clause 640.

2453. These provisions reflect the standard grounds for termination of appointments of statutory office holders.

Clause 644 – Termination of appointment for outside employment

2454. Clause 644 also requires the Governor-General to terminate the appointment of an FWA Member who breaches the restrictions on outside employment in clause 633.

- Subclause 644(1) requires the Governor-General to terminate the appointment of a Deputy President or a Commissioner for engaging in paid employment outside the duties of his or her office other than with the President's approval.

- Subclause 644(2) requires the Governor-General to terminate the appointment of a Minimum Wage Panel Member for engaging in paid employment that, in the opinion of the President, conflicts or may conflict with the proper performance of his or her duties.

Clause 645 – Resignation of FWA Members

2455. Clause 645 provides that an FWA Member may resign his or her appointment by giving written notice to the Governor-General. This clause also specifies when the resignation takes effect.

Clause 646 – Other terms and conditions of FWA Members

2456. This clause permits the Governor-General to determine the terms and conditions of appointment of FWA Members that are not otherwise provided for in this Bill (including any regulations).

Clause 647 – Appointment of acting President

2457. Clause 647 enables the Governor-General to appoint a person to act as the President during a vacancy in the office or during any period or periods when the President is absent or otherwise unable to perform the duties of the office. (Section 33A of the *Acts Interpretation Act 1901* provides that acting appointments are made on the same basis as appointments, but may only be made for a maximum term of 12 months.)

2458. Subclause 647(2) provides that the actions of a person purporting to act as President would not be invalid merely due to certain specified defects or irregularities.

2459. Subclause 647(3) provides that a person over the age of 65 would be able to be appointed to act as the President.

Clause 648 – Appointment of acting Deputy Presidents

2460. Subclause 648(1) provides that the Governor-General may appoint a person to act as a Deputy President for a specified period (including a period that exceeds 12 months). Acting appointments are made on the same basis as appointments (see section 33A of the *Acts Interpretation Act 1901*).

2461. Subclause 648(2) requires that the Minister be satisfied that the acting appointment is necessary to enable FWA to perform its functions effectively before recommending that the Governor-General make the acting appointment.

2462. Subclause 648(3) provides that the actions of a person purporting to act as Deputy President would not be invalid merely due to certain specified defects or irregularities.

2463. Subclause 648(4) provides that a person over the age of 65 would be able to be appointed to act as a Deputy President.

Division 6 – Cooperation with the States

2464. Division 6 deals with cooperation with the prescribed State industrial authorities (as defined in clause 12).

Clause 649 – President to cooperate with prescribed State industrial authorities

2465. Clause 649 requires the President of FWA to perform his or functions, and exercise his or her powers, in a way that facilitates cooperation between FWA and prescribed State industrial authorities.

2466. For example, subclause 649(2) provides that the President may invite the heads or principal registrars of prescribed State industrial authorities to meet for discussions about matters of mutual interest in relation to workplace relations and to exchange information.

Clause 650 – Provision of administrative support

2467. Clause 650 enables the President to enter into an arrangement with a prescribed State industrial authority in relation to the provision of administrative support. An arrangement may authorise FWA to provide administrative support to the State industrial authority, or authorise the State industrial authority to provide administrative support to FWA. Such an arrangement would enable FWA to have a greater presence in regional areas and to increase collaboration and reduce duplication of facilities and resources. It is envisaged that any service provided under such an arrangement would be on a fee for service basis.

Division 7 – Seals, annual reports and disclosure of information

2468. Division 7 deals with FWA's seal, reviews and reports, and disclosing information obtained by FWA.

Clause 651 – Seals

2469. Documents that are filed with FWA will be sealed to indicate they have been officially received. Clause 651 requires that FWA have a seal and such duplicates as the President directs, which are to be used as authorised by the President and kept in such custody as the President directs. All courts, judges, and persons acting judicially are required to take judicial notice of the seal of FWA. They must treat the seals as evidence that a document bearing them has been duly sealed by FWA unless evidence to the contrary exists.

Clause 652 – Annual Report

2470. FWA will produce an annual report about the operations of FWA to be presented to the Parliament. Subclause 652(1) requires the President to provide an annual report to the Minister as soon as practicable after the end of each financial year about the operations of FWA during that year.

2471. The General Manager must also prepare financial statements in accordance with section 49 of the *Financial Management and Accountability Act 1997* for examination by the Auditor-General under section 57 of that Act. A copy of the financial statements and Auditor-General's report must be included in FWA's annual report (see subsection 57(7) of the *Financial Management and Accountability Act 1997*).

2472. A note alerts the reader to the operation of Section 34C of the *Acts Interpretation Act 1901* which contains rules about annual reports.

2473. For the avoidance of doubt, subclause 652(2) clarifies that subclause 652(1) does not constitute authorisation or requirement to disclose personal information for the purposes of the *Privacy Act 1998*. For provisions about the disclosure of information by FWA, see clauses 654 and 655.

Clause 653 – Reviews and reports about making enterprise agreements

2474. The General Manager will be required to conduct a review and report on developments in making enterprise agreements as part of the General Manager's functions and responsibilities.

2475. Subclause 653(1) provides that reviews are to be completed at the end of each 3 year period. Subclause 653(2) provides that the review must consider the effects of enterprise bargaining on certain vulnerable groups (e.g., women and young people) and any other persons prescribed by the regulations.

2476. Subclauses 653(3) and (4) provide that the General Manager must provide the Minister with a written report of the review as soon as practicable, but no later than six months after the end of the period to which the report relates. The Minister must ensure a copy of the report is tabled in each House of the Parliament within 15 sitting days of the Minister receiving the report.

2477. Subclause 653(5) provides that the report will be a periodic report for the purposes of subsections 34C(4) to (7) of the *Acts Interpretation Act 1901*. These subsections provide a process for extensions to be sought and granted.

Clause 654 – President must provide certain information etc. to the Minister and Fair Work Ombudsman

2478. Clause 654 requires the President to provide certain publicly available information to the Minister and the FWO. Although the information required to be provided is publicly available, or derived from information that is publicly available, the information may contain personal information. This clause authorises the disclosure of personal information for the purposes of Information Privacy Principle 11.1(d) of the *Privacy Act 1988*, which permits the disclosure of personal information where authorised by law.

2479. To assist the Minister to remain informed about trends, research, and matters before FWA, personal information may need to be disclosed from time to time. Similarly, to facilitate information sharing and the efficient operation of FWA it will be necessary for personal information to be disclosed to the FWO at times. As the FWO will be a statutory appointment separate from the Department and Minister, specific provision is made for the disclosure of information to the FWO.

Clause 655 – Disclosure of information by FWA

2480. It will be necessary in certain circumstances for FWA to disclose information acquired or held by FWA, for example:

- where it is necessary or appropriate to do so in the course of performing functions or exercising powers under the Bill; or
- to assist in the administration or enforcement of a law of the Commonwealth, a State or a Territory.

2481. The scope of disclosure would, without specific provision, be limited by the operation of the *Privacy Act 1988* and the *Crimes Act 1914*. Clause 654 authorises the President to disclose information acquired by FWA, or a member of the staff of FWA, in the course of performing functions or exercising powers as FWA.

The power to disclose information will be able to be delegated to a Deputy President under clause 584.

Division 8 – General Manager, staff and consultants

2482. Division 8 is about the General Manager of FWA (whose function is to assist the President), staff of FWA and others assisting FWA.

Subdivision A – Functions of the General Manager

Clause 656 – Establishment

2483. Clause 656 provides that there is to be a General Manager of FWA. The General Manager will be an Agency Head for the purposes of the *Public Service Act 1999* and *Financial Management and Accountability Act 1997*.

Clause 657 – Functions and powers of the General Manager

2484. Subclause 657(1) provides that the General Manager's role is to assist the President to ensure that FWA performs its functions and exercises its powers. A note following this subclause alerts the reader to the General Manager's review function under clause 653. Subclause 657(2) provides that the General Manager has power to do all things necessary or convenient in the course of assisting the President.

Clause 658 – Directions from the President

2485. The General Manager will perform his or her functions subject to direction from the President (see clause 582). However, clause 658 provides that the General Manager is not required to comply with a direction from the President to the extent that compliance would be inconsistent with the General Manager's performance, functions, or exercise of powers under the *Financial Management and Accountability Act 1997* or the *Public Service Act 1999*. The General Manager will also not be required to comply with a direction that relates to the General Manger's review function under clause 653.

Clause 659 – General Manager not otherwise subject to direction

2486. Clause 659 provides that except as otherwise provided for by the Bill, or another Act, the General Manager is not subject to direction by or on behalf of the Commonwealth. In all other respects the General Manager will be subject to direction by the President and independent from the executive government.

Subdivision B – Appointment and terms and conditions of the General Manager

Clause 660 – Appointment of the General Manager

2487. Clause 660 provides that the General Manager is appointed by the Governor-General on a full-time basis for a period not exceeding five years. Subsection 33(4A) of the *Acts Interpretation Act 1901* provides that a General Manager is eligible for reappointment.

2488. The Minister must consult the President before recommending that the Governor-General appoint a General Manager (see paragraph 669(a)).

2489. Short-term and acting appointments will be able to be made by the Minister (see clause 668).

Clause 661 – Remuneration of the General Manager

2490. Subclause 661(1) provides that the Remuneration Tribunal will determine the remuneration of the General Manager. When no such determination is in operation, the General Manager is to be paid the remuneration that is prescribed by the regulations.

2491. Subclause 661(2) provides that the General Manager will be paid any allowances that are prescribed by the regulations.

2492. Subclause 661(3) makes this clause subject to the *Remuneration Tribunal Act 1973*. This ensures the application of provisions of the *Remuneration Tribunal Act 1973* that have the effect, in certain circumstances, of debarring the office holder from receiving remuneration (for instance, if she or he is at the same time a full-time public servant).

Clause 662 – Leave of absence of the General Manager

2493. Clause 662 provides the General Manager's recreational leave entitlements will be determined by the Remuneration Tribunal and that additional leave of absence may be granted by the Minister on such terms and conditions that the Minister determines.

Clause 663 – Outside employment of the General Manager

2494. Clause 663 prohibits the General Manager from engaging in paid employment outside of FWA without the President's approval. Failure to obtain the President's approval will result in termination of the General Manager's appointment (see clause 666).

Clause 664 – Disclosure of interests to the President

2495. Clause 664 requires the General Manager to give written notice to the President of all interests the General Manager has, or acquires, that conflict, or could conflict with the proper performance of his or her duties. Failure to do so without reasonable excuse will result in termination of the General Manager's appointment (see clause 666). This is to ensure impartiality and avoid any actual or perceived conflicts of interests.

Clause 665 – Resignation of the General Manager

2496. Clause 665 provides that the General Manager may resign by giving the Governor-General written resignation. Resignation will take effect from the day it is received by the Governor-General, or a later day if one is specified in the resignation.

Clause 666 – Termination of appointment of the General Manager

2497. This clause specifies the circumstances in which the Governor-General may or must terminate the appointment of the General Manager.

2498. Subclause 666(1) provides the Governor-General with discretion to terminate the General Manager on grounds for misbehaviour or where the General Manager is unable to perform the duties of the office because of his or her physical or mental incapacity.

2499. Subclause 666(2) sets out the circumstances in which the Governor-General is required to terminate the appointment of the General Manager. These circumstances include bankruptcy, unapproved absenteeism in excess of the specified period, engaging in paid employment without the President's approval (see clause 663) and failure to disclose to the President interests (pecuniary or otherwise) that conflict or could conflict with the proper performance of functions (see clause 664).

2500. These provisions reflect the standard grounds for termination of appointments of statutory office holders.

2501. Subsection 33(4) of the *Acts Interpretation Act 1901* provides that the power to appoint a person includes a power to suspend the appointment of that person.

Clause 667 – Other terms and conditions of the General Manager

2502. Clause 667 permits the Governor-General to determine the terms and conditions of the General Manager's appointment that are not otherwise provided for in this Bill (including any regulations). However, the Minister must consult the President before recommending any additional terms and conditions to the Governor-General – see clause 669(b).

Clause 668 – Appointment of acting General Manager

2503. Clause 668 enables the Minister to appoint a person to act as the General Manager during a vacancy in the office or during any period or periods when the General Manager is absent or otherwise unable to perform the duties of the office. Section 33A of the *Acts Interpretation Act 1901* provides that acting appointments are made on the same basis as appointments, but may only be made for a maximum term of 12 months.

2504. Subclause 668(2) provides that the actions of a person purporting to act as General Manager are not invalid merely due to certain specified defects or irregularities.

2505. The Minister must consult with the President before appointing an acting General Manager (see paragraph 669(c)).

Clause 669 – Minister to consult the President

2506. Clause 669 requires that the Minister consult the President about decisions regarding the appointment of the General Manager, acting arrangements and determining additional terms and conditions of the General Manager.

Subdivision C – Staff and consultants

Clause 670 – Staff

2507. Subclause 670(1) provides that the staff of FWA must be engaged under the *Public Service Act 1999*. Subclause 670(2) provides that, for the purposes of the *Public Service Act 1999*, the General Manager and the staff of FWA will constitute a Statutory Agency and that the General Manager is the head of that Agency.

Clause 671 – Delegation by General Manager to staff

2508. Subclause 671(1) allows the General Manager to delegate his or her functions and powers to a member of the FWA staff who is an SES employee, or acting SES employee. The General Manager will also be able to delegate to a member of the FWA staff who is of a class of persons prescribed by the regulations. This will enable powers to be delegated to managers of regional offices who may not be SES employees.

2509. Subclause 671(2) provides that a delegate must comply with any directions from the General Manager when performing delegated functions or exercising delegated powers.

2510. A note alerts the reader to sections 34AA and 34AB of the *Acts Interpretation Act 1901* which concern the effect of delegations. The effect of section 34AA is that the power to delegate in clause 671 allows delegation to any person from time to time holding an office or position even if the office or position does not come into effect until after the delegation is given. Section 34AB further defines the effect of delegations, for example by clarifying that powers that may be delegated do not include that power to delegate.

2511. Additionally, an instrument of delegation can be varied or revoked under subsection 33(3) of the *Acts Interpretation Act 1901*.

Clause 672 – Persons assisting FWA

2512. Clause 672 provides that FWA may be assisted in performing its functions by certain persons who are made available to FWA. Such persons may be:

- employees of Agencies (within the meaning of the *Public Service Act 1999*); or
- officers and employees of a State or Territory; or
- officers and employees of authorities of the Commonwealth, a State or a Territory.

2513. Persons assisting FWA will be subject to the direction and control of the General Manager.

Clause 673 – Consultants

2514. Clause 673 allows the General Manager to engage suitably qualified persons as consultants to FWA.

Division 9 – Offences relating to Fair Work Australia

2515. Division 9 sets out offences relating to Fair Work Australia. The offences provisions replicate a number of the existing provisions contained in sections 814 to 823 of the WR Act relating to proceedings before the AIRC. The level of penalty is consistent with equivalent provisions in the WR Act.

2516. The provisions have been drafted to rely on the Criminal Code. The Criminal Code distinguishes between the physical and fault elements of an offence. It distinguishes between three forms of the physical element: conduct, a result of conduct and a circumstance in which conduct, or a result of conduct, occurs. It provides a fault element in relation to each form of physical element where the law does not itself specify the fault element. For a conduct element, intention is the default fault element. For an element consisting of circumstance or a result, recklessness is the default fault element (which will also be satisfied by proof of intention or knowledge).

2517. For some provisions in this Division, the fault element that applies to a particular physical element in an offence has been set out in the provision but, in most cases, the default fault elements apply. This is set out in the tables below.

2518. There is a range of penalties for offences under this Division. The highest penalty in respect of an offence under this Division is 12 months' imprisonment. However, the court has discretion to impose a lower penalty (section 4D of the *Crimes Act 1914*). The court may also impose a fine instead of imprisonment (section 4B(2) of the *Crimes Act 1914*).

Clause 674 – Offences in relation to FWA

2519. These provisions create a number of offences in relation to proceedings before FWA. The offences draw on forms of common law contempt of court.

2520. Subclause 674(1) provides that it is an offence for a person to engage in conduct that insults or disturbs an FWA Member in the performance of their functions, or exercise of their powers, as an FWA Member. The penalty is 12 months' imprisonment.

Element of offence	Physical element	Fault element
Conduct	Engaging in conduct	Intention (default)
Result	Conduct insults or disturbs a FWA Member in the performance of functions, or the exercise of powers as an FWA Member	Recklessness (default)

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2521. Subclause 674(2) provides that it is an offence for a person to recklessly use insulting language towards a FWA Member performing their functions or exercising their powers as a FWA Member. The penalty is 12 months' imprisonment.

Element of offence	Physical element	Fault element
Conduct	Use of language towards another person	Intention (default)
Circumstance	Language is insulting	Recklessness (specified)
Circumstance	The other person is an FWA Member performing functions, or exercising powers, as an FWA Member	Recklessness (default)

2522. Subclause 674(3) provides that it is an offence for a person to engage in conduct where that conduct interrupts a matter before FWA. The penalty is 12 months' imprisonment.

Element of offence	Physical element	Fault element
Conduct	Engaging in conduct	Intention (default)
Result	Conduct interrupts a matter before FWA	Recklessness (default)

2523. Subclause 674(4) provides that it is an offence for a person to engage in conduct which creates, or contributes to creating or continuing a disturbance and the disturbance is in or near a place where FWA is dealing with a matter. The penalty is 12 months' imprisonment.

Element of offence	**Physical element**	**Fault element**
Conduct	**Engaging in conduct**	**Intention (default)**
Result	**Conduct creates, or contributes to creating or continuing, a disturbance**	**Recklessness (default)**
Circumstance	**Disturbance is in or near a place where FWA is dealing with a matter**	**Recklessness (default)**

2524. Subclause 674(5) provides that it is an offence for a person to use words (whether by writing or speech) that are intended to improperly influence a FWA Member or a person attending before FWA. The penalty is 12 months' imprisonment.

Element of offence	**Physical element**	**Fault element**
Conduct	Use of words (whether by writing or speech) that are intended to improperly influence another person	Intention (specified)
Circumstance	The other person is an FWA Member or a person attending before FWA	Recklessness (default)

2525. Subclause 674(6) provides that a reference to FWA or a FWA Member in 674(1) to (5) includes a delegate of FWA.

2526. Subclause 674(7) provides that it is an offence if a person publishes a statement and the statement implies or states that a FWA Member has engaged in misconduct as a FWA Member and the publication is likely to have an adverse effect on public confidence in FWA. The provision only applies where the FWA Member has not engaged in misconduct. The penalty is 12 months' imprisonment.

Element of offence	**Physical element**	**Fault element**
Conduct	Publishing a statement	Intention (default)
Circumstance	Statement implies or states that an FWA Member (whether identified or not) has engaged in misconduct in relation to the performance of functions, or the exercise of powers, as an FWA Member	Recklessness (default)
Circumstance	FWA has not engaged in that misconduct	Recklessness (default)
Result	Publication is likely to have a significant adverse effect on public confidence that FWA is properly performing its functions and exercising its powers	Recklessness (default)

2527. The note at the end of paragraph 674 alerts the reader to the fact that sections 135.1, 135.4, 139.1, 141.1 and 142.1 of the Criminal Code create offences of using various dishonest means to influence a Commonwealth public official (e.g., general dishonesty, conspiracy to defraud etc.).

2528. The second note at the end of paragraph 674 alerts the reader to other offence provisions that may apply in relation to FWA. Clauses 676 and 678 of the Bill and sections 36A, 37, 38 and 40 of the *Crimes Act 1914* create offences relating to interference with a witness. Section 39 of the *Crimes Act 1914* makes it an offence to destroy anything that may be required in evidence.

Clause 675 – Contravening an order of FWA

2529. Clause 675 provides that it is an offence for a person to engage in conduct which contravenes an order of FWA, except for the orders set out in paragraph (2). The penalty is 12 months' imprisonment.

Element of offence	Physical element	Fault element
Circumstance	FWA has made an order under the Act	Strict liability
Circumstance	Either the order or a term of the order applies to the person	Strict liability
Conduct	Engaging in conduct	Intention (default)
Result	Conduct contravenes the order or a term of the order	Recklessness (default)

2530. Subclause 675(3) provides that paragraphs (1)(a) and (b) are strict liability provisions. The application of strict liability to a physical element of an offence means that a fault element does not have to be proven for those elements of the offence.

2531. The Criminal Code makes clear that where an offence has an element that is strict liability, a defence of honest and reasonable mistake of fact may be raised in relation to that element.

2532. The note in this clause alerts the reader to the fact that strict liability is defined in section 6.1 of the Criminal Code.

Clause 676 – Intimidation etc.

2533. Clause 676 provides that a person commits an offence if they threaten, intimidate, coerce or prejudice another person because that person has given or proposes to give information or documents to FWA. The penalty is 12 months' imprisonment.

2534. This provision is intended to ensure that FWA is able to inform itself in dealing with a matter before it by preventing the intimidation of persons participating in FWA processes, including witnesses.

2535. Information has its ordinary meaning and includes evidence given before FWA. Document is defined by s 25 of the *Acts Interpretation Act 1901* and would include written submissions made to FWA.

Element of offence	Physical element	Fault element
Conduct	Threatening, intimidating, coercing or prejudicing a person	Intention (default)
Circumstance	Person does so because the other person has given, or proposed to give, information or documents to FWA	Recklessness (default)

Clause 677 – Offences in relation to attending before FWA

2536. Clause 677 sets out offences in relation to attending before FWA.

2537. Subclause 677(1) provides that a person commits an offence if they have been required to attend before FWA and fail to attend as required. The penalty is 6 months' imprisonment.

Element of offence	Physical element	Fault element
Circumstance	Person has been required to attend before FWA	Recklessness (default)
Conduct	Person fails to attend as required	Intention (default)

2538. Subclause 677(2) provides that a person commits an offence if they attend before FWA and FWA requires the person to take an oath or make an affirmation and the person refuses or fails to be sworn or to make an affirmation as required. The penalty is 6 months' imprisonment.

Element of offence	Physical element	Fault element
Circumstance	Person attends before FWA	Recklessness (default)
Circumstance	FWA requires the person to take an oath or make an affirmation	Recklessness (default)
Conduct	The person refused or fails to be sworn or to make an affirmation as required	Intention (default)

2539. Paragraph 677(3) provides that a person commits an offence if the person attends before FWA and FWA requires the person to answer a question or produce a document and the person refuses to do so or fails to answer the question or produce the document. The penalty is 6 months' imprisonment.

Element of offence	Physical element	Fault element
Circumstance	Person attends before FWA	Recklessness (default)
Circumstance	FWA requires the person to answer a question or produce a document	Recklessness (default)
Conduct	The person refused or fails to answer the question or produce the document	Intention (default)

2540. Paragraph 677(4) provides that paragraphs (1), (2) and (3) do not apply if the person has a reasonable excuse.

2541. The note alerts the reader to the fact that a defendant bears an evidential burden to prove they have a reasonable excuse and refers the reader to subsection 13.3(3) of the Criminal Code.

2542. Paragraph 677(5) makes it clear that a reference in this section to FWA or a FWA Member includes a delegate of FWA.

Clause 678 – False or misleading evidence

2543. 678(1) creates an offence of giving false or misleading evidence in connection with FWA proceedings. The penalty is 12 months' imprisonment.

Element of offence	Physical element	Fault element
Conduct	Witness gives sworn or affirmed evidence	Intention (default)
Circumstance	Evidence given in a matter before FWA or before a person taking evidence on behalf of FWA for use in a matter that the witness will start by application to FWA	Recklessness (default)
Result	Evidence is false or misleading	Recklessness (default)

2544. Clause 678(2) creates an offence for inducing a person to give false or misleading evidence in connection with FWA proceedings. The penalty is 12 months' imprisonment.

Element of offence	**Physical element**	**Fault element**
Circumstance	A person has been or will be required to appear as a witness in a matter before FWA	Recklessness (default)
Conduct	A person induces, threatens or intimidates the witness to give false or misleading evidence in a matter	Intention (default)

Part 5-2 – Office of the Fair Work Ombudsman

Division 1 – Guide to this Part

Clause 679 – Guide to this Part

2545. This clause provides a guide to this Part.

Clause 680 – Meanings of *employee* and *employer*

2546. In this Part, the terms employer and employee have their ordinary meanings. This is because this Part is incidental to other parts of the Bill. A provision in this Part could relate to national system employers and their employees, or to other employers and their employees, depending on the part of the Bill that creates the substantive right or obligation.

- For example, the FWO could investigate a suspected contravention of Part 2-2 (the NES) by a national system employer or of Part 6-3 (Extension of NES entitlements) by a non-national system employer.

2547. This Part is supported by the constitutional powers that support the substantive rights and obligations in other parts of the Bill.

Division 2 – Fair Work Ombudsman

2548. This Division deals with the establishment, functions and terms and conditions of appointment in relation to the statutory office of the FWO.

Subdivision A – Establishment and functions and powers of the Fair Work Ombudsman

Clause 681 – Establishment

This clause establishes the statutory office of the FWO.

Clause 682 – Functions of the Fair Work Ombudsman

2549. The functions of the FWO are set out in this clause.

2550. The broad function of the FWO is to promote: harmonious and cooperative workplace relations and compliance with this Act (defined in clause 12 to include the regulations) and fair work instruments (defined in clause 12 to include modern awards, enterprise agreements and orders of FWA such as national minimum wage orders).

2551. A key aspect of this function is to assist employers, employees and organisations to understand and comply with their rights and obligations under this Bill and fair work instruments by providing education, assistance and advice to employees, employers and organisations. This may involve:

- providing general information (e.g., fact sheets, guides and other guidance materials);

- developing and implementing targeted education campaigns for a particular industry or class of employees (e.g., juniors, employees in hospitality, foreign workers);

- assisting parties to access 'self-help' remedies (e.g., by providing information about the small claims procedure); and

- responding to requests for advice or information (e.g., about the NES or a particular employee's entitlements under a modern award).

2552. It is also a function of the FWO to monitor compliance, inquire into and investigate contraventions of this Bill and fair work instruments (paragraphs 682 (b) and (c)). Inspectors will be able to exercise a range of powers to determine compliance. Subdivision D of Division 3 of this Part sets out the powers that inspectors have and when those powers may be exercised.

2553. The FWO will also have discretion to inquire into and investigate contraventions of a safety net contractual entitlement. Safety net contractual entitlement is defined in clause 12 to mean an entitlement in a contract of employment about any of the subject matter described in subclause 61(2) or subclause 139(1). This includes, for example, a contractual entitlement to wages in excess of minimum wages set out in a modern award or enterprise agreement. It would also include a contractual entitlement to paid parental leave. Subclause 706(2) sets out the circumstances in which inspectors can investigate contraventions of safety net contractual entitlements.

2554. The functions of the FWO emphasise preventative compliance (e.g., through education and advice) and co-operative and voluntary compliance (e.g., through enforceable undertakings). However, in some circumstances it will be necessary for the FWO to enforce compliance more formally, through compliance notices or court proceedings. The FWO will be able to institute proceedings (paragraph 682(d)) and may represent employees who are or may become parties to proceedings under this Bill or a fair work instrument where such representation would promote compliance with this Act or the fair work instrument (paragraph 682(f)).

2555. It is also important that the FWO will be able to work with other relevant law enforcement agencies including State and Territory health and safety authorities, police, the Australian Tax Office and the Australian Competition and Consumer Commission. The FWO can refer matters to relevant authorities (paragraph 682(e)). The circumstances in which the FWO can disclose or authorise the disclosure of information to relevant authorities is set out in Subdivision E of Division 3 of this Part.

2556. Other Acts may also confer functions on the FWO (paragraph 682(g)).

Clause 683 – Delegation by the Fair Work Ombudsman

2557. Subclause 683(1) permits the FWO to delegate all or any of the FWO's functions or powers under any Act (other than his or her powers as an inspector) to a member of the staff of the Office of the Fair Work Ombudsman (see clause 697) or to an inspector. The delegation must be in writing.

2558. This provision recognises that many of the day to day functions of the FWO will be performed by staff members of the Office of FWO and inspectors. For example, in order to effectively provide education and advice to employees, employers and organisations, it will be necessary for the FWO to delegate this function to a number of people within the Office of the FWO. Delegation may be to an individual or to a class of staff (e.g., SES officers) and could authorise, for example, the institution of legal proceedings or the disclosure of information to other authorities.

2559. Subclause 683(2) provides that a delegate must comply with any directions of the FWO in performing functions or exercising powers under a delegation. This allows for appropriate supervision and accountability and ensures consistency of approach for delegated functions.

Clause 684 – Directions from the Minister

2560. This clause permits the Minister to give general directions to the FWO. For example, the Minister could direct the FWO to focus attention on a particular industry by implementing a targeted education campaign or a direction to focus attention on serious rather than minor or accidental contraventions. The FWO is required to comply with any such direction. However, the FWO is not required to comply with any direction to the extent that the direction relates to the FWO's performance of functions, or exercise of powers, under the *Public Service Act 1999*.

2561. Subclause 684(1) provides that written directions given by the Minister are legislative instruments for the purposes of the *Legislative Instruments Act 2003*. This provision has substantive operation as such directions would not ordinarily be legislative instruments. This provision gives greater oversight by Parliament in relation to directions by the Minister and ensures transparency. The effect of this provision is that any such directions will be required to be lodged with the Federal Register of Legislative Instruments and tabled in Parliament. However, as explained in the two notes to this provision, the directions will not be subject to disallowance or the sunsetting provisions of the *Legislative Instruments Act 2003*.

Clause 685 – Minister may require reports

2562. Clause 685 permits the responsible Minister to direct the FWO to produce reports in relation to a function, or the functions, of the Office of the FWO. For example, a report could outline the educational approaches for promoting compliance with the Bill or a fair work instrument. The FWO must comply with the direction.

2563. Subclause 685(3) provides that directions and reports under this clause are not legislative instruments within the meaning of section 5 of the *Legislative Instruments Act 2003*. This provision is merely declaratory of the law and is included to assist readers. It does not amount to an exemption from the *Legislative Instruments Act 2003*.

Clause 686 – Annual report

2564. The FWO will produce an annual report about the operations of the Office of the FWO to be presented to the Parliament.

2565. Subclause 686(1) requires the FWO to provide an annual report to the Minister as soon as practicable after the end of each financial year about the operations of the Office during that year. A note alerts the reader to the operation of section 34C of the *Acts Interpretation Act 1901* which contains rules about annual reports.

2566. Subclause 686(2) clarifies, for the avoidance of doubt, that subclause 686(1) does not constitute authorisation or requirement to disclose personal information for the purposes of the *Privacy Act 1998*. For provisions about the disclosure of information by the FWO, see Subdivision E of Division 3 of this Part.

Subdivision B – Appointment and terms and conditions of the Fair Work Ombudsman

Clause 687 – Appointment of the Fair Work Ombudsman

2567. This clause provides for the appointment of the FWO.

2568. The FWO must be appointed by the Governor-General by written instrument (subclause 687(1)). In order to be appointed, the Minister must be satisfied that the person has suitable qualifications or experience and is of good character (subclause 687(2)).

2569. The FWO holds office on a full-time basis (subclause 687(3)) for the period specified in the instrument of appointment, not exceeding 5 years (subclause 687(4)).

2570. A person can be re-appointed as the FWO. A note to this clause alerts the reader that subsection 33(4A) of the *Acts Interpretation Act 1901* provides that the power to appoint in an Act includes a power to re-appoint.

Clause 688 – Remuneration of the Fair Work Ombudsman

2571. Subclause 688(1) provides that the Remuneration Tribunal will determine the remuneration of the FWO. When no such determination is in operation, the FWO is to be paid the remuneration that is prescribed by the regulations.

2572. Subclause 688(2) provides that the FWO will be paid any allowances that are prescribed by the regulations.

2573. Subclause 688(3) also ensures the application of provisions of the *Remuneration Tribunal Act 1973* that have the effect, in certain circumstances, of debarring the office-holder from receiving remuneration (for instance, if she or he is at the same time a full-time public servant).

2574. This is a common mechanism for determining salaries of statutory appointees.

Clause 689 – Leave of absence of the Fair Work Ombudsman

2575. This clause provides that the FWO's recreation leave entitlements will be determined by the Remuneration Tribunal and that additional leave of absence may be granted by the Minister on such terms and conditions as the Minister determines.

Clause 690 – Outside employment of the Ombudsman

2576. Clause 690 prohibits the FWO from engaging in paid employment outside the duties of his or her office without the Minister's approval.

Clause 691 – Disclosure of interests to the Minister

2577. This clause requires the FWO to give written notice to the Minister of all interests the FWO has or acquires that conflict or could conflict with the proper performance of his or her duties. Failure to do so will result in termination of the FWO's appointment (see paragraph 693(2)(c)). This is to ensure impartiality and avoid any actual or perceived conflicts of interests.

Clause 692 – Resignation of the Fair Work Ombudsman

2578. This clause provides that the FWO may resign his or her appointment by giving written notice to the Governor-General. This clause also specifies when the resignation takes effect.

Clause 693 – Termination of appointment of the Fair Work Ombudsman

2579. This clause specifies the circumstances in which the Governor-General may or must terminate the FWO's appointment.

2580. Subclause 693(1) provides that the Governor-General may terminate the FWO's appointment for misbehaviour, or where the FWO is unable to perform the duties of the office because of his or her physical or mental incapacity.

2581. Subclause 693(2) sets out the circumstances in which the Governor-General is required to terminate the appointment of the FWO. These circumstances include bankruptcy, unapproved absenteeism in excess of the specified period, engaging in paid employment outside the duties of his or her office without the Minister's consent (see clause 690) and failure to disclose interests (pecuniary or otherwise) that conflict or could conflict with the proper performance of functions, to the Minister in accordance with clause 706.

2582. These provisions reflect the standard grounds for termination of appointments of statutory officeholders.

2583. Section 33(4) of the *Acts Interpretation Act 1901* provides that the power to appoint a person includes a power to suspend the appointment of that person.

Clause 694 – Other terms and conditions of the Fair Work Ombudsman

2584. This clause permits the Governor-General to determine the terms and conditions of the FWO's appointment that are not otherwise provided for in this Act (including the regulations).

Clause 695 – Appointment of acting Fair Work Ombudsman

2585. Clause 695 enables the Minister to appoint an acting FWO during any period or periods when the FWO is absent or is otherwise unable to perform the duties of the office.

Section 33A of the *Acts Interpretation Act 1901* provides that acting appointments are made on the same basis as appointments, but may only be made for a maximum term of 12 months.

2586. Subclause (2) provides that the actions of a person purporting to act as the FWO would not be invalidated merely due to certain specified defects or irregularities.

Division 3 – Office of the Fair Work Ombudsman

2587. This Division deals with the establishment and staffing arrangements of the Office of the FWO.

Subdivision A – Establishment of the Office of the Fair Work Ombudsman

Clause 696 – Establishment of the Office of the Fair Work Ombudsman

2588. This clause establishes the Office of the FWO.

Subclause 696(2) provides that the Office of the FWO consists of:

- the FWO;
- the staff of the Office of the FWO; and
- the inspectors appointed under clause 700.

Subdivision B – Staff and consultants etc

Clause 697 – Staff and consultants etc.

2589. This clause provides that all staff of the Office of the FWO must be persons engaged under the *Public Service Act 1999*.

2590. Subclause 697(2) provides that the FWO and the Office of the FWO together constitute a Statutory Agency for the purposes of the *Public Service Act 1999* and that the FWO is the head of that Statutory Agency.

2591. Agency Heads have a number of functions under the *Public Service Act 1999* in relation to the operations of their organisations, including responsibility for staffing arrangements as an employer on behalf of the Commonwealth and financial management.

Clause 698 – Persons assisting the Fair Work Ombudsman

Clause 698 provides that the FWO may be assisted by:

- employees of Commonwealth Departments, Executive Agencies or Statutory Agencies (see the *Public Service Act 1999*);
- officers and employees of a State or Territory; or
- officers and employees of authorities of the Commonwealth, a State or a Territory.

2592. The services of these persons can be made available to the FWO in connection with the performance of any of his or her functions.

2593. This ensures that the FWO has the ability to draw upon the skills, expertise and experience of these employees or officers to assist in the performance of the FWO's functions.

2594. The note provides an example of how this may occur, for example, by State or Territory governments offering or agreeing to make their employees' services available to assist the FWO in providing education in a particular region. Another example of assistance that may be provided could be responding to requests for advice or information within a region.

Clause 699 – Consultants

2595. Clause 699 permits the FWO to engage persons having suitable qualifications and experience as consultants to the Office of the FWO either generally or in relation to a specific matter or function. For example, the FWO may consider it appropriate to engage a specialist forensic accountant in relation to a specific case.

Subdivision C – Appointment of Fair Work Inspectors

Clause 700 – Appointment of Fair Work Inspectors

2596. Subclause 700(1) permits the FWO to appoint such Fair Work Inspectors (inspectors) as are necessary from time to time. The FWO may only appoint persons who have been appointed, or are employed, by the Commonwealth or by a State or Territory. Inspectors are authorised to perform certain functions and have certain powers whilst they are inspectors.

2597. In order to be appointed as an inspector, the FWO must be satisfied that the person is of good character (subclause 700(2)).

2598. Inspectors are appointed for the period specified in the instrument of appointment, not exceeding four years (subclause 700(3)).

2599. A person can be re-appointed as an inspector. A note to this clause alerts the reader that subsection 33(4A) of the *Acts Interpretation Act 1901* provides that the power in an Act to appoint includes a power to re-appoint.

Clause 701 – Ombudsman is a Fair Work Inspector

2600. This clause provides that the FWO is an inspector. This provision avoids the need for the FWO to appoint himself or herself as an inspector.

Clause 702 – Identity cards

2601. This clause provides that the FWO must issue an identity card to an inspector. The Minister must issue an identity card to the FWO. Subclause 702(3) provides that the identity card is to be in the form approved by the FWO and must contain a recent photograph of the inspector.

2602. Subclause 702(4) requires an inspector to carry his or her identity card at all times when performing functions or exercising powers as an inspector. Therefore, in the ordinary course of performing functions or exercising compliance powers inspectors would be expected to

show their identify card to identify themselves. Subclause 708(3) expressly requires an inspector to show his or her identity card either before or as soon as practicable after entering premises.

2603. Subclause 702(5) creates an offence of not returning an identity card to the FWO (in the case of an inspector) or the Minister (in the case of the FWO) within 14 days of a person ceasing to be an inspector. Identity cards must be returned as soon as practicable after an inspector ceases to be an inspector (e.g., their appointment ends) in order to prevent the improper use of such cards. The penalty is one penalty unit.

2604. Subclause 702(6) provides that the offence is one of strict liability. It is appropriate that this offence is one of strict liability because of the consequences of a person who is not an inspector misusing an identity card (e.g., unauthorised exercise of statutory powers, including entry to premises without consent).

2605. The paragraph includes a note referring to section 6.1 of the Criminal Code which provides that there is no fault element for the physical element of the offence, and that the defence of mistake of fact is available in relation to the physical element of the offence.

2606. Subclause 702(7) also provides that subclause 702(5) does not apply if the identity card was lost or destroyed. A note alerts the reader that the defendant bears an evidential burden in relation to this defence in accordance with subsection 13.3(3) of the *Criminal Code*.

Subdivision D – Functions and powers of Fair Work Inspectors

Clause 703 – Conditions and restrictions on functions and powers

2607. Clause 703 provides that the functions and powers conferred on an inspector are subject to such conditions and restrictions as are specified in his or her instrument of appointment under clause 700.

2608. The powers of inspectors are collectively referred to as compliance powers and include powers set out in clauses 708, 709, 711, 712, 714 and 716 in this Part.

Clause 704 – General directions by the Fair Work Ombudsman

2609. This clause provides that the FWO can give a written direction to inspectors relating to the performance of their functions or the exercise of their powers as inspectors. The direction must be of a general nature. For example, the FWO could direct inspectors to comply with investigation or litigation protocols that would apply to all matters. An inspector must comply with these directions. This ensures a consistent approach to the way that powers or functions of inspectors are exercised.

2610. Written directions given by the FWO under this clause are legislative instruments for the purposes of the *Legislative Instruments Act 2003*. The effect of this provision is that any such directions will be required to be lodged with the Federal Register of Legislative Instruments and tabled in Parliament.

Clause 705 – Particular directions by the Fair Work Ombudsman

2611. This clause provides that the FWO can give a direction to a particular inspector about the performance of that inspector's functions or the exercise of that inspector's powers. For example, the FWO could direct an inspector to prepare an internal report about a particular matter or whether to pursue or discontinue litigation. An inspector must comply with these directions.

2612. A particular direction under subclause 705(1), whether given in writing or otherwise, is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*. This provision is merely declaratory of the law and is included to assist readers. It does not amount to an exemption from the *Legislative Instruments Act 2003*.

Clause 706 – Purpose for which powers of inspectors may be exercised

2613. This clause specifies when an inspector can exercise compliance powers (other than a power to issue a compliance notice or, in the case of the FWO, the power to accept an enforceable undertaking). The purposes are collectively referred to as compliance purposes.

2614. Under this clause an inspector may exercise compliance powers for determining whether this Bill (including the regulations) or a fair work instrument is being or has been complied with (paragraph 706(1)(a)). Fair work instrument is defined in clause 12 to mean modern awards, enterprise agreements, workplace determinations and orders of FWA such as national minimum wage orders.

2615. This clause also provides that an inspector can exercise compliance powers where the regulations or another Act confers a function or power on inspectors (paragraphs 706(1)(c) and 706(1)(d)).

2616. A note to subclause 706(1) alerts readers that the powers in clauses 715 and 716 that deal with enforceable undertakings and compliance notices can only be exercised for the purposes of remedying the effects of certain contraventions (e.g., compliance notices can only be issued in relation to entitlements under the NES, a modern award, an enterprise agreement, a workplace determination, a national minimum wage order or an equal remuneration order).

2617. This section also permits an inspector to exercise compliance powers to determine whether certain entitlements in a contract of employment are being, or have been complied with. These entitlements are referred to as safety net contractual entitlements. Safety net contractual entitlement is defined in clause 12 to mean an entitlement in a contract of employment about any of the subject matters described in subclause 61(2) or subclause 139(1). This includes, for example, a contractual entitlement to wages (including where the contractual entitlement is more generous than the minimum wage entitlement in an applicable modern award or enterprise agreement).

2618. However, subclause 706(2) provides that an inspector can only exercise compliance powers in relation to a safety net contractual entitlement where the inspector reasonably believes that one party to the contract (either the employer or the employee) has not complied with one or more of the following in relation to the other party to the contract:

- a provision of the NES;
- a term of a modern award;
- a term of an enterprise agreement;
- a term of a workplace determination;
- a term of a national minimum wage order; and
- a term of an equal remuneration order.

2619. For example, an inspector can only exercise compliance powers in relation to a safety net contractual entitlement if she or he also has a reasonable belief that the employer has also not complied with one or more of the above statutory obligations.

2620. However, the safety net contractual entitlement does not need to be the same subject matter as the statutory entitlement.

Illustrative example

Mark is employed by Super Chef. Mark is contractually entitled to be paid $55,000 per annum. However, Super Chef has only paid Mark $45,000 in accordance with the modern award that applies to him.

Even though wages are a safety net contractual entitlement, an inspector would not be able to investigate whether Super Chef had a contractual obligation to pay Mark the additional $10,000 unless the inspector reasonably believed that Super Chef had not complied with a relevant statutory obligation, referred to in 706(2), that applied to Mark.

However, if an inspector reasonably believed that Super Chef had not paid Mark his annual leave entitlement at the appropriate base rate of pay, the inspector would be able to investigate both the failure to pay annual leave and Mark's contractual wage entitlement. Base rate of pay is defined in clause 16 to mean the rate of pay that is payable to an employee for his or her ordinary hours of work (excluding allowances etc).

Where Mark's base rate of pay in his contract of employment is higher than the base rate of pay that would otherwise apply to him under the modern award, Mark's base rate of pay for calculating his annual leave entitlement would derive from his contract of employment. If Super Chef has not paid Mark's annual leave in accordance with the applicable base rate of pay, it has not complied with a relevant statutory obligation.

Clause 707 – When powers of inspectors may be exercised

2621. This clause permits an inspector to exercise compliance powers during working hours in question or at any other time if the inspector reasonably believes that it is necessary to do so for one or more of the purposes set out in clause 706 (compliance purposes).

2622. There is no requirement for a complaint to be made before an inspector can exercise compliance powers.

Clause 708 – Power of inspectors to enter premises

2623. An inspector may enter premises without the consent of the occupier if the inspector reasonably believes that the Act (including the regulations) or a fair work instrument applies to work that is being, or applied to work that has been, carried out on the premises (paragraph 708(1)(a)).

2624. The inspector may also enter a business premises if the inspector reasonably believes that there are records or documents relevant to compliance purposes on the premises, or accessible from a computer on the premises (paragraph 708(1)(b)). The term business premises has its ordinary meaning (i.e., where business activities are carried out and/or documents relating to those activities are kept, including a home office).

2625. However, an inspector must not enter a premises used for residential purposes, unless she or he reasonably believes that the work referred to in subclause 708(1) is being performed on the residential part of the premises. This ensures that inspectors can properly investigate contraventions relating to outworkers whilst also providing appropriate protection of privacy for residential premises.

2626. An inspector cannot use force to enter premises. However, if an occupier prevents entry by an inspector they may contravene section 149.1 of the Criminal Code which deals with obstructing Commonwealth officials.

2627. Subclause 708(3) provides that either before or as soon as practicable after entering the premises, an inspector must show his or her identity card to the occupier (or another person who apparently represents the occupier). The requirement to produce identification is appropriate given the nature of the powers that inspectors can exercise.

2628. This requirement is consistent with restrictions in most other State and Commonwealth jurisdictions that require an inspector to identify him or herself prior to entry to premises.

Clause 709 – Powers of inspectors whilst on premises

2629. Clause 709 sets out the compliance powers that an inspector may exercise, whilst on premises, for one or more of the compliance purposes referred to in clause 706.

2630. A person may be guilty of an offence under the Criminal Code if she or he obstructs an inspector in the performance of his or her functions under this clause (see section 149.1 of the Criminal Code).

Inspect

2631. Paragraph 709(a) provides an inspector with broad power to inspect any work, process or object. This terminology is intended to simplify and modernise the previous provision that referred to inspection of 'work, material, machinery, appliance, article or facility', and in substance, has the same effect. For example, an inspector could inspect a room that an employer requires a permit holder to use, and the route that an employer requires a permit holder to take to use that particular room.

2632. An inspector is not authorised to inspect items (such as personal documents or effects) that have no connection to compliance purposes.

Interview

2633. Paragraph 709(b) permits an inspector to interview any person whilst on premises with their consent. A person may also agree to be interviewed by an inspector at another time or place.

Identify who has relevant documents

2634. Paragraph 709(c) authorises an inspector to require a person to tell him or her who has custody of, or access to, a record or document.

2635. This information is often necessary in order for inspectors to require the person with custody of, or access to, a record or document to produce the record or document (see paragraph 709(d)) or issue a notice to produce to that person (see clause 712). The intention is to allow workplace inspectors to quickly and accurately identify documents that are relevant to their investigations and therefore facilitate compliance with this Act or a fair work instrument.

2636. The terms document and record are defined in the *Acts Interpretation Act 1901* and include any paper or other material on which there is writing and information stored or recorded by a computer (see section 25 of the *Acts Interpretation Act 1901*).

Request records and documents

2637. Paragraph 709(d) permits an inspector to require a person who has custody of, or access to, a record or document to produce the record or document to the inspector either while the inspector is on the premises, or within a specified period. Unlike a written notice to produce (see clause 712), the specified time for production of documents under this clause is at the inspector's discretion and could include immediate production. For example, inspectors could require the production of time and wages records or documents whilst on premises.

2638. Where a person is asked to produce documents that are kept electronically, section 25A of the *Acts Interpretation Act 1901* provides that the information is to be provided in a form that is capable of being understood by the inspector.

2639. There is no penalty for failure to comply with an inspector's request under paragraph 709(d). However, an inspector may require production of the documents or records by issuing a formal written notice to produce within a specified period of not less than 14 days (see clause

712). Failure to comply with a notice to produce is a civil remedy provision under Part 4-1 (Civil remedies).

2640. A note at the end of this clause refers the reader to clauses 713 and 714 that deal with the privilege against self-incrimination in relation to documents produced by an individual.

Inspect and copy documents

2641. Paragraph 709(e) allows inspectors to inspect and make copies of any record or document that is kept on the premises by the employer or is accessible from a computer that is kept on the premises by the employer, so long as the document is relevant to compliance purposes. The power to copy a document or record includes the power to copy the whole or a part of the document or record.

2642. The intention of this power is to allow inspectors to inspect and copy documents and records while on premises without those documents being produced to him or her.

2643. In the ordinary course, this power should only be necessary where an employer fails to comply with a request or requirement to provide documents under paragraph 709(d) or clause 712 or where the inspector reasonably believes that the exercise of this power is necessary to avoid the destruction of evidence.

Take samples

2644. Paragraph 709(f) allows inspectors to take samples of any goods or substances in accordance with the procedures prescribed by the regulations.

Clause 710 – Persons assisting inspectors

2645. Clause 710 permits an inspector to take an assistant onto premises, without the consent of the occupier, to assist the inspector in the performance of his or her investigation. For example, an assistant could be a translator/interpreter, forensic accountant or IT specialist.

An assistant may only accompany an inspector onto premises if the FWO is first satisfied that the assistance is necessary and reasonable, and that the assistant has suitable qualifications and experience to properly assist the inspector (subclause 710(1)).

2646. This assessment by the FWO (or his or her delegate) is required in respect of each assistant, and on each occasion that an assistant accompanies an inspector onto premises. For example, in circumstances where an employee or an employer is from a non-English speaking background, the FWO may consider that it is appropriate for an inspector to take an interpreter onto premises to assist in their investigation.

2647. Whilst on premises, the assistant may do anything the inspector requires the assistant to do to assist the inspector exercise his or her compliance powers. However, the assistant must not do anything unless directed by the inspector and the assistant must not do anything that the inspector does not have power to do (even where directed to do so by the inspector) (subclause 710(2)). This provision ensures that assistants are always subject to directions from inspectors, and the same restrictions that apply to inspectors.

2648. Subclause 710(3) provides that anything done by the assistant is taken, for all purposes, to have been done by the inspector. This means that the inspector is accountable for the actions of the assistant and is intended to ensure the close supervision of assistants by the responsible inspector.

Clause 711 – Power to ask for person's name and address

2649. This clause provides that where an inspector reasonably believes that a person has contravened a civil remedy provision, the inspector may require the person to provide the inspector with his or her name and address. This is designed to enable inspectors to investigate contraventions of the Bill in an expedient manner by ensuring the correct identification of persons who may have contravened a civil remedy provision.

2650. Subclause 711(2) provides that in the event that the inspector reasonably believes that the name or address provided to them by the person is false, the inspector may require the person to give evidence of its correctness. For example, an inspector could ask to see the person's driver's licence.

2651. Subclause 711(3) provides that a person must comply with the requirement to provide their name and address only if the inspector has advised the person that they may contravene a civil remedy provision by not doing so, and the inspector has shown his or her identity card to the person.

2652. This subclause is a civil remedy provision under Part 4-1 (Civil remedies).

2653. Subclause 711(4) provides that the requirement for a person to tell an inspector their name and address under subclause 711(1) does not apply to a person if they have a reasonable excuse. The evidentiary burden is on the individual to demonstrate that they have a reasonable excuse (see clause 539).

Clause 712 – Power to require persons to produce records or documents

2654. Clause 712 permits an inspector to require a person, by notice, to produce a record or document to the inspector within a specified period which must be at least 14 days. This power is in addition to an inspector's powers to request and inspect documents whilst on premises under clause 709. Section 36 of the *Acts Interpretation Act 1901* applies in relation to the reckoning of time under this clause. For example, where the last day to comply with the notice to produce is a Saturday, Sunday or public holiday, the last day is deemed to be the next day that is not a Saturday, Sunday or public holiday (i.e., Monday).

2655. The notice must be in writing and specify that the person is required to produce the record or document at a specified place within a specified period of at least 14 days. The decision of Marshall J in the case of *Thorson v Pine* [2004] FCA 1316; 139 FCR 527 also considers content requirements for notices to produce. This case determined that in order to be valid, a notice to produce must, on its face, identify the specific purpose for which the notice is issued.

2656. Clause 712 also provides that the notice must be served on the person. In addition to the methods of service outlined in section 28A of the *Acts Interpretation Act 1901* (including service by post), this clause also allows service of a notice to produce by fax. Subclauses 712(3) and (4) provide that a person must not fail to comply with a notice to produce without a reasonable excuse.

2657. Subclause 712(3) provides that a person who is served a notice to produce must comply with a notice

2658. This subclause is a civil remedy provision under Part 4-1 (Civil remedies).

Clause 713 – Self-incrimination

2659. Clause 713 provides that a person must produce a record or document under paragraph 709(d) or paragraph 712(1) even if the production of the document or record might tend to incriminate the person or expose the person to a penalty. The effect of this provision is to abrogate the common law privilege against self-incrimination. However, documents produced and any information or thing obtained as a direct or indirect consequence will not be admissible as evidence against the individual in any criminal proceedings.

2660. This provision is necessary to enable inspectors to perform their compliance functions including monitoring compliance with the Bill (including the regulations) and fair work instruments. The production of documents is a key method of allowing inspectors to effectively investigate whether the Bill or a fair work instrument was being complied with or collect evidence to bring proceedings to enforce the Act or the fair work instrument.

2661. Subclause 713(2) provides a limited use immunity and derivative use immunity in relation to information provided by individuals. It provides a protection against criminal prosecution where a person is compelled to produce a document. This means that:

- the use of any information obtained directly or indirectly by an inspector would not be admissible in evidence against a person in any criminal proceedings (limited use immunity); and
- any information, document or thing obtained as a direct or indirect result of producing the information, document or thing, is not admissible as evidence in criminal proceedings against an individual if, but for subclause 713(2), the privilege against self-incrimination could have been claimed for the information, document or thing (derivative use immunity).

Clause 714 – Power to keep records or documents

2662. This clause provides that if a record or document is produced to an inspector in accordance with paragraph 709(d) or paragraph 712(1), the inspector may inspect and make copies of the record or document and keep the record or document for such period as is necessary for the inspector to perform their functions under this Bill (including the regulations).

2663. In the ordinary course, an inspector would be expected to copy and return original documents produced to him or her. However, in some circumstances it may be appropriate for

an inspector to retain original documents, for example, to produce in court, or to prevent the destruction or alteration of evidence.

2664. For the period in which an inspector keeps a record or document, the inspector must allow the following persons to inspect the record or document, or to make copies of it, at all reasonable times:

- the person who produced the record or document;
- any person otherwise entitled to possession of the record or document;
- a person authorised by any person entitled to possession of the record or document.

Clause 715 – Enforceable undertakings relating to contraventions of civil remedy provisions

2665. Clause 715 sets out a mechanism for the FWO to accept a written enforceable undertaking from a person in relation to a contravention of a civil remedy provision where she or he reasonably believes that the person has contravened the civil remedy provision. This provides the FWO with another option to deal with non-compliance (by encouraging co-operative compliance) instead of pursuing court proceedings.

- An enforceable undertaking could include a commitment by the employer to comply with a specific legislative provision, to provide back pay or provide compensation and/or agree to provide information to its employees or to participate in an education program.

2666. With the consent of the FWO, a person may withdraw or vary the undertaking at any time (see subclause 715(3)).

2667. This clause also sets out the relationship between enforceable undertakings, compliance notices and court proceedings.

2668. The FWO must not accept an enforceable undertaking if the person has already been given a compliance notice under clause 716 (see subclause 715(5)). This restriction is designed to ensure that the FWO or an inspector cannot pursue multiple enforcement mechanisms in relation to the same contravention.

2669. An inspector must not apply for an order under Division 2 of Part 4-1 in relation to a contravention of a civil remedy provision by a person if an undertaking under clause 715 has not been withdrawn (see subclause 715(4)). Again, this restriction is designed to ensure that the FWO or an inspector cannot pursue multiple enforcement mechanisms in relation to the same contravention.

2670. The note under this subclause 715(4) alerts the reader to the fact that a person who has standing to apply for an order under Part 4-1 in relation to a contravention of a civil remedy provision can still seek to enforce their rights. It is envisaged that a court would take an enforceable undertaking into account when making orders to remedy a contravention, including when it is considering whether to impose a pecuniary penalty. There is no express provision that

would prevent a person from entering into an enforceable undertaking in relation to a matter that has been resolved by a court. However, an enforceable undertaking would not be necessary where the contravention has already been dealt with by a court, and it is unlikely that a person would give an undertaking in this situation.

Illustrative example

Shanahan's Sugar has been investigated by an inspector for failing to pay overtime to its factory workers in contravention of the applicable modern award.

The inspector alerted Shanahan's Sugar to the contravention and it accepted that it had underpaid the factory workers.

Shanahan's Sugar agreed to remedy the underpayment by repaying the overtime. It also agreed to provide its factory workers with a written apology and to enrol its managerial staff in training provided by the FWO about the modern award system. The FWO accepted an enforceable undertaking on these terms instead of initiating court proceedings in relation to the contravention.

Notwithstanding that the FWO accepted Shanahan's Sugar's enforceable undertaking in relation to the contravention, a factory worker could also seek to enforce his or her rights to be paid overtime in accordance with the terms of the applicable modern award by bringing an application to the Federal Court, the Federal Magistrates Court or an eligible State or Territory court in accordance with clause 539. Additionally, a union could bring an action to enforce the underpayment of one or more factory workers where the union is entitled to represent the industrial interests of the affected employees. A court would have discretion to make orders in accordance with Part 4-1, including the imposition of a pecuniary penalty. However, in exercising its discretion the Court could take into consideration the enforceable undertaking, including the extent to which Shanahan's Sugar had complied with its terms.

Where Shanahan's Sugar did not comply with the enforceable undertaking, an inspector could bring court proceedings under subclause 715(6) in relation to the contravention. A court could make orders under subclause 715(7) in relation to Shanahan's Sugar's failure to comply with the terms of the enforceable undertaking. A court could also make any order it considers appropriate in relation to the contravention, including requiring Shanahan's Sugar to pay interest on the underpayment. A court could not make an order under Part 4-1 in relation to contravention of an enforceable undertaking.

2671. Subclause 715(6) provides that if the FWO considers that the person who gave the undertaking has contravened any of the terms of the undertaking, the FWO may apply to the court for an order under subclause 715(7) to enforce the undertaking.

2672. Subclause 715(7) sets out the orders that a court may make if the court is satisfied that the person has contravened a term of the undertaking. These are:

- an order directing the person to comply with the terms of the undertaking;
- an order awarding compensation for loss that a person has suffered because of the contravention;

- any other order that the court considers appropriate.

Failure to comply with an enforceable undertaking is not a civil remedy provision.

Clause 716 – Compliance notices

2673. Clause 716 sets out a mechanism for an inspector to issue a compliance notice. This provides inspectors with another option to deal with non-compliance instead of pursuing court proceedings.

2674. An inspector cannot issue a compliance notice in relation to a contravention where the person has entered into an enforceable undertaking and that undertaking has not been withdrawn (see clause 715). As noted above, this restriction is designed to ensure that the FWO or an inspector cannot pursue multiple enforcement mechanisms in relation to the same contravention.

2675. The ability to issue a compliance notice is restricted to what would be considered to be an 'entitlement provision'. For example, subclause 716(1) makes it clear that a notice can be issued where an inspector reasonably believes that a person has contravened:

- a provision of the NES;
- a term of a modern award;
- a term of an enterprise agreement;
- a term of a workplace determination;
- a term of a national minimum wage order;
- a term of an equal remuneration order.

2676. Subclauses 716(2) and 716(3) set out the content requirements for compliance notices. Subclause 716(2) provides that a compliance notice may direct a person to whom the notice is directed to take specific action to remedy the *direct* effects of the contravention.

Illustrative example

An inspector reasonably believes that DDS Daycare has underpaid Darrin $100 to which he was entitled to under the modern award that applies to him.

In this scenario the inspector could give DDS Daycare a compliance notice that requires it to remedy the direct effect of the underpayment by paying $100 to Darrin instead of pursuing court proceedings.

If DDS Daycare did not comply with the compliance notice, the inspector could bring an action under clause 539 in relation to failure to comply with the compliance notice.

2677. Subclause 716(3) sets out the requirements for the contents of the notice, including an explanation of the process available to the recipient to apply for a review of the notice by the

Federal Court, the Federal Magistrates Court or an eligible State or Territory Court. A notice that is deficient may be invalid and may be reviewed by a court (see clause 717).

2678. Subclause 716(4) explains the relationship between a compliance notice and an enforceable undertaking (issued under clause 715). Subclause 715(4) provides that if a person has given an undertaking under clause 715 and it has not been withdrawn, an inspector must not give a person a compliance notice in relation to the same contravention.

2679. Subclauses 716(5) provide that a person must comply with a compliance notice

2680. This subclause is a civil remedy provision under Part 4-1 (Civil remedies).

2681. However, subclauses 716(6) provides a defence of reasonable excuse

Clause 717 – Review of compliance notices

2682. Clause 717 provides that a person to whom a compliance notice applies may apply to the Federal Court, the Federal Magistrates Court or an eligible State or Territory court for a review of the notice on either or both of two grounds.

2683. The first ground for review is that the person has not committed the contravention set out in the notice. For example, this ground would be relevant where the provision or term that is alleged to have been contravened does not apply (e.g., the modern award does not apply because an enterprise agreement applies to the employee or simply because the alleged contravention had not occurred).

2684. The other ground for review under this clause is that the notice does not comply with the content requirements set out in subclauses 716(2) or (3). For example, it is procedurally deficient, or requires a person to do something more than is necessary to remedy the *direct* effects of the contravention set out in the notice (see example above).

A person can apply for review of a compliance notice on one or both of these grounds.

2685. Subclause 717(2) provides that a court may stay the operation of a notice on the terms and conditions that the court considers appropriate. For example, a court could make an interim order staying the operation of the notice while it decides whether to confirm, cancel or vary the notice. In the absence of such an order, a person to whom a compliance notice is directed would be required to comply with it.

2686. Subclause 717(3) provides that a court may confirm, cancel or vary the notice after reviewing it.

2687. Nothing in this clause is intended to limit a person's rights to pursue any other avenue for review of a compliance notice, including review under section 39B of the *Judiciary Act 1903.*

Illustrative example

An inspector reasonably believed that Katie G's Bar had underpaid Aaron $250 that he was entitled to under the Katie G's Bar Enterprise Agreement 2010.

The inspector issued a compliance notice in relation to the contravention, requiring Katie G's Bar to pay Aaron $250 to remedy the underpayment. The compliance notice also required Katie G's Bar to conduct an audit of all its employees' wage entitlements to make sure that it was not underpaying Aaron.

In this situation, Katie G's Bar could seek review of the compliance notice on the ground that the notice did not comply with clause 716 because the requirement to audit its employees' wage records goes beyond remedying the direct effects of the contravention for which the notice was given.

If the Katie G's Bar Enterprise Agreement 2010 did not apply to Aaron, Katie G's Bar could also seek review of the compliance notice on the ground that it had not committed the contravention set out in the notice.

Subdivision E – Disclosure of information by the Office of the Fair Work Ombudsman

Clause 718 – Disclosure of information by the Office of the Fair Work Ombudsman

2688. Clause 718 deals with the circumstances in which information acquired by persons in the course of performing work within the Office of the FWO can be disclosed. This includes information acquired by the FWO, inspectors, assistants, staff and consultants.

2689. Subclause 718(2) provides that the FWO may disclose or authorise the disclosure of information to which subclause 718(1) applies if the FWO reasonably believes that it is:

- necessary or appropriate to do so in the course of performing functions, or exercising powers, under the Bill; or
- that the disclosure is likely to assist in the administration or enforcement of a law of the Commonwealth, a State or a Territory.

2690. This clause is intended to operate in conjunction with relevant provisions in the *Privacy Act 1988* and the *Public Service Act 1999* and *Public Service Regulations 1999* (including the APS Code of Conduct).

2691. Subclause 718(3) also permits the FWO to disclose or authorise disclosure of the prescribed information to the Minister if the FWO reasonably believes that the disclosure is likely to assist the Minister to properly consider a complaint or issue about a matter under this Bill for which she or he is responsible (e.g., to respond to a specific complaint, in relation to an issue raised in public, or about a matter where proceedings have been initiated).

2692. Subclause 718(4) permits the FWO to disclose or authorise disclosure of prescribed information to the Secretary of the Department, or a Commonwealth public service employee within the Department for the purpose of briefing, or considering briefing, the Minister, provided

that the FWO reasonably believes the disclosure is likely to assist the Minister to consider a complaint or issue. The purpose of this provision is to allow the Department to access relevant information to enable it to provide effective and comprehensive briefing to the Minister in relation to a complaint or issue about a matter under the Bill.

2693. The FWO is able to delegate his or her disclosure functions under clause 718 (see clause 683). However, ultimate responsibility regarding disclosure of information rests with the FWO.

2694. The FWO may disclose or authorise disclosure of any information by a person in accordance with subclause 718(2), whether or not the information was originally acquired by that person.

Part 6-1 – Multiple Actions

Overview

2695. This Part deals with cases where there may be more than one remedy available for the same conduct or circumstances. It ensures that people have access to an appropriate remedy but also ensures that they are not entitled to more than one remedy in such cases.

Division 1 – Introduction

Clause 719 – Guide to this Part

2696. This clause provides a guide to this Part.

Clause 720 – Meanings of *employee* and *employer*

2697. In this Part, the terms employer and employee have their ordinary meanings. This is because this Part is incidental to other parts of the Bill. An action dealt with by this Part could relate to a national system employee, or to an employee other than a national system employee, depending on the part of the Bill that authorises the substantive action.

- For example, the Part applies to an unfair dismissal application under Part 3-2 by a national system employee and an unlawful termination application under Part 6-4 by any employee.

2698. This Part is supported by the constitutional powers that support the substantive rights and obligations in other parts of the Bill.

Division 2 – Certain action not permitted if alternative action can be taken

Clause 721 – Equal remuneration applications

2699. Clause 721 prevents FWA dealing with an application for an equal remuneration order under clause 302 if there is an adequate alternative remedy that would ensure equal remuneration for work of equal or comparable value for the relevant employees.

2700. Subclause 721(2) clarifies that a remedy under an anti-discrimination law that consists solely of compensation for past actions is not an adequate remedy for this purpose.

Clause 722 – Notification and consultation requirements applications

2701. This clause provides that FWA must not make an order under subclauses 532(1) or 787(1), which require an employer to consult with any relevant employee industrial association(s) in circumstances where it is proposed to terminate 15 or more employees if there is an acceptable alternative remedy. The alternative remedy must be available under machinery that exists under a law of the Commonwealth or a State or Territory and by which effect will be given to the requirements of Article 13 of the Termination of Employment Convention.

Clause 723 – Unlawful termination applications

2702. This clause prevents a person from making an unlawful termination application under Division 2 of Part 6-4 if they are able to make an application under the general protection provisions in Part 3-1 in relation to the same termination of employment. This is because the general protections and unlawful termination provisions cover the same grounds of when a termination is for a prohibited reason. The unlawful termination provisions are only intended to be an extension of these protections to persons who are not covered by the general protections in relation to the termination. The additional coverage in unlawful termination arises because these provisions rely on the external affairs power, as they give effect, or further effect, to the *ILO Convention (No. 158) concerning Termination of Employment at the Initiative of the Employer* (Geneva, 22 June 1982) [1994] ATS 4.

Subdivision A – Equal remuneration applications

Clause 724 – Equal remuneration applications

2703. Clause 724 prevents FWA dealing with an application for an equal remuneration order in relation to an employee if proceedings for an alternative remedy have commenced under a law of the Commonwealth (other than the equal remuneration provisions in Part 2-7) or a law of a State or Territory.

2704. This clause also prevents a person from commencing proceedings under a law of the Commonwealth (other than Part 2-7) or a law of a State or Territory for an alternative remedy to ensure equal remuneration for work of equal or comparable value for an employee if an application has been made to FWA for an equal remuneration order in relation to the employee.

2705. This clause does not prevent FWA dealing with an application if proceedings for an alternative remedy have been discontinued or have failed for want of jurisdiction (subclause 724(2)). This clause also does not prevent a person commencing proceedings for an alternative remedy if the application to FWA has been discontinued or has failed for want of jurisdiction (subclause 724(4)).

2706. Subclause 724(5) clarifies that a remedy under an anti-discrimination law that consists solely of compensation for past actions is not an alternative remedy for this purpose.

Subdivision B – Applications and complaints relating to dismissal

Clause 725 – General Rule

Clause 726 – Dismissal remedy bargaining order applications

Clause 727 – General protections FWA applications

Clause 728 – General protections court applications

Clause 729 – Unfair dismissal applications

Clause 730 – Unlawful termination FWA applications

Clause 731 – Unlawful termination court applications

Clause 732 – Applications and complaints under other laws

2707. This Subdivision is intended to prevent a person 'double-dipping' when they have multiple potential remedies relating to a dismissal from employment by seeking to limit a person to a single remedy.

2708. Clauses 726 to 732 set out all of the potential remedies that may apply. Clause 725 is the key operative provision. It provides that if a person has made an application that falls within any of clauses 726 to 732 then they may not bring an application that falls within any of the other clauses.

2709. Each of clauses 726 to 732 deals with different potential remedies. They each set out particular circumstances in which a person may not be prevented from making an application under one of the clauses even where they have initiated an application under another clause.

2710. In all cases the anti-double dipping provisions will not apply where the initial application has:

- been withdrawn; or
- failed for want of jurisdiction.

2711. This is intended to ensure that a person does not miss out on a remedy because they were unable to make a competent application for another remedy or where they have realised another remedy may be more appropriate than the remedy they initially sought.

2712. Clause 726 deals with the case when an application for a bargaining order has been made by a person (or on their behalf) on the ground that she or he was dismissed in breach of the good faith bargaining requirement in paragraph 228(1)(e). The requirement is 'refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining'. Clause 231 makes clear that FWA may make a bargaining order to reinstate an employee where the termination constitutes, or relates to, a breach of the requirement in paragraph 228(1)(e).

2713. Subparagraph 727(1)(b)(iii) provides that a person is not prevented from seeking another remedy if they have made a general protections application to FWA and FWA has issued a certificate saying that all reasonable attempts to settle the dispute have failed. This is necessary as this type of application is not capable of ensuring a remedy as FWA is limited to trying to settle the dispute and cannot arbitrate or otherwise impose an outcome. If this circumstance was not included, a person who lodged a claim with FWA would be unable to gain a remedy if an employer simply refused to settle – this would include being prevented from seeking a remedy under a general protections court application.

2714. Subparagraph 729(1)(b)(iii) provides that a person is not prevented from bringing an application under one of the other clauses if their unfair dismissal application failed because FWA was satisfied that the dismissal was a case of genuine redundancy. This is necessary because a dismissal may be a genuine redundancy even if the reason for selecting the employee for dismissal would contravene the general protections in Part 3-1 or a State or Territory anti-

discrimination law. A person must make an application for unfair dismissal within seven days and whether or not a dismissal is a genuine redundancy is a preliminary matter that FWA must deal with before considering whether a dismissal was harsh, unjust or unreasonable. It would therefore be possible for a person to have an unfair dismissal application dismissed before they were even aware of the existence of a potential general protections or other claim.

2715. Clause 732 deals with an application or complaint under another law. This includes an application or complaint made under a law of a State or Territory. This reflects the fact that various State or Territory laws are not excluded by Part 1-3 of the Bill (Application of this Act) and national system employees could therefore seek remedies under those Acts. For example, a person whose employment has been terminated or who has been adversely treated in employment for reasons such as race, colour, sex, sexual preference, age or other discriminatory reasons could seek a remedy under a State or Territory anti-discrimination or equal opportunity law, or a remedy for contravention of protections under Division 5 of Part 3-1 (General Protections), but not both.

2716. Subclause 732(3) seeks to address the fact that a person is able to amend an application made to the HREOC by leave of the President of HREOC. It would operate to ensure that where a person has amended a complaint to make it a complaint about his or her dismissal then it is taken to be a complaint for the purposes of the clause from that time. This is necessary as otherwise a person may avoid the operation of these provisions by amending their HREOC complaint to relate to a dismissal after they have already sought a remedy that falls into one of the other clauses.

Clause 733 – Dismissal does not include failure to provide benefits

2717. This clause ensures that any applications relating to a failure by an employer to provide a benefit to which the person is entitled as a result of the dismissal are not prevented by the anti-double dipping provisions.

2718. This means an employee will not be prevented from seeking a remedy for their dismissal just because they have separately taken action to enforce their rights to certain termination entitlements such as receiving notice or payments due on termination.

Subdivision C – General protections applications that do not relate to dismissal

Clause 734 – General Rule

2719. The general protection provisions in Part 3-1 provide protections against a range of conduct that falls short of dismissal (e.g., discriminating against a person in his or her employment or refusing to employ a person).

2720. There are a number of areas where the general protections overlap with remedies in other Commonwealth or State or Territory laws. For instance, conduct that breaches the broad anti-discrimination protections in clause 351 may also breach any relevant Commonwealth, State or Territory anti-discrimination laws.

2721. This clause ensures that a person cannot bring a general protections application if they have already sought a remedy under one of those other laws unless they have withdrawn the application or it has failed for want of jurisdiction.

Part 6 – 2 – Dealing with disputes

Overview

2722. This Part sets out how FWA and other persons can deal with disputes in accordance with a term of a modern award, an enterprise agreement or a contract of employment.

2723. Interaction rules between modern awards, enterprise agreements and contracts of employment mean that employers and employees will be subject to only one dispute settlement procedure (see Divisions 2 and 3 of Part 2-1) in relation to a dispute.

- Where an enterprise agreement applies to an employer and employee, the procedure in the enterprise agreement applies.
- Where there is no enterprise agreement, the procedure in the modern award that applies to the employer and employee applies.
- Where neither an enterprise agreement nor a modern award applies to the employer and employee in relation to the dispute, the procedure in a contract of employment (if any) applies.

2724. Nothing in this Part affects any right of a party to a dispute to take court action to enforce their rights or entitlements.

2725. Nothing in this Part authorises an employee to stop performing work in accordance with his or her contract of employment whilst a dispute is being resolved.

Division 1 – Introduction

Clause 735 – Guide to this Part

2726. This clause provides a guide to this Part.

Clause 736 – Meanings of *employee* and *employer*

2727. In this Part, the terms employee and employer mean national system employee and national system employer respectively (as defined in clauses 13 and 14). The rights and obligations of employers and employees set out in this Part apply only to the employment relationships within the scope of the corporations and other constitutional powers that are engaged by clauses 13 and 14.

Division 2 – Dealing with disputes

Subdivision A – Model term about dealing with disputes

Clause 737 – Model term about dealing with disputes

2728. This clause requires the regulations to prescribe a model term for dealing with disputes that could be included in an enterprise agreement. Consistent with the requirements of the Bill

for dispute settlement terms (see subclause 186(6)), the model term will provide for the binding resolution of disputes.

2729. In order to be approved by FWA, an enterprise agreement must contain a procedure for the settlement of disputes about matters arising under the agreement and in relation to the NES (see subclause 186(6)). Such a term:

- must provide for FWA or another person who is independent of the parties to deal with a dispute; and
- must provide for representation of employees in the dispute settlement process.

2730. This requirement means, for example, that while the initial stages of a dispute resolution process may involve the direct participants, such as the manager and the employee (and his of her representative), the final stage of the process must involve FWA or any independent person or body, such as professional mediator.

2731. Employers and employees (and their bargaining representatives) can refer to the model term for guidance, and may agree to include the term, or part of it, in a proposed enterprise agreement.

Subdivision B – Dealing with disputes

Clause 738 – Application of this Division

2732. This Division applies where a modern award or enterprise agreement includes a term providing a procedure for dealing with disputes.

2733. Modern awards and enterprise agreements must include a term providing a procedure for settling disputes about matters arising under the modern award or enterprise agreement (as the case may be) and in relation to the NES (these requirements are set out in clause 146 for modern awards and in clause 186 for enterprise agreements). A modern award or enterprise agreement may also provide a procedure for settling other disputes at a workplace. This Division will also apply to those matters.

2734. This Division also applies where a contract of employment includes a term providing a procedure for dealing with disputes, but only to the extent that the term relates to either the NES or a safety net contractual entitlement (as defined in clause 12). The Bill does not require contracts of employment to include a term that provides a procedure for dealing with disputes. Employers and employees can choose to include such terms but, despite anything to the contrary in the contract, this Division only applies to the limited extent described in paragraph 738(c), and does not apply to general workplace disputes.

Clause 739 – Disputes dealt with by FWA

2735. This clause sets out what FWA can and cannot do when dealing with disputes under a term of a modern award, enterprise agreement or contract of employment.

- Subclause 595(1) provides that FWA may only deal with a dispute if it is expressly authorised to do so under the Act, and subclauses 595(2) and (3) set out how FWA may deal with disputes. For the purpose of subclause 595(1), subclause 739(1) expressly authorises FWA to deal with disputes.

2736. Where such a term requires or allows FWA to deal with a dispute, it can exercise all of its powers under Subdivision B of Division 3 of Part 5-1 (see subclause 595(4)), unless those powers are limited by the term (subclause 739(3)). FWA has general powers under clause 590 to inform itself as it sees fit, including the power to require parties to attend, conduct a conference and take evidence. Clause 595 provides that FWA can deal with a dispute before it as it considers appropriate, including by mediation, conciliation, making non-binding recommendations and expressing an opinion.

2737. Under subclause 739(4) FWA can make a binding decision in relation to a dispute if, in accordance with a term in a modern award, enterprise agreement or contract, the parties have agreed to this, whether the term refers to arbitration, final determination, making an award or order or something similar. For example, a term of an enterprise agreement could authorise FWA to arbitrate or determine (however described) a dispute under that enterprise agreement, resulting in a binding determination.

- Subclause 595(3) provides that FWA may only deal with a dispute by arbitration if expressly authorised to do so under the Bill. For the purpose of that provision, subclause 739(4) expressly authorises FWA to deal with a dispute by arbitration.

2738. Unless the dispute resolution process term provides otherwise, an arbitrated decision of FWA about a dispute will be appealable in accordance with clause 604. Similarly, if FWA holds a hearing in relation to a matter, the hearing would ordinarily be held in public. This is because all of FWA's powers and procedures under this Bill apply in relation to disputes under this Division unless limited by the parties in the term.

2739. Despite anything to the contrary in a modern award, enterprise agreement or contract of employment, FWA cannot make a binding decision that is inconsistent with the parties' rights or obligations under the Bill (including the regulations) or a fair work instrument (such as an enterprise agreement) that applies to them (subclause 739(5)). These rights and obligations can only be finally determined by a court.

- For example, FWA could not make a binding decision that would modify the way the NES or a modern award apply in a particular workplace or to determine that requirements of the Bill do not apply.

- This maintains the integrity and stability of the safety net, by ensuring that NES or a modern awards cannot be modified other than in accordance with the processes provide in the Bill so that it does not apply differently in relation to particular workplaces or employees.

2740. FWA can only deal with a dispute where requested by a party to the dispute. This means that FWA cannot intervene in a dispute without being asked to do so by at least one of the parties (subclause 739(6)).

2741. Under subclause 739(2), FWA cannot exercise any of its powers or otherwise consider, review or question whether an employer had reasonable business grounds to refuse a request by an employee for flexible working arrangements (see subclause 65(5)) or extension of unpaid parental leave (see subclause 76(4)).

2742. However, if an enterprise agreement provides a right to flexible working arrangements (including by reference to a State law) or a right to request extension of unpaid parental leave that supplements the entitlements under the NES, the dispute settlement procedure in the agreement would apply to this right.

Clause 740 – Disputes dealt with by persons other than FWA

2743. A term about a procedure to settle a dispute in a modern award, enterprise agreement or contract of employment can confer functions on an independent third party other than FWA to assist the parties with a dispute. Such a person can deal with the dispute by arbitration and make a binding decision where, in accordance with such a term, the parties have agreed to this (subclause 740(3)).

- Unlike FWA (which can exercise its general powers unless otherwise limited), an independent third party provider can only assist the parties to resolve their dispute in accordance with the powers that are expressly conferred by the term.

2744. Despite anything to the contrary in a modern award, enterprise agreement or contract of employment:

- under subclause 740(2) an independent third party who deals with a dispute cannot consider, review or question whether an employer had reasonable business grounds to refuse a request by an employee for flexible working arrangements (subclause 65(5)) or extension of unpaid parental leave (subclause 76(4)); and

- under subclause 740(4) the person cannot make a binding decision that is inconsistent with the parties' rights or obligations under the Bill (including the regulations) or a fair work instrument (as noted above, these rights and obligations can only be finally determined by a court).

Part 6-3 – Extension of National Employment Standards entitlements

Division 1 – Introduction

Clause 741 – Guide to this Part

2745. This clause provides a guide to this Part.

Clause 742 – Meanings of *employee* and *employer*

2746. In this Part, the terms employer and employee have their ordinary meanings.

2747. This Part assists in giving effect to Australia's international treaty obligations in relation to unpaid parental leave and related entitlements (Division 2), and entitlements to notice of termination or payment in lieu of notice (Division 3). The Part is supported by the external affairs power and can therefore extend to non-national system employees and employers.

Division 2 – Extension of entitlement to unpaid parental leave and related entitlements

Subdivision A – Main provisions

Clause 743 – Object of this Division

2748. Clause 743 provides that the object of this Division is to give effect, or further effect, to Australia's international treaty obligations by providing for a system of unpaid parental leave and related entitlements that will help men and women workers who have responsibilities in relation to their dependent children:

- to prepare for, enter, participate in or advance in economic activity; and
- to reconcile their employment and family responsibilities.

Clause 744 – Extending the entitlement to unpaid parental leave and related entitlements

2749. Subclause 744(1) extends the application of the provisions of Division 5 of Part 2-2 of the Bill and the related provisions referred to in subclause 744(2) to a non-national system employee. It does this by providing that:

- any reference to a national system employee is taken to include a reference to an employee who is a non-national system employee; and
- any reference to a national system employer is taken to include a reference to an employer that is a non-national system employer.

2750. Subclause 744(2) identifies other related provisions that also have extended operation.

2751. Subclause 744(3) makes clear that the extended parental leave provisions also have effect subject to the modifications referred to in Subdivision B. This subclause also defines the

term extended parental leave provisions as the provisions of Division 5 of Part 2-2 and any related provisions set out in subclause 744(2).

Clause 745 – Contravening the extended parental leave provisions

2752. A non-national system employer must not contravene the extended parental leave provisions (subclause 745(1)).

2753. This is a civil remedy provision under Part 4-1 (Civil remedies).

2754. An order cannot be made under the compliance provisions in the Bill (see Division 2 of Part 4-1) in relation to a contravention, or alleged contravention, of subclause 76(4) (employer may refuse an application to extend unpaid parental leave only on reasonable business grounds) as that subclause applies as an extended parental leave provision (subclause 745(2)).

These provisions are equivalent to those which apply to the parental leave entitlement under the NES.

Clause 746 – References to the NES include extended parental leave provisions

2755. Clause 746 confirms that any reference to the NES includes a reference to the extended parental leave provisions.

Clause 747 – State and Territory laws that are not excluded

2756. Clause 747 makes clear that State or Territory laws that provide employee entitlements in relation to the birth or adoption of children are not excluded and continue to apply to non-national system employees where they provide more beneficial employee entitlements than the extended parental leave provisions.

Subdivision B – Modifications of the extended parental leave provisions

Clause 748 – Non-national system employees are not award/agreement free employees

Clause 749 – Modification of meaning of base rate of pay for pieceworkers

Clause 750 – Modification of meaning of full rate of pay for pieceworkers

Clause 751 – Modifications of meaning of ordinary hours of work – if determined by State industrial instrument

Clause 752 – Modification of meaning of ordinary hours of work – if not determined by State industrial instrument

Clause 753 – Modification of meaning of ordinary hours of work – regulations may prescribe usual weekly hours

Clause 754 – Modification of meaning of pieceworker

Clause 755 – Modification of provision about interaction with paid leave

Clauses 756 – Modification of provision about relationship between NES and agreements

Clause 757 – Modification of power to make regulations

2757. The provisions in this Subdivision modify the effect of certain of the extended parental leave provisions to ensure they operate as intended for non-national system employees. This includes:

- ensuring that a non-national system employee is not an award/agreement free employee (as that term is defined clause 12), even though a modern award or enterprise agreement will not apply to a non-national system employee;
- modifying the definitions of certain terms that apply as extended parental leave provisions;
- modifying the application of clause 79 to the extended parental leave provisions by omitting subclauses 79(2) and (3), as the types of leave referred to in those subclauses (personal/carer's leave and community service leave), do not apply to non-national system employees; and
- modifying the application of other interaction and regulation making powers.

Division 3 – Extension of entitlement to notice of termination or payment in lieu of notice

Subdivision A – Main provisions

Clause 758 – Object of this Division

2758. Clause 758 provides that the object of this Division is to give effect, or further effect, to Australia's international treaty obligations.

Clause 759 – Extending entitlement to notice of termination or payment in lieu of notice

2759. Subclause 759(1) provides that the provisions of Subdivision A of Division 11 of Part 2-2 of the Bill and the related provisions referred to in subclause 759(2) apply to a non-national system employee. It does this by providing that:

- any reference to a national system employee is taken to include a reference to a non-national system employee; and
- any reference to a national system employer is taken to include a reference to a non-national system employer.

2760. Subclause 759(2) identifies other related provisions that also have extended operation.

2761. Subclause 759(3) makes clear that the extended notice of termination provisions also have effect subject to the modifications referred to in Subdivision B. This subclause also defines the term extended notice of termination provisions as the provisions of Subdivision A of Division 11 of Part 2-2 and any related provisions set out in subclause 759(2).

Clause 760 – Contravening the extended notice of termination provisions

2762. A non-national system employer must not contravene the extended notice of termination provisions.

2763. This is a civil remedy provision under Part 4-1 (Civil remedies).

2764. These provisions are equivalent to those which apply to the notice of termination provisions under the NES.

Clause 761 – References to the NES include extended notice of termination provisions

2765. Clause 761 confirms that any reference to the NES includes a reference to the extended notice of termination provisions.

Clause 762 – State and Territory laws that are not excluded

2766. Clause 762 makes clear that State or Territory laws that provide employee entitlements in relation to notice of termination of employment (or payment in lieu of notice) are not excluded and continue to apply to non-national system employees where they provide more beneficial employee entitlements than the extended notice of termination provisions.

Subdivision B – Modifications of the extended notice of termination provisions

Clause 763 – Non-national system employees are not award/agreement free employees

Clause 764 – Modification of meaning of full rate of pay for pieceworkers

Clause 765 – Modification of meaning of pieceworker

Clause 766 – Modification of provision about notice of termination by employee

Clause 767 – Modification of provision about relationship between NES and agreements

Clause 768 – Modification of power to make regulations

2767. The provisions in this Subdivision modify the effect of certain of the extended notice of termination provisions to ensure they operate as intended for non-national system employees. This includes:

- ensuring that a non-national system employee is not an award/agreement free employee (as that term is defined in clause 12), even though a modern award or enterprise agreement will not apply to a non-national system employee;
- modifying the definitions of certain key terms that apply as extended notice of termination provisions; and
- modifying the application of certain interaction and regulation making powers.

Part 6-4 – Additional provisions relating to termination of employment

Division 1 – Introduction

Clause 769 – Guide to this Part

2768. This clause provides a guide to this Part.

Clause 770 – meanings of *employee* and *employer*

2769. In this Part, the terms employer and employee have their ordinary meanings.

2770. This Part assists in giving effect to Australia's international treaty obligations in relation to termination of employment (Division 2) and notification and consultation requirements in relation to certain terminations of employment (Division 3). The Part is supported by the external affairs power and can therefore apply to any employer and employee in Australia, not only to national system employers and employees.

- Division 2 can apply in relation to any employee in Australia, subject to clause 723, which prevents a person from making an unlawful termination application in relation to certain conduct if the person is entitled to make a general protections court application in relation to that conduct.

- Division 3 extends the notification and consultation obligations set out in Part 3-6 so that they also relate to employees other than national system employees.

Division 2 – Termination of employment

2771. Division 2 broadly reproduces the existing unlawful termination protections in section 659 of the WR Act for non-national system employees, where a remedy is not available under Part 3-1 (General protections).

Clause 771 – Object of this Part

2772. Clause 771 provides that the objects of the Part are to give effect, or further effect to:

- the *ILO Convention (No. 111) concerning Discrimination in respect of Employment and Occupation*, done at Geneva on 25 June 1958 ([1974] ATS 12); and

- the *ILO Convention (No. 156) concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities*, done at Geneva on 23 June 1981 ([1991] ATS 7); and

- the *Termination of Employment Recommendation*, 1982 (Recommendation No. R166) which the General Conference of the ILO adopted on 22 June 1982.

Clause 772 – Employment not to be terminated on certain grounds

2773. Subclause 772(1) prohibits an employer from terminating an employee's employment for one of the following reasons, or reasons that include one of the following reasons.

- temporary absence from work due to illness or injury of a kind prescribed by the regulations (paragraph 772(1)(a));
- trade union membership and participation in trade union activities (paragraph 772(1)(b));
- non-membership of a trade union(paragraph 772(1)(c));
- seeking office or acting as a representative of employees (paragraph 772(1)(d));
- filing a complaint or legal proceedings against the employer or recourse to competent administrative authorities (paragraph 772(1)(e));
- race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin (paragraph 772(1)(f));
- absence from work during maternity or other parental leave (paragraph 772(1)(g)); and
- temporary absence from work for the purpose of engaging in a voluntary emergency management activity, where the absence is reasonable having regard to all the circumstances (paragraph 772(1)(h)).

2774. Subclause 772(1) has been expanded to include a person's carer's responsibilities as a ground upon which termination is prohibited.

2775. This subclause is a civil remedy provision under Part 4-1 (Civil remedies).

2776. A termination will be unlawful, subject to the exceptions in subclause 772(2), if one of the reasons listed in subclause 772(1) is a reason for terminating the person's employment.

2777. The exceptions in subclause 772(2) are:

- the inherent requirements of the particular position concerned; or
- action taken in good faith to avoid injury to the religious susceptibilities of adherents of the particular religion or creed.

2778. Subclause 772(3) is an avoidance of doubt provision and provides that an employer will be taken to have contravened paragraph 772(1)(g) in circumstances where:

- the employer has terminated the employee's employment;
- the reason, or a reason, for the termination is that the employee's position no longer exists, or will no longer exist; and

- the reason, or a reason, that the employee's position no longer exists, or will no longer exist is the employee's absence during maternity leave or other parental leave.

Clause 773 – Application for FWA to deal with a dispute

2779. The process by which alleged contraventions of subclause 772(1) are dealt with is broadly consistent with how unlawful termination claims are currently dealt with under the WR Act.

2780. Clause 773 provides that a person who alleges that they have been terminated in contravention of subclause 772(1) may apply to FWA for a conference to attempt to settle the dispute. An industrial association entitled to represent the industrial interests of the terminated employee may also make an application to FWA under clause 773.

Clause 774 – Time for application

2781. Subclause 774(1) provides that an application must be made within 60 days of a termination taking effect. However, FWA has discretion to extend the timeframe for making an application if it is satisfied that there are exceptional circumstances.

2782. Subclause 774(2) provides an exhaustive list of the factors FWA must take into account when determining if there are exceptional circumstances. These factors are based on the principles set down by the Industrial Relations Court of Australia in *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298 and are consistent with the approach taken to extension of time applications in the WR Act.

Clause 775 – Application fees

2783. Subclause 775(1) requires an application under clause 773 to be accompanied by the prescribed fee (if any).

2784. Paragraphs 775(2)(a), (b) and (c) provide that the application fee, the method for indexing the fee and the circumstances in which all or part of the fee may be waived or refunded may be prescribed by regulation.

Clause 776 – Conferences

2785. Subclause 776(1) provides that if a person makes an application under clause 773 FWA must conduct a conference to deal with the dispute.

2786. A legislate note alerts the reader to the fact that clause 592 contains procedural rules relating to the conduct of conferences by FWA.

2787. A further legislative note alerts the reader to clause 595, which sets out FWA's powers when dealing with a dispute by way of a conference. The effect of this provision is that FWA cannot arbitrate the dispute (see subclauses 595(1) and (5)), but can deal with the dispute by (for example) mediation, conciliation, making a recommendation or expressing an opinion.

2788. Subclause 776(2) provides that FWA must conduct the conference in private. The subclause is a limitation on FWA's discretion in subclause 592(3), which would otherwise allow the person conducting the conference to direct it be held in public.

Clause 777 – Certificate if matter not resolved

2789. Clause 777 requires FWA, where it is satisfied all reasonable attempts to settle the matter have been, or are likely to be unsuccessful, to issue a certificate to that effect.

Clause 778 – Advice on unlawful termination court application

2790. If FWA considers, taking into account all of the materials before it, that an unlawful termination court application would not have a reasonable prospect of success, subclause 778(1) requires FWA to advise the parties accordingly.

2791. Subclause 778(2) defines an unlawful termination court application as an application to the Federal Court or Federal Magistrates Court under Division 2 of Part 4-1 (Civil remedies) for orders in relation to a contravention of subclause 772(1).

Clause 779 – Unlawful termination court applications

2792. Subclause 779(1) sets out the two circumstances in which a terminated employee can make an unlawful termination court application. They are:

- if FWA has issued a certificate under clause 777 in relation to the dispute; or
- if the unlawful termination court application includes an application for an interim injunction.

2793. Subclause 779(2) provides that once FWA has issued a certificate under clause 777, a person has 14 days to make an unlawful termination court application.

Clause 780 – Costs orders against lawyers and paid agents

2794. Subclause 780(1) allows FWA to make costs orders against lawyers and paid agents who cause costs to be incurred by the other party in relation to an application under subclause 773, because they encouraged a person to make the application when it should have been reasonably apparent there were no reasonable prospects of success, or because an act or omission by them in connection with the conduct or continuation of the dispute was unreasonable.

2795. These provisions are designed to deter lawyers and paid agents from encouraging others to make speculative applications, or make applications they know have no reasonable prospects of success.

2796. Subclause 780(1) operates in addition to subclause 611(2). Subclause 611(2) provides FWA with a general power to make costs orders against a person in the following circumstances:

- where a person made an application, or responded to an application, vexatiously or without reasonable cause; or

- where a person made an application, or responded to an application, and it should have been reasonably apparent to the person that their application, or response to an application, had no reasonable prospects of success.

2797. Subclause 780(2) provides that, in order for FWA to make a costs order against a lawyer or paid agent, an application by the person seeking the costs needs to have been made under clause 780.

2798. Subclause 780(3) clarifies that these provisions are not intended to limit FWA's power to order costs under clause 611.

Clause 781 – Applications for costs orders

Clause 782 – Contravening costs order

2799. Clause 781 sets a time limit on applications for costs in relation to an application under subclause 773 of 14 days after FWA has finished dealing with the dispute.

2800. Clause 782 provides that a person to whom a costs order applies must not contravene a term of the order.

2801. This clause is a civil remedy provision under Part 4-1 (Civil remedies).

Clause 783 – Reason for action to be presumed unless proved otherwise

2802. Clause 783 reverses the onus of proof applicable to civil proceedings for a contravention of subclause 772(1). Clause 783 provides that, once a complainant has alleged that a person's actual or threatened action is motivated by a reason that would contravene subclause 772(1), the person has to establish, on the balance of probabilities, that the conduct was not carried out unlawfully.

2803. Subclause 783(2) provides that the reverse onus will not apply to the granting of interim injunctions.

Division 3 – Notification and consultation requirements relating to certain terminations of employment

Subdivision A – Object of this Division

Clause 784 – Object of this Division

2804. Clause 784 provides that the object of this Division is to give effect, or further effect, to Australia's international treaty obligations. It provides protections related to termination of employment of non-national system employees.

Subdivision B – Requirement to notify Centrelink

Clause 785 – Employer to notify Centrelink of certain proposed terminations

2805. Clause 785 is modelled on section 660 of the WR Act and related provisions.

2806. Subclause 785(1) obliges an employer to notify Centrelink in writing if the employer has decided to terminate the employment of 15 or more employees for reasons of an economic, technological, structural or similar nature, or for reasons including such reasons. The notice must be given as soon as practicable after the decision is made and before an employee's employment is terminated in accordance with the decision (subclause 785(3)).

2807. The notice must be in the prescribed form and set out the information listed in subclause 785(2).

2808. Subclause 785(4) stipulates that the employer must not terminate an employee's employment on the basis of the decision made unless the employer has complied with this clause.

2809. This subclause is a civil remedy provision under Part 4-1 (Civil remedies).

2810. Subclause 785(5) clarifies the orders that may be made by a court if it finds an employer has breached subclause 785(4).

Subdivision C – Failure to notify or consult registered employee associations

2811. This Subdivision is modelled on Subdivision D in Division 4 of Part 12 of the WR Act.

2812. Under this Subdivision, an employer is obliged to notify or consult a registered employee association (as defined in clause 12). The reason for this is to enable an employer to properly identify the body with whom it is obliged to consult, which it should be able to do by reason of the registration of the employee association.

Clause 786 – FWA may make orders where failure to notify or consult registered employee associations about terminations

2813. Subclause 786(1) identifies the circumstances when FWA may make orders in relation to a failure to notify or consult a registered industrial association. The orders may be made if FWA is satisfied that:

- the employer has decided to terminate the employment of 15 or more employees for reasons of an economic, technological, structural or similar nature, or for reasons including such reasons (paragraph 786(1)(a));
- the employer has failed to comply with subclause 786(2) (notifying relevant registered employee associations) or subclause 786(3) (consulting relevant registered employee associations) (paragraph 786(1)(b)); and
- the employer could have reasonably expected to have known that one of more of its employees were members of a registered employee association when the decision was made (paragraph 786(1)(c)).

2814. An employer complies with subclause 786(2) if the employer gives the relevant registered employee association the specified notification as soon as practicable after making the decision, but before terminating an employee's employment on the basis of the decision.

2815. An employer complies with subclause 786(3) if the employer gives the relevant registered employee association an opportunity to consult about certain measures as soon as practicable after making the decision, but before terminating an employee's employment on the basis of the decision.

Clause 787 – Orders that FWA may make

2816. The effect of subclause 787(1) is to give FWA the discretion to make appropriate orders in the public interest to, as far as it can, put employees and relevant registered employee associations in the same position as if the employer had complied with paragraphs 786(2)(a) and (3)(a).

2817. In exercising its discretion, FWA may not make the orders identified in subclause 787(2).

Clause 788 – Application to FWA for order

2818. Clause 788 identifies the employees and relevant registered employee associations (as specified in paragraphs 788(b) and (c)) as those who can apply for an order.

Subdivision D – Limits on scope of this Division

Clause 789 – Limits on scope of this Division

2819. Subclause 789(1) lists the categories of employees to whom this Division does not apply.

2820. Subclause 789(2) is an 'anti-avoidance' provision. The subclause establishes that an employee employed for a specified period of time, specified task or for the duration of a specified season is not excluded if a substantial reason for employing the employee on this basis was to avoid the application of this Division.

Part 6-5 – Miscellaneous

2821. This Part deals with miscellaneous matters that are not dealt with elsewhere in the Bill, such as delegations and regulations.

Division 1 – Introduction

Clause 790 – Guide to this Part

2822. This clause provides a guide to this Part.

Clause 791 – Meanings of *employee* and *employer*

2823. In this Part, the terms employer and employee mean national system employer and national system employee respectively (as defined in clauses 13 and 14). This is because references to employers and employees in clauses 792 and 795 are necessarily references to national system employers and their employees. The power in clause 800 to make regulations to exhibit fair work instruments will operate only in relation to national system employers.

2824. However, in clause 793, the term employee has its ordinary meaning because a reference to an employee of a body corporate in that clause is not limited to a national system employee.

Division 2 – Miscellaneous

Clause 792 – Delegation by Minister

2825. Subclause 792(1) provides that a Minister may delegate his or her functions or powers under the Bill to the Secretary of the Department or an SES employee (or acting SES employee) in the Department. Given the powers of the Minister, it is appropriate to limit delegations of power to SES employees.

2826. Subclause 792(2) makes it clear that the delegate must comply with any direction of the Minister.

Clause 793 – Liability of bodies corporate

2827. Clause 793 deals with the liability of bodies corporate under the Bill and procedural rules. It sets out the circumstances in which liability may be imposed on a body corporate where conduct is engaged in on behalf of a body corporate.

2828. This clause provides that conduct engaged in by an officer, employee or agent of the body corporate (or by a person at the direction or with the consent or agreement of the officer, employee or agent) is taken to have been engaged in by the body corporate, provided the conduct is within that person's actual or apparent authority.

2829. Similarly, it is sufficient to show the state of mind of an officer, employee or agent (or of a person acting at the direction or with the consent or agreement of the officer, employee or agent), to establish the state of mind of the body corporate.

2830. Subclause 793(4) makes it clear that Part 2.5 of Chapter 2 of the Criminal Code, which deals with corporate criminal responsibility, does not apply to an offence under the Bill.

Clause 794 – Signature of on behalf of body corporate

2831. Clause 794 provides that for the purposes of the Bill a document does not need to be made under the seal of a body corporate and may be signed on behalf of a body corporate by an authorised officer of the body.

Clause 795 – Public sector employer to act through employing authority

2832. This clause sets out special provisions relating to public sector employment.

2833. Subclause 795(1) provides that for the purposes of the Bill and procedural rules, an employer of a public sector employee in public sector employment must act through an employing authority.

2834. Public sector employment is defined to include an employee of the Commonwealth employed under the *Public Service Act 1999*. The full definition of public sector employment is set out in subclause 795(4). Subclause 795(5) provides that regulations may prescribe what is not public sector employment. However, subclause 795(5) does not apply to clause 40 which deals with when public sector employment law prevails over a fair work instrument and when a fair work instrument or their terms prevails over a public sector employment law.

2835. Subclause 795(6) defines an employing authority of an employee as a person prescribed by regulations. For example the regulations could provide that the Head of a Commonwealth agency could be an employee's employing authority. In a situation where the Commonwealth is a party to an enterprise agreement, at an agency level, it can only act through the Agency Head. For example, the Agency Head could sign off on the agreement for the agency on behalf of the employer, being the Commonwealth.

2836. Subclause 795(2) makes it clear that anything done by or to an employee's employing authority is taken to have been done by or to the employer.

2837. The effect of these provisions is that if, for example, an employee is employed by the Commonwealth, then the Commonwealth must act through the employee's employing authority (as prescribed) for the purposes of the Bill.

Clause 796 – Regulations

2838. Clause 796 is a general regulation making power. The inclusion of other clauses providing for regulations to be made in relation to certain matters does not limit in any way the regulations which may be made under clause 796. Clause 796(1) allows for the Governor General to make regulations prescribing matters:

- required or permitted by the Bill to be prescribed; or

- necessary or convenient to be prescribed for carrying out or giving effect to the Bill.

2839. Clause 796(2) provides that regulations made under the Bill prevail over procedural rules made under the Bill to the extent of any inconsistency.

Clause 797 – Regulations dealing with offences

2840. Clause 797 permits the regulations to provide for offences against the regulations. The penalties for offences must not be more than 20 penalty units.

Clause 798 – Regulations dealing with civil penalties

2841. Clause 798 permits the regulations to provide for civil penalties for contravention of the regulations.

2842. The penalties for a contravention of a civil remedy provision under the regulations must not be more than 20 penalty units for an individual or 100 penalty units for a body corporate.

2843. Broadly speaking, the penalty for a contravention of a civil remedy provision under the Bill is either 30 or 60 penalty units (or 5 times higher for a body corporate) depending on the nature of the contravention. Given the nature of the regulations that could be made, it is considered appropriate for the regulations to provide a lower penalty of 20 penalty units (or 5 times higher for a body corporate).

Clause 799 – Regulations dealing with infringement notices

2844. Clause 799 permits the regulations to provide for an infringement notice scheme for offences and civil remedy provisions in the regulations.

2845. The use of an infringement notice scheme is appropriate where the fault element does not have to be proven – i.e., where it is only necessary to show that an act or omission occurred but where a mental element of, for example, intent or recklessness does not need to be established. An infringement notice scheme provides another option for inspectors to deal with non-compliance instead of considering court proceedings to enforce a contravention. The scheme provides for a pecuniary penalty instead of court proceedings.

2846. Subclauses 799(1) and 799(2) permit the establishment of an infringement notice scheme for offences under regulations.

2847. Subclauses 799(3) and 799(4) permit the establishment of an infringement notice scheme for civil remedy provisions under regulations.

2848. Subclause 787(4) provides a penalty of one tenth of the maximum penalty that can be imposed for a contravention of a civil remedy provision in the regulations. For example, rather than bring court proceedings to enforce a contravention of a civil remedy provision in the regulations, an inspector could issue an infringement notice for 2 penalty units (5 times higher for a body corporate).

Clause 800 – Regulations dealing with other matters

2849. Clause 800 permits regulations to be made in relation to the exhibiting of a fair work instrument on an employer's premises.